UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VISA CHECK/MASTERMONEY ANTITRUST LITIGATION	**MASTER FILE NO. CV-96-5238 (Gleeson, J.) (Mann, M.J.)**
This Document Relates To All Actions:	

CLASS COUNSEL'S PETITION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS AND EXPENSES

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Class Counsel, consisting of Lead Counsel, Constantine & Partners ("C&P"), and the twenty-nine other law firms who assisted C&P in successfully litigating this case, respectfully submit this Petition for Attorneys' Fees and Reimbursement of Costs and Expenses, along with the following declarations in support of Class Counsel's petition:

- the Declaration of John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia Law School, dated August 17, 2003 ("Coffee Dec.");
- the Declaration of Professor Arthur R. Miller, Bruce Bromley Professor of Law at Harvard Law School, dated August 18, 2003 ("Miller Dec.");
- the Declaration of Professor Harry First, Director of New York University Law School's Trade Regulation Program, dated August 13, 2003 ("First Dec.");
- the Declaration of Willard P. Ogburn, Executive Director of the National Consumer Law Center, dated August 6, 2003 ("Ogburn Dec.");
- the Declaration of Professor Franklin M. Fisher, Jane Berkowitz Carlton and Dennis William Carlton Professor of Economics at the Massachusetts Institute of Technology, dated August 14, 2003 ("Fisher Dec.");
- the Declaration of Lloyd Constantine, managing partner of Constantine & Partners, dated August 17, 2003 ("Constantine Dec."); and
- the Declaration of Stacey Anne Mahoney, partner of Constantine & Partners, dated August 18, 2003 ("Mahoney Dec.").[1]

[1] References herein to "Ex. __" refer to exhibits attached to the Constantine Dec. References herein to "App. Ex. __" refer to exhibits attached to the Appendix to this Petition. Attached as App. Ex. 1 are copies of the unreported decisions or court transcripts cited herein.

PRELIMINARY STATEMENT

By any measure, this is a case of historic proportions.

Plaintiffs' compensatory relief alone -- $3.05 billion in cash and roughly $800 million in mandated price reductions over the next five months -- is the largest in any federal court class action in history. It is more than three times the recovery in any other antitrust class action. However, more important than the compensatory relief, plaintiffs have recovered injunctive relief presently valued most conservatively at $25 billion over the next ten years. The injunction will change an entire industry to the benefit of consumers and merchants. The total package of relief has been heralded as "groundbreaking," "stunning," "the stuff of dreams," "revolutionary," and "a grand slam for the merchants." *See infra*, notes 42-46.

Class Counsel went far beyond taking the normal risks associated with typical class actions. This was an extremely difficult case, outside the mainstream of established antitrust law, and viewed with much skepticism by the industry. Federal and state antitrust agencies declined to bring this case, or even investigate the challenged practices, despite the urging of plaintiffs and Constantine & Partners. Visa and MasterCard and their lawyers had a proven track record of being tough litigators who successfully defended antitrust cases. There was no parallel government investigation or proceeding to assist Class Counsel. In fact, subsequent government actions piggybacked on this case. Despite these formidable risks, for a period of six-and-a-half years, C&P devoted more than 50% of its firm resources to this case, a figure that rose to more than 70% in the year-and-a-half prior to trial. Professors John Coffee and Arthur Miller, noted experts in the area of class action fee awards, described this level of risk as unprecedented.

This case was massive on every metric: six-and-a-half years of hard-fought litigation; 5

million pages of documents; almost 400 depositions; discovery involving roughly 200 non-parties; 21 experts and 54 expert reports; 18 briefs on class certification; 16 briefs and almost 1,800 exhibits on summary judgment; approximately 350 procedural court submissions; 31 motions *in limine* and 3 *Daubert* motions; months of intense mediation and settlement meetings; and a Pretrial Order that identified 230,000 pages of trial exhibits, 730 trial witnesses, and more than 17,000 deposition designations.

For this historic and record setting result, achieved in a colossal effort involving unprecedented risk, Class Counsel request that the Court award it 18% of the present value of the compensatory relief recovered in this case ($3,383,400,000).[2] This amounts to 2.14% of the present value of the most conservative estimate of the total relief recovered by the class ($28,459,400,000).[3] Either figure is well below the 20%-30% fee typically awarded for class action settlements, and in particular, well below the percentages recently awarded in other so-called "mega-fund" antitrust settlements. Yet, as Professor Miller states, none of these cases approach this case in terms of the result achieved, risk assumed, or effort undertaken by Class Counsel:

> Because there never has been an antitrust class action as complex, as risky, and as hard-fought that has led to similar beneficial results for the class and the public at large, no reported decision concerning a mega-fund case actually can serve as a "benchmark"

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[2] This amounts to 15.84% of the non-discounted total compensatory relief ($3,844,400,000). Class Counsel also seek $18,716,511.44 for the reimbursement of the reasonable costs and expenses incurred by plaintiffs and counsel in this case. *See, infra* page 69.

[3] According to Dr. Fisher, the present value of the injunctive relief over the next ten years ranges between $25 billion and $87 billion. While Dr. Fisher describes several scenarios in this range which he considers to be plausible, the scenario he considers to be most plausible values the injunction at $70 billion. Fisher Dec. at ¶ 7b, 43. Class Counsel's requested fee amounts to less than 1% of this figure.

for appraising this fee and expense application.[4]

Professor Coffee summarized his view of Class Counsel's effort as follows:

> [T]his case presents the clearest example that I have ever seen of a "You-bet-your-firm" case in which the principal law firm that carried this case forward for plaintiffs for over six and one half years of uncompensated litigation was forced to risk its survival as a firm on the outcome of a single, very high-risk case. Although I have testified in several dozen large class actions regarding fee awards, I have encountered no other case in which the principal law firm devoted the majority of its attorneys' hours over several years to the prosecution of a single action on a contingent fee basis. Indeed, I would have doubted that any firm could have accepted such a level of risk. Here, however, one firm did, persisting over six years and finally achieving not simply an exemplary recovery, but a record one.[5]

Professor Harry First echoed this sentiment about Class Counsel's achievement here:

> I conclude that plaintiffs' counsel did an extraordinary job representing the class in this extremely difficult and highly risky case. The settlements they have achieved are historic. It is beyond anything that I might have predicted when this litigation was commenced and it is hard for me now to imagine any better result.[6]

BACKGROUND

I. PRE-COMPLAINT HISTORY

In 1991, Lloyd Constantine lectured to a group of bankers and merchants on various antitrust topics. Among the issues Mr. Constantine addressed were the competitive effects of Visa and MasterCard's common membership and ownership and their Honor All Cards ("HAC") tying arrangements which required merchants who accepted Visa and MasterCard credit cards to

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[4] Miller Dec. at ¶ 26.

[5] Coffee Dec. at ¶ 2.

[6] First Dec. at ¶ 77.

also accept their off-line signature debit cards. One attendee of the conference was the Chief Executive Officer of Limited Credit Services, the payment systems subsidiary of The Limited Inc. Mr. Constantine and his firm were subsequently retained by The Limited. Constantine Dec. at ¶¶ 20-22.

During the period 1992 through November 1995, Mr. Constantine provided The Limited with numerous legal, economic, and business analyses of the HAC tying arrangements, antitrust developments in the payments industry, and other matters relating to what ultimately became this case. Mr. Constantine and his firm were not paid for the extensive time and effort they spent on these issues. Nevertheless, the hours they worked during this time period have not been included as part of Class Counsel's total lodestar.[7] *Id.* at ¶ 23.

In November 1995, C&P was contacted by Wal-Mart, and with The Limited's consent, C&P provided Wal-Mart with briefings on these antitrust issues. Shortly thereafter, Wal-Mart and The Limited retained C&P to draft a complaint against Visa and MasterCard challenging their HAC tying arrangements and related anticompetitive conduct. C&P also was directed to persuade the Federal Trade Commission (the "FTC"), the Antitrust Division of the United States Department of Justice (the "DOJ"), or one or more State Attorneys General ("AG's") to bring a government lawsuit. *Id.* at ¶¶ 24-25.

Over the next eleven months, C&P prepared the litigation, drafted numerous iterations of the complaint, and retained economic experts. During this time, C&P also met with the FTC, DOJ, and various State AG's providing them with extensive briefings, documentation, and legal analyses. The agencies declined to take any action against Visa or MasterCard. On October 25,

[7] Class Counsel's lodestar covers the period November 1, 1995 through July 31, 2003.

1996, C&P filed the original complaint on behalf of The Limited and Wal-Mart. *Id.* at ¶¶ 26-27, 31.

II. THE LAWSUIT

Shortly after C&P filed the complaint, numerous "follow-on" suits were filed and ultimately consolidated in this Court with C&P appointed as lead counsel. In 1997, the lead action was amended to add additional C&P clients Sears, Circuit City, Safeway, National Retail Federation and International Mass Retail Association as plaintiffs, and to add MasterCard as a defendant. In January 1998, C&P client Food Marketing Institute was consolidated into the lead action. In May 1999, the operative Second Amended Consolidated Class Action Complaint was filed. *Id.* at ¶¶ 31-33.

Plaintiffs' case involved two basic claims. First, plaintiffs alleged that defendants' HAC tying arrangements constituted both *per se* and "rule of reason" violations of Section 1 of the Sherman Act. Second, plaintiffs alleged that defendants used their respective tying arrangements and other anticompetitive conduct in an attempt and conspiracy to monopolize the debit card market in violation of Section 2 of the Sherman Act. Plaintiffs alleged that, as a result of defendants' anticompetitive conduct, merchants were forced to pay supracompetitively priced interchange fees amounting to hundreds of millions of dollars of overcharge damages. The claimed overcharges rose to billions of dollars during the six-and-a-half year course of the litigation.

The case was originally met with skepticism in the industry. This was apparently due to the extremely difficult antitrust claims plaintiffs asserted, and defendants' long record of

successfully defending antitrust challenges.[8] As The American Banker reported shortly after the original complaint was filed: "One legal observer, who did not want to be named, said the Wal-Mart and Limited claims against Visa will be difficult to prove 'because the case does not fit into the traditional antitrust box. Most antitrust cases fail.'"[9]

Similarly, citing one federal antitrust enforcer who "does not expect the merchants to have an easy time proving their case," Bank Network News reported that "many believe the merchants face an uphill fight."[10] Likewise, Bank Technology News reported that "[s]ome observers are not optimistic about the retailers' chances:"[11]

> Paul Martaus, an electronic payments industry consultant based in Clearwater, FL, believes the retailers chose "the wrong precedent," in making a case of antitrust issues. Martaus says Visa is not really violating antitrust implications because it is setting prices through an interchange mechanism. "The stores may say it's unfair, but it's monopolistic case law that's already been looked at and, in the past, it has been decided that while it's a closed system, it's not antitrust."
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> . . .
>
> Other market experts also believe Visa will not lose the case. "It's the linchpin of taking the Visa brand. If you take one Visa card, you take them all," says one industry analyst who requested

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[8] The cases successfully defended by defendants include *National Bankcard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 596 F. Supp. 1231 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir.), *reh'g denied*, 785 F.2d 1037 (11th Cir.), *and cert. denied*, 479 U.S. 923 (1986); *SouthTrust Corp. v. Plus Sys., Inc.*, 913 F. Supp. 1517 (N.D. Ala. 1995); *SCFC ILC, Inc. (Mountainwest) v. Visa U.S.A. Inc.*, 819 F. Supp. 956 (D. Utah 1993), *aff'd in part, rev'd in part*, 36 F.3d 958 (10th Cir. 1994), *and cert. denied*, 515 U.S. 1152 (1995); *Nordstrom, Inc. v. Visa U.S.A., Inc.*, No. C83-448 (W.D. Wash. 1983).

[9] App. Ex. 2 (Lisa Fickenscher, *2 Retail Giants Sue Visa Over Having to Take Debit Cards*, American Banker, Oct. 31, 1996, at 2).

[10] App. Ex. 3 (*Merchants Go To Bat For On-Line Debit*, Bank Network News, Nov. 25, 1996, *available at* 1996 WL 11829649).

[11] App. Ex. 4 (Joanna Kolor, *The Online-Offline Debit Card Debate*, Bank Technology News, Jan. 1, 1997, *available at* 1997 WL 9510979).

> anonymity. "If the retailers are successful at all, they may get them to lower the fees, but that's a very big 'if.' Frankly, I wouldn't count on it."

Id.

This skepticism persisted even after this case was certified as a class action. Card News quoted the views of Anita Boomstein, an antitrust partner at Hughes, Hubbard & Reed, as follows:

> "But I think realistically in this case, the plaintiffs have a very difficult burden of proof [] and they would face that same burden of proof whether it was class or merely an action on behalf of the individual retailers that banded together to bring the suit. I think as a practical matter that the ultimate outcome is not necessarily going to be different."[12]

Professor First sheds some light on the reasons behind the industry's widespread skepticism:

> As I have already indicated, the antitrust case plaintiffs filed against Visa and MasterCard was a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes. Within the four corners of this case alone it is apparent to me that a successful result was far from assured at the time plaintiffs filed their suit.

First Dec. at ¶ 64. He further points to defendants' impressive track record in defending antitrust challenges: "Knowing the track record of both Visa and MasterCard in prior antitrust litigation, as well as the abilities of their lawyers, would make anyone even more cautious about filing this antitrust case." *Id.* at ¶ 74.

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[12] App. Ex. 5 (*Class Action Certification Granted In Lawsuit*, Card News, Mar. 8, 2000, *available at* 2000 WL 4447399).

III. DISCOVERY

A. Documents

In total, more than five million pages of documents were produced in this case, the bulk of which came from defendants' files. Class Counsel's meticulous, multi-level analysis of this sea of paper formed the basis of virtually every success that they achieved in this case. This analysis was aided by Class Counsel's use of cutting edge litigation support technology which assisted them in saving attorney time and effort.[13]

1. Defendants' Productions

In early 1998, MasterCard and Visa produced more than three million pages of documents in New York and Berkeley. These productions followed more than six months of negotiations among the parties, the frequent intervention by Magistrate Judge Mann, and hundreds, if not thousands, of hours of attorney and paralegal time. Constantine Dec. at ¶¶ 38-40.

C&P trained and supervised a team of twenty-two lawyers from C&P and other firms to review MasterCard's production. These attorneys prepared spreadsheets describing the documents they reviewed. Class Counsel initially selected for scanning 600,000 pages from MasterCard's original production. The entire process took months and thousands of hours of attorney and paralegal time. Review of the Visa production mirrored the MasterCard effort. C&P led a team of 21 lawyers to Berkeley to review and summarize the production. Class Counsel initially selected for scanning 700,000 pages from Visa's original production. *Id*. at ¶¶

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[13] *See* App. Ex. 12 (Paul Neale, *Latest Technology Was Wired for the Visa/MasterCard Trial*, New York Law Journal, at T2).

39-40.

Once Class Counsel had scanned the 1.3 million pages of documents from defendants' original productions, they sent the documents to an outside vendor for coding of basic bibliographic information such as the author, names in text, date, and document type. Then Class Counsel performed a more substantive review of the documents. Over a six-month period, every page of these documents was reviewed at C&P by twenty-five attorneys working under C&P's supervision. The documents were prioritized and coded for issues relevant to the case. This initial substantive review laid the groundwork for the preparation of depositions, substantive motions, and ultimately, trial. In the summer of 1999, the parties agreed to supplement their original productions. Defendants produced an additional 820,000 pages of documents in this production. *Id.* at ¶¶ 41-42, 45.

2. Plaintiffs' Productions

Concurrent with defendants' original productions, plaintiffs produced 340,000 pages of documents in response to defendants' extremely broad document demands and interrogatories: Visa served five sets of discovery requests with a total of 1,530 document demands and 1,560 interrogatories; MasterCard served a set of discovery requests with a total of 1,863 document demands and 588 interrogatories. Class Counsel searched the files of more than 400 custodians at almost 100 locations throughout the United States. In 1999, Class Counsel supplemented their original production with 150,000 additional pages of documents collected from the files of more than 120 custodians. *Id.* at ¶¶ 37, 43, 45.

3. Non-Party Productions

Non-party discovery involved virtually every part of the payments industry. In addition to

American Express and Discover, nearly 200 non-parties -- including banks, processors, consultants, vendors, and regional debit networks -- were served with subpoenas resulting in the production of more than 450,000 pages of documents. *Id.* at ¶ 46.

