GCR INSIGHT

US COURTS
ANNUAL REVIEW

Editors
Paula W Render, Eric P Enson and Julia E McEvoy

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to launch this new publication, *US Courts Annual Review*, which is our first to take a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Paula W Render, Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Second Circuit: Southern District of New York

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Overview

This chapter focuses on the decisions of the United States Court of Appeals for the Second Circuit in appeals from decisions of the District Court for the Southern District of New York (SDNY). In addition, it addresses a few of the most significant SDNY decisions addressing antitrust claims.

2019 saw four significant antitrust decisions of the Court of Appeals for the Second Circuit. The Court decided an important case in the airline reservations industry that considered the application of the 'two-sided market' principles outlined by the Supreme Court in the 2018 *Ohio v American Express* decision (*Amex*).[1] Two decisions were in cases brought under section 1 of the Sherman Act:[2] the first on the application of the 'antitrust injury' requirement for standing to sue under the antitrust laws; and the second on the pleading standards for alleging conspiracy. Finally, the Court considered the application of the import exclusion of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) to conduct in Russia that allegedly prevented a US company from importing generic pharmaceuticals into the US.

Antitrust claimants also were very active in the SDNY, with over a dozen cases raising antitrust claims. Of these, we have addressed three: the decision denying an injunction against the *Sprint/T-Mobile* merger; a decision addressing the pleading standards for multi-defendant cases; and a decision addressing the potential anticompetitive effects of exclusivity clauses.

1 585 U.S. ____; 138 S. Ct. 2274 (2018).

2 15 U.S.C. § 1.

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Second Circuit appeals from SDNY decisions

US Airways, Inc v Sabre Holdings Corporation

The Court's decision in the *US Airways, Inc v Sabre Holdings Corporation* appeal[3] from a jury verdict in favor of US Airways is the first decision in the Second Circuit to address the application of the Supreme Court's *Amex* decision concerning the assessment of competitive effects in two-sided credit card markets. The Court had close familiarity with the *Amex* case, since *Amex* reached the Supreme Court from the Second Circuit Court of Appeals, which had also decided in favor of American Express (although on slightly different grounds). In *US Airways v Sabre*, the Court considered the application of *Amex* to a technology platform connecting airlines and travel agents.

Sabre operates a travel technology platform (known generically as a global distribution system or GDS) through which travel agents can search for and book airline flights for their customers. Airlines, including US Airways, use the GDS platform to list available tickets for their flights.

US Airways brought antitrust claims against Sabre alleging that 'full content' provisions in its contracts with Sabre were unlawful restraints of trade in violation of section 1 of the Sherman Act, and that Sabre also violated section 2 of the Act by monopolizing and conspiring to monopolize the distribution of GDS services to Sabre subscribers. The District Court dismissed the counts of US Airways' complaint alleging monopolization and conspiracy to monopolize. At the subsequent trial, a jury found against Sabre on the section 1 counts of the complaint and awarded US Airways over $5 million (before trebling). Sabre appealed the decision on section 1; US Airways appealed the dismissal of its monopolization and conspiracy to monopolize claims.

Sabre's contracts with US Airways included provisions requiring that: the airline provide all available fares to customers through the Sabre GDS; any fares offered be no more expensive or comprehensive than fares offered through any other forum; the airline not require or induce any travel agent to circumvent the Sabre platform (such as by booking direct on the airline's website); and the airline is prevented from charging higher fees to travel agents booking through Sabre than by other means. US Airways alleged that these provisions amounted to an unlawful vertical restraint of trade and caused it to pay supracompetitive booking fees.

Sabre argued that the decision below was flawed because the trial court allowed the jury to determine as a matter of fact that the relevant market was one-sided and issued erroneous jury instructions as to the impact of this finding. Sabre argued that under the Supreme Court's decision in *Amex*, Sabre's GDS is a two-sided transaction platform and therefore the relevant market must always include – and competitive effects be assessed across – both sides of the market.[4]

The Court accepted these arguments, finding that the jury's finding that the market was one-sided was clearly erroneous. The Court found that the GDS clearly met the *Amex* criteria for a transaction platform: (1) it offers different products or services, (2) to different groups of customers, (3) whom the platform connects, (4) in simultaneous transactions.[5] Under the *Amex* decision, the trial court should have found that the market was two-sided as a matter of law and should have

3 938 F.3d 43 (2d Cir. 2019).

