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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE DELL TECHNOLOGIES INC. CLASS V STOCKHOLDERS LITIGATION	))))	CONSOLIDATED C.A. No. 2018-0816-JTL

CORRECTED BRIEF OF LAW PROFESSORS AS *AMICI CURIAE*

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I. STATEMENT OF *AMICI CURIAE*'S INTEREST

The Law Professors listed in Exhibit A hereto (together, the "Amici") publish extensively on representative stockholder litigation. They offer this brief in answer to the Court's question: "What do law professors say in favor or against the declining percentage method [of awarding fees]?"[1] *Amici* have no direct interest in the outcome of this case. While *Amici* all concur in the conclusions expressed herein, individual *amici* would express various observations differently.

II. INTRODUCTION

For decades, some academics have advocated for increasing-percentage fee awards in class actions, based largely on economic models and theoretical moral hazard. Yet judges tend to award smaller percentages as settlement size grows. Are the judges mistaken? And if profits from decreasing-percentage awards discourage litigation, why do plaintiffs continue to pursue large settlements?

A new study of nearly 2,500 securities cases suggests that the judicial intuition is correct and the theoretical model wrong.[2] Plaintiffs pursue large settlements because they tend to have the highest multiplier to lodestar—in other words, they're more profitable than the alternatives. Thus, class counsel have

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[1] D.I. 520 at 2.

[2] Stephen Choi, Jessica M. Erickson, and A.C. Pritchard, *The Business of Securities Class Action Lawyering*, 99 IND. L. J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350971 [hereinafter, "Business of SCAL"].

adequate incentive to take risk, even on a declining-percentage fee basis. Overcompensating class attorneys simply diminishes class recovery.

The Court also sought information concerning *ex ante* fee agreements. Research shows that plaintiffs' counsel seek lower percentage fees when class plaintiffs bargain *ex ante*. Plaintiff's counsel could, and should, disclose data to answer the Court's question. On the other hand, *Amici* respectfully suggest that market-based fund manager compensation provides little guidance for class action attorneys' fees. Investors can avoid funds that they believe overcompensate managers. The same is not true here: if the Court grants Plaintiff's motion, even class members with extreme distaste for "2-and-20" pay must participate.

Finally, this brief highlights recent research on the role of "additional counsel." *Amici* respectfully suggest that the Court seek information concerning the identity of any attorneys or law firms who may be compensated out of the settlement that may not appear in the papers.

III. A DECLINING-PERCENTAGE AWARD PROVIDES SUFFICIENT INCENTIVE TO CLASS COUNSEL.

Amici anticipate that Plaintiff's counsel will rely upon the work of academics that, for over three decades, have offered theoretical models justifying

an increasing-percentage paradigm.[3] These authors' concerns are based on theoretical models and the concept that declining fees will lead plaintiffs to settle early.[4] Yet these models largely fail to reckon with empirical data demonstrating that (a) judges tend to award smaller percentage awards as total settlement size increases,[5] and (b) plaintiffs continue to pursue large recoveries anyway.

For instance, a 2010 study by Professor Brian Fitzpatrick found that "fee percentage is strongly and inversely associated with settlement size . . .; [when] a settlement size of $100 million was reached . . . fee percentages plunged well

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[3] *See, e.g.*, Brian Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1166 (2021) [hereinafter "Judge's Guide"]; Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1444-45 (2015); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 678 (2002) (arguing that declining-percentage is "especially likely to create a significant moral hazard problem"); Andrew K. Niebler, *In Search of Bargained-For Fees for Class Action Plaintiffs' Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Counsel*, 54 BUS. LAW. 763, 802 (1999) (favoring straight-percentage or rising marginal percentage in cases where firms are likely to experience steady or diminishing marginal returns to effort); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 697 (1986).

[4] *See, e.g.*, Fisch, *supra* note 3, at 678.

[5] *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 814 (2010) [hereinafter "Fitzpatrick Study"].

below 20 percent."[6] In Fitzpatrick's study, the median fee for settlements between $500 million and $1 billion was 12.9 percent, and the median fee for settlements over $1 billion was 9.5 percent.[7] This result is consistent with Delaware cases such as *Americas Mining* and *LAMPERS v. Crawford*.[8]

Although Delaware, like most jurisdictions, does not mandate a declining-percentage,[9] the approach is economically rational: "recovery will not necessarily increase in proportion to the number of hours" because it does not take ten times as

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[6] *See Ark. Teacher Ret. Sys. v. State Street Bank and Trust Co.*, 512 F.Supp.3d 196, 215 (D. Mass. 2020), *aff'd in part, dismissed in part sub nom. Ark. Teacher Ret. Sys. v. State St. Corp.*, 25 F.4th 55 (1st Cir. 2022) (citing Fitzpatrick Study, *supra* note 5, at 837-38). Notably, the *State Street* court criticized Labaton Sucharow for providing a "misleading description" of the Fitzpatrick Study to support a 24.85% fee award. *Id*. at 214. The court ultimately awarded 20% of a $300 million fund. *Id*. at 265.