B. Depositions

The size and scope of the document discovery was overshadowed by the size and scope of deposition discovery. Plaintiffs repeatedly attempted to limit the number and length of depositions to be taken but defendants successfully opposed plaintiffs' efforts.[14] What followed was perhaps the largest number of depositions taken in a single case: approximately 400 depositions taken over 500 days, the vast majority of which occurred during a fifteen month period, at locations throughout the United States. 69% of these depositions were taken or defended by six C&P attorneys. Overall, Class Counsel staffed approximately 75% of these depositions with only one attorney. *Id*. at ¶¶ 48-49.

C. Experts

The parties collectively submitted 54 reports from 21 experts. Six of these were plaintiffs' experts,[15] and 15 were defendants' experts.[16] The depositions of the 19 merits experts were taken during a three-and-a-half week period in May 2000, at the same time the parties were

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[14] *See, e.g.,* App. Ex. 40 (Letter dated April 14, 1999 from Keila Ravelo to Judge Mann regarding defendants' efforts to extend discovery).

[15] Plaintiffs' experts included Dennis Carlton (class certification); Frank Fisher (liability and damages); Ken Morrison (Canada); Jim Brown (consumer); Phil Johnson (survey); and Joel Steckel (brand). Mr. Johnson and Mr. Steckel were rebuttal experts.

[16] Defendants' experts included the following seven economists: Richard Schmalensee (class certification and initially, liability), George Benston (liability), Ben Klein (liability), Orley Ashenfelter (damages), Bruce Stangle (damages), John Danforth (Canada), and Lewis Mandell (industry historian); as well as the following additional experts: Patrick Foster (Canada), Derek Fry (Canada), Gerri Detweiler (consumer), John Hauser (survey), David Stewart (survey), Kevin Keller (brand), Stewart Myers (credit industry), and Russell Peppet (cost accounting).

preparing their voluminous summary judgment submissions. Supplemental depositions of 5 of these experts were taken in October 2002. The bulk of plaintiffs' substantive expert work, including preparation of the reports, defending depositions, responding to defendants' expert reports, taking defendants' experts' depositions, preparing plaintiffs' experts for trial, and preparing cross-examination of defendants' experts for trial, was principally handled by two C&P attorneys. Constantine Dec. at ¶¶ 7, 77-79.

IV. SUBSTANTIVE MOTIONS

A. Class Certification

Plaintiffs moved for class certification in April 1999, which defendants opposed on several Rule 23 and *Daubert* grounds. The Court granted plaintiffs' motion in February 2000 concluding that "[w]ithout class certification, there are likely to be numerous motions to intervene, and millions of small merchants will lose any practical means of obtaining damages for defendants' allegedly illegal conduct." *In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000). The Court recommended that the Second Circuit grant an interlocutory appeal of its class certification decision because:

> This litigation poses enormous financial risks for the defendants, risks that are obviously increased drastically by certification of the class. Moreover, this certification motion raises substantial and novel questions involving the standards a district court should apply in evaluating a class motion and the interaction of those standards with antitrust principles. [*Id*. at 89.]

The Second Circuit granted defendants' Rule 23(f) petition in March 2000. Numerous banking associations filed a brief *amicus curiae* in support of defendants' appeal. In October 2001, the Second Circuit affirmed this Court's class certification decision concluding that "this is

precisely the type of situation for which the class action device is suited." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001). The District Court and Court of Appeals opinions have become leading precedent on certifying class actions and the standards for challenging experts at the class certification stage.[17]

In October 2001, the Second Circuit denied defendants' petition for rehearing and rehearing *en banc*. In April 2002, after obtaining an *ex parte* extension, defendants petitioned the Supreme Court for a writ of *certiorari*. Plaintiffs opposed the petition in less than three weeks -- eleven days before their opposition was due -- to avoid what would have likely amounted to substantial further delay of the case. More than two dozen banking and manufacturing associations submitted briefs *amicus curiae* in support of defendants' petition.[18] The Supreme Court denied defendants' petition in June 2002.

In total, the four rounds of class certification submissions involved 18 briefs, including a *Daubert* motion. Plaintiffs' briefs to the District Court and Second Circuit were principally written by three C&P attorneys. Plaintiffs' Supreme Court brief was principally written by two

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[17] A recent search in Westlaw found that the District Court and Court of Appeals class certification decisions in this case have been cited by 65 other cases. *See also*, A. Conte and H. Newberg, *Newberg on Class Actions* §18:30, at 118-25 (4th ed. 2002) (providing exhaustive discussion of class certification decision in this case); App. Ex. 39 (Cari Dawson, *Combating Class Certification Experts: Potential Strategies for Defendants*, 72 U.S. Law Week 2051 (August 5, 2003) (noting Court of Appeals decision "is instructive in examining potential strategies for responding to experts at the class certification stage").

[18] These organizations included The American Bankers Association, The Consumer Bankers Association, The Financial Services Roundtable, The Independent Community Bankers of America, America's Community Bankers, The Delaware Bankers Association, The New Mexico Bankers Association, The New York Bankers Association, The New York Clearing House Association LLC, The North Carolina Bankers Association, The Oklahoma Bankers Association, The South Carolina Bankers Association, The Alliance of Automobile Manufacturers, American Chemistry Council, American Council of Life Insurers, American Insurance Association, American Petroleum Institute, Association of American Railroads, California Bankers Association, European-American Business Council, The Fertilizer Institute, Institute of International Bankers, Mortgage Bankers Association of America, Pharmaceutical Research and Manufacturers of America, and the Texas Bankers Association.

C&P attorneys. Defendants' efforts to overturn this Court's original class certification decision delayed this case for almost two-and-a-half years (*i.e.,* from the original firm trial date of November 27, 2000 to the actual trial date of April 28, 2003).[19]

B. Summary Judgment

During the summer of 2000, the parties moved for summary judgment on virtually every issue in the case. In December 2002, over plaintiffs' objection, the parties supplemented their original motions to address industry developments arising since the original summary judgment submissions were made. In total, plaintiffs submitted six briefs totaling more than 200 pages; 1,366 evidentiary exhibits comprising more than 16,000 pages; two Rule 56.1 statements totaling 170 pages; 10 declarations, and hundreds of additional pages responding to defendants' Rule 56.1 statements and various evidentiary objections defendants made to virtually every one of plaintiffs' exhibits. Plaintiffs' summary judgment briefs were principally written by three C&P attorneys.[20] Constantine Dec. at ¶¶ 80, 82, 84, 86.

On April 1, 2003, the Court denied defendants' eleven motions for summary judgment in their entirety, and granted six of plaintiffs' summary judgment motions. *In re Visa Check/ MasterMoney Antitrust Litig.*, No. 96-CV-5238, 2003 WL 1712568 (E.D.N.Y. Apr. 1, 2003). The Court granted plaintiffs summary judgment on the following issues: (i) debit cards and credit

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[19] The original trial date was ultimately rescheduled only after "the prospect of further review of the class certification order (either by the panel, the *en banc* Court or the U.S. Supreme Court) no longer exists (either because counsel no longer intend to seek such review or because the time for doing so has expired . . ."). App. Ex. 6 (October 26, 2001 Order of Judge Gleeson).

[20] Defendants submitted an equally voluminous set of summary judgment materials including: ten briefs totaling 250 pages; approximately 400 exhibits; five Rule 56.1 statements totaling approximately 110 pages; 28 declarations; a motion to strike plaintiffs' Rule 56.1 statement, and hundreds of pages of objections to plaintiffs' exhibits. *Id.* at ¶¶ 81, 83, 85, 87.

cards are distinct products; (ii) credit and charge card services to merchants constitutes a relevant antitrust market; (iii) Visa has market power in the market for credit and charge card services to merchants; (iv) defendants tied their credit card services to their debit card services; (v) debit card services to merchants constitutes a relevant antitrust market; and (vi) defendants' tying arrangements affected a not insubstantial amount of commerce.[21]

Impartial observers characterized plaintiffs' summary judgment victory as "stunning,"[22] "almost unheard-of,"[23] and "'nearly unprecedented' in an antitrust case of this kind."[24] The American Banker quoted antitrust lawyer Mark Ostrau as follows: "'This is extremely rare. In antitrust you almost always assume a summary judgment victory is for the defense.'"[25] Visa acknowledged that "courts rarely grant summary judgment in cases like this . . . ."[26]

C. Motions *In Limine*

On April 14, 2003, two weeks before the start of trial, defendants made 25 motions *in*

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[21] In denying defendants' motions, the Court found that: (i) plaintiffs' allegations of predatory or anticompetitive conduct, alleged as part of their Section 2 claims, were "factually-supported;" (ii) plaintiffs made a "threshold showing" that there was a dangerous probability that defendant Visa, individually, would achieve monopoly power in the debit card services market; (iii) plaintiffs presented direct and circumstantial evidence of a conspiracy; and (iv) plaintiffs "have presented a sufficiently compelling (and factually-supported) theory of damages . . . ." *Id.* at *6-8.

[22] App. Ex. 7 (Kara Scannell and John R. Wilke, *Merchants Advance in Card Suit,* The Wall Street Journal, Apr. 2, 2003, at C10) (David Balto, former Director of Policy at the FTC's Bureau of Competition, "called the ruling 'a stunning victory, in which the judge has effectively decided more than two-thirds of the case, leaving Visa and MasterCard relatively restricted on what defenses they can make.'").

[23] App. Ex. 8 (W.A. Lee, *Will Ruling Shake Banks' Faith in Visa, MasterCard?*, American Banker, Apr. 7, 2003, at 5) ("Pretrial nods to the plaintiffs in this type of antitrust case are almost unheard-of, lawyers said.").

[24] App. Ex. 9 (Karen Donovan, *Visa's High-Stakes Fight to the Finish*, BusinessWeek Online, Apr. 29, 2003, at 2).

[25] App. Ex. 8 at 5.

[26] App. Ex. 10 (*Wal-Mart Trial*, CardFlash, Apr. 2, 2003, at 1) ("Visa USA Statement by Daniel Tarman, Vice President: 'While courts rarely grant summary judgment in cases like this . . . .'").

limine (one with 4 distinct sub-motions) and 3 *Daubert* motions. Plaintiffs made 6 motions *in limine*. The Court-ordered schedule gave the parties one week to respond to what effectively was 37 motions. Plaintiffs responded to all 31 motions by the April 21 deadline. Of the 10 motions it ultimately decided prior to the preliminary settlements, the Court denied 7 of defendants' motions and granted one, and granted two of plaintiffs' motions. This effort, supervised by C&P and Hagens Berman, involved 17 attorneys. One C&P attorney wrote 14 of these opposition briefs during this one week period. Constantine Dec. at ¶¶ 140-42.

D. Other Substantive and Procedural Motions

In addition to their successes on class certification, summary judgment, and the motions *in limine*, Class Counsel prevailed on virtually every substantive motion during the case. For example, Class Counsel successfully opposed Visa's assertion of privilege over a document prepared by Visa's consultant, Andersen Consulting, that analyzed how Visa might respond to an elimination of the HAC tying rules.[27] C&P successfully opposed defendants' efforts to dismiss Wal-Mart because of alleged discovery violations. C&P successfully opposed MasterCard's Rule 11 motion against Wal-Mart and its efforts to preclude the operative Second Amended Consolidated Class Action complaint. Class Counsel also successfully opposed MasterCard's eleventh-hour attempt to sever plaintiffs' case against Visa and MasterCard. Constantine Dec. at ¶¶ 33, 93-100, 134-35.

The parties also made roughly 350 "voluminous" discovery/procedural submissions to the

[27] This document confirmed in extraordinary depth and detail plaintiffs' damages methodology which had been the subject of intense attack by Visa in the summary judgment proceedings.

Court which, as the Court remarked, inundated the Court "almost on a daily basis."[28] Hundreds of additional procedural disputes were resolved by the parties without judicial intervention, but with the expenditure of thousands of hours of attorney time. Constantine Dec. at ¶ 7.

V. TRIAL PREPARATION

A. Culling the Discovery Record

Trial preparation began almost three years before the trial. The process of culling millions of pages of documents and hundreds of depositions involved several layers of review.[29] Class Counsel's use of sophisticated litigation support technology greatly assisted in this review. The trial preparation team wrote trial memos concerning various parties, themes, and legal and substantive issues such as "the suppression of regional debit networks." These memos incorporated the key documents and deposition extracts relating to those issues. Attorneys were then assigned to analyze whether the documents and deposition extracts could be authenticated and whether there was a plausible plan for their admission at trial. *Id*. at ¶¶ 119-21.

In addition, each attorney who had taken depositions designated portions of depositions that might be useful at trial. When these selections were finalized, the trial team collectively viewed a "movie" of the videotaped deposition extracts to discuss evidentiary and thematic

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[28] App. Ex. 11 (May 7, 1999 Order of the Honorable Roanne L. Mann, United States Magistrate Judge, at 1 ("This complex antitrust action has spawned a multitude of discovery disputes and voluminous submissions by the parties, almost on a daily basis.")).

[29] In his declaration, Mr. Constantine describes the review of the discovery record in which he personally engaged over the three year period leading up to trial. The result of his work became the core tools with which plaintiffs prepared for trial: "Lloyd's Log" -- a compilation and detailed analysis of the top 1,200 documents in the case; the Deposition Log -- a compilation and detailed analysis of the best and worst 1,300 deposition extracts in the case; and "Lloyd's Book" -- a 650-page narrative of plaintiffs' case organized around plaintiffs' tying and attempt to monopolize claims and containing the best documents, deposition extracts, and other evidence, presented in a suggested order for trial. Several attorneys then spent several months analyzing the authenticity and admissibility of each piece of evidence in the book. Mr. Constantine's work on these materials involved thousands of hours of his time. Constantine Dec. at ¶¶ 112-18.

issues and to shorten these extracts for trial. The process of selecting, editing, reviewing, and then group re-editing of the depositions took thousands of hours. *Id*. at ¶ 122.

Starting approximately a year before trial, Class Counsel began drafting trial testimony for many of the 270 witnesses plaintiffs might call at trial. During the same time frame, Class Counsel met with potential witnesses to discuss and prepare their trial testimony. *Id*. at ¶ 123.

B. Trial Simulations

Working with several outside trial consultant firms, C&P designed and conducted three separate trial simulations over the three years leading up to trial. The first exercise was held in 2000 when the November 27, 2000 trial date was still in place. The second trial simulation was a multi-day exercise held in February 2003. C&P attorneys prepared separate presentations on plaintiffs' and defendants' cases highlighting the best and worst documents and deposition extracts for each side. Four juries deliberated over each presentation. Teams of psychologists observed each jury deliberation. Their analysis provided critical insight regarding the evidence and themes jurors found compelling, and the themes or evidence that confused them. *Id*. at ¶¶ 124-25.

In March 2003, C&P held a full-week mock trial with a retired federal judge presiding. The firm assigned its most experienced trial counsel to represent one defendant and retained eminent trial counsel from an outside law firm to represent the other defendant. Approximately 60 jurors were selected to participate in the exercise. The trial presentation included numerous live witnesses, numerous Visa and MasterCard witnesses presented by videotaped deposition and by live actors, and the live testimony of three Ph.D. economists, two of whom played defendants' economists. The juries' deliberations, questionnaires, and verdicts were assessed by the trial

team and a group of trial consultants and psychologists. *Id*. at ¶¶ 126-28.

C. The Pretrial Order

The Joint Pretrial Order typified the size and complexity of this case and the effort necessary to prepare it for trial. Defendants submitted more than 11,200 deposition designations, with selections from nearly every deposition taken in the case. Class Counsel reviewed the full deposition transcripts of each of those depositions to make objections and counter-designations. Class Counsel submitted some 6,200 deposition designations. This process took thousands of hours of attorney and paralegal time. *Id*. at ¶ 130.

Defendants submitted 180,000 pages of trial exhibits, and identified more than 460 trial witnesses. Plaintiffs submitted some 50,000 pages of trial exhibits, and identified more than 270 witnesses. Class Counsel spent thousands of hours reviewing defendants' trial exhibits, of which approximately 60,000 pages had not previously been produced, and researching the witnesses identified on their trial witness list, of which 122 had not been deposed.[30] *Id*. at ¶¶ 131-333.

D. Jury Selection

C&P worked with its jury consultants to augment the results of the trial simulations and survey jury pool attitudes toward the case. The parties drafted jury questionnaires, a modified version of which the Court used. On April 21, 2003, 414 prospective jurors completed jury questionnaires, which were reviewed by the trial team and jury specialists retained by C&P. On April 23, the parties made cause and hardship challenges. On April 24, the Court held a conference on these challenges. On April 28, after MasterCard settled, individual *voir dire* was

[30] In addition to the designations submitted with the Pretrial Order, C&P attorneys also drafted a stipulation of uncontested facts (containing more than 650 proposed stipulations), and precharge and jury instructions (totaling more than 70 pages). *Id*. at ¶¶ 129, 136.

conducted for a trial against Visa only, and a jury was impaneled. *Id*. at ¶¶ 137-39.

