UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CARLOTZ, INC. SECURITIES LITIGATION	Lead Case No. 1:21-cv-05906-AS

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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Lead Plaintiff David Berger ("Lead Plaintiff") respectfully submits this memorandum in support of his motion for: (i) an award of attorneys' fees of 33[1/3]% of the all-cash $13,000,000 Settlement Fund to Lead Counsel Kahn Swick & Foti, LLC ("KSF"); (ii) reimbursement of necessary and reasonable litigation expenses of $155,185.13; and (iii) service awards of $10,000 to Lead Plaintiff and $5,000 to Additional Plaintiff Craig Bailey ("Additional Plaintiff")—$15,000 total).[1]

I. INTRODUCTION

The proposed Settlement, which provides for an all-cash payment of $13,000,000 to the Settlement Class in exchange for resolution of all claims against Defendants, is a strong result achieved by Lead Plaintiff and Lead Counsel. In light of the bankruptcy of CarLotz in the middle of litigation and Defendants' rapidly-depleting insurance coverage, as well as challenges to establishing liability and damages, Lead Plaintiff and the Settlement Class faced the very real risk of no recovery at all.

Despite the risks, Lead Counsel tirelessly litigated this case for almost four years, spending nearly 4,000 hours on behalf of the Settlement Class, all on a fully contingent basis with no guarantee of ever being paid. *See* Declaration of Kim E. Miller ("Miller Declaration") filed herewith, at ¶¶ 125, 132. Lead Plaintiff respectfully seeks an award of attorneys' fees of 33[1/3]% of the Settlement Fund ($4,333,333.33), plus interest. The requested award—which represents a modest lodestar multiplier of ***just 1.33***—is eminently reasonable in light of Lead Counsel's significant efforts and the substantial benefits conferred upon the Settlement Class and is well within the range regularly approved by courts in similar securities and other common fund cases.

[1] The Settlement terms are set forth in the Stipulation and Agreement of Settlement (ECF No. 177; "Stipulation"), preliminarily approved on January 27, 2025. *See* ECF No. 178. All capitalized terms not defined herein have the meanings ascribed to them in the Stipulation.

In addition, Lead Plaintiff respectfully requests reimbursement of $155,185.13, plus interest, for Lead Counsel's reasonable, out-of-pocket expenses to prosecute the litigation. *See id.* at ¶ 150. These expenses are below the noticed cap of $190,000. *See id.* The expenses, which include investigators, experts and consultants, a discovery platform, and other routine litigation expenses, were necessary to prosecute this Action and to resolve the claims in a beneficial manner for the Settlement Class and are the type of expenses regularly charged by law firms and regularly approved by courts within this Circuit. *See id.* at ¶¶ 151-157. To date no objections have been received to the expense request.[2] *See id.* at ¶ 160.

Lead Plaintiff also requests service awards of $10,000 to Lead Plaintiff Berger and $5,000 to Additional Plaintiff Bailey to compensate them for their time and effort in service to the Class. Both Mr. Berger and Mr. Bailey devoted substantial time and effort researching the facts of the case, reviewing filings and hearing transcripts, conferring with Lead Counsel about litigation and settlement strategies, and approved the Settlement. *See id.* at ¶¶ 162-165.

II. ARGUMENT

A. Lead Counsel Is Entitled to an Award of Attorneys' Fees and Expenses from the Common Fund

The Supreme Court and the Second Circuit have long recognized that attorneys whose efforts create a "common fund" are entitled to a reasonable attorneys' fee from that fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000) ("[T]he attorneys whose efforts created the [common] fund are entitled to a

[2] The deadline for exclusions and objections to the Settlement is May 20, 2025. Plaintiff will supplement this submission in its reply memorandum on June 3, 2025, in accordance with the Court's Order. *See* ECF No. 178.

reasonable fee - set by the court - to be taken from the fund. "The purpose of the common fund doctrine is to fairly and adequately compensate class counsel for services rendered and ensure that all class members contribute equally towards the costs associated with litigation pursued on their behalf." *City of Providence v. Aéropostale*, No. 11-cv-7132, 2014 U.S. Dist. LEXIS 64517, at *30 (S.D.N.Y. May 9, 2014) (citing *Goldberger*, 209 F.3d at 47 ("The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost.")). In addition, fair attorneys' fee awards from a common fund "encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons, and to discourage future alleged misconduct of a similar nature." *Id.* at *30-31; *see also Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002). Consistent with that view, "[w]here 'an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury inflicted on the class, as . . . in a securities class action litigation, the attorney is entitled to the reasonable value of the services performed in creating that class recovery, as set by the court.'" *In re Hi-Crush Partners L.P. Sec. Litig.*, No. 12-cv-8557, 2014 U.S. Dist. LEXIS 177175, at *30 (S.D.N.Y. Dec. 19, 2014) (citation omitted).

As discussed below, the requested attorneys' fee of $33^{1/3}$% of the Settlement Fund is eminently reasonable in light of the successful result achieved for the Settlement Class, achieved only by high caliber of work performed by Lead Counsel, as confirmed by a lodestar cross-check.

