UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 23-600

Caption [use short title]

Giordano v. Saks Incorporated

Motion for: Leave to File Amici Curiae Brief in support of Defendants-Appellees

Set forth below precise, complete statement of relief sought:

The International Center for Law & Economics moves for leave to file an amicus curiae brief in support of Appellees seeking affirmance of the district court's ruling.

MOVING PARTY: ICLE and Scholars **OPPOSING PARTY:** Appellants Giordano, et al.

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Rachel S. Brass **OPPOSING ATTORNEY:** Innessa M. Huot

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Court- Judge/ Agency appealed from: Hon. Margo K. Brodie, U.S. District Court for the Eastern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
■ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ■ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ■ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is the oral argument on motion requested? ☐ Yes ■ No (requests for oral argument will not necessarily be granted)

Has the appeal argument date been set? ☐ Yes ■ No If yes, enter date:

Signature of Moving Attorney:

/s/ Rachel S. Brass **Date:** 11/03/2023 Service : ■ Electronic ☐ Other [Attach proof of service]

No. 23-600

United States Court of Appeals for the Second Circuit

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

- v. -

SAKS INCORPORATED, SAKS & COMPANY LLC, SAKS FIFTH AVENUE LLC, LOUIS VUTTON USA INC., LORO PIANA & C. INC., GUCCI AMERICA, INC., PRADA USA CORP., AND 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, Case No. 20-cv-833 (Hon. Margo K. Brodie)

MOTION OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLEES

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November 3, 2023

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(3), the International Center for Law & Economics ("ICLE") and fifteen scholars of antitrust, law, and economics (collectively, "*amici*") respectfully move for leave to file a brief as *amici curiae* in support of Defendants-Appellees. A copy of the proposed brief is included as an exhibit to this motion. Counsel for Plaintiffs-Appellants do not consent to the filing of the brief.

A motion for leave to file an amicus brief "must be accompanied by the proposed brief and state: (A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). Here, all three factors—interest, desirability, and relevance—strongly favor granting leave to file the proposed brief.

Interest of Amici. ICLE is a nonprofit, nonpartisan, global research and policy center aimed at building the intellectual foundations for sensible, economically-grounded public policy through the use of law and economics methodologies. For their part, the *amici* scholars specialize in antitrust, law, and economics, and hold positions at leading universities and research institutions across the United States. All *amici* have extensive expertise in antitrust law and economics. Based on their academic background and institutional mission, *amici* have a strong interest in

ensuring that antitrust doctrine is grounded in sensible legal rules informed by sound economic analysis.

Desirability. *Amici*'s proposed brief is "desirable" because it explains why the economics of "store-within-a-store" arrangements support the district court's holding that the alleged no-hire restraints are ancillary to the collaborations between Saks and the Brand Defendants. As explained in the proposed brief, store-within-a-store partnerships can boost sales output, expand opportunities for cross-brand marketing, and create additional jobs at concessions located within the "host" store. But these types of arrangements also create the risk of employee raiding—that is, the risk that brands located within the host store will hire away the host store's highly-trained employees. As the proposed brief explains, the alleged no-hire agreements eliminate that risk, thereby allowing Saks to enter procompetitive store-within-a-store collaborations without fear the Brand Defendants will free ride off Saks's investments in its employees. The proposed brief further explains why Plaintiffs and their *amici*, including the United States, make foundational errors of law and economics in arguing that ancillarity consists of a rigid two-prong test that may not be resolved on the pleadings. Accordingly, *amici* believe that their unique scholarly and policy-informed perspective will aid this Court's evaluation of key issues in this case.

Relevance. The proposed amici brief is also undoubtedly "relevant" to the disposition of the case. Plaintiffs and their *amici* contend that the district court should be reversed because it misapplied the ancillary restraints doctrine. But as the proposed brief argues, the district court's ancillarity analysis (and its related ruling that the rule of reason applies to the alleged no-hire restraints) is entirely consistent with the economic considerations that should underpin the ancillarity inquiry. The lower court's analysis is also consistent with the Supreme Court's admonition that *per se* treatment is appropriate only after courts have had "considerable experience" with the type of restraint at issue, and only when the competitive harm of the restraint has been proven by "demonstrable economic effect." By speaking directly to the core reasons why the district court's ruling should be affirmed, the proposed brief is highly relevant to the outcome of this appeal.

For these reasons, *amici* respectfully request that this Court grant it leave to file the accompanying brief in support of Defendants-Appellees seeking affirmance.

Dated: November 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) and Local Rule 27.1 because this motion contains 590 words, as determined by the word-count function of Microsoft Word.

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. *See* Fed. R. App. P. 27(d)(1)(E) (adopting requirements of Fed. R. App. P. 32(a)(5)-(6) for motions).

Dated: November 3, 2023

/s/ *Rachel S. Brass*
Rachel S. Brass
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

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

Dated: November 3, 2023

/s/ *Rachel S. Brass*
Rachel S. Brass
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No. 23-600

United States Court of Appeals for the Second Circuit

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

- v. -

SAKS INCORPORATED, SAKS & COMPANY LLC, SAKS FIFTH AVENUE LLC, LOUIS VUTTON USA INC., LORO PIANA & C. INC., GUCCI AMERICA, INC., PRADA USA CORP., AND BRUNELLO CUCINELLI USA, INC.,
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On Appeal From The United States District Court For The Eastern District of New York, Case No. 20-cv-833 (Hon. Margo K. Brodie)

BRIEF FOR INTERNATIONAL CENTER FOR LAW & ECONOMICS AND SCHOLARS OF LAW AND ECONOMICS AS *AMICI CURIAE* SUPPORTING APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae International Center for Law & Economics states that there is no parent corporation or any publicly held corporation that owns 10% or more of its stock. *See* Fed. R. App. P. 26.1.

