04-1055-cv

IN TANDEM 04-0344, 04-0514, 04-0635, 04-1052, 04-1231, 04-2108

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

WAL-MART STORES, INC., LIMITED, INC., SEARS ROEBUCK AND CO., INTERNATIONAL MASS RETAIL, SAFEWAY INC., NATIONAL RETAIL FEDERATION, AUTO-LAB OF FARMINGTON HILLS, THE ROMAN BURLINGTON COAT FACTORY WAREHOUSE CORP., SAFEWAY, INC., CIRCUIT CITY STORES, INC., ROMAN BUHOLZER a/k/a THE CONTINENTAL GARDEN RESTAURANT,

Plaintiffs-Appellees-Cross-Appellants,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the Eastern District of New York

APPELLEE/CROSS APPELLANT-CLASS COUNSEL'S BRIEF (i) IN OPPOSITION TO THE APPEAL OF OBJECTORS 710 CORP. AND LEONARDO'S PIZZA BY THE SLICE, INC. AND (ii) IN SUPPORT OF CLASS COUNSEL'S CROSS-APPEAL FROM THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES

CONSTANTINE & PARTNERS
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DOW JONES AND COMPANY, INC.,

Intervenor-Plaintiff-Appellee,

v.

VISA U.S.A. INC. and MASTERCARD INTERNATIONAL, INC., and HAT-IN-THE-RING, INC. d/b/a EDDIE RICKENBACKER'S,

Defendants,

TCF FINANCIAL CORPORATION and LUPITA LLAMAS MARTINEZ, d/b/a DEL YAQUI RESTAURANT,

Intervenors,

v.

LEONARDO'S PIZZA BY THE SLICE, INC. and 710 CORP. INC.,

Objectors-Appellants-Cross-Appellees,

DUKE PRODUCTS, INC., SOUTHERN NETWORK SERVICES, INC., SOUND DEALS, INC., DIGITAL SOLUTIONS, INC. and VILLAGE FABRICS AND FURNISHING, INC., REYN'S PASTA BELLA, JEFFREY LEDON DEWEESE, M.D., BARRY LEONARD, RENTAL SOLUTIONS, INC., RENTAL TECH, INC., ARMENTA'S MEXICAN FOOD, INC., PRESTON CENTER PERSONAL TRAINING, INC., G & G ENTERPRISES, NSG ENTERPRISES, INC., S & GJ ENTERPRISES, INC., JAC VAC, INC., JOHN WENTURINE, Y.P.I., INC., MOBIL TOWN USA, INC., YOUNG PIONEERS, INC., DIGITAL PLAYROOM, INC., THOMAS MCMACKIN, CLASS ACTION FAIRNESS GROUP and UCC QUICKDOCS. INC.,

Objectors.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Class Counsel/Appellees/Cross Appellants Constantine & Partners PC, Hagens Berman LLP, Alexander Hawes & Audet, Law Office of Leo W. Desmond, Law Office of Kenneth A. Elan, Garwin Bronzaft Gerstein & Fisher, Law Offices of Lionel Z. Glancy, Goodkind Labaton Rudoff & Sucharow LLP, Heins Mills & Olson PLC, Hoffman & Edelson LLC, Jenkins & Mulligan, Law Offices of Jeffrey F. Keller, Kirby McInerney & Squire LLP, Levin Fishbein Sedran & Berman, Lieff Cabraser Heimann & Bernstein, Law Offices of Lawrence Metzger, Milberg Weiss Bershad Hynes & Lerach, Miller Faucher Cafferty & Wexler, Prongay & Borderud, Rabin & Peckel, Rohan Goldfarb & Shapiro PS, Elwood S. Simon & Associates PC, Law Offices of Harris J. Sklar, Spector Roseman & Kodroff, Law Offices of Jerald M. Stein, Law Offices of Robert Taylor-Manning, Trujillo Rodriguez & Richards, Wolf Haldenstein Adler Freeman & Herz, Zwerling Schachter & Zwerling LLP, and Law Offices of Michael Zwick, disclose that they have no parent corporations and that no publicly held company owns ten percent or more of their stock.

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<u>FEDERAL STATUTES</u>

<u>OTHER AUTHORITIES</u>

Class Counsel, consisting of Lead Counsel, Constantine & Partners ("C&P"), and the twenty-nine other law firms that successfully litigated this case, respectfully submit to the United States Court of Appeals for the Second Circuit, pursuant to Rule 3 of the Federal Rules of Appellate Procedure, this Brief (i) In Opposition to the Appeal of Objectors 710 Corp. and Leonardo's Pizza by the Slice, Inc. (together, "Leonardo's"), and (ii) In Support of Class Counsel's Cross-Appeal from the District Court's Award of Attorneys' Fees (the "Fee Award").[1]

PRELIMINARY STATEMENT

In rendering the Fee Award, the district court evaluated the performance of Class Counsel and the results they achieved under the factors established by this Court in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). The district court found that the case was of "enormous" magnitude and complexity and "very risky" (297 F. Supp. 2d at 523); that the "excellence" of Class Counsel's representation "produced the largest antitrust settlement ever" (*id.* at 524) and based on compensatory relief alone, "the largest settlement ever

[1] The Fee Award is contained in (1) the Memorandum and Order issued by the Honorable John Gleeson, United States District Judge for the Eastern District of New York, on December 19, 2003 (reported as *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003)); and (2) the separate Final Judgments issued by Judge Gleeson on January 23, 2004 and entered on January 30, 2004, approving the Settlements with defendants Visa U.S.A. Inc. ("Visa") and MasterCard International Incorporated ("MasterCard").

approved by a federal court" (*id.* at 511); and that the Settlements "produced significant and lasting benefits for America's merchants and consumers." *Id.* at 524.

Having found that Class Counsel's performance exceeded all others in risk, difficulty and result and "compels the award of an extraordinary fee" (*id.* at 523), the district court (purporting to use the favored percentage-of-recovery method) awarded an attorneys' fee representing the lowest percentage awarded -- and well less than one-third the average percentage awarded -- of all antitrust mega-fund settlements in United States history. In doing this, the district court abused its discretion in five ways.

First, while purporting to consider the sixth *Goldberger* factor -- "public policy" -- the district court not only failed to apply it, but erected a strong disincentive for future counsel to pursue monetary recoveries above $1 billion and important injunctive relief, which the district court recognized was "far more significant" in this case than the record compensatory relief. *Id.* at 520. The district court also failed to apply the other five *Goldberger* factors after finding that the performance and risk assumed by Class Counsel, the magnitude, complexity, and difficulty of the case, and the result achieved, were excellent, extraordinary, and unprecedented.

Second, while purporting to utilize the percentage-of-recovery method for calculating fee awards, the district court actually used the lodestar/multiplier method instead. The decisions of this Court make clear that either method of fee calculation may be used. However, a district court may not mischaracterize the factual or legal bases of an important decision, as the district court did here.

Third, the district court purported to protect a class that was "not fully informed" and had not been "able to negotiate collectively, or at arm's length" (*id.* at 521), when the district court knew that Class Counsel was requesting fees well below those arrived at in arm's length negotiations between a small law firm and five of the nation's largest merchants, including Wal-Mart, the world's largest corporation.

Fourth, while stating that the "far more significant relief for the individual merchants is the injunctive relief" (*id.* at 520), "the substantial injunctive relief here should inform my decision" (*id.* at 525), and "it has" (*id.*), the district court failed to give any weight to this relief in the fee determination.

Fifth, the district court abused its discretion by purporting to apply the six *Goldberger* factors, when in fact it merely awarded the fee it deemed appropriate. In doing so, it rejected Class Counsel's fee request of 18% as "excessive," "absurd," and "fundamentally unreasonable" (*id.* at 522-23), and described the Fee

Award of 6.511% as "extraordinary," "generous," and "exorbitant" (*id.* at 523-25), without any explanation or analysis as to how it came to that conclusion. According to the district court's own idiosyncratic and undisclosed standards, those characterizations of the fee request and Fee Award are no doubt correct. However, the award cannot be squared with the district court's assessment of the *Goldberger* factors. Under any objective assessment of those factors, the award is unreasonable and an abuse of discretion.

