

No.

In The
Supreme Court of the United States

MICHAEL BRIGHT-ASANTE,

Petitioner,

v.

SAKS & COMPANY, INC. AND THEO CHRIST,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented:

1. Did the Second Circuit Court of Appeals in its *de novo* review, and the United States District Court for the Southern District of New York, apply the correct standard of review in this action as reiterated by this Court in *Tolan v. Cotton*, 572 U.S. 650 (2014)?
2. Was the Second Circuit, in its affirmance, correct to make credibility determinations in favor of Saks & Company, as the moving party on summary judgment, against Petitioner herein; and did they properly draw inferences against the Petitioner?
3. If the Second Circuit applied the incorrect standard of review, did that fact result in an erroneous determination against the Petitioner?
4. If the incorrect standard of review was applied, did the application of the incorrect standard deprive Petitioner of the right to jury trial guaranteed to him under the Seventh Amendment to the Constitution of

the United States?

5. Was the Second Circuit correct in not separately analyzing Petitioner's claim under the New York City Human Rights Law, as distinct from 42 USC Section 1981?

PARTIES TO THE PROCEEDING

Petitioner is a former Sales Associate with Saks & Company who was indefinitely suspended from employment without pay, and ultimately constructively discharged for crimes which he did not commit.

Respondent Saks & Company is Petitioner's former employer and a retail store establishment in New York City. Respondent Theo Christ was an executive of Saks & Company at all times relevant to this proceeding.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
APPEALS FOR THE SECOND CIRCUIT**

Introduction

Petitioner, Michael Bright-Asante, an African American former Sales Associate at Saks & Company, Inc., requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this matter. The Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York (Ramos, DJ), which granted summary judgment to Saks & Company, Inc., and Theo Christ, dismissing Bright-Asante's claim for damages for race discrimination and constructive discharge. Bright-Asante's subsequent petition for *en banc* rehearing by the Second Circuit was also denied.

In granting summary judgment, the District Court applied the wrong standard of review for summary judgments by making credibility determinations against Bright-Asante in favor of the Movant, Saks & Company and Theo Christ, which included crediting the deposition and affidavit testimony of Lisa Benson, a White female management staff of Saks & Company. Bright-Asante and Susan David, a White female Sales Associate, had sold merchandize to the same person within three days of each other under similar circumstances. Lisa Benson testified that

she had observed some “suspicious activities” on a CCTV footage of Bright-Asante’s transaction but did not observe similar suspicious activities in the CCTV footage of Susan David’s transaction. Ms. Benson testified that it was the suspicious activities of Bright-Asante which led her to believe that Bright-Asante was part of a criminal ring which was stealing merchandize from Saks & Company. Neither Ms. Benson nor Saks & Company preserved for review, by the District Court or anyone else, this videotape of Susan David’s transaction which had no ‘suspicious’ activities. Following Bright-Asante’s arrest at the behest of Saks & Company and Ms. Benson, the United States Secret Service, the Manhattan D.A.’s Office, and the NYPD conducted a thorough investigation of Bright-Asante’s alleged ‘suspicious activities’ and found no incriminating evidence of any criminal conduct. All charges against Bright-Asante were therefore dismissed.

Upon Bright-Asante’s arrest, Saks & Company suspended him indefinitely without pay pending the resolution of his legal matter. Unlike Bright-Asante, Susan David was not suspended at all, by Saks & Company, arrested or prosecuted. After all charges against Bright-Asante were dismissed, Saks & Company still refused to reinstate him to his position. Bright-Asante sued for race discrimination and constructive discharge, among others. At the conclusion of discovery, Saks & Company and Theo Christ moved for summary

judgment which was opposed by Bright-Asante. The District Court granted the motion improperly applying the governing standard of review for summary judgment. And the Second Circuit affirmed the erroneous outcome. Both the erroneous application of the governing standard, and the Second Circuit's affirmance thereof, deprived Bright-Asante of his constitutional right to jury trial under the Seventh Amendment.

