23-600

United States Court of Appeals for the Second Circuit

SUSAN GIORDANO,

Plaintiffs-Appellants,

v.

SAKS & COMPANY LLC,

Defendants-Appellees.

(*Caption continues inside front cover.*)

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

LETITIA JAMES
Attorney General
State of New York
Attorney for Amici Curiae
28 Liberty Street
New York, New York 10005
(212) 416-6073

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
DANIEL S. MAGY
Assistant Solicitor General
of Counsel
(*Additional counsel listed on signature pages.*)

Dated: August 4, 2023

(*Caption continues from front cover.*)

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

Plaintiffs-Appellants,

v.

SAKS INCORPORATED, SAKS FIFTH AVENUE LLC, 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.

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INTERESTS OF AMICI CURIAE

In this antitrust case, plaintiffs-appellants allege that defendants—the department store chain Saks and five sellers of luxury brand goods (the "Brand Defendants")—violated the Sherman Act, 15 U.S.C. § 1, by agreeing to allocate the labor market for luxury retail employees. Specifically, plaintiffs allege that the Brand Defendants agreed not to compete with Saks for employees in the luxury retail industry by refusing to hire employees who have worked at Saks within the last six months unless Saks consented to any such hires. The States of New York, Arizona, California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, and the District of Columbia file this brief as amici curiae in support of plaintiffs-appellants, individuals who were employed at Saks and were prevented from seeking or obtaining

employment with the Brand Defendants because of defendants' unlawful and anticompetitive no-hire agreements.[1]

As enforcers of both federal and state antitrust law, Amici States have strong interests in combatting anticompetitive practices in markets for labor. Such anticompetitive practices include entering into no-hire agreements like those at issue here. No-hire agreements and non-solicitation agreements are types of "no-poach" agreements, which are agreements among direct labor market competitors not to compete for employees. Many Amici States have acted to protect labor markets and workers within their respective jurisdictions from the anticompetitive effects of no-hire and non-solicitation agreements by initiating investigations and, where appropriate, enforcement actions against entities that use such agreements.

Amici States have found that no-hire agreements are typically anticompetitive and have the effect of depressing wages, negatively

[1] This amicus brief addresses the district court's conclusion that defendants' no-hire agreements were not *per se* antitrust violations, including the district court's erroneous application of the ancillary restraints doctrine at the pleading stage. It does not address the district court's decisions regarding the statute of limitations or other issues presented in this appeal.

affecting employment benefit packages, and limiting worker mobility. Each Amici State has a keen interest in preventing such anticompetitive harms to labor markets and to workers in their respective jurisdictions.

In addition, as institutional enforcers of the antitrust laws, Amici States have strong interests in the sound development of the law regarding anticompetitive labor practices. The district court's refusal to recognize that plaintiffs properly pled that defendants' no-hire agreements were *per se* illegal, and its erroneous application of the ancillary restraints doctrine at the pleading stage, if allowed to stand, threaten to impede Amici States' ability to protect labor markets in the future.

STATEMENT OF THE CASE

Saks is a nationwide department store that, among other things, sells goods and apparel made by luxury brands, such as Gucci, Louis Vuitton, and Prada. These luxury brands, including the Brand Defendants here, also sell their goods and apparel at their own standalone stores. (J.A. 42.) Both Saks and the Brand Defendants rely on luxury retail employees to sell the luxury products they offer for sale. (J.A. 44.)

Together, Saks and the Brand Defendants are the dominant employers of luxury retail employees in the United States. (J.A. 46.) Saks and the Brand Defendants compete with each other in the labor market for luxury retail employees. (J.A. 46.) Despite being direct competitors, however, Saks and the Brand Defendants have entered into "no-hire" agreements, under which they have agreed not to compete with each other for luxury-retail employees. (J.A. 54-55.) Under these no-hire agreements, the Brand Defendants have agreed not to hire any Saks luxury-retail employee unless Saks gives permission for such a hire or the employee has not been employed at Saks for at least six months. (J.A. 54, 59, 72.)