4 138 S. Ct. 2274, 2298 (2018).

5 138 S. Ct at 2298.

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instructed the jury to analyze the impact of the challenged restraints on both airlines and travel agents. The trial court's attempt to allow for this issue through hypothetical alternative questions (the trial took place in the midst of the *Amex* proceedings, but before the Supreme Court's decision) was found to be inadequate.

Sabre argued that the appropriate result was for the Court to enter judgment in Sabre's favor on US Airways' section 1 claims. Instead, the Court remanded the case for a new trial on the section 1 claims finding that there was extensive record evidence that the jurors could reasonably have relied upon to conclude that US Airways had met its burden to prove that the challenged restraints had a substantial anticompetitive effect that harmed consumers, even considering the relevant market to be two-sided.

In the context of US Airways' appeal from the dismissal of its monopolization claims, the Court considered the question of whether a single brand can constitute a relevant market for purposes of a Sherman Act claim. The District Court had rejected the section 2 claim on the basis that US Airways pleaded a market definition limited to a single brand (ie, limited to Sabre's distribution of GDS services to Sabre subscribers). Relying on the Supreme Court's decision in *Eastman Kodak Co v Image Technical Services, Inc*,[6] the Court found that a relevant market could be constituted by a single brand. In *Kodak*, considering the choices available to Kodak equipment owners, the Supreme Court found a relevant market consisting solely of service and parts for Kodak equipment. Here, the Court found that considering the choices available to travel agents using Sabre, US Airways had appropriately pleaded that there were no viable substitutes and that therefore the market could be limited to Sabre's services. The monopolization claims also were remanded for further proceedings.

Eastman Kodak Co v Henry Bath LLC

In *Eastman*,[7] the Court considered the antitrust injury requirement for standing to bring an antitrust claim based on market manipulation. Although antitrust injury (injury of the type that the antitrust laws are designed to prevent) typically occurs in a market in which plaintiff and defendant both participate, the Supreme Court 'has found antitrust injury where a plaintiff, though "not an economic actor in the market that had been restrained," nevertheless experiences injuries that are "inextricably intertwined with the injury the conspirators sought to inflict."'[8] *Eastman* illustrates that whether injury occurs in the same or a different market from the alleged conduct can be a complex question and provides guidance for pleading such claims.

The plaintiffs were purchasers of primary aluminum through long-term supply contracts with aluminum producers. Under the contracts, the purchase prices included as a cost element the Platts Midwest Premium (the Midwest Premium), a figure associated with the cost of delivering

6 504 U.S. 451, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992).

7 936 F.3d 86 (2d Cir. 2019).

8 936 F.3d 86, 94, citing *Blue Shield of Va. v McCready*, 457 U.S. 465, 484, 102 S. Ct. 2540, 73 L.Ed.2d 149 (1982).

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aluminum. The defendants are financial institutions (financial defendants) and warehousers who own and operate aluminum warehouses (warehousing defendants) who were acquired by the financial defendants in the aftermath of the 2008 global financial crisis.

During the economic downturn following the 2008 market collapse, the financial defendants purchased large quantities of primary aluminum at low prices with the intent of selling it when the market recovered. The financial defendants allegedly conspired with the warehousing defendants to manipulate the Midwest Premium to artificially inflate the prices they could realize by later selling off their large aluminum holdings. They did this by moving around the inventory of primary aluminum from one warehouse to another, and creating bottlenecks in supply that would increase the cost of delivery, thereby impacting the Midwest Premium. The plaintiffs claimed that they were harmed by the defendants' manipulation of the Midwest Premium because it resulted in them paying artificially inflated prices under their supply contracts with aluminum producers.