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Bright-Asante v. Saks & Co.*, 855 Fed. Appx. 40 (2d. Cir. 2021). The Order on the *en banc* petition is unreported but was issued on June 21, 2021. The citation of the opinion of the United States District Court for the Southern District of New York is *Bright-Asante v. Saks & Co.*, 2020 U.S. Dist. LEXIS 47345*. An opinion of the District Court in the case is cited as *Bright-Asante v. Saks & Co.*, 242 F. Supp. 3d 229 (2017). Another opinion of the District Court relating to reconsideration of aspects of the court's 2017 opinion is cited as *Bright-Asante v. Saks & Co.*, 2019 U.S. Dist. LEXIS 38910. The unreported Order of the Second Circuit dated June 21, 2021, on the *en banc* rehearing is reproduced in the Appendix to this petition.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Order of the Second Circuit

Court of Appeals which denied Bright-Asante’s timely *en banc* rehearing petition was entered on June 21, 2021. And the Second Circuit’s opinion which affirmed the District Court judgment was entered on May 14, 2021 and reported as *Bright-Asante v. Saks & Co.*, 855 Fed. Appx. 40 (2d. Cir. 2021).

Constitutional and Statutory Provisions Involved

1. The Seventh Amendment to the Constitution of the United States, which guarantees petitioner’s right to a jury trial.
2. 42 U.S.C. §1981.
3. Federal Rules of Civil Procedure, Rule 56.
4. Title 8 of the Administrative Code of the City of New York (New York City Human Rights Law).

STATEMENT OF THE CASE

On August 29, 2014, Bright-Asante sold merchandize to a customer of Saks & Company who produced an identification to Petitioner which showed her as “Maureen Hennessy.” Petitioner had not met this customer before then and did not otherwise know her true identity. This customer purchased said merchandize without presenting a Saks store credit card, *but Petitioner complied with Saks protocols for selling merchandize to customers who did not present Saks store credit card at the time of purchase.* Apparently, Saks had already flagged this “customer” as part of a criminal ring which was stealing merchandize from Saks.

Meanwhile, about three days after Petitioner's sale to this customer, the same customer purchased merchandize from the same store, this time from Susan David, a White female Sales Associate, without presenting a Saks store credit card to Ms. David.

Lisa Benson, who conducted an initial investigation on behalf of Saks & Company, caused Petitioner to be arrested by law enforcement on suspicion of being part of a criminal ring which was stealing merchandize from Saks & Company with "Maureen Hennessy." As a result, on September 9, 2014, Saks & Company suspended Petitioner indefinitely without pay "pending the legal outcome of [his] situation." Lisa Benson claimed to have observed "suspicious activities" by Petitioner on a CCTV footage belonging to Saks & Company which caused her to act against Petitioner but did not observe similar suspicious activities on the CCTV footage of Susan David. Petitioner was arraigned in Criminal Court on criminal charges. After a thorough investigation by the United States Secret Service, the Manhattan District Attorney's Office and the NYPD, no criminal conduct was found against Petitioner and all charges against Petitioner were dismissed. Neither Ms. Benson nor Saks & Company preserved a video of the CCTV footage of Susan David's sale to "Maureen Hennessy" which allegedly did not contain any suspicious activities by Susan David. Nor, indeed, did Ms. Benson ever show this CCTV video footage

of Susan David to anyone else at Saks & Company. Susan David was not subjected to a similar treatment like Petitioner despite the fact that they both sold merchandize to the same individual under similar circumstances.

After the dismissal of all charges against Petitioner, Petitioner notified Saks & Company of the legal outcome of his arrest, but Saks & Company refused to reinstate Petitioner. Petitioner then commenced this action for race discrimination and constructive discharge, among other claims. On a motion to dismiss by Saks & Company, the District Court denied the motion to dismiss on the ground that indefinite suspension without pay, which continued after criminal charges against Petitioner were dismissed, was sufficient to support a claim of constructive discharge under the law. *See Bright-Asante v. Saks & Co.*, 242 F. Supp. 3d 229.