See also Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1261 (Del. 2012) (in securities class action settlements, "[o]nce in the vicinity of over $500 million, the median attorneys' fees falls to 11%."); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (citing three studies to conclude that "the percentage of the fund awarded to counsel declines as the size of the fund increases" and an "award fixed at 27.5% of a 200 million fund is exceptionally high") (citing Fitzpatrick Study; Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUDIES 248 (2010); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUDIES 27 (2004)); Business of SCLA, *supra* note 2, at 55-56.

[7] Fitzpatrick Study, *supra* note 5, at 839, tbl. 11.

[8] *See* Obj.'s Br. at 6-7 (citing *Ams. Mining*, 51 A.3d at 1263; *LAMPERS v. Crawford*, C.A. No. 2635-CC (Del. Ch. June 8, 2007)).

[9] *See, e.g.*, *Ams. Mining*, 51 A.3d at 1258; *In re Synthroid Marketing Litig.*, 264 F.3d 712, 718 (7th Cir. 2001).

much work to resolve a $100 million case as a $1 billion case.[10] Thus, some courts conclude that "in a hypothetical bargaining situation, well-informed class members . . . likely would shop around to see if any other firm would be willing to take their case and pursue a large recovery for a sliding-scale fee."[11] "Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards)."[12]

So why, if theory suggests that declining-percentage fee awards underincentivize litigation, do plaintiffs' counsel pursue large settlements? New data from a recent draft paper, *The Business of Securities Class Action Lawyering*, offers an answer: large cases are more profitable. Professors Erickson, Choi, and Pritchard studied nearly 2,500 securities lawsuits filed between 2005 and 2018.[13] They found that top-tier plaintiff's firms tend to win lead counsel fights and serve in cases with strong initial indicia of wrongdoing—cases that "look better from the

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10 *Synthroid*, 264 F.3d at 721.

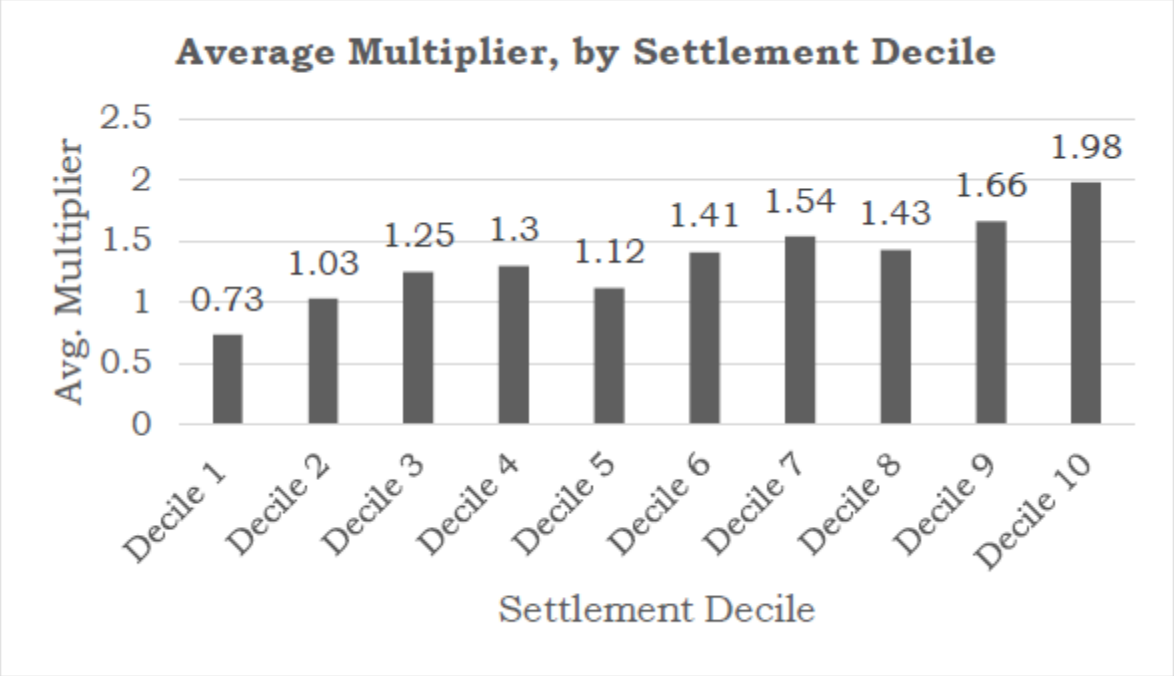
11 *In re Stericycle Sec. Litig.*, 35 F.4th 555, 563 (7th Cir. 2022) (quoting *Aranda v. Caribbean Cruise Line, Inc.*, 2017 WL 1369741, at *5 (N.D. Ill. Apr. 10, 2017)).

