

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE CARLOTZ, INC. SECURITIES
LITIGATION

Lead Case No. 1:21-cv-05906-AS

**OMNIBUS REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF LEAD
PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT, PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS, AND
CERTIFICATION OF SETTLEMENT CLASS AND LEAD COUNSEL'S MOTION FOR
AN AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION
EXPENSES, AND SERVICE AWARD TO PLAINTIFFS**

KAHN SWICK & FOTI, LLC

Kim E. Miller (KM-6996)
J. Ryan Lopatka (admitted PHV)
250 Park Avenue, 7th Floor
New York, NY 10177
Telephone: (212) 696-3730
Facsimile: (504) 455-1498

Lewis S. Kahn (admitted PHV)
Craig J. Geraci, Jr. (admitted PHV)
1100 Poydras Street, Suite 960
New Orleans, LA 70163
Telephone: (504) 455-1400
Facsimile: (504) 455-1498

*Lead Counsel for Lead Plaintiff
David Berger and the Settlement Class*

I. THE SETTLEMENT CLASS REACTION SUPPORTS APPROVAL

The proposed Settlement resolves all claims brought against Defendants for an all-cash payment of \$13,000,000. As detailed in Lead Plaintiff’s opening papers (ECF Nos. 180, 181), the Settlement is the product of hard-fought litigation and extensive arm’s-length negotiations and represents an excellent recovery for the Settlement Class, particularly in light of the bankruptcy of CarLotz’ successor, Shift Technologies Inc. (“Shift”), and the rapidly wasting insurance coverage. Further, as detailed in the Fee and Expense Application (ECF Nos. 182, 183), Lead Counsel expended significant time, effort, and resources over nearly four years in order to confer substantial benefits upon the Settlement Class, amply justifying its request for a 33^{1/3}% award of attorneys’ fees and reimbursement of litigation expenses. Finally, service awards of \$10,000 to Lead Plaintiff David Berger and \$5,000 to Additional Plaintiff Craig Bailey are appropriate to compensate them for their time and effort in service to the Settlement Class, as contemplated by the PSLRA.

Altogether, the Notice was distributed to 43,031 potential Settlement Class Members and their Nominees. *See* Supplemental Declaration of Susanna Webb, filed contemporaneously herewith (“Supp. Webb Decl.”) at ¶¶ 3. Additionally, Epiq Class Action & Claims Solutions (“Epiq”) caused the Summary Notice to be published in *PR Newswire* and *Business Wire* and established and maintained a toll-free phone number and a Settlement Website. *Id.* at ¶¶ 2, 5-6. In total, Epiq received over 50,000 claims—a testament to the Settlement Class’s broad approval of the Settlement—which it will process in the normal course of the administration. *Id.* at ¶ 4.

Further, not a single request for exclusion has been received and just two timely objections to the Settlement have been lodged, received by Lead Counsel on May 16, 2025. As discussed below, these objections should be rejected. The extremely positive reaction by the Class strongly supports final approval. *See, e.g., Pearlstein v. Blackberry Ltd.*, No. 13-cv-7060, 2022 U.S. Dist. LEXIS 177786, at *10 (S.D.N.Y. Sep. 29, 2022) (“If only a small number of objections are

received, that fact can be viewed as indicative of the adequacy of the settlement.”) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005)); *In re Facebook, Inc.*, 343 F. Supp. 3d 394, 410 (S.D.N.Y. 2018) (where only two objections were received, “[t]he overwhelmingly positive reaction—or absence of a negative reaction—weighs strongly in favor of confirming the Proposed Settlement”).

Finally, neither Epiq nor Lead Counsel have received any objections to Lead Counsel’s Fee and Expense Application, supporting the approval of Lead Counsel’s request. *See In re Veeco Instruments Inc. Sec. Litig.*, No. 05-md-01695, 2007 U.S. Dist. LEXIS 85554, at *32 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request “is entitled to great weight by the Court” and the absence of any objection “suggests that the fee request is fair and reasonable”) (citing *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 374 (S.D.N.Y. 2002)).