Plaintiffs are former Saks luxury retail employees. Each plaintiff was interested in working for one or more of the Brand Defendants, including because the Brand Defendants often offered higher wages than Saks. (*E.g.*, J.A. 58, 62, 64, 67.) However, defendants' no-hire agreements prevented plaintiffs from being hired by the Brand Defendants, even though plaintiffs were qualified to work at the Brand Defendants' stores. For example, one plaintiff was told by multiple Brand Defendants that although she was qualified for employment positions at their stores, the Brand Defendants would not hire her because she was a Saks employee. (J.A. 58-60.) When the plaintiff raised this issue with Saks, Saks confirmed that it had no-hire agreements with the Brand Defendants, as well as other luxury retailers. (J.A. 59.) Other plaintiffs were similarly rejected from Brand Defendant employment positions because—although they were qualified—they were told that the no-hire agreements prevented the Brand Defendants from hiring them. (J.A. 62-68.)

Plaintiffs filed a putative class action against Saks and the Brand Defendants, claiming that the no-hire agreements violate Section 1 of the Sherman Act. (J.A. 1-29, 38-74.) In their operative amended

complaint, plaintiffs allege that Saks and the Brand Defendants entered into the no-hire agreements to restrain competition in the market for luxury retail employees. (J.A. 54-55.) Plaintiffs also alleged that, absent the no-hire agreements, Saks and the Brand Defendants would openly compete with each other for the services of luxury retail employees, including by offering better compensation and benefit packages. (J.A. 48, 50-52.) And plaintiffs alleged that by preventing the Brand Defendants from hiring Saks luxury retail employees, the no-hire agreements both reduce luxury retail employees' compensation and restrict their job mobility. (J.A. 54-55.) The complaint does not allege that the no-hire agreements are related to any other agreements or business relationship between defendants, such as a sales agreement. Nor does the complaint allege that the no-hire agreements are reasonably necessary to the efficacy of any such other agreements.

Defendants filed a motion to dismiss the complaint, which the district court (Brodie, J.) granted. (J.A. 208-256.) The court concluded that the complaint had plausibly alleged an anticompetitive conspiracy, observing that the complaint alleged that the director of human resources at Saks and store managers at several of the Brand

Defendants had confirmed the existence of the no-hire agreements. (J.A. 230-234.) The court also concluded that the complaint's allegations were economically plausible because the "alleged no-hire agreements are similar in structure to no-hire agreements that other courts have found to plausibly give rise to a claim" under the Sherman Act. (J.A. 233.)

However, the district court determined that the complaint had not adequately pleaded that the anticompetitive conspiracy was an unreasonable restraint of trade.[2] (J.A. 234-254.) In doing so, the court rejected plaintiffs' argument that defendants' no-hire agreements were *per se* antitrust violations. (J.A. 234-239.) The court instead concluded that the no-hire agreements were "ancillary restraints" that accompanied defendants' "collaborative business relationship" (J.A. 237-238)—even though the complaint had not alleged any such procompetitive relationship or any facts regarding whether the no-hire agreements were related to such a procompetitive relationship. The court further concluded that, without the no-hire agreements, "there would be a

[2] The district court also dismissed several plaintiffs' claims as untimely. (J.A. 217-228.) This amicus brief does not address that ruling.

continual risk that the Brand Defendants would use their concessions in Saks stores to recruit employees." (J.A. 239.)

ARGUMENT

POINT I

IN AMICI STATES' EXPERIENCE, NO-HIRE AGREEMENTS SUPPRESS COMPETITION FOR EMPLOYEES, DEPRESS WAGES, AND LIMIT WORKERS' MOBILITY

Amici States, through their attorneys general, protect their residents from unfair and anticompetitive conduct by enforcing both federal and state antitrust law. Congress has authorized state attorneys general to bring antitrust actions under federal law to protect their residents from anticompetitive conduct. 15 U.S.C. §§ 15c(a)(1), 26; *see Hawaii v. Standard Oil Co.*, 405 U.S. 251, 261 (1972). Almost all States have also enacted their own state statutes to combat anticompetitive conduct and to authorize their respective state attorneys general to enforce state antitrust law. Although these statutes can be broader than federal law, they often parallel federal law, and courts often rely on interpretations of federal law to interpret the state laws. *See, e.g.*, *In re Namenda Indirect Purchaser Antitrust Litig.*, 338 F.R.D. 527, 572

(S.D.N.Y. 2021); *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 335 (1988).

