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VIA ELECTRONIC FILING

The Honorable Joanna Seybert
United States District Judge
United States District Court for the Eastern District of New York
100 Federal Plaza, Courtroom 1030
Central Islip, New York 11722

Re: ***Rigrodsky Law, P.A. v. Acamar Partners Acquisition Corp. (N/K/A CarLotz, Inc.), et al.*, No. 2:21-cv-04567 (E.D.N.Y.) (JS) (JMW)**

Dear Judge Seybert:

Pursuant to Rule III.B of Your Honor's Individual Rules and Practices, we write on behalf of defendants CarLotz, Inc. and CarLotz Group, Inc. (collectively "CarLotz") to request a pre-motion conference in connection with CarLotz's anticipated motion to dismiss under F.R.C.P. 12(b).[1] As set forth below, the Complaint for attorneys' fees filed by plaintiff Rigrodsky Law, P.A. ("Rigrodsky") should be dismissed for multiple reasons, including that the Complaint fails to state a claim for which relief can be granted, this Court lacks personal jurisdiction over defendants, the case was filed in the wrong forum, and Rigrodsky failed to join an indispensable party. Because most of these defects are incurable, the Complaint should be dismissed in full and with prejudice.

Background

On October 22, 2020, Acamar Partners Acquisition Corp. ("Acamar"), a special purpose acquisition company, announced that it had entered into an agreement with CarLotz, Inc. ("Old CarLotz"), pursuant to which Old CarLotz would merge into a subsidiary of Acamar and, subject to shareholder approval, become a public company. Acamar filed a registration statement and proxy with the SEC on October 29, 2020 regarding the transaction.

Shortly thereafter, on November 9, 2020, Rigrodsky sent a demand letter to Acamar on behalf of Eric Broyles (a purported Acamar stockholder), asserting that the registration statement omitted material information about the transaction. Rigrodsky never provided proof that Mr. Broyles was an Acamar stockholder entitled to vote, Acamar never responded to the demand, and Rigrodsky never pursued Mr. Broyles' claims.

[1] CarLotz removed this action from the Supreme Court of New York, Nassau County, on August 13, 2021. (ECF 1.)

On January 7, 2021, after the registration statement and proxy became final, a verified class action complaint was filed in Delaware Chancery Court on behalf of a different purported Acamar stockholder (Cody Laidlaw) represented by a different law firm (Monteverde & Associates PC), alleging that the proxy omitted material information. Mr. Laidlaw also moved for expedited treatment and a preliminary injunction. Counsel subsequently provided proof of Mr. Laidlaw's ownership of Acamar stock.

After the *Laidlaw* case and motions were filed, Rigrodsky purported to file an individual complaint against Acamar and others alleging similar disclosure violations, this time on behalf of purported Acamar stockholder Marc Waterman. The *Waterman* complaint, which was filed in New York County, was not verified, did not seek pre-vote relief, and was never served. It was also filed in violation of Acamar's charter, which required that Mr. Waterman's claims be brought in Delaware Chancery Court. Rigrodsky never provided proof that Mr. Waterman was an Acamar stockholder.

On January 12, 2021, Acamar filed supplemental disclosures concerning the transaction. Thereafter, the Delaware Chancery Court dismissed the *Laidlaw* action pursuant to an agreement among the parties and subsequently so-ordered a stipulation that the go-forward company would pay $175,000 to resolve Mr. Laidlaw's fee request. Rigrodsky never sought to intervene in the *Laidlaw* action or to object to the fee award, despite being on public notice. Instead, Rigrodsky voluntarily discontinued the *Waterman* action without notice and filed the instant Complaint.

Summary of Motion to Dismiss Grounds

Lawyer-driven disclosure suits have been castigated as "valueless," *Rosenfeld v. Time Inc.*, 2018 WL 4177938, at *4 (S.D.N.Y. Aug. 30, 2018), and "a racket [that] must end," *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016). This case is no exception. Indeed, none of the supplemental disclosures that Rigrodsky claims to have "caused" were remotely material or had any impact on the shareholder vote. Nearly all of the "supplemental" information was already "in the public domain" and part of the "total mix" of information that stockholders had. *In re Dynagas LNG Partners LP Sec. Litig.*, 504 F. Supp. 3d 289, 318-19 (S.D.N.Y. 2020). The remaining disclosures denied that events had occurred, which is insufficient to state a claim. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1132 (Del. Ch. 2011) ("A plaintiff does not state a disclosure claim by asking whether or not something happened.") Thus, the "benefit" Rigrodsky claims to have caused was no benefit at all.