JURISDICTIONAL STATEMENT

This class action was filed in the United States District Court, Eastern District of New York, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and for damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. The jurisdiction of the district court is based upon 28 U.S.C. §§ 1331 and 1337. The jurisdiction of this Court is based upon 28 U.S.C. §§ 1291 and 1294. Class Counsel filed their Notice of Cross-Appeal on February 27, 2004, and their Amended Notice of Cross-Appeal on March 10, 2004.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in its Fee Award by:

1. Failing to apply the "public policy" factor for evaluating fee

requests set forth in *Goldberger* and establishing a disincentive for future counsel to seek compensatory and injunctive relief comparable to the unprecedented relief which the district court found was achieved by Class Counsel in this case;

2. Failing to apply the district court's own assessments of the other factors for evaluating fee requests set forth in *Goldberger*;

3. Mischaracterizing as a percentage calculation of attorneys' fees what in fact was a lodestar/multiplier calculation;

4. Counter-factually purporting to protect a class that was not able to bargain for a fee arrangement at arm's length;

5. Failing to factor the injunctive relief into the Fee Award after finding that this relief produced "significant and lasting benefits for America's merchants and consumers"; and

6. Making the Fee Award under its own idiosyncratic and undisclosed standard.

STATEMENT OF THE CASE AND FACTS

For a full recitation of the procedural history of this litigation, Class Counsel respectfully refer the Court to the declarations of Lloyd Constantine dated August 17 and September 17, 2003 (A1091-1144, A2082-2089),[2] and the district court's three reported decisions in this case: *In re Visa Check*, 297 F. Supp. 2d 503 (settlement approval and Fee Award); No. 96-CV-5238, 2003 WL 1712568 (Apr.

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[2] References herein to "A __" refer to documents contained in the Joint Appendix For Leonardo's. Unreported decisions cited herein are contained in the accompanying Addendum of Unreported Decisions.

1, 2003) (summary judgment); and 192 F.R.D. 68 (2000) (class certification).

I. THE LAWSUIT

C&P filed the original complaint in this action on October 25, 1996. Plaintiffs' case involved two basic claims. First, plaintiffs alleged that defendants' Honor All Cards ("HAC") tying rules, which required merchants that accepted Visa and MasterCard credit cards also to accept their signature debit cards, 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, exclusionary rules, price-fixing regime, 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 credit and debit card 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 active adversarial litigation. A166-209, A1091.

II. DISCOVERY

In total, more than five million pages of documents were produced. 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. The parties took approximately 400 depositions over 500 days, including depositions of 21 experts who collectively submitted 54 expert reports. A1108-1109, A1094.

III. SUBSTANTIVE MOTIONS

A. Class Certification

Plaintiffs moved for class certification in April 1999. The district 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." 192 F.R.D. at 88.

The Second Circuit granted defendants' Rule 23(f) petition in March 2000. In October 2001, the Second Circuit affirmed the district court's class certification decision concluding that "this is precisely the type of situation for which the class action device is suited." 280 F.3d at 146. The Second Circuit denied defendants' petition for rehearing and rehearing *en banc*. The Supreme Court denied defendants' petition for a writ of *certiorari* in June 2002. *Visa U.S.A. Inc. v. Wal-*

Mart Stores, Inc., 536 U.S. 917 (2002). In total, the four rounds of class certification submissions involved 18 briefs, including defendants' failed *Daubert* motion. A1094-1095, A1109-1110.

B. Summary Judgment

During the summer of 2000, with supplementation in December 2002, the parties moved for summary judgment on virtually every issue in the case. In total, the four rounds of summary judgment submissions involved 16 briefs, more than 1,750 evidentiary exhibits, and 38 declarations. A634, A645, A1116-1119.

On April 1, 2003, the district court denied defendants' eleven motions for summary judgment in their entirety, and granted six of plaintiffs' summary judgment motions. 2003 WL 1712568. The district court granted plaintiffs summary judgment on the following issues: (i) debit cards and credit cards are distinct products; (ii) credit and charge card services to merchants constitutes a relevant 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 market; and (vi) defendants' tying arrangements affected a not insubstantial amount of commerce.

IV. THE SETTLEMENTS

Prior to plaintiffs' summary judgment victory, the likelihood that this case would settle was remote. The centrality and importance of the tying arrangements and defendants' commitment to vigorously defend them was explained by Visa's lead counsel, Laurence Popofksy, at the first court appearance in this case, responding to the district court's suggestion that an early settlement conference be scheduled:

> I don't think we should hold any delusions about it. . . . The practice at issue is a fundamental business practice in both associations, the cost of adjusting that business practice is enormous . . . and settlement discussions before the parties have flexed their muscles [at] summary judgment strikes me as probably a waste of the Court's time. [A862.]

More than six years later -- after the district court granted most of plaintiffs' summary judgment motions and denied all of defendants' motions -- mediation and settlement activities, which began late in 2002, intensified. MasterCard agreed to settle at 4:45 A.M. on April 28, 2003, hours before a jury was seated. Visa agreed to settle two days later. On April 30, 2003, the parties entered into binding Memoranda of Understanding which were the framework for the formal Settlement Agreements executed on June 4, 2003. A1135-1136.

In approving the Settlement Agreements without any change, the district court placed the relief obtained by Class Counsel in proper historical perspective:

- The compensatory relief by itself constitutes the largest settlement ever approved by a federal court. [297 F. Supp. 2d at 511 (internal quotes omitted).]

- The discounted present value of the total compensatory relief, on which Lead Counsel base their requested fee, amounts to $3,383,400,000 (the 'Fund'). [*Id.* at 509.]

- The injunctive relief will result in future savings to the class valued from approximately $25 to $87 billion or more. [*Id.* at 512.]

- Despite the size of the Net Settlement Funds, the far more significant relief for the individual merchants is the injunctive relief -- the absence of artificially high and mandatory debit card transaction fees. [*Id.* at 520.]

- The Settlement Agreements are the proposed culmination of approximately seven years of litigation, and represent the largest antitrust settlement in history. [*Id.* at 508.]

- [T]he Settlements have produced significant and lasting benefits for America's merchants and consumers. [*Id.* at 524.]

The district court concisely summarized the main provisions of the Settlements as follows:

- [T]he cessation, as of January 1, 2004, of defendants' 'Honor All Cards' rules, by which the defendants' debit card services to merchants were tied to their credit card services . . . . [*Id.* at 508.]

- [T]he creation of a \$3.05 billion settlement fund . . . . [*Id.*]

- [T]he creation of clear, conspicuous and uniform visual identifiers on Visa and MasterCard debit cards by January 1, 2007 (80% by July 1, 2005), so merchants and consumers can distinguish these products from credit cards . . . . [*Id.*]

- [T]he lowering, by roughly one third, of the interchange rates on debit products for the period from August 1, 2003, through December 31, 2003 . . . . [*Id.*]

- [O]ther injunctive relief, such as the provision of signage from defendants to merchants communicating the merchants' acceptance of defendants' untied debit products; and a prohibition on defendants enacting any rules that prohibit merchants from encouraging or steering customers to use forms of payment other than defendants' debit cards . . . . [*Id.*]

- [T]he release of Visa and MasterCard from claims arising out of the conduct at issue . . . . [*Id.*]

V. THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENTS AND FEE AWARD

A. Class Counsel's Fee Petition

On August 18, 2003, Class Counsel filed their petition for attorneys' fees, costs, and expenses (the "Fee Petition"). A622-706. Class Counsel requested 18% of the present value of the compensatory relief recovered in this case (\$3,383,400,000). This amounts to 2.14% of the discounted present value of the most conservative estimate of the total relief recovered by the Class ($28,383,400,000). A683, 701. Class Counsel requested a fee that was far less than the fee which would have resulted from class-wide application of the fee arrangement negotiated at arm's length between C&P, a 17 lawyer firm, and five of the nation's largest merchants, including Wal-Mart, the world's largest corporation. A2084.

In support of their petition, Class Counsel submitted (at their expense) declarations from Professors John Coffee of Columbia, Arthur Miller of Harvard, Harry First of New York University, and Frank Fisher of the Massachusetts Institute of Technology. A1200-1236, A1237-1251, A526-559. Each of these noted professors emphasized the unprecedented magnitude, complexity, risk, and difficulty encountered by Class Counsel, and the unprecedented results they achieved.

Professor Coffee prepared, and Class Counsel submitted, a table showing the twelve antitrust class action recoveries of $100 million or more ("mega-fund" recoveries) and their respective fee awards (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 (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 (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 of **14%** 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)

- *In re Corrugated Container Antitrust Litig.*, M.D.L. No. 310 (S.D. Tex. filed Sept. 1, 1983) (awarding fees and expenses 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)

The average fee award for these cases was 24.52%. The compensatory relief in this case exceeds the combined total in the eight previously highest recoveries.