In their roles as antitrust law enforcers, several Amici States have focused in recent years on combating antitrust violations in labor markets—the markets that govern what jobs are available to their residents and on what terms. Labor markets exhibit many of the same features as markets for goods.[3] For example, just as rival sellers compete with each other for consumers in the market for the sellers' products, employers compete with each other for employees in the labor market. *See, e.g.*, *United States v. Jindal*, No. 20-cr-00358, 2021 WL 5578687, at *5-7 (E.D. Tex. Nov. 29, 2021) (collecting cases). And just as rival sellers compete for consumers through, inter alia, price and product quality, rival employers compete for employees through, inter alia, wages and benefit packages. *See id.*

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[3] *See, e.g.*, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 364-65 (1926) (applying antitrust law to labor markets); Org. for Econ. Co-operation & Devel., *Competition in Labour Markets* 14-20 (2020) (describing how features of monopsony in labor markets can parallel features of monopoly in traditional products markets).

Many Amici States have recently devoted significant time and resources to combatting companies' use of no-hire and non-solicitation agreements, anticompetitive practices that typically violate federal and state antitrust law. No-hire and non-solicitation agreements (also called, collectively, no-poach agreements) are compacts between employers not to hire or solicit workers from each other.[4] No-poach agreements impair full and free competition in the labor market by preventing rival employers from competing with each other to hire employees.[5] In doing so, no-poach agreements remove the employers' incentive to compete with each other in hiring employees by offering better wages or benefits, including job hours or locations. No-poach agreements therefore harm workers by suppressing employee

[4] Evan Starr, Econ. Innovation Group, *The Use, Abuse, and Enforceability of Non-Compete and No- Poach Agreements* 2 (Feb. 2019).

[5] *See, e.g.*, Alan B. Krueger & Orley Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* 9-11, 16-17, 20-21 (Nat'l Bur. of Econ. Res. Working Paper No. 24831, July 2018) (discussing no-poach provisions in franchise contracts).

compensation, limiting employee mobility, and depriving employees of job opportunities.[6]

New York, for example, has entered into settlement agreements with several of the largest U.S. title insurance underwriters that required them to end their use of no-poach agreements and to pay millions of dollars in penalties.[7] New York's investigation of the title insurance industry uncovered evidence of illegal no-poach agreements, which were reducing competition, wages, and opportunities for employees.[8] Earlier this year, New York also reached a settlement agreement with a home healthcare company to end the use of unlawful no-hire agreements that prevented patients from obtaining the services of the provider of their choice.[9]

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[6] *See id.*

[7] *See* Press Release, N.Y. Office of the Att'y Gen., Attorney General James Ends Harmful Labor Practices at Largest U.S. Title Insurance Company (Mar. 29, 2023).

[8] *See id.*

[9] *See* Press Release, N.Y. Office of the Att'y Gen., Attorney General James Stops Home Care Company From Deceiving Patients and Caregivers (Feb. 24, 2023).

Similarly, Illinois has sued multiple temporary-employment-staffing firms for restraining labor markets and depressing wages through anticompetitive no-hire agreements.[10] These lawsuits allege that the agencies in question worked together with an employer to ensure that the agencies did not poach any employees assigned by any agency to work at the employer, thus eliminating the need for the agencies to compete with each other for workers, for instance by offering better wages or working conditions.[11]

Washington has also invested significant resources in protecting labor markets from anticompetitive practices, including by establishing an initiative in 2018 focused on franchises use of no-hire provisions in franchise agreements. Washington investigated national franchisor corporations with three or more locations in the State and, where

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[10] *See State ex rel. Raoul v. Elite Staffing, Inc.*, No. 2020-CH-05156 (Ill. Cir. Ct. Cook Cnty., filed July 29, 2020); *State ex rel. Raoul v. Alternative Staffing, Inc.*, No. 2022-CH-05069 (Ill. Cir. Ct. Cook Cnty., filed May 26, 2022).