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Rules

Federal Rule of Appellate Procedure 29 1

INTEREST OF *AMICI CURIAE*[1]

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan global research and policy center aimed at building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies to inform public policy debates and has longstanding expertise in antitrust law. ICLE has an interest in ensuring that antitrust promotes the public interest by remaining grounded in sensible legal rules informed by sound economic analysis.

Amici also include fifteen scholars of antitrust, law, and economics at leading universities and research institutions across the United States. Their names, titles, and academic affiliations are listed in Appendix A. All have longstanding expertise in antitrust law and economics.

Amici respectfully submit that this brief will aid the Court in reviewing the order of dismissal by explaining that the district court properly held, on the pleadings, that the restraint at issue is ancillary and thus that *per se* treatment is inappropriate. The restraint furthers Saks's procompetitive goal of creating a strong and stable luxury brand through collaboration with the Brand Defendants. Treating such

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for ICLE represents that no counsel for any of the parties authored any portion of this brief and that no entity, other than *amici curiae* or their counsel, monetarily contributed to the preparation or submission of this brief.

a restraint as *per se* unlawful, as Plaintiffs ask this Court to do, would stifle the type of legitimate cooperation that facilitates output and would ultimately harm consumers. *Amici* also explain why Plaintiffs and several of their *amici*, including the United States, make foundational errors of law and economics in arguing that ancillarity is an affirmative defense that may not be resolved on the pleadings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Saks and the Brand Defendants are well-known luxury retail brands. As luxury retailers, their business models depend on developing and maintaining a distinct, exclusive brand to differentiate their products from the lower-priced goods sold by mass-market retailers. A primary way in which they define and protect their brands is by cultivating a premium shopping experience for customers that promotes "an atmosphere of exclusivity and opulence surrounding . . . luxury products." Compl. ¶ 33. To that end, Saks and the Brand Defendants have for years collaborated through "store-within-a-store" arrangements: Saks allows the Brand Defendants to set up boutiques and concessions within Saks's stores, which in turn helps all involved grow their customer base, augment their luxury brand status, and sell more products. This "store-within-a-store" model not only expands customer product choice within a single retail establishment, resulting in a better shopping experience, but also creates additional jobs at Brand Defendants' concessions in Saks's stores.

Plaintiffs allege that the Brand Defendants agree, as part of their respective partnerships with Saks, not to hire Saks's own luxury retail employees without the approval of a Saks manager or until six months after the employee leaves Saks. Plaintiffs argue that these alleged no-hire provisions violate Section 1 of the Sherman Act. The district court disagreed, concluding that the *per se* rule could not apply because the no-hire provisions were "ancillary" to a broader procompetitive collaboration between Saks and each of the Brand Defendants, and that Plaintiffs failed to plead a plausible claim under the rule of reason. That decision is correct and should be affirmed.

First, the alleged no-hire agreements are ancillary to the arrangements between Saks and the Brand Defendants. Saks invests heavily in its employees. But without the no-hire provision, Saks would stand to lose those investments as the Brand Defendants could take advantage of their co-location within Saks's stores to hire away Saks's best workers, thereby free-riding on Saks's training. The alleged no-hire provisions eliminate that powerful economic disincentive and thereby facilitate brand-enhancing, procompetitive store-within-a-store arrangements. That is all that is required for the agreements to be "ancillary." Plaintiffs' (and their *amici*'s) insistence on a rigid two-prong test for ancillarity is not only at odds with economic logic but also out of step with this Circuit's precedent—and, in any event, would not change the result here.

Second, the district court properly resolved ancillarity on the pleadings. Ancillarity is a threshold inquiry decided at the earliest possible stage of a Section 1 case to determine whether the alleged facts justify departing from the default rule of reason standard. That is precisely what the district court did here: based on Plaintiffs' *own allegations*—including those regarding "a continual risk that the Brand Defendants would use their concessions in Saks stores to recruit employees" (Op. 32)—the district court ruled that the alleged restraints were ancillary and thus incompatible with *per se* condemnation. Contrary to Plaintiffs' argument, the district court did not improperly resolve any factual inferences. The court considered the Complaint in its entirety and determined that Plaintiffs did not state a plausible *per se* claim, just as it was supposed to do before requiring the enormous expense that would result should this kind of "potentially massive factual controversy . . . proceed." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

ARGUMENT

I. The Alleged Restraints Are Ancillary To Procompetitive Collaboration

The *per se* rule is reserved for the most pernicious and anticompetitive restraints. Before condemning a restraint as *per se* unlawful, therefore, courts must "have amassed considerable experience with the type of restraint at issue" and be able to "predict with confidence that it would be invalidated in all or almost all instances." *NCAA v. Alston*, 141 S. Ct. 2141, 2156 (2021). Reserving *per se*

condemnation for that small category of restraints ensures that the antitrust laws do not inadvertently chill procompetitive conduct. Ancillary restraints do not fit the *per se* mold because they have a "reasonable procompetitive justification, related to the efficiency-enhancing purposes of [a] joint venture." *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment).