Class Counsel also submitted the report of an independent outside certified public accounting firm which conducted one of two complete audits on the time charges and expenses Class Counsel submitted with the Fee Petition. A1143, A1280-1285. The first audit was conducted by C&P. As part of its audit, C&P reduced attorney and paralegal billing rates to those which C&P considered to be reasonable and commercially realistic, using C&P's own billing rates as a frame of reference.[3]

Notably, there were two submissions that took the position that these rates were too low. Professor Coffee commented extensively about C&P's below-market billing rates, and why the lodestar/multiplier resulting from a cross-check

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[3] C&P reviewed every time and expense entry from C&P and the 29 co-counsel firms for the seven year period. C&P established criteria for the formulaic reduction of fee and expense requests. The criteria were based upon professional experience, fairness and instinct and applied uniformly to C&P and the co-counsel firms. Duplicative entries were rejected. Fees requested for travel time between various city pairs, such as New York and San Francisco, were reduced. Fee and expense requests which C&P could not understand or relate to the case were eliminated. C&P applied a formula to reduce what it considered excessively long days, especially those involving travel. C&P rejected numerous hotel, cleaning and office supply expenses, and any charges for entertainment or alcohol. Meal expenses were also limited to specified amounts, such as $10 for breakfast while traveling. Meal charges were rejected unless the attorney worked a minimum number of hours for the case on the day the meal was charged, such as 9.75 hours to charge a breakfast. A1278-1279.

would be much higher than it would be at prevailing market rates. A1228-1232. Objector and appellant Wolf Haldenstein, whose objection below was in part based upon C&P's reduction of certain billing rates submitted by that law firm, also thought C&P's rates were too low.

A second complete audit of all 30 firms' bills was done by an independent auditor. This audit assured that the formulaic time and expense reductions were accurately and neutrally applied to all 30 firms, including C&P. As a result of these audits, C&P reduced the lodestar for this case by $3,053,045. A1263. The lodestar submitted to the district court was $62,940,045.84. 297 F. Supp. 2d at 522.

B. The Small Number of Objections

Seventeen merchants objected to Class Counsel's fee request. None of the Class Representatives objected, nor did any of the thousands of large and sophisticated merchants who have the biggest monetary stake in the settlement fund. 297 F. Supp. 2d at 509 n.6, 522 n.27. On September 25, 2003, the district court held a Fairness Hearing to hear argument on the objections.

C. The District Court's Decision

On December 19, 2003, the district court issued its Memorandum and Order approving the Settlements and awarding Class Counsel attorneys' fees of

$220,290,160.44. This amount represents approximately 6.511% of the settlement fund, but is precisely the lodestar of $62,940,045.84 multiplied by 3.5. 297 F. Supp. 2d at 522, 524. It also represents less than eight tenths of one percent of the district court's most conservative valuation of the total relief obtained for the Class. In granting final approval to the Settlements and awarding fees, the district court stated that "an application of the six *Goldberger* factors indeed compels the award of an extraordinary fee." *Id.* at 523.

ARGUMENT

I. STANDARD OF REVIEW

A district court's award of attorneys' fees is reviewed under the abuse of discretion standard. *Goldberger*, 209 F.3d at 47. "'[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.* at 48 (quoting *In re Bolar Pharm. Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir. 1992)).

"However, reviewable for ''abuse of discretion' is not the equivalent of 'unreviewable,'' and it is important that we 'be informed by the record of why the district court acted as it did.'" *Jones v. UNUM Life Ins. Co. of America*, 223 F.3d 130, 138 (2d Cir. 2000) (quoting *Bolar*, 966 F.2d at 732). "Thus, whichever way it exercises its discretion, a district court should make specific findings regarding the matter in order to permit meaningful appellate review." *Id.* (internal quotes and cites omitted). "The court awarding [attorneys' fees] should articulate reasons for the selection of the given percentage sufficient to enable a reviewing court to determine whether the percentage selected is reasonable." *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196 (3d Cir. 2000) (quoting Moore's Federal Practice, Manual for Complex Litigation (Third) § 24.121 at 206 (1997)).

"A recitation of the applicable factors or legal standard standing alone, is normally not sufficient to permit appropriate appellate review. The court must inform the reviewing court as to how the standard has been applied to the facts as the court has found them." *Orchano v. Advanced Recovery, Inc.*, 107 F.3d 94, 99 (2d Cir. 1997). "[A]t a bare minimum, the order awarding fees, read against the backdrop of the record as a whole, must expose the district court's thought process and show the method and manner underlying its decisional calculus." *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331, 337 (1st Cir. 1997). "If the court fails to make findings and to give an explanation, and the reason for the court's ruling is not clear to us, we will remand for findings and an explanation." *Orchano*, 107 F.3d at 99 (2d Cir. 1997). *See also Gierlinger v. Gleason*, 160 F.3d 858 (2d Cir. 1998) (vacating and remanding for this reason).

The need for the district court to explain fully its reasoning "is especially important when the fee award departs substantially from the contours shaped by the application." *Coutin*, 124 F.3d at 337 (district court "has a burden to spell out the whys and wherefores") (internal quotes and cites omitted). As the *Gunter* court noted:

> [D]istrict courts, in awarding attorneys' fees, may not reduce an award by a particular percentage or amount (albeit for justifiable reasons) in an arbitrary or indiscriminate fashion. If the court believes that a fee reduction . . . is indicated, *it must analyze the circumstances requiring the reduction and its relation to the fee, and it must make specific findings to support its action.*

223 F.3d at 196 (quoting *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 253 (1985)) (emphasis in original). *See also Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991) ("[a]buse of discretion occurs when the court . . . fails to explain a reduction").

An abuse of discretion will also be found "if a district court does not fulfill its duty to apply the relevant legal precepts to a fee application . . . ." *Gunter*, 223 F.3d at 196. And it will be found "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Coutin*, 124 F.3d at 336 (internal quotes and cite omitted). A district court is not permitted merely to "eyeball the fee request and cut it down by an arbitrary percentage because it seemed excessive to the court." *Spellan v. Bd. of Educ. for Dist. 111*, 59 F.3d 642, 647 (7th Cir. 1995) (internal quotes and cite omitted).

The district court committed every one of these errors, each constituting an abuse of discretion. The district court assessed, but failed to apply, the factors set forth in *Goldberger*. Instead, it applied its own idiosyncratic and undisclosed standard in making the Fee Award.

II. THE DISTRICT COURT ABUSED ITS DISCRETION

A. The *Goldberger* Factors for Attorney Fee Awards

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 awards attorneys' fees based on class counsel's total lodestar, plus a multiplier if deemed appropriate. While both methods are available, the clear preference among the courts in this Circuit is the percentage method rather than the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger*, 209 F.3d at 50 (internal quotes and cites omitted). *See In re Visa Check*, 297 F. Supp. 2d at 520 ("The trend in the Second Circuit is toward the percentage method.").

The pronounced preference for the percentage method reflects the widespread recognition that it avoids "the needless complications and dubious merits of the lodestar approach." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003). As this Court stated in *Goldberger*, "experience with the lodestar method proved vexing." 209 F.3d at 48. In contrast, "[t]he percentage method directly aligns the interests of the class and its 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). It also permits the judge to focus on the quality of the lawyers' efforts rather than on how many hours they billed. *Nasdaq*, 187 F.R.D. at 485. "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.[4]

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[4] *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*

No matter which method is chosen, the fees awarded in common fund cases must be "based on scrutiny of the unique circumstances of each case . . . ." *Goldberger*, 209 F.3d at 53. *Goldberger* sets forth six factors a court should consider: "(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 representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Id.* at 50 (internal quotes and cite omitted).

The district court's purported award of 6.511% (of compensatory relief only) cannot be squared with the district court's assessment of the *Goldberger* factors. Under any objective assessment of these factors, the Fee Award is inadequate and an abuse of discretion.

B. The District Court Abused Its Discretion By Failing to Apply the *Goldberger* Factors

In approving the Settlements without any change, the district court lauded the results and placed them in their proper historical perspective, stating that: the Settlements "represent the largest antitrust settlement in history" (297 F. Supp. 2d

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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 Holographics, Inc.*, 127 F. Supp. 2d 418, 432 (S.D.N.Y. 2001) ("[P]ercentage of the recovery formula can serve as a proxy for the market in setting counsel fees.").

at 508); "[t]he compensatory relief by itself constitutes the largest settlement ever approved by a federal court" (*id.* at 511); "[t]he discounted present value of the total compensatory relief . . . amounts to $3,383,400,000" (*id.* at 509); "[t]he injunctive relief will result in future savings to the class valued from approximately $25 to $87 billion or more" *(id.* at 512); and "[d]espite the size of the Net Settlement Funds, the far more significant relief for the individual merchants is the injunctive relief . . . ." *Id.* at 520.

Recognizing that the monetary recovery alone more than tripled what had previously been the highest antitrust settlement of $1.027 billion (in *Nasdaq*), and that, as Professor Miller noted, "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" (A1248), Lead Counsel concluded that the district court was about to navigate in unchartered waters. Lead Counsel believed that the district court needed as much latitude and assistance as possible in making what likely would become the most influential decision on mega-fund attorneys' fees.