[11] *See* Press Release, Ill. Office of the Att'y Gen., Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements (June 6, 2022).

necessary, initiated enforcement actions to ensure that those corporations stopped using no-hire provisions.[12]

In 2014, California obtained a $3.75 million settlement, which included injunctive relief, in a case against eBay for implementing a no-hire agreement that the State alleged was *per se* illegal.[13] More recently, fourteen States obtained consent decrees with national fast-food franchisors that bar the companies from using no-hire agreements to prevent workers from relocating between franchisees in the same chain.[14]

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[12] *See* Press Release, Wash. Office of the Att'y Gen., AG Report: Ferguson's Initiative Ends No-Poach Practice Nationally At 237 Corporate Franchise Chains (June 16, 2020).

[13] *See* Order Granting Motion for Final Approval of Settlement, *California v. eBay, Inc.*, No. 5:12-cv-5874 (N.D. Cal. Sept. 3, 2015), ECF No. 85.

[14] *See, e.g.*, Press Release, Ill. Office of the Att'y Gen., Attorney General Raoul Reaches Agreement To End Use Of No-Poach Agreements (Mar. 2, 2020); Press Release, Cal. Office of the Att'y Gen., Attorney General Becerra Announces Multistate Settlements Targeting "No-Poach" Policies that Harm Workers (Mar. 12, 2019). The fourteen States were California, the District of Columbia, Iowa, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

The States' work in this area has provided substantial evidence that no-hire agreements impose anticompetitive harms on labor markets and workers by suppressing wages and employee benefits and by limiting worker mobility. For example, Washington's enforcement campaign against no-hire provisions in franchise agreements increased the wages of previously restricted workers by 3 to 4%.[15] And Washington's experience is no outlier. Enforcement actions against no-hire agreements and prohibitions on non-compete agreements have consistently raised wages.[16]

The States' enforcement efforts have also provided evidence that, contrary to the argument pressed by defendants in the district court

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[15] Brian Callaci et al., *The Effect of No-Poaching Restrictions on Worker Earnings* 17 (July 20, 2023) (assessing the impact of Washington's no-hire enforcement campaign econometrically).

[16] *E.g.*, Matthew Gibson, *Employer Market Power in Silicon Valley* 3-4, 13 (IZA Inst. of Lab. Econ. Discussion Paper No. 14843, Nov. 2021) (finding that Silicon Valley wages went up 4.8%, and even more for certain large firms, following a Justice Department enforcement campaign against Silicon Valley no-hire agreements); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143 (2021) (manuscript copy) (finding that eliminating non-compete agreements in Oregon grew wages by 2 to 3% on average, and likely more among employees previously bound by non-competes).

here, no-hire agreements do not usually provide any procompetitive benefits. A significant portion of the franchisors to whom Washington issued process in its no-hire initiative had never included any form of a no-hire provision in their franchise agreements.[17] And many of those who had previously included such provisions were prompted by Washington's investigation to cease enforcement of no-hire provisions voluntarily and to remove them from future contracts, suggesting that there had been no substantial procompetitive business need for those provisions in the first place.[18]

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[17] *See* Amicus Curiae Brief by the Attorney General of Washington at 9, *Stigar v. Dough Dough, Inc.*, No. 18-cv-00244 (E.D. Wa. filed March 11, 2019), ECF No. 36 (hereinafter "*Stigar* Amicus"); Krueger & Ashenfelter, *supra*, at 27-28.

[18] *See Stigar* Amicus, *supra*, at 9.

POINT II

THE DISTRICT COURT ERRED IN CONCLUDING ON THE PLEADINGS THAT DEFENDANTS' NO-HIRE AGREEMENTS ARE NOT *PER SE* UNLAWFUL

Plaintiffs plausibly alleged in their complaint that defendants are horizontal competitors in the market for luxury retail employees and that defendants entered into no-hire agreements that blatantly allocated this labor market and prevented Saks' employees from seeking or obtaining employment with the Brand Defendants. (*See* J.A. 46, 54-68.) The district court erred in concluding that these allegations did not plausibly allege a horizontal market allocation agreement that is *per se* unlawful under the Sherman Act.