But even if the disclosures were "material"—and they were not—the Complaint must be dismissed for at least the following additional reasons.

First, the Court lacks personal jurisdiction over CarLotz. The Complaint asserts that personal jurisdiction is proper because "Plaintiff's headquarters are located in this County" (¶ 20), but that is no basis for jurisdiction over *defendants*. For jurisdiction to lie, "the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1780 (2017) (citation omitted). No such contacts are (or could be) alleged here, since CarLotz is a Delaware company headquartered in Virginia whose disclosures were issued from that state.

Second, this case was filed in the wrong court. Like Acamar, CarLotz's charter contains an exclusive forum provision requiring that any suit "asserting a claim of breach of a fiduciary duty" or a claim "governed by the internal affairs doctrine" be filed in Delaware. Because this case is predicated on CarLotz's supposed fiduciary breaches and implicates the internal affairs doctrine, it—like the *Waterman* case on which it is based—should have been filed in Delaware. It makes no difference that Rigrodsky purports to assert a fee claim on its own behalf. *See Cuno, Inc. v. Hayward Indust. Prod., Inc.*, 2005 WL 1123877, at *6 (S.D.N.Y. May 10, 2005) (enforcing forum clause for claims "completely derivative" of and "directly related to, if not predicated upon" covered claims) (citation omitted); *Donnay USA Ltd. v. Donnay Int'l S.A.*, 2016 WL 9640001, at *5 (E.D.N.Y. Sept. 1, 2016) (enforcing forum clause where the "gist of" the claims was "a breach of [the] relationship" governed by the clause) (citation omitted), *aff'd*, 705 F. App'x 21 (2d Cir. 2017).

Third, "a claim for attorney fees . . . may not be maintained as a separate cause of action." *PSC Ave. A LLC v. Table 20 LLC*, 2021 WL 222064, at *1 (Sup. Ct., N.Y. Cnty. Jan. 19, 2021). *See also La Porta v. Alacra, Inc.*, 142 A.D.3d 851, 853 (1st Dep't 2016) (same); *Nwachukwu v. Chem. Bank*, 1997 WL 441941, at *8 (S.D.N.Y. Aug. 6, 1997) (same). Accordingly, since the *Waterman* action was voluntarily and unilaterally discontinued, Rigrodsky has no claim for fees. *See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 54 F.3d 69, 71 (2d Cir. 1995) ("The common-benefit rule permits a *prevailing party* to obtain reimbursement of attorneys' fees.") (emphasis added). *Crothall v. Zimmerman*, 94 A.3d 733 (Del. 2014) (same).

Finally, even assuming Rigrodsky were entitled to relief (and it is not), its claim is against Monteverde, not CarLotz. Indeed, only one "corporate benefit" was allegedly caused here, for which CarLotz has already paid. It should not have to pay twice. *In re Burlington N. Santa Fe S'holder Litig.*, C.A. No. 5043, Tr. at 59:12-20 (Del. Ch. Oct. 28, 2010) ("It's exactly the same benefit. . . . There's no basis here to parse a fee into Delaware and Texas components."). Without Monteverde, CarLotz faces "a substantial risk of double liability," making it a necessary party under Rule 19. *Glob. Disc. Travel Servs., LLC v. Trans World Airlines, Inc.*, 960 F. Supp. 701, 709 (S.D.N.Y. 1997) (citation omitted). Because the Complaint fails to name Monteverde, it should be dismissed.[2]

Respectfully submitted,

/s/ *Mary Eaton*
Mary Eaton

CC: All Counsel of Record (via CM/ECF)

[2] In addition, the mere fact that the Broyles demand and the *Waterman* complaint challenged some of the same alleged omissions as *Laidlaw* does not entitle Rigrodsky to relief. *See In re Infinity Broad. Corp. S'holders Litig.*, 802 A.2d 285, 294 (Del. 2002) (follow-on New York litigation was "so insubstantial that it [was] unlikely to have had meaningful influence").