B. The Court Should Award a Reasonable Percentage of the Common Fund

The Supreme Court has held that where, as here, counsel has created a common fund, attorneys' fees are properly determined on a percentage-of-recovery basis. *See Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) ("[U]nder the 'common fund doctrine,'…a reasonable fee is based on a percentage of the fund bestowed on the class…."). The Second Circuit has approved this

method. *See Goldberger*, 209 F.3d at 48-49; *see also Guerrero v. Montefiore Health Sys. Inc.*, No. 22-cv-9194, 2025 U.S. Dist. LEXIS 8020, at *28 (S.D.N.Y. Jan. 15, 2025) ("The trend in this circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation."). Further, "the text of the PSLRA also contemplates using the percentage method, as it provides that "attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a ***reasonable percentage*** of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C.S. § 77z-1(a)(6) (emphasis added); *see also Guevoura Fund Ltd. v. Sillerman*, No. 15-cv-07192, 2019 U.S. Dist. LEXIS 218116, at *45-46 (S.D.N.Y. Dec. 18, 2019) (the percentage of the fund method is "consistent with the PSLRA").

The percentage method does not, however, render the lodestar irrelevant: rather, the lodestar is used as a "cross check" on the reasonableness of the percentage of the fund. *See, e.g.*, *In re N. Dynasty Minerals Ltd. Sec. Litig.*, No. 20-cv-5917, 2024 U.S. Dist. LEXIS 14438, at *39 (E.D.N.Y. Jan. 26, 2024) ("Courts using the percentage of the fund method, which is the 'trend in this Circuit,' will also 'cross-check the percentage fee against counsel's "lodestar" amount of hourly rate multiplied by hours spent.'") (citation omitted); *Pearlstein v. BlackBerry Ltd.*, No. 13-cv-7060, 2022 U.S. Dist. LEXIS 177786, at *26 (S.D.N.Y. Sep. 29, 2022) (courts "look to the lodestar multiplier" as a "cross-check on the reasonableness of the requested percentage"); *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16-cv-6728, 2020 U.S. Dist. LEXIS 128998, at *47 (S.D.N.Y. July 21, 2020) ("To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, district courts may cross-check the proposed award against counsel's lodestar.")

In sum, Lead Plaintiff submits that fees should be awarded based on the percentage approach, with a lodestar cross-check.

C. Analysis of the Relevant Factors Confirms the Requested Fee is Reasonable

In *Goldberger*, the Second Circuit explained that whether the court uses the percentage of-the-fund method or the lodestar approach, it should consider certain criteria that reflect a reasonable fee in common fund cases, including: (i) time and labor expended by counsel; (ii) risks of the litigation; (iii) magnitude and complexity of the litigation; (iv) requested fee in relation to the settlement; (v) quality of representation; and (vi) public policy considerations. *See* 209 F.3d at 50. An analysis of these factors—as confirmed by Lead Counsel's lodestar multiplier—demonstrates that the requested fee of $33^{1/3}$% of the Settlement Fund, plus accrued interest, is eminently fair and reasonable.

1. Time and Labor Expended by Lead Counsel

Lead Counsel has expended a substantial amount of time and effort pursuing this complex litigation on behalf of the Settlement. Since its inception, Lead Counsel has devoted nearly 4,000 hours to this litigation for a total lodestar of $3,260,642.50. *See* Miller Decl. at ¶¶ 125, 132. This figure excludes dozens of additional attorney hours that were cut by Lead Counsel, in its discretion and judgment, to maximize efficiency. *See id.* at ¶ 127.

As discussed more fully in the Miller Declaration, Lead Counsel extensively investigated Lead Plaintiff's claims; researched and drafted three amended complaints after consulting with an economics expert and a private investigator; briefed oppositions to three rounds of motions to dismiss; presented oral arguments on Defendants' motions to dismiss before two different federal judges; prepared, served, and reviewed the responses to written discovery, including requests for production and interrogatories; drafted and served document subpoenas on seventeen third-parties and met and conferred with numerous third-parties regarding the production of documents; reviewed and analyzed a preliminary production of documents produced by Defendants and documents produced by several of the subpoenaed third-parties; responded to numerous discovery

requests; prepared (but did not file) a motion for class certification supported by an expert report on market efficiency and damages;[3] consulted with an expert on damages; participated in a full-day mediation after submitting a thorough mediation brief; and conducted additional post-mediation settlement negotiations, while discovery continued, until a resolution could be reached.

In the midst of litigation, while Defendants' motion to dismiss the SAC was pending, CarLotz's successor, Shift, filed for bankruptcy protection on October 9, 2023. ECF No. 106. This substantially complicated matters and increased expenses for Lead Counsel. The bankruptcy filing resulted in an automatic stay of litigation against CarLotz and shifted the focus of litigation and settlement discussions from CarLotz to Individual Defendants, who naturally had less resources at their disposal than the corporate Defendant. "Due to limited financial resources, including due to [defendant] being in bankruptcy and the wasting D&O insurance policies that had to pay for the global settlement, reaching a settlement that would ensure a benefit to the Class required significant time, effort and ingenuity on behalf of all the parties." *Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *50 .

Despite these difficulties, Lead Counsel was persistent and was ultimately able to negotiate a $13,000,000 cash payment from Individual Defendants (to be paid by their insurance carriers). Throughout the litigation, Lead Counsel's efforts focused on advancing the Action to bring about the most successful outcome for the Settlement Class by the most efficient means possible. The time and effort devoted to this case by Lead Counsel to obtain the $13,000,000 all-cash recovery confirms that the request for $33^{1/3}$% of the Settlement Fund is reasonable.