Upon completion of discovery, Saks & Company moved for summary judgment which Petitioner opposed. In granting summary judgment which rested largely on Ms. Benson's deposition and affidavit testimony, the District Court credited Ms. Benson despite the conflict between her testimony, on the one hand, and contemporaneous documentary evidence, on the other, as well as the deposition and affidavit evidence of Petitioner. In other words, contrary to well-settled law, the District Court granted summary judgment against Petitioner based upon credibility determinations it

made in favor of Saks & Company against Petitioner. *See Bright-Asante v. Saks & Co.*, 2020 U.S. Dist. LEXIS 47354.

In affirming the District Court, the Second Circuit Court of Appeals failed to realize that the District Court had misapplied the governing standard of review for summary judgments. The Second Circuit's affirmance is inconsistent with settled law and a long line of precedents in this Court applicable to the standard of review of summary judgment motions. The Second Circuit also failed to separately consider and determine, as it should have, Petitioner's constructive discharge claim under the broader rubric of the New York City Human Rights Law, as distinct from 42 USC §1981.

The Second Circuit also misapprehended the fact that it was not "the Store's investigators" who reviewed "relevant CCTV footage" and concluded that Bright-Asante's transactions were "fraudulent." It was only one individual – Lisa Benson, Saks's Director of Internal Investigation, who admittedly did not share the CCTV footage with anyone at Saks & Company. The importance of the distinction between Ms. Benson and "the Store's investigators" rests on the fact that it was Ms. Benson who made the decisions which landed Petitioner in the embrace of law enforcement. It was the same Ms. Benson who ignored countervailing available evidence that Petitioner did not engage and could not have engaged in the

criminal conduct that she was investigating. Although the record suggests that the CCTV footage of Susan David's sale to "Maureen Hennessy" met the criteria for passing the footage along to law enforcement, Ms. Benson decided not to do so, but had no difficulty in passing along the Petitioner's footage to law enforcement. Ms. Benson did not share the David CCTV footage to anyone at Saks either. The importance of the distinction between Lisa Benson and "the Store's investigators" will become clearer in this petition in light of the deliberate actions and inactions of Ms. Benson relative to the underlying criminal investigation, and the fact that the summary judgment herein rested largely upon her testimony.

Settled precedents require the courts, at summary judgment, to believe the evidence of Bright-Asante as the nonmovant and draw all favorable inferences in his favor. Neither the District Court nor the Second Circuit which affirmed the District Court, adhered to this well-settled standard of review. Both the District Court and the Second Circuit ignored Petitioner's critical uncontroverted contemporaneous evidence. Nor did both courts draw the necessary favorable inferences in Petitioner's favor. Some of these uncontradicted evidence and reasonable favorable inferences will be identified below.

Specifically, after his transaction with "Maureen Hennessy," Petitioner became suspicious of the customer based upon information he later

received from Marcus Paskel, another sales associate, on August 29, 2014. Petitioner reported his suspicion at the earliest opportunity, the very next day, to Joseph Gonzalez of Saks Asset Protection. This was **six days before** Bright-Asante was arrested for fraudulent collusion with the very same customer whom he had reported. Under these circumstances, the suspicion that Bright-Asante was colluding with this customer makes no sense at all.

On September 3, 2014, while on his lunch break, Bright-Asante was alerted by Marcus Paskel that “Maureen Hennessy” was back in the store to return the merchandize that she had purchased through Bright-Asante on August 29, 2014. Bright-Asante told Mr. Paskel to immediately alert Mr. Gonzalez of the situation. Bright-Asante then rushed back to the store where “Maureen Hennessy” requested a *Gift Card* for the returned merchandize instead of a return of merchandize to the credit card of purchase. Bright-Asante refused to comply with the customer’s request because of the potential loss it would cause Saks. Bright-Asante also got his immediate supervisor, Brandon Cole, involved. Evidence of these uncontroverted facts was readily available to Lisa Benson as Saks & Company’s lead internal investigator.

