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Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation

Arthur M. Kaplan

ANTITRUST AS A PUBLIC-PRIVATE PARTNERSHIP:

A CASE STUDY OF THE *NASDAQ* LITIGATION

Arthur M. Kaplan[†]

INTRODUCTION

What one perceives depends on where one stands. From one perspective, the conduct of the private plaintiffs and the government in the *In re Nasdaq Market-Makers Antitrust Litigation*[1] reflects respective private or governmental interests. From another perspective, *Nasdaq* represents a clash between the old Chicago school thinking, that "it couldn't have happened in theory and therefore it didn't happen in fact," and post-Chicago school empirical thinking, that "it evidently happened in fact, so let's see whether the theory needs adjustment." Last, but not least, from the perspective of public policy, the *Nasdaq* litigation epitomizes the complementary roles, and synergy, of private and public enforcement as envisioned by the Clayton Act.

Ultimately, public and private enforcement dramatically reduced the trading costs paid by individual and institutional investors in buying or selling securities traded on the Nasdaq National Market, revolutionized the rules under which the Nasdaq market operates, and achieved what apparently was and remains the largest financial recovery in the history of the antitrust laws.

The settlements achieved by the private, class action plaintiffs totaled $1.027 billion. Those settlements apparently are the largest recovery, by settlement or paid judgment, in the more than one hundred year history of the federal and state antitrust laws.[2]

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† Arthur M. Kaplan was one of plaintiffs' co-lead counsel in the *In re Nasdaq Market-Makers Antitrust Litigation*, together with Christopher Lovell, Leonard B. Simon and Robert A. Skirnick. He is a member of the American Antitrust Institute's Advisory Board.

1 184 F.R.D. 506 (S.D.N.Y. 1999).

2 The $634,900,000 antitrust settlement in *ETSI Pipeline Project v. Burlington Northern, Inc.*, No. B-84-979, 1989 U.S. Dist. LEXIS 18796 (E.D. Tex. 1989) apparently was the largest antitrust recovery before the *Nasdaq* recovery. (Larger recoveries had been won else-

I. NASDAQ 101

There are tales about how this was achieved, but first a brief lesson in Nasdaq 101. Unlike the New York Stock Exchange ("NYSE") and other markets built on an auction model, where investors trade against one another (through brokers, with a single "specialist" for each security maintaining the orderly flow of trading), the counterparty to a purchase or sale of securities on the Nasdaq National Market is a professional market-maker trading for its own account. The Nasdaq model fundamentally relies on competition between market-makers to offer the best buy-side quotation and the best sell-side quotation, thereby minimizing the so-called bid/ask spread between those prices. The spread is the difference between the best buy-side quotation and the best sell-side quotation, and represents the cost (along with brokerage commissions) of a complete buy and sell turnaround. The spread is a trading cost borne by individual and institutional investors. It also is the source of market-makers' income.

A. Brief Overview of the Nasdaq *Proceedings*

Nasdaq is not an example of private plaintiffs passively following in the footsteps of the government. As put by the federal district court in approving the $1.027 billion settlements: "Notably, this is not a case where 'plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill."[3]

Instead, as put by Professor John C. Coffee, Jr., who served as a member of the Legal Advisory Board to the National Association of Securities Dealers ("NASD"), not only did private plaintiffs "awake the federal government to . . . price collusion that the government had previously ignored," but also pulled "the principal laboring oar in advancing this case."[4]

Private plaintiffs filed their cases more than two years before the Antitrust Division of the Department of Justice ("DOJ") or the Secu-

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where by judgment at trial, but lost on appeal.) After *Nasdaq*, a class action settlement in the *In re Vitamins Antitrust Litigation* was announced with a maximum value of $1.05 billion, briefly making it antitrust's Empire State to *Nasdaq*'s Chrysler Building. However, because of a claims reduction clause in the *Vitamins* settlement (not present in *Nasdaq*) and unusually large opt-outs, by "companies representing 75 percent of the vitamins purchased" (to pursue individual cases), the actual amount paid under the *Vitamins* class action is approximately $242 million. *See Settlement in Vitamin Case is Approved*, N.Y. TIMES, Mar. 31, 2000, at C5. *See also In re* Vitamins Antitrust Litigation, No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 8931, at *35 (S.D.N.Y. Mar. 30, 2000) (approving settlement agreement).

3 *In re* Nasdaq Market-Makers Antitrust Litigation, 187 F.R.D. 465, 488 n.23 (S.D.N.Y. 1998) (citation omitted).

4 Affidavit of John C. Coffee, Jr. ¶ 24, *In re* Nasdaq Market-Makers Antitrust Litigation, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998) [hereinafter Coffee Affidavit]. Professor Coffee is the Adolph A. Berle Professor of Law at Columbia Law School.

rities and Exchange Commission ("SEC") filed their complaints. As observed by the then-general counsel of the Federal Trade Commission, private counsel were the catalyst for the government, rather than vice versa: "NASDAQ did not follow a prior governmental investigation. Indeed, the private action appears to have triggered the governmental activity."[5]

Private plaintiffs filed their initial lawsuits in May 1994, and immediately obtained orders (before and after multidistrict transfer) suspending the periodic destruction of crucial audiotapes, long before any government subpoenas. Private counsel and private economists also provided the DOJ with direct and economic evidence that helped keep the government investigation alive through periods of skepticism.

On the other hand, the private cases eventually benefited from the fruits of government discovery. Likewise, the filing of the DOJ and SEC complaints and consent decrees in 1996 helped private counsel achieve a difficult, and arguably unprecedented, class certification. As stated by Professor Arthur R. Miller in his affidavit submitted in support of settlement approval, the class action plaintiffs overcame "enormous litigation risks" and achieved an "extraordinary result."[6] However, those results weren't achieved in a vacuum.

Instead, private counsel and private economists danced a dance with their counterparts at the SEC and perhaps more so, with their counterparts at the Antitrust Division of the DOJ. As shown below chronologically, the music sometimes quickened or slowed, and sometimes private plaintiffs or the government took the lead. In the end, the music achieved a crescendo that no one, least of all defendants, predicted at the start.