VI. SETTLEMENT NEGOTIATIONS

Prior to plaintiffs' summary judgment victory, the likelihood that this case would settle was remote. Mr. Constantine explained why:

> From the outset, I believed that this case, more than any I have litigated during 31 years of practice, would not be settled prior to a jury verdict. I know from discussions with my worthy adversaries that many of them held similar opinions. The primary reason for this was the centrality of the defendants' Honor All Cards tying arrangements to their organizations and business plans, and the absolute resolve on the part of my clients that the tying arrangements had to be eliminated.

Constantine Dec. at ¶ 143. Defendants' conviction about the importance of their tying arrangements was stated by Visa's Laurence Popofksy at the first court appearance in this case when the Court suggested a settlement conference:

> I think we always welcome the involvement of the Court in solving the process. I don't think we should hold any delusions about it. The damage claimed theoretically exceeds a billion. The practice at issue is a fundamental business practice in both associations, the cost of adjusting that business practice is enormous. The class issues are literally exceptionally large and that's why we had singled them out for the separat[e] attention and I guess summary judgment is a crucial juncture and settlement discussions before the parties have flexed their muscles [at] summary judgment strikes me as probably a waste of the Court's time.[31]

Industry observers also dismissed the idea that this case would settle. A little more than a year into the litigation, Bank Network News reported: "There is no end in sight to the litigation. Although the U.S. District Court in New York has ordered a settlement conference for Dec. 15, [1999,] giving the plaintiffs time to sift through millions of pages of documents supplied by Visa

[31] App. Ex. 13 at 40-41 (June 26, 1997 Transcript of Conference Before Judge Mann).

and MasterCard, a settlement is unlikely . . . ."[32] This view remained even after plaintiffs' summary judgment victory, as reported in the American Banker:

> Regarding a settlement possibility in the Wal-Mart suit, Bruce Sokler, the vice president of the Washington Office of Mintz, Levin . . . said he did not think the summary judgment decision has changed the associations' perspectives. "It's hard to believe the big individual retailers who are the named plaintiffs in the case could agree on anything on their side of the table that is going to be acceptable to Visa and MasterCard," he said.[33]

Despite this, the parties began substantive settlement discussions with the aid of a mediator in 2002. Numerous mediation sessions were held over many months with several of the sessions attended not only by the lawyers but by the parties' experts and key fact witnesses. The process was extraordinarily demanding of the time and attention of the principal members of plaintiffs' trial team in the brutal year leading up to trial. While the process was conducted in good faith by the parties, it did not move the case materially closer to settlement. Constantine Dec. at ¶¶ 149-51.

After the Court granted plaintiffs partial summary judgment, mediation and settlement activities intensified further. During the few weeks leading up to trial, and in particular, the last week, four of the principal lawyers on plaintiffs' trial team spent more time in settlement discussions than preparing for trial. This put a tremendous strain on them and the rest of plaintiffs' trial team. MasterCard ultimately agreed to settle at 4:45 a.m. on April 28, just prior to *voir dire*. Visa agreed to settle two days later. On April 30, 2003, the parties entered into

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[32] App. Ex. 14 (*Looking Up at a Legal Sword of Damocles, Debit Players Ponder Interchange*, Bank Network News, Mar. 26, 1998, *available at* 1998 WL 13846401) (quoting Elizabeth Costa, Director of Dove Associates).

[33] App. Ex. 8 at 5.

Memoranda of Understanding which became the framework for the formal Settlement Agreements that the parties entered into on June 5, 2003. *Id*. at ¶¶ 153-59.

VII. THE SETTLEMENTS

The Visa settlement provides for a cash payment by Visa of two billion and twenty five million dollars ($2,025,000,000) to be made to the merchants in annual installments over the next ten years. Ex. C at ¶ 3. The MasterCard settlement provides for a cash payment by MasterCard of one billion and twenty five million dollars ($1,025,000,000) to be made to the merchants in annual installments over the next ten years. Ex. D at ¶ 3. The present value of these payments is $2,589,000,000. Fisher Dec. at ¶¶ 9, 47-52.

The settlements further provide that for the period of August 1 through December 31, 2003 Visa and MasterCard will reduce by roughly one-third the interchange rates merchants pay for accepting signature based debit products, stored-value cards, payroll cards, gift cards, electronic benefit transaction cards, and all other Visa and MasterCard branded products that access, debit, hold, or settle funds from the consumer's demand deposit or asset account. Exs. C and D at ¶ 8(a). Plaintiffs accepted these interim rate reductions as compensation, in lieu of cash, for the continuing damages they will suffer from defendants' Honor All Cards tying rules, which will remain in effect until the end of the year.[34] In an attempt to intervene and object to these interim price reductions, one major Visa owner-member logically argued that the price

[34] Constantine Dec. at ¶ 9. Plaintiffs agreed to give defendants until January 1, 2004 to end the challenged tying arrangements because of the technical, operational, and business issues associated with eliminating these practices which have existed since 1975 (for Visa) and 1979 (for MasterCard).

reductions are "really a disguised award of damages to the merchant class . . . ."[35] The value to the merchants of these price reductions is $794,400,000,[36] bringing the total present value of the compensatory relief of the settlements to $3,383,400,000.

The settlements also provide for historic injunctive relief. As this Court previously recognized, "the highly significant injunctive relief" that plaintiffs sought through this lawsuit was "as important as the damages claimed." *In re Visa Check*, 192 F.R.D. at 88-89 (comparing the preliminary damages estimate of $8 billion to the $63 billion the requested injunction would save the class over the next decade). Indeed, because of the escalating damages resulting from defendants' tying arrangements, plaintiffs have consistently maintained that the injunction they were seeking was, if anything, more important than the compensatory damages they claimed.[37]

The most significant element of the injunctive relief is defendants' rescinding of their "fundamental business practice" HAC tying arrangements (*supra* note 31), an outcome that defendants predicted would "obliterate" their business model (*infra* note 68). The Economist reported that: "The plaintiffs' real victory . . . was to force Visa and MasterCard to lower their

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[35] App. Ex. 15 at 24 (Proposed TCF Court of Appeals brief). As the Court stated in its June 12, 2003 Order denying TCF's motion to intervene: "This interim cap on debit card interchange fees recognizes that: (1) the parties require a brief transition period to prepare for the newly competitive environment; and (2) a reduction in the interchange fees on debit cards during this interim period is an appropriate way to accommodate merchants pending the untying." App. Ex. 41.

[36] Fisher Dec. at ¶¶ 7(a), 24, 30-32.

[37] Pl. Rep. Mem. in Support of Class Cert. dated August 2, 1999 at 46: "The equitable relief sought by plaintiffs is equally, if not more, important to plaintiffs. . . . While the damages caused by defendants' conduct to date is extremely high, these damages will exponentially increase in the coming years if defendants' anticompetitive practices are not enjoined." *See also*, App. Ex. 16 (James J. Daly, *Out on a Limb*, Credit Card Management, Dec. 27, 2002, at 4) ("I'll predict that the associations will settle for no damages but agree to substantially lower interchange for signature-based debit cards. That's the main thing the retailers want.").

fees for offline debit[].”[38] As Professor Coffee points out: “In short, properly viewed, this is a landmark injunctive action to which is appended over $3 billion in compensatory relief.” Coffee Dec. at ¶ 13. The present value of this injunctive relief is between $25 billion and $87 billion over the next decade alone.[39]

In addition to dropping the tying rules, the settlements contain significant additional relief:

- Clear and Conspicuous Debit Branding: Defendants must require their debit card issuers to clearly, conspicuously, and uniformly identify their debit cards with unique debit identifiers for easy merchant and consumer recognition. Exs. C and D at ¶ 5. This provision will eliminate the merchant and consumer confusion regarding the identity of Visa and MasterCard debit cards that has plagued these products since their inception.

- Signage: Defendants must, at the merchant’s request, provide merchants signage communicating the merchant’s acceptance of defendants’ debit products. Exs. C and D at ¶ 6.

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[38] App. Ex. 17 (*Plastic Pricing - Visa and MasterCard Settle With Retailers*, The Economist, May 1, 2003, *available at* 2003 WL 6245912). *See also,* App. Ex. 18 (James J. Daly, *Debit Deflation*, Credit Card Management, May 27, 2003, *available at* 2003 WL 11823161) (“The retailers obtained in the settlements everything they had sought since the suit was filed more than six years ago. The honor-all-cards policies are now gone. The plaintiffs will be $3 billion richer. And their most important goal, lower card-acceptance costs, was achieved, as both associations are lowering offline debit interchange by about a third for most of the rest of 2003.”); App. Ex. 19 (Robert H. Lande, *Commentary: A New Future for Debit Cards*, The Daily Record, July 18, 2003, *available at* 2003 WL 10167680) (“As eye-catching as the $3 billion settlements are, the future savings to consumers from this case are likely to be even larger . . . .”); App. Ex. 20 (*Debit’s Watershed Spring*, Credit Card Management, June 2003, *available at* 2003 WL 11823162) (“[B]ecause of the settlements, traditionally much higher signature-based (offline) debit interchange rates that merchant acquirers pay issuers will plunge.”); App. Ex. 21 (John R. Wilke, *Retailers Seek to Squeeze Card Giants for $39 Billion*, The Wall Street Journal Europe, June 6, 2002, *available at* 2002 WL-WSJE 22214822) (“The significance of the case extends far beyond the money.”).

[39] Fisher Dec. at ¶¶ 7(b), 25-28, 33-46. Within this range, Dr. Fisher concludes that $70 billion is the most plausible figure. *Id.* at ¶ 43. Moreover, Dr. Fisher’s calculations are conservative in that they are based on a ten year horizon, even though the class will receive the benefits of the injunction well beyond 2013, and they do not account for numerous unquantified additional benefits the class likely will receive from the injunction: (i) the acceptance of pre-paid debit cards, such as the Visa Buxx and Visa Payroll card, and the analogous MasterCard products shall be untied from Visa and/or MasterCard credit cards on January 1, 2004; (ii) the elimination of the HAC tying rules will remove a major barrier to entry, and thus might facilitate new entry into the debit market; and (iii) the elimination of the HAC tying rules may lead to new competition in the credit card market. *Id.* at ¶ 8.

- Electronic Identification: Defendants must require their debit products to have unique electronic identities which merchants can use to distinguish defendants' debit products from their credit products. Exs. C and D at ¶ 7.

- Hold Harmless: For a period of approximately three years, defendants shall hold merchants harmless for any charges they incur for a debit transaction that is declined or rejected because the merchant does not accept defendants' debit transactions. Exs. C and D at ¶ 7(e).

- Steering: Defendants are prohibited from enacting any rules that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards, or from discounting other forms of payment. Exs. C and D at ¶ 9.

- Prohibiting Competing Debit Marks: For two years, Visa is prohibited from entering into contracts prohibiting financial institutions from issuing debit cards of competing networks (other than MasterCard). Ex. C at ¶ 10.

- Notice: Defendants and/or their acquirers are required to provide various forms of advance notice to plaintiffs relating to their different obligations under the settlement agreements.[40]

Neither the ending of the tying arrangements, nor this additional injunctive relief, would have occurred for years if this case had proceeded to trial.[41]

The total package of relief -- $3,383,400,000 worth of presently valued compensatory relief, $25 billion to $87 billion of presently valued injunctive relief, and an extensive but unquantified amount of additional injunctive relief -- has led the press, the banking industry, and

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[40] These include (i) monthly notice to merchants that as of January 1, 2004 the HAC tying rules will be rescinded (Exs. C and D at ¶ 4(d)); (ii) advance notice to C&P of new or planned payment products (Exs. C and D at ¶ 4(g)); (iii) advance notice of any change to the debit identifiers used by defendants to clearly and conspicuously identify their debit products and an exemplar of the new identifiers (Exs. C and D at ¶ 5(c)); (iv) advance notice of any change to the brand of defendants' debit cards and an exemplar of the new brands (Exs. C and D at ¶ 5(d)); (v) an exemplar of the signage that defendants will provide merchants communicating merchant acceptance of defendants' debit cards (Exs. C and D at ¶ 6); and (vi) advance notice of the first change in interchange rates after January 1, 2004 for defendants' debit products (Exs. C and D at ¶ 8(a)).

[41] App. Ex. 38 (*Visa to Cite First Data-Concord Deal*, The American Banker, April 11, 2003, at 18) (citing Visa spokesperson that "in the event of a ruling against Visa, the case might not be resolved until 2007, when all appeal avenues -- including the Supreme Court -- would have been exhausted").

the antitrust community to herald these settlements as "groundbreaking,"[42] "stunning,"[43] "the stuff of dreams,"[44] "revolutionary,"[45] and "a grand slam for the merchants."[46]

ARGUMENT

I. THE STANDARD

When a class action settlement creates a common fund or confers some other substantial benefit on a class, the costs of the litigation, including an award of reasonable attorneys' fees, are recoverable from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This "equitable" or "common fund" doctrine, established more than a century ago in *Trustees v. Greenough*, 105 U.S. 527 (1881), spreads the costs of the litigation, including attorneys' fees, among the fund's beneficiaries. It is designed to prevent the unjust enrichment of class members who benefit from a lawsuit without contributing to its cost. *Boeing*, 444 U.S. at 478. It "also serves the salutary purpose of encouraging counsel to pursue meritorious claims on behalf of a class of individuals who could not afford to litigate their individual claims." *Steiner v. Williams*, No. 99 CIV. 10186, 2001 WL 604035, at *1 (S.D.N.Y. May 31, 2001).

Courts have traditionally used two methods to calculate attorneys' fees in common fund cases: (i) the percentage method -- which awards attorneys' fees based on a percentage of the common fund or benefit created for the class; and (ii) the lodestar/multiplier method -- which

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[42] App. Ex. 22 (James J. Daly, *Legal Overload?*, Credit Card Management, August 2003, at 4).

[43] App. Ex. 19, *available at* 2003 WL 10167680.

[44] App. Ex. 23 (Sarah Henderson, *US Swipes Card Sharps*, Herald Sun (Melbourne), May 28, 2003, at 18).

[45] App. Ex. 24 (James J. Daly, *Cards Uncorked*, Credit Card Management, July 2003, at 4).

[46] App. Ex. 25 (Robert A. Bennett, *The Retailers' Home Run*, Credit Card Management, July 2003, at 24).

awards attorneys' fees based on the total lodestar of the hours reasonably expended by class counsel multiplied by counsel's reasonable hourly rate, plus a lodestar multiplier if deemed appropriate. Although the Second Circuit has held that both the percentage and lodestar/multiplier methods are available to district courts in calculating attorneys' fees in common fund cases, *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000), the clear preference among the courts in this Circuit is to use the percentage method rather than the "'cumbersome, ennervating, and often surrealistic process' of lodestar computation."[47] *See, e.g., Sheppard v. Consol. Edison Co.*, No. 94-CV-0403, 2002 WL 2003206, at *7 (E.D.N.Y. Aug. 1, 2002) (noting that the trend in the Second Circuit "appears to be the utilization of the percentage method") (quoting *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96 Civ. 0583, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002)).[48]

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[47] *Goldberger*, 209 F.3d at 50 (citing *Savoie v. Merchants Bank*, 166 F.3d 456, 461 n.4 (2d Cir. 1999) quoting *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 258 (1985) (hereinafter "*Third Circuit Report*")). The Third Circuit, one of the original champions of the lodestar method (*see Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973)), convened a task force of prominent judges and practitioners to reconsider the lodestar method because "a number of difficulties [had] been encountered . . . ." *Third Circuit Report,* 108 F.R.D. at 238. The Task Force (on which Professor Miller served as the Reporter) identified a number of deficiencies in the lodestar method (*e.g.*, wastes judicial resources; insufficiently objective; lacks precision, consistency, and fairness; encourages unjustified attorney work; discourages early settlement; limits court's flexibility) and unequivocally recommended a return to the percentage method. *Id.* at 246-48, 258.