Lisa Benson was simply not interested in the facts which were readily available to her through Joseph Gonzalez, Markus Paskel and other

witnesses named by Bright-Asante at the time of the transactions. If Ms. Benson had reached out to Mr. Gonzalez, Marcus Paskel, and Brandon Cole before September 5, 2014, that would have dispelled whatever legitimate suspicion she may have harbored, and Bright-Asante would not have been arrested. The only rational conclusion based on the record is that Lisa Benson made a deliberate choice to lump Petitioner together with the African American Sales Associates exclusively whom she was investigating, and she chose to ignore any facts which would have exonerated Petitioner. Ms. Benson's investigation involved only African American Sales Associates despite the fact that they constituted only 50% of the Sales Associates at Saks & Company at the time.

Ms. Benson's decision not to follow the readily available lead to the truth is indicative of a person with an agenda. Before even conducting any meaningful investigation, Ms. Benson had already concluded *in writing*, without ascertaining the facts, that Bright-Asante was "knowingly and actively facilitating fraudulent transactions in the store." Therefore, any facts which would contradict her conclusion must be ignored or swept aside. She targeted only African American shoe sales associates, including Bright-Asante. She was undeterred in her pursuit which destroyed the reputation and career of Bright-Asante as a high-performing African American Sales Associate at Saks & Company.

REASONS FOR GRANTING THE WRIT

Applying the correct standard of review of summary judgment and drawing all the reasonable inferences in favor of Bright-Asante, as should have been done, the only reasonable conclusion on the record is that there are material issues of fact as to whether race was a motivating factor in the conduct of Saks & Company towards Bright-Asante. Working through Lisa Benson, Saks & Company zeroed in on Bright-Asante in an investigation which targeted only African American sales associates despite the fact that 50% of the sales associates were White. She refused to refer Susan David, a White Sales Associate, to law enforcement despite the fact that her transaction was flagged as unusual and met the criteria for such referral. Susan David was not even investigated let alone suspended indefinitely without pay, as was Bright-Asante. To this day, Saks & Company has not provided a nondiscriminatory reason for its conduct against Bright-Asante.

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENTS OF THIS COURT REGARDING THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT MOTIONS

The decision of the Second Circuit Court of Appeals in this matter conflicts with well-settled authorities in this Court. This Court has not

hesitated to take appropriate action where there is a clear misapprehension of the correct standard of review by lower courts e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The following principles can be distilled from these precedents:

1. In ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *See Tolan v. Cotton*, 572 U.S. 650. *See also Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000). *Tolan* is particularly instructive as it is a case in which, as in the case at bar, the district court granted summary judgment to the defendant police officer; the Fifth Circuit affirmed but this Court vacated by a 9-0 decision. In the case at bar, both the District Court and the Second Circuit did exactly the opposite of what this Court enjoined in *Tolan v. Cotton*.
2. Summary judgment is inappropriate when the admissible materials in the record make it arguable that the claim has merit. On such a motion, the evidence of the non-movant (Petitioner) is to be believed, all permissible inferences

are to be drawn in his favor, *and the court must disregard all evidence favorable to the moving party (Saks & Company) that the jury is not required to believe.* The jury is not required to believe Lisa Benson's testimony that Susan David CCTV footage which she alone viewed showed material differences from that of Bright-Asante, even though both sales associates sold to the same customer, especially since Saks did not preserve the footage. In sum, summary judgment is proper only when, with all permissible inferences and credibility questions resolved in favor of the party against whom judgment is sought (Bright-Asante), there can be but one reasonable conclusion as to the verdict, i.e., it is quite clear what the truth is. (Emphasis added). *See Redd v. N.Y. State Dept. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012).

3. The evaluation of ambiguous acts is a task for the jury, not for the judge on summary judgment. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. The court's role in deciding a motion for

summary judgment is to identify factual issues, not to resolve them. *Redd, Id.* In this case, it clearly appears that both the district court and the Second Circuit in its *de novo* review of summary judgment, believed the evidence of the moving party (Saks) and drew inferences in favor of Saks & Company.

The sole evidence in this case that the Susan David CCTV tape is materially different from Bright-Asante's came from Ms. Benson herself; she was reporting what she purportedly observed on the CCTV footage which is uncorroborated. And summary judgment in this case rested largely on Ms. Benson's testimony. Therefore, a close examination of Ms. Benson's testimony is warranted in the context of other contradictory contemporaneous evidence necessary to evaluate the propriety of summary judgment here.