Clearly, a billion dollar recovery was beyond initial expectations. Likewise, no one initially expected the spreads on most Nasdaq securities to narrow dramatically. These results were achieved through several years of cooperative private and government enforcement efforts. Of course, there were disagreements and disputes along the way, when governmental and private interests legitimately diverged.

In general, however, there was a deeply held commitment to public/private cooperation on the part of private counsel and the then-current leadership of the Antitrust Division.[7] This should serve as a

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[5] Stephen Calkins, *An Enforcement Official's Reflections On Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 422 (1997). *See id.* at 443 ("NASDAQ's genesis was entirely private.").

[6] Affidavit of Arthur R. Miller in Support of Final Settlement Approval and Petition for Counsel Fees and Reimbursement of Expenses ¶ 19, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998) [hereinafter Miller Affidavit]. Professor Miller is the Bruce Bromley Professor of Law at Harvard Law School. He also is the co-author of CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (5th ed. 1999).

[7] Among others in the Antitrust Division leadership, who particularly deserve credit, are: Anne K. Bingaman, who was the Assistant Attorney General in charge of the Antitrust Division

model for the future, and has not always been so in other cases and administrations. From a birds-eye view, this coordination of efforts represented public and private enforcement at its best. But let's now descend from this overview to see the "patient etherized upon the table."[8]

B. *How The* Nasdaq *Recovery Was Won—Relevant History*

1. *Investigation and Early Complaints*

Private plaintiffs began their investigation of possible collusion on Nasdaq following publication of a 1993 *Forbes* article.[9] However, the direct impetus for these cases was the announcement in 1994 of a then-forthcoming publication entitled *Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?*, written by two young finance professors, William G. Christie and Paul H. Schultz.[10] That study discovered an absence of odd-eighth quotations on many high-profile Nasdaq securities within a sample of 100 securities, and inferred "tacit" collusion from the absence of plausible legitimate explanations. In effect, spreads on the affected Nasdaq securities were rounded-up to the nearest even-eighth, and were therefore substantially larger than spreads on comparable securities traded on the NYSE.[11]

Initially in 1994, Wall Street "insiders" said "there's not much" to the case, while "street lawyers said they were not overly impressed by the original pleadings. 'It struck me that they have remarkably little in the way of evidence,' [stated] one lawyer."[12]

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throughout the *Nasdaq* investigation; K. Craig Wildfang, who as special deputy assistant supervised much of the investigation; Hays Gorey, the senior staff attorney who directly supervised the later phases of the investigation; and Jack Worland, who was the senior staff attorney most directly charged with that investigation.

[8] T.S. ELIOT, *The Love Song of J. Alfred Prufrock*, *in* T.S. ELIOT: THE COMPLETE POEMS AND PLAYS, 1909-1950 3 (1962).

[9] Gretchen Morgenson, *Fun and Games on Nasdaq*, FORBES, Aug. 16, 1993, at 74 (criticizing clout of large market-makers trading on Nasdaq at the expense of individual investors).

[10] William Christie & Paul Schultz, *Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?*, 49 J. FIN. 1813, 1840 (1994) (inferring that Nasdaq dealers may have "tacitly" colluded to maintain wide spreads).

[11] One-eighth (of a dollar) was the most common spread on actively traded NYSE securities. By contrast, the minimum spread on Nasdaq securities on which odd-eighth quotations were avoided, by definition, was one-quarter. Ironically, in the glare of publicity about the initial study and private lawsuits, Nasdaq market-makers soon began using a normal complement of odd-eighth quotations (after avoidance for years) on certain high-profile Nasdaq securities. This had the effect of dramatically narrowing the spreads on those securities. Professors Christie and Schultz followed up with a second study, concluding that in the absence of any apparent structural or economic explanation for this startling change, the switch to a normal complement of odd and even quotations, with resulting narrower spreads, itself tended to confirm their earlier hypothesis of collusion. *See id.* at 1859.

[12] Hal Lux, *Wall Street on Trial*, INVESTMENT DEALERS' DIG., Aug. 1, 1994, at 16, 18.

The securities industry subsequently attempted to silence Professors Christie and Schultz by threatening a libel action, and for a while even stopped Professor Christie from using the word "collusion."[13] The industry sought to refute these young turks (who were honored in retrospect by their peers) by hiring their mentor, Nobel laureate Prof. Merton Miller, and other prominent economists to roundly criticize their work at a highly publicized conference.

With economic criticism of this kind, widespread skepticism was not easily or quickly put to rest. Nearly a year after the private cases were filed, an in-depth analysis in the April 6, 1995 *New York Times* commented favorably on several industry-sponsored studies:

> 'There is much less here than meets the eye,' said Merton Miller, the Nobel Prize-winning economist from the University of Chicago . . . . He said a study by him and four colleagues found similar clustering [at round numbers] in several foreign markets . . . . Dean Furbush of Economics Inc. . . . argued that "the market structure makes any collusion inconceivable." He pointed to the large number of market-makers and the ease of entry into the business, as proof . . . . Allan Kleidon of the Stanford Law School and Robert D. Willig, a Princeton economist . . . concluded that competitive economic factors accounted for the evident discrepancies found by Mr. Christie and Mr. Schultz.[14]

The *Times* commentary concluded that "when all is said and done" the absence of explicit collusion "might be the conclusion reached by all."[15]

Industry-retained experts even convinced a group of prominent financial economists (the "Shadow SEC") to publicly disavow a central finding of the Christie and Schultz paper—rejecting the proposi-

[13] *See* William Power, *Academics Fan Flames of Nasdaq Fairness Debate*, WALL ST. J., Nov. 7, 1995, at C1 ("Prof. Christie stood by the findings of the paper . . . . But pro-Nasdaq observers noted that he didn't use the word collusion . . . . Paul Godek, an economist who sides with Nasdaq, said in his presentation that, 'I'm gratified to hear that Mr. Christie has managed to deliver that entire presentation—check me on this—without using the word collusion.' That shows 'some progress has been made.'").

[14] Floyd Norris, *Market Place: The Battle of the Studies: Is there competition at Nasdaq?*, N.Y. TIMES, Apr. 6, 1995, at D10.