[48] *See also*, *Snapp v. Topps Co.,* No. 93-CV-0347, 1997 WL 1068687, at *3 (E.D.N.Y. Feb. 12, 1997) ("It is proper to compensate counsel based on a percentage of the common settlement fund in this type of case.") (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *In re Int'l Murex Techs. Corp. Sec. Litig.*, No. 93 CV 336, 1996 WL 1088899, at *4 (E.D.N.Y. Dec. 4, 1996) (same); *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 150 (E.D.N.Y 1995) (same); *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 431 (S.D.N.Y. 2001) (noting that the trend of the district courts in this Circuit is to use the percentage method); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) (same); *Duncan v. Unity Life and Accident Ins. Ass'n*, No. 00 Civ. 7261, 2003 WL 1907959, at *4 (S.D.N.Y. Apr. 18, 2003) (same); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 85 (E.D.N.Y. 2002) (same); *In re Arakis Energy Corp. Sec. Litig.*, No. 95 CV 3431, 2001 WL 1590512, at *8 (E.D.N.Y. Oct. 31, 2001) (same); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 370 (S.D.N.Y. 2002) ("there is a strong consensus . . . in favor of awarding attorneys' fees in common fund cases as a percentage of the recovery); *In re Nasdaq Market -Makers Antitrust Litig.*, 187 F.R.D. 465, 484 (S.D.N.Y. 1998) ("[T]here is strong support for the percentage approach from district courts in this Circuit.").

The reason for this pronounced preference for the percentage method is the widespread recognition that it avoids "the needless complications and dubious merits of the lodestar approach." *Strougo*, 258 F. Supp. 2d at 261. As the oft-cited court in *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160 (S.D.N.Y. 1989) observed:

> Experience . . . has finally taught us that convoluted judicial efforts to evaluate the lodestar, and see to it that the lodestar hours were reasonable and necessary, and that the case was not overmanned or the time overbooked, are extremely difficult to say the least, and unrewarding. Such efforts produce much judicial papershuffling, in many cases with no real assurance that an accurate or fair result has been achieved.
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> . . .
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> [A percentage fee] award is consistent with the new learning (old wine in a new bottle) . . . which new learning we believe will . . . take us back to straight contingent fee awards bereft of largely judgmental and time-wasting computations of lodestars and multipliers. These latter computations, no matter how conscientious, often seem to take on the character of so much Mumbo Jumbo. They do not guarantee a more fair result or a more expeditious disposition of litigation.

Id. at 165, 170 (cited in *Strougo*, 258 F. Supp. 2d at 261; *In re Nasdaq*, 187 F.R.D. at 485.)[49]

In contrast, "[t]he percentage method directly aligns the interests of the class and its

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[49] *See also, In re Twinlab*, 187 F. Supp. 2d at 85 ("Courts favor the percentage of the fund method because lodestar 'created an unanticipated disincentive to early settlements,' tempted lawyers to run up their hours, and 'compell[ed] district courts to engage in a gimlet-eyed review of line-item fee audits.'") (quoting *Goldberger*, 209 F.3d at 48-49); *Baffa*, 2002 WL 1315603, at *1 (same); *In re Dreyfus Aggressive Growth Mutual Fund Litig.*, No. 98 CV 4318, 2001 WL 709262, at *4 (S.D.N.Y. June 22, 2001) (same); *In re Arakis*, 2001 WL 1590512, at *6 (same); *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 397 (S.D.N.Y. 1999) ("Courts increasingly have come to recognize the shortcomings of the lodestar/multiplier method . . . ."); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992) ("Because of the gap between what it seems to promise and what it delivers, the lodestar formula is undesirable if an alternative is available."); *In re Presidential Life Sec.*, 857 F. Supp. 331, 334 (S.D.N.Y. 1994) ("Problems encountered in evaluation of fees utilizing the Lodestar approach have led to rejection of that method in common fund cases and express approval of the percentage method as an acceptable alternative.") (internal citations omitted); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1306 (E.D.N.Y. 1985) (lodestar approach "tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of litigation"), *aff'd in part, rev'd in part on other grounds*, 818 F.2d 226 (2d Cir. 1987).

counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262, 2002 WL 31663577, at *25 (S.D.N.Y. Nov. 26, 2002), *appeal pending*, No. 03-0711 (2d Cir. argued Apr. 4, 2003). It also permits the judge to focus on the quality of the lawyers' efforts rather than on how many hours they billed. *In re Nasdaq*, 187 F.R.D. at 485.[50] "In addition, the percentage method is consistent with and, indeed, is intended to mirror, practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients." *Strougo*, 258 F. Supp. 2d at 262.[51]

No matter which method is chosen, the fees awarded in common fund cases must be "reasonable . . . [and] based on scrutiny of the unique circumstances of each case . . . ." *Goldberger*, 209 F.3d at 47, 53.[52] *Goldberger* sets forth the following six factors a reviewing court should consider in evaluating what constitutes a reasonable fee: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of the representation [measured by result]; (5) the requested fee in

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[50] "'The hourly rate approach . . . frequently [bears] little or no relationship to the value of the services performed in anything but the most routine work. A flash of brilliance by a trial lawyer may be worth far more to his client than hours or days of plodding effort.'" *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 964 (E.D. Tex. 2000) (quoting *Foster v. Boise-Cascade, Inc.*, 577 F.2d 335, 337 n.1 (5th Cir. 1978)).

[51] *See also, In re Lloyd's*, 2002 WL 31663577, at *26 ("the percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model"); *In re RJR Nabisco, Inc. Sec. Litig.*, No. 88 Civ. 7905, 1992 WL 210138, at *7 (S.D.N.Y. Aug. 24, 1992) ("[w]hat should govern such awards is not the essentially whimsical view of a judge, or even a panel of judges, as to how much is enough in a particular case, but what the market pays in similar cases"); *In re Am. Bank Note*, 127 F. Supp. 2d at 432 ("[P]ercentage of the recovery formula can serve as a proxy for the market in setting counsel fees.").

[52] "What constitutes a reasonable fee is properly committed to the sound discretion of the district court, . . . and will not be overturned absent an abuse of discretion . . . ." *Id.* at 47. "Indeed 'abuse of discretion' . . . takes on special significance when reviewing fee decisions. . . . '[T]he district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record.'" *Id.* (quoting *In re Bolar Pharm. Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992) (*per curiam*)).

relation to the settlement; and (6) public policy considerations." *Sheppard,* 2002 WL 2003206, at *7 (citing *Goldberger*, 209 F.3d at 50). By any of these measures, this case, and the accomplishments of Class Counsel, demonstrate that Class Counsel's fee request is not merely reasonable, but conservative.

II. APPLICATION OF THE *GOLDBERGER* FACTORS TO CLASS COUNSEL'S FEE REQUEST

A. The Time and Labor Expended By Class Counsel

As set forth above, and described in more detail in the Constantine Declaration, the time and labor expended in this case by Class Counsel were staggering:

- six-and-a-half years of hard-fought litigation, following years of foundational work;
- 5 million pages of documents;
- almost 400 depositions;
- discovery from roughly 200 non-parties;
- 21 experts and 54 expert reports;
- four rounds of class certification briefing through the Supreme Court involving 18 briefs;
- 16 summary judgment briefs along with almost 1,800 exhibits, 38 declarations, and hundreds of additional pages in Rule 56.1 statements and other submissions;
- a motion to disqualify Wal-Mart, a motion to sever the trials of Visa and MasterCard, a motion for Rule 11 sanctions against Wal-Mart and to preclude the operative complaint, and approximately 350 voluminous nonsubstantive procedural/discovery court submissions;
- 31 motions *in limine* and 3 *Daubert* motions;
- months of intense mediation and settlement meetings; and

- a Pretrial Order that identified 230,000 pages of trial exhibits, 730 trial witnesses, and more than 17,000 deposition designations.

This massive effort required more than 223,000 hours of Class Counsel's uncompensated time. As discussed below, but for the extreme efficiency with which C&P, and the 29 other law firms working with C&P, prosecuted this case, this figure would have been significantly higher.

B. The Magnitude and Complexity of this Case

1. Magnitude

The magnitude of this case cannot be overstated. It involves virtually every U.S. bank and virtually every U.S. consumer who purchases goods and services from the five million class members. As MasterCard's counsel stated in 1999: "resolution of this case . . . will have enormous implications for the future of the payment systems industry in the United States, a multi-billion dollar industry involving tens of thousands of financial institutions, millions of merchants, and tens of millions of consumers who carry MasterCard and Visa-branded cards." App. Ex. 40. *See also,* Ogburn Dec. at ¶ 18 ("In referring to issues of costs and savings and consumer participation . . ., it should be understood that the degrees of magnitude -- though unquantified -- are quite substantial. Millions of people and billions of transactions are involved in practices that have in the main been in effect for years.").

2. Complexity

Antitrust cases in general are among the most difficult types of class actions to bring. *See, e.g., Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (distinguishing antitrust class actions from securities class actions because antitrust claims "are notoriously complex, protracted, and bitterly fought"); *In re Nasdaq*, 187 F.R.D. at 475 (pointing

to the particular risk and uncertainty associated with antitrust cases: "Recurrently, when some of the largest members of antitrust classes have opted-out of the class to try to do better than the class, they have failed to establish impact or other elements of liability, and have lost their cases at trial.").[53]

This case was particularly difficult and complex. Professor First explains why: (i) plaintiffs could not safely rely on *per se* presumptions to carry their case;[54] (ii) the case was not an easy one to describe and analyze in terms of the two products that were being tied;[55] (iii) plaintiffs faced a number of complicated and novel issues in trying to prove defendants' market power;[56] (iv) plaintiffs had to rebut defendants' competitive effects and efficiency arguments;[57]

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[53] *See also, Id.* at 476 (pointing to the difficulty of proving damages in antitrust cases: "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.") (citing cases).

[54] *See*, First Dec. at ¶¶ 9-17. Professor First pointed to various developments in the law and economics of tying that, in his view, show that regardless of the *per se* rule, "a plaintiff in a tying case will be required to convince the factfinder that the tying arrangement will likely produce adverse economic effects and will need to meet the defendant's efficiency justifications for the tying arrangement." *Id.* at ¶ 17. *See also,* Julian O. von Kalinowski, *et al.*, 1 Antitrust Laws and Trade Regulation §22.03 (2d ed. 2003) ("As a practical matter . . . a tying arrangement that is not per se illegal is unlikely to violate the rule of reason because the per se analysis of a tying arrangement requires careful consideration of market conditions."); ABA Section of Antitrust Law, Antitrust Law Developments, at 210 (5th ed. 2002) ("Since the Supreme Court's decision in *Jefferson Parish*, plaintiffs' victories on rule of reason tying claims have been rare.").

[55] *See,* First Dec. at ¶¶ 20-25. In this regard, Professor First concluded: "This was not an 'easy' tying case to describe and analyze, unlike salt machines and salt, or computers and punch cards, or hospital services and anesthesiology, or prefabricated houses and credit, or gasoline and S&H Green Stamps. . . . Plaintiffs' success in showing that there were two products was fully justified by their production of record evidence of differing product perception, differing functions, and distinct pricing and certainly warranted the Court's grant of summary judgment on this issue; but the need to develop such a strong record was just as certainly a significant factor in making this case a risky one to bring." *Id.* at ¶ 25 (internal citations omitted).

[56] *Id.* at ¶¶ 26-33.

[57] *Id.* at ¶¶ 34-43.

(v) the courts are unsettled as to the proper method for computing damages in tying cases;[58] (vi) plaintiffs had to fend off defendants' vigorous challenges to plaintiffs' but-for damages methodology;[59] and (vii) plaintiffs had to deal with defendants' mitigation defense.[60]

For these reasons, Professor First concluded that "the antitrust case plaintiffs filed against Visa and MasterCard was a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes." First Dec. at ¶ 64. In contrast, Professor First pointed to a number of recent "mega-fund" antitrust class actions which did not pose nearly the same type of challenges as this case: *In re Nasdaq,* 187 F.R.D. 465; *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 13, 2001); *In re Buspirone Antitrust Litig.*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); and *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003). *Id.* at ¶¶ 66-68.

None of these cases had nearly as many difficult legal issues with which to deal. None involved class certification briefing at the appellate or Supreme Court level. None reached the summary judgment stage, let alone the morning of trial. None involved classes that approached the size and complexity of this class. None involved Class Counsel who prosecuted the case without any assistance from the government, and indeed, who helped the government launch and

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[58] *Id*. at ¶¶ 50-51 (pointing to the "package price" method which looks to proof of an overcharge of both the tying and tied products, and the "tied product" method which looks to proof on an overcharge of the tied product alone). *See also, In re Visa Check,* 192 F.R.D. at 83 (noting "competing line of cases" on this issue). While at class certification the Court noted that plaintiffs' damages theory was "'uncommon'" and "'elusive and seldom attempted,'" *Id*. 83, 85 (quoting X Phillip E. Areeda, *Antitrust Law*, ¶ 1769(b) & (c), at 429, 432 (1996)), at summary judgment the Court concluded that "the merchants have presented a sufficiently compelling (and factually-supported) theory of damages to warrant a trial of the issue." *In re Visa Check*, 2003 WL 1712568, at *8.

[59] *Id*. at ¶¶ 52-57

[60] *Id*. at ¶¶ 58-61.

litigate its own case. *See generally,* First Dec. at ¶¶ 66-73; Miller Dec. at ¶¶ 26-29. And plaintiffs' claims in the *Nasdaq* and *Vitamins* cases involved an "antitrust violation about which there is no legal dispute," and a "well-accepted" core theory of damages. First Dec. at ¶¶ 70-71.

Yet the compensatory recovery in this case far exceeds the recoveries in all of these other cases combined. And the injunctive relief here stands in stark contrast to the lack of any meaningful injunction in any of these cases.

Adding further to the complexity of this case was the interaction between these difficult antitrust issues and plaintiffs' successful efforts to get the class certified. The perceived complexity of these issues motivated the Court to recommend that the Second Circuit review its class certification decision: "[T]his certification motion raises substantial and novel questions involving the standards a district court should apply in evaluating a class motion and the interaction of those standards with antitrust principles." *In re Visa Check*, 192 F.R.D. at 89.

As Professor Hovenkamp notes: "Few areas of federal antitrust law are more confusing than the law that governs tying arrangements. Plaintiffs compound the confusion by bringing tying arrangement cases as class actions because the 'common question' requirement for class certification vastly complicates the economic analysis of the potential harms of tying arrangements."[61]

Defendants raised numerous issues in their class certification opposition that attempted to exploit these perceived complications and to contrive difficulties in certifying the class. For example, defendants argued that credit card prices would rise absent the tying arrangements, creating the possibility that class members would fair differently in an untied world depending on

[61] Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 Vand. L. Rev. 213 (1983).

each merchant's mix of debit and credit transactions. Defendants argued counter-factually that they would have engaged in merchant-specific pricing in an untied world, further complicating the application of a common damages formula. Defendants also argued that differences in merchant efforts to steer would require millions of individualized liability and damages determinations, rendering the case unmanageable.

While plaintiffs successfully rebutted all of these arguments with both economic and evidentiary support, it "required the assembly and mastery of documents, studies, and expert economic opinion to understand a complex market and show how it should have worked if competition had been able to flourish." First Dec. at ¶ 62. Professor First characterized this effort as "extraordinary." *Id*. at ¶ 77.

C. The Risk of this Case

The contingency risk taken by class counsel is the most important factor to which courts look in evaluating the reasonableness of a fee request. *See, Goldberger*, 209 F.3d at 54 ("We have historically labeled the risk of success as perhaps the foremost factor to be considered in determining whether to award an enhancement.") (internal quotation and citation omitted); *In re Arakis*, 2001 WL 1590512, at *11 ("[T]he courts consider [risk] to be the most important in determining the reasonableness of a fee award."); *In re Dreyfus*, 2001 WL 709262, at *5 (noting that Second Circuit has directed courts to "set the attorneys' fees percentage primarily according to the actual contingency risk").

The contingency risk assumed by Class Counsel, and by C&P in particular, was enormous. Class Counsel devoted 223,000 hours to this case without any assurance that they would ever be paid for their labors. Class Counsel undertook this risk, and devoted this massive

amount of resources, without the benefit of any prior government investigation or proceeding; against opponents who have a proven track record of successfully defending antitrust challenges; and for a case that was difficult to prove.

1. The Resources C&P Devoted to this Case

The sheer number of hours Class Counsel devoted to this case, though enormous, does not fully reflect the extraordinary contingency risk they undertook. The records submitted to the Court show, that for C&P, this case was a "bet-the-firm" proposition.

The 125,000 hours C&P devoted to this case between January 1,1997 and April 30, 2003 represented 52% of the firm's attorney and paralegal resources over the entire six-and-a half-year period. Ex. E at 1. For the period of 1999 through April 30, 2003, this figure is 61%. *Id.* at 2. And for the year and a half leading up to trial, this figure is 71%. *Id*. at 3. More specifically, the annual percentage of firm resources devoted to this case over the entire period are as follows: 1997 (23%); 1998 (31%); 1999 (58%); 2000 (52%); 2001 (57%); 2002 (64%); and January 1 - April 30, 2003 (84%). *Id.* at 1.

