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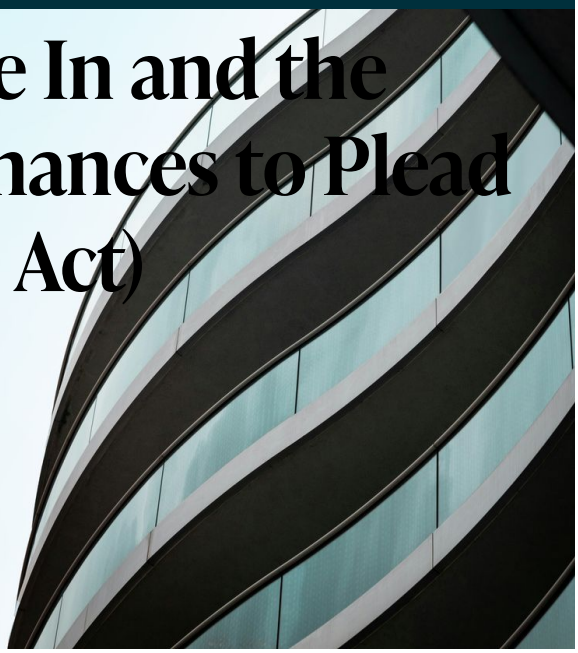
In Fashion, One Day You're In and the Next Day You're Out (Of Chances to Plead Violations of the Sherman Act)



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While French luxury brand Hermès is likely best known for its Birkin handbags and silk scarves, a group of plaintiff consumers in California are focused on its ties—or more accurately, its alleged ties. Plaintiffs claim Hermès used in violation of Sherman Act Sections 1 and 2 to coerce plaintiffs and others into buying its shoes, clothing, jewelry, and even neck ties just for the opportunity to purchase its exclusive Birkin bag.[1] Judge James Donato of the U.S. District Court for the Northern District of California, however, found plaintiffs' allegations as to Hermès' purported tying scheme lacking, and on September 17, he dismissed plaintiffs' complaint for the second (and final) time. Plaintiffs now look to the U.S. Court of Appeals for the Ninth Circuit to revive their antitrust claims, filing a notice of appeal to the appellate court last Tuesday.

Judge Donato first dismissed plaintiffs' claims against Hermès in March 2024, concluding that plaintiffs had failed to plausibly allege the relevant markets, market power, or antitrust injury. Judge Donato gave plaintiffs leave to amend, and on October 11, 2024, they filed their second amended complaint. The second amended complaint alleged that Hermès possesses market power in the market for "elitist luxury handbags," which is made up of certain handbags sold by Hermès, Chanel, and Bottega Veneta. Plaintiffs' alleged market excludes "aspirational" luxury handbags sold by brands such as Louis Vuitton, Gucci, Prada, and Ferragamo, and "accessible" luxury handbags sold by brands such as Burberry, Coach, Ralph Lauren, and Calvin Klein.

According to plaintiffs, Hermès wields its market power in the alleged market for elitist luxury handbags to affect competition in a distinct "luxury ready-to-wear apparel and accessories" market, consisting of scarves and shawls, ready-to-wear clothing, footwear, watches, jewelry, fragrances, accessories, and home goods sold by Hermès and competitors such as Chanel and Louis Vuitton. In particular, plaintiffs averred that the only customers who are offered the chance to purchase Hermès' "iconic" and "high[ly] demand[ed]" Birkin and Kelly bags are those that shop in-store and have already purchased thousands of dollars worth of Hermès shoes, scarves, belts, clothing, jewelry, and home goods from Hermès (what plaintiffs refer to as "Ancillary Products"). Plaintiffs further alleged that Hermès took steps to ensure that its salespeople enforced this condition by offering commissions for sales of Ancillary Products but not for sales of Birkin bags.

Despite the amendments, Judge Donato dismissed plaintiffs' claims a second time, finding they failed to overcome the same pleading deficiencies from which their prior complaint suffered. While we are likely many months from learning how the Ninth Circuit will view this case, Judge Donato's dismissal highlights several recent trends in antitrust and fashion.[2]

First, courts are grappling with how to define antitrust markets in fashion, particularly around tiers of luxury.

