

Fill in this information to identify the case:

Debtor QLess, Inc.

United States Bankruptcy Court for the: _____ District of Delaware
(State)

Case number 24-11395

Official Form 410
Proof of Claim

04/22

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. **Who is the current creditor?** Alex Backer
Name of the current creditor (the person or entity to be paid for this claim)
Other names the creditor used with the debtor _____

2. **Has this claim been acquired from someone else?** No
 Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**

Where should notices to the creditor be sent?	Where should payments to the creditor be sent? (if different)
Alex Backer Laurel Roglen Ballard Spahr LLP 919 N. Market Street, 11th Floor Wilmington, DE 19801, USA Contact phone <u>302-252-4462</u> Contact email <u>roglenl@ballardspahr.com</u>	Contact phone _____ Contact email _____

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?** No
 Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?** No
 Yes. Who made the earlier filing? _____



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor? No
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _

7. How much is the claim? \$ 3500765.32. Does this amount include interest or other charges?
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.
Money loaned, services performed

9. Is all or part of the claim secured? No
 Yes. The claim is secured by a lien on property.
Nature or property:
 Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
 Motor vehicle
 Other. Describe: _____
Basis for perfection: _____
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)
Value of property: \$ _____
Amount of the claim that is secured: \$ _____
Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.)
Amount necessary to cure any default as of the date of the petition: \$ _____
Annual Interest Rate (when case was filed) _____ %
 Fixed
 Variable

10. Is this claim based on a lease? No
 Yes. Amount necessary to cure any default as of the date of the petition. \$ _____

11. Is this claim subject to a right of setoff? No
 Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

- No
- Yes. Check all that apply:

- | | Amount entitled to priority |
|---|-----------------------------|
| <input type="checkbox"/> Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B). | \$ _____ |
| <input type="checkbox"/> Up to \$3,350* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7). | \$ _____ |
| <input type="checkbox"/> Wages, salaries, or commissions (up to \$15,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4). | \$ _____ |
| <input type="checkbox"/> Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8). | \$ _____ |
| <input type="checkbox"/> Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5). | \$ _____ |
| <input type="checkbox"/> Other. Specify subsection of 11 U.S.C. § 507(a)() that applies. | \$ _____ |

* Amounts are subject to adjustment on 4/01/25 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

- I am the creditor.
- I am the creditor's attorney or authorized agent.
- I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.
- I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 08/16/2024
MM / DD / YYYY

/s/Morgan E Ricketts
Signature

Print the name of the person who is completing and signing this claim:

Name Morgan E Ricketts
First name Middle name Last name

Title Attorney

Company Hadsell Stormer Renick and Dai LLP
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____

Contact phone _____ Email _____



Verita (KCC) ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (866) 967-0493 | International (310) 751-2693

Debtor: 24-11395 - QLess, Inc. District: District of Delaware		
Creditor: Alex Backer Laurel Roglen Ballard Spahr LLP 919 N. Market Street, 11th Floor Wilmington, DE, 19801 USA Phone: 302-252-4462 Phone 2: Fax: Email: roglenl@ballardspahr.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:	
	Has Related Claim: No Related Claim Filed By:	
	Filing Party: Authorized agent	
Other Names Used with Debtor:	Amends Claim: No Acquired Claim: No	
Basis of Claim: Money loaned, services performed	Last 4 Digits: No	Uniform Claim Identifier:
Total Amount of Claim: 3500765.32	Includes Interest or Charges: No	
Has Priority Claim: No	Priority Under:	
Has Secured Claim: No Based on Lease: No Subject to Right of Setoff: No	Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:	
Submitted By: Morgan E Ricketts on 16-Aug-2024 5:13:16 p.m. Eastern Time Title: Attorney Company: Hadsell Stormer Renick and Dai LLP		

Fill in this information to identify the case:

Debtor 1 _____

Debtor 2 _____
(Spouse, if filing)

United States Bankruptcy Court for the: _____ District of _____

Case number _____

Official Form 410

Proof of Claim

04/22

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?

Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor

2. Has this claim been acquired from someone else?

No

Yes. From whom? _____

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?

Name

Number Street

City State ZIP Code

Contact phone

Contact email

Where should payments to the creditor be sent? (if different)

Name

Number Street

City State ZIP Code

Contact phone

Contact email

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. Does this claim amend one already filed?

No

Yes. Claim number on court claims registry (if known) _____ Filed on _____
MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

No

Yes. Who made the earlier filing? _____

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?** No
 Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____ _

7. **How much is the claim?** \$_____. **Does this amount include interest or other charges?**
 No
 Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?** Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.
Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).
Limit disclosing information that is entitled to privacy, such as health care information.

9. **Is all or part of the claim secured?** No
 Yes. The claim is secured by a lien on property.

Nature of property:

Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

Motor vehicle

Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: \$ _____

Amount of the claim that is secured: \$ _____

Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: \$ _____

Annual Interest Rate (when case was filed) _____ %

Fixed

Variable

10. **Is this claim based on a lease?** No
 Yes. **Amount necessary to cure any default as of the date of the petition.** \$ _____

11. **Is this claim subject to a right of setoff?** No
 Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

No

Yes. Check one:

Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Up to \$3,350* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

Wages, salaries, or commissions (up to \$15,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

Amount entitled to priority

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

\$ _____

* Amounts are subject to adjustment on 4/01/25 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

I am the creditor.