On August 31, 2014, well before the arrest of Bright-Asante, U.S. Secret Service Special Agent Matthew Wagner specifically asked Ms. Benson how she figured out Bright-Asante's involvement in the fraud that Ms. Benson was investigating. Ms. Benson's response at the time, which is different from what she later swore to in court documents, is as follows:

“The way we figured it out with Asante was ***just by*** running the zip code for Bronxville on exception-based reporting,

then looking at high value with *credit cards keyed in*. The one for Asante didn't match the customer's normal sending (sic) habits, then the fact that he works with them in shoes [African American sales associates being investigated], *it was keyed in*, customers are all from the same street (cleaning company?), a lot of Louboutin shoes which are typical..." (Emphasis added)

Notably, every material fact mentioned in Ms. Benson's email response with respect to Bright-Asante equally applies to Susan David except that Ms. David does not "work with them (African American sales associates being investigated) in shoes." The same "Maureen Hennessy" was involved in both Bright-Asante and Susan David transactions. So, the same zip code for Bronxville which was run for Bright-Asante would be run for David. Both the Bright-Asante and David transactions were "keyed in" because the customer did not present her credit card at the time of purchase as the sales receipts of both transactions prove. Both transactions were high value each being in excess of \$5000, which did not match the "customer's normal spending habit." i.e., the spending habits of the real Maureen Hennessy.

Although on August 31, 2014, Agent Wagner made clear to Ms. Benson that he would stop by at Saks store on the following Tuesday to pick up the videos, Ms. Benson never mentioned that she

viewed anything on the videos which went into her calculus of identifying Bright-Asante as a suspect. She also made the decision to withhold the David video footage from Agent Wagner. Remarkably, Ms. Benson discussed the David tape with Catherine Riccards, an attorney who was Saks's Senior Director of Professional Standards, in the context of fraudulent transactions, but never showed Ms. Riccards the tape! The alleged contents of the tape of the Susan David transaction remain uncorroborated.

During the law enforcement investigation following the arrest of Bright-Asante, Ms. Benson was informed that there was no evidence against Bright-Asante to present to a grand jury. Given the fact that it was she who got Bright-Asante arrested by law enforcement, she became concerned and expressed her concern in writing. On September 23, 2014, Ms. Benson sent an email to some Saks management employees in which she expressed her "concerns over Michael Bright-Asante" and "the ramifications if he is not indicted." Ms. Benson was rightly concerned in light of her role in Bright-Asante's arrest and prosecution.

In her deposition of October 27, 2017, and later in her sworn declaration of February 21, 2019, Ms. Benson added material facts to the original reason she provided to Agent Wagner on September 1, 2014 as to how she determined Bright-Asante's involvement in the suspected crimes. Ms. Benson testified, in her deposition, that

when Bright-Asante's transaction came to her attention, *she reviewed CCTV footage of the sales* and found the circumstances of Bright Asante's sale to be "extremely unusual." She further testified that subsequent to Bright-Asante's transaction, she learned of the Susan David transaction and viewed the CCTV footage also. From both footages, she determined that only Bright-Asante's footage showed suspicious activity. Ms. Benson's deposition of October 2017 was *the first time* that Ms. Benson mentioned that she reviewed both CCTV footages of Bright-Asante's and Susan David's transactions which led her to suspect Bright-Asante. If, in fact, Ms. Benson had reviewed Susan David's CCTV footage as of September 2014, she would have said so in her email to Agent Wagner on September 1, 2014. Ms. Benson's subsequent claims are *ex post facto* attempts to justify the unjustifiable. In his own declaration of April 10, 2019, which the District Court and the Second Circuit did not credit, Bright-Asante controverted with contemporaneous evidence, specific material allegations contained in the declaration and deposition of Lisa Benson.

The Second Circuit relied heavily upon Ms. Benson's declaration and deposition testimony, despite their inconsistencies. The court credited instead of disregarding same. "[A]lthough the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See

Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." *Id.* at 300. *Reeves, Id.* 151. In dealing with Crystal Kipp (fake Maureen Hennessy) whom Bright-Asante believed was Maureen Hennessy, Bright-Asante adhered to Saks' **written** protocol for selling merchandize to a customer who did not present a Saks store credit card at the time of purchase. And the record evidence is that, even though Saks & Company knew the true identity of Crystal Kipp, Bright-Asante did not know the true identity of Crystal Kipp at the time of his sale of merchandize to Ms. Kipp.