The district court concluded that *per se* treatment was inapplicable as a matter of law because the no-hire agreements were ancillary to a broader procompetitive agreement between defendants. (J.A. 234-239.) But the district court failed to meaningfully analyze either element of the relevant legal test for identifying ancillary restraints, and there would be no basis to find that the test was satisfied here, particularly at the motion-to-dismiss stage. To qualify as ancillary restraints, the no-hire agreements must be both (i) subordinate to a separate agreement,

and (ii) reasonably necessary to achieving that separate agreement's procompetitive purpose. There was no basis to make such critical findings at the motion-to-dismiss stage, disregarding the facts alleged in the complaint and resolving factual questions against plaintiffs rather than allowing the case to proceed to discovery. Accordingly, this Court should reverse.

A. No-Hire Agreements Are Horizontal Restraints on Trade that are Unlawful *Per Se*.

To determine whether conduct violates federal antitrust law, courts apply one of three analytical frameworks, which are generally referred to as "*per se*," "quick look," and "rule of reason" analysis. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 315-18 (2d Cir. 2008). As relevant here, the *per se* analysis applies where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) (quotation marks omitted); *see also United States v. Apple, Inc.*, 791 F.3d 290, 321 (2d Cir. 2015). *Per se* violations "are illegal as a matter of law for reasons of efficiency." *Agnew v. National Collegiate*

Athletic Ass'n, 683 F.3d 328, 336 (7th Cir. 2012). Courts need not engage in a more fine-grained factual analysis, like the rule of reason analysis, "when the Court can predict with confidence" that the conduct is unlawful. *Id.* (brackets and quotation marks omitted).

In determining which analysis applies, courts typically distinguish between horizontal restraints on trade and vertical restraints on trade. *See Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 182-83 (2d Cir. 2012). Horizontal restraints are agreements between "competitors at the same level of the market structure," while vertical restraints are agreements between entities "at different levels of the market structure, e.g., manufacturers and distributors." *United States v. American Express Co.*, 838 F.3d 179, 194 (2d Cir. 2016) (quotation marks and citation omitted).

Certain horizontal restraints on trade have long been considered to be *per se* antitrust violations. "The paradigmatic example of a *per se* illegal restraint on trade" is a horizontal agreement to fix prices. *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022). Such agreements "concentrate the power to set prices among the conspirators, including the 'power to control the market and to fix arbitrary and unreasonable

prices.'" *Apple*, 791 F.3d at 326 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). Other classic examples of *per se* violations are agreements between competitors to allocate territories or customers. *See Aiyer*, 33 F.4th at 115; *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 574-75 (2d Cir. 1961). The Supreme Court has held that such horizontal market-allocation agreements, like price fixing agreements, "are naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *see also Consolidated Laundries*, 291 F.2d at 574-75.

As noted above (at 9), these basic antitrust principles apply to all markets, including markets for labor. *See Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001); *United States v. DaVita Inc.*, No. 21-cr-229, 2022 WL 266759, at *3 (D. Colo. Jan. 28, 2022) ("[A]nticompetitive practices in the labor market are equally pernicious—and are treated the same—as anticompetitive practices in markets for goods and services."); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 352c (May 2023 update) (VitalLaw) ("Just as antitrust law seeks to preserve the free market

opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.").