I am the creditor's attorney or authorized agent.

I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date _____
MM / DD / YYYY

Signature *Morgan Zicketts*

Print the name of the person who is completing and signing this claim:

Name _____
First name Middle name Last name

Title _____

Company _____
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address _____
Number Street

City State ZIP Code

Contact phone _____ Email _____

Official Form 410

Instructions for Proof of Claim

United States Bankruptcy Court

12/15

These instructions and definitions generally explain the law. In certain circumstances, such as bankruptcy cases that debtors do not file voluntarily, exceptions to these general rules may apply. You should consider obtaining the advice of an attorney, especially if you are unfamiliar with the bankruptcy process and privacy regulations.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both.
18 U.S.C. §§ 152, 157 and 3571.

How to fill out this form

- Fill in all of the information about the claim as of the date the case was filed.
- Fill in the caption at the top of the form.
- If the claim has been acquired from someone else, then state the identity of the last party who owned the claim or was the holder of the claim and who transferred it to you before the initial claim was filed.
- Attach any supporting documents to this form.
Attach redacted copies of any documents that show that the debt exists, a lien secures the debt, or both. (See the definition of *redaction* on the next page.)
Also attach redacted copies of any documents that show perfection of any security interest or any assignments or transfers of the debt. In addition to the documents, a summary may be added. Federal Rule of Bankruptcy Procedure (called “Bankruptcy Rule”) 3001(c) and (d).
- Do not attach original documents because attachments may be destroyed after scanning.
- If the claim is based on delivering health care goods or services, do not disclose confidential health care information. Leave out or redact confidential information both in the claim and in the attached documents.

- A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, individual’s tax identification number, or financial account number, and only the year of any person’s date of birth. See Bankruptcy Rule 9037.
- For a minor child, fill in only the child’s initials and the full name and address of the child’s parent or guardian. For example, write *A.B., a minor child (John Doe, parent, 123 Main St., City, State)*. See Bankruptcy Rule 9037.

Confirmation that the claim has been filed

To receive confirmation that the claim has been filed, either enclose a stamped self-addressed envelope and a copy of this form or go to the court’s PACER system (www.pacer.psc.uscourts.gov) to view the filed form.

Understand the terms used in this form

Administrative expense: Generally, an expense that arises after a bankruptcy case is filed in connection with operating, liquidating, or distributing the bankruptcy estate.
11 U.S.C. § 503.

Claim: A creditor’s right to receive payment for a debt that the debtor owed on the date the debtor filed for bankruptcy. 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Creditor: A person, corporation, or other entity to whom a debtor owes a debt that was incurred on or before the date the debtor filed for bankruptcy. 11 U.S.C. §101 (10).

Debtor: A person, corporation, or other entity who is in bankruptcy. Use the debtor's name and case number as shown in the bankruptcy notice you received. 11 U.S.C. § 101 (13).

Evidence of perfection: Evidence of perfection of a security interest may include documents showing that a security interest has been filed or recorded, such as a mortgage, lien, certificate of title, or financing statement.

Information that is entitled to privacy: A *Proof of Claim* form and any attached documents must show only the last 4 digits of any social security number, an individual's tax identification number, or a financial account number, only the initials of a minor's name, and only the year of any person's date of birth. If a claim is based on delivering health care goods or services, limit the disclosure of the goods or services to avoid embarrassment or disclosure of confidential health care information. You may later be required to give more information if the trustee or someone else in interest objects to the claim.

Priority claim: A claim within a category of unsecured claims that is entitled to priority under 11 U.S.C. §507(a). These claims are paid from the available money or property in a bankruptcy case before other unsecured claims are paid. Common priority unsecured claims include alimony, child support, taxes, and certain unpaid wages.

Proof of claim: A form that shows the amount of debt the debtor owed to a creditor on the date of the bankruptcy filing. The form must be filed in the district where the case is pending.

Redaction of information: Masking, editing out, or deleting certain information to protect privacy. Filers must redact or leave out information entitled to **privacy** on the *Proof of Claim* form and any attached documents.

Secured claim under 11 U.S.C. §506(a): A claim backed by a lien on particular property of the debtor. A claim is secured to the extent that a creditor has the right to be paid from the property before other creditors are paid. The amount of a secured claim usually cannot be more than the value of the particular property on which the creditor has a lien. Any amount owed to a creditor that is more than the value of the property normally may be an unsecured claim. But exceptions exist; for example, see 11 U.S.C. § 1322(b) and the final sentence of 1325(a).

Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment may be a lien.

Setoff: Occurs when a creditor pays itself with money belonging to the debtor that it is holding, or by canceling a debt it owes to the debtor.

Uniform claim identifier: An optional 24-character identifier that some creditors use to facilitate electronic payment.

Unsecured claim: A claim that does not meet the requirements of a secured claim. A claim may be unsecured in part to the extent that the amount of the claim is more than the value of the property on which a creditor has a lien.