At her deposition, in describing the criteria for referring the internal Saks investigation to law enforcement, Ms. Benson said:

"How the investigation worked was any information or facts that we had, or any transactions *that were identified as unusual*, we would gather that information and we would pass that along to the Secret Service or District Attorney's office." (Emphasis added)

Clearly, the Susan David transaction was identified by Saks internal investigators as an unusual transaction because it involved the same

“Maureen Hennessy” who had previously been flagged by Saks & Company as making a purchase with the stolen identity of the real Maureen Hennessy. Hence Ms. Benson discussed the Susan David transaction with Catherine Riccards. Notwithstanding these facts, Ms. Benson never showed the David CCTV footage to Ms. Riccards, an attorney and top executive of Saks & Company. Nor did Ms. Benson comply with her own description of the protocol for turning over investigative materials to law enforcement. Ms. Benson alone (not Store’s investigators), made the conscious decision not to pass along the Susan David CCTV footage to law enforcement.

II. THE SECOND CIRCUIT OVERLOOKED CRITICAL EVIDENCE OF THE PETITIONER WHICH CONFLICTS WITH THE TESTIMONIES OF SAKS & COMPANY’S WITNESSES AND APPLIED THE WRONG STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Contrary to the governing standard of review, the Second Circuit credited Lisa Benson instead of Bright-Asante, as the nonmovant, when it held thus: *“the evidence did not implicate David in the fraud so as to admit an inference of race discrimination in Saks’s treatment of its employees. The transactions conducted by Bright-Asante and David were different in material respects.”* (Emphasis added). *See Bright-Asante v. Saks & Co.*, 855 Fed. Appx. 40, 41 (2d Cir. 2021).

The starting point for summary judgment purposes is that the court must disregard all evidence favorable to the moving party (Saks and Christ), that the jury is not required to believe. *See Redd v. N.Y. State Dept. of Parole*, 678 F.3d 166, 174 (2d Cir. 2012). The jury is not required to believe or credit Lisa Benson's testimony that she found suspicious criminal conduct in Bright-Asante CCTV which Movants failed to preserve but did not find a similar such conduct in Susan David CCTV footage.

In its *de novo* review, the Second Circuit should have believed the following uncontradicted evidence in support of Bright-Asante's position, and drawn inferences favorable to him from the evidence:

1. That on August 29, 2014, Bright-Asante did not know the true identity of "Maureen Hennessey" when he sold merchandize to her.
2. That Bright-Asante promptly reported the "Maureen Hennessey" situation to Gonzalez of Saks Asset Protection on August 30, 2014, at the earliest opportunity.
3. That Lisa Benson did not attempt to inquire from Gonzalez whether Bright-Asante in fact reported the "Maureen Hennessey" situation to Gonzalez.

4. That during her internal investigation, Ms. Benson learned that Bright-Asante had reported previous incidents of fraud which he was aware of to Saks & Company's supervisory staff.
5. That when the customer (Crystal Kipp) returned the merchandize which she purchased through Bright-Asante and wanted a gift card for the returned items, Bright-Asante refused and insisted on putting the returned merchandize back on the original credit card despite the suggestion of his direct supervisor to the contrary.
6. That exchanging the returned merchandize with a gift card would have resulted in loss of money to Saks.
7. That by his handling of the returned merchandize, Bright-Asante derived no benefit or advantage from the sale transaction because he is paid a percentage commission of merchandize actually sold.

8. That Bright-Asante believed that he was targeted for his race by Lisa Benson because he was lumped together with all the Sales Associates that Saks was investigating who were all African Americans, but not Susan David, the White female Sales Associate.
9. That of the 90-100 shoe sales associates at the time that Bright-Asante was at Saks & Company, 50 percent of whom were Caucasians, only the African American sales associates were investigated.
10. It remains uncontradicted that the customers photographs and identification cards, etc. (media) found on Bright-Asante's cell phone by law enforcement were authorized by Saks in July 2014.