Here, any purported no-hire agreements form a key plank of the broader leasing, concession, and distribution arrangements between Saks and the Brand Defendants. Op. 30-32. It is beyond dispute that these agreements are procompetitive. They not only enhance Saks's and the Brand Defendants' ability to vigorously compete against other retailers and luxury brands (*i.e.*, increasing output in markets for luxury products) but also create jobs (*i.e.*, increase output in labor markets). That places the restraint far beyond the *per se* rule, *MLB*, 542 F.3d at 339 (Sotomayor, J., concurring in the judgment); only the rule of reason can be used to determine whether the restraint "stimulat[es] competition that [is] in the consumer's best interest" or has "anticompetitive effect[s] that are harmful to the consumer." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).[2]

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[2] The alleged no-hire agreements also do not fit the *per se* mold because they are part of a dual-distribution relation in which the Brand Defendants sell their products to end consumers through "their own standalone boutiques" as well as through distributors, "including Saks." Compl. ¶ 21; *see Beyer Farms, Inc. v. Elmhurst Dairy, Inc.*, 35 F. App'x 29, 29-30 (2d Cir. 2002) (holding that a restraint was "subject to scrutiny under the 'rule of reason'" because the complaint alleged a "dual-distributorship

A. The Alleged No-Hire Agreements Are Facially Procompetitive

A restraint is ancillary where it "could have a procompetitive impact related to the efficiency-enhancing purposes" of a cooperative venture. *MLB*, 542 F.3d at 340 (Sotomayor, J., concurring in the judgment); *see Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) (restraint is ancillary if it "may contribute to the success of a cooperative venture that promises greater productivity and output"). Where a restraint is deemed "ancillary to the legitimate and competitive purposes" of a venture, the restraint is presumptively "valid" and must be assessed under the rule of reason. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). There is a clear procompetitive rationale for the collaboration arrangement between Saks and the Brand Defendants: the arrangement allows customers to expand their choice in one-stop shopping, and the retailers to offer a wider range of high-end luxury goods. And it creates a halo effect across the store-within-a-store through proximity and availability of multiple luxury brands. All of this in turn promotes and enhances the luxury status of Saks and the Brand Defendants alike. The alleged no-hire restraints enable and are ancillary to that larger endeavor.

As Plaintiffs allege, Defendants each derive much of their respective brand value from their ability to project a "luxury brand[] aura[]," which both entices

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relationship"); *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997) (similar).

customers and creates demand for Defendants' goods "over other, lower-priced goods." Compl. ¶¶ 23, 26, 28. For this reason, Defendants "go[] to great lengths to market" and otherwise "maintain[] their luxury brands' auras." *Id.* ¶¶ 23, 26. They "accomplish this feat," in part, by ensuring that their brick-and-mortar stores provide a "luxury shopping experience[]." *Id.* ¶ 27. Defendants do that with sophisticated "décor and design" and premium "customer service" from skilled employees "who reflect their respective brand images and cultures." *Id.* ¶¶ 27-29.

Store-within-a-store arrangements further enhance the luxury brand shopping experience for both consumers and retailers. In these arrangements, Saks allows the Brand Defendants to set up mini-stores or concessions within Saks's large stores. These arrangements, similar to those used by "[a]lmost all department store chains," Kinshuk Jerath & Z. John Zhang, *Store Within a Store*, 47 J. Mktg. Rsch. 748, 748 (2010), are mutually beneficial and procompetitive. The presence of the popular luxury brands helps draw brand-loyal customers into Saks, thus increasing foot traffic and broadening Saks's customer reach—directly boosting sales output. Compl. ¶ 28; *see* Jerath & Zhang, *supra*, at 756-57 ("The introduction of new products through stores within a store can bring new consumers to the store who want to purchase the focal product and also purchase other products."). The Brand Defendants benefit from access to Saks's considerable customer base, Compl. ¶ 28, and their presence also makes possible cross-brand marketing opportunities. Consumers

benefit as well: they have access to a wider array of products, and have it all at hand in a single store. And they have the benefit of workers highly trained with respect to the luxury goods they sell. *Id.* ¶¶ 27-29, 32-34.

But there is a significant practical impediment to allowing stores-within-stores: employee raiding. Saks invests heavily in its luxury retail employees, providing them with the "extensive training on service, selling, and product-knowledge" required to ensure that they are "knowledgeable about the particular products" for sale "as well as current trends." Compl. ¶¶ 32, 34. Permitting the Brand Defendants to operate inside of Saks stores without restriction would put that investment in immediate danger. The Brand Defendants would have every incentive to free-ride off of Saks's investment, observing and hiring Saks's highly trained luxury retail employees, thereby "tak[ing] advantage of the efforts [Saks] has expended in soliciting, interviewing, and training skilled labor" and "simultaneously inflicting a cost on [Saks] by removing an employee on whom [Saks] may depend." *Id.* ¶ 62. This risk—and the mistrust it can create—disincentivizes the formation and maintenance of store-within-a-store agreements.