[15] *Id.* The principal exception to widespread skepticism in the press was a series of investigative articles by Scott Paltrow in the *Los Angeles Times*. *See, e.g.*, Scott Paltrow, *Study Suggests Collusion Among Brokerage Firms*, L.A. TIMES, May 26, 1994, at D3 (supporting investigation).

tion that Nasdaq spreads are greater than spreads for comparable securities on the NYSE.[16]

If private plaintiffs had not filed and tenaciously pursued the *Nasdaq* litigation, the Christie and Schultz study might have become a mere footnote to history. In fact, Professor Schultz later reviewed these events and concluded that: "I have no doubt that neither the settlement, nor the lasting improvement in Nasdaq spreads, would have occurred in the absence of the vigorous and creative prosecution of the class action . . . . I believe, from my conversations with him, that Professor Christie is of the same opinion."[17]

The private complaints were filed beginning in May 1994. In developing these cases, private counsel conferred with economists and witnesses. Private counsel also arranged for maverick market-makers to break even-eighth spreads, and monitored the resulting conversations, which reflected the enforcement of market-maker collusion.

Neither the SEC nor the DOJ opened formal investigations until the fall of 1994, after the class actions were filed. In fact, the preliminary investigation at the Department initially was assigned to a junior level attorney, who accepted the industry argument that collusion could not have occurred among so many market-makers, and who, therefore, intended to terminate the investigation without taking discovery.

Without resuscitation, through early and successive presentations of direct and economic evidence by private counsel and private economists (including Prof. Schultz), the Department investigation would have died a premature death.

2. *Preservation of Important Audiotapes*

As noted above, private counsel immediately obtained a document preservation order, even before multidistrict transfer, that *inter alia* prevented the ordinary periodic erasure and recycling of audiotapes. That preservation order was incorporated by Judge Sweet into Pretrial Order No. 1, following multidistrict transfer.

Defendants soon moved the court to permit the resumption of erasure and reuse of audiotapes, arguing that continued preservation was too costly, and that the audiotapes themselves were irrelevant. Private plaintiffs' counsel knew from their own monitoring of conversations that these tapes might contain important evidence.

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[16] *See* Power, *supra* note 13, at C13 (noting that the Shadow SEC was unable to conclude if any difference in spreads existed).

[17] Affidavit of Professor Paul H. Schultz ¶ 6, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998) [hereinafter Schultz Affidavit].

Private plaintiffs, therefore, countered by offering to take the tapes off defendants' hands, at plaintiffs' expense, in discovery. Defendants thereupon summarily withdrew their motion, tacitly confirming plaintiffs' belief in the potential importance of the audiotapes.

Without the early preservation orders, and private counsel's thwarting the resumed recycling of audiotapes, crucial evidence would have been lost to private plaintiffs and the government, thereby radically changing the course of events. The thousands of hours of preserved audiotape eventually provided important, direct evidence of collusion.

3. *Private Plaintiffs' Early Contacts with the SEC and the DOJ Regarding Preemption and the Merits*

As noted above, the private cases initially met with skepticism in the business and financial community. Prominent economists (often sponsored by the industry) argued that there was no conspiracy, and that a conspiracy could not possibly succeed given the structure of the Nasdaq National Market, which included hundreds of market-makers in the aggregate, and often thirty or more registered market-makers for a particular security. They argued, moreover, that the absence of odd-eighth quotations reflected an ordinary, entirely innocent phenomenon: namely, the convenience of using round numbers.

This litigation was widely portrayed as lacking in factual or economic foundation (other than anecdotal conversations and the speculations of two young economists). Defense counsel privately mentioned to plaintiffs' counsel the possibility of a Rule 11 motion. They publicly forecast a motion to dismiss that would terminate the litigation once and for all.

Defendants, including several dozen of the nation's largest brokerage firms, planned to file a motion arguing antitrust preemption, based on comprehensive regulation by the NASD, which owns and regulates Nasdaq, and by the SEC, which regulates the NASD.[18]

However, private plaintiffs successfully blocked such a motion. Private plaintiffs drafted a Consolidated Complaint expressly averring that defendants' spread-fixing was unauthorized by the NASD and SEC. Private plaintiffs then spoke with the SEC, which already had been contacted by defendants. Defendants had requested an amicus brief from the SEC supporting preemption. The SEC gave plaintiffs an opportunity to respond.

Plaintiffs' counsel met with the SEC's senior staff, and thoroughly explored the law as applied to plaintiffs' draft Consolidated

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[18] *See* Lux, *supra* note 12, at 16-19 ("'A government agency's blessing can have an immunizing effect,' says one lawyer . . . . Defendants are also expected to argue that the SEC should have primary jurisdiction in the case.").

Complaint, as well as the facts currently known to plaintiffs. By the conclusion of the meeting, the SEC senior staff decided, on the basis of the facts alleged, that the draft complaint would not be preempted, and that the SEC, therefore, would not support defendants' anticipated motion.

Private plaintiffs also met with senior officials at the Antitrust Division of the DOJ. As noted above, plaintiffs found that an informal, preliminary investigation had been assigned to a junior staff attorney, who had already concluded in his own mind that there was nothing worth investigating.[19]

Private plaintiffs lit a fire under the Department's investigation by repeatedly furnishing direct and economic evidence. In late October 1994, the DOJ announced the opening of a formal investigation. Plaintiffs also alerted the Department to the perils of an antitrust preemption motion that could foreclose the Department's own antitrust investigation.

As a result of plaintiffs' efforts, defendants were faced with a strong Consolidated Complaint, and an SEC and DOJ unsupportive of preemption.

4. Overcoming Defendants' Efforts at Dismissal on Alternative Grounds

The motion to dismiss thereafter filed by defendants backed away from the announced preemption argument. Instead, it alternatively argued: (1) that plaintiffs had only alleged "conscious parallelism," not actionable under the antitrust laws; (2) that plaintiffs had not alleged enough about the individual role of each defendant; and (3) that plaintiffs must include in their complaint a list of the affected securities.[20]

The first and second defenses went to the adequacy of the pleaded facts, as well as to issues of law. If defendants had prevailed on either or both of these defenses, the case would effectively have been over, except for appeals, because plaintiffs had pled essentially all of the then-available evidence, before discovery. With regard to the third defense, plaintiffs and their economists already had begun a massive study, utilizing immense computerized databases. As a result of this in-depth study, and the accompanying analysis, plaintiffs' economists were able to prepare a list identifying the 1,659 Class Securities targeted by the conspiracy, before argument on defendants' motion.