Moreover, Lead Counsel's work will not end with the Court's approval of the Settlement.

[3] The Parties reached an agreement to settle as the class certification motion deadline was rapidly approaching.

Lead Counsel will necessarily expend many additional hours and resources assisting Settlement Class Members with Proofs of Claim, shepherding the claims process, and responding to Settlement Class Member inquiries – work for which no additional compensation will be sought. *See In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, No. 12-md-2389, 2015 U.S. Dist. LEXIS 152668, at *27 (S.D.N.Y. Nov. 9, 2015) ("Considering that the work in this matter is not yet concluded for Plaintiffs' counsel who will necessarily need to oversee the claims process, respond to inquiries, and assist Class Members in submitting their Proof of Claims, the time and labor expended by counsel in this matter support a conclusion that a 33% fee award in this matter is reasonable.").

2. The Magnitude, Complexity, and Risk of Litigation

In the Second Circuit, "the risk of success" is "perhaps the foremost factor to be considered in determining" a reasonable award. *Goldberger*, 209 F.3d at 54. Indeed, courts within the Second Circuit have long recognized that the risk of non-payment associated with a contingency arrangement is an important factor in determining an appropriate fee award. "The Second Circuit has recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award." *Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at *39; *see also Ashe v. Arrow Fin. Corp.*, No. 23-cv-764, 2025 U.S. Dist. LEXIS 25913, at *36-37 (N.D.N.Y. Feb. 13, 2025) ("Lead Counsel invested extensive time and costs with no guarantee of success. Lead Counsel's efforts are especially worthy of award in the securities class action context, which, as noted, are notably difficult and notoriously uncertain. Therefore, the risk of the litigation weighs heavily in favor of the requested award.")

Lead Counsel undertook this Action on a wholly contingent-fee basis, with no guarantee of ever being compensated for the investment of time and money that the Action would require. *See* Miller Decl. at ¶ 137. Lead Counsel steadfastly pursued the claims on behalf of the Settlement

Class, dedicating substantial attorney and professional resources to this effort. *See id.* at ¶¶ 123-125. Lead Counsel also advanced $155,185.13 in out-of-pocket expenses with no guarantee that those expenses would ever be reimbursed. *See id.* at ¶¶ 150, 154. Unlike Defendants' Counsel, who are paid substantial hourly rates and reimbursed for their expenses on a regular basis, Lead Counsel has not been compensated for any time or expenses since this case began and would have received no compensation or expenses had this case not been successful. Indeed, "[p]recedent is replete with situations in which attorneys representing a class have devoted substantial resources in terms of time and advanced costs yet have lost the case despite their advocacy." *In re Xcel Energy, Inc., Sec., Deriv. & "ERISA" Litig.*, 364 F. Supp. 2d 980, 994 (D. Minn. 2005).

"[S]ecurities class actions are by their very nature complicated and district courts in this Circuit have 'long recognized' that securities class actions are 'notably difficult and notoriously uncertain' to litigate." *Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at *14; *see also Christine Asia Co. v. Jack Yun Ma*, No. 15-md-2631, 2019 U.S. Dist. LEXIS 179836, at *63 (S.D.N.Y. Oct. 16, 2019) ("Securities class actions in particular are notably difficult and notoriously uncertain.") (citation and quotation marks omitted); *Arrow Fin. Corp.*, 2025 U.S. Dist. LEXIS 25913, at *21-22 ("[S]ecurities class actions are recognized by courts as 'notably difficult and notoriously uncertain to litigate.'") (citing *In re Facebook, Inc., IPO Sec. & Deriv. Litig.*, 343 F. Supp. 3d 394, 409 (S.D.N.Y. 2018)). The complexity (and expense) of this litigation was heightened by the bankruptcy proceeding, which was commenced in October 2023, while the Parties were in the middle of briefing Defendants' motion to dismiss the SAC. *See Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *58 (considering bankruptcy issues as part of complexity supporting 30% fee request) (citations omitted) *Maley*, 186 F. Supp. 2d at 372 (the "factual difficulties of a possible bankruptcy" contributed to the complexity of the action, justifying a $33^{1/3}$% fee award).

Moreover, in this Action, no civil or criminal charges were filed by any governmental agency against CarLotz or the Individual Defendants. Thus, Lead "Plaintiff['s] counsel (and their teams and experts) were truly the authors of the favorable outcome for the class." *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 670 (S.D.N.Y. 2015); *see also Maley*, 186 F. Supp. 2d at 371 (awarding one-third of settlement fund and noting that "[i]n this Action, Plaintiffs' Class Counsel did not 'piggy back' on any prior governmental action related to [defendant]"); *In re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 395 (S.D.N.Y. 1999) (awarding 2.5 multiplier and noting "[t]here was no governmental assist to ease the task with which Petitioners was confronted").