Offers to purchase a claim

Certain entities purchase claims for an amount that is less than the face value of the claims. These entities may contact creditors offering to purchase their claims. Some written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court, the bankruptcy trustee, or the debtor. A creditor has no obligation to sell its claim. However, if a creditor decides to sell its claim, any transfer of that claim is subject to Bankruptcy Rule 3001(e), any provisions of the Bankruptcy Code (11 U.S.C. § 101 et seq.) that apply, and any orders of the bankruptcy court that apply.

Do not file these instructions with your form.

Schedule to Proof of Claim

In re: QLess, Inc., Case No. 24-11395 (BLS)
United States Bankruptcy Court for the District of Delaware

Creditor: Alex Backer (“Mr. Backer”)

This Schedule supplements the information stated in the accompanying Proof of Claim and shall constitute part of the Proof of Claim.

I. Basis for the Claim

A. Background

Mr. Backer founded QLess, Inc. (“Debtor” or the “Company”) in 2007. Mr. Backer served as Chief Executive Officer of the Company and as a member of the board of directors of the Company until the 2021 merger transaction (the “Transaction”) orchestrated by Palisades Growth Capital II, L.P. (“Palisades”).¹

Prior to the Transaction, Mr. Backer was arbitrarily terminated from the Company in violation of Company policies put into place specifically to guard against the arbitrary removal of a CEO. This had the effect of – after a delay – removing one of Mr. Backer’s Board seats. Once that Board seat was gone, and Palisades had installed a CEO they could count on to vote with them, the Transaction was approved and completed, ending Mr. Backer’s role on the Board. Meanwhile, Mr. Backer brought claims (the “Arbitration”) relating to monies owed him by the Company both before and after his termination. Those claims include conversion for monies taken from Mr. Backer’s account or never reimbursed to him though they were owed; unpaid interest on a loan Mr. Backer had made to the Company in 2016; his preapproved 2019 bonus; four months of salary owed as severance (eight were paid, but twelve were due); seven months of health insurance premiums owed following his termination (five were paid, but twelve were due); a change of control bonus that was due upon the Transaction; money owed to cover the personal income tax on that change of control bonus; consultant pay for work performed for the Company following his abrupt termination; waiting time penalties for the failure to timely pay severance and bonuses; attorneys fees and costs; and prejudgment interest to the date of the first day of trial in the Arbitration.

Trial in the Arbitration began on May 22 and was set to conclude on May 31, 2024; however, the parties needed an additional day of trial, which took place on June 14, 2024. On June 19, 2024 (the “Petition Date”), the Debtor filed a voluntary petition for relief under subchapter V of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), commencing the instant bankruptcy case (the “Chapter 11 Case”) before a ruling could be made in the Arbitration. The Arbitration is now stayed by operation of the automatic stay.

¹ Litigation regarding the Transaction is ongoing in Delaware Chancery Court, C.A. No. 2023-1279-JTL, and this Proof of Claim does not assert any claims in the bankruptcy cases created thereto, which will be filed as a separate proof of claim.

II. Amount & Priority of the Claim

Mr. Backer asserts a general unsecured claim against the Debtor in the amount of \$2,372,673.47, based upon the claims and causes of action asserted in the Arbitration, and reasonable attorney's fees of \$1,119,930.00 and litigation costs of \$8,161.85, for a total of \$3,500,765.32.

Mr. Backer's claims include \$875,757.23 in deferred compensation and change of control bonus; \$91,667.67 in severance; \$84,787.50 in bonus; \$21,831.66 in health insurance costs; \$675,580.00 in consultant wages; \$3,912.12 in company charges to Dr. Bäcker's personal credit card; \$22,068.83 in company IRS obligations wrongfully deducted from Claimant's tax refunds; \$119,232.97 in waiting time penalties; and \$477,835.49 in prejudgment interest. See p. 9 of attached Arbitration Brief submitted to arbitrator.

III. Notices

All notices and pleadings concerning this proof of claim should be sent to the following:

Matthew G. Summers
Laurel D. Roglen
Ballard Spahr LLP
919 N. Market Street, 11th Floor
Wilmington, Delaware 19801

IV. Reservation of Rights

Mr. Backer reserves the right to amend this proof of claim to include amounts not stated above, including, without limitation, costs, expenses, attorneys' fees, and any other charges or amounts due, as appropriate, under applicable bankruptcy and non-bankruptcy law. Mr. Backer reserves all of his rights and remedies, including, without limitation, the right to amend this claim from time to time to reflect damages, additional charges, adjustments and the like, due and payable to Mr. Backer, as the same become quantified, known or available.

Mr. Backer further reserves the right to amend this Proof of Claim (and any Proof of Claim that he files, has filed or may file in the Debtors' bankruptcy cases) to make such claim a secured claim by virtue of Mr. Backer's right to setoff, offset, or recoup the amount thereof under 11 U.S.C. § 553 or otherwise, or to otherwise assert a defense of setoff, offset and/or recoupment against any claims, defenses or offsets that the Debtor or any other party may assert against Mr. Backer.