12 *Silverman*, 739 F.3d 956 at 959 (affirming 27.5% settlement because objector did not raise issue of declining percentage awards in district court).

13 Business of SCAL, *supra* note 2, at 3.

start"—and thus are more likely to achieve settlements.[14] This is important because the risk of non-recovery (for a plaintiff's firm) falls dramatically once a case survives a motion to dismiss, and it continues to decrease after class certification and summary judgment.[15]

This data leads to two counterintuitive results. First, although the percentage of fees awarded for settlements in the top two deciles of recovery declines, the average multiplier to lodestar increases.[16] Or in other words, "[a]s the settlements



[14] *Id*. at 33, 35. As Objectors point out, similar facts exist here, including the possibility of entire fairness review. Obj. at 11.

[15] *Id*. at 14.

[16] *Id*. at 55-56.

get larger, judges are willing to give plaintiffs' firms a larger return on the time they invested in their cases" such that declining fee awards "still compensate the plaintiffs' firms more for their time than the awards for smaller settlements."[17]

Second, not all hours are equally risky. In securities cases, "[t]he PSLRA makes the motion to dismiss the key screening device for securities fraud class actions," with later hours holding a smaller risk of non-recovery.[18] The same is true in merger litigation: a case that survives a motion to dismiss becomes much more likely to lead to settlement.[19] Erickson, Choi and Pritchard conclude that, relative to risk, attorneys are undercompensated before a motion to dismiss, but overcompensated afterwards—especially in cases involving high market-capitalization firms like Dell.[20] (See table below.)

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17 *Id.* at 56-57.

18 *Id*. at 60. This is unsurprising—as in securities class actions, it is at this point that defendants begin to incur significant discovery costs, raising settlement value. *Id*. at 60-61.

19 Consider the recent SolarCity litigation. *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022). Elon Musk prevailed at trial (with an appeal pending), but counsel did not leave empty-handed. After winning a motion to dismiss and summary judgment motion, plaintiffs settled with every other Tesla director for $60 million. *Id*. at *26.

20 Business of SCAL, *supra* note 2, at 62.

	Prob of Settlement	Implied Multiplier	Actual Multiplier
MARKET CAP DECILES 0 TO 9			
Prior to Final MTD Order	0.408	2.45	1.34
Conditional on Surviving the MTD	0.935	1.07	
MARKET CAP DECILE 10			
Prior to Final MTD Order	0.368	2.72	1.43
Conditional on Surviving the MTD	0.896	1.12	

This explains what the theorists have not. Economically rational plaintiffs' firms pursue large settlements despite expecting a declining percentage because large settlements are more profitable and the later hours less risky. Simply put, even at the lower percentage, the much higher hourly rate means that larger recoveries are more attractive than any alternative. This suggests that *Americas Mining*'s result—a 15% fee—would be more appropriate here than a 28% award.[21]

Moreover, the conjecture that plaintiffs' firms will not pursue meritorious cases under a declining-fee approach ignores the significant money that firms make in these cases. Most of the fees in securities class actions come from the mega-settlements in the top decile.[22] Even under the declining-fee approach, these mega-settlements are extremely profitable, demonstrating the winner-take-all reality of shareholder litigation.

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21 *Compare Ams. Mining*, 51 A.3d at 1252, *with id.* at 1259-60.

22 Business of SCAL, *supra* note 2, at 54.

Of course, a declining-fee approach may not always be best. For example, a sophisticated institutional investor could negotiate for a "baseline" recovery (*i.e.*, a settlement amount that a typical plaintiffs' firm could likely achieve given the facts known at the start of the litigation) with a relatively low fee percentage for achieving this baseline and a larger percentage for achieving a greater recovery.[23] This approach, however, would require the investor to determine this baseline amount when selecting lead counsel and incorporate it into the retainer agreement. There is no indication of such an *ex ante* agreement in this case, and it would be difficult to judicially replicate the incentives of such an agreement after the fact.