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[19] That staff attorney not long thereafter joined a law firm representing one of the defendants, and the Department required that a "Chinese wall" be erected around him.

[20] *See In re* Nasdaq Market-Makers Antitrust Litigation, 894 F. Supp. 703, 710 (S.D.N.Y. 1995).

After extensive briefing of the law, facts, and economic arguments, plaintiffs prevailed against defendants on their first and second defenses, each of which was potentially dispositive.[21] If private plaintiffs had not prevailed on fundamental adequacy of the pleadings, there would have been no private cases, and likely no continuing government investigation.

5. Continuing Assistance and Cooperation in the Government Investigation

Throughout late 1994, 1995, and into 1996, private plaintiffs and economists retained by private plaintiffs, continued to encourage and assist the government investigation.[22] Plaintiffs and their economists, principally Professors Paul Schultz and Michael Barclay, repeatedly met with the DOJ. Plaintiffs' counsel continued to provide the Department with direct evidence developed through plaintiffs' own investigation, including witness interviews. Plaintiffs' economists developed extensive additional economic evidence, which they shared with the Department's economists.

Although the DOJ and the SEC scrupulously maintained confidentiality, questions and comments by staff reflected a gradual shift as the governmental investigations and private plaintiffs amassed impressive evidence. However, the government's thinking had its apparent twists and turns.

At times, defendants and their economists nearly convinced the DOJ that no conspiracy existed, or that no conspiracy could have succeeded among several hundred Nasdaq market-making firms. One senior Department official remained openly skeptical until the eleventh hour, when audiotapes and other evidence left little to the imagination. Each rebuttal by plaintiffs effectively answered a new series of arguments advanced by defendants and their economists.

6. The DOJ and the SEC File Their Complaints and Consent Decrees

Eventually, both the DOJ and the SEC filed their own complaints and concurrent consent decrees, in July 1996, and September 1996, respectively, more than two years into the private litigation. The Antitrust Division's July 17, 1996 consent decree, involving two dozen of the nation's largest market-makers, not only forbade all

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[21] *See id.* at 711-13. The district court held that since plaintiffs could prepare such a list (and, indeed, had already done so), the list of Class Securities should be included in the complaint. *See id.* at 711. Accordingly, the list was made part of an Amended Consolidated Complaint. It subsequently withstood enormous economic scrutiny.

[22] After the announcement of the Christie and Schultz study, Professor Schultz was retained by plaintiffs together with other economists, including Professor Michael Barclay. Professor Christie declined retention by plaintiffs, as well as by defendants, in order to preserve his professional neutrality.

forms of price-fixing (including, but not limited to, odd-eighth avoidance), but also required antitrust compliance programs, appointment of antitrust compliance officers, annual compliance certifications, and the taping and monitoring of a specified sample of market-maker telephone conversations.[23]

The SEC's August 8, 1996 consent agreement with the NASD, which owns and operates Nasdaq, fundamentally reorganized the NASD and Nasdaq in order to include a non-industry majority in the governance of the NASD, and to provide enhanced and independent regulation and monitoring of Nasdaq.

The SEC, beginning in January 1997, also began implementing new trading rules for Nasdaq. The new rules in effect made limit orders and proprietary trading system (e.g., Instinet) quotations generally available to investors, as additional sources of competition to the market-makers' own Nasdaq quotations. The new rules (expressly formulated in response to imperfect competition on Nasdaq) furthered and systematized the narrowing of spreads that already had occurred on many high profile Nasdaq securities, under the glare of publicity and private litigation.[24]

7. Achieving a Difficult, and Arguably Unprecedented, Class Certification

The record-breaking $1.027 billion private recovery would not have been achieved without substantial direct evidence of collusion (including evidence of how and why the particular 1,659 Class Securities were targeted for collusion) and persuasive economic evidence of damages. Nor would it have been achieved without an extremely difficult (and defendants would say unprecedented) class certification.

Even the discovery leading to class certification became a major battlefield.[25] The first step in achieving class certification was developing a class definition that would reflect the considerable intricacies of the case, without seeming unduly complex or being underinclusive or overinclusive. Plaintiffs created a novel definition that, through a facially simple and straightforward phrase ("Class Securities"), fused the class definition with sophisticated economic studies. This marriage of law and economics enabled plaintiffs to target *only* the affected 1,659 securities, and the appropriate months for each, thereby

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[23] Thirteen of the defendants in the litigation were not sued by the Department of Justice in its complaint. Generally, the Department sued only the largest market-makers.

[24] After the private cases were settled for $1.027 billion, the SEC imposed monetary and disciplinary sanctions against certain market-makers and some of their employees for related conduct. These monetary sanctions totaled approximately $26,200,000.

[25] *See, e.g.*, Pretrial Order No. 3, *In re* Nasdaq Market-Makers Antitrust Litigation, 1996-1 Trade Cas. (CCH) ¶ 71,407 (S.D.N.Y. 1996) (seeking order to allow depositions of certain class representatives prior to certification).

enabling plaintiffs to overcome potentially fatal arguments that the class definition was indefinite or overinclusive.[26]

Defendants raised innumerable defenses to class certification, and represented to the court that under *Eisen v. Carlisle & Jacquelin*[27] and its progeny, no broad class action had ever been certified, or could be certified, in the securities industry.

After exhaustive discovery, including thrity-seven depositions regarding defendants' financial records, the exchange of many experts' reports and depositions, voluminous briefing, and extensive oral argument, the court certified the class.[28] The court's opinion suggests the extraordinary number and breadth of issues raised by defendants in opposition to class certification.[29]

For example, plaintiffs overcame defendants' argument that buyers and sellers were in conflict with one another, and could not be included in the same class. According to defendants, even if damages were assumed to exist, whether the damages on any particular trade were sustained on the buyer side versus the seller side would be an issue of fact that necessarily would have to be evaluated separately in millions of transactions.[30]

Many potential experts and consultants frankly told plaintiffs that this and other certification problems might be insuperable. If plaintiffs' counsel and plaintiffs' economists had accepted that advice there would have been no class, and no recovery.

