

## Litigators of the Week: Cahill Gets a Defense Verdict for Credit Suisse as Last Bank Standing in Foreign Exchange Class Action

While 15 other banks paid plaintiffs a total of more than \$2.3 billion to settle claims they conspired to manipulate the \$5 trillion-per-day foreign exchange currency market, Herbert Washer, Edward Moss and Tammy Roy of Cahill Gordon & Reindel defended Credit Suisse at trial and won.

By Ross Todd  
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It wasn't pretty. Here's what Credit Suisse was looking at heading to trial on claims the bank conspired with 15 other players to manipulate spreads in the \$5 trillion-per-day foreign exchange market: A certified class, a stack of guilty pleas from other banks and traders who admitted to wrongdoing, another stack of traders set to take the Fifth when questioned about what they did, and reams of chatroom transcripts with seemingly incriminating communications, including one from a Credit Suisse trader saying "Let's sign a pact on spreads."

Gulp. All that in mind, it's easy to understand why Credit Suisse was the last bank standing at trial. Other banks shelled out a total of more than \$2.3 billion to settle. But this week's Am Law Litigation Daily Litigators of the Week—**Herbert Washer, Edward Moss and Tammy Roy** of **Cahill Gordon & Reindel**—defended Credit Suisse at trial. Last week, 10 jurors in Manhattan federal court [sided with them and their client](#).

**Litigation Daily: Who was your client and what was at stake?**

Herb Washer: Our client was Credit Suisse, and the stakes were very high. We were fortunate in that we had previously convinced the court at the class certification stage that plaintiffs couldn't pursue damages on a class-



**L-R: Herbert S. Washer, Edward Moss and Tammy L. Roy of Cahill Gordon & Reindel.**

wide basis. But if the jury had found that Credit Suisse participated in a conspiracy, we expected a significant number of class members to pursue individual lawsuits seeking damages, which plaintiffs previously had suggested were upwards of \$20 billion after trebling.

**Who was on your team and how did you divide the work?**

Eddie Moss: We had a truly incredible team—brilliant, hard-working, and selfless. Our partners **Anirudh Bansal** and **Jason Hall**, in particular, played critical roles. Jason did a fantastic job with several key

witnesses and also led many aspects of the pretrial briefing and trial preparation. Anirudh's background as a federal prosecutor was huge for us, given that much of civil conspiracy law derives from the criminal law, and that we had to grapple with the Fifth Amendment invocations and guilty pleas. **Miles Wiley** and **Margaret Barone** also deserve special mention; they helped lead the team and contributed to every single aspect of the case. Our other terrific team members were **Helena Franceschi**, **Elai Katz**, **David Wishengrad**, **Isabella Abelite**, **Cyrus Bordbar**, **Connor Carroll**, **Kayla Gebhardt**, **Phil Golodetz**, **Alice Kim**, **David Montgomery**, **Paul Morales**, **Lauren Perlgut**, **Jason Rozbruch**, **Sophia Slade-Ilaria**, **Ivan Torres** and **Emily Tu**. As for dividing up the work, that was easy because everyone volunteered to pitch in however they could, and each team member was selfless at every step. We are so appreciative of this award, but it really should go to the entire trial team.

**How did you view being the last defendant standing at trial in this case? I could see it as a benefit in terms of clarifying your defense themes, but I could also see it as a challenge in terms of having jurors wonder why you're the lone defendant.**

Moss: This is a great question and something we went back and forth over for months. Ultimately, we concluded that being the lone defendant was a positive for a couple of reasons. First, although we love collaborating with other firms, this gave us the opportunity to try the case exactly as we wanted to. Second, being the last defendant was very much consistent with our themes that (i) Credit Suisse was a disruptor in the industry, a bank with relatively small market share in FX that aimed to take customers away from its competitors with great service and better pricing (in other words, it had no incentive to enter into a conspiracy); and (ii) the guilty pleas did not involve Credit Suisse. Also, Judge Schofield instructed the jury that they should not consider the fact that 15 other banks had been sued but were no longer defendants as part of their deliberations. So to the extent there was any negative inference that

the jury might draw, the court's instructions were quite helpful.