The grant of summary judgment by the District Court, and the affirmance thereof by the Second Circuit under the foregoing circumstances, are contrary to settled precedents. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

In *Anderson*, this Court vacated summary judgment and remanded to the DC Circuit because the incorrect standard of review was applied. In

Matsushita, this Court reversed and remanded because the Third Circuit relied on irrelevant evidence and failed to consider the absence of any plausible motive for petitioners to engage in predatory pricing. In the case at bar, both the District Court and the Second Circuit failed to consider the absence of any plausible motive for Bright-Asante, who had reported “Maureen Hennessy” to Gonzalez of Saks Asset Protection for suspected criminality long before he was arrested, to be conspiring with the very same individual to steal from Saks. Any unbiased view of Bright-Asante’s actions between August 29, 2014 and his arrest on September 5, 2014 completely belies any suggestion of collusion with Crystal Kipp. In *EEOC v. Abercrombie*, another summary judgment case, this Court reversed the judgment of the Tenth Circuit and remanded when summary judgment was granted on the wrong principle.

III. THE SECOND CIRCUIT MISSED THE FACT THAT THERE IS SUFFICIENT EVIDENCE IN THE RECORD FOR A RATIONAL JURY TO FIND THAT SAKS’ CONDUCT STEMMED IN PART FROM A DISCRIMINATORY MOTIVE

Apparently believing that there is no evidence in the record to hold that Saks & Company’s conduct stemmed in part from a discriminatory motive, the Second Circuit held thus: “...to survive a motion for summary judgment Bright-Asante must adduce evidence admitting a

finding that Saks's conduct stemmed at least in part from a discriminatory motive, *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 110 n.8 (2d. Cir. 2013). But Bright-Asante has not pointed to any evidence of discriminatory intent fueling the decision not to reinstate him." *See Bright-Asante v. Saks & Co.*, 856 Fed. Appx 40, at 42.

Quite the contrary. The record abounds with circumstantial evidence on which a rational jury could find for Bright-Asante on the issue of discriminatory intent or motive. It bears repeating that the courts have consistently cautioned that "trial courts must be especially chary in handing out summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue. *See, e.g., Gallo*, 22 F.3d at 1224; *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989). Since it is rare indeed to find in an employer's records proof that a personnel decision was made for a discriminatory reason, whatever other depositions, affidavits and materials are before the district court must be carefully scrutinized for circumstantial evidence that could support an inference of discrimination {citation omitted}" (Emphasis added). *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996).

According to both Bright-Asante and Theo Christ, at the time of Bright-Asante's arrest in September 2014, there were about 90-100 shoe

sales associates at Saks & Company where Petitioner worked, 50 per cent of whom were Caucasians and the remainder minorities. Ms. Christ also confirmed Bright-Asante's prowess as a superior sales associate. Since 2010, Bright-Asante had been in the elite group of sales associates at Saks & Company who sold in excess of \$1,000,000 in merchandize.

All the suspects that Saks targeted for investigation in this fraud scheme were African Americans, including Bright-Asante. No White sales associate was investigated despite Whites constituting 50% of the sales associates work force in the women's shoe. Saks & Company refused to reinstate Bright-Asante even after the court had dismissed all charges against him. To this day, Saks has not provided any nondiscriminatory explanation for its continued refusal to reinstate Bright-Asante. Susan David was not referred to law enforcement for further investigation despite the fact that her transaction was flagged as unusual, and she met the criteria for referral to law enforcement for further investigation. All the above facts provide the circumstantial evidence from which a reasonable jury could infer that race was a motivating force in the treatment meted to Bright-Asante.

Under these circumstances, whether race was, in fact, a motivating factor is a jury question, not for a summary judgment court. Bright-Asante having adduced sufficient evidence to raise an

inference of discriminatory intent/motive, the burden was on Saks & Company to articulate a non-discriminatory explanation for its conduct towards Bright-Asante. *See Legg v. Ulster County*, 860 F.3d 67 (2d Cir. 2016). Saks & Company failed to carry its burden in this regard.