1 Dan Stormer, Esq. [S.B. #101967]
Morgan Ricketts, Esq. [S.B. #268892]
2 David Clay Washington, Esq. [S.B. 268892]
HADSELL STORMER RENICK & DAI LLP
3 128 North Fair Oaks Avenue
Pasadena, California 91103-3645
4 Telephone: (626) 585-9600
Facsimile: (626) 577-7079
5 Emails: dstormer@hadsellstormer.com
mricketts@hadsellstormer.com
6 dwashington@hadsellstormer.com

7 Robert D. Newman, Esq. [S.B. #86534]
ROBERT D. NEWMAN, ATTORNEY AT LAW
8 3701 Wilshire Boulevard, Suite 208
Los Angeles, California 90010
9 Telephone: (213) 487-4727
Facsimile: (213) 487-0242
10 Email: rnewman@wclp.org

11 Attorneys for Claimant
ALEX BÄCKER

12
13 **AMERICAN ARBITRATION ASSOCIATION**

14
15 ALEX BÄCKER,

16 Claimant,

17 v.

18 QLESS INC.,

19 Respondent.

AAA CASE NO.: 01-22-0002-3444

**CLAIMANT ALEX BÄCKER'S
ARBITRATION HEARING BRIEF**

Arbitrator – Hon. Christine A. Page

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I. INTRODUCTION

Claimant Alex Bäcker founded and built a tech start-up company, QLess, for twelve years, often sacrificing his own income and salary, and at every turn choosing what was best for the Company, before being removed from his post as its CEO in June 2019. QLess' subsequent failure to pay Dr. Bäcker what it owed him was the result of inertia, disinterest, personality conflicts, and greed. But none of the reasons QLess has put forth excuse it from its contractual obligations to pay Dr. Bäcker agreed-upon deferred compensation at an agreed-upon interest rate; his bonus for 2019; a change of control bonus; his severance and health insurance; reimbursements of charges wrongfully incurred on his credit cards and against his tax refund; waiting time penalties; and attorney's fees.

II. FACTUAL BACKGROUND

While waiting in line with his family in 2007, Dr. Alex Bäcker thought to himself, "There must be a better way than standing in line." Thus was born QLess, a company dedicated to eliminating time wasted in line. Over the next twelve years, Dr. Bäcker invented, formed and built QLess, leading it to almost fifty employees at the time of his termination in June 2019. During the time Dr. Bäcker led QLess, the company saw growth for 144 months in a row. He sold the product to huge entities like Office Depot, Walmart, and the Michigan Department of State. The company won numerous awards under his tenure, such as

- "Best Places To Work In LA" based on employee surveys (LA Business Journal) in 2017;
- "Best Computer Services Company" (American Business Awards) for six years in a row;
- "Best Computer Services Company" (International Business Awards) in 2015, 2016, and 2018; &
- "Best Medium-Sized Consumer Services Company" and "Best Medium Sized Computer Software Company" (International Business Awards) in 2019.

There was no part of QLess operations in which Dr. Bäcker did not play a significant role: from algorithms to raising money to public relations to management to sales to recruiting.

While Dr. Bäcker was building QLess, he took no salary for 8 years. In 2016, QLess' company counsel, Scott Alderton, drafted an Employee Agreement for Dr. Bäcker. **Exh. 1.**¹ This agreement, dated

¹ Claimant refers to various exhibits throughout this brief, which will be uploaded once they have been paginated.

1 February 10, 2016, contemplated that at some point, the company would have to repay Dr. Bäcker for
2 \$508,022 worth of his past services that had never been compensated. QLess agreed to pay compound
3 interest at 7.5% per annum upon the occurrence of a “Milestone Event”, which was defined as the
4 company closing an equity financing transaction that resulted in net proceeds of at least \$3,000,000; a
5 change of control; positive cash flow of at least \$500,000 per month for three consecutive months; or
6 having more than \$1,500,000 of unrestricted and unreserved cash in the company’s bank accounts. The
7 company also agreed to pay Dr. Bäcker a bonus upon any change of control (Change of Control Bonus).

8 Throughout QLess’ existence, Dr. Bäcker periodically obtained cash investments from
9 individuals and professional investors in order to permit it to continue to grow. In August 2017, Dr.
10 Bäcker accepted an initial investment of \$5,000,000 from Palisades Growth Capital. As part of that deal,
11 Palisades negotiated a Board seat, and nominated its partner Jeff Anderson. The cash received in that
12 round of financing constituted a Milestone Event, rendering the Deferred Compensation due.

13 On August 24, 2017, the parties amended the Deferred Compensation term (Amendment No. 1),
14 clarifying that payment would not jeopardize the company’s ability to continue as a going concern. **Exh.**
15 **2.** Dr. Bäcker did not insist upon payment then because Palisades asked to wait.

16 In November 2018, Dr. Bäcker obtained another round of financing of \$9,300,000. As part of that
17 transaction, Altos Ventures invested, and also negotiated a Board seat, to which it nominated its partner
18 Ho Nam. In November 2018, the Board consisted of Dr. Bäcker, Ho Nam, Jeff Anderson, Mike Bell, and
19 Iván Markman.