The initial hurdle Lead Plaintiff faced was at the pleading stage. Over the last ten years, of the cases where a motion to dismiss was decided, "61% of motions [to dismiss] were granted." Edward Flores and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation 2024 Full-Year Review," *National Economic Research Associates, Inc. (*"*NERA*") (Jan. 22, 2025) at 17 (Miller Decl., Ex. A). The motion to dismiss phase in this case was particularly complicated because it involved issues of first impression in this District – the application of the Second Circuit's decision in *Menora Mivtachim Ins. Ltd. v. Frutarom Indus.*, No. 21-1076, 2022 U.S. App. LEXIS 27412 (2d Cir. Sept. 30, 2022), *amended by* 54 F. 4th 82 (2d Cir. 2022), to SPACs, and whether *Frutarom* applied to scheme liability claims. While Lead Plaintiff was able to defeat Defendants' second motion to dismiss in part, certain of his claims which may have succeeded pre-*Frutarom* were lost in the wake of that decision—highlighting another risk of contingent litigation, namely, that a change in law could happen at any time preventing recovery for the class. *See Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *26 (citing recent changes to Federal Rule 23, noting "the risk always exists that a change in the law could occur"). Moreover, while Lead Plaintiff could have sought to appeal the Court's dismissal of claims based on pre-merger

statements, this would have added further uncertainty, delay, and expense.

But for the Settlement, Individual Defendants would have vigorously opposed class certification, arguing that the Class should not be certified due to price impact, market efficiency, or adequacy issues, and even if a Class were to be certified, any Class Period should be substantially shortened. The Parties would have served competing expert reports on price impact and potentially on market efficiency. If Individual Defendants were to prevail on any of these arguments, Lead Plaintiff's recovery might be reduced, if not eliminated.

Even if the Action made it past Class Certification and a probable summary judgment motion, the elements of a securities case are notoriously difficult to explain—much less prove—to a jury. For example, Individual Defendants would almost certainly have argued (as they have in the past) that there was no evidence by which the requisite mental state of scienter—*i.e.*, that Individual Defendants misled investors intentionally or with extreme recklessness—could be proven. *See*, *e.g.*, ECF No. 96 at 46-58. The scienter requirement "is often the most difficult and controversial aspect of a securities fraud claim." *Fishoff v. Coty Inc.*, No. 09-cv-628, 2010 U.S. Dist. LEXIS 6242, at *5 (S.D.N.Y. Jan. 25, 2010), *aff'd*, 634 F.3d 647 (2d Cir. 2011); *see also Hi-Crush*, 2014 U.S. Dist. LEXIS 177175, at *43-44 (discussing difficulty in proving scienter and noting "considerable risk . . . that [Plaintiffs] would not be able to convince a jury to accept [their] theory over Defendants' competing narrative"). Scienter could come down to the highly subjective question of whether or not a jury found the testimony of Individual Defendants to be credible. For example, in *In re Tesla, Inc. Sec. Litig.*, No. 18-cv-4865 (N.D. Cal.), after a three-week trial and only a few hours of deliberations, the jury found in favor of Tesla, based largely on the testimony of CEO Elon Musk. *See, e.g.*, Bonnie Eslinger, *Tesla Jury Clears Musk In $12B 'Take Private' Tweet Trial*, LAW360 (Feb. 3, 2023). Thus, after over four years of hard-fought litigation, Tesla

investors received nothing.

Another considerable risk is whether Lead Plaintiff could ultimately prove, in the face of vigorous opposition, that the Settlement Class was damaged by the alleged misrepresentations and the amount of those damages. At trial, this would likely come down to a "battle of experts," the outcome of which is never predictable. *See In re Bear Stearns Cos, Sec., Deriv., & ERISA Litig.*, 909 F. Supp. 2d 259, 267-68 (S.D.N.Y. 2012) (noting that in a battle of the experts, "victory is by no means assured" and the "jury could be swayed by experts for the Defendants, who [c]ould minimize the amount of Plaintiffs' losses"); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 U.S. Dist. LEXIS 119702, at *54 (S.D.N.Y. Nov. 8, 2010) ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."). There is a very real possibility that a jury could be swayed by experts for Individual Defendants to minimize the Settlement Class's losses or to conclude that those losses were attributable to factors other than the alleged misstatements and omissions. Thus, even if Lead Plaintiff prevailed as to liability at trial, the judgment obtained very possibly could have been only a fraction of the damages claimed. *See Hi-Crush*, 2014 U.S. Dist. LEXIS 177175, at *44 ("Defendants raised arguments in opposition to Lead Plaintiffs' loss causation and damages theories, which created additional risk that in the absence of a settlement, the Class's recovery would have been commensurately smaller, or nonexistent.").

Moreover, even successful verdicts for plaintiffs may be overturned on appeal or on a post-trial motion. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 413 (7th Cir. 2015), *reh'g denied* (July 1, 2015) (verdict vacated and remanded for new trial on loss causation issues); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448-49 (11th Cir. 1997) ($81 million jury verdict reversed on loss causation grounds); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215,

1233 (10th Cir. 1996) (overturning plaintiffs' jury verdict in case filed in 1973 and tried in 1988 on the basis of 1994 Supreme Court opinion); *Backman v. Polaroid Corp.*, 910 F.2d 10, 18 (1st Cir. 1990) (reversing substantial jury verdict and dismissing case after 11 years).

Finally, even if Lead Plaintiff overcame all these significant risks, achieved class certification, prevailed at summary judgment, succeeded at trial, and survived the appeals process, any award granted by the jury may not even be collectible because Individual Defendants' insurance would be long gone, CarLotz/Shift would not be able to contribute due to the bankruptcy, and Individual Defendants are unlikely to have sufficient resources to fund the recovery.