More important, counsel understood that the district court's fee decision would become a leading decision on the sixth *Goldberger* factor -- "public policy" -- because of the more than $2.35 billion increment over the previous *Nasdaq* record and the landmark injunction recognized by the district court as the "far more significant relief," and valued by the court in the range of $25 to $87 billion. How Class Counsel was compensated for achieving these two unique benefits would clearly determine whether the Fee Award in this case would become an incentive or a disincentive for future lawyers to press beyond the traditional realm of antitrust mega-fund cases to a result such as this, where the settlements "produced significant and lasting benefits for America's merchants and consumers." *Id.* at 524.

Prior to submitting the Fee Petition, Lead Counsel asked the district court for permission to file a petition which did not request any specific fee. The proposed fee petition would have merely set out the facts and law and requested the court to award a fee consistent with the *Goldberger* factors.[5] The district court rejected Lead Counsel's proposal and directed it to make a specific fee request. A2317a.

Class Counsel prepared the Fee Petition supported by, among others, Professors Coffee, Miller, First, and Fisher, as well as Willard Ogburn, the Executive Director of the National Consumer Law Center. The Fee Petition was

[5] This request was properly made *ex parte* because under the Settlements defendants were precluded from taking any position on the issue of attorneys' fees (A385, A487), and no objectors had filed objections as of that time.

also accompanied by the report of an independent outside certified public accounting firm which conducted one of two complete audits on the time charges and expenses submitted along with the Fee Petition.

The Fee Petition was organized around the six *Goldberger* factors. The experts who supported the Fee Petition, principally Professors Coffee, Miller, First, and Fisher, also organized their assessments of the Settlements and the performance of counsel around these same six factors. The district court agreed with these assessments, quoted them extensively, adopted many of them and said they "compel[led] the award of an extraordinary fee." 297 F. Supp. 2d at 523.

The Fee Award was "extraordinary." It was the lowest percentage in any federal mega-fund antitrust case in history, well less than one-third the average percentage fee awarded in such cases, and 64% lower than the fee Class Counsel requested. In making this award, the district court utilized its own idiosyncratic and undisclosed standard to award the fee it deemed appropriate, indeed "extraordinary" (*id.* at 523), "generous" (*id.* at 525), and even "exorbitant." *Id.* at 524. The district court did not apply its own assessment of the six *Goldberger* factors.

1. The District Court Abused Its Discretion By Failing to Apply the Public Policy Factor

The Supreme Court has repeatedly recognized the vital role played by private parties in bringing lawsuits to enforce the antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969). In written acknowledgment of the important public policy of encouraging private antitrust challenges, the district court stated that "the Settlements have produced significant and lasting benefits for America's merchants and consumers," and the fees awarded must "serve as an inducement for lawyers to make similar efforts in the future." 297 F. Supp. 2d at 524.

However, instead of applying this factor to create an incentive for similar cases in the future, the district court erected a significant disincentive for lawyers to pursue such cases. More specifically, the district court erected a powerful disincentive to press forward for important injunctive relief and additional compensatory relief once $1 billion dollars is offered in settlement.

Professor Coffee advised the district court about the need for "predictability and legal certainty" in this area of the law:

> Plaintiffs' attorneys need to be able to make accurate judgments about the fee determinations that courts are

> likely to make years later if those attorneys are to be able to undertake lengthy and risky litigation on a contingent fee basis. A law firm simply cannot invest millions of dollars plus billable time in an action based upon an anticipation of the likely fee award if the law is unclear or unpredictable. [A1216.]

With regard to the other five *Goldberger* factors, the district court seriously diminished predictability and legal certainty by failing to explain how unparalleled risk, difficulty and result translated into the Fee Award of a record low percentage. With regard to public policy, however, the district court sent a clear message that there is very little incremental reward and tremendous risk for a recovery above $1 billion.

The law in this area is now defined by two decisions: *Nasdaq* and this case. They are the only two antitrust class action settlements over $1 billion. The results are easily compared. These decisions and results will be compared by future counsel. In *Nasdaq*, the compensatory relief was $1.027 billion; here it was $3.383 billion. In *Nasdaq* there was no injunctive relief; here there was $25 to $87 billion of injunctive relief which the district court found to be "far more significant" than the record compensatory relief. 297 F. Supp. 2d at 520.

In *Nasdaq*, plaintiffs' counsel was aided by a simultaneous Antitrust Division prosecution. In this case, the district court found that the government "piggybacked" on the efforts of Class Counsel, leading to the additional public benefits secured by the government in its case. *Id.* at 524 n.31. *Nasdaq* settled relatively early, and well before any summary judgment proceedings (in part because the successful government prosecution forced the defendants to settle). In this case, settlements were signed with a jury sitting in the box awaiting opening argument, one month after all of the defendants' summary judgment motions were denied in their entirety, and most of plaintiffs' summary judgment motions were granted.

The experts, who assessed the two cases, all opined that while *Nasdaq* was a difficult and risky case which produced a then record settlement, compared to this case, it didn't "really come close." A552-556, A1234, A1248-1251. Notably, this assessment was made not only by Professor First, but by Professors Coffee and Miller, the two pre-eminent authorities in this field, who also filed declarations in support of counsel's fee request in *Nasdaq*.

Class Counsel in *Nasdaq* applied for a fee of 17.5% as compensation for their exemplary result. They were awarded a 14% fee, a reduction from their request by 20%. In this case, Class Counsel petitioned for a fee representing 18% of the compensatory relief and 2.14% of the total relief (based on the district court's lowest valuation of the injunctive relief). The district court purported to award a fee of 6.511% of the compensatory relief, a reduction from the request by 64%. Even when measured by the lodestar/multiplier cross-check, the fee awarded in *Nasdaq* (3.97 multiplier) was more than that awarded here (3.5 multiplier).

Although the result, effort, difficulty, and risk in *Nasdaq* were not close to that in this case -- as all objective measurements and subjective assessments clearly show -- the percentage fee awarded to Class Counsel of the $2.356 billion compensatory relief above that secured in *Nasdaq* was only 3.2%. Considering the most conservative value of the injunction and the additional $2.356 billion, the percentage awarded to Class Counsel of the total relief above that obtained in *Nasdaq* is less than three-tenths of one percent.

The message to future counsel is very clear. Any attempt to go beyond $1 billion in compensatory relief, and to seek what may even be more valuable injunctive relief, will bring a relatively small additional award. It will also come with the distinct risk that the $1 billion on the table may disappear and not be recovered at trial. The risk of losing everything for a relatively modest incremental reward is the real disincentive the district court's decision has erected, a disincentive that clearly misaligns the interests of counsel and the class. As Professor Coffee warned:

> 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. [A1235.]

The mechanical application of such a "declining percentage" approach punishes attorneys who recover large settlements as a direct result of their outstanding efforts:

> 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.

In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 197 (E.D. Pa. 2000). It also contravenes the clear directive in *Goldberger* that "a fee award should be assessed based on scrutiny of the unique circumstances of each case." 209 F.3d at 53. That is why so many cases, and the antitrust mega-fund cases in particular, have refused to apply a declining percentage approach.[6]

While it may be argued that this dilemma of settling at $1 billion or pressing forward is artificial and contrived, it is real. The district court which closely supervised the settlement process was acutely aware of this reality. This dilemma will no doubt occur again and in precisely the type of cases the public policy factor is designed to encourage.

The district court's sarcastic observation that if its fee award "amounts to punishment, I am confident there will be many attempts to self-inflict similar punishment in future cases" (297 F. Supp. 2d at 525), ignores the clear disincentive its decision has created to bring such future cases and to prosecute them fully. That disincentive is exacerbated by both the district court's sarcasm and its intemperate characterization of Class Counsel's fee request as "absurd." *Id.* at 522. The district court's misapplication of *Goldberger's* crucial public

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[6] *See, e.g., Vitamins,* 2001 U.S. Dist. LEXIS 25067, at *68 ("This Court agrees [with *Ikon*] that it is not fair to penalize counsel for obtaining fine results for their clients."); *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)); *Lease Oil*, 186 F.R.D. at 447 (refusing to apply declining percentage because case "was made more difficult due to the sheer number and variety of members in the class").

policy factor will discourage rather than encourage the attainment of multi-billion dollar recoveries and even more valuable injunctive relief, and was an abuse of discretion.

