23-600

IN THE

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,
Plaintiffs-Appellants,

v.

SAKS & COMPANY LLC, 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.

On Appeal from the United States District Court for the Eastern District of New York, No. 1:20-cv-00833-MKB-CLP (Hon. Margo K. Brodie)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus*, by and through its undersigned attorney, hereby certifies that it has no parent corporation, and no publicly held corporation owns more than ten percent or more of its stock.

/s/ Lauren Willard
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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Here, *amicus* the United States Department of Justice ("DOJ") has mischaracterized the ancillary restraints doctrine as an affirmative defense that Defendants bear the burden of raising and proving at the pleading stage—incorrectly shifting this burden away from the Plaintiffs in this action, and those that might follow. The ancillary restraints doctrine, however, is a mode of analysis to determine whether the *per se* rule or rule-of-reason analysis applies to a given claim and is not an affirmative defense. Plaintiffs, not defendants, bear the burden to adequately plead all elements of an antitrust claim. As a result, if a plaintiff seeks to establish liability under a *per se* theory, it must plead facts demonstrating that the *per se* rule

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

applies. The DOJ also proposes a test that would improperly import the least-restrictive-means analysis from the final stage of the rule of reason to the threshold analysis of whether to apply the rule of reason in the first instance. This suggestion has been considered and rejected by other courts, and it would sow doctrinal confusion and duplication. The DOJ's proposed approach to the ancillary restraints doctrine would have major negative repercussions and chill procompetitive behavior by businesses—particularly given the extraordinary expense of antitrust litigation and the outsized threat of antitrust liability. The Chamber therefore believes it is important to affirm the district court's application of ancillary restraints doctrine and reject the DOJ's attempt to craft a new and unsupported burden-shifting framework for that doctrine.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court "has long recognized that" the Sherman Act prohibits only "*unreasonable* restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (emphasis added). In assessing the reasonableness of a challenged restraint, courts "presumptively appl[y] rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Application of the rule of reason requires "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2151 (2021) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018)).

There is a narrow exception to the presumptive application of the rule of reason, which courts refer to as the *per se* rule. The *per se* rule treats a limited category of restraints "as necessarily illegal," thus "eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

"*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.'" *Dagher*, 547 U.S. at 5 (quoting *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 692 (1978)). The *per se* shortcut is therefore appropriate "only

after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886–87 (citations omitted). By contrast, *per se* analysis is inappropriate "where the economic impact of certain practices is not immediately obvious." *Dagher*, 547 U.S. at 5 (internal quotation marks and citations omitted); *see also 1-800 Contacts, Inc. v. Fed. Trade Comm'n*, 1 F.4th 102, 115 (2d Cir. 2021) (*Per se* "designation is saved for certain types of restraints, *e.g.*, geographic division of markets or horizontal price fixing, that have been established over time to lack . . . any redeeming virtue." (alteration in original; internal quotation marks and citation omitted)).

The limited scope of the *per se* rule has particular relevance in the context of joint ventures, as "the fact that joint ventures can have . . . procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively." *Alston*, 141 S. Ct. at 2155. Thus, even a restraint that might otherwise be categorized as a *per se* violation may warrant rule-of-reason analysis if it relates to a procompetitive joint venture or collaboration.

The Supreme Court has distinguished between three categories of restraints in the context a joint venture: "(1) restraints that are *core* to the joint venture's efficiency enhancing purpose; (2) restraints that are *ancillary* to the joint venture's efficiency enhancing purpose; and (3) restraints that are *nakedly* unrelated to the

purpose of the joint venture." *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 724–25 (6th Cir. 2019) ("*MCEP II*") (citing *Dagher*, 547 U.S. at 7–8). Only the last of these three categories—naked restraints—justifies *per se* treatment. *Id.*

This case focuses on the line dividing the second and third of these categories—so called "ancillary" versus "naked" restraints. The relevant antitrust doctrine "seeks to distinguish between those restraints that are intended to promote the efficiencies of a joint venture [([ancillary restraints]) and those that are simply unrelated [(naked restraints)]." *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338–39 (2d Cir. 2008) (Sotomayor, J., concurring). As the Sixth Circuit explained in *MCEP II*, "[a] restraint is ancillary if it bears a reasonable relationship to the joint venture's success." *MCEP II*, 922 F.3d at 725 (citing *MLB Props.*, 542 F.3d at 339-40 (Sotomayor, J., concurring)). In other words, "the standard [is] whether there exists a plausible procompetitive rationale for the restraint." *MCEP II*, 922 F.3d at 726. The existence of such a plausible rationale means that the competitive effects of the restraint are not "immediately obvious," *Dagher*, 547 U.S. at 5, such that full rule-of-reason analysis is required to determine whether, in fact, the restraint is unreasonable.