In a related case, *In re Aluminum Warehousing Antitrust Litigation* (*Aluminum III*),[9] the Court had held that end users of aluminum (who purchased reconstituted aluminum or end products that contained aluminum) lacked standing because they were neither participants in the market restrained by the defendants (found in that case to be the market for warehousing services) nor were their injuries inextricably intertwined with the objective of the conspiracy. Given their remoteness from the defendants' restraints, their alleged injury was merely 'collateral damage.'[10]

In this case, seeking to apply *Aluminum III*, the District Court granted summary judgment to the defendants on the plaintiffs' pleadings on the basis that they had no standing for failure to establish they had suffered antitrust injury. The District Court held that the alleged conspiracy 'first and foremost' affected the London Metal Exchange warehousing market, and not the market for primary aluminum in which the plaintiffs were injured. Since they were not participants in the same market as the alleged conspiracy, the plaintiffs' injuries were an 'incidental by-product' of the alleged conspiracy.[11]

The Court disagreed. It found that the plaintiffs had alleged that the defendants restrained the market for sales of primary aluminum by artificial manipulation of the Midwest Premium and that they suffered harm because they paid inflated prices when they purchased primary aluminum. The alleged actions of the defendants took place in the same market in which the plaintiffs were injured: the market for the purchase and sale of primary aluminum.[12] Even though the defendants' actions first artificially caused bottlenecks and delays in warehouse deliveries, the alleged anticompetitive purpose was not simply to cause such delays but to inflate the prices of the metal so that their own holdings would be more valuable.[13]

9 833 F.3d 151 (2d Cir. 2016).

10 833 F.3d at 163.

11 936 F.3d at 96.

12 *Id.* at 95.

13 *Id.* at 96.

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Gamm v Sanderson Farms, Inc

In *Gamm*,[14] the Court considered the requirement of particularity in pleading an antitrust conspiracy claim, following a long line of pleading cases starting with *Bell Atlantic Corporation v Twombly*[15] and *Ashcroft v Iqbal*.[16] The Court affirmed the principle that pleading a conspiracy based only on evidence of parallel conduct requires additional 'plus factors' to establish a claim. Without specific allegations of fact identifying how collusive conduct occurred and whether and how it affected trade, the claim fails.

The defendant, Sanderson Farms, is a chicken producer. In 2016, several classes of plaintiffs and individual plaintiffs sued Sanderson Farms and other chicken producers for allegedly conspiring to raise prices and manipulate a chicken pricing index in violation of federal and state antitrust laws. After these lawsuits were filed, Sanderson Farms' stock price fell. The plaintiffs, a putative class of shareholders of Sanderson Farms, sued Sanderson Farms for securities fraud, claiming that statements made by Sanderson Farms regarding the competitive conditions in the chicken industry in Securities and Exchange Commission filings between 2013 and 2016 were false and misleading. The plaintiffs allege that they were injured by the stock price drop following the filing of the antitrust lawsuits.

Sanderson Farms moved to dismiss the complaint for failure to state claim under Federal Rules of Civil Procedure Rule 12(b)(6), which the District Court granted. The Court of Appeals affirmed dismissal of the complaint.

The Court held that the plaintiffs failed to plead the first element of antitrust conspiracy – agreement – at even a 'basic level.' The plaintiffs made a general allegation that Sanderson Farms engaged in 'anticompetitive' conduct, but the complaint did not explain how that collusive conduct occurred, and whether and how it affected trade. The plaintiffs alleged that Sanderson Farms reduced supply through various means, including destroying eggs and broiler hens, but provided no facts alleging that Sanderson Farms or its co-conspirators actually reduced supply, that the reductions were the result of an agreement or that their alleged conduct was interrelated. Bald assertions that chicken producers 'worked in concert' and 'coordinated' are insufficient to state an antitrust claim.

Biocad JSC v F Hoffman-La Roche

In *Biocad*,[17] the Court considered the application of the FTAIA to injury allegedly caused by anticompetitive conduct in Russia. The Court made an in-depth analysis of the meaning of the FTAIA's 'import exclusion,' which permits antitrust actions against conduct with a direct, substantial and reasonably foreseeable effect on US import trade or import commerce.

14 944 F.3d 455 (2d Cir. 2019).

15 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).

16 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009).

17 942 F.3d 88 (2d Cir. 2019).