20 Around the same time, the Employment Agreement was again amended, by Amendment No. 2
21 dated November 20, 2018, again drafted by Alderton. **Exh. 3.** The relevant change was to the Change of
22 Control Bonus, which was changed to \$266,484.96. The parties agree that notwithstanding a mistake in
23 the Amendment’s language, the parties intended that Dr. Bäcker receive an amount sufficient to
24 compensate him for his state and federal income tax on the Bonus.

25 After the \$9.3M financing, Dr. Bäcker instructed CFO Danny Joe to pay the Deferred
26 Compensation, and Joe wrote to the board that it was due. **Exh. 11.** Anderson interfered, and asked Joe to
27 hold off. On March 18, 2019, Dr. Bäcker wrote to the Board:

28 Although it is not my preference I believe, at this time, the best outcome for the Company is to

1 extend the time need to repay the overdue debt. I am amenable to having it be repaid by 50% of
2 any excess cash over the Company's Plan, whether it comes from additional sales or financing,
3 until it is repaid. If the debt has not been paid off by the time the Company generates positive
4 cash flow or raises additional equity, any positive cash flow or additional equity financing raised
5 should be used to pay the debt off.

6 As of Danny Joe's last calculation, the current balance of the debt was \$391,192 with an interest
7 rate of 7.5% APR compounded monthly. If the Board decides to delay payment, I will leave it up
8 to the board to re-adjust the interest rate to that of a fair market rate of an outstanding
9 subordinated loan, with the only caveat of having the interest be paid out monthly.

10 **Exh. 19.** (Claimant contests the \$391,192 figure cited by Joe.) When the Board failed to act on his
11 request, Dr. Bäcker, acting in his capacity as CEO, instructed Joe to change the interest rate from 7.5% to
12 12% as of August 2017, which was the same rate being paid to other lenders at that time, including the
13 Canadian Imperial Bank of Commerce (CIBC) and Nicolás Bäcker (Dr. Bäcker's brother). Because
14 monthly compounding was Respondent's standard practice for all lenders, it was not necessary to specify
15 that the interest would compound monthly. No QLess policy prevented Dr. Bäcker from giving this
16 instruction to Joe. Joe passed the instruction on to Controller Amy Muradyan, who then crated a debt
17 schedule calculating the interest at 12%. **Exh. 13.**

18 Meanwhile, on February 22, 2019, the Compensation Committee consisting of Ho Nam, Iván
19 Markman, Jeff Anderson, and Dr. Bäcker, met with corporate counsel Barbara Mirza present to discuss a
20 Bonus Plan for 2019, as it was QLess' practice to agree on objective metrics by which bonuses would be
21 calculated. Dr. Bäcker circulated a draft bonus plan to the Committee. **Exh. 32.** Markman replied, "I
22 think we are generally aligned." **Exh. 8.**

23 Preserving stability was also discussed at the Compensation Committee meeting, since Dr. Bäcker
24 had recently lost control of the Board and some disincentive had to be established to prevent ill-
25 considered removal of the CEO. One proposal was to increase CEO severance to 18 months. Markman
26 agreed with the goal and proposed instead a 12 month severance and a required three month cooling off
27 period before termination could be formally voted on. The Committee agreed to recommend the proposed
28 bonus plan, the cooling off period, and one year's severance and health insurance upon termination of the

1 CEO, to the full Board. **Exh. 8.**

2 Dr. Bäcker drafted the minutes and sent them to Mirza for her input. She wrote back on March 1,
3 2019 agreeing with the relevant portions. **Exh. 8.** Dr. Bäcker then called Director Mike Bell to bring him
4 up to speed on the proposals. The Committee's recommendations were then made to the full Board at its
5 March 18 meeting. This time, attorney Tom Hopkins attended instead of Mirza. Because Mike Bell was
6 the only Director not on the Compensation Committee, there was minimal discussion before the Board
7 approved the Committee's recommendations. **Exh. 9.**

8 After the meeting, Bell resigned from the Board. To fill the vacancy, Dr. Bäcker nominated his
9 father, Ricardo Bäcker, an expert in management who has worked at Arthur Andersen, Korn Ferry and
10 Heidrick & Struggles, among other firms.

11 On March 25 – a week after the three month cooling off period, severance, and health benefits
12 were approved – Dr. Bäcker terminated Nico Martinez, an employee who had been performing very
13 poorly. Martinez rallied supporters to approach the Board. On that same morning Ho Nam met with Dr.
14 Bäcker and asked him to resign that very day, presumably because of whatever Martinez and his friends
15 had said.

16 A meeting of the board was hastily convened on March 31. Unfortunately, the meeting was very
17 contentious, and neither the February 22 Compensation Committee minutes nor the March 18 Board
18 meeting minutes were ever formally approved. No competing versions of the minutes, or substantive
19 changes, were put forth, despite repeated requests by Dr. Bäcker. **Exh. 9.** The Directors simply refused to
20 indicate their approval of the minutes. The Board then took the position that because the minutes were
21 not approved, the resolutions they had passed were also invalid. Claimant contends that the vote itself is
22 the relevant act, not the approval of the minutes.