Here, the district court properly concluded that the ancillary restraints doctrine applied where "the Amended Complaint indicates that the no-hire agreements are

part of a larger 'legitimate business collaboration' between Saks and the Brand Defendants." A-241 (quoting *Dagher*, 547 U.S. at 6). In critiquing the district court's decision, the DOJ proposes a novel pleading standard that that would place the burden on Defendants to establish that a challenged restraint is "(1) subordinate and collateral to a separate, legitimate business collaboration among them and (2) reasonably necessary to the collaboration's procompetitive objectives." DOJ Br. 7. And Defendants must do so solely based on the face of Plaintiffs' complaint.

The DOJ's ancillary restraints test is doubly flawed. First, it improperly categorizes the ancillary restraints *doctrine* as an *affirmative defense*, and thus absolves Plaintiffs from meeting their threshold burden to allege facts indicating that the narrow *per se* rule applies. *See* Section I, *infra*. Second, the DOJ's interpretation of "reasonably necessary" holds Defendants to an enhanced burden to demonstrate that the restraint is not "overbroad"—*i.e.*, it attempts to import into the ancillary restraints analysis the least-restrictive-means test from the full rule-of-reason analysis. *See* Section II, *infra*. This proposed test is unsupported by the case law, and would provide civil plaintiffs with a nearly automatic ability to send antitrust challenges involving joint ventures into discovery, creating coercive settlement pressure, and ultimately deterring many procompetitive collaborations. *See* Section III, *infra*.

ARGUMENT

I. The Ancillary Restraints Doctrine is Not an Affirmative Defense That Defendants Must Establish on the Face of Plaintiffs' Complaint.

Plaintiffs bear the burden to plead a plausible antitrust claim, which includes a requirement that they either plead facts indicating that the *per se* rule applies, or plead facts sufficient to state a viable claim under the rule of reason. In its *amicus* brief, the DOJ proposes a novel test that would shift the burden to defendants in cases involving potentially ancillary restraints to demonstrate the reasonableness of the challenged restraint based on the allegations in the complaint.[2] The DOJ cites no doctrinal basis or applicable case law, however, for its position.

A. Plaintiffs Bear the Burden to Plead Facts Indicating That a Challenged Restraint Is Unreasonable.

To survive a motion to dismiss in antitrust cases, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" such that there is "more than a sheer possibility that a defendant acted unlawfully." *Concord Assocs., L.P. v. Ent. Props. Tr.*, 817 F.3d 46, 52 (2d Cir. 2016) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also TV Commc'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992) ("A plaintiff must allege sufficient facts to support a cause of action under the

[2] We note that neither Plaintiffs-Appellants nor the States *amici* advocate for such a test. In their brief, the Amici States never assert that the ancillary restraints doctrine is an affirmative defense and concede that "whether *per se* or rule-of-reason analysis applies to an antitrust claim is ultimately a question of law." States Br. 30.

antitrust laws."). Where, as here, Plaintiffs seek to establish their claims by application of the *per se* rule—and thereby avoid the need to actually prove anticompetitive effects or establish a viable antitrust market and market power, among other requirements—they accordingly bear the burden to allege sufficient facts to justify the invocation of that rule. *See id.*; *see also SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1118 (9th Cir. 2022) ("[A] plaintiff must plausibly allege an agreement that is unreasonable 'per se' or under the 'rule of reason.'" (citation omitted)); *Gatt Commc'ns, Inc. v. PMC Assocs., LLC*, 2011 WL 1044898, at *2 (S.D.N.Y. 2011) ("To establish a per se claim under the Sherman Act, a plaintiff must plead facts establishing" that the rule applies.), *aff'd on other grounds*, 711 F.3d 68 (2d Cir. 2013).