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The plaintiff, Biocad, is a Russian pharmaceutical manufacturer. The defendants are the brand-name manufacturers of certain cancer-treatment drugs. The US patents on defendants' drugs were due to expire, and Biocad planned to enter the US market with a biosimilar version of the drugs immediately after patent expiration.

Biocad alleged that the defendants engaged in a range of anticompetitive conduct in Russia directed against Biocad – predatory and discriminatory pricing, tying and restricting Biocad's access to samples for Food and Drug Administration approval testing – that was intended to cripple Biocad financially and prevent Biocad from entering the US market. Biocad had no active US business, and the defendants' conduct was all conducted through its foreign operations.

The District Court dismissed Biocad's antitrust claims on several grounds, including that they were barred by the FTAIA. The FTAIA creates a bar on the extraterritorial application of the Sherman Act to cases that cause only foreign injury. There are two exceptions to this bar where the conduct has a 'direct, substantial and reasonably foreseeable effect' on (1) US import trade or commerce; and (2) US domestic commerce. Because Biocad had not raised the application of the domestic effects exclusion at the District Court, the Court here only considered the application of the import exclusion.

Biocad argued that the import exclusion applied in this case because the defendants' actions were intended to prevent or delay Biocad's entry into the import market for pharmaceuticals. The Court rejected this argument, interpreting the FTAIA import exception to mean that the Sherman Act could be applied where foreign conduct 'constitutes or directly acts upon import commerce,' but not where a defendant may 'subjectively intend to impact import commerce in the future.'[18] The Court found that an interpretation of the exclusion that turns on the subjective intent of the defendant is inconsistent with the language of the statute, its structure and its purpose.

The Court considered the statutory language of the FTAIA, attempting to give meaning to some of the more ambiguous words found in the text. It found that 'it is the situs of the effects, as opposed to the conduct, that determines whether United States antitrust law applies.' As such, the Court applied an effects-based approach over Biocad's intent-based interpretation, and because the alleged actions and effects occurred immediately within Russia, the Court weighed this factor in favor of the defendants.

The Court's structural analysis pointed to the simplicity of the import exclusion contrasted with the complexity and more broad nature of the effects exception. The Court believed that the import exception was meant to apply only to imports. Therefore, the Court decided the FTAIA should not apply because the alleged conduct did not directly involve importing drugs into the United States, and that the possibility that the defendants' immediate action was to block Biocad's ability to import was too far removed.

Finally, the Court held that Congress intended the FTAIA to boost US exports by making it clear to US exporters that the Sherman Act did not apply to them as long as the conduct only affected foreign markets adversely and to clarify what conduct fell within the Sherman Act. The Court believed that applying an intent-based approach to the FTAIA would undermine those aims

18 *Id.* at 95.

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because a more attenuated intent-based approach could more readily implicate US exporters, and would ultimately move the Sherman Act further away from the clarity, objectivity and practicality the FTAIA was intended to provide.

SDNY decisions

New York v Deutsche Telekom AG

New York v Deutsche Telekom AG[19] was a high-profile challenge to the merger of Sprint and T-Mobile brought by a group of 13 states and the District of Columbia. The United States Federal Communications Commission (FCC) and the United States Department of Justice's Antitrust Division (DOJ) had conducted lengthy reviews and ultimately cleared the transaction subject to conditions. However, the states disagreed and brought their own proceedings claiming that the merger was anticompetitive under section 7 of the Clayton Act. After a bench trial, Judge Marrero denied the states' request to enjoin the merger.

The District Court outlined the three-part burden-shifting framework of a section 7 case: (1) the plaintiff establishes a *prima facie* case by showing that the transaction will increase concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition; (2) the defendant may rebut the presumption by producing evidence to cast doubt on the plaintiff's evidence of future anticompetitive effects; and (3) the burden of production then shifts back to the plaintiff and merges with the ultimate burden of persuasion.[20]

As with any antitrust case, market definition was a key battleground. The Court defined the market to comprise only wireless carriers that have their own national network, excluding mobile virtual network operators that lease their networks from the national carriers.[21] This restricted the market to T-Mobile, Sprint, AT&T and Verizon.[22] The Court found the relevant geographic market to be both national as well as local cellular market areas as defined by the FCC.