2. The District Court Abused Its Discretion By Failing to Apply the Time and Labor Factor

As clearly recognized by the district court, the time and labor expended in this case by Class Counsel were staggering:

> Class Counsel have litigated this case . . . for seven years. During that time, there were almost 400 depositions of witnesses, including 21 experts who issued 54 expert reports; four rounds of class certification briefing (through the Supreme Court); 16 summary judgment motions, 31 motions *in limine*, and three *Daubert* motions; and a pretrial order identifying 230,000 pages of trial exhibits, 730 trial witnesses, and more than 17,000 deposition designations." [297 F. Supp. 2d at 523.]

This massive effort required more than 223,000 hours of Class Counsel's uncompensated time. A662. Yet, the district court did not explain why this effort was not factored into the Fee Award.

3. The District Court Abused Its Discretion By Failing to Apply the Magnitude and Complexity Factor

The district court recognized the enormous magnitude and complexity of this case:

> [T]he magnitude and complexities of the litigation were enormous. The case involved almost every U.S. bank and more than five million U.S. merchants. As to complexity, Professor Harry First correctly describes the case as a very complicated one, presenting, on virtually every legal point, unique issues with uncertain outcomes." [*Id.* at 523 (internal quotes omitted).]

While "[t]he complexity of federal antitrust law is well known, as are the particular difficulties with the law that governs tying arrangements" (297 F. Supp. 2d at 510), this case was particularly difficult and complex, far exceeding that of any arguably comparable antitrust mega-fund case. Professors First and Miller looked to several recent antitrust mega-fund class actions (*Nasdaq*, *Vitamins*, *Buspirone*, and *Cardizem*) and concluded that none posed the same degree of challenge as this case:

> None of these cases was easy to win; each presented particular challenges. In comparison to the difficulties faced by plaintiffs in [this case], however, none of the other cases really come close. [A553 (First).]
>
> [C]lass counsel in those cases [*Nasdaq* and *Vitamins*] . . . did not face the massive procedural legal and economic complexities that were confronted by Class Counsel, and specifically, C&P, in this case. [A1248 (Miller).]

The compensatory recovery in this case far exceeds the recoveries in all of these other cases combined. The injunctive relief here stands in stark contrast to the lack of an injunction in any of these cases. Yet, the Fee Award -- whether measured as a percentage or a lodestar/multiplier -- is lower than that awarded in any of these other cases: *Nasdaq* (**14%** of $1.027 billion - **3.97** multiplier); *Vitamins* (**34.6%** of $365 million - unknown multiplier); *Buspirone* (**33.3%** of $220 million - **8.46** multiplier); and *Cardizem* (**30%** of $110 million - **3.7** multiplier).

In its discussion of this *Goldberger* factor, the district court failed to address any of these cases. Moreover, the court did not explain why the enormous magnitude and complexity of this case was not factored into the Fee Award.

4. The District Court Abused Its Discretion By Failing to Apply the Risk Factor

Concerning risk -- which the Second Circuit has "historically labeled . . . as perhaps the foremost factor to be considered in determining whether to award an enhancement" (*Goldberger*, 209 F.3d at 54 (internal quotes and cite omitted)) -- the district court found that:

> [T]he litigation was very risky. Constantine & Partners devoted 52% of its attorney and paralegal resources to this case. . . . Such a hardship weighs in favor of higher compensation, particularly where, as here, Lead Counsel did not benefit from any previous or simultaneous government litigation . . . . Indeed, the government piggybacked on Class Counsel's efforts. [297 F. Supp. 2d at 523, 524 n.31.]

Professors Coffee, Miller, and First were equally emphatic in describing the unprecedented level of risk in this case.

> [T]his case presents the clearest example that I have ever seen of a "You-bet-your-firm" case . . . . 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. [A1200, 1227-1228 (Coffee).]

> 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. [A1247 (Miller).]

> My conclusions are that plaintiffs undertook an extremely risky 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. [A527 (First).]

Even objectors to the Fee Petition acknowledged the extraordinary risk. At the Fairness Hearing, John Pentz, counsel for several of the objectors, argued that the district court should not encourage the degree of risk C&P assumed in this case, stating:

> To me that would encourage frivolous reckless long shot cases. What Class counsel did here seems to me to be a little bit crazy. They risked the firm. It was a bet the firm case on a case that really [sic] to be a negative lawsuit. It really looked like a huge long shot. [A2224.]

Objector Pentz recommended a 10% fee award ($338,340,000), or a lodestar/multiplier of 5 ($314,700,230). A2219.

It is not clear whether the district court agrees or disagrees with this Court that contingency risk is the most important factor in evaluating the reasonableness of a fee request. That is because with risk, as with the other five *Goldberger* factors, the district court made an assessment, then failed to apply it.

5. The District Court Abused Its Discretion By Failing to Apply the Quality of Representation and Result Factor

The district court generously praised Class Counsel's advocacy and the historic result they obtained for the Class:

> [T]he excellence of the representation of plaintiffs, especially in light of the very high quality of opposing counsel, cannot seriously be debated. Constantine & Partners is a premiere plaintiffs' litigation firm, specializing in antitrust litigation particularly and complex commercial litigation generally. Its work is uniformly excellent, and thus it is no surprise that it has led the effort that produced the largest antitrust settlement ever. [297 F. Supp. 2d at 524.]

Going beyond the realm of antitrust, the district court said that "the compensatory relief by itself constitutes 'the largest settlement ever approved by a federal court.'" *Id.* at 511 (adopting Professor Coffee's assessment). The district court then valued the injunctive relief at "$25 to $87 billion or more" (*id.* at 512 (adopting Professor Fisher's valuation)), and concluded that "the Settlements have produced significant and lasting benefits for America's merchants and consumers." *Id.* at 524. The court also noted that a unique feature of the Settlements was that a significant portion of the compensatory relief and injunctive relief was being provided to the Class prior to final approval and the exhaustion of the objectors' appeals. *Id.* at 520.[7]

Professors Coffee, Miller and First agreed that the results achieved by Class Counsel in this case were "off the charts." A1215. Professor Coffee stated that while the compensatory relief alone represents "the largest settlement ever approved by a federal court" (A1206) -- more than tripling the monetary recovery of the previous record antitrust settlement in *Nasdaq* -- when "properly viewed:"

> [T]his is a landmark injunctive action to which is

[7] The district court cited unspecified "hyperbole" in Class Counsel's description of its accomplishments in this case. 297 F. Supp. 2d at 524. Class Counsel is not aware of any such hyperbole. Given the district court's laudatory comments of Class Counsel's performance, Class Counsel believes that the court was more laudatory of counsel's accomplishments than counsel was.

> appended over $3 billion in compensatory relief. . . . Put simply, the projected benefits from this action are an order of magnitude greater than any benefits that have ever been presented to any court in the context of class action litigation. [A1207-1208 (Coffee).]

Professors Miller and First agreed with this assessment:

> [T]he result achieved for the Class in this case far exceeds the recovery secured by way of settlement in all other antitrust class actions. The proposed settlements are nothing short of historic. [A1241 (Miller).]
>
> [P]laintiffs' 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. [A558 (First).]

The industry shared this view that the Settlements were historic. David Balto, former head of policy for the FTC's Bureau of Competition, described the Settlements in this manner:

> 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. [A1082.]

Professor Robert Lande of Baltimore University Law School stated:

> 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. [A875-876.]

However, here again the district court neither gave weight to these, nor to the district court's own, glowing subjective assessments, nor to the quantifiable record results. This is apparent from the district court's record low award, and the fact that it embodies an increment which approaches zero percent of the monetary and injunctive benefit achieved above all previous antitrust cases.

The district court's gracious praise of counsel removes any doubt over whether it believed that the historic result in this case was a product of happenstance. However, the district court's reliance on Judge Scheindlin's caution that courts must guard against overcompensating counsel for obtaining huge settlements "whether by happenstance or skill" suggests that the district court considered these two very different routes to the unprecedented results as meriting the same award. 297 F. Supp. 2d at 521 (quoting *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003)). That approach destroys the very purpose of the quality of representation factor. In failing to apply that factor, the district court abused its discretion.

6. The District Court Abused Its Discretion By Failing to Apply the Relationship of the Fee to the Settlement Factor

With respect to this factor, the district court stated that "the Settlements are so large, particularly considering the injunctive relief, that even the exorbitant fee I award seems small in comparison." 297 F. Supp. 2d at 524. Although this comment is somewhat cryptic, the district court admits what is manifest; it did not apply this *Goldberger* factor. There is no explanation of why the district court considered the Fee Award -- the lowest percentage ever awarded in an antitrust mega-fund case, and made in a case that the district court repeatedly recognized as off the charts in effort, risk, and result -- to be "exorbitant." The district court reached this conclusion by disregarding *Goldberger*, mechanically applying an extreme version of the "declining percentage" approach, and disregarding the fee awards made in all of the other antitrust mega-fund cases.