3. The Parties Were Represented by Experienced, High-Caliber Counsel and Obtained an Excellent Result for the Settlement Class

The fourth *Goldberger* factor, "quality of representation," involves a review of the "recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 U.S. Dist. LEXIS 120953, at *55-56 (S.D.N.Y. Dec. 23, 2009). "[T]he quality of representation is best measured by results, and such results may be calculated by comparing 'the extent of possible recovery with the amount of actual verdict or settlement.'" *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-md-1720, 2019 U.S. Dist. LEXIS 216796, at *190 (E.D.N.Y. Dec. 16, 2019) (citation omitted), *aff'd in large part by Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 62 F.4th 704, 727 (2d Cir. 2023).

Lead Counsel has extensive experience successfully prosecuting class actions in the specialized field of securities litigation, which it leveraged to achieve the exceptional result here. *See* Miller Decl. Ex. D (KSF Firm Resumé); *see also BlackBerry*, 2022 U.S. Dist. LEXIS 177786, at *20 ("Plaintiffs had the benefit of attorneys who are highly experienced in complex securities litigation . . . ."). Individual Defendants were ably represented by very experienced and highly-qualified attorneys from Freshfields US LLP—a preeminent law firm that has defended numerous

securities cases resulting in favorable decisions for defendants. *See* Miller Decl. at ¶ 141; *see also Rankings – United States Securities Litigation: Defense*, Legal500 (describing Freshfields US LLP's "high caliber" securities litigation practice), *available at* https://www.legal500.com/rankings/ranking/c-united-states/dispute-resolution/securities-litigation-defense/1178-freshfields-bruckhaus-deringer-llp (last visited May 5, 2025).

In order to estimate Class-wide damages, Lead Counsel consulted a damages expert who, using a well-accepted 80/20 two-trader model that simulated trading during the Class Period, determined that if every single issue went Lead Plaintiff's way and every absent Class Member put in a claim, maximum estimated damages would be $126 million. *See* Miller Decl. at ¶ 72. As such, the $13,000,000 Settlement represents more than 10% of the total amount that could be recovered, had Lead Plaintiff prevailed in full at every future stage of the litigation. *Id*. According to research collected by NERA, the median ratio of total losses to settlement amount from January 2015-December 2024, in cases where the total estimated damages ranged from $100 million to $199 million, was just 3%. *See* Miller Decl., Ex. A, at 26. Based on these figures, the Settlement is an excellent result for the Settlement Class. *See, e.g.*, *In re Tenaris S.A. Sec. Litig.*, No. 18-cv-7059, 2024 U.S. Dist. LEXIS 72980, at *35 (E.D.N.Y. Apr. 22, 2024) (finding settlement fund of "4.02-5.01% of the total estimated 'best-case' recovery" was "significantly higher than the . . . average settlement recovery rate for similar securities class actions between December 2011 and December 2022"); *N. Dynasty Minerals*, 2024 U.S. Dist. LEXIS 14438, at *34 (awarding attorneys' fees of one-third of the fund when settlement "represents approximately 2.3% of the maximum estimated aggregate damages").

Despite the significant risks to recovery in this Action, and the complicating factors of Shift's bankruptcy and the dwindling insurance proceeds available to cover a settlement, Lead

Counsel successfully negotiated a $13,000,000 cash Settlement for the Settlement Class. Lead Counsel was also able to successfully defeat, in part, Defendants' motions to dismiss, no small feat considering that between 2015 and 2024, more than half (61%) of motions to dismiss filed in securities class actions were granted in full. *See* Miller Decl. Ex. A at 17. That Lead Counsel achieved the Settlement for the Settlement Class in the face of high-quality opposition further evidences the quality of their efforts. *See Christine Asia Co*, 2019 U.S. Dist. LEXIS 179836, at *65 ("The quality of representation by both Plaintiffs' and Defendants' counsel was high in this case and supports the requested fee."); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03-cv-5755, 2006 U.S. Dist. LEXIS 84621, at *15 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work.") (citation omitted).

The positive reaction by Settlement Class Members thus far further confirms the quality of Lead Counsel's representation. To date, no exclusion requests have been received, and no Settlement Class Member has objected to the Settlement or to the attorneys' fees and expenses set forth in the Notice. *See* Miller Decl. at ¶¶ 147. That such a positive reaction followed the mailing and/or emailing of 42,618 Postcard Notices (*see id.*) constitutes powerful support for the requested award. *See*, *e.g.*, *Arrow Fin. Corp.*, 2025 U.S. Dist. LEXIS 25913, at *37 ("[T]he positive reaction to the Settlement by the Settlement Class Members indicates to this Court that Lead Counsel effectively represented the Settlement Class Members."). Moreover, Lead Plaintiff and Additional Plaintiff support the fee request. *See* Miller Decl. at ¶¶ 145-146.

4. The Requested Fee in Relation to the Settlement Is Fair, Reasonable, and Wholly Consistent with Case Law

"In determining whether the Fee Application is reasonable in relation to the settlement

amount, the Court compares the Fee Application to fees awarded in similar securities class-action settlements of comparable value." *Marsh & McLennan*, 2009 U.S. Dist. LEXIS 120953, at *56.