Relying on *United States v Philadelphia National Bank*,[23] the Court then found that the plaintiffs had established a *prima facie* case because New T-Mobile's combined market shares would be above 30 per cent. But the Court held that the defendants successfully rebutted the plaintiffs' *prima facie* case because: the merger would lead to cognizable efficiencies; in the absence of the transaction, Sprint would be a weak competitor; and the conditions supporting DISH's entry into the market addressed any competitive concerns.[24] Ultimately, these factors supported a decision in favor of the merging parties.

The crediting of efficiencies claims was of central importance in the District Court's analysis, despite skepticism about the 'efficiencies defense' expressed by courts in other circuits and the lack of Second Circuit precedent. The Court stated that it considered the evidence of efficiencies 'given courts' and federal regulators' increasingly consistent practice of doing so and

19 1:19 Civ. 5434 (VM), 2020 WL 635499 (S.D.N.Y 2020).

20 *Id.* at 12.

21 *Id.* at *13–18.

22 *Id.*

23 374 U.S. 321, 83 S. Ct. 1715, 10 L.Ed.2d 915 (1963).

24 *Id.* at 19.

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because section 7 requires evaluation of the merger's competitive effects under the totality of the circumstances.'[25] The Court accepted the defendants' claims that New T-Mobile would increase capacity in the market and achieve economies of scale similar to AT&T and Verizon by reducing marginal costs and increasing network speeds.[26] These efficiencies were merger-specific because T-Mobile would utilize Sprint's additional spectrum and existing network infrastructure to meet projected future network demand, and opportunities to acquire spectrum other than through the merger were infrequent and sporadic.[27] The Court also found the efficiencies to be sufficiently verifiable because the model used to project them was based on a highly successful internal T-Mobile model, and T-Mobile had exceeded its efficiencies estimate in a prior transaction.[28]

Another key factor in the decision was the proposed divestiture of business units and spectrum to DISH, designed to facilitate DISH's entry as a fourth national carrier. Although the plaintiffs argued that DISH was a weak potential entrant that had previously reneged on an agreement with the FCC, the Court concluded that DISH was likely to enter the market given the terms of the DOJ and FCC's agreements with T-Mobile and Sprint as well as DISH's extensive spectrum ownership.[29] Additionally, the DOJ and FCC required DISH to develop its own 5G network within three years.[30] Ultimately, the Court held that DISH's entry was sufficiently likely to replace Sprint's competitive presence in the long term.[31]

Although the federal antitrust regulators review many hundreds of transactions annually, litigation under section 7 of the Clayton Act is still relatively rare – in the single digits annually – and this decision provides useful perspectives on the types of evidence that can be persuasive, as well as the import of efficiencies and planned divestitures on the ultimate analysis.

In re GSE Bonds Antitrust Litigation

On a motion to dismiss, the Court in *GSE Bonds*[32] dismissed well over half of the defendants. According to the Court, the plaintiffs failed to plead facts sufficient to create an inference that those defendants were part of the alleged conspiracy.

The plaintiffs are a putative class of investment and retirement funds that purchased government-sponsored entity (GSE) bonds (such as those issued by Freddie Mac and Fannie Mae) from the defendants in the secondary market. The defendants are financial institutions approved to sell GSE bonds that, collectively, traded 77.16 per cent of all the GSE bonds issued during the proposed class period. The plaintiffs allege that the defendants conspired to fix the price of the GSE bonds in the secondary market.

25 *Id.* at 19.
26 *Id.* at 20.
27 Id at 22.
28 *Id.* at 23–26.
29 *Id.* at 34–39.
30 *Id.* at 33.
31 *Id.* at 39.
32 396 F. Supp. 3d 354 (2019).