23 At the March 31 meeting, Markman, Ricardo Bäcker, and Dr. Bäcker declined to vote for Ho
24 Nam's and Jeff Anderson's proposal to terminate Dr. Bäcker. Instead, Markman conducted an initial
25 investigation, and determined that Dr. Bäcker should not be terminated. Jeff Anderson did not accept this
26 and pushed for another investigation, which was undertaken. That investigator interviewed all current and
27 former female employees in an attempt to find some instance of untoward behavior by Dr. Bäcker; she
28 found none. The investigator also reviewed all of Dr. Bäcker's expenses in an effort to find some form of

1 misappropriate; she found none. The investigator interviewed primarily terminated employees, rather
2 than high level current employees. Presumably, the terminated employees had negative things to say
3 about Dr. Bäcker. During the pendency of the investigation, Dr. Bäcker was placed on leave and asked to
4 refrain from most activities relating to QLess. The company’s performance began to suffer immediately.

5 On June 1 and June 2, 2019, the Board met, with company counsel Scott Alderton acting as
6 Secretary, to terminate Dr. Bäcker as CEO. **Exh. 6.** Ho Nam stated that the investigation had tried and
7 failed to find cause to terminate Dr. Bäcker, but the Board was terminating him anyway. There was no
8 succession plan in place, and no replacement CEO had been identified.

9 Iván Markman presented a proposal that Dr. Bäcker sign a general release of claims in exchange
10 for twelve months of severance and health insurance, and repayment of the Deferred Compensation. **Exh.**
11 **6.** All of these had already been agreed upon. It was unclear if past meeting minutes had been consulted
12 in preparing the proposal. The proposal also contemplated an “ongoing future role” for Dr. Bäcker,
13 according to Alderton’s minutes, and that the company “will hire new CEO and would like to return Alex
14 to CEO if warranted.” **Exh. 6.** Resolutions were adopted to terminate Dr. Bäcker; to allow him to remain
15 Chairman of the Board; to hire a new CEO; and to “continue discussing with Alex a potential ongoing
16 role.” **Exh. 6.**

17 On June 6, 2019, the Board held a special meeting, which was attended by QLess consultant
18 Carrie Kish. At that meeting, the Board passed three resolutions: to allow Dr. Bäcker to retain access to
19 his QLess emails during his Directorship; to compensate Ricardo Bäcker for his Board service; and to
20 continue providing Dr. Bäcker health insurance for a year. In the health insurance discussion, Ho Nam
21 stated that Dr. Bäcker would “of course” keep his insurance because he “had a family”. Anderson and
22 Markman were silent, and agreement was assumed; either way, three Board members voted for it. Dr.
23 Bäcker drafted the minutes. **Exh. 37.**

24 Palisades Board member Jeff Anderson replied, erroneously stating that Scott Alderton had been
25 on the call and should have drafted the minutes; he also stated that the minutes would need to be edited
26 for “extraneous commentary,” but did not dispute that twelve months of health insurance had been
27 approved. Markman also replied; he disputed that Dr. Bäcker’s health insurance had been approved.
28 Carrie Kish, however, confirmed that the Board in fact agreed to provide health insurance for a year at

1 the June 6 meeting, and expressed her belief that Iván Markman perhaps was not paying full attention to
2 the meeting because he had been boarding a plane and on mute. **Exh. 37.**

3 On June 8, all members of the Board other than Dr. Bäcker met to further discuss Dr. Bäcker's
4 termination. Notwithstanding the Board's resolution two days prior to continue Dr. Bäcker's health
5 insurance, Iván Markman indicated that he had circulated a proposed Separation Agreement consistent
6 with the terms approved at the June 1 meeting – i.e., twelve months of health insurance contingent on a
7 release. **Exh. 15.** Dr. Bäcker never signed any release, since there was nothing being offered for it.

8 On June 22, 2019, Iván Markman sent an email to Dr. Bäcker, copying the Board, asking about
9 the scope and terms of a founder consulting agreement. He wrote, "I will check in with Simon on this,"
10 referring to Simon Heyrick, the then-CFO and interim CEO after Dr. Bäcker's removal. **Exh. 20.**
11 Markman also wrote, "On founder engagement/transition, my understanding was that you were going to
12 draft and provide a proposal – please let me know if I misunderstood this and if I didn't, please let know
13 when we should expect a first draft." **Exh. 20.**

14 On June 24, 2019, Dr. Bäcker sent Simon Heyrick a proposal that he be paid by the hour for
15 consulting work done for the company. **Exh. 20.** Dr. Bäcker outlined his value to the company, and
16 offered to refund the difference in his pay until the company saw a return on investment. The same day,
17 Dr. Bäcker "shared" a Google Sheet with Heyrick that documented the hours he worked for QLess, the
18 dates, and a brief description of the task. **Exhs. 20, 21.**

19 On June 27, 2019, Charlie Meyer, QLess' Vice President of Sales, emailed Dr. Bäcker outlining a
20 commission arrangement if Dr. Bäcker brought in leads that resulted in Monthly Recurring Revenue
21 (\$10,000 or less = 10%; more than \$10,000 = 20%). This offer did not contain, nor contemplate, a formal
22 contract. **Exh. 20.**

