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Foreign Airlines Move to Dismiss Rate-Fixing Litigation

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Last Friday, foreign cargo carriers filed motions to dismiss an air freight price-fixing suit brought by Schenker AG, the logistics division of Germany's national railway company, Deutsche Bahn, in the Eastern District of New York. *Schenker AG v. Societe Air France, et al.*, case number 1:14-cv-04711. In its complaint filed last August, Schenker alleged that seven foreign airlines conspired to fix surcharge rates for various air cargo routes to, from and within the United States. This suit is just the latest in a series of investigations and claims concerning anticompetitive behavior in the air cargo industry, which began in 2006 when the U.S. Department of Justice (DOJ), in conjunction with the European Commission and South Korea's Fair Trade Commission, organized raids of the offices of numerous air carriers around the world. Airlines have paid billions of dollars in fines to competition agencies throughout the world and nearly a billion more dollars in settlements to direct purchaser plaintiffs in a multi-district litigation in U.S. federal court.

Defendants All Nippon Airways Co., Ltd. and Cargolux Airlines International S.A. moved the district court to dismiss the action on the grounds of forum non conveniens under the Second Circuit's precedent in *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998). According to these defendants, Schenker's choice of forum should be afforded little deference because Schenker is a foreign corporation that was forum shopping, choosing the United States for its treble damages. Instead, defendants argued that Germany was an adequate alternative forum, especially given that Schenker is owned by the German government and that many of the witnesses and documents are located in Europe. In addition, defendant Qantas filed a separate motion to dismiss on the basis that Schenker filed its claims after the Clayton Act's four year statute of limitations had run. Qantas argued that if Schenker had performed the requisite due diligence, then it would have been aware of its claims on February 15, 2006, the day after which it was reported that the DOJ organized the raids of the airlines. Even considering that the statute of limitations was tolled until May 2011 when Schenker opted out of the middle-district class action against the airlines, Qantas contended that Schenker had to file its complaint before June 1, 2014, which the plaintiff failed to do.

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