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The plaintiffs pleaded evidence of a 'smoking gun' as to five defendants in the form of transcripts from chatroom conversations between dealers that worked for those defendants. But as to the other defendants, the complaint was virtually silent. The chatroom transcripts reproduced in the complaint did not even mention the other 11 defendants and the Court found that the plaintiffs did not offer any 'circumstantial facts supporting the inference that a conspiracy existed.'[33]

Absent direct evidence of a defendant's participation in an alleged conspiracy, plaintiffs must allege enough facts to show parallel conduct among the defendants along with 'plus factors' that make it more likely than not that defendants' conduct was the result of the alleged conspiracy rather than independent business decisions. Here, the Court found that the plaintiffs failed to plead both parallel conduct and the plus factors. 'The complaint does not, for example, include any evidence that defendants all priced their bonds similarly.'[34]

Keeping with a growing trend in recently filed antitrust cases, the plaintiffs attempted to bolster their claim of a price-fixing conspiracy with statistical analysis. They compared the price charged for GSE bonds by the defendants with the prices charged for Treasury securities with comparable maturity periods. The plaintiffs then compared that markup to the markup charged for GSE bonds by non-defendants. The Court found the statistical analysis to be helpful, to a degree, at this early stage of the litigation, but found that ultimately the statistical analysis did not tie the other defendants to the alleged conspiracy: 'Even assuming that the price-fixing conspiracy extended beyond the banks appearing in the chatroom logs, there is no particular reason to believe that the other defendants named in this suit were involved apart from plaintiffs' say-so.'[35] The Court also took issue with how aggregated the data was: 'it is impossible to have any confidence that the statistics actually capture something different about each and every defendant.'

This decision underscores the fact that plaintiffs need to plead specific facts that tie each defendant to the alleged conspiracy; generalized statements and statistical analysis about the defendants collectively will not be sufficient to survive a motion to dismiss.

Caruso Management Co Ltd v International Council of Shopping Centers

In *Caruso*,[36] the Court deals with the potential antitrust implications of exclusivity clauses in contracts under section 2 of the Sherman Act and under what circumstances conduct by a trade association constitutes a violation of section 1.

The plaintiff, Caruso, a real estate company, alleged multiple antitrust violations as well as claims for tortious interference with contract and prospective business against the defendant, the International Council of Shopping Centers (ICSC), a retail real estate trade association.

The ICSC holds an annual retail real estate conference, called RECon, in Las Vegas at the Las Vegas Convention Center. Over the years, other organizations began hosting competing real estate conferences and events in Las Vegas at the same time as RECon. As part of a larger effort to

33 *Id.* at 363.

34 *Id.* at 364.

35 *Id.* at 365.

36 403 F. Supp. 3d 191 (SDNY 2019).

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minimize the impact that those competing events had on RECon attendance, the ICSC began adding exclusivity clauses to its contracts with hotels surrounding the Convention Center that prevented those hotels from renting venue space for any event that would be similar or connected to RECon.

Caruso attempted to hold meetings with potential clients at a nearby hotel during RECon but was prevented from doing so because of ICSC exclusivity arrangements with the hotel. When the ICSC found out about Caruso's plan, its CEO discussed the situation with the ICSC's executive board and then emailed the hotel to remind them of their exclusivity clause and that to allow Caruso to hold its meeting would violate that clause.

The ICSC moved for summary judgment on all claims, arguing that Caruso failed to allege an agreement that violated section 1 and that its market definition was fatally flawed. The Court disagreed, holding that a reasonable jury could find that there was an agreement between the ICSC's CEO and executive board to block Caruso's event by threatening to boycott the hotel and that the ICSC had monopoly power in the market for meeting space during RECon.

In analyzing the alleged agreement, the Court reiterated the conventional wisdom that 'a trade association is not by its nature a walking conspiracy.'[37] The ICSC's conduct, alone, is not sufficient to establish an agreement under section 1. To show the existence of an agreement for section 1 purposes, 'a plaintiff must . . . [present] evidence that tends to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.'[38] In this case, that means 'Caruso must show an agreement among the executive board members, who make decisions on behalf of ICSC, to achieve an unlawful anticompetitive purpose.'[39] Evidence that the executive board communicated with the CEO about preventing Caruso from exhibiting at the hotel during RECon was sufficient to create a genuine issue of material fact.