Absent such an agreement, the declining-percentage award matches risk and return, adequately compensates contingency counsel, and preserves settlement value for the class. It is also consistent with *Sugarland*, which instructs the Court to consider "any contingency factor."[24] After a motion to dismiss, contingency risk falls. The data suggests that courts are requiring stockholders to pay a higher risk premium than necessary.

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[23] This may be the strategy underling the increasing-percentage approach taken by plaintiffs in the appraisal case cited in the Court's letter. *See* D.I. 520 at 2 (citing *In re Appraisal of Dell, Inc.*, 2016 WL 6069017, at *5 (Del. Ch. Oct. 17, 2016), *vacated*, *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1, 46 (Del. 2017)).

[24] *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980) (quotation omitted).

IV. THE COURT SHOULD CONSIDER *EX ANTE* FEE AGREEMENTS.

The Court's letter also asks about "privately negotiated fee arrangements."[25] This makes sense: as Fitzpatrick suggests, both absent class members and judges should seek to pay "at the end of the case the amount they would have paid class counsel to take the case to begin with. . . ."[26] One study of securities class actions found that 27.7% of cases with public sector lead pension funds showed evidence of an *ex ante* fee agreement, and that the presence of *ex ante* agreements appears to strongly correlate with lower fee requests.[27]

Unfortunately, the study lacks details on the percentage of *ex ante* negotiated fees that were decreasing-, increasing- or flat-percentages. Available data is mixed. In at least two cases, pension funds agreed to a declining-percentage scale.[28] In at least two cases, pension funds agreed to flat fees.[29] Others may exist,

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25 D.I. 520 at 2.

26 Judge's Guide, *supra* note 3, at 1153; *see also State of Wisconsin Inv. Bd. v. Bartlett*, 2002 WL 568417, at *6 (Del. Ch. Apr. 9, 2002), *aff'd*, 808 A.2d 1205 (Del. 2002) ("Fee agreements cannot absolve the Court of its duty to determine a reasonable fee; on the other hand, an arm's-length agreement, particularly with a sophisticated client, . . . can provide an initial 'rough cut' of a commercially reasonable fee.").

27 Baker, *supra* note 3, at 1393-95 (finding that modal fee request is 25% of fund, but "[t]he vast majority (74.36%) of fee requests in cases with ex ante agreements . . . are below 25%.").

28 *Id.* at 1432 n. 225 (describing *ex ante* agreement with declining fees in *In re Glob. Sec. Litig.*, No. 1:02-cv-00910 (S.D.N.Y. July 29, 2004)); *Stericycle*, 35 F.4th at 562 (describing *ex ante* agreement with Mississippi fund where fees

but the data largely resides in a black box. Thus, Professor Fitzpatrick's study of *ex ante* fee arrangements did not collect data from securities class actions.[30]

But Plaintiffs' counsel have the data.[31] The Court could require class counsel to disclose the percentage of their clients with *ex ante* fee agreements, and the percentage that are declining-, increasing-, and flat-percentage arrangements. Equally important would be disclosure of the number of cases that each firm has litigated on behalf of clients with each type of retainer agreement. Pre-existing relationships with numerous funds allow firms to choose which plaintiff to represent, and this data would show whether a firm selects clients based on which has the most generous (to the firm) payment policy.

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declined from 25% of any recovery up to $10 million to 5% for any recovery over $25 million).

[29] *See* Baker, *supra* note 3, at 1439 n.258 (describing 17.5% fee cap in a $175 million opt-out settlement against Time Warner) (citing D&O Diary, *Ohio Joins the Time Warner Opt-Out Settlement Parade* (Mar. 7, 2007), https://www.dandodiary.com/2007/03/articles/opt-outs/ohio-joins-the-time-warner-opt-out-settlement-parade/); *Stericycle*, 35 F.4th at 563 n.6 (describing 25% fee cap in agreement with Arkansas Teacher Retirement System).

[30] Judge's Guide, *supra* note 3, at 1161 n.52.

[31] Notably, Plaintiff's affidavit does not disclose the existence of an *ex ante* agreement in this case, or whether it regularly enters into such agreements with its counsel. *See* D.I. 510, Little Aff. ¶¶ 4-8.

V. FUND MANAGERS' FEES ARE NOT COMPARABLE.

The Court's letter suggests that the Objector's fee structures could serve as a "cross-check" for a fee award. Respectfully, *Amici* disagree.[32] Much could be (and has been) said about the wisdom of bankers' fees. But investors choose their bankers and investment managers, and they can select between low-cost and high-cost providers depending on whether they agree or disagree with, for instance, a "2-and-20" compensation formula.[33]

Class members lack the same freedom here. Although primarily a monetary settlement, Plaintiffs secured no "opt-out" for dissenters. Thus, shareholders

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[32] At least one Delaware Supreme Court Justice has criticized (in dissent) comparisons to banker compensation as not "based on *Sugarland*." *Ams. Mining*, 51 A.3d at 1263 (Berger, J., dissenting in part).