No-hire restraints solve this problem. By imposing a narrow, time-limited, waivable restriction on the Brand Defendants' ability to hire Saks employees, Compl. ¶ 92, the alleged no-hire agreements remove a roadblock from the "cooperation underlying the restraint," which "has the potential to create the efficient

production that consumers value," *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987). In particular, the alleged no-hire restrictions help prevent free-riding by Brand Defendants on Saks's training. The agreement encourages Saks to invest in employee development, including by providing specific training on Brand Defendants' products, and that investment enhances Saks's ability to sell products from and compete against Brand Defendants' standalone brick and mortar and online stores. *See, e.g.*, Gregory J. Werden, *The Ancillary Restraints Doctrine After* Dagher, 8 Sedona Conf. J. 17, 21 (2007). "[W]ith the restraint," Saks may "collaborate" with the Brand Defendants "for the benefit of its [customers] without 'cutting [its] own throat.'" *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110-11 (9th Cir. 2021) (quoting *Polk Bros.*, 776 F.2d at 189). As a result, the alleged no-hire restraints are "at least potentially reasonably ancillary to joint, efficiency-creating economic activities." *Phillips v. Vandygriff*, 711 F.2d 1217, 1229 (5th Cir. 1983); *cf. Eichorn v. AT&T Corp.*, 248 F.3d 131, 146-47 (3d Cir. 2001) ("As an ancillary covenant not to compete, the no-hire agreement was reasonable in its restrictions on the plaintiffs' ability to seek employment elsewhere.").

The contrary conclusion—that the alleged no-hire restraints are *not* ancillary—risks stifling competition across the retail economy. No-hire agreements are merely one of the many ancillary contractual restraints commonly used in store-

within-a-store partnerships (exemplified by, for instance, the well-known collaborations between Target and Starbucks or Best Buy and Samsung) to preserve brand integrity, guard against misuse of store space, and safeguard investments in specialized training. By solving for risks such as employee raiding or damage to property, these restrictions instill confidence in both parties, facilitating the creation of these cooperative ventures in the first place. Categorizing the alleged no-hire provisions here as *per se* unlawful could chill a whole spectrum of reasonable ancillary restraints, undermining the careful balance that store-within-a-store arrangements aim to maintain and inhibiting market innovation. That would be bad for potential employees, who would lose the opportunity to work at stores-within-stores, as well as for consumers, who would lose the convenient access to goods in-store concessions provide.

B. The Rigid Two-Prong Test Advanced By Plaintiffs And Their *Amici* Is Not The Law, And The Alleged Restraints Here Satisfy It In Any Event

Plaintiffs and their *amici* resist ancillarity by, in part, insisting upon application of a strict and formalistic test not found in the law of this Circuit or any other. In their view, an ancillary restraint must be both (1) "subordinate and collateral to a separate legitimate transaction" and (2) "reasonably necessary to achiev[e] that transaction's procompetitive purpose." AOB 34-35. This rigid two-step test is not the law in this Circuit. But even if it were, Plaintiffs and *amici* misconstrue the

second prong, improperly transforming it into a *strict* necessity standard that no circuit has adopted. Consistent with their evident procompetitive potential, the alleged restraints here amply satisfy the *actual* test.

Although some courts have moved toward a delineated two-prong standard, this Court has not. This Court's leading opinion on ancillarity is then-Judge Sotomayor's influential concurrence in *MLB*, in which she observed that a restraint is ancillary where it is "reasonably necessary to achieve any of the efficiency-enhancing benefits of a joint venture." 542 F.3d at 338 (Sotomayor, J., concurring in the judgment). She noted no other requirements, invoking Judge Easterbrook's similar formulation in *Polk Bros.* that a restraint is ancillary where it "may contribute to the success of a cooperative venture that promises greater productivity and output." *Id.*; *Polk Bros.*, 776 F.2d at 189; *see Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (restraint is ancillary when it "appears capable of enhancing the group's efficiency"). That approach in turn traces all the way to then-Judge Taft's seminal *United States v. Addyston Pipe & Steel Co.* decision, which assessed ancillarity using this same flexible formulation. *See* 85 F. 271, 281 (6th Cir. 1898).

Even if the two-prong test advanced by Plaintiffs and their *amici* did apply, however, they misconstrue the second prong by paying only lip service to a "reasonably necessary" standard and in reality asking this Court to impose a "strictly

necessary" test. Instead of asking whether the restraint "promoted enterprise and productivity"—which is all that is required for a restraint to be "reasonably necessary," *Aya*, 9 F.4th at 1110-11—Plaintiffs would require Defendants to show that the "restraint [is] *necessary* to achieve the business relationship," AOB 36, such that in its absence, "Saks would terminate or . . . alter its purported collaborative relationships," NY Br. 29.

No court of appeals has embraced this strict-necessity standard. In *Medical Center at Elizabeth Place, LLC v. Atrium Health System*, for instance, the Sixth Circuit considered and rejected it, holding that requiring a defendant to show that a restraint "is necessary" is "too high a standard to determine what qualifies as 'reasonable.'" 922 F.3d 713, 725 (6th Cir. 2019); *see also id.* at 726 (observing Judge Sotomayor's *MLB* concurrence "categorically rejected" a strict necessity test). Rather, an ancillary restraint "need not be essential, but rather only reasonably ancillary to the legitimate cooperative aspects of the venture" because "there exists a *plausible* procompetitive rationale for the restraint." *Id.* (quotation marks omitted). The Ninth Circuit similarly rejected the United States' attempt to advance this standard, and instead held in *Aya* that a no-hire restraint was "properly characterized as ancillary" where it "promoted enterprise and productivity at the time it was adopted." 9 F.4th at 1111. And the United States and a different set of plaintiffs recently argued for a strict-necessity test in the Seventh Circuit. *See* Br. for the U.S. and the FTC as *Amici*

Curiae Supporting Neither Party at 26, *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333 & 22-2334 (7th Cir. Nov. 9, 2022) (arguing no-hire agreement was not ancillary because it "was not necessary to encourage franchisees to sign" franchising agreements). The panel declined to adopt it, adhering instead to the *Polk Bros.* test. *See Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023).