II. THE OBJECTIONS ARE MERITLESS AND SHOULD BE REJECTED

A. The Fen Wang Objection

The objection of Fen Wang (the “Fen Objection”) makes four requests.¹ *See* Supplemental Declaration of Kim E. Miller (“Supp. Miller Decl.”) at Ex. A. First, it asks Lead Counsel to: “Reject or oppose the proposed settlement in its current form and request further negotiations to secure a resolution that better reflects the magnitude of shareholder harm.” But “[c]ourts routinely overrule objections from class members that the anticipated relief they will receive under the settlement is too low....” *Blackberry*, 2022 U.S. Dist. LEXIS 177786, at *12 (citation omitted). The Fen Objection does not take into account the difficulties Lead Plaintiff already faced in this

¹ While the Fen Objection was accompanied by a brokerage statement demonstrating that Fen Wang owned 31,451 shares of CarLotz common stock as of August 31, 2021 (the Settlement Class Period ends on May 26, 2021), the statement does not list the date(s) Fen Wang acquired those shares. Based on the information provided, it is not possible to determine if Fen Wang is a Settlement Class Member with standing to object. Nevertheless, solely for the purposes of this Omnibus Reply, Lead Counsel will address each issue raised in the Fen Objection on the merits.

case, nor does it acknowledge the difficulties of proving liability and damages at each future stage, Shift's bankruptcy, or rapidly wasting coverage—all factors which support the reasonableness of the Settlement. *See In re Patriot Nat'l, Inc. Sec. Litig.*, 828 F. App'x 760, 764 (2d Cir. 2020) (objector's argument that the settlement amount should have been higher “does not materially impact the reasonableness analysis” when company was bankrupt and had limited coverage).

Second, the Fen Objection requests that Lead Counsel “[p]ursue stronger accountability measures against CarLotz executives and insiders.” There is no legal basis for any equitable relief through the present Action, which appropriately seeks only monetary damages (*see* ECF No. 90), or claims against any “executives and insiders” other than the Individual Defendants, who are indemnified by rapidly wasting D&O policies, which are funding the Settlement (*see* ECF No. 184 at n.2). *See In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 n.11 (S.D.N.Y. 2004) (“In evaluating the proposed settlement’s fairness, the Court need not consider claims against non-Releasees or claims that do not appear to be covered by the settlement.”). It is Lead Plaintiff’s understanding that the Individual Defendants could not contribute meaningfully to any judgment. *See* ECF No. 181 at 22; *see also Glob. Crossing*, 225 F.R.D. at 457 (denying similar objection where defendants “lack the financial ability to contribute to the fund in amounts that would materially improve the settlement”).

Third, the Fen Objection asks for “a revised Plan of Allocation that better compensates long-term holders and those most affected by the decline in stock value post-SPAC merger.” “When formulated by competent and experienced class counsel, a plan for allocation of net settlement proceeds ‘need have only a reasonable, rational basis.’” *In re Advanced Battery Techs. Sec. Litig.*, 298 F.R.D. 171, 180 (S.D.N.Y. 2014) (citing *Glob. Crossing*, 225 F.R.D. at 462). Here, the proposed Plan of Allocation was developed by Lead Counsel after consultation with an expert

economist. *See* ECF No. 184 at ¶ 106; *see also Patriot Nat'l*, 828 F. App'x at 764 (plan of allocation approved when plaintiff relied on the analysis of an expert). Consistent with the Court's dismissal of claims relating to alleged pre-Merger statements (*see* ECF No. 145 at 9), the proposed Plan of Allocation confers nominal damages to shares of Acamar common stock, effectively delivering the remedy requested by the Fen Objection. *See* ECF No. 184 at ¶ 110, n. 4.

