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Second Circuit Affirms Dismissal of Sherman Act Claims Based On Failure to Allege a Plausible Geographic Market Definition

In *Concord Associates, L.P., et al. v. Entertainment Properties Trust, et al.*, No. 13-3933-cv (2d Cir. 2016), the United States Court of Appeals for the Second Circuit affirmed the dismissal of a complaint asserting claims under Sections 1 and 2 of the Sherman Act because of the plaintiffs' failure to allege a plausible geographic market.

The dispute arose over plaintiffs' purported plans to develop a resort and casino on the site of the former Concord Hotel in Sullivan County, New York. Plaintiffs, seven entities affiliated with the real estate developer Louis Cappelli, claimed that defendants, three groups of investors including Paul, Weiss clients Empire Resorts, Inc. and Monticello Raceway Management, Inc., "are all members of an anti-competitive scheme to undermine the plaintiffs' resort development project." Slip Op. at 6.

In the district court, defendants successfully moved to dismiss on multiple grounds, including that plaintiffs had not alleged a plausible relevant market. *Concord Associates, L.P. v. Entertainment Properties Trust*, 12 Civ. 1667, 2014 WL 1396524 (S.D.N.Y. Apr. 9, 2014). The district court subsequently denied plaintiffs' motion for reconsideration and for leave to file an amended complaint. *Concord Associates, L.P. v. Entertainment Properties Trust*, 12 Civ. 1667, 2014 WL 5643240 (S.D.N.Y. Nov. 3, 2014).

On appeal, the Second Circuit focused on the sufficiency of the alleged geographic market definition. In an opinion written by Judge Peter Hall, and joined by Judges Dennis Jacobs and Rosemary Pooler, the Court explained that "Courts generally measure a market's geographic scope, the 'area of effective competition,' by determining the areas in which the seller operates and where consumers can turn as a practical matter, for supply of the relevant product." Slip Op. at 11 (citations omitted). Here, the plaintiffs alleged a relevant geographic market of "the area within a radius of approximately 100 miles from the Town of Thompson, with a total population of more than 18-20 million people, of whom almost ninety percent reside in the New York City metropolitan area." *Id.* at 7.

The Court of Appeals found several faults with the alleged geographic market. In particular, the Court observed that "[c]onveniently for the plaintiffs, th[e] proposed market definition excludes gambling markets in Connecticut, Pennsylvania, and New Jersey that are well-known and accessible to residents of the NY Metro area." *Id.* at 14. Although those locations were just beyond the 100-mile radius of the alleged geographic market, the Court held that plaintiffs did not present a "plausible basis for explaining why an additional twenty-five miles makes the difference." *Id.*

The Court of Appeals also considered and rejected plaintiffs' argument that the Catskills region was a "unique" geographic market because of its "regional character." *Id.* The Court found that plaintiffs did not allege facts sufficient to show "why their proposed resort differs from the variety of other options for tourists to combine a gambling trip, access to natural resources, and other related activities available more or less the same distance from the New York Metro area." *Id.* at 15.

The Second Circuit also affirmed the District Court's denial of leave to amend because plaintiffs' proposed amended complaint did not cure the defects in plaintiffs' relevant market definition. *Id.* at 17-18.

This case is significant because it signals a willingness on the part of the Second Circuit to carefully consider the factual underpinnings of market definitions in Sherman Act cases at the pleadings stage. Indeed, in analyzing the sufficiency of the alleged geographic market, the Second Circuit noted that "[a]lthough market definition is a 'deeply fact-intensive inquiry' not ordinarily subject to dismissal at the pleadings stage, there is no 'absolute rule' against dismissal where the plaintiff has failed to articulate a plausible explanation as to why a market should be limited in a particular way." *Id.* at 12.

Defendants Empire Resorts, Inc. and Monticello Raceway Management, Inc. were represented by a Paul, Weiss team which included litigation partner Moses Silverman, who argued both the motion to dismiss in the district court and the Second Circuit appeal.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins
212-373-3183
ratkins@paulweiss.com

Craig A. Benson
202-223-7343
cbenson@paulweiss.com

Andrew C. Finch
212-373-3460
afinch@paulweiss.com

Kenneth A. Gallo
202-223-7356
kgallo@paulweiss.com

William B. Michael
212-373-3648
wmichael@paulweiss.com

Jane B. O'Brien
202-223-7327
jobrien@paulweiss.com

Jacqueline P. Rubin
212-373-3056
jrubin@paulweiss.com

Moses Silverman
212-373-3355
msilverman@paulweiss.com

Joseph J. Simons
202-223-7370
jsimons@paulweiss.com

Aidan Synnott
212-373-3213
asynnott@paulweiss.com

Associate Joshua D. Kaye contributed to this client memorandum.