What mode of analysis to apply—and whether Plaintiffs have stated a claim under the appropriate standard—are legal questions that often will be suited to resolution on a motion to dismiss. *See, e.g.*, *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61 (1st Cir. 2004) ("Whether a plaintiff's alleged facts comprise a per se claim is normally a question of legal characterization that can often be resolved by the judge on a motion to dismiss or for summary judgment."); *In re ATM Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) ("the decision of what mode of analysis to apply—per se, rule of reason, or otherwise—is entirely a question of law for the Court"). These principles apply with

equal force in cases involving ancillary restraints. *See, e.g.*, *MCEP II*, 922 F.3d at 727 (holding, in ancillary restraints context, that "whether a given restraint falls within the per se category is a question of law"); *In re HIV Antitrust Litig.*, 2023 WL 3088218, at *20 (N.D. Cal. Feb. 17, 2023) ("Notably, the ancillary restraints issue appears to be one for the Court, and not a jury, to decide.").

Courts thus routinely and appropriately dismiss claims where plaintiffs seek to apply the *per se* rule, but fail to allege facts sufficient to justify the invocation of that rule. *E.g.*, *Concord Assocs., L.P.*, 817 F.3d at 53 ("We agree with the district court that the plaintiffs have failed to allege a per se violation of the Sherman Act."); *Frame-Wilson v. Amazon.com, Inc.*, 591 F. Supp. 3d 975, 987–88 (W.D. Wash. 2022) ("Absent plausible allegations of a horizontal arrangement—or any legal authority supporting per se analysis in the absence of a horizontal agreement or inference thereof—the Court concludes that Plaintiffs' allegations of a per se violation fail as conclusory and unsupported."); *Kelsey K. v. NFL Enters. LLC*, 2017 WL 3115169, at *4 (N.D. Cal. 2017) (dismissing *per se* claim where complaint "fail[ed] to allege facts supporting any plausible inference that the anti-tampering policy actually functioned as a 'no-poaching agreement . . . separate from or not reasonably necessary to a larger legitimate collaboration'"); *In re Int. Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 467 (S.D.N.Y. 2017) (dismissing *per se* claim where plaintiffs alleged conduct that "d[id] not fit into any category of agreement

recognized as per se illegal"); *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, 312 F. Supp. 2d 379, 390 (E.D.N.Y. 2004) ("Plaintiffs have not alleged sufficient facts . . . to allow plaintiffs' Section 1 claim to proceed under a theory of per se price-fixing.").

There is no exception to the general rule that a plaintiff bears the burden to justify invocation of the *per se* rule for cases in which the ancillary restraints doctrine is at issue. That burden appropriately falls on the plaintiff because proving the existence of an unreasonable restraint of trade is an element of a *plaintiff's* claim; a defendant bears no burden to prove "reasonableness" as an affirmative defense. Indeed, the ancillary restraints doctrine is premised on courts' recognition that "joint ventures 'hold the promise of increasing a firm's efficiency and enabling it to compete more effectively.'" *Salvino*, 542 F.3d at 337 (Sotomayor, J., concurring) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). It is for this reason that "competitors engaged in joint ventures may be permitted to engage in a variety of activities that would normally be illegal under a per se rule when such activities are necessary to achieve the significant efficiency-enhancing purposes of the venture." *Id.*

The Sixth Circuit's decision in *MCEP II* illustrates an appropriate application of the doctrine. There, the plaintiffs argued that the defendants "bear the burden of proving that a challenged restraint is procompetitive, and therefore ancillary." 922

F.3d at 727. The court rejected that argument, emphasizing the Supreme Court's holding that where "a plaintiff failed to make a threshold showing that the challenged conduct had the characteristics necessary to justify per se condemnation, rule of reason analysis should apply instead." *Id.* at 728 (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985)). Thus, where the record "reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then the possibility of countervailing procompetitive effects is not remote and per se treatment is improper." *Id.* (citation omitted); *see also Salvino*, 542 F.3d at 340 (Sotomayor, J., concurring) (where a restraint "could have a procompetitive impact related to the efficiency-enhancing purposes" of a joint venture, that restraint "must be viewed as ancillary to the joint venture and reviewed under the rule of reason").

B. The DOJ Offers No Basis for Its Novel Proposed Treatment of the Ancillary Restraints Doctrine As an Affirmative Defense.

Contrary to these precedents, the DOJ's *amicus* brief improperly characterizes the ancillary restraint doctrine as "a defense," and asserts that "Defendants bear the obligation of raising and proving the defense." DOJ Br. 8. This proposed framing, however, distorts the role of the ancillary restraints doctrine and is unsupported by the case law.