Next the Court evaluated Caruso's section 2 claims and whether the ICSC was able to exercise market power through enforcement of its exclusivity clauses with the hotels surrounding RECon. The focus of the parties' arguments was on the proposed market definition. And while the market definition evolved over the course of the case, the Court found the market definition offered by Caruso's expert was sufficient to go to the jury. In particular, the Court credited the expert's hypothetical monopolist test (or SSNIP analysis). Using the SSNIP analysis and documentary evidence, the expert concluded 'that ICSC was able to raise the prices over seven percent, and in excess of its costs, on its RECon exhibitors without concern of losing customers.'[40] Although the ICSC attempted to show that the market definition was flawed by suggesting there were numerous other places and events at which Caruso could have met with potential clients, the Court was not convinced that the proffered alternatives were true substitutes, especially since there were a number of internal ICSC documents touting the uniqueness of RECon.[41] Despite noting that the

37 *North Am. Soccer League, LLC v United States Soccer Fed'n, Inc.*, 883 F.3d 32, 40 (2d Cir. 2018).

38 *Caruso Mgmt Co.* at 204.

39 *Id.* at 205.

40 *Id.* at 207.

41 *Id.* at 209.

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plaintiffs' market analysis was 'based more on documentary evidence [rather] than the rigorous economic modeling that is typical,' the Court found that 'whether ICSC exercised market power in a relevant market in a way that harmed competition' was a question for the jury.

Lisl Dunlop
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Lisl Dunlop has more than 25 years of experience in antitrust and competition issues, including counseling, litigation and transactions. Lisl guides clients through the antitrust-related aspects of mergers and acquisitions, joint ventures and other combinations, and sales and distribution matters. She also represents clients in antitrust agency investigations, and has represented major corporations in complex antitrust litigations.

She has significant experience advising leading US and multinational companies in a broad range of industries, including the media, technology and healthcare sectors. For her healthcare clients, Lisl provides antitrust and strategic advice in evaluating value-based payment initiatives, the establishment and operation of accountable care organizations and independent physician networks, financial and clinical integration issues, and other transactions and collaborations.

Lisl began her career in Australia, and in addition to the US, has also practiced in the UK. Her wide-ranging international experience includes appearing before US federal and state antitrust enforcement agencies, the European Commission, and UK and Australian antitrust authorities. Additionally, she has coordinated the multi-jurisdictional defense of transactions throughout the world. Lisl's experience in competition matters in a broad range of jurisdictions brings added value to clients that conduct business internationally and interact with different legal systems and regulators.

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Jetta Sandin is an antitrust associate in Axinn's Washington, DC office. Her practice focuses on antitrust and competition matters. Experienced in antitrust litigation, Jetta has represented clients in matters involving the Capper-Volstead Act, unfair trade practices and securities. She has also counseled clients on obtaining merger clearance from the DOJ and FTC.

Prior to joining Axinn, Jetta practised in the litigation department of a national law firm and as an attorney for a national defense contractor. In those positions, she served on the team that secured a complete defense verdict in a multibillion dollar jury trial and worked with the DOJ on a pre-complaint investigation. Jetta also worked for the Financial Industry Regulatory Authority as an advisor on federal securities laws and regulations. Jetta earned her JD at Vanderbilt University Law School. She holds an undergraduate degree in political science from Boston College.

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Global Competition Review named Axinn the 'Firm of the Year – Americas' for acting as global lead counsel in its representation of Ball Corporation in its $6.8 billion acquisition of Rexam, creating the largest aluminum can beverage company in the world. It also acted as global lead counsel for Dell in its $67 billion acquisition of EMC, the largest technology deal in history. The firm was nominated by *Global Competition Review* for 'Litigator of the Year,' 'Litigation of the Year' (*SawStop v Black & Decker*), 'Litigation of the Year - Cartel Defense' (*Auto Parts* MDL), 'Deal of the Year' (Dell's acquisition of EMC) and 'Dealmaker of the Year.'

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Providing a detailed dive into key antitrust decisions from across the US over the past year, separated by court or circuit, GCR's *US Courts Annual Review* is the first of our publications to delve into the regional differences in antitrust litigation in the US, as well as the national trends that bring them together.

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