C&P's investment of resources in this case substantially impacted the firm's ability to staff existing matters. For example, in 1998, C&P was preparing for an antitrust trial against America Online in the Eastern District of Virginia. Because of the resources it was devoting to this case, C&P was forced to bring in other law firms to assist with trial preparation, ceding millions of dollars in billings. Similarly, in 2000, C&P was preparing for an antitrust trial against Time Warner in the Eastern District of New York. Because of this case, C&P had to hire more than a dozen outside attorneys to assist, resulting in millions of dollars of lost billings as well as additional costs. Constantine Dec. at ¶ 15.

More significantly, C&P's dedication to this case forced the firm to turn away a significant number of professionally challenging and lucrative matters. This lost business included several major antitrust litigations the firm was asked to bring on behalf of various Fortune 500 companies. In one matter, the firm had to resign well into the assignment, turn over work product to successor counsel, and write off extensive billings. The firm also declined requests to serve as antitrust counsel in two hotly contested mergers, both of which were the subject of intense government review. *Id.* at ¶ 19.

The court in *In re Sumitomo* noted how this kind of dedication of firm resources greatly magnifies the already high risk of a contingency case:

> Petitioners were required to expend substantial amounts of professional time and money away from other professional business in order to prosecute the action, with no certainty of recovery thereof from any source. Thereby, the already high risks of this litigation were greatly multiplied.

74 F. Supp. 2d at 399. *See also, Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir.) (in justifying 28% fee award, court noted that representation of the class "required counsel to forego significant other work, resulting in a decline in the firm's annual income"), *cert. denied*, -- U.S. --, 123 S.Ct. 536 (2002).

C&P's commitment to this case was described by Professor Coffee as follows:

> Having studied class actions for over two decades and having been involved in numerous such actions as an expert witness, I am unaware of any similar level of commitment. No law firm of which I am aware has concentrated as single-mindedly or for as long on a single case. . . . [T]he bottom line is that this case represented for Constantine & Partners a level of risk that few, if any, other firms have ever experienced. Moreover, . . . they

remained exposed to this high level of risk for nearly seven years.[62]

Professor Miller agreed with this assessment: "In all my years of following attorney efforts prosecuting class actions, I have never seen a firm take on the amount of risk -- from the standpoint of resource allocation -- that C&P assumed in prosecuting this case." Miller Dec. at ¶ 24.[63]

2. Class Counsel Did Not Build Upon Government Efforts; Rather, the Government's Case Built Upon Class Counsel's Efforts

An additional factor that contributed to the risk and difficulty faced by Class Counsel is the absence of any pre-existing government investigation or lawsuit on which they could rely. The ability of class counsel to "piggy back" or "free ride" on the fruits of the government's labor is one of the key factors courts look to in evaluating the level of risk counsel assumed. *See, City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974) ("The tangible factors which comprise the 'risk of litigation' might be determined by asking the following questions: has a relevant government action been instituted or, perhaps, even successfully concluded against the defendant . . . .").

Numerous courts have elevated percentage fee awards because of the absence of such "bootstrapping" by counsel: "The petitioners in this case developed and litigated the case -- and I give this a lot of weight -- by themselves. There was no parallel governmental enforcement

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[62] Coffee Dec. at ¶ 36.

[63] Professors Coffee and Miller also point to the length of time Class Counsel have gone uncompensated for their work on this case as an additional risk factor. Coffee Dec. at ¶¶ 34-35; Miller Dec. at ¶ 25. Professor Coffee found that this case lasted approximately two years longer than the average mega-fund case. Coffee Dec. at ¶ 35. He concluded that such a resulting delay in payment "places a plaintiff's law firm under great organizational stress, as some attorneys must subsidize the rest of the firm out of their current earnings in the hopes of receiving an eventual contingent return. *The extent of that stress was probably unparalleled in this case* . . . ." *Id*. (emphasis added).

action or investigation . . . for anyone to bootstrap on." *Behr v. Schwartz (In re APAC Teleservices, Inc. Sec. Litig.)*, No. 97 Civ. 9145, at 2-3 (S.D.N.Y. Dec. 10, 2001) (awarding 33.3% of settlement fund). *See also, In re Gulf Oil*, 142 F.R.D. at 597 (in justifying 30% fee award the court noted: "[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own.").[64]

Class Counsel could not build upon pre-existing government work. On the contrary, the government piggybacked on Class Counsel's efforts. Two years after this action was filed, the FTC opened an investigation into defendants' debit card practices. The origins of this investigation were largely the briefings and documentation C&P provided the FTC and DOJ in connection with C&P's pre-complaint efforts to persuade the government to bring an action against Visa and MasterCard, and in post-complaint meetings between C&P and the DOJ held at the DOJ's request. Constantine Dec. at ¶¶ 26-29. Shortly after the FTC commenced its investigation, and again based in part on the information C&P provided, the DOJ filed its lawsuit challenging Visa and MasterCard's exclusionary rules. *Id.* at ¶ 29. *See, United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *appeal pending*, No. 02-6074 (2d Cir. argued

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[64] *See also, Maley*, 186 F. Supp. 2d at 371 (in justifying 33.3% fee award, the court noted that class counsel "did not 'piggy back' on any prior governmental action related to Del Global"); *In re RJR Nabisco,* 1992 WL 210138, at *6 (in justifying 24.3% fee award, court noted that "plaintiffs' counsel have not taken a free ride on the efforts of a government agency"); *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *8 (E.D.N.Y. Aug. 7, 1998) (in justifying 33.3% fee award, court noted that "class counsel did not have the benefit of a prior government litigation or investigation"); *In re Sumitomo*, 74 F. Supp. 2d at 395 (in justifying 27.5% fee award, court noted that "[t]here was no governmental assist to ease the task with which Petitioners [were] confronted"); *In re Arakis*, 2001 WL 1590512, at *11 (in justifying 25% fee award, court noted absence of government investigation and criminal proceedings on which plaintiffs could rely); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112, at *1 (N.D. Ill. Feb. 10, 2000) (in justifying 25% award, court noted that: "This case was not marked by any governmental investigations or prosecutions, leaving the development of the facts in the hands of private litigants.").

May 8, 2003).

More important, in January 1999, the government received the three million pages of documents that defendants originally produced to plaintiffs in this case. In January 2000, this Court granted the government's motion to intervene in this case to modify the protective order to allow Class Counsel to share with the government their extensive work-product protected analyses of the documents and depositions in this case. In granting the motion, the Court held that "the Government has a significant interest in obtaining these materials in order to efficiently prosecute its action without unnecessarily duplicating effort already expended by counsel for Wal-Mart." *In re Visa Check*, 190 F.R.D. 309, 312 (E.D.N.Y. 2000).[65]

The Court's decision permitted Class Counsel to provide their work-product to the government without waiving their privilege, but did not require them to do so. Nevertheless, Class Counsel spent hundreds of hours selecting and transmitting to the government the fruits of the tens of thousands of hours they had spent reviewing, coding, and analyzing the millions of pages of defendants' documents. Indeed, for more than a year, the principal assignment of one of C&P's attorneys was to provide the government with documents, deposition extracts, and analyses which C&P believed would assist the government's case. Constantine Dec. at ¶ 30.

This one-way exchange of work product proved extremely valuable to the government. As this Court anticipated, it spared the government extensive time and duplicative efforts and helped the government to get to trial within 20 months of its complaint. In addition, the district

[65] *See also,* App. Ex. 26 at 3 (Government Brief in Support of Motion to Intervene) ("The disclosure of plaintiffs' analyses will serve only one purpose: to expedite, in the most economical manner, (1) the Government's preparation for trial of its credit card litigation, now scheduled to begin on February 8, 2000 and (2) its investigation of debit card issues, including those at issue here.").

court's decision to strike defendants' exclusionary rules was based in part on the evidence and analyses that plaintiffs supplied the government.[66]

3. The Strength of the Opposition

Further adding to the risk Class Counsel faced in this case was the strength and tenacity of their opposition. Visa and MasterCard had a proven track record of successfully defending antitrust challenges. Historically, they did not settle; they won. Visa's Laurence Popofsky, made that clear at the settlement conference the Court held in December 1999:

> When I am quoted, as [Mr. Constantine] did in his opening statement, he should have said we won the trial. We won the trial not only then but three other times when Visa has been sued, and the question was market definition. . . . I only mention that because litigation in the settlement context we are here in today is not something which people fear. I was amused . . . by [Mr. Constantine's] reference to the so-called vote [by the Visa Debit Advisor's Group in 1991] about should we have litigation or unbundle . . . . Visa was sued on this very claim in 1981 . . . . And in the preliminary injunction hearing, it went so badly for Nordstrom that they packed up their bags and terminated the litigation. . . . I can't tell you how many subpoenas I have on my desk. But it has been continuous since 1981. Everything Visa does is subject to antitrust scrutiny, and that is perfectly par for the course. It causes no concern in the sense that the system is going to go forward.[67]

"Knowing the track record of both Visa and MasterCard in prior antitrust litigation, as well as the abilities of their lawyers, would make anyone even more cautious about filing this

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[66] The evidence Class Counsel provided played a prominent role in the court's decision. *See, e.g.,* 163 F. Supp. 2d at 329 (the exclusionary rules "weaken competition and harm consumers by . . . effectively foreclosing American Express or Discover from competing to issue off-line debit cards"); at 394 ("The inability to provide debit functionality on a cost-effective basis further limits the effectiveness of American Express and Discover as suppliers of credit and charge card network services."); at 408 ("the court includes debit cards in its prohibition against the future adoption of exclusionary rules . . . [because] the future of credit card products will be built on, and dependent upon, debit functionality").

[67] App. Ex. 27 (December 14, 1999 Transcript of Proceedings Before Judge Mann., at 132-33).

antitrust case." First Dec. at ¶ 74. "At a minimum, this track record realistically implied to plaintiffs' counsel that they were in for a long fight, which they would have to finance themselves, as they were litigating on a contingent fee basis." Coffee Dec. at ¶ 31.

Settlement was particularly improbable in this case given defendants' view that, if successful, plaintiffs would "obliterate[] the business model that defendants have built over several decades,"[68] and "tear down the foundation of the national bankcard associations . . . ."[69] This case is a far cry from most securities class actions where settlement is virtually guaranteed. *Goldberger*, 209 F.3d at 52 (pointing to empirical and anecdotal evidence that "there appears to be *no appreciable risk* of non-recovery in securities class actions, because virtually all cases are settled") (emphasis in original) (internal quotations and citation omitted).

4. The Difficulty of the Case

The difficulty of this case further added to the level of risk that Class Counsel undertook. Antitrust cases are inherently difficult.[70] This case -- with the "unsettled doctrinal issues of antitrust law raised by plaintiffs' claims, the unique economic issues posed by defendants' conduct, and the factual complexity of this network industry"[71] -- was particularly so:

My conclusions are that plaintiffs undertook an extremely risky

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[68] App. Ex. 28 (Letter dated December 20, 1999 from James Benedict, counsel for MasterCard, to Judge Mann, at 2).

[69] Def. Mem. In Opp. to Pl. Mot. for Class Cert. dated June 17, 1999, at 3.

[70] According to Professor Coffee: "Antitrust class actions are far less common than securities class actions and on average considerably riskier. Most antitrust class actions seem to fail, not settle." Coffee Dec. at ¶ 48. This may explain in part why the Class Action Reports Survey (the "CAR Survey") of 1,120 class action settlements over the past thirty years reported only 100 antitrust cases compared to 877 securities cases. *See,* App. Ex. 29 (Stuart Logan, Jack Moshman & Beverly Moore, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports 167 (March-April 2003), at Table 2).

[71] First Dec. at ¶ 2.

> case, one which was well outside the mainstream of cases generally brought by antitrust plaintiffs . . . . Plaintiffs did not have the comfort of a clear *per se* rule to support their theory, nor did they have the comfort of a prior government prosecution attacking the challenged conduct. Indeed, plaintiffs sought to apply tying analysis to products and an industry for which there were no close analogues in prior court decisions. In addition, there was the magnitude of the claims themselves. . . . [P]laintiffs took the risk that the pressure of so large a recovery could cause courts to approach their claims more conservatively than might otherwise have been the case. Faced with these factors, plaintiffs' counsel were extraordinarily effective. . . . They brought the litigation to the very eve of trial, at which point they secured the largest private damages settlement of an antitrust case in history. I can only conclude that they applied extraordinary skill and that they achieved an extraordinary result.[72]

D. The Quality of the Representation and the Result Achieved

1. The Quality of Class Counsel

The quality of Class Counsel's work, and indeed defendants' counsel's work, was recognized by the Court:

> The lawyering in this case has been great. The briefs are excellent, the oral arguments even better all around. It's a pleasure to have the case before me for that reason. There are others that make it a little less pleasurable. But the lawyering is fantastic.[73]

C&P is a nationally recognized law firm specializing in antitrust litigation and counseling and complex commercial litigation. The firm has extensive experience in bringing and defending large and sophisticated antitrust actions and representing clients before the DOJ, FTC, and the

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[72] First Dec. at ¶ 4. *See also, supra* notes 9-12 and accompanying text discussing articles about difficulty of case.

[73] App. Ex. 30 at 111 (January 10, 2003 Transcript of Summary Judgment Argument Before Judge Gleeson).

State AG's.[74] For its work on this case and other matters, C&P was recently recognized by the National Law Journal as one of the top 25 plaintiffs' litigation firms in the country: "This is our pick of 25 litigation firms that seem exemplary . . . ."[75]

The lead trial team, and the attorneys responsible for the bulk of the substantive work on this case, include the following C&P partners who have extensive antitrust and complex commercial litigation experience:[76]

- Robert Begleiter: a 1972 graduate of New York University Law School and former Chief of the Civil Division of the United States Attorney's Office for the Eastern District of New York. Mr. Begleiter has conducted more than 40 trials in federal court, supervised hundreds more, and argued more than 20 appeals. He also has taught trial advocacy at Brooklyn Law School for many years.

- Matthew Cantor: a 1995 graduate of New York University Law School. Mr. Cantor has eight years of litigation and antitrust experience, is a frequent lecturer on various antitrust matters, and has written numerous articles on a variety of antitrust topics for numerous legal and antitrust publications.

- Lloyd Constantine: a 1972 graduate of Columbia Law School and former Assistant Attorney General in Charge of Antitrust Enforcement for the State of New York. Mr. Constantine is one of the country's leading experts in antitrust law. He has testified before Congress on numerous occasions and is a frequent lecturer, commentator, and author on competition law and policy issues. He taught antitrust law at Fordham Law School for many years.

- Stacey Anne Mahoney: a 1994 graduate of Fordham Law School and the recipient of the Archibald R. Murray Public Service Award. Ms. Mahoney has nine years of litigation and antitrust experience and is a co-author of *State Antitrust Law*, an analysis of the antitrust laws of all 50 states.

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[74] Attached as App. Ex. 31 is a copy of the firm's resume which describes in more detail the type of work the firm does and the clients the firm represents.

[75] App. Ex. 32 (*The Plaintiffs' HOT LIST*, The National Law Journal, July 21, 2003, pull-out Section S). In addition to C&P, additional Class Counsel members Milberg Weiss Bershad Hynes & Lerach; Leiff Cabraser Heimann & Bernstein; and Levin Fishbein Sedran & Berman were also included on this list of 25 "go-to" firms.

[76] Attached as App. Ex. 33 are copies of the resumes of these attorneys which provides in more detail their background and experience.

- Gordon Schnell: a 1991 *Stone Scholar* graduate of Columbia Law School. Mr. Schnell has more than eleven years of litigation and antitrust experience, has written and lectured extensively on a variety of antitrust issues, and was a contributing author of *The Merger Review Process*, a guide to the law and practices surrounding the federal merger review process.

- Mitchell C. Shapiro: a 1989 graduate of the University of Pennsylvania Law School. Mr. Shapiro has fourteen years of experience in antitrust and complex commercial litigation, has argued numerous motions and appeals in various federal courts, and is a frequent lecturer on various complex commercial litigation issues.

- Jeffrey Shinder: a 1991 graduate of Osgoode Hall Law School (Toronto) and a 1994 graduate of New York University Law School's LLM program in Trade Regulation, specializing in antitrust. Mr. Shinder has eleven years of antitrust and litigation experience, has written and lectured extensively on various antitrust issues, and was a contributing author of *The Antitrust Advisor*, a leading antitrust textbook.