The DOJ's proposed characterization of the ancillary restraints doctrine as the equivalent of an affirmative defense is doctrinally confused. *See* DOJ Br. 15 (citing

discussion from *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998), about the standards for when "[a]n affirmative defense may be raised by a pre-answer motion to dismiss"). Antitrust plaintiffs bear the burden of proving unreasonableness of the challenged restraint as an element of their claim. *See supra* at 10. An argument by a defendant that a plaintiff cannot satisfy that element of their claim is "not an affirmative defense" that a defendant bears the burden either to plead or prove. *Nat'l Mkt. Share, Inc. v. Sterling Nat'l Bank*, 392 F.3d 520, 527 (2d Cir. 2004); *see also Utica Mut. Ins. Co. v. Munich Reinsurance Am., Inc.*, 7 F.4th 50, 63 (2d Cir. 2021) ("An affirmative defense is a defense that will defeat the plaintiff's . . . claim, even if all allegations in the complaint are true, rather than an attack on the truth of the allegations, or a rebuttal of a necessary element of the claim." (alteration in original; internal quotation marks and citation omitted)).

Because application of the ancillary restraints doctrine seeks to prevent the plaintiff from proving an element of its claim (the unreasonableness of the restraint), it is not an affirmative defense. Rather, the doctrine is nothing more than "an early stage decision about which mode of analysis should be applied." Herbert Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 140 (2018). The involvement of that doctrine in the case provides no reason to craft any novel burden-shifting framework. *See, e.g.*, *MCEP II*, 922 F.3d at 727–28; *supra* at 10–11.

None of the DOJ's citations justifies application of the specific rules that apply to authentic affirmative defenses, as contrasted to the kinds of "defenses" that merely negate an element on which a plaintiff bears the burden of proof. *See* DOJ Br. 12–13. *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022), referred to the ancillary restraints doctrine as an "exception," but that decision did not address the relevant civil burdens of proof both because it was a criminal case and because there was no "cooperative venture" at issue. *Id.* at 119. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003), used the term "defense" colloquially, but it ultimately confirmed that its holding was that the evidence established "the legal essentials of *plaintiffs'* case," thus justifying summary judgment in plaintiffs' favor. *Id.* at 1157 (emphasis added). *Blackburn v. Sweeney*, 53 F.3d 825, 828–29 (7th Cir. 1995), found that the challenged agreement was a "naked" restraint based on an analysis of the apparently undisputed facts, without any discussion of burdens of proof. And finally, the DOJ cites a portion of *Board of Regents of University of Oklahoma v. National Collegiate Athletic Association*, 707 F.2d 1147, 1154 n.9 (10th Cir. 1983), in which the Tenth Circuit held that certain NCAA restrictions were subject to the *per se* rule. But although the Supreme Court affirmed the judgment against the NCAA, it *rejected* the portion of the Tenth Circuit's opinion that the DOJ relies on, holding that "it would be inappropriate to apply a per se rule" in that case, which "involves an industry in which horizontal restraints on competition are

essential if the product is to be available at all." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100–01 (1984). The DOJ's brief thus cites no case in which a motion to dismiss was denied by application of its proposed test in which a defendant bears the burden to prove that the ancillary restraints doctrine applies.

II. The Ancillary Restraints Doctrine Does Not Require a Threshold Least-Restrictive-Means Inquiry.

The DOJ's *amicus* brief adds to the unfounded burden they seek to place on antitrust defendants by suggesting that a defendant also bears the burden to establish that the challenged restraint is the least restrictive means of achieving the relevant procompetitive effect. This proposed standard has been specifically rejected by numerous courts of appeals, and it would create confusion between the distinct questions of whether the rule of reason applies and whether it is satisfied.

A. Precedent Consistently Rejects Application of Least Restrictive Means Analysis As Part of the Ancillary Restraints Doctrine.

In the joint venture context, only naked restraints that are "plainly anticompetitive" are subject to the *per se* rule. *Dagher*, 547 U.S. at 5. An antitrust defendant needs only show that the restraint has a "plausibly procompetitive rationale" to avoid *per se* treatment. *MCEP II*, 922 F.3d at 726. Yet, the DOJ asks this court to create a new two-step analysis: a defendant (i) must show that the restraint has a plausibly procompetitive rationale, and (ii) if able to establish that,

must then show that the restraint is the least restrictive means to meet that rationale. This new requirement finds no support in any case law and improperly imports the final step from the rule-of-reason analysis into the threshold ancillarity inquiry.