After many meetings and discussions, plaintiffs' counsel and plaintiffs' economists developed a solution to the buyer/seller conundrum, utilizing an arcane economic measurement known as the "effective half-spread."[31] This measurement had been used by financial

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[26] Significantly, despite extensive depositions of Professors Barclay and Schultz, defendants were unable to establish any substantial inaccuracy or overinclusion in the identity of Class Securities.

[27] 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

[28] *See In re* Nasdaq Market-Makers Antitrust Litigation, 169 F.R.D. 493, 532 (S.D.N.Y. 1996) ("Plaintiffs' motion for class certification pursuant to Rule 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure is hereby granted in part, as set forth above.").

[29] In addition to working closely with their own experts in developing studies and arguments, plaintiffs took highly effective depositions of several of the defendants' experts. These depositions, principally taken by Joseph Goldberg, severely undermined the defense experts' previously submitted opinions.

[30] According to defendants, since the mechanism of the conspiracy was to enlarge quotations by 1/8 (from an odd-eighth to an even-eighth), damages necessarily involved changing *either* the bid *or* the ask by 1/8, but not both. According to this argument, since the minimum "tick" size for quotations generally was 1/8 (rather than 1/16th), a separate transaction-by-transaction analysis would be required to determine whether at any given moment it was the buyer side, or the seller side, that was injured. If so, this case would be unmanageable as a class action, according to defendants, because of the millions of transactions that would have to be separately analyzed.

[31] The "effective half-spread" is the difference between the actual price and the mid-point of the bid and ask quotations.

economists in academic studies of this particular micromarket. Private plaintiffs and their economists successfully argued that it also reflected market realities.[32] The measurement effectively assigned one-half of the damages to the buyer side and one-half to the seller side, thereby resolving the alleged conflict and management difficulties.

Likewise, plaintiffs overcame a plethora of arguments concerning brokers and investment advisers as intermediaries under *Illinois Brick Co. v. Illinois*;[33] diversity of market-makers, proposed Class Securities, and class members; other potential conflicts within the class; predominance of common questions; typicality of claim; and adequacy of representation. Ultimately, the class was certified as to all 1,659 Class Securities.[34] The certified class included more than one million individual investors.[35]

Plaintiffs then overcame defendants' full-court press to exclude institutional investors who, according to defendants, accounted for most of the trading. Following extensive additional proceedings, including the filing of further expert reports and briefs, the court certified the class in its entirety, including tens of thousands of institutional investors.[36]

8. *Extensive Discovery Including over 3,000,000 Documents and over 10,000 Hours of Audiotape*

One advantage, among many, of having helped keep the government investigation alive was that plaintiffs eventually were able to overcome defendants' objections and, step-by-step, obtain access to the government's evidence. Defendants initially opposed all such access. After the court indicated that this discovery would be granted, however, the private parties were able to negotiate the many details in the September 18, 1995 Stipulated Order Regarding Initial Discovery and Stipulated Order Regarding Confidential Documents.[37]

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[32] Plaintiffs showed through testimony that the effective half-spread reflects the way investment advisors, and other sophisticated traders, actually determine the size of a negotiated spread.

[33] 431 U.S. 720, 736 (1977) (precluding recoveries by antitrust plaintiffs under a pass-on theory).

[34] *See In re* Nasdaq Market-Makers Antitrust Litigation, 169 F.R.D. 493, 509 (S.D.N.Y. 1996).

[35] *See id.* ("Here, the class numbers at least a million members . . . .").

[36] *See In re* Nasdaq Market-Makers Antitrust Litigation, 172 F.R.D. 119, 130 (S.D.N.Y 1997). In December 1997, the Court granted plaintiffs' motion to broaden the class period to include the interim between filing of the private complaints in May 1994 and filing of the Department of Justice complaint on July 17, 1996. *See In re* Nasdaq Market-Makers Antitrust Litigation, 1997-2 Trade Cas. (CCH) ¶ 72,028 (S.D.N.Y. 1997). That certification likewise assisted in achieving the record-breaking antitrust settlement.

[37] *See Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1995). These stipulated orders, negotiated at about the same time, represented the first two of many instances

Plaintiffs reviewed over 2,000,000 pages of document discovery by October 1996, long before the first settlement was negotiated.[38] Furthermore, plaintiffs reviewed approximately 4,000 hours of audiotape by this time, after overcoming defendants' strenuous resistance to such discovery.[39] This massive review of audiotapes and documents that already had been produced to the government, of course, was just one aspect of the private plaintiffs' exhaustive investigation, which also included many witness interviews and formal discovery independent of the government investigations.

Discovery by the private plaintiffs was conducted by a discovery team of eighty-one well-trained, associate level attorneys (assisted by paralegals), handpicked from the plaintiffs' law firms, and was carefully supervised by eleven senior attorneys. The team included a specialized sub-team of sixty-nine audiotape reviewers. Discovery team members and supervisors shared evidence through a state-of-the-art data entry system, with unique retrieval capabilities, and periodic conference calls to keep audiotape reviewers up-to-speed on insights and leads in deciphering the complex evidence.[40]

As noted above, defendants strenuously resisted private plaintiffs' access to the audiotapes already produced to the government, and the court initially granted access only to those portions of the audiotapes that defendants deemed relevant to the private plaintiffs' allegations. Later, over defendants' further objections, the court granted plaintiffs' motion for access to all of the audiotapes produced

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where all parties, after substantial negotiations, were able to voluntarily resolve the myriad details of massive discovery without unnecessarily burdening the court. Even in circumstances where resolving or minimizing discovery disputes required a dozen or more meetings (such as a later June 13, 1997 Stipulation and Order), all parties negotiated the issues.