These attorneys were ably assisted by 8 additional C&P attorneys and paralegals, and 29 additional law firms, including such leading class action firms as co-lead counsel Hagens Berman; Milberg Weiss Bershad Hynes & Lerach; Miller, Faucher, Cafferty & Wexler; and Kirby McInerney & Squire.

2. The Quality of Defendants' Counsel

"The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work." *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986). Opposing counsel in this case included some of the largest and most highly respected law firms in the country who vigorously contested virtually everything that could be contested in this case.

Heller Ehrman and Arnold & Porter (representing Visa), and Clifford Chance and Simpson Thacher & Bartlett (representing MasterCard) enabled defendants to extend this case

for so long.[77] Their unsuccessful efforts to overturn this Court's class certification decision alone were responsible for delaying this case by almost two-and-a-half-years.[78] This delay created the basis for defendants demanding, and, over plaintiffs' objections, getting additional rounds of summary judgment submissions, expert reports, and expert depositions.

Not only did defendants' counsel provide a large pool of skilled attorneys and legal resources from which defendants could draw, they were led by three of the top antitrust lawyers in the country. Laurence Popofsky, of Heller Ehrman, is a former Rhodes Scholar. He has been practicing, lecturing on, and writing about antitrust law for more than forty years. He has been the lead counsel in numerous landmark antitrust cases including his victory before the United States Supreme Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Stephen Bomse, also of Heller Ehrman, has served as lead counsel in numerous high profile antitrust cases and appeals over the past thirty-five years. Kevin Arquit, originally of Clifford Chance and now with Simpson Thacher, formerly served as both General Counsel and Director of the FTC's Bureau of Competition.

In addition, defendants retained the services of Carter Phillips of Sidley Austin Brown &

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[77] Heller Ehrman has 600 lawyers; Arnold & Porter has 700 lawyers; Simpson Thacher & Bartlett has 600 lawyers; and Clifford Chance is the largest law firm in the world.

[78] Defendants' *modus operandi* in securing this 29 month delay was characteristic of their efforts throughout. Defendants successfully "defended" against plaintiffs' motion to expedite defendants' Rule 23(f) appeal. Defendants requested, and received over plaintiffs' objection, additional time to file their appellate briefs. One defendant requested that certain dates be excluded as potential dates for oral argument, claiming that a specific lawyer who would argue the appeal would be unavailable on such dates. The Court accommodated this request; nonetheless, that lawyer did not argue the appeal. After the Second Circuit affirmed, defendants petitioned for rehearing with a suggestion for rehearing *en banc*, despite the Circuit's often stated disfavor of *en banc* reconsideration. The defendants hired an eminent Supreme Court advocate who obtained an *ex parte* extension of defendants' time to file a petition for *certiorari*. Plaintiffs received the application several days after Justice Ginsburg granted the extension. The extension moved the petition to the end of the term, so that it was likely to be considered in October 2002, rather than in the Spring of 2002, as it was, only because C&P filed plaintiffs' opposition 11 days prior to the due date. Constantine Dec. at ¶¶ 57, 61.

Wood to handle their efforts to get the United States Supreme Court to overturn class certification. Mr. Phillips served as Assistant to the Solicitor General and has argued more than three dozen cases before the Supreme Court. Defendants' Supreme Court support team also included former Solicitor General Drew Days, of Morrison & Foerster, the author of the brief *amicus curiae* submitted on behalf of twelve banking associations comprised of defendants' dual owner-member banks.

"The ability of Class Counsel to obtain record-breaking settlements in the face of [such] a stubborn and well executed defense further evidences the excellent quality of petitioners' work." *In re Nasdaq*, 187 F.R.D. at 488. *See also, Maley*, 186 F. Supp. 2d at 373 ("The ability of plaintiffs' counsel to recover a settlement valued at more than $11.5 million for the Class in the face of such formidable legal opposition provides further evidence of the quality of their work."); *In re Medical X-Ray*, 1998 WL 661515, at *8 (in justifying 33.3% fee award, the court noted that "plaintiffs' counsel confronted defense counsel from highly respected law firms that raised several challenges to the merits of this case").

3. The Result

The best measure of the quality of Class Counsel's efforts is the result they achieved for the class. *See, Goldberger*, 209 F.3d at 55 ("the quality of representation is best measured by results"). Based on the compensatory relief alone, this is the largest federal court settlement in class action history, and the largest antitrust settlement by a factor of more than three. More important to the class is the injunctive relief valued at between $25 billion and $87 billion over

the next ten years.[79]

The industry has recognized the "groundbreaking," "stunning," and "revolutionary" nature of the settlements (*supra* notes 42-43, 45), and the benefits they will bring to the class. As Credit Card Management reported:

> The retailers obtained in the settlements everything they had sought since the suit was filed more than six years ago. The honor-all-cards policies are now gone. The plaintiffs will be $3 billion richer. And their most important goal, lower card-acceptance costs, was achieved, as both associations are lowering offline debit interchange by about a third for most of the rest of 2003.[80]

According to Professor First, plaintiffs could not have obtained a better recovery for the class: "The settlements they have achieved are historic. It is beyond anything that I might have predicted when this litigation was commenced and it is hard for me now to imagine any better result."[81] *See also*, Miller Dec. at ¶ 15 ("The proposed settlements are nothing short of historic.").

Even Visa's Chief Executive Officer, Carl Pascarella, recognized the historic nature of these settlements when he recently acknowledged that, as of January 1, 2004, after decades of

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[79] According to Professor Coffee, another way to measure the quality of this settlement is to compare the present value of the compensatory relief recovered ($3.38 billion) to the total damages plaintiffs were seeking at trial ($24.9 billion to $31.6 billion). Under this measure, plaintiffs recovered between 10.7% and 13.6% of the total monetary damages sought. This is between five and seven times better than the typical 2% recovery cited in the study on which Professor Coffee relies. Coffee Dec. at ¶ 17. This study further showed that the recovery in this complex antitrust case is "well over one hundred times the average securities class action settlement." *Id.* at ¶ 18. One other study to which Professor Coffee pointed to "illustrate just how 'off the charts' this recovery was" shows that the recovery here is "over 600 times the average class action settlement in the most 'generous district court' in this study." *Id.* at ¶ 19.

[80] App. Ex. 18, *available at* 2003 WL 11823161. *See also, supra* notes 38, 44, and 46 for additional articles reporting on the settlement.

[81] First Dec. at ¶ 77. Professor Coffee agrees that "plaintiffs appear here to have recovered as much as was possible." Coffee Dec. at ¶ 18.

merchants being forced to accept Visa debit cards, "it becomes a free market."[82] That free market will benefit both merchants and consumers:

> The nation's merchants recently won a stunning $3 billion antitrust victory against Visa and MasterCard. But the ultimate winners will be consumers. . . . As eye-catching as the $3 billion settlements are, the future savings to consumers from this case are likely to be even larger, and the new choices even more important.[83]

See also, Ogburn Dec. at ¶ 19 ("In my opinion, the Settlement Agreements should significantly alleviate consumer - particularly low income consumer - harms caused by the Honor All Cards rules and practices.");[84] First Dec. at ¶ 75 ("The settlements also contain key provisions that advance the public interest. The settlements require the untying of debit cards, which will mean that merchant costs of accepting debit will decline, a reduction in input costs valued in the tens of billions of dollars that will ultimately redound to the benefit of consumers.")

E. The Requested Fee Is Reasonable In Relation to the Settlement

1. A Proper Valuation of the Settlements Should Include the Estimated Value of the Injunctive Relief

"Under the 'equitable fund' doctrine, attorneys for the representative plaintiffs in a class action litigation may petition the court for compensation from *any benefits* which were achieved

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[82] App. Ex. 34 (W.A. Lee, *Put Up or Pay Up, Visa Tells Debit Issuers*, American Banker, Aug. 5, 2003, at 17).

[83] App. Ex. 19, *available at* 2003 WL 10167680. *See also,* App. Ex. 35 (Jennifer Bayot, *Settlement is Seen as Changing Ways Consumers Use Debit Cards*, The New York Times, May 2, 2003, at C1) ("'Visa and MasterCard will be compelled to act more competitively, and that's undoubtedly good for the consumer'") (quoting Albert Foer, president of the American Antitrust Institute); App. Ex. 36 (Chaka Ferguson, *Retailers Win $3B in Debit Card Lawsuit*, Associated Press, May 1, 2003 at 1) ("'It's a terrific day for consumers,' David Balto, a former Federal Trade Commission policy director, said. 'Consumers will see the benefits of lower prices, greater choice and safer debit card products.'").

[84] *See also, Id*. at ¶ 8 ("Eliminating the anti-competitive, artificially high interchange costs imposed by the Honor All Cards rules should benefit all consumers and low income consumers in particular.").

as a result of their efforts." *Snapp*, 1997 WL 1068687, at *3 (emphasis added).[85] When determining the total value of a class action settlement for purposes of calculating the attorneys' fee award, the court should consider both the direct compensatory relief and the economic value of any prospective injunctive relief obtained for the class. *See, e.g., Sheppard,* 2002 WL 2003206, at *7 (in valuing total settlement for percentage-based attorneys' fee award, court included $6.745 million in monetary relief and "an estimated $5 million in non-monetary, injunctive relief"); *Steiner*, 2001 WL 604035, at *4 ("Although the settlement in this action did not involve the payment of money by the defendants, counsel may nonetheless recover a fee if the settlement conferred a substantial non-monetary benefit").[86]

As the Supreme Court has recognized, the rationale of the common-fund doctrine "must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation 'which corrects or prevents an abuse which would be prejudicial to the rights and interests' of those others." *Hall v. Cole*, 412 U.S. 1, 5 n.7 (1973) (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970)). *See also*, *Kaplan v. Rand*, 192 F.3d 60, 70 (2d Cir. 1999) (noting "'well-established [rule] that non-monetary benefits, such as . . . deterring future misconduct by management may support a fee award'") (quoting *Koppel v. Wien*, 743 F.2d 129,

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[85] *See also, In re Int'l Murex Techs.*, 1996 WL 1088899, at *4 (same); *Slomovics*, 906 F. Supp. at 150 (same); *In re Am. Bank Note*, 127 F. Supp. 2d at 430 (quoting *Slomovics* for same).

[86] *See also, Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2d Cir. 1995) (attorneys' fees may be awarded based on non-pecuniary benefit obtained for class); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 199 (S.D.N.Y. 1997) (in determining fee award in employment discrimination case, court considered value of prospective wage increases and defendants' costs of initiating and maintaining internal civil rights task force); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (in justifying fee award of 33.8%, court noted that "class counsel's efforts may reasonably be expected to have created a benefit beyond the immediate settlement proposed"); *Vizcaino*, 290 F.3d at 1049 ("[i]ncidental or non-monetary benefits conferred by the litigation are a relevant circumstance" in evaluating the reasonableness of attorneys' fees); *Shaw,* 91 F. Supp. 2d at 971 ("When considering the quality of the proposed Settlement Agreement, this Court considered both the monetary and the non-monetary benefits the class is to receive.").

134-35 (2d Cir. 1984)); *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975) ("[A]s the Supreme Court has developed the 'common fund' rationale for awarding attorney fees, assessment of such fees . . . may be predicated on the conferral of benefits which are neither monetary in nature nor explicitly sought on behalf of the entire group.").

Defendants' agreement to drop their tying arrangements is the type of substantial non-monetary benefit for which these courts have found that attorney compensation is warranted. Indeed, if plaintiffs had received no monetary damages in these settlements, Class Counsel would still be entitled to substantial attorneys' fees for the injunctive relief alone. *Steiner*, 2001 WL 604035, at *4. *Cf.*, *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) ("Congress made clear that it intended that the amount of fees awarded under [the Civil Rights Act] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature*.") (internal quotations omitted) (emphasis in original).

This case was not exclusively, nor even primarily, instituted to recover compensatory relief for past conduct. While the monetary damages plaintiffs claimed in this case were important, the elimination of defendants' HAC tying arrangements were "equally, if not more, important" to plaintiffs. *Supra* note 37. As Professor Coffee noted:

> "Understandably, a tendency exists for courts to ignore, or give only passing attention to, prospective or non-pecuniary relief in appraising the adequacy of a class action or determining the appropriate fee award. In this case, however, it is the prospective relief that represents the greatest achievement. Impartial observers have made this point over and over in analyzing the settlement. . . . *In short, properly viewed, this is a landmark injunctive action to*

which is appended over $3 billion in compensatory relief."[87]

Therefore, any calculation of the true value of the settlements to plaintiffs, and the appropriate percentage to be applied, must account for this substantial injunctive relief. Courts that have not included the value of prospective injunctive relief as part of the "settlement fund" have considered the value of the injunctive relief in determining what percentage of the fund should be awarded. *See*, *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) ("courts should consider the value of the injunctive relief obtained as a relevant circumstance in determining what percentage of the common fund class counsel should receive as attorneys' fees") (internal quotation and citation omitted).

Class Counsel's fee request is 2.14% of the present value of the total settlement ($3,383,400,000 in compensatory relief plus $25,076,000,000 in injunctive relief as most conservatively estimated), or 18% of the present value of the compensatory relief alone. Precedents in common fund cases, mega-fund cases, and antitrust mega-fund cases all demonstrate how reasonable, and indeed conservative, Class Counsel's fee request is.

2. Class Counsel's Requested Percentage Is Below the Norm in this Circuit

"There is no general rule as to what percentage of the common fund should be awarded as attorneys' fees. . . . Many courts in this circuit have awarded between 20% and 30%, with 25% perhaps being thought of as the 'benchmark.'" *Snapp*, 1997 WL 1068687, at *3 (awarding 25% of $2.5 million settlement fund).[88] While the Second Circuit has recently criticized the use of a

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[87] Coffee Dec. at ¶ 13 (emphasis added) (quoting articles). *See also, supra* notes 37 and 38 and accompanying text.

[88] *See also, In re Int'l Murex Techs.*, 1996 WL 1088899, at *4 (same) (awarding 25% of $5.4 million settlement fund); *Slomovics*, 906 F. Supp. at 151 (same) (awarding 25% of $827,500 settlement).

"benchmark" as too rigid and "an all too tempting substitute for the searching assessment that should properly be performed in each case," *Goldberger*, 209 F.3d at 52, the Court's principal concern with the concept was applying it to cases with little or no contingency risk, like the one before it.[89] For those cases with significant contingency risk, however, the 25% fee award remains a prevalent benchmark.[90]

Since *Goldberger*, fee awards of 25% or more have been common in this Circuit in cases with settlement funds large and small. Most recently, in *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003), the court awarded attorneys' fees of 33.3% of the $220 million settlement fund. In justifying the award, the court noted that "[t]he fee of one-third falls within the range of rates that have been approved in other class actions." *Id.* at 41. Similarly, in awarding fees and expenses of 28% of a $20 million settlement fund in *In re Lloyd's*, the court noted that "[i]n this district alone, there are scores of common fund cases where fees alone (*i.e.*, where expenses are awarded in addition to the fee percentage) were awarded in the range of 33-

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[89] *Id*. ("But the principal analytical flaw in counsel's [benchmark] argument lies in their assumption that there is a substantial contingency risk in every common fund case. We harbor some doubt that this assumption is justified in cases such as this.") (citing to empirical evidence showing that "there appears to be *no appreciable risk* of non-recovery in securities class actions, because virtually all cases are settled," and anecdotal evidence by class counsel that "losses in these cases are few and far between") (internal quotations and citations omitted) (emphasis in original). The Court went on to conclude that the case was a low risk case in which class counsel's performance was helped enormously by prior criminal and civil government proceedings. *Id*. at 54-56.

[90] Awards that have fallen below the 25% benchmark have typically been made in securities class actions, where, like in *Goldberger*, the court found there was minimal, if any, contingency risk associated with bringing the action. *See, e.g.*, *In re Dreyfus*, 2001 WL 709262, at *5 (awarding 15% of $18.5 million settlement noting that "the merits of this case were promising from the outset" and that "[t]here was substantial overlap between the government's [pre-existing] investigations and the plaintiffs' claims"); *In re Twinlab*, 187 F. Supp. 2d at 86 (awarding 12% of $26.5 million settlement noting that "the most important factor in our analysis which is the contingency risks involved in the litigation weighs against awarding a more substantial fee in this matter."). As in *Goldberger*, these courts also pointed to the evidence that "there appears to be no appreciable risk for non-recovery in securities class actions." *In re Dreyfus*, 2001 WL 709262, at *5 (quoting *Goldberger*, 209 F.3d at 52) (internal quotation omitted); *In re Twinlab*, 187 F. Supp. 2d at 85 (same).