Lead Counsel's fee request of $33^{1/3}$% of the Settlement Fund is fair and reasonable for a litigation of this kind and wholly consistent with the percentages courts have awarded over the last decade in similar securities class action and complex litigation settlements with similarly-sized settlement funds and at similar or even less advanced stages of litigation. *See, e.g.*, *In re Y-Mabs Therapeutics, Inc. Sec. Litig.*, No. 23-cv-431, 2024 U.S. Dist. LEXIS 226526, at *5, 11-12 (S.D.N.Y. Oct. 29, 2024) (Subramanian, J.) (awarding 33.3% of $19,650,000 settlement fund; in early discovery); *In re PPDAI Grp. Inc. Sec. Litig.*, No. 18-cv-6716, 2022 U.S. Dist. LEXIS 11427, at *36 (E.D.N.Y. Jan. 21, 2022) (awarding $33^{1/3}$% of $9 million settlement; motion to dismiss partially briefed); *Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *56 (awarding $33^{1/3}$% of $7,500,000 settlement fund; pre-discovery); *see also* Miller Decl. at ¶ 139 (chart of similar settlements).

5. Public Policy Considerations Support the Requested Fee Award

"Congress, the Executive Branch, and [the Supreme] Court . . . have recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission." *BlackBerry*, 2022 U.S. Dist. LEXIS 177786, at *27 (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013)); *see also Arrow Fin. Corp.*, 2025 U.S. Dist. LEXIS 25913, at *38 ("Lawsuits such as this one further the objective of federal securities laws to protect investors and consumers against deceptive practices."); *Aéropostale*, 2014 U.S. Dist. LEXIS 64517, at *50 (recognizing importance of "private enforcement actions and the corresponding need to incentivize attorneys to pursue such actions on a contingency fee basis").

Such policy considerations weigh in favor of Lead Counsel's requested fee award. *See Rosi v. Aclaris Therapeutics, Inc*., No. 19-cv-7118, 2021 U.S. Dist. LEXIS 236200, at *22 (S.D.N.Y. Dec. 9, 2021) ("Public policy supports an attorneys' fees award [of 33.3%] in this case.").

D. A Lodestar Cross-Check Confirms That the Requested Attorneys' Fees Are Reasonable[4]

A lodestar cross-check confirms the reasonableness of the requested fee award. As set forth in the Miller Declaration, Lead Counsel has expended nearly 4,000 hours in the investigation, prosecution, and resolution of the claims against Defendants, for a lodestar of $3,260,642.50, resulting in a multiplier of approximately 1.33. *See* Miller Decl. at ¶ 148.[5] "In complex contingent litigation . . . fees representing multiples above the lodestar are regularly awarded to reflect the contingency-fee risk and other relevant factors." *Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *48 ("[A] positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors….") (quoting *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *76); *In re Comverse Tech., Inc.*, No. 06-cv-1825, 2010 U.S. Dist. LEXIS 63342, at *14 (E.D.N.Y. June 23, 2010) ("Where, as here, counsel has litigated a complex case under a contingency fee

[4] The figures set forth herein are based on time records maintained by Lead Counsel in the ordinary course of business. To calculate the lodestar, hours expended were multiplied by each attorney's respective current hourly rate. "[T]he use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation." *Hi-Crush*, 2014 U.S. Dist. LEXIS 177175, at *39-40 (citations omitted).

[5] "[W]here [the lodestar method is] used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50. Instead, "district courts . . . may rely on summaries submitted by the attorneys and need not review actual billing records." *In re Sturm*, No. 09-cv-1293, 2012 U.S. Dist. LEXIS 116930, at *37 (D. Conn. Aug. 20, 2012) (citing *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306-07 (3d Cir. 2005)); *see also Tenaris*, 2024 U.S. Dist. LEXIS 72980, at *31 (noting "the Second Circuit has made clear that detailed lodestar analyses in securities class actions are unnecessary").

arrangement, they are entitled to a fee in excess of the lodestar."). Indeed, "[i]n complex litigation, lodestar multipliers between 2 and 5 are commonly awarded, and fee awards resulting in multipliers as high as 6 have also been approved." *Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *48-49; *see also Sillerman*, 2019 U.S. Dist. LEXIS 218116, at *56-57 (noting courts "generally grant fees with positive multipliers to reflect the complexity and risks undertaken by class counsel").