[38] *See* Defendants' Memorandum in Opposition to Plaintiffs' Motion to Lift the Stay of Discovery, at 4, *Nasdaq* M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1996) (emphasis added). To date, defendants have provided plaintiffs with access to roughly two million pages of documents and 4,000 hours of audiotaped conversations. Plaintiffs also have taken significant discovery from various third parties, such as the NASD, culminating in the production of an even greater volume of documents and other materials for plaintiffs to review in connection with their claims. The NASD alone has produced over 130,000 pages of documents pursuant to plaintiffs' subpoena.

[39] Of course, the private plaintiffs also produced documents, including their own trading records and the dozens of economic studies on which plaintiffs relied. *See, e.g., In re* Nasdaq Market-Makers Antitrust Litigation, 929 F. Supp. 723, 727 (S.D.N.Y. 1996) (compelling plaintiffs to produce materials related to civil investigation demands).

[40] Plaintiffs' co-lead counsel required that each member of the discovery team have substantial qualifying prior discovery experience. Plaintiffs' co-lead counsel also organized orientation sessions and extensive orientation materials, including an evidentiary compilation, a video, and written discovery guidelines specific to the case, so that all of the members of the discovery team would be fully conversant with the case, and the workings and terminology of the industry, before reviewing tapes or documents. Partners and senior associates, organized as discovery captains or discovery co-chairs, coordinated and supervised the work of the discovery team.

by defendants to the DOJ, including the portions that defendants deemed irrelevant.[41]

Eventually, plaintiffs obtained and reviewed in excess of 10,000 hours of audiotape, including thousands of hours of audiotapes (selected by plaintiffs' counsel) that had never been produced to the government. The tapes were full of indistinct words and industry jargon. Key passages often had to be listened to several times by knowledgeable reviewers to be understood, then accurately transcribed, and categorized in plaintiffs' computerized database. Among mountains of dross, however, the reviewers unearthed many nuggets of pure evidentiary gold.

Likewise, despite defendants' strenuous resistance, plaintiffs won access to the transcripts of more than 200 depositions taken by the government.[42] Many of these were also valuable, and all were carefully analyzed and integrated with the other evidence.[43]

The DOJ and private plaintiffs diverged, however, with respect to private access to a compilation of evidence that the Department created and shared with the defendants for purposes of negotiating a consent decree. Private plaintiffs argued that any work product protections had been waived by sharing the evidentiary compilation with defendants. The government urged that disclosure to plaintiffs would discourage settlement negotiations in future cases, and that private plaintiffs already had won access to the documents, audiotapes, deposition transcripts, and other underlying evidence. The government prevailed.[44] The government also prevailed in limiting access to any future audiotapes prepared solely pursuant to the consent decree.[45]

Private plaintiffs retained computer experts and developed a customized, state-of-the-art data retrieval system in order to integrate and analyze all of this government evidence together with all of the evidence independently developed by plaintiffs, including confidential witness interviews. As all of this formal and informal discovery snow-balled,[46] the end result was a giant database and state-of-the-art

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[41] *See* Transcript of February 7, 1996 hearing, at 46, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1996) ("[T]hey get the tapes.").

[42] *See In re* Nasdaq Market-Makers Antitrust Litigation, 169 F.R.D. 493, 530-531 (S.D.N.Y. 1996) ("Those CID deposition transcripts already in Defendants' possession must be produced.").

[43] For example, plaintiffs painstakingly compared the government transcripts to the plaintiffs' document database to identify any significant documents not covered by the government examination.

[44] *See* United States v. Bleznak, 153 F.3d 16, 21 (2d Cir. 1998) (finding that settlement memorandum was not a determinative document).

[45] *See id.* at 19 (holding that without the consent decree, there would be no tapes to produce).

[46] *See, e.g.*, Pretrial Order No. 4, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1996); Pretrial Order No. 5, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1997) and the Stipulation and Order Governing Defendants' Production of Docu-

retrieval system that was used to great effect in settlement negotiations, including settlement presentations to the court.

Likewise, by immediate investigation and prompt rebuttal, plaintiffs were able to counteract a 1997 report by Dr. Susan E. Woodward (former chief economist of the SEC), prepared under contract for the Congressional Budget Office, which purported to show that any and all allegations of conspiracy or harm were unfounded. Defendants openly boasted in the *Wall Street Journal* that this new study would slow plaintiffs' path towards settlement.[47]

Private plaintiffs discovered and proved Dr. Woodward's industry connections, including her continuing affiliation with the principal consulting firm for defendants, and her retention by the Securities Traders Association. Plaintiffs also were able to show the court that she reached her highly publicized opinions without reviewing certain relevant materials.

Plaintiffs' counsel ultimately reviewed and analyzed over 3,000,000 pages of documents, and over 10,000 hours of audiotape, in addition to the numerous depositions taken by plaintiffs, and more than 200 government transcripts. All of this private and government evidence was painstakingly integrated in the state-of-the-art database. Settlement negotiations drew on this wealth of information.

C. History of the Settlement Negotiations

Bearing in mind the confidentiality of negotiations, I will describe them only in outline.

1. Early Attempted Negotiations

From the outset of the litigation, private plaintiffs made known to defendants their willingness to explore settlement, individually or collectively. Before defendants' motion to dismiss was decided, no defendant was interested in exploring settlement. Even afterwards, some defendants continued to argue that their cases should be dismissed without payment, and the joint defense as a group argued that any settlement would have to be primarily or entirely in the form of coupons, rather than cash.

At the time of the class certification argument in 1996, settlement negotiations with one individual defendant began in earnest. However, after many discussions, its best offer was still inadequate.

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ments in Response to Plaintiffs' First Set of Document Requests to All Defendants and Plaintiffs' Revised Second Set of Document Requests to All Defendants, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1996).

[47] *See* Deborah Lohse, *Research Paper That Concludes Nasdaq Dealers Probably Didn't Fix Prices May Slow Settlements*, WALL ST. J., Aug. 25, 1997, at C7.

It was rejected because it would have set a low benchmark for the rest of the case.

Collective negotiations with all defendants began soon after the class certification argument, but before the court's decision certifying the class. At this stage, defendants offered only a minuscule fraction of the amount they ultimately agreed to pay.