Although the DOJ purports to advocate for a "reasonable necessity" test, its proposed approach is, in actuality, a least-restrictive-means analysis. Rather than limit courts' review to the question of whether the alleged restraint was reasonably necessary, the DOJ asks them to micromanage specific aspects of the restraint—such as its implication of other brands and its duration—and ask whether each specific aspect was absolutely required. *See* DOJ Br. 19. This emphasis on the overbreadth of the restraint operates in functionally the same manner as a least restrictive means analysis. *See* DOJ Br. 20 ("Because the alleged conspiracy applies to more employees and more brands over a longer time span than reasonably necessary to address any risk that the District Court found to exist, defendants cannot meet their burden of establishing reasonable necessity."). The DOJ's invocation of the term "reasonably necessary" cannot disguise the fact that the underlying analysis is too specific and too demanding to constitute anything other than a search for the least restrictive alternative.

This version of the ancillary restrains doctrine advanced by the DOJ finds no support in any case law. Most recently, the Ninth Circuit rejected the DOJ's proposed approach in *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th

1102, 1111 (9th Cir. 2021). There, the court explained that "contrary to the United States' amicus brief, [the defendant] need not satisfy a less-restrictive-means test to demonstrate that the non-solicitation agreement is an ancillary restraint," finding that "the less restrictive alternative analysis falls within the rule-of-reason analysis, not the ancillary restraint consideration." *Id.* at 1111. The Ninth Circuit noted that in that case, as here, the United States "does not cite any case law in support of this argument" and its position "conflicts with the Supreme Court's 'reluctance to adopt per se rules' in cases 'where the economic impact' of the restraints 'is not immediately obvious.'" *Id.* (quoting *Leegin*, 551 U.S. at 887). In light of these flaws, the court "decline[d] the United States' request to create new law within the ancillary restraint doctrine." *Id.* This court should do the same.

The Ninth Circuit's holding is consistent with opinions from a majority of other Circuits, which have made clear that they do not require such scrutiny for ancillary restraints. Rather, courts have explained that the "reasonable" part of the reasonable necessity test gives businesses the latitude they need to achieve the procompetitive goals of their collaborations. The Sixth Circuit's decision in *MCEP II*, 922 F.3d 713, is illustrative. After explaining that the ancillary restraint in question was "reasonably related to the joint venture's procompetitive features," the court "follow[ed] the majority of Circuits and h[e]ld that a joint venture's restraint is ancillary and therefore inappropriate for per se categorization when,

viewed at the time it was adopted, the restraint '*may contribute* to the success of a cooperative venture.'" *Id.* at 724–25 (quoting *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)) (emphasis added). The Sixth Circuit also clarified that "[c]ondemning as per se illegal restraints that, while not necessary to achieving a joint venture's efficiency-enhancing purpose nevertheless plausibly relate to that purpose, would run counter to the Supreme Court's instruction to avoid applying the per se rule to situations where efficiencies are being served." *Id.* at 727.

The most applicable authority from this Court reflects the same conclusion. In her concurrence in *Salvino*, then-Judge Sotomayor reiterated that, "[u]nder the ancillary restraints doctrine, a challenged restraint need not be essential, but rather only 'reasonably ancillary to the legitimate cooperative aspects of the venture.'" 542 F.3d at 340. Similar to the opinions in *Aya Healthcare* and *MCEP II*, she explained that "[w]hether the externalities could be eliminated in a substantially less restrictive manner is an inquiry that should generally be part of a rule-of-reason analysis rather than part of a per se or quick-look approach." *Id.* at 340 n.9. As a result, where challenged provisions "*could* have a procompetitive impact related to the efficiency-enhancing purposes" of a joint venture, that restraint "*must* be viewed as ancillary to the joint venture and reviewed under the rule of reason in the context of the joint venture as a whole." *Id.* at 340 (emphases added).