Thus, like horizonal competitors in other markets, it has long been settled that "employers who [are] horizontal competitors for labor [are] prohibited from agreeing upon terms and conditions of employment." *National Basketball Ass'n v. Williams*, 45 F.3d 684, 690 (2d Cir. 1995).[19] For example, just as horizontal competitors for goods are prohibited from agreeing to fix the price of such goods, horizontal competitors for labor are prohibited from agreeing to fix the price of employee wages. *See Todd*, 275 F.3d at 198 ("If the plaintiff in this case could allege that defendants actually formed an agreement to fix . . . salaries, th[e] *per se* rule would likely apply."). As the Supreme Court has explained, the Sherman Act "does not confine its protection to consumers, or to

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[19] This Court's decision in *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), is not to the contrary. In that case, the insurance agents were paid by a uniform commission rate set by a vertically related entity, and so the agreement at issue could not have negatively impacted the agents' wages. *Id.* at 511-12, 515. Moreover, the agreement was "akin to an intra firm agreement." *Id.* at 515 (noting that the agreement was "not a classic interfirm horizontal restraint on trade in insurance sales agents"). For those reasons, the Court determined, at the summary-judgment stage, that the agreement was not *per se* unlawful. No such circumstances are alleged here.

purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victim of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *see also Jindal*, 2021 WL 5578687, at *5 ("The antitrust laws fully apply to the labor markets, and price-fixing agreements among buyers . . . are prohibited by the Sherman Act." (citing *Anderson*, 272 U.S. at 361-65)).

Similarly, just as other market participants are prohibited from agreeing to allocate customers, horizontal competitors for labor are prohibited from agreeing to allocate employees. *See, e.g.*, *In re Railway Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (competitors' no-hire agreement was an "agreement to allocate their employees to minimize competition"). And such unlawful employee allocation typically occurs through no-hire or non-solicitation agreements. *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) ("[A]n agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement." (quotation marks and citation

omitted)). Like wage-fixing agreements, employee-allocation agreements are anticompetitive because they remove the need for employers to compete with each other by offering higher wages or better benefits to obtain or keep employees. *See supra* at 10-15.

Because no-hire agreements between horizontal competitors in the market for labor are just another form of a market allocation agreement, courts have generally found them to be—like any other agreement to allocate a market—*per se* unlawful restraints on trade. *See, e.g.*, *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 990 (N.D. Ill. 2022); *DaVita*, 2022 WL 266759, at *8; *In re Railway Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d at 481; *eBay*, 968 F. Supp. 2d at 1039; *see also* Areeda & Hovenkamp, *supra*, ¶ 2013b.

Here, the complaint plausibly alleges that defendants' no-hire agreements are classic, anticompetitive market-allocation agreements that are *per se* unlawful. Plaintiffs allege that Saks and the Brand Defendants are horizontal competitors in the market for luxury retail employees. (J.A. 46.) They allege that the no-hire agreements impermissibly allocate employees to Saks by prohibiting the Brand Defendants from hiring any Saks luxury retail employees, even if the employee is

qualified for the job, unless Saks consents to the hire or the employee has not worked at Saks for at least six months. (J.A. 54.) And they allege that Saks and the Brand Defendants entered into the no-hire agreements specifically to restrain competition in the market for luxury retail employees and fix compensation at artificially low levels. (J.A. 54-55.) Although not necessary to plead a *per se* violation, the complaint also amply alleges that these no-hire agreements have harmed Saks employees—plaintiffs allege that multiple Brand Defendant managers admitted that they could not even consider plaintiffs for job opportunities because of the no-hire agreements. (*E.g.*, J.A. 58-60, 62.) And the complaint alleges that the no-hire agreements have resulted in suppressed compensation for not just plaintiffs but also other luxury retail employees. (J.A 56-57.) These allegations, which must be taken as true at the motion-to-dismiss stage, are more than enough for plaintiffs to proceed on their claims that defendants' no-hire agreements are *per se* antitrust violations.

B. The District Court Erred In Concluding at the Pleading Stage That Defendants' No-Hire Agreements Are Ancillary Restraints.

The ancillary restraints doctrine provides a narrow exception to the general rule that horizontal rivals' agreements not to compete are *per se* unlawful. That doctrine distinguishes between "naked" agreements not to compete, which do nothing but suppress competition, and "ancillary" agreements not to compete, which are subordinate and integral to a separate, procompetitive agreement among the horizontal competitors (such as a joint venture). *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). When an agreement satisfies the ancillary restraint doctrine's prerequisites, it is not *per se* unlawful and is instead subject to rule-of-reason analysis. *See Aiyer*, 33 F.4th at 115.