Courts regularly award fees of $33^{1/3}$% where—like here—there is a modest (and sometimes far higher) lodestar multiplier. *See*, *e.g.*, *Y-Mabs Therapeutics*, 2024 U.S. Dist. LEXIS 226526, at *11 & ECF No. 63 at 13-17 (awarding 33.3% of $19.65 million settlement; 3.84 multiplier); *In re Reconnaissance Energy Afr. Ltd. Sec. Litig.*, No. 21-cv-6176, 2024 U.S. Dist. LEXIS 235463, at *4 (E.D.N.Y. Dec. 30, 2024) (awarding $33^{1/3}$% of $7 million settlement; 2.01 multiplier); *In re XL Fleet Corp. Sec. Litig.*, No. 21-cv-2002, 2024 U.S. Dist. LEXIS 80758, at *5 (S.D.N.Y. Apr. 30, 2024) (awarding $33^{1/3}$% of $19,500,000 settlement; 1.4 multiplier); *Tenaris*, 2024 U.S. Dist. LEXIS 72980, at *30 (awarding 33.33% of $9.5 million settlement; "relatively low" multiplier of 1.36); *Martínek v. Amtrust Fin. Servs., Inc.*, No. 19-cv-8030, 2022 U.S. Dist. LEXIS 209097 (S.D.N.Y. Nov. 16, 2022) (awarding $33^{1/3}$% of $13 million settlement; 1.64 multiplier); *BlackBerry*, 2022 U.S. Dist. LEXIS 177786, at *27-29 (awarding $33^{1/3}$% of $165 million settlement; 2.15 multiplier); *Lea v. Tal Educ. Grp.*, No. 18-cv-5480, 2021 U.S. Dist. LEXIS 229314, at *36-38 (S.D.N.Y. Nov. 30, 2021) (awarding 33.33% of $7.5 million settlement; 1.3 multiplier); *Merryman v. Citigroup Inc.*, No. 15-cv-9185, ECF No. 163 (S.D.N.Y. July 3, 2019) (awarding 33.33% of $14.75 million settlement; 1.3 multiplier); *Hi-Crush*, No. 12-cv-8557, ECF No. 115 (S.D.N.Y. Dec. 19, 2014) (awarding 33.33% of $3.8 million settlement; 1.41 multiplier); *Maley*, 186 F. Supp. 2d at 368-69 (awarding $33^{1/3}$% of $11.5 million settlement; 4.65 multiplier).

As noted above, Lead Counsel, in its discretion and judgment, cut substantial amounts of time from its lodestar for work that it considered to be less than maximally efficient. *See* Miller Decl. at ¶ 127. Lead Counsel will also exclude from the lodestar any time spent preparing for the final approval hearing, as well as time spent after final approval relating to administration of the Settlement. *See id.* at ¶ 133. The additional tasks after final approval, which are significant, will lower the lodestar multiplier even further. *See, e.g.*, *BlackBerry*, 2022 U.S. Dist. LEXIS 177786, at *28 (reasonableness of $33^{1/3}$% fee supported by the fact that "after final approval there will be significant additional tasks relating to the Settlement, lowering the lodestar multiplier even further").[6]

The billing rates used to develop Lead Counsel's lodestar are also reasonable. In a lodestar analysis, the appropriate hourly rates are those rates that are "normally charged in the community where the counsel practices, *i.e.*, the 'market rate.'" *Hi-Crush*, 2014 U.S. Dist. LEXIS 177175, at *38-40 (citation omitted). The hourly billing rates for KSF attorneys working on this case ranged from $500 (associates) to $1250 (senior partner). *See* Miller Decl. at ¶ 132. These rates are comparable to peer plaintiffs and defense firms litigating matters of similar magnitude and complexity and similar have been approved in this district. *See*, *e.g.*, *In re Nielsen Holdings PLC Sec. Litig.*, No. 18-cv-07143, ECF Nos. 146-5, 156 (S.D.N.Y. July 21, 2022) (awarding fees with attorney rates of $425 to $1,300 per hour); *Mo-Kan Iron Workers Pension Fund v. Teligent, Inc.*, No. 19-cv-03354, ECF Nos. 91, 102 (S.D.N.Y. Dec. 1, 2021) (awarding fees with attorney rates of $475 to $1,295 per hour); *Signet Jewelers*, No. 16-cv-6728, ECF Nos. 258, 267 (S.D.N.Y. July 21, 2020) (awarding fees with attorney rates of $425 to $1,300 per hour); *Alaska Electrical Pension*

[6] Time spent preparing the fee application for Lead Counsel is also excluded. *See* Miller Decl. at ¶ 127.

Fund v. Bank of America, N.A., No. 14-cv-7126, ECF Nos. 699, 742 (S.D.N.Y. Nov. 30, 2018) (awarding fees with attorney rates of $350 to $1,375 per hour).

In light of the time and effort devoted to this case by Lead Counsel to achieve the $13,000,000 recovery for the Settlement Class, the lodestar cross-check readily confirms that the requested fee award is reasonable and should be granted.

E. Lead Counsel Should Be Reimbursed for $155,185.13 in Expenses

"It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class and should therefore be reimbursed "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were 'incidental and necessary to the representation.'" *Christine Asia Co.*, 2019 U.S. Dist. LEXIS 179836, at *68 (citation omitted). Lead Counsel tried, whenever possible, to avoid unnecessary expenditures to keep costs down. *See* Miller Decl. at ¶ 152; *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010) ("Because Plaintiffs' Counsel was proceeding on a contingent-fee basis, they had a strong incentive to keep expenses at a reasonable level.").

One of the relatively larger expenses was for the fees of Lead Plaintiff's economics expert, who assisted with preparation of a draft market efficiency report and damages methodology which was near-final at the time the Settlement was reached. *See* Miller Decl. at ¶¶ 154-155; *see also Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *64 (experts in loss causation and damages were "instrumental in Lead Counsel's prosecution of the Action"). Lead Plaintiff also retained a private investigation firm to conduct an independent investigation regarding the allegations in the amended complaints. *See* Miller Decl. at ¶¶ 154, 156. These consultants "assisted Lead Counsel in the factual investigation and analysis in connection with the amended complaints" and were therefore "essential to the successful prosecution and resolution of [the] Action." *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *87-88 (citations omitted). The remainder of the expenses

consist of mediator fees, legal research, court fees, travel, photocopies, and other routine litigation expenses, that are the type of expenses normally charged to clients in non-contingency cases. *See* Miller Decl. at ¶¶ 154, 157.