23 On July 3, 2019, Simon Heyrick responded to Dr. Bäcker's proposal, stating: "I have spent time
24 chatting with Charlie [referring to Charlie Meyer, VP of Sales] and others about this consulting
25 agreement. I understand the important areas where your input will be valuable so I am starting the
26 process of drafting something up." **Exh. 20.** Heyrick later replied again, agreeing to pay \$350 per hour,
27 projects to be outlined in writing before work commenced. The first project would be for technical
28 expertise. **Exh. 20.**

1 Over the next two years, Dr. Bäcker diligently worked to help QLess in any way he could.
2 Among other tasks, he led the search for his own replacement; pitched prospective investors at the
3 request of the replacement CEO; worked to improve the company’s wait forecast algorithms; brought in
4 numerous offers of financing; and various other tasks. **Exhs. 21-31.**

5 Dr. Bäcker recalls working far more than the 1878.8 hours he billed. In some cases, he
6 documented his time but categorized it as “No charge” because it was time spent in an effort to close
7 deals for QLess which would have entitled him to a commission under the deal offered by Charlie Meyer.
8 **Exh. 21.** In every case, Dr. Bäcker was explicitly asked to do this work by QLess.

9 QLess now claims that it wanted nothing to do with Dr. Bäcker and that his efforts were not just
10 of no value, but actually harmful to the company. For example, Jeff Anderson claimed in deposition that
11 Dr. Bäcker’s contact with investors actively damaged the company’s reputation and made it harder to
12 secure investment. But Dr. Bäcker was the heart and soul of the company that had impressed Anderson
13 himself – so much so that Anderson convinced his venture capital firm, Palisades, to invest \$5 million in
14 mid-2017, without any accompanying demand to remove or minimize Dr. Bäcker’s involvement.
15 Likewise, Dr. Bäcker had convinced Altos Ventures and other professional investors to invest an
16 additional \$9.3M in QLess. In fact, Dr. Bäcker was responsible for securing every single investment into
17 QLess until its sale in October of 2021, including also Thayer Ventures, Act One, Crestmont Ventures,
18 Assigncorp, Diego Mandelbaum, Phoebe and Mark Wood, Ron Baecker, Ricardo Bäcker, Andy Bäcker,
19 Nicolás Bäcker, Iván Markman, Adam Miller, Africa Agencies, Mark Brosso and Dave Chen, among
20 others. The idea that after March 2019 Dr. Bäcker’s work suddenly became actively harmful is simply
21 revisionist.

22 For example, the company’s largest customer, the Michigan Department of State (MDOS)
23 requested a quote for expanding QLess to more locations just before Dr. Bäcker’s termination.
24 Afterwards, MDOS experienced problems with the wait forecasting. Jeff Anderson and Ho Nam refused
25 to allow Dr. Bäcker to get involved in fixing the problem until MDOS decided to stop using QLess
26 entirely, at which point the Board and CEO asked Dr. Bäcker to fly to Michigan to meet with the client
27 and try to save the relationship. **Exh. 26.** (By then, it was too late.) QLess now claims that Dr. Bäcker
28 went Michigan against the company’s wishes, but the written record shows otherwise.

1 Meanwhile, the company was experiencing significant turnover. On September 30, 2019, just
2 after hiring Grauman to take Dr. Bäcker's place, Ho Nam resigned his Board seat and sold Altos' shares
3 to Palisades at half price. Palisades appointed partner Paul D'Addario to its second Board seat. In
4 November 2019, Markman also resigned.

5 Key employees were leaving too. For example, Simon Heyrick, CFO and acting CEO in Dr.
6 Bäcker's absence, resigned in November 2019, just a few months after Dr. Bäcker was removed. Kevin
7 Grauman, who replaced Dr. Bäcker as CEO, was fired. Even the replacements for Heyrick and Grauman
8 have since been replaced. Indeed, the employee quit rate increased 1150% when Dr. Bäcker was
9 separated from his job.²

10 Through it all, the company never did as well as it had under Dr. Bäcker. Turnover skyrocketed,
11 customers left, and sales never recovered. After Dr. Bäcker was removed, the company's bookings
12 declined precipitously. **Exh. 32.** But the sales the company had made under Dr. Bäcker's leadership in
13 the early part of 2019 not only beat the company's Bonus Plan for that year, it also beat the Bookings
14 Plan by 240%. The company now claims that it does not owe a bonus for 2019 because the company
15 missed the metrics by which the bonus was determined. But the evidence will show that, at minimum,
16 Grauman received his full bonus for 2019, suggesting the opposite.

17 After Dr. Bäcker's termination, the company needed further investment to stay afloat. Dr. Bäcker
18 spent significant time obtaining offers of financing to help the company's cash position. **Exhs. 25, 27-30.**
19 D'Addario actively undermined these offers by negotiating against QLess, and ensuring the Board
20 rejected every offer Dr. Bäcker brought in. D'Addario did this to position Palisades to be able to buy
21 QLess at a fire sale price. After the Board rejected all other offers, D'Addario convinced a Special
22 Committee that Palisades was the only investor left that would save QLess from failure. The Palisades
23 directors then voted to sell QLess to Palisades for \$17M. At the time, there were competing offers that
24 valued QLess at far more, including one for \$85M. The sale completely wiped out the equity Dr. Bäcker

25 _____
26 ² Others who quit in the months following Dr. Bäcker's removal were Michael Pliha, Director of Sales
27 Operations, Jerry Darakjian, Director of Sales Development, Mitch Lusas, VP of Product, Peter Frank,
28 Sr. engineer, Amy Muradyan, Controller, Manali Gosh, in charge of QA, Loc Tran, in charge of Systems
Reliability Engineering, Josh Hull, sr. engineer, Andrew Houser, head designer, later in charge of
product, Joaquin Meza, in charge of testing, Fran Grolemond, in charge of software development, and
Kelly Kliner, the star salesperson.