All of these decisions make sense. The *per se* rule applies only when a challenged restraint is obviously and clearly anticompetitive, and a restraint that is plausibly part of a procompetitive venture should be judged by "the facts peculiar to the business to which the restraint is applied." *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). A contrary decision would discourage competition; strict necessity is not only an unrealistic requirement, as businesses make these decisions *ex ante*, but also would require them to constantly recalibrate their policies. The result would be that firms forego potentially procompetitive collaborations, chilling innovative policies and business models. *See* Werden, *supra*, at 23-24 (comprehensive analysis by DOJ economist rejecting strict-necessity test).

Nor is there any legal or logical basis for Plaintiffs' made-up "tailor[ing]" prong—that a "restraint must be 'tailored' to a legitimate objective to qualify as ancillary." AOB 35. Courts routinely reject any "reasonabl[e] tailor[ing]" requirement, because that phrase would not "carr[y] a materially different meaning than 'reasonably necessary'" and because a restraint "need not satisfy a less-restrictive-

means test." *Aya*, 9 F.4th at 1111 & n.5. A tailoring analysis can be part of the rule-of-reason framework employed *after* a restraint is deemed ancillary, but it has no role in the ancillarity inquiry itself, which evaluates whether a restraint "should be reviewed under the rule of reason" in the first place. *MLB*, 542 F.3d at 341 (Sotomayor, J., concurring in the judgment). The flaw in Plaintiffs' argument is underscored by the only case they cite to support their purported tailoring requirement, which did not even involve ancillarity, but instead analyzed whether there was a less restrictive alternative under the rule of reason. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984); *see also Aya*, 9 F.4th at 1111 ("[T]he less restrictive alternative analysis falls within the rule-of-reason analysis, not the ancillary restraint consideration.").

Properly interpreted to require only "reasonable necessity," the two-prong test is satisfied here on the face of the Complaint. The alleged restraint is "subordinate and collateral" to a broader venture in which Saks permits the Brand Defendants to "sell their goods and apparel" with Saks's stores. Compl. ¶ 21. Although the United States argues that the Complaint "contains no allegations of any connection . . . between the alleged conspiracy and those business relationships," U.S. Br. 15-16, that is not correct: the Brand Defendants operate "concessions at Saks stores," Compl. ¶ 21, and Saks employees receive brand-specific training, *id.* ¶ 160. As the district court held, Op. 34 n.22, the alleged restraint prevented the Brand Defendants from

hiring Saks employees who sold the Brand Defendants' merchandise, thereby protecting Saks's training investments, *see* Compl. ¶¶ 156-61, 187-91, increasing the attractiveness of the broader collaboration, and promoting mutual trust between the parties, *see Rothery Storage*, 792 F.2d at 224 (restraint that "serves to make the main transaction more effective in accomplishing its purpose" is "subordinate and collateral").

Plaintiff Susan Giordano's allegations about her own experience demonstrate that this alleged restraint is ancillary. Giordano was a Saks employee at Saks's Loro Piana boutique for "18 months," during which time she became "familiar[] with Loro Piana's . . . merchandise." Compl. ¶¶ 157, 160. Giordano sought employment at a standalone Loro Piana boutique, explaining that she "would surely be an asset" because of her familiarity with Loro Piana's product gained from Saks's training. *Id.* ¶¶ 156-61. But the no-hire restraint allegedly prevented Loro Piana from hiring Giordano, *id.* ¶ 161, "ensur[ing] that [Saks] [did] not lose its personnel during the collaboration" with Brand Defendants, *Aya*, 9 F.4th at 1110. Courts have found just these sorts of no-hire agreements to facilitate "procompetitive collaboration" to be "reasonably necessary." *Id.*; *cf. Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (rejecting *per se* treatment for no-hire agreements).

The United States' arguments to the contrary are unavailing. It argues that the alleged no-hire agreements go beyond solicitation at the concessions themselves,

barring the Brand Defendants from hiring even Saks employees who independently apply or approach the Brand Defendants for a job. U.S. Br. 19. But the no-hire agreements' purpose, to protect against risks that employees would leave for a collaborating brand located inside their own store, applies equally regardless of whether an employee is solicited by or independently approaches a competitor. In both instances, Saks invested in brand-specific employee training, *see* Compl. ¶¶ 32, 34, 156, that the no-hire agreement protects from the unique exposure of a store-within-a-store.

The United States also suggests that the restraint is not reasonably necessary because it applies to "any brand [or designer company] carried by Saks" rather than just brands that maintain concession stands. U.S. Br. 16, 19. But a restraint "need not satisfy a less-restrictive-means test," *Aya*, 9 F.4th at 1111; regardless, Saks employees receive detailed training on all luxury brands sold in the stores, even those that do not maintain concession stands, *see* Compl. ¶ 34. The alleged no-hire agreement notably does *not* extend to the many luxury brands whose goods are not "carried by Saks," *id.* ¶ 175, leaving Saks employees free to take their talents to those competing employers or to other retailers of luxury goods. And the United States' suggestion that the duration of the agreement is too long, U.S. Br. 19, ignores that employees receive continuous training to remain "knowledgeable about the particular products [sold] . . . as well as *current* trends," Compl. ¶ 34 (emphasis added). If

employees could leave their employment with Saks and immediately join the competitor, then the alleged restraint would have no effect at all, and Saks would lose the incentive to invest in ongoing specialized training regarding competitor brands.