Other federal courts—including the Supreme Court—have endorsed this rationale. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n, v. Bd. of Regents of Univ. Okla.*, 468 U.S. 85, 103, 114, 117–19 (1984) (applying the rule-of-reason, even though the provision at issue (i) restrained the ability of members to compete on both price and output, (ii) was not "necessary" to market the product, and (iii) was "not even arguably tailored" to serve the proffered justification); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227–28 (D.C. Cir. 1986) (explaining that the Supreme Court did not intend that the lower courts "calibrate degrees of reasonable necessity . . . [t]here is no reason in logic why the question of degree should be important"); *Polk Bros.*, 776 F.2d at 189 ("A restraint is ancillary when it *may* contribute to the success of a cooperative venture that promises greater productivity and output." (emphasis added)); *In re HIV Antitrust Litig.*, 2023 WL 3088218, at *19 ("'reasonably necessary' requirement does not demand as much rigor as the language might suggest"); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1912c2 (4th ed., 2020 Supp.) ("An ancillary restraint is one that is reasonably related to a joint venture or transaction that, at least upon initial examination, promises to increase output, reduce costs, improve product quality, or otherwise benefit consumers.").

B. The DOJ's Proposed Approach Would Lead to Doctrinal Duplication and Confusion.

The DOJ's proposed requirement of a least restrictive means analysis in determining ancillarity also would create doctrinal disarray. The DOJ's asserted test puts the cart before the horse by improperly importing one element from the rule-of-reason inquiry into the threshold question of which antitrust mode of analysis applies. It is not the function of the ancillary restraints doctrine to make a final distinction between pro- and anticompetitive restraints; rather, that is the purpose of the carefully calibrated rule-of-reason analysis.

A case involving the ancillary restraints doctrine involves two separate inquiries. First, a court must assess whether plaintiffs are challenging an ancillary restraint that "could have a procompetitive impact related to the efficiency-enhancing purposes" of a joint venture. *Salvino*, 542 F.3d at 340 (Sotomayor, J., concurring). Second, and if so, the court applies a three-step inquiry under the rule of reason that analyzes (i) whether "the challenged restraint has a substantial anticompetitive effect," (ii) whether there is a "a procompetitive rationale for the restraint," and (iii) whether "the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Alston*, 141 S. Ct. at 2160 (internal quotation marks omitted). A claim of overbreadth is intended to be adjudicated *as part of the* rule-of-reason analysis, not as a basis for determining whether the rule of reason applies in the first place.

Further, importing the rule of reason's least restrictive means analysis would saddle defendants with a burden that the rule of reason places firmly on plaintiffs only after they have carried their initial burden of showing substantial anticompetitive effects. *Am. Express Co.*, 138 S. Ct. at 2284. As explained in a leading antitrust treatise:

> [A] showing of possible less restrictive alternatives is part of the "burden shifting" procedure that goes on in a rule of reason case and is required only if the preceding inquiries warrant it. Thus, for example, if the plaintiff's prima facie case fails because the plaintiff is unable to prove power or a plausible anticompetitive effect, then condemnation under the antitrust laws would be improper whether or not less "restrictive" alternatives are available. That is, *the availability of a purported less restrictive alternative does not make a challenged practice effectively illegal per se*.

Areeda & Hovenkamp, *supra*, ¶ 1913c (emphasis added). Adopting the DOJ's proposed approach would create precisely the outcome against which the treatise warns—and thus it would risk condemning restraints that have procompetitive effects and do not adversely affect competition.

Lastly, it is worth noting that the district court properly found here that the alleged restraint was ancillary rather than naked—relying on a reasonable necessity approach. In the Amended Complaint, Plaintiffs alleged that absent the no-hire agreement, there would be a continual risk that the Brand Defendants would use their concessions in Saks stores to recruit employees. Am. Compl., Dkt. 44, ¶¶ 56–57, 83. The District Court found that the complaint thus "indicates that there is a

procompetitive rationale for the challenged restraint," the existence of which required it to "weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." Order, Dkt. 130 at 34. The DOJ points to no applicable precedent indicating any error in this approach.

III. Adoption of the DOJ's Proposed Rule Would Automatically Send Antitrust Claims Into Expensive Discovery, Create Coercive Settlement Pressure, and Deter Procompetitive Collaborations.

The ancillary restraints doctrine, and antitrust law more generally, strike a balance between deterring plainly anticompetitive behavior while encouraging procompetitive conduct and collaboration. *Dagher*, 547 U.S. at 7 ("[C]ourts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid."). The DOJ's novel proposed ancillary restraints test would upend that careful balance by relieving antitrust plaintiffs of their burden to adequately plead a *per se* claim in the context of a joint venture. If adopted, the DOJ's proposed rule would threaten to subject defendants to the disproportionate expense of antitrust discovery and the attendant settlement pressure accompanying it—chilling procompetitive collaboration in the process. Further, in doing so, courts and defendants would be functionally unable to screen out plainly unmeritorious claims. This outcome is at odds with the policy interests that underpin antitrust law generally and the ancillary restraints doctrine in particular.