Though Judge Donato did not accept plaintiffs' "elitist luxury handbag" market, plaintiffs' tiered framing of luxury fashion products is not too far afield from how Judge Jennifer Rochon approached the relevant markets in blocking the merger of Tapestry and Capri Holdings last October (see Axinn's prior coverage of the decision here). Judge Rochon concluded that "true luxury" handbags—such as Louis Vuitton or Hermès—are not in the same market as "accessible luxury" handbags, such as Coach, Kate Spade, and Michael Kors. Notably, however, Judge Rochon did not expressly opine on whether "true luxury" handbags constituted their own antitrust product market, what would be included in that market, or whether "true luxury" handbags are themselves substitutable (a complicated question given strong brand identities and customer loyalty). Therefore, while Judge Donato found that plaintiffs' specific market allegations in the Hermès case lacked adequate facts to make their allegations "more than purely conclusory," the Hermès and Tapestry/Capri decisions may provide a roadmap for future antitrust plaintiffs/enforcers in pleading relevant product markets in cases involving luxury fashion brands.

Second, per se antitrust prohibitions may be less likely to apply in the luxury and fashion industries.

While plaintiffs maintained Hermès' alleged tying arrangement constituted a per se violation of the Sherman Act, Judge Donato was much more skeptical, observing that "[e]xperience with the luxury handbag industry is not such that a presumption of per se liability is obvious." This skepticism is unsurprising, as modern antitrust law has trended away from applying the per se standard to tying arrangements. In fact, courts may be skeptical of applying per se liability in the fashion industry more generally. In March, for example, the Second Circuit held that the rule of reason applied to alleged no-hire agreements between luxury department store chain Saks Fifth Avenue and luxury fashion houses Louis Vuitton and Prada.[3] According to the Second Circuit, courts lacked "considerable experience" with the type of arrangement at issue

in which fashion houses distributed their products in department stores and agreed not to hire employees who the department store trained to sell those houses' products.

These cases suggest that courts may view the per se rule as ill-fitting for the luxury and fashion industries, which frequently involve complex blended relationships, relatively novel pricing, marketing, or selling arrangements, and/or complicated issues surrounding exclusivity, quality, and brand loyalty.

Third, reserving certain luxury products for the highest-paying customers could still constitute anticompetitive conduct.

Lastly, Judge Donato concluded that plaintiffs failed to allege a properly defined tied product market and thus, necessarily failed to plausibly allege harm to competition in a market for a tied product. Judge Donato concluded that this was fatal to plaintiffs' claims even if Hermès does, in fact, "reserve the Birkin bag for its highest-paying customers." Quoting the Ninth Circuit, Judge Donato advised that "[b]usinesses may choose the manner in which they do business absent an injury to competition." Judge Donato did not, however, decide whether Hermès' conduct would be considered anticompetitive tying conduct should a different group of plaintiffs avoid these pleading errors. Luxury and fashion brands that seek to limit the availability of certain products as a marketing or sales technique should not overread Judge Donato's decision—the door is still open for plaintiffs to frame such practices as plausible tying claims. Luxury and fashion brands would also be well served to pay close attention to the Ninth Circuit's treatment of this case for potential guidance on what types of marketing and sales strategies will be tolerated under antitrust law.

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[1] Second Amended Class Action Complaint, *Cavalleri et al v. Hermes International, a French corporation et al.*, No. 3:24-CV-01707 (N.D. Cal.).

[2] For an interesting discussion regarding recent notable cases involving the luxury and fashion industries, tune into Episode 333 of the ABA's *Our Curious Amalgam*, led by Axinn's Managing Partner, Jeny Maier, featuring experienced fashion and luxury industry counsel Andowah Newton.

[3] *Giordano v. Saks & Co. LLC*, No. 23-600-CV, 2025 WL 799270 (2d Cir. Mar. 13, 2025).

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