**During opening statements, you analogized the plaintiffs' theory of the alleged conspiracy in the foreign exchange market to commuting on New York's expressways. Can you explain the basics of that analogy and how you landed on it?**

Moss: One of my mentors always said that arguing by analogy is difficult because the analogy is almost never perfect, and someone in the courtroom—whether opposing counsel or the fact-finder—will notice and be able to pick it apart. But given how complicated this case was, we knew that we needed to use graphics, analogies, and whatever other tools we could to effectively convey our themes to the jury during the course of a relatively short trial. We had long discussed the concept of cars speeding on the highway to illustrate that just because several people are doing the same thing, it does not mean that they have entered into a massive agreement to do that thing. But the concept of speeding cars alone didn't quite capture it because we wanted to convey the concept that even a bunch of little, isolated agreements in private chat rooms, if proven, did not mean that every trader in every chat room had agreed with every other trader. So we came up with the concept of carpools. A carpool is a private group just like a private chat room, and it makes sense that three or four people in a given carpool might enter into an agreement to speed on a given day without, of course, entering into that same agreement with all the other carpools on the road on every other day. We kept discussing and refining the analogy right up until the day before the trial.

**Here the plaintiffs could point to criminal plea deals involving other banks and non-Credit Suisse traders, as well as the non-testimony of traders who invoked their Fifth Amendment rights. How did you attempt to thread the needle between acknowledging misconduct in the industry while making the case that your client wasn't part of a massive 16-bank conspiracy?**

Tammy Roy: There were clearly difficult facts, including the guilty pleas and Fifth Amendment invocations, that have long served as the centerpiece of plaintiffs' case and which, on a superficial level, may have given plaintiffs leverage at certain stages of the litigation. But we also knew that there was a deeper and more compelling story for Credit Suisse that put these difficult facts into their appropriate context and distinguished the conduct underlying the guilty pleas from the far-reaching conspiracy plaintiffs had alleged here. We were confident that a jury could and would understand that story if we were given the opportunity to tell it.

**The plaintiffs spent a lot of time dealing with the chatroom transcripts including focusing on one where a Credit Suisse trader suggested "Let's sign a pact on spreads" to traders at two other banks. How did you go about defusing that potentially damaging evidence?**

Washer: Yes, that was one of our biggest challenges. Without context, that phrase and others like it were bound to sway a jury. But we believed that if we presented the full conversation, and the circumstances in which the conversation took place, the jury would come to view these kinds of statements as bluster or idle chatter, rather than some grand conspiracy. So in the "let's sign a pact" conversation, for example, it was clear that the traders had no intention of actually entering into some sort of agreement, and were simply bemoaning the current state of the market. Fortunately, the jury seems to have been very thoughtful in assessing the evidence, and was able to make these kinds of distinctions.

**The jury still found that there was an underlying conspiracy here, but that Credit Suisse was not a part of it. Were you at all surprised by that?**

Roy: Interestingly, the jury didn't have an opportunity to define the scope of the conspiracy they found, since the verdict form required them to do that only if they found that Credit Suisse had participated. So we'll never know what conspiracy the jury believed

existed—it could have been something quite narrow, involving only a few traders over a very short period of time. In any event, our focus was on convincing the jury that Credit Suisse hadn't participated in any conspiracy, regardless of the scope.

**What's important here for other banks and class action defendants?**

Washer: For many years, there has been an operating assumption that defendants in class actions, and banks in particular, would almost never take cases like this to trial due to the potentially significant exposure and the perception that juries don't view banks as terribly sympathetic. I'm hopeful that the outcome here demonstrates that these cases can be tried, that juries are capable of looking beyond the headlines and personalities to get to the merits, and that clients, like Credit Suisse, who have both confidence in their position and the determination to defend, can win.

**What will you remember most about this matter?**

Roy: I will remember most our amazing team and how well the team worked together to tell our client's story and to achieve a great result. This was a case that was vigorously defended for almost 10 years and the team was far bigger than the three of us. Our success at trial was the result of years of hard work by many people, including our partners, Jason Hall and Anirudh Bansal, an outstanding group of additional Cahill partners, counsel and associates, and an exceptional group of in-house counsel at Credit Suisse. I am proud to be among them.

Moss: I will remember that we got the verdict almost exactly on my one-year anniversary at Cahill. Having this experience with my new partners and other colleagues just reinforced how happy and lucky I am to have had an opportunity to join this incredible firm.

Washer: I'll remember the night before [closing arguments](#), when our whole team was together working on the themes and slides for our closing. I was so grateful for the talent of our team and the effort everyone had put in and felt like we had given ourselves and the client a real chance to win.