A. The DOJ's Proposed Test Would Subject Nearly All Joint Ventures to Expensive Discovery and Coercive Settlement Pressure.

The DOJ's proposed test essentially dictates that the applicability of the ancillary restraints doctrine is a fact question that can only be resolved with discovery, unless the plaintiff affirmatively concedes that a restraint is both related and reasonably necessary in the complaint. DOJ Br. 18–20. Plaintiffs operating under such a rule would have no incentive to include allegations that a restraint is "reasonably necessary" to the joint venture's procompetitive collaboration in the complaint. By omitting these facts, plaintiffs could send nearly any antitrust case involving joint ventures to discovery by alleging a "naked" restraint and omitting any facts about the context in which the restraint arises.

Shifting the burden of establishing whether a restraint is naked or ancillary from plaintiffs to defendants is contrary to the policy interests underpinning the antitrust laws. Requiring plaintiffs to establish the narrow exception of the *per se* rule is designed to protect critical policy interests—in particular, preventing unfounded antitrust claims from foisting tremendous costs and settlement pressure on defendants, as well as promoting procompetitive behavior.

Antitrust litigation is inherently complex and, where discovery is granted, imposes necessarily great expense. For decades, courts have warned "against sending the parties into discovery" based on dubious claims given "the costs of modern federal antitrust litigation." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d

1101, 1106 (7th Cir. 1984); *see also Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013) ("If we permit antitrust plaintiffs to overcome a motion to dismiss simply by alleging parallel conduct, we risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy."). And in its landmark decision on the 12(b)(6) plausibility standard, the Supreme Court collected authority discussing the "unusually high cost of discovery in antitrust cases," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007), a reality that continues to this day, *see, e.g.*, David F. Herr, *Annotated Manual for Complex Litigation* § 30 (4th ed., updated May 2022) (noting that antitrust litigation "involve[s] voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money").

The burdens of antitrust litigation are exacerbated by the outsized threat of antitrust *liability*. By statute, antitrust defendants must pay treble damages if they are found liable—*i.e.*, three times the aggregate damages imposed through the alleged antitrust conspiracy. *See* 15 U.S.C. § 15. That figure often amounts to billions of dollars. The consequences for antitrust defendants can be "economically devastating." Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from*

the American Experience, 41 Loy. U. Chi. L.J. 629, 633–34 (2010). As a result, there is often intense pressure to settle antitrust cases. Indeed, antitrust "[d]efendants frequently face a Hobson's choice: either pay some amount to settle, even though they believe in their innocence, or try the matter and risk uncapped liability." Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1284 (1987); *see also Twombly*, 550 U.S. at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment and trial] proceedings.").

Coercive settlement pressure is compounded where, as here, plaintiffs seek to certify a nationwide class action. Allowing plaintiffs to proceed on a class basis under a *per se* theory by pleading artfully around the ancillary restraints doctrine—aggregating thousands upon thousands of antitrust claims—would exponentially increase legal exposure without any sound justification. This risk emphasizes the consequences of adopting the DOJ's proposed rule, which will be available to all private litigants, who may not have the same incentives and prosecutorial discretion as the federal government. The prospect of large payouts—including from forced settlements—will open the floodgates of antitrust litigation if the pleading standard for *per se* claims is lowered in the manner the DOJ proposes.

These inherent features of antitrust litigation and liability magnify the potential harms that would flow from endorsing the DOJ's flawed approach to the ancillary restraints doctrine. Allowing plaintiffs to plead a naked *per se* restraint in the context of a procompetitive collaboration simply by omitting the restraint's reasonable relationship and necessity in a complaint would subject nearly every defendant to the expense of antitrust litigation—including sizeable discovery costs, the threat of catastrophic liability, and coercive settlement pressure.

B. The DOJ's Proposed Test Would Chill Procompetitive Collaboration.

By subjecting defendants to considerable costs and the attendant settlement pressure, the DOJ's proposed ancillarity test would chill procompetitive business behavior. An overly restrictive doctrine also risks ultimately condemning restraints that are in fact procompetitive, and which would be proven so under the more rigorous rule of reason analysis. A "legal system that errs even a few percent of the time is likely to 'catch,'" or, in other words, condemn, "mostly desirable practices." Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1, 16 (1984). In the antitrust context, the rate of error is "quite high," due in no small part to the complexity of the subject and the unfamiliarity of many courts in dealing with such cases. *Id.* at 16 n.32 (noting that, in 1983, "the error rate on legal issues alone [wa]s 17%" in civil antitrust cases). This means that any steps lowering plaintiffs'

pleading burden are likely to invite more legal judgement and, correspondingly, more legal error into the review of high-stakes antitrust cases.