II. The District Court Properly Decided Ancillarity On The Pleadings

Nothing in the antitrust laws prohibits a district court from resolving ancillarity on the pleadings, and the court's decision to do so here was procedurally proper and analytically sound. Determining whether a challenged restraint is "naked" or "ancillary" is a threshold inquiry for a Section 1 claim because "[t]his all-important classification largely determines the course of subsequent legal evaluation of [the] restraint." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1904 (5th ed., 2023 Cum. Supp.). Put another way, resolving ancillarity at the outset of the case dictates the mode of analysis employed by the court: naked restraints are subject to *per se* treatment, while ancillary restraints are analyzed under the rule of reason.

This does not mean that ancillarity *must* be resolved at the pleadings—depending on the circumstances, it may be resolved after the pleadings but before summary judgment, at summary judgment, or even at trial. *See In re HIV Antitrust Litig.*, 2023 WL 3088218, at *23 (N.D. Cal. Feb. 17, 2023) (summary judgment); *N. Jackson Pharmacy, Inc. v. Caremark RX, Inc.*, 385 F. Supp. 2d 740, 743 (N.D. Ill. 2005) (pre-summary judgment Rule 16 motion). Rather, ancillarity is a threshold issue

that sets the stage for the analysis that follows, and deciding it at the pleadings stage permits defendants to defeat meritless claims before undergoing costly discovery.

The district court properly resolved the question on a motion to dismiss here because Plaintiffs' own allegations made clear that the alleged no-hire agreements were ancillary. Plaintiffs and their *amici* make two arguments: first, that ancillarity cannot be resolved on the pleadings, and second, that the district court improperly resolved facts in Defendants' favor. Neither argument persuades.

A. Ancillarity Is A Threshold Inquiry, Not An Affirmative Defense

Courts analyzing Section 1 claims must first determine the proper framework to apply: the *per se* rule or the rule of reason (or, in some cases, an abbreviated "quick look" analysis). *See Leegin*, 551 U.S. at 886-87. To make that determination, "[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." *MLB*, 542 F.3d at 339 (Sotomayor, J., concurring in the judgment) (quoting *Polk Bros.*, 776 F.2d at 188). "This all-important classification largely determines the course of subsequent legal evaluation of any restraint." Areeda & Hovenkamp, *supra*, ¶ 1904; *see* Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine*, 45 Seattle U. L. Rev. 587, 634 (2022) ("In order to do any real work, the ancillary restraints doctrine has to precede the rule of reason."); Herbert

Hovenkamp, *The Rule of Reason*, 70 Fla. L. Rev. 81, 140 (2018) ("The ancillary restraints doctrine is not a comprehensive method for applying the rule of reason, but rather an early stage decision about which mode of analysis should be applied."). Thus, ancillarity is a gating inquiry. By determining at the outset of the case whether a challenged restraint is naked or ancillary, the court ensures it applies the proper analytical framework.

Because this determination guides how the parties conduct discovery and try the case, it is important to decide ancillarity at the earliest possible stage. This avoids "expensive pretrial discovery" on the wrong questions and issues. And it avoids discovery altogether in cases that do not state a claim and should never proceed past the pleadings. *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (noting importance of carefully evaluating antitrust claims at pleading stage "lest a defendant be forced to conduct expensive pretrial discovery in order to demonstrate the groundlessness of the plaintiff's claim" (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007))).

Treating ancillarity as a gating inquiry also is consistent with the Supreme Court's admonition that *per se* treatment must be confined to a narrow class of cases. As the Court has explained, "the *per se* rule is 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" under the rule of reason.

Leegin, 551 U.S. at 886-87; *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." (quotation marks omitted)). That predictive confidence must be rooted in the "demonstrable economic effect" of the restraint at issue, not a plaintiff's suspicion that the restraint is harmful. *Leegin*, 551 U.S. at 887. This is a high bar. Only when a restraint is "so obviously lacking in any redeeming pro-competitive values" may courts apply the *per se* rule. *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

Because *per se* analysis is warranted only when justified by "demonstrable economic effect," resolving the issue of ancillarity on the pleadings ensures that plaintiffs cannot invoke *per se* treatment on mere say-so. The ancillarity inquiry, by definition, considers the relationship of the challenged restraint to the parties' business collaboration—that is, the inquiry explores the likely "economic effect" of the restraint within the context of commercial realities. That is precisely what the Supreme Court requires before expanding the *per se* rule into new frontiers. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 n.33 (1979) ("[T]he *per se* rule is not employed until after considerable experience with the type of challenged restraint."); *Bogan*, 166 F.3d at 514 ("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." (quotation marks omitted)).

If ancillarity could be resolved only *after* the pleadings stage, as Plaintiffs and their *amici* urge, then a Section 1 plaintiff could survive dismissal simply by invoking the *per se* rule *without* regard for the restraint's "economic effect" or the courts' ability to "predict with confidence that [the restraint] would be invalidated." *Leegin*, 551 U.S. at 886-87. A simple example underscores the absurdity of that rule: ever since they were recognized in *Addyston Pipe* as axiomatic ancillary restraints, no-hire provisions are commonly included in agreements for the sale of a business. The approach proposed would require litigation through discovery to decide if such a provision were ancillary.