The district court relied on the ancillary restraints doctrine to reject plaintiffs' *per se* theory at the motion-to-dismiss stage (J.A. 237-238), but it misapplied the doctrine and engaged in impermissible fact-finding. Under the ancillary restraints doctrine, an agreement not to compete can escape *per se* treatment only when the agreement is *both* "(1) subordinate and collateral to a separate, legitimate transaction" *and* "(2) reasonably necessary to achieving that transaction's

procompetitive purpose." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (quotation marks and citations omitted); *accord, e.g.*, *Major League Baseball Props.*, 542 F.3d at 338-39 (Sotomayor, J., concurring in the judgment) ("[A] restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). The district court misapplied both prongs here.

First, the district court failed to address whether the no-hire agreements were subordinate and collateral to another procompetitive agreement between defendants. Instead, the district court concluded that the ancillary restraints doctrine applied because the no-hire agreements purportedly accompanied a collaborative business relationship between Saks and the Brand Defendants. (J.A. 238-239.) But that is not the proper standard. To be subordinate and collateral, an ancillary agreement must be "part of a larger endeavor" and that larger endeavor must be procompetitive. *See In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 345 (3d Cir. 2010); *see also Major League Baseball Props.*, 542 F.3d at 339 (Sotomayor, J., concurring in the

judgment). The mere fact that Saks and the Brand Defendants had sales agreements on the one hand and no-hire agreements on the other hand says nothing about whether those two sets of agreements were part of a larger endeavor, let alone whether that endeavor was procompetitive.

Moreover, the district court erred by making factual assumptions at the motion-to-dismiss stage necessary to satisfy the subordinate-and-collateral prong. Whether or not the defendants' business relationship is procompetitive is an inherently fact-intensive inquiry. Indeed, courts frequently deny motions to dismiss that rely on the ancillary restraints doctrine because the doctrine requires an "inherently fact-specific inquiry that is difficult to determine with certainty at the motion to dismiss stage." *Snow v. Align Tech., Inc.*, 586 F. Supp. 3d 972, 979 (N.D. Cal. 2022); *accord Borozny v. Raytheon Techs. Corp.*, No. 21-cv-1657, 2023 WL 348323, at *9 (D. Conn. Jan. 20, 2023) ("[N]umerous courts examining similar alleged no-poach agreements have found it premature to determine whether the agreement is an ancillary restraint at the pleading stage.").

Here, the factual allegations in the complaint do not support the district court's conclusion—particularly when all reasonable inferences must be drawn in favor of plaintiffs, not defendants. The complaint alleges that Saks sells the Brand Defendants' luxury goods (J.A. 42), but there are no details concerning this relationship. For instance, the complaint does not allege any details about any sales agreements between Saks and the Brand Defendants, such as the terms or scope of any such agreements or when they were executed relative to when the no-hire agreements were consummated. The complaint also does not suggest that the no-hire agreements were related to or part of any sales agreements. And the complaint does not allege that Saks would sell any less of the Brand Defendants' goods under any sales agreements (or change its behavior in any other way) if the no-hire agreements did not exist.

Second, the district court also failed to analyze whether defendants' no-hire agreements were reasonably necessary to any purported collaborative relationship between Saks and the Brand Defendants. A "restraint is not automatically deemed ancillary simply because it 'facilitates' a procompetitive arrangement." *In re Insurance*

Brokerage Antitrust Litig., 618 F.3d at 346; *accord Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995). Rather, the restraint must be an "essential or reasonably necessary component" of the procompetitive arrangement. *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d at 346; *see also Sullivan v. National Football League*, 34 F.3d 1091, 1102 (1st Cir. 1994) (describing an ancillary restraint as "one that is required to make the joint activity more efficient").

Here, the district court did not actually analyze whether the no-hire agreements were essential or reasonably necessary to Saks' business relationship with the Brand Defendants, and it would have been error for the court to reach such a conclusion at the motion-to-dismiss stage. Instead, the district court determined only that, absent the agreements, "there would be a continual risk that the Brand Defendants would use their concessions in Saks stores to recruit employees." (J.A. 239 (citing J.A. 48-49, 52).)