"The fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher v. Phoenix Life Ins. Co.*, No. 11-cv-8405, 2015 U.S. Dist. LEXIS 121574, at *77 (S.D.N.Y. Sept. 9, 2015). Considering the complexity of the action, including Shift's bankruptcy, Lead Counsel's expenses are eminently reasonable. Further, the expenses represent just 1% of the Settlement Amount. Finally, no potential Settlement Class Member has yet objected to the request (*see* Miller Decl. at ¶ 160), which supports granting the request. *See Signet Jewelers*, 2020 U.S. Dist. LEXIS 128998, at *62 ("The absence of any objections to the . . . Litigation Expenses supports a finding that the request is fair and reasonable."); *Flag Telecom*, 2010 U.S. Dist. Lexis 119702, at *88 (noting the requested expenses were less than the amount notices and no objection had been received).

F. The Proposed Service Awards Are Reasonable

Lead Plaintiff Berger diligently and capably represented the best interests of the Class and engaged with counsel at all stages of the litigation. As set forth more fully in the Miller Declaration, and his own declaration, Mr. Berger has been actively monitoring and overseeing this Action since he was appointed Lead Plaintiff on October 15, 2021. He devoted substantial time and effort researching the facts of the case, reviewing and commenting on Defendants' motions to dismiss and the oppositions thereto, reviewing filings and hearing transcripts, gathering documents potentially responsive to Defendants' requests for production, conferring with Lead Counsel about litigation and settlement strategies, and providing authorization to Lead Counsel for the settlement negotiations. *See* Miller Decl. at ¶ 163; Ex. B (Declaration of David Berger) at ¶¶ 3, 7. Additional

Plaintiff Bailey has been involved in the case for the past three and a half years, since he joined as an Additional Plaintiff. During that time, Mr. Bailey has spent considerable time researching news related to CarLotz and its securities, monitoring the progress of the Action, reviewing filings closely communicating with Lead Counsel during settlement negotiations; and approving the Settlement. *See* Miller Decl. at ¶ 164; Ex. C (Declaration of Craig Bailey) at ¶¶ 3, 7.

The PSLRA expressly permits plaintiffs to seek an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class[]." 15 U.S.C. § 78u-4(a)(4). "Courts in this Circuit routinely award such costs and expenses both to reimburse the named plaintiffs for expenses incurred through their involvement with the action and lost wages, as well as to provide an incentive for such plaintiffs to remain involved in the litigation and to incur such expenses in the first place." *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 165 (S.D.N.Y. 2011); *see*, *e.g.*, *Tenaris*, 2024 U.S. Dist. LEXIS 72980, at *37-38 (awarding $15,000 to lead plaintiffs); *In re Veeco Instruments Sec. Litig.*, No. 05-MDL-1695, 2007 U.S. Dist. LEXIS 85554, at *38 (S.D.N.Y. Nov. 7, 2007) (awarding lead plaintiff approximately $16,000 for time spent supervising litigation and characterizing such awards as "routine" in this Circuit). Moreover, the proposed service awards represent just 0.1% of the total settlement amount and, therefore, they are also "reasonable and appropriate relative to the . . . overall settlement." *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 370 (E.D.N.Y. 2010) (collecting cases); *see*, *e.g.*, *BlackBerry*, 2022 U.S. Dist. LEXIS 177786, at *31-32 (awarding $100,000 to each co-lead plaintiff, representing only 0.3% of total settlement amount); *Alaska Elec. Pension Fund v. Bank of America, N.A.*, No. 14-cv7126, 2018 U.S. Dist. LEXIS 202526, at *17-18 (S.D.N.Y. Nov. 29, 2018) (awarding $500,000 ($50,000 to six plaintiffs and $100,000 to two), finding "the considerable effort expended by the named Plaintiffs to assist in the litigation renders the incentive

awards requested [ ] appropriate" and "in the aggregate they amount to a miniscule portion of the settlement fund" (0.09%))"); *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *89-90 (awarding $100,000 to lead plaintiff, representing 0.4% of settlement).

For those reasons, Lead Plaintiff respectfully submits that the requested service awards of $10,000 to Lead Plaintiff, and $5,000 to Additional Plaintiff, to compensate them for their time and service to the Settlement Class throughout the life of this case are reasonable and should be granted.

III. CONCLUSION

Lead Plaintiff respectfully requests that the Court: (a) award attorneys' fees in the amount of $33^{1/3}$% of the gross Settlement fund, *i.e.*, $4,333,333.33, plus interest; (b) reimburse expenses in the amount of $155,185.13, plus interest; and (c) service awards in the amount of $10,000 to Lead Plaintiff David Berger and $5,000 to Additional Plaintiff Craig Bailey ($15,000 total).

DATED: May 9, 2025

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Kim E. Miller, certify that the foregoing memorandum of law complies with the word-count limitations set forth in Local Civil Rule 7.1(c). According to the word count of the word-processing program used to prepare the memorandum, and exclusive of the portions of it that are excluded by the rule, there are 7,135 words in the document.

/s/ Kim E. Miller
Kim E. Miller