The Supreme Court has increasingly narrowed the types of conduct subject to the *per se* rule because of the risk of deterring procompetitive behavior. As the Supreme Court explained in *Leegin*, *per se* rules "can be counterproductive" because they "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage" and "may increase litigation costs by promoting frivolous suits against legitimate practices." *Leegin*, 551 U.S. at 895. The DOJ's proposed rule would create precisely this counterproductive approach by permitting *per se* claims to proceed against procompetitive ancillary restraints.

Under the DOJ's novel proposed approach, joint venture participants would be unable to have meritless *per se* claims against procompetitive ancillary restraints dismissed at an early stage. Accordingly, the risk of overdeterrence is especially pronounced—and many businesses may forgo even procompetitive ventures and collaboration for fear of expensive litigation and the prospect of trebled damages. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993) ("overdeterrence" risks "imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior").

C. By Shifting the Burden of Proving Ancillarity to Defendants, the DOJ Would Prevent Courts From Screening Plainly Unmeritorious Claims.

Finally, the DOJ's proposed approach would allow plaintiffs to impose the excessive costs of antitrust litigation on businesses without any showing of actual harm to competition. Such an approach undercuts the aim of the rule-of-reason analysis, which—given the stakes for defendants—ensures that antitrust claims are subject to appropriate standards at each phase of the litigation designed to permit courts to screen out plainly unmeritorious claims, as was done in this very case. The DOJ's proposed approach would strip courts of these critical tools.

As a threshold matter, rejecting the DOJ's proposed ancillarity rule would still allow meritorious antitrust claims to proceed. Plaintiffs can either allege facts demonstrating that a restraint is, in fact, "naked" or allege a plausible claim under the rule of reason. The rule of reason is the default and predominant mode of analysis for antitrust claims because it requires a showing of harm to competition. As explained above, the rule of reason demands "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition." *Alston*, 141 S. Ct. at 2155 (quoting *Am. Express Co.*, 138 S. Ct. at 2285). Consistent with the pleading standards set in *Twombly*, plaintiffs must allege facts sufficient to prove a *prima facie* violation of the Sherman Act. Under rule-of-reason analysis, this pleading threshold aids courts and litigants alike in measuring, as early as possible, whether a viable antitrust claim actually exists.

By contrast, shifting the burden of proving ancillarity to defendants under the DOJ's proposed test would make it impossible to screen out even plainly procompetitive restraints at the motion to dismiss stage. According to the DOJ's proposed test, plaintiffs that allege a *per se* naked restraint among joint venturers would be entitled to embark on a multi-year discovery campaign absent defendants' ability to demonstrate based on the face of plaintiff's complaint that the restraint is related, necessary, and the least restrictive means. It cannot be that both *Twombly* and the rule of reason can be circumvented so easily.

This case is illustrative. At the district court, Plaintiffs' alternative rule of reason claim failed because they could not allege facts indicating market power or actual harm to competition. The district court explained that Plaintiffs "offer[ed] no facts to support the conclusory assertion that 'suppressing LRE compensation at a large LRE employer like Saks removes significant competitive pressure on the Brand Defendants' LRE pay as well,'" nor that they "allege[d] that either Saks individually, or all Defendants collectively, have a market share that would give rise to an inference of market power." Order, Dkt. 130 at 45–46. Yet, under the DOJ's approach, the failure to allege these facts would be immaterial, so long as the Defendants could not satisfactorily demonstrate ancillarity based on Plaintiffs' allegations. This type of burden-shifting is not consonant with *Twombly*, and too readily sidesteps the governing rule-of-reason analysis.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Plaintiffs' *per se* claim should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Further, pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), I certify that this brief complies with the word-count limitation of 2d Cir. R. 29.1(c) and 2d Cir. 32.1(a)(4)(A). This brief contains 6,804 words, not counting the parts excluded by Fed. R. App. P. 32(f) .

Dated: November 3, 2023

/s/ Lauren Willard
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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 for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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