Finally, the Fen Objection requests that Lead Counsel “[e]nsure full transparency regarding the final allocation of funds and ensure that Lead Plaintiff’s interests align with those of the broader class.” In its Preliminary Approval Order, the Court found Lead Plaintiff “will fairly and adequately protect the interests of the Settlement Class,” and nothing has occurred to suggest this would change. ECF Nos. 178 at ¶ 3. Further, pursuant to the Stipulation, if the Settlement is finally approved, Lead Counsel will apply to the Court for a Class Distribution Order. ECF No. 177 at ¶ 23. The supporting documents for this application will contain detailed information about the Claims submitted, ensuring the transparency requested by the Fen Objection. Finally, Lead Plaintiff and Additional Plaintiff will each receive a *pro rata* share of the Settlement, such that their interests align with and are not antagonistic to the absent Settlement Class Members.

B. The Xinbao Wang Objection

The objection of Xinbao Wang (the “Xinbao Objection”)² objects to the Plan of Allocation due to the use of a 90-day lookback period to calculate the end-date of the damages period, requesting instead that damages continue “through the merger with Shift Technologies and into the company’s eventual delisting [on December 9, 2022].” *See* Supp. Miller Decl. at Ex. B. The PSLRA clearly limits damages to the difference between the price of a security and the mean

² The Xinbao Objection was accompanied by a brokerage statement demonstrating that Xinbao Wang purchased 1,000 shares of CarLotz common stock on May 17, 2021, during the Class Period. For the purposes of this Omnibus Reply, therefore, Lead Counsel assumes Xinbao Wang is a Settlement Class Member.

trading price of that security “during the **90-day period**” beginning after the alleged misstatement or omission is corrected. 15 U.S.C.S. § 78u-4(e)(1) (emphasis added). The cases cited by the Xinbao Objection support this statutory method of calculating damages. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, 123 F. Supp. 3d 424, 438-39 (S.D.N.Y. 2015) (“The bounce back provision of the PSLRA caps damages by factoring in gains that occur within ninety days after a corrective disclosure.”). Since none of the alleged misstatements in the TAC directly relate to the Shift merger (which occurred some 563 days after the Settlement Class Period), the Xinbao Objection’s request should be rejected. *See In re Frontier Commc’ns Corp. Stockholders Litig.*, No. 17-cv-01617, 2022 U.S. Dist. LEXIS 163432, at *53 (D. Conn. May 20, 2022) (overruling objection that the damages period should extend beyond the 90-day lookback period). Lead Plaintiff notes that, if Mr. Wang believes his losses were caused by misstatements or fraud connected to the Shift merger, he could have brought a securities case alleging those facts.

Finally, the Xinbao Objection states that Mr. Wang “may seek leave to submit expert testimony or legal briefing.” “While a court must conduct an independent evaluation of the fairness of a proposed class action settlement, ‘it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case.’” *Moses v. Apple Hosp. Reit, Inc.*, No. 14-cv-3131, 2018 U.S. Dist. LEXIS 50786, at *23 (E.D.N.Y. Mar. 27, 2018) (citing *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974)). Also, the deadline for submitting objections has passed, and the submissions proposed by the Xinbao Objection would substantially delay relief to the Settlement Class, who have already waited through three-and-a-half years of litigation.

III. CONCLUSION

Lead Plaintiff respectfully requests that the Court approve Lead Plaintiff’s Final Approval Motion and Lead Counsel’s Fee and Expense Application.

DATED: June 3, 2025

Respectfully submitted,

KAHN SWICK & FOTI, LLC

/s/ Kim E. Miller

Kim E. Miller (KM-6996)
250 Park Ave., 7th Floor
New York, NY 10177
Telephone: (212) 696-3730
Facsimile: (504) 455-1498
E-Mail: kim.miller@ksfcounsel.com
E-Mail: j.lopatka@ksfcounsel.com

-and-

Lewis S. Kahn (admitted PHV)
Craig J. Geraci, Jr. (admitted PHV)
1100 Poydras Street, Suite 960
New Orleans, LA 70163
Phone: (504) 455-1400
Facsimile: (504) 455-1498
E-Mail: lewis.kahn@ksfcounsel.com
E-Mail: craig.geraci@ksfcounsel.com

*Lead Counsel for Lead Plaintiff David
Berger and the Settlement Class*

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 1,699 words in the document.

/s/ Kim E. Miller

Kim E. Miller