Class Counsel submitted a list prepared by Professor Coffee of the twelve largest antitrust class action recoveries and their respective fee awards. Only three had attorney fee awards that were lower on a percentage basis than Class Counsel's 18% request in this case *of the compensatory relief alone.* Class Counsel's requested percentage also fell well below the average percentage fee award of 24.52% in these antitrust mega-fund cases. Since the Fee Petition, one additional antitrust mega-fund fee award was made: *Deloach v. Philip Morris Co., Inc.*, 2003 WL 23094907, 2004-1 Trade Cas. (CCH) ¶ 74,244 (M.D.N.C. Dec. 19, 2003) (awarding fees of 33.4% of $211.8 million).

In awarding a 6.511% fee -- which falls below 1% when measured against the district court's lowest valuation of the total relief recovered -- the district court dismissed the relevance of any of these cases merely noting that most of them "do not involve funds even approaching the $1 billion mark, let alone the $3 billion mark of this action." 297 F. Supp. 2d at 525 n.33. By uncritically sweeping these cases aside, the district court also disregarded the fact that the other antitrust mega-fund cases do not reveal a declining percentage pattern. Indeed, one of the highest percentages awarded (34.6%) was in a case (*Vitamins*) with one of the largest settlement funds ($365 million). Moreover, many of these courts explicitly rejected the declining percentage approach (*Vitamins*, *Cardizem*, *Lease Oil*). *See supra* note 6.

In mechanically applying a declining percentage approach, the district court disregarded the unique attributes of antitrust class actions -- particularly this one -- and their significantly greater complexity, difficulty, and risk compared to the "bread-and-butter" securities class actions that flood the courts. Indeed, the Second Circuit's concern in *Goldberger* with providing class counsel with "windfalls" was targeted at those very kinds of cases, cases which the Court viewed as having little or no contingency risk. 209 F.3d at 52. The district court ignored these distinctions, and ignored the substantially greater awards made in all of the other antitrust mega-fund cases, notwithstanding their failure to even approach this case in terms of risk, difficulty, or result.

C. The District Court Abused Its Discretion By Mischaracterizing as a Percentage Calculation What Was Really a Lodestar/Multiplier Calculation

After considering all of the *Goldberger* factors, without explaining how any, let alone all of those factors -- which objectively reflect unprecedented difficulty, risk and result -- led it to award the lowest percentage in any antitrust mega-fund case, the district court described the Fee Award as follows:

> I award attorneys' fees in the amount of $220,290,160.44. This amount represents approximately 6.511% of the Fund. The lodestar *cross-check*, which results in a multiplier of 3.5, further convinces me that my award is reasonable. [297 F. Supp. 2d at 524 (emphasis added).]

Here, the district court mischaracterized what it actually did. The Fee Award is precisely 3.5 times Class Counsel's submitted and accepted lodestar to the last 44 cents. The district court did not "cross-check" a 6.511% award as it stated, but merely multiplied the lodestar by 3.5 and then "backed-out" the percentage of

6.511%.

It is painful for Lead Counsel, who have profound respect for the district court, to fathom why it mischaracterized what it did. Two possible explanations suggest themselves. One is that the district court, which recognized the pronounced trend in this Circuit to use the percentage method (*id.* at 520), was uncomfortable departing from it and explaining that departure. The second is that the district court initially made a percentage calculation, cross-checked it against the lodestar, and then adjusted it to a precise lodestar/multiplier. If the district court did that, it wasn't explained.

In either event, or if there is any other explanation, the mischaracterization cannot be excused merely because this Circuit allows district courts to use either method. The district court's mischaracterization here is a particularly harmful abuse of discretion.

The district court's decision is already a leading fee decision, both generally and specifically with respect to antitrust mega-fund settlements. As previously discussed, this case and Judge Sweet's earlier *Nasdaq* decision define the entire universe of antitrust mega-fund decisions above $1 billion. These two decisions will be the exclusive guide on how courts construe the public policy factor in antitrust recoveries that exceed $1 billion. Given the importance of the district court's decision, it was imperative to explain what it did and why, rather than to leave most of its methodology unexplained and then also mischaracterize its actual method of calculation.

The district court's abuse of discretion with respect to its veiled lodestar/multiplier calculation was compounded by its mechanical application of what it considered to be an appropriate multiplier. In doing so, the district court explicitly stated that it ignored all of the arguments Class Counsel proffered supporting the reasonableness of their requested multiplier. 297 F. Supp. 2d at 523 (The requested fee "is not a figure from which reductions can be made based on nuanced disagreements with counsel's methodology or arguments. . . . I therefore reject it entirely.").[8]

The district court also disregarded the fact that the multiplier was overstated because of (i) the reduction of the lodestar resulting from the audits performed by C&P and an independent accounting firm; (ii) the efficiency with which Class

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[8] Leonardo's claim that the 3.5 multiplier the district court awarded is "higher than any other megafund multiplier recorded" (Leonardo's App. at 17), ignores the higher multipliers awarded in *Buspirone* (**8.46**); *Nasdaq* (**3.97**); *Deloach*, 2003 WL 23094907, at *11 (**4.45**); *Cardizem* (**3.7**); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 197 (S.D.N.Y. 1997) (**5.5**); *Nabisco,* 1992 WL 210138 at *5 (**6**); and *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (**4.5 to 8.5**).

Counsel, and in particular, C&P, prosecuted this case;[9] and (iii) the below-market billing rates used by Class Counsel. A1228-1234.[10]

Professors Miller and Coffee stated that approving larger multipliers in mega-fund cases is particularly warranted lest the disfavored lodestar/multiplier method eviscerate the favored percentage method of awarding fees. A1232, A1245. "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." A1232 (Coffee).

While the district court noted that it was "mindful" of this policy rationale, it merely concluded that "[w]ere the case not so fully litigated . . . a larger multiplier might well be necessary to properly reward Class Counsel and encourage counsel to bring similar cases in the future." 297 F. Supp. 2d at 525. The district court's message for class counsel is clear: the longer and riskier the

[9] Six C&P attorneys took and defended the vast majority of the roughly 400 depositions in this case, with 75% of them being staffed by only one attorney. A1109. The class certification and summary judgment briefs were principally written by three C&P attorneys. A644-645. And, the bulk of plaintiffs' expert work, including the rebuttal of defendants' 16 experts, was principally handled by only two C&P attorneys. A1094.

[10] As Professor Coffee remarked: "[I]t would be a perverse irony to reduce [Class Counsel's] fee because of a high multiplier when that high multiplier was in turn the product of charging only a low hourly rate." A1231.

fight, the less the relative reward -- regardless of the result achieved.[11]

D. The District Court Abused Its Discretion By Counter-Factually Purporting to Protect a Class That Was Not Able to Bargain for a Fee Arrangement at Arm's Length

Although the district court did not explain why it failed to apply its own assessment of the six *Goldberger* factors, the district court did explain that it was influenced by its obligation to act as a fiduciary for a class that was "not fully informed . . . or able to negotiate collectively, or at arm's length." 297 F. Supp. 2d at 521 (quoting *Goldberger*, 209 F.3d at 52). However, the district court knew that five of the nation's largest merchants, including Wal-Mart, the world's largest corporation, had collectively and at arm's length negotiated a fee arrangement with C&P. The district court also knew that the fee arrangements negotiated between C&P and these five well-known power buyers would have yielded a fee far greater than the 18% fee Class Counsel requested, and which the district court reduced by 64%. A2084.

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[11] The district court's observation that the "fully litigated" nature of this case justifies a lower multiplier and distinguishes this case from *Buspirone*, conflicts with the district court's finding that: "This action would have taken three months (at a grueling pace) to try. Past that, it would have taken many more years to finally resolve, taking into account the time necessary to exhaust all avenues of review." 297 F. Supp. 2d at 510. *See Buspirone*, No. 01-MD-1410, at 42 (pointing to trial and appeals as among the "substantial amount of additional work" that the court found "mitigated to some degree" the 8.46 multiplier).

In basing the Fee Award in part on a premise and assertion known to be counter-factual, the district court not only abused its discretion, but ignored the well-settled Second Circuit precedent that courts should accord great weight to the reasonableness of fee arrangements negotiated at arm's length:

> We agree that many class actions serve a useful purpose, that lawyers who prosecute them deserve reasonable compensation, *and that market rates, where available, are the ideal proxy for their compensation.*

Goldberger, 209 F.3d at 51-52 (emphasis added). *See also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974) (information on counsel's separate fee arrangements with class members "is vital to the determination of a fair and adequate fee").