Finally, the Second Circuit did not apply the broader standard applicable to New York City Human Rights Law claims to Bright-Asante's constructive discharge claim. *See Mihalik, Id.*; *Williams v. N.Y.C. Housing Auth.*, 61 A.D.3d 62.

To establish race discrimination under New York City Human Rights Law, Bright-Asante only need demonstrate that he is treated "less well" than Susan David because of a discriminatory intent. *Mihalik, Id.*, 110. As noted above, in her investigation, Ms. Benson, a White manager, targeted African Americans sales associates only despite the fact that 50% of the Sales Associates were White. Even though Susan David's transaction with "Maureen Hennessy" was flagged as unusual, and met the criteria articulated by Ms. Benson to Agent Wagner in September 2014 for referral to law enforcement for further investigation, Ms. Benson did not refer the Susan David situation to law enforcement. The result was that Bright-Asante was arrested by law enforcement and Saks & Company suspended him indefinitely without pay. These facts point to Bright-Asante being treated differently and less well than Susan David by Saks & Company.

This “less well” treatment from Saks continued when Saks refused to reinstate Bright-Asante even after the criminal court had cleared Bright-Asante of all criminal charges. Saks failed to provide the requisite nondiscriminatory motive for its continued refusal to reinstate Bright-Asante. *See Mihalik, Id.*, 111. Finally, it was the burden of Saks & Company to demonstrate that “discrimination played no role” in its actions. *Mihalik, Id.* Saks & Company failed woefully to carry this burden. The record evidence demonstrates that Ms. Benson’s suspicion of criminality on the part of Bright-Asante was most unreasonable since she failed to ask obvious questions which any disinterested investigator would ask. The available answers to those questions would have dispelled any suspicion of criminality that Ms. Benson may have harbored.

IV. THE DISTRICT COURT’S ERRONEOUS GRANT OF SUMMARY JUDGMENT AND THE SECOND CIRCUIT’S AFFIRMANCE THEREOF DENIED BRIGHT-ASANTE HIS RIGHT TO JURY TRIAL GUARANTEED BY THE SEVENTH AMENDMENT

The Seventh Amendment to the Constitution of the United States guarantees a jury trial to a litigant like Bright-Asante who is making a legal claim, as distinct from an equitable claim. *See Chauffers v. Terry*, 494 U.S. 558 (1990); *Curtis v. Loether*, 415 U.S. 189 (1974); *Woodell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991). Bright-

Asante is claiming money damages from Saks & Company on the ground that the company unlawfully discriminated against him because of his race, and constructively discharged him. Bright-Asante sought jury trial of his claims.

As shown above, Bright-Asante demonstrated that it is a disputed fact whether the conduct of the Saks & Company and its management staff towards him was motivated by negative racial animus, especially the conduct of Lisa Benson which must be attributed to Saks & Company. With only African American Sales Associates targeted in Lisa Benson's internal investigation despite the factor that 50% of the sales associates were White, and the fact that Susan David who sold to the same customer as Bright-Asante was not even investigated, is it simply a coincidence? Or was race a motivating factor in Lisa Benson's handling of the matter? In light of the totality of the record evidence, there is a material dispute as to whether race was a motivating factor which should have been left to a jury for final resolution.

From the totality of the record, it is clear that Bright-Asante was treated less well than Susan David in the underlying internal investigation by Saks, which culminated in the arrest and indefinite suspension of Bright-Asante. The difference in the treatment of Bright-Asante and African American sales associates, as distinct from Susan David, raises the question of what role

race may have played in the investigation. That is a material question which should have been left for resolution by the jury and not the District Court, as affirmed by the Second Circuit.

The erroneous application of the governing standard of review of motions for summary judgment which led to the grant of summary judgment to Respondents resulted in a denial of Bright-Asante's constitutional right to jury trial under the Seventh Amendment. Had the proper standard been adhered to by the lower courts in this case, summary judgment would have been denied and Bright-Asante's right to jury trial would not have been improperly abridged.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

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November 2, 2021

Respectfully Submitted,

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