[33] The investing world contains numerous examples of declining fees, including the well-known "Lehman formula." *See* Investopedia, *The Lehman Formula: Definition and Calculation Examples*, https://www.investopedia.com/terms/l/lehmanformula.asp (Nov. 23, 2020); *See also* T.S. Walker, et al., *The Role of Investment Banks in M&A Transactions: Fees and Services*, 16 PACIFIC-BASIN FIN. J. 341, 351 (2007) ("It is believed that economies of scale exist in larger transactions, such that the fees investment banks charge are a decreasing function of the size of the deal."); Vanguard, *What Share Classes Does Vanguard Offer*, https://investor.vanguard.com/investor-resources-education/mutual-funds/share-classes-of-vanguard-mutual-funds (accessed Apr. 10, 2023) (describing funds with decreasing expense ratios as minimum investment rises).

representing 24.5% of the class, let alone absent stockholders, cannot remove themselves to seek a better recovery with lower costs.[34]

This lack of a market mechanism underlies the Court's protective fiduciary role. Class members (apart from Objectors) may well be skeptical of high fund manager compensation and choose to avoid it. It would be unfortunate to adopt a rule forcing class members to compensate lawyers they've never met on the same basis that they would avoid in their personal investments.

VI. THE COURT SHOULD ASK ABOUT "ADDITIONAL COUNSEL."

Finally, *The Business of Securities Class Action Lawyering* recommends another inquiry appropriate before approving any fee: whether any "additional counsel" unlisted in the application stand to receive part of the award.[35] "[A]dditional counsel operate in the shadows of securities class actions" without "appoint[ment] by the court [or] any formal role defined by law."[36] They frequently do not report hours as part of a lodestar submission.[37] Most often, their role appears to be to connect lead counsel with institutional investors willing to

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[34] The Delaware Supreme Court has held that in some circumstances large class members must be given an opt-out. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 436 (Del. 2012). No one has suggested that similar facts obtain here.

[35] Business of SCAL, *supra* note 2, at 38.

[36] *Id*.

[37] *Id*. at 39.

serve as plaintiffs, and these relationships "have the potential to be a cover for finders' fees that simply compensate additional counsel firms for introducing lead counsel firms to institutional clients."[38]

Lead Counsel here are no stranger to this practice. In *Arkansas Teacher Retirement System v. State Street Bank and Trust Company*, a Massachusetts federal court discovered—after it appointed a special master to investigate unrelated issues—that Labaton "agreed to pay $4,100,000 to . . . a lawyer who had done no work on this case. . . ."[39] Such relationships with "additional counsel" rarely receive judicial attention, but these firms sometimes offer perquisites—such as lower retainer fees or scholarships for pension fund members—not shared by other class members.[40] These relationships may help lead counsel recruit institutional clients, but such client development costs should not be passed along to the class.

This Court has not weighed in on whether such practices are appropriate. A settlement of this magnitude offers a vehicle to do so. Requiring class counsel to

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38 *Id*. at 39, 41.

39 *Ark. Teacher Ret. Sys.*, 512 F.Supp.3d at 211-12.

40 *See* Benjamin Edwards and Anthony Rickey, *Uncovering the Hidden Conflicts in Securities Class Action Litigation: Lessons from the* State Street *Case*, 75 BUS. LAW. 1551, 1560-61 (2019-20) (describing one additional counsel decision not to raise retainer after "receiv[ing] some income from the work we did on the securities litigation case" and scholarship funds set up by additional counsel for benefit of fund members).

identify any attorney or firm that stands to receive fees from this litigation, as well as the specific work that these attorneys or firms performed, and then accounting for these arrangements (if any) in setting the fee award, would ensure that the class are not burdened by counsel's costs of client acquisition.

VII. CONCLUSION

Amici respectfully suggest that a declining-percentage fee award adequately compensates Plaintiff's counsel while preserving funds for the class. An award of 15 percent, as in *Americas Mining*, would preserve $135 million for the class, while still compensating counsel with a ~3.7x multiple.[41] Meanwhile, the Court should consider requesting other information before setting a fee, including any *ex ante* agreements Plaintiff's counsel has reached with clients and fee-sharing arrangements with any other counsel.

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[41] D.I. 510, Weinberger Aff. ¶¶ 7-8.

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