Here, the fully informed arm's length negotiation occurred between parties of clearly unequal bargaining power, with the great preponderance of power on the side of the powerful Class Representatives. Had those fee arrangements been advanced and enforced, the millions of small class members would have gotten the benefit of a contract negotiated by merchants far larger, more powerful, and better informed than they. However, C&P in recognition of its duties to its absent clients and its unflagging commitment to their interests, chose to give up its contractual right with the large Class Representatives and the benefit of precedent which gave these contracts persuasive force.

Further belying the district court's purported concerns about a class that needed protecting was the fact that not a single large merchant among the class of 5 million objected to the Fee Petition. The absence of an objection from any of these merchants is telling:

> The class in this case is a . . . sophisticated class represented by sophisticated lawyers who with the best interests of their clients looked at the fee request and made a determination not to object . . . . So that is a very important factor in assessing the reasonableness of the fee sought in this case.

Buspirone, No. 01-MD-1410, at 44 (distinguishing cases where class is comprised "of very small consumers who may not have the incentive to and the wherewithal to be heard on the issues of fees"). The 17 merchant objectors were all represented by "professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests . . . ." *Shaw v. Toshiba America Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000). These professional objectors represent less than one one-thousandth of one percent of the total Class.

Mindful of the Class' reaction, in approving the Settlements, the district court stated:

> [T]he reaction of the class [] may be the most significant factor in this inquiry. The extremely small number of

> objectors -- a mere 18 out of approximately five million Class members -- heavily favors approval. [297 F. Supp. 2d at 511 (internal cite omitted).]

Yet, the district court ignored this factor in relation to the Fee Award.

In counter-factually purporting to protect a class that did not collectively negotiate a fee, and which in fact demonstrated its acquiescence to Class Counsel's fee request, the district court abused its discretion. *See Gunter*, 223 F.3d at 199 (district court's failure to consider lack of objections to fee award was abuse of discretion: "a client's views regarding her attorneys' performance and their request for fees should be considered when determining a fee award").

E. The District Court Abused Its Discretion By Failing to Consider the "Far More Significant" Injunctive Relief

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)). The district court paid lip service to this well-recognized authority: "I agree that the substantial injunctive relief here should inform my decision on awarding fees, and it has." 297 F. Supp. 2d at 525.

Had the district court applied its own assessment of the *Goldberger* factors, it could not have awarded well less than one-third the average award in all other antitrust mega-fund cases, all of which fell short of this case on every one of these factors. To reconcile the district court's statement that in making the Fee Award it considered the injunction -- which the court said was "far more significant" than the record compensatory relief -- one would have to assume that the Fee Award without the injunction would have been even lower than its record low award. Perhaps it would have been one-fifth the average antitrust mega-fund award, or even less. However, that assumed outcome further demonstrates the simple truth that the district court did not obey *Goldberger*. To the extent the district court considered the injunction, it did so under its private standard.

F. The District Court Abused Its Discretion By Awarding a Fee Under Its Own Idiosyncratic and Undisclosed Standard

Beyond the district court's failure to explain its private standard, its reliance on a counter-factual lack of arm's length fee negotiation, its mischaracterization of the method used for calculating the award, and its failure to consider the injunctive relief, the district court simply refused to apply the *Goldberger* factors. The Fee Award cannot be squared with its assessment of the *Goldberger* factors. Under the district court's or any objective assessment of those factors, the Fee Award was unreasonable and an abuse of discretion.

Class Counsel have repeated over and over again, perhaps excessively, the district court's objective and quantified assessments of the magnitude, risk, and difficulty of this case, and the unprecedented results of counsel's efforts. Class Counsel have also repeated the district court's glowing subjective assessments of their performance. Class Counsel have pointed to the district court's recognition of the public policy which requires a fee award to encourage cases which the court deems worthy of encouraging. There is no doubt that the district court recognized this case as the paradigm of such a case.

Had the district court actually applied the *Goldberger* factors as the Second Circuit requires, it would have either granted the Fee Petition, or modestly reduced it with some explanation. However, the district court did not apply the *Goldberger* factors. Rather, it applied an idiosyncratic and undisclosed private standard. When the Fee Petition offended that standard, the district court angrily refused to address it, merely stating that the requested fee was "excessive," and "absurd," and "not a useful starting point," nor "a figure from which reductions can be made, based on nuanced disagreements . . . . I therefore reject it entirely." 297 F. Supp. 2d at 522-23. Paying mere lip service to *Goldberger*, the district court then awarded the fee it deemed appropriate.

If this case marked the end of attorneys' fee jurisprudence that result might be acceptable. After all, "America's merchants and consumers" will get the "significant and lasting benefits" of these record Settlements, and counsel will be paid a lot of money. Who, or what has been damaged? What has been severely damaged and can only be repaired through the action of this Court is the strong public policy which requires the courts to create incentives for future cases of precisely this type. These are cases which come along "once in a generation" (A1082) and produce "significant and lasting benefits for America's merchants and consumers."

If the need for predictability in this area of the law no longer exists; if district courts can simply award the fees they idiosyncratically and arbitrarily deem appropriate, or even extraordinary; if courts are free to make such awards without explaining their reasons and by relying on counter-factual assertions and even by mischaracterizing their method of calculation -- then this decision should stand. However, these actions by the district court each involved a clear abuse of discretion and should be corrected both as a matter of law and to advance an important public policy.

III. LEONARDO'S APPEAL HAS NO MERIT

In its appeal of the Fee Award, Leonardo's does not address any of the

Goldberger factors. Leonardo's appeal is principally confined to an argument it did not raise below that Class Counsel's fee should be limited to their lodestar, inappositely citing *City of Burlington v. Dague*, 505 U.S. 557 (1993). Leonardo's appeal should be denied for three reasons. First, Leonardo's has waived this argument by not raising it below. Second, as held by every circuit that has considered the question, the fee limitations established in *Dague* do not apply to common fund cases. Third, Leonardo's completely ignores *Goldberger*.

A. Leonardo's Has Waived Its Right to Bring Its Appeal

While the fee-shifting argument on which Leonardo's appeal is principally based was touched upon below by a different objector, it was not raised by Leonardo's. Indeed, Leonardo's barely objected to the Fee Petition. As the district court's Special Master noted in her review of Leonardo's own application for attorneys' fees -- of the ten page brief Leonardo's filed objecting to the settlement, only one sentence addressed the Fee Petition:

> Objectors request the Court carefully consider the amount of attorneys' fees and expenses requested by class counsel, an issue which Objectors expressly reserve for further argument when the matter of fees is considered. [A2357.]

At the Fairness Hearing, Leonardo's entire argument on the question of fees was as follows:

> Your Honor, our objections contain matters as to the fee. I will not speak on that at all fully. I will incorporate the comments of other objectors so that they are not repeated. [A2357.]

For this "objection," Leonardo's requested a fee of $2,915,323.77 (representing a lodestar/multiplier estimated at between 29 and 752). A2357-2360.[12] The Special Master refused to award any fee to Leonardo's counsel reasoning that their objection to the Fee Petition "was so insignificant that it would not merit an award of fees . . . ." A2359. The district court agreed. A2381-2382.

Leonardo's should not be permitted to raise for the first time its fee shifting argument. *See Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982) ("A party who has not raised an issue below is precluded from raising it for the first time on appeal.") (internal quotes omitted); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir. 1977) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal.")

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[12] Leonardo's did not submit any time records to support its fee application. A2359. Class Counsel's estimate of Leonardo's requested multiplier is based on averaging the hourly rates of and time spent by the other objectors. A2341-2342. It also counter-factually assumes that Leonardo's entire objection was on the fee issue even though it devoted only one sentence in its ten page brief to the subject.

(internal cites omitted).