2. *The First Six Individual Settlements, Laying the Groundwork for Further Large, All-Cash Settlements*

Class certification on November 26, 1996, and the growing accumulation of evidence, led to scores of further meetings and telephone calls exploring settlement. In order to maximize recovery for the class, private plaintiffs resisted the urge to settle quickly. Instead, private plaintiffs played the defendants off against each other, individually and collectively, and continued to develop their case.

As a result, the first individual settlement was not achieved until April 9, 1997. That ice-breaking settlement, however, was all cash (rather than coupons), and was at a level that put other negotiations on course for a large recovery.

Plaintiffs from the outset openly followed a strategy of ratcheting each settlement upwards—letting all defendants know that each successive settlement would be progressively greater, per percentage point of market share. That strategy created strong incentives for each defendant to settle, rather than be left behind. It also created strong incentives for defendants to settle as a group, before additional defendants jumped ship. The individual all-cash settlements also put increasing pressure on those defendants who had argued that any settlement must be paid in coupons.[48]

Following exhaustive negotiations, five additional all-cash, individual settlements were reached during the spring and summer of 1997, at progressively higher amounts per percentage point of market share. The first six settlements were preliminarily approved, despite objections by the joint defense to certain terms.[49]

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[48] Plaintiffs also developed other strategies that encouraged defendants to settle. For example, during class notice negotiations, certain defendants said that they had few, if any, computerized records identifying class members. Plaintiffs reminded defendants of the document preservation orders that had been entered prior to multidistrict transfer in Pretrial Order No. 1, which expressly included computerized data.

Plaintiffs then served document destruction discovery, and followed up with extensive negotiations (on a defendant-by-defendant basis) anticipatory to a motion to compel, or a motion for sanctions. The prospect of a motion to compel or a motion for sanctions encouraged many defendants to locate additional computerized records that turned out to be in storage or in the custody of third-party computer service providers. The prospect of a records destruction motion may have served as an added incentive for some defendants to settle.

[49] *See In re* Nasdaq Market-Makers Antitrust Litigation, 176 F.R.D. 99 (S.D.N.Y. 1997). The contested terms were contingencies in the event that plaintiffs later settled with other de-

Each successive settlement was structured to maximize the joint and several responsibility of the remaining defendants, to the fullest extent permitted by law, for all of the damages occasioned by the conspiracy. Each settlement thereby increased the financial exposure of the remaining defendants. This, too, increased pressure on the remaining defendants to settle individually or collectively.

3. Extensive Group Settlement Negotiations and the All-Cash, Record-Breaking Antitrust Group Settlement

Even after class certification, most of the defendants resolutely resisted the pressure to settle for cash, and plaintiffs' domino strategy would not have succeeded, by itself, without the fruits of plaintiffs' massive investigation, and the creative and extensive work of plaintiffs' economists, who continued to refute each successive defense study. One of plaintiffs' negotiating techniques was to update defense counsel with examples (but examples only) of conversations from recently transcribed tapes, or to advert to recent deposition testimony, recent studies, or recent witness interviews.

At appropriate junctures, the joint defense also was advised that several unnamed members were willing to settle individually. Plaintiffs particularly targeted the joint defense's leadership for individual settlements. Thus, plaintiffs' third individual settlement was reached with defendants' own liaison counsel.

Private plaintiffs by all of these means, step-by-step, induced the joint defense to substantially increase its collective offers. As more defendants indicated their willingness to explore settlement at increasingly higher amounts (per percentage point of market share), the joint defense likewise by necessity began to explore larger numbers.By mid-1997, defendants hinted at an aggregate figure that would modestly exceed the record for any prior antitrust settlement if, but only if, plaintiffs were willing to accept most of the payment in coupons. However, until late 1997, the joint defense persisted in arguing that any group settlement would have to be predominantly coupons (redeemable for discounts against future services), rather than cash.

Plaintiffs' co-lead counsel remained steadfast and maintained a united front. Instead of claiming victory based on the face value of coupons, private plaintiffs presented an all-cash global settlement as the only alternative to more individual settlements, and continued to

fendants for coupons. These contingency provisions, and the objections by the joint defense, reflected an erroneous belief by the individually settling defendants and the joint defense that private plaintiffs eventually would capitulate and settle with the joint defense for coupons. *See id.* As time would tell, plaintiffs instead achieved all cash settlements.

develop their case. Only at the eleventh hour did the joint defense yield its ground on coupons, and agree to an all cash settlement.

Collective negotiations received invaluable help from the district judge presiding over this multidistrict litigation, Judge Robert W. Sweet, who initially was asked to participate by defendants. Through his settlement conferences, which broke crucial logjams, and after literally dozens of additional out-of-court meetings (often far into the night), private plaintiffs were finally able to achieve an all cash, record breaking antitrust recovery.

4. Settlement with the Final Holdout

The last settlement, with defendant Robertson, Stephens & Company, was signed on March 23, 1998. The final settling defendant had argued its innocence throughout negotiations in 1996, 1997 and into 1998, observing that it had not been included in the DOJ complaint, and contending that it should, therefore, be dismissed from the private cases without payment.[50] After further helpful settlement conferences with the court (including candid discussions of the evidence), and further out-of-court discussions, the holdout settled. Robertson paid as much as any prior settling defendant, per percentage point of market share, plus substantial interest.

5. The All-Cash, Record-Breaking Antitrust Settlements and the Reduction in Spreads

The settlements in the aggregate totaled approximately $1.027 billion. An affidavit of Professor Michael Barclay showed that this amount approximated plaintiffs' individual damages.[51] The settlements were enthusiastically approved by the court.[52]

The $1.027 billion dollar value does not take into account, however, the future savings accomplished directly and indirectly by this litigation and the government proceedings. The private litigation, and the new SEC rules spurred in part by this litigation, dramatically reduced Nasdaq spreads. According to a recent academic study, there has been a "large decline" in Nasdaq spreads, reflecting newly "competitive pricing."[53]

[50] Thirteen of the private defendants had not been named in any government complaint.

[51] Affidavit of Professor Michael J. Barclay in Support of Final Settlement Approval ¶¶ 2, 29, *Nasdaq*, M.D.L. No. 1023, No. 94 Civ. 3996 (RWS) (S.D.N.Y. 1998).

[52] *See In re* Nasdaq Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D.N.Y. 1998).