1/3% of the settlement fund." 2002 WL 31663577, at *26 (citing cases).[91]

3. Class Counsel's Requested Percentage Is Below the Norm in Antitrust "Mega-Fund" Cases

Attorney fee awards of 25% or more have been routinely awarded in the so-called "mega-fund" cases. In addition to the cases in this Circuit cited above (*In re Buspirone* -- 33.3% of $220 million; *Kurzweil* -- 30% of $124 million; and *In re Sumitomo* -- 27.5% of $116.6 million) there have been numerous "mega-fund" cases in other circuits with analogous fee awards. For example, in *Vizcaino*, 290 F.3d 1043, the Ninth Circuit affirmed a district court's fee award of 28% of a $97 million settlement. In upholding the award, the circuit court pointed to numerous "mega-fund" cases with awards of 25% or more. Indeed, almost 70% of the 34 mega-fund cases the Ninth Circuit surveyed had fee awards of 18% or more, and none of these cases even begin to approach the risk, effort, or result here.[92]

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[91] *See also, Maley*, 186 F. Supp. 2d at 370 (awarding 33.3% of $11.5 million settlement fund and noting that award "falls comfortably within the range of fees typically awarded in securities class actions"); *In re APAC Teleservices*, No. 97 Civ. 9145, at 2-3 (awarding 33.3% of $21 million settlement fund and noting that the award is "within the range of fees that are regularly awarded"); *Steiner*, 2001 WL 604035 (awarding 30% of $20 million settlement fund); *Newman v. Caribiner Int'l, Inc.*, No. 99 Civ. 2271 (S.D.N.Y. Oct. 19, 2001) (awarding 33.3% of $15 million settlement fund); *In re Arakis*, 2001 WL 1590512 (awarding 25% of $24 million settlement fund); *In re Am. Bank Note*, 127 F. Supp. 2d 418 (awarding 25% of $21 million settlement fund); *Baffa*, 2002 WL 1315603 (awarding 30% of $3 million settlement fund); *Strougo*, 258 F. Supp. 2d 254 (awarding 33.3% of $1.5 million settlement fund). These awards are consistent with the awards routinely made in pre-*Goldberger* cases. *See, e.g.*, *In re Sumitomo*, 74 F. Supp. 2d 393 (awarding 27.5% of $116.6 million settlement fund); *Kurzweil v. Philip Morris Cos.,* Nos. 94 Civ. 2373, 94 Civ. 2546, 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999) (awarding 30% of $124 million settlement fund); *In re Medical X-Ray*, 1998 WL 661515 (awarding 33.3% of $39.4 settlement fund); *In re Crazy Eddie*, 824 F. Supp. 320 (awarding 33.8% of $42 million settlement fund); *In re RJR Nabisco,* 1992 WL 210138 (awarding 24.3% of $72.5 million settlement fund).

[92] The court surveyed awards from 34 common fund settlements of $50-200 million from 1996-2001. 23 of the 34 cases involved fee awards of 18% or more. 22 of the 34 involved awards of 20% or more. And, 18 of the 34 involved fee awards of 25% or more. *Id.* at Appendix (citing, among others, *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706 (E.D. Pa. 2001) (awarding 25% of $193 million settlement fund); *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (awarding 25% of $190 million settlement fund); *In re Informix Corp. Sec. Litig.*, No. 97-1289 (N.D. Cal. Nov. 23, 1999) (awarding 30% of $137 million settlement fund); *In re Combustion, Inc.*, 968 F. Supp. 1116 (W.D. La. 1997) (awarding 36% of $127 settlement fund); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000) (awarding 29% of $112 settlement fund); *In re Sunbeam Sec. Litig.*, 176 F.

This range of fee awards is particularly prevalent in the antitrust "mega-fund" cases, which Professor Coffee considers "a more comparable and useful sample." Coffee Dec. at ¶ 15. Professor Coffee pointed to the following list of the twelve largest antitrust class action recoveries and their respective fee and expense awards (set forth in reverse chronological order):

- *In re Buspirone Antitrust Litig.*, No. 01-MD-1410 (S.D.N.Y. Apr. 11, 2003) (awarding fees of **33.3%** of $220 million settlement)
- *In re Cardizem CD Antitrust Litig.*, No. 99-MD-1278, at 18-19 (E.D. Mich. Nov. 26, 2002) (awarding fees of **30%** of $110 million settlement)
- *In re Methionine Antitrust Litig.*, No. C 99-3491, MDL No. 00-1311, at 8-9 (N.D. Cal. Oct. 3, 2002) (awarding fees and expenses of **23.3%** of $107 million)
- *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 16, 2001) (awarding fees and expenses of **34.6%** of $365 million)
- *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 2000 WL 204112 (N.D. Ill. Feb. 10, 2000) (awarding fees and expenses of **25.4%** of $696 million)
- *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393 (S.D.N.Y. 1999) (awarding fees and expenses of **28.3%** of $132 million)
- *In re Lease Oil Antitrust Litig.*, 186 F.R.D. 403 (S.D. Tex. 1999) (awarding fees and expenses of **35.1%** of $190 million)
- *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998) (awarding fees and expenses of **14.4%** of $1.027 billion)
- *In re Coordinated Pretrial Proceedings In Petroleum Prods. Antitrust Litig.*, No. MDL 150, 1994 WL 675265 (C.D. Cal. Aug. 11, 1994) (awarding fees of **21%** of $140 million)
- *In re Infant Formula Antitrust Litig.*, MDL No. 878 (N.D. Fla. Sept. 7, 1993) (awarding fees and expenses of **26.3%** of $125.8 million)

Supp. 2d 1323 (S.D. Fla. 2001) (awarding 25% of $110 million settlement fund).

- *In re Corrugated Container Antitrust Litig.*, M.D.L. No. 310 (S.D. Tex. filed Sept. 1, 1983) (awarding fees and expense of **8%** of $550 million)

- *In re Plywood Antitrust Litig.*, M.D.L. 159 (E.D. La. Apr. 29, 1983) (awarding fees and expenses of **14.9%** of $171.4 million)

Of these cases, only three had attorney fee awards that were lower on a percentage basis than what Class Counsel request here *based on the compensatory relief alone*. Two of those awards (*In re Corrugated Container* and *In re Plywood*) were made in 1983 and, according to Professor Coffee, were likely the result of the "reflexive use" of the "now disfavored" lodestar method that was mandated at the time. Coffee Dec. at ¶ 16. Class Counsel's requested percentage falls well below the average percentage fee award in these antitrust mega-fund cases, whether the mean, median, or mode is considered.[93] Moreover, this case far exceeds any of these other cases in terms of risk, effort, and results.

The only recent case that awarded a percentage lower than that requested here (based on compensatory relief alone) is *In re Nasdaq*. The meaningful differences between this case and *Nasdaq* are apparent. First, in addition to the unprecedented compensatory relief obtained here, the recovery in this case, unlike that in *Nasdaq*, includes injunctive relief presently valued at between $25 billion and $87 billion over the next ten years.

Second, the level of risk assumed by C&P in this case far exceeds that assumed by the lead counsel in *Nasdaq*. Professors Miller and Coffee -- who served as experts for lead counsel

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[93] Professor Coffee's analysis shows a weighted average fee award of 21.34% for these 12 antitrust mega-fund cases, which rises to 24.05% if the two out-of-date "now disfavored lodestar decisions" are excluded. Coffee Dec. at ¶ 16. The straight average of these awards is 24.55% and 27.17%, respectively. Professor Coffee also excludes from his list the recent decision *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 1361, 2003 WL 21513082, at *17 (D. Me. 2003) (awarding fees and expenses of 18.5% of the cash portion of the settlement or 8.7% of the total settlement). Professor Coffee excluded this case from his list because a large portion of the settlement involved the distribution of music CDs to schools and libraries and "there are issues surrounding the valuation of 'in kind' consideration to cy pres beneficiaries." Coffee Dec. at ¶ 15 n .7.

in *Nasdaq* and submitted declarations in support of their fee requests -- concluded that the level of risk assumed by C&P in this case was unprecedented. Miller Dec. at ¶ 24; Coffee Dec. at ¶¶ 2, 36.

Third, *Nasdaq* was a simpler case to prove in terms of liability and damages.[94] Fourth, the plaintiffs in *Nasdaq* had the benefit of a parallel government investigation from which they received discovery and assistance.[95] Fifth, *Nasdaq* settled well before trial and prior to any summary judgment submissions.[96] Sixth, the class in *Nasdaq*, though large, did not approach the size or complexity of the class in this case.[97] And seventh, *Nasdaq* lasted three years less than this case.[98] These differences place the fee awarded in *Nasdaq* in its proper context relative to this case. Moreover, as a percentage of the total recovery, Class Counsel here is requesting

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[94] According to Professor First: *Nasdaq* "involved a substantive antitrust violation about which there is no legal dispute. The *per se* rule for horizontal price fixing is clear and beyond challenge." First Dec. at ¶ 70. And with respect to damages, he concluded that plaintiffs' theory in *Nasdaq* is "well-accepted. Price fixing enables sellers to exercise market power to raise price. Absent collusion, the market power does not exist and prices should be at competitive levels. In the end the damages question was simply 'how much?'" *Id.* at ¶ 71. In contrast, "the antitrust case plaintiffs filed against Visa and MasterCard was a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes." *Id*. at ¶ 64. *See also,* Miller Dec. at ¶ 27 (counsel in *Nasdaq* "did not face the massive procedural[,] legal and economic complexities that were confronted by Class Counsel, and specifically, C&P, in this case.").

[95] *See,* Miller Dec. at ¶ 29 (*Nasdaq* "followed a government investigation regarding horizontal price-fixing claims. Indeed, most of the 'discovery' completed in that case by plaintiffs' counsel was merely their review of documents requested and depositions taken by the government."); First Dec. at ¶ 70 (in *Nasdaq*, counsel "had the assistance of the Justice Department in gathering that proof, as well as the tactical assistance that came from the filing of a civil settlement against the largest of the market-makers."); *In re Nasdaq*, 187 F.R.D. at 471 ("Class Counsel reviewed certain of the discovery provided to the Government, including 3.0 million pages of documents and 10,000 hours of audiotapes and more than 200 depositions.").

[96] *See,* Miller Dec. at ¶ 29; First Dec. at ¶ 73; *In re Nasdaq*, 187 F.R.D. at 477 (If not for settlement, "[d]efendants almost certainly would have pursued extensive pretrial and post-trial motions, including but not limited to motions for summary judgment and motions *in limine*.").

[97] *See,* First Dec. at ¶ 73.

[98] *In re Nasdaq*, 187 F.R.D. at 471 (the case was filed in May 1994 and received initial preliminary settlement approval in October 1997).

substantially less.

4. A "Declining Percentage" Approach Is Not Warranted Here

The *Nasdaq* fee award falls below the norm of awards made in the other recent antitrust mega-fund cases because the court applied a "declining percentage" approach in calculating the fee award. Under this approach the percentage awarded is reduced as the size of the fund increases. *See, In re Nasdaq*, 187 F.R.D. at 486 ("[T]he expectation is that 'absent unusual circumstances, the percentage will decrease as the size of the fund increases.'") (quoting *Third Circuit Report*, 108 F.R.D. at 256 and n.63). The rationale for this approach is to account for economies of scale: "In many instances the increase [in fund size] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id*.

However, a mechanical application of this approach punishes attorneys who recover large settlements as a direct result of their outstanding efforts. Because of this, many courts have refused to apply the declining percentage approach, including post-*Nasdaq* cases within this Circuit as well as many of the antitrust mega-fund cases identified above. As the court in *In re Ikon* explained:

> This court respectfully concludes that [the declining percentage] approach tends to penalize attorneys who recover large settlements. More importantly, it casts doubt on the whole process by which courts award fees by creating a separate, largely unarticulated set of rules for cases in which the recovery is particularly sizable. It is difficult to discern any consistent principle in reducing large awards other than an inchoate feeling that it is simply inappropriate to award attorneys' fees above some unspecified dollar amount, even if all of the other factors ordinarily considered relevant in determining the percentage would support a higher percentage. . . . *Such an approach also fails to appreciate the immense risks undertaken by attorneys in prosecuting complex cases in which there is a great risk of no recovery.*

194 F.R.D. at 197 (emphasis added).

The *In re Vitamins* court similarly refused to reduce its percentage award simply because the recovery was large: "This Court agrees [with *Ikon*] that it is not fair to penalize counsel for obtaining fine results for their clients." 2001 U.S. Dist. LEXIS 25067, at *68. *See also*, *Kurzweil*, 1999 WL 1076105, at *3 (court refuses to "reduce arbitrarily the amount requested by able and diligent counsel" simply because settlement fund was large); *In re Cardizem*, No. 99-MD-1278, at 19 ("[B]lind adherence to a declining percentage-of-fund method under these circumstances 'can create an incentive to settle quickly and cheaply when the returns to effort are highest,' and can create an undesirable situation where counsel is inadequately rewarded for 'investing additional time and maximizing plaintiffs' recovery.'") (quoting *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 80 (S.D.N.Y. 2000)). Professor Coffee agrees with these decisions:

> I have long argued that the courts are correct in rejecting the declining percentage approach. Put simply, if courts were to hold that the percentage should decline sharply after, say, the $1 billion threshold was passed, then plaintiffs' counsel would have had little incentive to hold out for $3.38 billion (as they did hold out here) when by holding out they exposed themselves to real litigation and appellate risk. Moreover, defendants would quickly come to understand that plaintiffs' counsel lacked an incentive to maximize the recovery (at least beyond some threshold), and they could exploit this lack of incentive.

Coffee Dec. at ¶ 51.

The *In re Lease Oil* court also refused to reduce its fee award merely because of the large recovery. While recognizing that such a reduction might be appropriate under certain circumstances, the court concluded it was not appropriate there because "the case required such a

large initial investment by the attorneys and because it was made more difficult due to the sheer number and variety of members in the class." The court further explained:

> That is, the attorneys have had to work harder to represent this class due to its size and diversity; they have not simply benefitted from the fact that, for example, a single tortious act harmed millions of people rather than thousands.

186 F.R.D. at 447.

As in *Lease Oil,* this case also involved a large initial investment. Moreover, the massive size and complexity of the class created numerous challenges and difficulties that Class Counsel had to overcome in order to bring this case to trial. To certify the class, Class Counsel parried defendants' numerous arguments relating to the complex interaction between the law and economics of damages in a tying case and the "common injury" requirement of Rule 23. Class Counsel defeated these arguments by using the massive discovery record to marshal the facts to expose the flaws in defendants' arguments.

The size and complexity of the class added to Class Counsel's burden as the case proceeded to trial. After the class motion, Class Counsel had to deal with defendants' numerous attempts to contrive antagonisms among class members. A significant portion of the depositions given by the merchants, and the principal rationale for defendants' withering deposition strategy, was an attempt to exploit these purported differences.

Moreover, much of defendants' attack on Dr. Fisher's sound damages methodology was a disguised challenge to the class. For example, on summary judgment, defendants recycled their contention that price discrimination would emerge in the Fisher "but-for" world. Defendants also argued that some class members were "not well-suited" for on-line debit, while others were

"well-suited" to accept on-line debit.

After the Court denied defendants' summary judgment motions, defendants resurrected these arguments in their pretrial submissions. For example, defendants designated thousands of deposition extracts that went to many rejected class and summary judgment arguments. In addition, defendants' proposed jury instructions and precharge were based, in large part, on these very same arguments. Class Counsel, yet again, had to respond to these arguments in their jury instruction and precharge submissions. Simply put, this is not a case where the size of the recovery "has no direct relationship to the efforts of counsel." *In re Nasdaq*, 187 F.R.D. 486.

F. Public Policy Favors the Requested Fee Award

The Supreme Court has repeatedly recognized the vital role played by private parties in bringing lawsuits to enforce the antitrust laws.[99] To encourage lawyers to bring these suits, the courts in this Circuit have repeatedly emphasized the importance of awarding substantial attorneys' fees in antitrust class actions,[100] and other class actions serving the public interest. *See generally, Goldberger*, 209 F.3d at 51 ("There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public

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[99] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of [Clayton Act] § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969) ("Congress has encouraged private antitrust litigation . . . to vindicate the important public interest in free competition.").