B. The Fee Limitations Imposed on Fee-Shifting Cases Do Not Apply to Common Fund Cases

Leonardo's fee-shifting argument is baseless. The restrictions that *Dague* imposes on attorney fee awards made under the fee-shifting statutes do not apply to common fund cases. Every circuit court that has considered this issue has reached the same conclusion.[13]

Moreover, the Supreme Court has made clear that it views very differently

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[13] *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 967 (**9th Cir.** 2003) ("there is no preclusion on recovery of common fund fees where a fee-shifting statute applies"); *Cook v. Niedert*, 142 F.3d 1004, 1014 (**7th Cir.** 1998) ("Congress (and the Supreme Court in *Dague*) did not intend to foreclose resort to equitable powers in common fund cases"); *Brytus v. Spang & Co.*, 203 F.3d 238, 246-47 (**3d Cir.** 2000) (rejecting statutory fee limitations in common fund cases); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1268 (**D.C. Cir.** 1993) (statutory fee limitations imposed by *Dague* "do not govern common fund awards"); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 308 (**1st Cir.** 1995) (rejecting limitations of *Dague* in common fund context); *Gottlieb v. Barry*, 43 F.3d 474, 482 (**10th Cir.** 1994) (recognizing "the fundamental differences between common fund cases and statutory fee-shifting cases, and how those differences affect the analysis of the fee award"); *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (**6th Cir.** 1993) ("In assessing the reasonableness of requests for fees in class actions resulting in the creation of a common fund, a court must consider factors that are not present in statutory fee shifting cases."); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (**5th Cir.** 1992) (post-*Dague* case noting that Fifth Circuit still uses multipliers, including for risk, to adjust the lodestar amount). Despite Leonardo's suggestion to the contrary, the circuits are not split on this issue. Leonardo's App. at 11.

fee awards made in common fund cases from those made under the fee-shifting statutes. *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the fee shifting statute] reflects the amount of attorney time reasonably expended on the litigation."). So has this Court:

> As for the possibility that Suffolk could recover attorneys' fees based upon RICO's fee-shifting provision [], this possibility is not a persuasive reason for denying fees herein. *In our view, fee-shifting statutes are generally not intended to circumscribe the operation of the equitable fund doctrine.*

County of Suffolk v. Long Island Lighting Co. ("*LILCO*"), 907 F.2d 1295, 1327 (2d Cir. 1990) (emphasis added).[14]

Beyond the fact that "*Dague*, by its terms, applies only to statutory fee-shifting cases" (*Florin v. NationsBank of Georgia, N.A.*, 34 F.3d 560, 564 (7th Cir. 1994)), the stark differences between the two types of fee awards demonstrates

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[14] While this Court's decision in *LILCO* pre-dates *Dague,* its reasoning stands, and it has been relied on by other courts in their refusal to apply *Dague* to common fund cases. *See, e.g., Brunson v. The City of New York*, No. 94 Civ. 4507, 2000 WL 1876910, at *1 n.1 (S.D.N.Y. Dec. 22, 2000) ("When a case is brought under a statute pursuant to which an attorney may receive fees pursuant to a fee-shifting statute and the case is resolved by a settlement, the equitable fund doctrine is still applicable.") (citing *LILCO*).

why *Dague's* limitations on statutory fee awards do not apply to common fund cases.

First, under the fee-shifting statutes, the losing defendant pays plaintiffs' attorneys' fees. In contrast, "attorneys' fees in common fund cases are not paid by the losing defendant, but by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund." *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994). "Thus, the concerns expressed in *Dague* about unduly burdening losing parties in statutory fee cases are not present in common fund cases where fees are paid out of the settlement fund." *Id.* at 1301. *See also Cook*, 142 F.3d at 1015 ("in contrast to *Dague* and other fee-shifting cases, defendants in common fund cases cannot be characterized as subsidizing unsuccessful lawsuits against other defendants"); *Florin*, 34 F.3d at 564 (in common fund cases, "there is no direct or immediate danger of unduly burdening the defendant") (internal quotes omitted).

Second, statutory fee awards are by definition creatures of statute, and *Dague's* "reasoning is largely based on the statutory language of fee-shifting provisions." *Florin*, 334 F.3d at 564. Common fund fee awards are creatures of equity based on the "equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *Washington Pub. Power Supply*, 19 F.3d at 1300 (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). The fee-shifting statutes were not intended to interfere with this equitable principle. *LILCO*, 907 F.2d at 1327. As the Supreme Court held in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-258 (1975):

> In *Trustees v. Greenough*, . . . the 1853 Act [and its limits on statutory fees] was read as not interfering with the historic power of equity to permit . . . a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or . . . directly from the other parties enjoying the benefit. That rule has been consistently followed.

"Common fund fees are essentially an equitable substitute for private fee arrangements where a class benefits from an attorney's work . . . ." *Staton*, 327 F.3d at 968. As such, they may be provided even in cases where statutory fees are also provided. *Id.* (citing *Venegas v. Mitchell*, 495 U.S. 82, 86-90 (1990) (holding that statutory fee awards can coexist with private fee arrangements -- "§ 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer")). *See also Brytus*, 203 F.3d at 247, 247 n.3 (rejecting argument "that the common fund doctrine may never be applied in a case for which there is a statutory fee provision and which goes to judgment."). Accordingly, Leonardo's presumption that Class Counsel would have been limited to statutory fees if this case had gone to judgment is off-base and irrelevant.

Third, "[t]he procedures used to determine the amount of reasonable attorneys' fees differ concomitantly in cases involving a common fund from those in which attorneys' fees are sought under a fee-shifting statute." *Staton*, 327 F.3d at 967. In fee-shifting cases, fees are strictly awarded based on a reasonable lodestar calculation. In common fund cases, however, the fee award may be based on either a lodestar/multiplier or percentage-of-recovery method (*Goldberger*, 209 F.3d at 50), with the courts in this Circuit showing a clear preference for the percentage approach.

Imposing the lodestar strictures of *Dague* on common fund cases would abrogate the firmly established precedent of allowing, and even encouraging, percentage based fee calculations in order to avoid the "vexing" problems associated with lodestar computation. *Goldberger*, 209 F.3d at 48. It would further abolish the settled authority for awarding a multiplier if the lodestar calculation is used. *Id*. at 47.

In arguing that *Dague* should apply to this case, Leonardo's is asking this Court to overturn its decisions in *Goldberger* and *LILCO*, and twenty years of fee jurisprudence which hundreds of courts have followed in every circuit.[15] This would eliminate the incentive for class counsel to bring the very types of cases Congress wanted to encourage with its fee-shifting and treble damages provisions. As stated by the Honorable H. Lee Sarokin, Chair of the Third Circuit Task Force on Court Awarded Attorney Fees, in rejecting the application of *Dague* to common fund cases:

> To apply the [*Dague*] rule to plaintiffs would infer an agreement by lawyers to work for nothing if they did not succeed, and be paid only for their time, if they did. To the extent possible a fair and reasonable fee should replicate the marketplace. It is difficult to envision any lawyer agreeing to such a bad bargain.

McLendon v. The Continental Group, Inc., 872 F. Supp. 142, 146 (D. N.J. 1994) (C.J. Sarokin sitting by designation). *See also Florin*, 34 F.3d at 565 (because they are "inescapably contingent," the need for risk multipliers "is particularly acute in class action suits") (internal quotes and cite omitted).

C. Leonardo's Ignores the *Goldberger* Factors

The balance of Leonardo's appeal is simply a hodge-podge of arguments that either ignore outright or completely mischaracterize the district court's

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[15] In *Goldberger*, this Court noted that "[c]ourts have held such [*Dague*] strictures inapplicable to cases like this, where the lawyers seek fees from a common fund they won for plaintiffs." 209 F.3d at 54 n.3.

decision. For example, Leonardo's suggestion that there was something untoward about the timing of the Settlements (Leonardo's App. at 10, 18-19), is frivolous in light of the district court's finding that "there could not be any better evidence of procedural integrity. . . . Collusion or coercion could not conceivably have tainted the process." 297 F. Supp. 2d at 510.

Similarly, Leonardo's characterization of the $25 to $87 billion of injunctive relief in this case as "illusory" and a "mirage" (Leonardo's App. at 25-26), is plainly refuted by the district court's finding that this relief has "produced significant and lasting benefits for America's merchants and consumers." *Id.* at 524. It is also refuted by Leonardo's recognition of the enormous injunctive relief in this case:

> The impact of defendants' coercive tying conduct is economically enormous. In 1999 alone, the class of merchants affected by allegedly illegal conduct of defendants processed over $150 billion in sales via the defendants' debit cards. [Leonardo's App. at 5.][16]

Leonardo's appeal completely ignores the *Goldberger* factors. Leonardo's says nothing about the massive time and effort Class Counsel expended on this case; nothing about the extraordinary magnitude and complexity of this case;

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[16] Ironically, the only part of the injunctive relief about which Leonardo's complains -- the prohibition of Visa exclusivity agreements -- was not even included in the $25-$87 billion valuation of the injunctive relief. A563-567.

nothing about the unprecedented contingency risk assumed by Lead and Class Counsel; nothing about the unprecedented result achieved by Class Counsel; and nothing about the strong public policy of encouraging lawyers to undertake complex industry-wide lawsuits of this kind. In bringing this appeal without any regard for the law, or the unique circumstances of this case, Leonardo's seeks to undermine the very inquiry this Court demands in evaluating fees.

CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that this Court (i) reverse the Fee Award and grant the Fee Petition, or in the alternative, reverse and remand the Fee Award with instructions to the district court specifying how the district court must apply its own assessment of the *Goldberger* factors, and (ii) deny Leonardo's appeal.

Dated: June 4, 2004
New York, New York

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 13,897 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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