As an initial matter, even if this were true, the fact that the Brand Defendants might attempt to recruit Saks employees does not show, as a matter of law, that the no-hire agreements are reasonably necessary for Saks to sell the Brand Defendants' products. Although Saks might

prefer that the Brand Defendants do not recruit Saks employees, nothing in the complaint suggests that Saks would terminate or even alter its purported collaborative relationships with the Brand Defendants absent the no-hire agreements. And the district court did not consider whether any potential competitive benefits of the purported collaborative relationships could be achieved through potentially less restrictive means than the no-hire agreements.

More fundamentally, the complaint paragraphs on which the district court relied do not remotely support the conclusion that the no-hire agreements are necessary to Saks' business relationship with the Brand Defendants or to achieve the *benefits* thereof. To the contrary, those paragraphs describe the anticompetitive *harms* that flow from the no-hire agreements. Specifically, the relevant paragraphs allege that the no-hire agreements prevent defendants from competing with each other for luxury retail employees by, for example, recruiting employees through higher wages, better benefits, or other competitive factors. (*See* J.A. 48-49, 52.) These allegations of anticompetitive harms do not in any way allege that the no-hire agreements are necessary to defendants' business relationship.

The district court's errors are compounded by the fact that the case was at the motion-to-dismiss stage. Although whether *per se* or rule-of-reason analysis applies to an antitrust claim is ultimately a question of law, that question is often predicated on a factual inquiry that cannot be resolved on a motion to dismiss. *See National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 596 (11th Cir. 1986) (citing *National Collegiate Athletic Ass'n*, 468 U.S. at 104); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d at 990; *see also Todd*, 275 F.3d at 198 ("'[I]n antitrust cases in particular . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" (quotation marks omitted)).

Here, whether a *per se* analysis applies to plaintiffs' Sherman Act claims, or whether the ancillary restraints doctrine properly applies, turns on multiple facts that the district court either did not consider or improperly assumed in defendants' favor. For example, although the ancillary restraints doctrine requires that an anticompetitive agreement is necessary to a procompetitive arrangement, there is no basis in the complaint to conclude that Saks would not sell the Brand Defendants' goods without the no-hire agreements or that it would sell less of

their goods. Indeed, given that the complaint emphasizes that Saks specializes in selling luxury goods (*see, e.g.*, J.A. 42-44), there is no reason to assume at the pleading stage that Saks would stop selling those very goods if their employees could be hired by the Brand Defendants. Yet, that is exactly what the district court appears to have assumed. (J.A. 239.) The complaint also does not contain allegations about several other facts that are likely to bear on whether the no-hire agreements are ancillary to a procompetitive arrangement, including the history of no-hire agreements among other luxury stores, how many stores continue to use such no-hire agreements, and whether stores that have such agreements sell more products than those that do not.

Rather than allowing relevant facts that might answer these questions to be developed during discovery, the district court improperly assumed for itself the factfinder's role at the motion-to-dismiss stage. This error compounded the district court's failure to apply the appropriate legal standards, and further warrants reversal.

CONCLUSION

The Court should reverse the district court's judgment.

Dated: New York, New York
August 4, 2023

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: */s/ Daniel S. Magy*
Daniel S. Magy
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
DANIEL S. MAGY
Assistant Solicitors General
of Counsel

28 Liberty Street
New York, NY 10005
(212) 416-6073

(*Counsel listing continues on the next page.*)

KRIS MAYES
Attorney General
State of Arizona
2005 North Central Avenue
Phoenix, AZ 85004

ROB BONTA
Attorney General
State of California
1300 "I" Street
Sacramento, CA 95814

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway
Denver, CO 80203

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801

ANNE E. LOPEZ
Attorney General
State of Hawai'i
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Place, 20th Floor
Baltimore, MD 21202

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

GENTNER DRUMMOND
Attorney General
State of Oklahoma
313 Northeast 21st Street
Oklahoma City, OK 73105

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,636 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ *Oren L. Zeve*