[100] *See, e.g., In re Buspirone*, No. 01-MD-1410, at 42 (In awarding 33.3% of $220 million settlement, court noted that "[t]here is certainly a public policy favoring the pursuit of anti-trust litigation on the part of consumers."); *In re Medical X-Ray*, 1998 WL 661515, at *8 (In justifying 33.3% fee award, court noted that it "furthers the public policy of encouraging private lawsuits in protecting against restraint of trade.").

interest."); *In re RJR Nabisco*, 1992 WL 210138, at *7 ("The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits.") (quoting *Dolgow v. Andersen*, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (1970)).[101]

"In the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.,* 481 F.2d 1045, 1050 (2d Cir. 1973) (holding that the principle of adequate attorneys' fees "is particularly applicable in the area of the antitrust class action, which depends heavily on the notion of the private attorney general as the vindicator of the public policy. "). Moreover, as noted by the court in *In re Pepsico Sec. Litig.*, No. 82-Civ-8403, at 17-18 (S.D.N.Y. Apr. 26, 1985), substantial fee awards not only maximize the number of cases brought, but also the results obtained:

> It unquestionably is true that without able lawyers handling these matters not only do some of them go unprosecuted, but the big difference in my experience is in the amount obtained and you don't get the highest recovery and when you are paying at the low end of the scale of fee recovery in contingent actions, it seems to me that I as the protector of the class, can fairly say, and honestly say, that I believe it is in the class' best interests -- of this class and of future classes yet unknown -- to pay this kind of money for these kinds of benefits.

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[101] *See also*, *In re Union Carbide*, 724 F. Supp. at 169 ("A large segment of the public might be denied a remedy for violations of the securities laws if contingent fees awarded by the courts did not fairly compensate counsel for the services provided and the risks undertaken."); *In re Sumitomo*, 74 F. Supp. 2d at 399 (noting that in awarding attorneys' fees, courts in this Circuit "have taken into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation."); *Eltman v. Grandma Lee's, Inc.*, No. 82 Civ. 1912, 1986 WL 53400, at *9 (E.D.N.Y. May 28, 1986) ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding. The concept of a private attorney acting as a 'private attorney general' is vital to the continued enforcement and effectiveness of the Securities Acts.") (internal quotations omitted); *Roberts*, 979 F. Supp. at 197 ("the result achieved was one that captured national attention and focused upon the importance of private attorneys general in enforcement of the proscriptions against racial discrimination in the workplace").

In truth, however, many and indeed most private antitrust suits prosecuted by "private attorneys general" are simply not the type of action one would expect government agencies to bring. Most private suits focus solely or predominantly on a quick monetary recovery. They do not seek significant injunctive relief. They do not address the basic competitive problems faced by an industry. They are not "big picture" cases with a long vision of the benefits of vibrant competition. This case was the paradigm of the type of difficult structural case the government is supposed to bring, and once in a long while actually does:

> Once in a generation an antitrust case offers a chance to restructure an industry. Twenty years ago the settlement of the Justice Department suit against AT&T Corp. led to a proliferation of consumer choice, more innovation, dramatically lower prices, and major telecommunications-industry restructuring. The Wal-Mart settlements offer the promise of many of those benefits.[102]

Granting Class Counsel's fee request will encourage other lawyers to take the substantial risk of undertaking another such lawsuit. *See, Maley*, 186 F. Supp. 2d at 374 ("It is therefore imperative that the filing of such contingent lawsuits not be chilled by the imposition of fee awards which fail to adequately compensate counsel for the risks of pursuing such litigation and the benefits which would not otherwise have been achieved but for their persistent and diligent efforts.").[103]

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[102] App. Ex. 37 (David A. Balto, *Life After the Wal-Mart Case,* Credit Card Management, August 2003, at 48).

[103] *See also, Cosgrove v. Sullivan*, 759 F. Supp. 166, 169 (S.D.N.Y. 1991) ("When a small law firm successfully battles a huge bureaucracy to obtain justice for a class, with a result that confers enormous benefits on the class, such services should be appropriately rewarded. If they are not, there will simply be no incentive for public interest law firms to undertake such difficult assignments.").

III. APPLICATION OF THE LODESTAR "CROSS-CHECK"

In *Goldberger*, the Second Circuit suggested the use of a lodestar/multiplier as a "cross-check" on the reasonableness of a percentage based fee request. 209 F.3d at 50. However, not all courts have followed this suggestion.[104] Nevertheless, applying such a cross-check here further demonstrates the reasonableness of the fee request. Class Counsel have submitted a total lodestar of $62,545,603 based on 223,459 hours of work by Class Counsel.[105] Mahoney Dec. at ¶¶ 11, 13. Applying this figure to the fee request of 18% of the presently valued compensatory relief or 2.1% of the presently valued total relief translates into a multiplier of 9.74. Based on the *Goldberger* factors discussed above, there are compelling reasons for approving the requested percentage that yields this multiplier. In addition, this number is significantly overstated based on the exhaustive audit and reduction C&P performed on the individual time records submitted by Class Counsel, the extreme efficiency with which Class Counsel litigated this case, and the below market hourly rates of Class Counsel, and principally, of C&P.

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[104] *See, e.g., Steiner*, 2001 WL 604035, at *7 (court did not apply a cross-check on its 30% fee award noting only that "the time charges were relatively insignificant when compared to the fee requested"); *Thompson v. Metro Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003) (court evaluated fee request under percentage method only). The fact that numerous courts do not apply a lodestar/multiplier cross-check is further reflected in the CAR Survey of common fund settlements. App. Ex. 29. While the survey reported on more than one-thousand cases, it did not contain lodestar/multiplier information for cases accounting for 60% of the total recoveries "due to the present dominance of the percentage of recovery method for awarding fees, where no hours are reported." *Id.* at 1 of 10. *See also*, *Id.* at 7 of 10 ("It should be kept in mind that 616 of the 1,120 Survey cases have no data (actual or proxy) for hours, hourly rates, or multipliers.")

[105] This calculation excludes the substantial time and resources C&P expended in preparing this fee petition and the supporting affidavits, and in performing the exhaustive audit of Class Counsel's total lodestar and expenses. The lodestar was calculated using current billing rates. *See, Strougo*, 258 F. Supp. 2d at 263 n.3 ("The Supreme Court and other courts have held that the use of current rates is proper since such rates more adequately compensate for inflation and loss of use of funds.") (citing *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989) and *Savoie*, 166 F.3d at 463).

A. C&P's Audit of the Lodestar

Class Counsel's calculation of the lodestar submitted to the Court was made only after C&P, and an outside auditor retained by C&P, performed an exhaustive audit of all of the time and expense records submitted by Class Counsel. These audits involved a careful review of each time entry recorded by each law firm to ensure that the work being billed was reasonable and necessary, that the amount of time spent on the work was reasonable, that the rate billed for the work was reasonable, and that the amount of detail provided in support of the time entry was sufficient. *See* Mahoney Dec. at ¶ 4. As result of this audit, C&P reduced the total lodestar submitted to the Court by $3,053,045.

B. The Multiplier Requested Is Reasonable

There is support within this and other Circuits for fee awards with multipliers in this range, *albeit* in cases where the level of risk, efforts and results achieved were far less than here.[106] These courts have refused to set an arbitrary ceiling on multipliers when the percentage award is fully justified by the effort, risk undertaken, and results achieved by counsel. As the court in *Newman* noted in approving a 33.3% fee award that yielded a 7.7 multiplier:

> I wanted to note that, in my view, there is no difficulty with the fact candidly acknowledged in the papers that, in terms of the time expended, this is a profitable case for the plaintiffs' lawyers who worked on it. Contingency type percentage settlements serve an important purpose . . . . So it is important in awarding fees or approving a fee settlement in a case of this kind not to be what in my view would be blinded or distorted that in this particular case,

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[106] *See, e.g., In re Buspirone*, No. 01-MD-1410, at 42-43 (**8.46** multiplier); *Cosgrove*, 759 F. Supp. at 167 n.1, 169 (**8.74** multiplier); *Newman,* No. 99 Civ. 2271 (**7.7** multiplier); *In re RJR Nabisco*, 1992 WL 210138, at *5 (**6** multiplier); *In re Rite Aid*, 146 F. Supp. 2d at 736 n.44 (multiplier of up to **8.5** which court described as "handsome" but "unquestionably reasonable"); *Vizcaino*, 290 F.3d 1043, at Appendix (citing *In re Merry-Go-Round Enterprise, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000) as awarding **19.6** multiplier); and *Weiss v. Mercedes-Benz of North America, Inc.*, 899 F. Supp. 1297, 1304 (D.N.J. 1995) (**9.3** multiplier).

> calculated on an hourly basis, this is a very large, high proportion to what the hourly charges would have been. Taking everything all in all, there is no reason to think that this is an excessive or inappropriate fee.

No. 99 Civ. 2271, at 6.

Approving the percentage requested here is particularly warranted lest the disfavored lodestar method completely overwhelm the favored percentage method of awarding attorneys' fees:

> The use of the lodestar/multiplier methodology in mega-fund cases becomes a less reliable cross-check. This is because the multiplier is generally above the norm in these cases even though the percentage of recovery may be lower than the norm. To rely too heavily on the lodestar/multiplier methodology in such cases would thus eviscerate the percentage of recovery method, which I think is the appropriate metric.[107]

Professor Coffee agrees with this general policy and recommends a balancing approach in evaluating multipliers: "the 'more the percentage of the recovery falls below the norm, the more the multiplier may rise above average. One balances the other.'" Coffee Dec. at ¶ 45 (quoting *In re Rite Aid*, 146 F. Supp. 2d at 736 n.44). Otherwise:

> "the lodestar approach begins to dominate and supercede the percentage of the recovery formula," particularly in those exemplary cases where the recovery greatly exceeds the national averages . . . . It is precisely in these cases where an above average fee is justified and where a rigid application of the multiplier cross check would deny it.

Id. See also, App. Ex. 29 (CAR Survey) at 3 of 10 (reporting that with respect to those cases that calculated a lodestar/multiplier, they "tend on average to increase with the size of the class

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[107] Miller Dec. at ¶ 21 n.4.

recovery . . . ."[108] Here, Class Counsel's requested percentage falls below the norm thereby justifying a higher multiplier.

C. The Multiplier Is Overstated Because of Class Counsel's Efficient Prosecution of this Case

Class Counsel's multiplier is significantly overstated because of the efficiency with which Class Counsel prosecuted this case. While many lawyers worked on this case and provided valuable assistance, a small group of attorneys performed most of the substantive work.[109] This core group took and defended the vast majority of the depositions, drafted and argued all of the substantive motions, supervised the exchange and review of documents, and led the preparation of this case for trial.

Maintaining the primary responsibilities of this case in the hands of this small group of attorneys greatly reduced Class Counsel's duplication of efforts. It also streamlined plaintiffs' ability to prepare for trial by having a core group of lawyers each of whom possessed a comprehensive command of the record.

The efficiency of Class Counsel's work is further demonstrated by their lean staffing on most substantive matters. 75% of the depositions were staffed by only one attorney. Constantine Dec. at ¶ 49. The class certification briefs were principally written by three C&P attorneys (with only two working on the Supreme Court brief against defendants' Supreme Court "dream team").

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[108] Professor Coffee offered additional commentary on the proper use of the lodestar cross-check: "To be sure, there is a legitimate role for the lodestar cross check. That role is to identify circumstances in which an automatic application of the percentage of the recovery would result in a windfall to counsel, either because the case settled quickly or because others did the real work. But that is clearly not this case, which has been litigated intensively for six and one half years and was not preceded or assisted by any governmental action." Coffee Dec. at ¶ 44.

[109] This group consisted of Robert Begleiter, Matthew Cantor, Lloyd Constantine, Stacey Anne Mahoney, Gordon Schnell, Mitchell C. Shapiro, and Jeffrey Shinder from C&P; and George Sampson, from Hagens Berman.

The summary judgment briefs were also principally written by three C&P attorneys. And the bulk of plaintiffs' expert work, including the rebuttal of defendants' 15 experts, was principally handled by only two C&P attorneys.

D. The Multiplier Is Also Overstated Because of Class Counsel's Below Market Rates

Class Counsel's multiplier is further overstated because of the below market rates used by Class Counsel. The blended hourly rate of Class Counsel in this case was $280. This falls well below the blended hourly rates typically used by counsel in class actions brought in New York. A sampling of New York class action fee award decisions over the past three years shows that the blended hourly rates used by class counsel range from $316 to $516,[110] with an average rate of $390.[111]

Applying a $390 hourly blended rate to the total hours Class Counsel worked on this case increases their lodestar to $87,149,010 and reduces the requested multiplier to less than 7. As Professor Coffee remarked: "[I]t would be a perverse irony to reduce their fee because of a high multiplier when that high multiplier was in turn the product of charging only a low hourly rate."

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[110] *See, e.g., Duncan*, 2003 WL 1907959, at *2, 4 (2003) (**$516** blended hourly rate based on $530,000 lodestar and 1,027 hours worked); *Baffa*, 2002 WL 1315603, at *2 (2002) (**$448** blended hourly rate based on $2.36 million lodestar and 5,273 hours worked); *Varljen v. H.J. Meyers & Co.,* No. 97 Civ. 6742, 2000 WL 1683656, at *5 (S.D.N.Y. Nov. 8, 2000) (**$412** blended hourly rate based on $1,029,298 lodestar and 2,500 hours worked); *In re Arakis*, 2001 WL 1590512, at *10 (2001) (**$389** hourly blend based on $5,052,603 lodestar and 13,000 hours worked); *In re Am. Bank Note*, 127 F. Supp. 2d at 432 (2001) (**$368** blended hourly rate based on $3.5 million lodestar and 9500 hours worked); *Maley*, 186 F. Supp. 2d at 371 (2002) (**$366** blended hourly rate based on $823,000 lodestar and 2,246 hours worked); *Cromer Finance Ltd. v. Berger*, No. 00 Civ. 2284, 2003 WL 203197, at *1 n.4 (S.D.N.Y. Jan. 29, 2003) (**$366** blended hourly rate based on $1,267,653 lodestar and 3,464 hours worked); *In re Lloyd's,* 2002 WL 31663577, at *27 (2002) (**$326** blended hourly rate based on $2,614,831 lodestar and 8,030 hours worked); *In re Twinlab.*, 187 F. Supp. 2d at 86 (2002) (**$318** blended hourly rate based on $2,462,538 and 7,750 hours worked).

[111] This $390 figure is consistent with the $349 figure cited in the CAR Survey derived from fee award decisions between 2001and 2003 throughout the United States (including jurisdictions where the market rate for attorneys' fees are well below those in New York). App. Ex. 29 at Table 3 (column 11).

Coffee Dec. at ¶ 42.

IV. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES SHOULD BE GRANTED

Plaintiffs and their counsel request reimbursement from the Settlement Funds of expenses they have incurred in the amount of $18,716,511.44. The bulk of these expenses comes from the costs of plaintiffs' experts and consultants (approximately $10.6 million); litigation and trial support services (approximately $2.5 million); document imaging and copying (approximately $1.7 million); deposition costs ($0.6 million); on-line legal research (approximately $0.5 million); and travel expenses (approximately $0.4 million).[112] In addition, Class Counsel also seek the Court's approval for a disbursement from the Settlement Funds in the amount of $6,034,645.23 to be paid to the Garden City Group, Inc. for the invoice dated March 5, 2003 for dissemination and administration of the Class Notice of Pendency. *See,* Mahoney Dec. at ¶ 24.

These and the other categories of expenses for which Class Counsel seek reimbursement are the types of expenses routinely incurred in complex antitrust litigations of this size and all were necessary and reasonable for the proper and efficient prosecution of this case. Given the size, length, and complexity of this case, these expenses are reasonable. This is particularly so given the exhaustive auditing and reductions C&P performed of all expenses submitted by Class Counsel. *Id*. at ¶¶ 5, 12. "Courts in the Second Circuit normally grant expense requests in common fund cases as a matter of course." *In re Arakis*, 2001 WL 1590512, at *17 n.12 (citing cases).

[112] *See,* Mahoney Dec., Ex. E for a detailed breakout of all of the expenses for which plaintiffs and their counsel seek reimbursement.

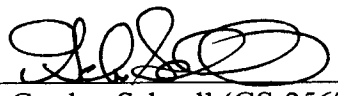
CONCLUSION

For the foregoing reasons, and for the reasons set forth in the accompanying declarations, Class Counsel respectfully request that the Court grant their request for an award of attorneys' fees in the amount of 18% of the presently valued compensatory relief, or 2.1% of the presently valued total relief, along with reimbursement of the $18,716,511.44 in reasonable costs and expenses incurred by plaintiffs and Class Counsel, plus accrued interest.

Dated: New York, New York
August 18, 2003

Respectfully submitted,

CONSTANTINE & PARTNERS, P.C.

By: 

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