Moreover, neither the federal courts nor the academy have amassed sufficient experience with this subject to allow default *per se* treatment. Indeed, the only study that attempted to analyze the relevant economic considerations in a systematic way concluded that eliminating no-hire provisions "causes minimal reductions in job concentration and no increase in wages." Daniel S. Levy et al., *No-Poaching Clauses, Job Concentration and Wages: A Natural Experiment Generated by a State Attorney General*, Advanced Analytical Consulting Group, Inc., at 1 (Jan. 23, 2020). That inconclusive literature falls far short of justifying a rule that would effectively extend *per se* treatment to all no-hire agreements.

If anything, the economic incentives weigh strongly in favor of deciding ancillarity at the earliest possible stage allowed by the record. This is because a rule prohibiting courts from deciding ancillarity at the pleadings stage would be a free pass to discovery (and the "potentially enormous expense" associated with it), which would "push cost-conscious defendants to settle even anemic [Section 1] cases." *Twombly*, 550 U.S. at 559. That pressure, in turn, would distort normal business incentives—faced with the prospect of huge discovery costs from meritless claims, rational businesses would understandably refrain from entering into legitimate, procompetitive collaborations. Plaintiffs and their *amici* offer no good reason for adopting a rule that would undercut the very efficiency-enhancing purposes antitrust law is meant to advance. *See Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."); *see also MLB*, 542 F.3d at 339 (Sotomayor, J., concurring in the judgment) (restraints do not receive *per se* treatment when they have a "reasonable procompetitive justification, related to the efficiency-enhancing purposes of [a] joint venture").

The United States asserts that ancillarity is only a "defense" to *per se* illegality, rather than a threshold inquiry to determine whether a case calls for departing from the rule of reason. U.S. Br. 12-13. None of the United States' cases, however, limit the ancillarity restraints doctrine in this way. The lone Second Circuit case the

United States cites was a *criminal* matter where the standard applied to motions to dismiss is far more lenient and deferential to the United States than that mandated for civil cases in *Twombly*. In such cases, courts treat the government's characterization of conduct as within the four corners of a recognized *per se* theory as sufficient for *indictment* purposes. *See United States v. Aiyer*, 33 F.4th 97, 116 (2d Cir. 2022) (indictments need only "contain[] the elements of the offense charged" and enable defendant to enter plea). Moreover, in that case, the defendant had not even challenged on appeal the district court's conclusion that the indictment at issue adequately alleged a *per se* antitrust violation. *See id.* at 116-23. The panel never characterized ancillarity as a "defense." *See id.*

The same goes for *Blackburn* and *Board of Regents*. Although the courts in those cases ultimately concluded the restraints at issue were not ancillary, neither case held that ancillarity was only a defense. *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995); *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1153-56 (10th Cir. 1983). *Freeman* is similarly off base. While the court there offhandedly referred to the defendant's overall argument against the antitrust claim as a "defense," it did so *after* the ancillarity discussion. *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151-52 (9th Cir. 2003). The court did not use the term with specific reference to ancillarity, and in any event its use of "defense" was not meant in the same way that Plaintiffs and their *amici* use it—that is, as an issue that

cannot be resolved at the outset of the case. AOB 39; U.S. Br. 12-13, 15. In short, none of the government's cases hold that ancillarity is strictly a defense or is otherwise immune from resolution on the pleadings.

The Seventh Circuit's recent decision in *Deslandes* doesn't advance the government's cause either. Although the court in *Deslandes* summarily stated that "the classification of a restraint as ancillary is a defense," 81 F.4th at 705, plaintiffs can plead themselves out of court, *Hadid v. City of New York*, 730 F. App'x 68, 71 (2d Cir. 2018), which is what Plaintiffs have done here. Nor should it be followed: the Seventh Circuit cited no case law and offered no analysis to support its bald assertion. *Deslandes*, 81 F.4th at 705. And, as explained, any suggestion that ancillarity can be treated only as a defense would undo the clear demarcation between the rule of reason and *per se* treatment. If courts can't evaluate ancillarity at the outset, restraints that should be presumptively analyzed under the rule of reason would instead be presumptively treated as *per se* illegal. That result is plainly inconsistent with the Supreme Court's antitrust precedents.

In a related argument, Plaintiffs contend that ancillarity cannot be decided on the pleadings, but instead "requires discovery." AOB 39. But that also is wrong. "In considering a motion to dismiss, the court is not required to don blinders and to ignore commercial reality." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984), *abrogated on other grounds by Schmees v. HC1.COM, Inc.*,

77 F.4th 483 (7th Cir. 2023). Consistent with this principle, courts routinely resolve ancillarity on the pleadings where it is clear from the complaint that the restraint may be procompetitive. For example, in *Helmerich & Payne International Drilling Co. v. Schlumberger Technology Corp.*, the court dismissed a restraint of trade claim at the pleading stage where "the pleadings in [the] case [made] clear" that the challenged non-solicitation provision was "ancillary" to "a larger business transaction between two independent parties." 2017 WL 6597512, at *4 (N.D. Okla. Dec. 26, 2017). Similarly, the court in *Gerlinger v. Amazon.Com, Inc.* determined that a purported price-fixing arrangement between Borders and Amazon was "ancillary" to the companies' broader website hosting agreement, in part because the "context in which the agreement was entered into" confirmed its procompetitive potential. 311 F. Supp. 2d 838, 848-49 (N.D. Cal. 2004). The court reached this conclusion on a motion for judgment on the pleadings. *Id.* Other courts have similarly decided ancillarity on the pleadings alone. *See Kelsey K. v. NFL Enters. LLC*, 2017 WL 3115169, at *4 (N.D. Cal. July 21, 2017) (motion to amend), *aff'd*, 757 F. App'x 524, 526 (9th Cir. 2018); *Hanger v. Berkley Grp., Inc.*, 2015 WL 3439255, at *5 (W.D. Va. May 28, 2015) (motion to dismiss); *Caudill v. Lancaster Bingo Co.*, 2005 WL 2738930, at *3-6 (S.D. Ohio Oct. 4, 2005) (motion for judgment on the pleadings). Contrary to Plaintiffs' argument, the district court's pleading-stage ancillarity ruling was entirely proper.