[53] James P. Weston, *Competition on the Nasdaq and the Impact of Recent Market Reforms*, 55 J. FIN. 2565, 2566 (2000). *See also*, Michael Barclay et al., *Effects of Market Reform on the Trading Costs and Depths of Nasdaq Stocks*, 55 J. FIN. 1 (2000) (finding that for the first group of 100 Nasdaq securities phased in under the reformed trading rules, quoted and effective spreads narrowed by approximately 30 percent from 1994 to 1997, with most of the improvement resulting directly from the investigations, publicity, and litigation prior to 1997). Re-

6. Settlement Distributions to More Than a Million Class Members

Under a bifurcated procedure contemplated by the settlement agreements, and approved by the court, questions of allocation and distribution were deferred until after aggregate settlement approval.[54]

After settlement approval, the court approved an innovative plan of distribution, including claim forms with preprinted transaction information developed from the computerized records of many defendant and non-defendant brokerage firms.[55] The preprinted transaction information included the vast majority of eligible transactions for most retail members of the class. That innovative plan, which also included computerized claim filing in a variety of convenient formats for institutional members of the class, was developed by plaintiffs' co-lead counsel jointly with a working group of deputy state attorneys general.[56] The information pre-printed for claimants included the vast majority of eligible transactions for most individual members of the class.[57] Eventually, more than a million class members filed valid claims, and after deduction of attorneys' fees, litigation expenses, class notice costs, and settlement administration fees and costs, payments totaling about $896,233,301 were mailed to class members.[58]

CONCLUSION

One can recall the situation in 1994, when the securities industry, most journalists, and world-renowned economists expressed skepticism regarding the success of the *Nasdaq* litigation. As noted by Professor Coffee, a billion dollar recovery and a substantial reduction in spreads hardly seemed conceivable.[59]

As noted, defendants initially hoped to terminate the entire case by a motion on the pleadings. Even in its broadest outline, liability in

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cently, spreads narrowed further as a result of an SEC mandated switch from trading in fractions of a dollar (such as 1/4, 1/8, 1/16) to trading in decimal increments of as little as a penny. *See* Kate Kelly, *Nasdaq Traders Stumbling Over Decimals*, WALL ST. J., May 25, 2001, at C1.

[54] *See Nasdaq*, 187 F.R.D. at 473.

[55] *See id.* at 492.

[56] The working group of deputy state attorneys general was co-chaired by Patricia Conners of the Florida Attorney General's Office and Margaret Spencer of the California Attorney General's office.

[57] *See* Cassell Bryan-Low, *Nasdaq Price-Fixing Settlement to Reach Entitled Investors Soon*, WALL ST. J., Dec. 26, 2000, at C16 (noting that claim forms already contained investors' transactions that were stored on computers). Other innovations in the approved plan of distribution included "electronic" claims in convenient formats for large claimants with voluminous transaction data, and "positional" claims reconstructed by computer program from end-of-quarter or end-of-year holdings for claimants who lacked records of purchases and sales. *See In re* Nasdaq Market-Makers Antitrust Litigation, 2000-1 Trade Cas. (CCH) ¶ 72,773, at 86,648 (S.D.N.Y. 2000).

[58] Approximately 1,249,500 claimants received payment, in addition to certain late claims that were subsequently allowed. The payments to class members have ranged from a minimum of $25 to more than $11 million. *See Nasdaq*, 2000-1 Trade Cas. at 86,648.

[59] *See* Coffee Affidavit, *supra* note 4, ¶¶ 25-31.

this case required proof of an unusually complex conspiracy involving 37 defendants and a checkerboard of fact situations and disparate periods for each of 1,659 different securities. Other liability issues included proof of a "common motive," "actions which were against [defendants'] own individual business interest," and "evidence of coercion."[60]

The risks overcome in the area of damages were even more formidable. Defendants forcefully argued that plaintiffs would be unable to prove any damages whatsoever, particularly in light of allegedly offsetting rebates of commissions on Nasdaq trades. Defendants were able to convince a panel of prominent economists, the Shadow SEC, to reject the proposition that Nasdaq spreads were greater than spreads for comparable securities on the NYSE.[61] From the outset, plaintiffs likewise faced enormous risks that the class would not be certified. As noted by Professor Miller, private plaintiffs achieved an extremely difficult class certification against great odds.[62] The Second Circuit's decision in *Eisen v. Carlisle & Jacquelin*,[63] established these extreme risks. *Eisen*, like this case, involved a broad multi-security, antitrust class action. In *Eisen*, after two trips to the Second Circuit, and one to the Supreme Court, plaintiffs and the putative class ultimately recovered nothing.

Here, by contrast, private and government cooperation produced the largest antitrust recovery in history, and revolutionized the organization and operation of the NASD and the Nasdaq National Market. It directly benefited more than one million investors who filed claims and shared in the $1.027 billion recovery, and indirectly benefited all investors by permanently reducing trading costs.

As Professor Schultz, now a chaired professor of finance at Notre Dame, observed in an unsolicited letter on the occasion of the settlements: "Just a casual look at Nasdaq quotes shows stocks like Microsoft and Intel trading with a spread of 1/16 today—less than a quarter of their average spread in early 1994. I have no doubt that this would not have happened if the civil suits were not filed."[64]

That is the way that complementary private and government enforcement is supposed to work. Of course, it is not how the government and private bar always conduct themselves. However, it pre-

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[60] *In re* Nasdaq Market-Makers Antitrust Litigation, 894 F. Supp. 703, 713-14 (S.D.N.Y. 1995).

[61] *See* Power, *supra* note 13, at C13 (noting that the Shadow SEC was unable to conclude that there was any difference in spreads or transaction costs between Nasdaq and NYSE).

[62] *See* Miller Affidavit, *supra* note 6, ¶ 16 ("The contrast between the outcome of this case, and the outcome of facially similar class certification issues in *Eisen v. Carlisle & Jacquelin* well illustrates the enormous risk that was overcome with regard to class certification.") (citation omitted).

[63] 479 F.2d 1005 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974).

[64] Schultz Affidavit, *supra* note 17, ¶ 4.

sents an example of the cooperation and results to which the private bar and government appropriately aspire.