B. The District Court Did Not Reach Past Plaintiffs' Allegations

Ancillarity can support dismissal when it is "apparent from the allegations in the complaint," as even the United States acknowledges. U.S. Br. 15. Here, the district court's ancillarity ruling was amply supported by Plaintiffs' own allegations. Plaintiffs allege that Saks and the Brand Defendants collaborate in the sale of luxury goods by partnering to sell the Brand Defendants' goods both directly at Saks stores and through concessions within them. Compl. ¶¶ 21, 28; *see supra*, at 4-10. By cooperating in this way, Saks and the Brand Defendants can leverage each other's employees and brands to create a distinct "shopping experience for customers"—that is, the "atmosphere of exclusivity and opulence surrounding . . . luxury products," Compl. ¶ 33, needed to promote "demand for[] luxury goods over other, lower-priced goods," *id.* ¶ 23. The upshot is a procompetitive collaboration that, in the words of *Polk Bros.*, "promises greater productivity and output." 776 F.2d at 189.

The district court also properly relied on the Complaint to conclude 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 [Saks] employees." Op. 32 (citing Compl. ¶¶ 56-57, 83). Minimizing the risk of such "free rid[ing]" is a common, efficiency-enhancing feature of ancillary restraints. *Rothery Storage*, 792 F.2d at 229 (restraints were ancillary where they "preserve[d] the efficiencies of the

[collaboration] by eliminating the problem of the free ride"); *Polk Bros.*, 776 F.2d at 190 (agreement was ancillary to a joint sales venture where it limited the potential that one retailer would free ride on the sales efforts of another). That includes pro-competitive restraints on employee movement. *Aya*, 9 F.4th at 1110 (restraint was ancillary to business collaboration where it guarded against risk of one party "pro-actively raiding . . . employees" of another party).

Notably, the risk of free riding wasn't hypothetical: as the district court pointed out, the Complaint specifically alleges that Plaintiff Giordano sought to leverage the experience she acquired while working at the Loro Piana boutique *as a Saks employee* to seek employment with Loro Piana. Op. 34 n.22. The district court also highlighted Plaintiffs' allegations that without the no-hire agreements, Brand Defendants such as Louis Vuitton could "take advantage" of Saks's hiring efforts by recruiting Saks employees away from Saks after that company had already invested time and money to recruit and train its personnel. Op. 32; Compl. ¶¶ 62-63; *see* Compl. ¶ 53 (alleging that "a Defendant would save on training costs and receive the immediate benefit of a well-trained, motivated salesperson" by hiring "from one of its rivals"). This poaching, according to Plaintiffs, would "inflict[] a cost on [Saks] by removing an employee on whom [Saks] may depend." Compl. ¶ 62. Thus, Plaintiffs' own allegations demonstrate the alleged no-hire agreement is ancillary. By addressing the free-rider problem, the agreement eliminates an externality "that

may otherwise distort the incentives of [the Brand Defendants] and limit the potential efficiency gains of [the collaboration]." *MLB*, 542 F.3d at 340 (Sotomayor, J., concurring in the judgment). Nothing more was required to resolve ancillarity on the pleadings.

Plaintiffs and their *amici* argue the district court erred by drawing factual inferences in favor of Saks, rather than Plaintiffs. AOB 37-40; N.Y. Br. 26-27. According to Plaintiffs, ancillarity was a "contested factual issue" that could be resolved in Saks's favor only by improperly rejecting Plaintiffs' allegations. AOB 37-38. Plaintiffs' argument is misplaced.

"Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Jessani v. Monini N. Am., Inc.*, 744 F. App'x 18, 19 (2d Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). As part of that exercise, courts consider "a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013); *see Boca Raton Firefighters & Police Pension Fund v. Bahash*, 506 F. App'x 32, 35 (2d Cir. 2012).

That is precisely what the district court did here. It considered the "*full factual picture* presented by the complaint"—including the nature of the Defendants' business relationship and the role of the no-hire agreement in the context of that relationship—to conclude that the alleged no-hire agreement was ancillary to a procompetitive collaboration. *Fink*, 714 F.3d at 741 (emphasis added); Op. 28-34. And in doing so, the court properly demonstrated that Plaintiffs' own allegations precluded *per se* treatment. *See Weisbuch v. Cnty. of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) ("Whether [a] case can be dismissed on the pleadings depends on what the pleadings say."). Plaintiffs can't avoid the consequences of *their* allegations by truncating the court's properly holistic review of the pleadings—indeed, "[i]f the pleadings establish facts compelling a decision one way, that is as good as if depositions and other expensively obtained evidence on summary judgment establishes the identical facts." *Id.*

The district court's ancillarity ruling was sound.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,

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APPENDIX A

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point, Times New Roman typeface using Microsoft Word 2019.

/s/ Rachel S. Brass
Rachel S. Brass

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.

/s/ Rachel S. Brass
Rachel S. Brass