1 had built for the common shareholders, while making Palisades rich. To top it all off, QLess now claims
2 Dr. Bäcker does not even deserve compensation for his time spent vainly trying to get it to accept a better
3 offer than Palisades’.

4 To add injury to insult, Dr. Bäcker was forced to spend significant time battling for relatively
5 small reimbursements that the company owed him, from a \$250 annual fee for the corporate credit card to
6 \$21,987.33 for prior years’ tax obligations that QLess had failed to pay. **Exhs. 33-35.**

7 **Amounts Due**

8 Respondent is liable to Dr. Bäcker in the amount of **\$2,372,673.47** plus reasonable attorney’s
9 fees. This amount represents \$875,757.23 in deferred compensation and change of control bonus;
10 \$91,667.67 in severance; \$84,787.50 in bonus; \$21,831.66 in health insurance costs; \$675,580.00 in
11 consultant wages; \$3,912.12 in company charges to Dr. Bäcker’s personal credit card; \$22,068.83 in
12 company IRS obligations wrongfully deducted from Claimant’s tax refunds; \$119,232.97 in waiting time
13 penalties; and \$477,835.49 in prejudgment interest.

14 **i. Unpaid Pre-2016 Compensation & Change of Control Bonus**

15 The pre-amendment version of Dr. Backer’s Employment Agreement, signed on February 10,
16 2017 states that Dr. Backer is owed \$508,022 “for services rendered to the Company prior to the calendar
17 year 2016” to accrue compound interest at the rate of 7.5% per annum. Therefore, by September 1, 2017,
18 the amount accrued was \$570,705.80 (representing the \$508,022.00 principal plus \$62,683.80 in interest
19 at 7.5% per annum compounding monthly). Respondent disputes that the interest should have
20 compounded monthly, stating that it should have compounded annually. Calculating the interest as such
21 would render \$568,537.66 accrued as of September 1, 2017 (representing the \$508,022.00 principal plus
22 \$60,515.66 in interest at 7.5% per annum compounding annually). Lastly, also in August, 2017, QLess
23 agreed to adjust the interest rate on Dr. Backer’s deferred compensation to 12% beginning on September
24 1, 2017. QLess disputes this agreement and maintains that the 7.5% interest rate should apply throughout.

25 Effective June 7, 2019, Respondent terminated Dr. Bäcker, rendering his pre-2016 compensation
26 due and payable to him under state law. However, Respondent did not pay Dr. Bäcker what he was owed.
27 Instead, Respondent withheld payment of any of Dr. Bäcker’s deferred compensation for another 28.5
28 months, and paid him only \$457,385.00 on October 20, 2017. Respondent contends that this was the

1 correct amount due to Dr. Bäcker. Despite discovery and deposition testimony having been sought on this
2 issue, Respondent has not produced a full billing justification for this number. Instead, Respondent relies
3 on a spreadsheet showing the following numbers:

4 Amount owed to Dr. Bäcker:

- 5 • \$580,022 principal pre-2016 deferred compensation
- 6 • \$173,469.00 in interest accrued at 7.5% per annum
- 7 • \$266,485.00 in change of control bonus
- 8 • \$55,962.00 representing “gross-up for federal corporate taxes” at 21%
- 9 • \$23,557.00 representing “gross-up for California corporate taxes” at 8.83%

10
11 = \$1,027,495.00

12 The spreadsheet goes on to list the following “deductions:”

- 13 • \$199,000.00 for “payments to AB Invention 2016-2019”
- 14 • \$23,761.00 for “Misc payments for Alex Bäcker personal”
- 15 • \$70,859.00 for “AMEX credit card payments for AB Inventio”
- 16 • \$276,490.00 for “Stockholder Notes Recv – due at change of control.”

17
18 = (\$570,110.00)

19 Subtracting the “deductions” from the “amount owed” results in \$457,385.00, representing the
20 amount paid by QLess to Dr. Bäcker on October 20, 2021.

21 As mentioned, the Parties dispute whether the interest rate on his deferred compensation changed
22 to 12% in August 2017. The Parties also dispute whether the interest rate compounds monthly or
23 annually. Further disputes regarding the amount due are as follows, in order of their appearance in the
24 bullet points above:

25 First, regardless of the interest rate or frequency of compounding, the \$173,469.00 calculated by
26 QLess as interest due as of October 20, 2021 is incorrect.

27 **a. Interest Rate Compounding Monthly, Changing to 12% on September 1, 2017**

- 28 • 7.5% per annum interest compounding monthly on \$508,022.00 from February 10, 2016 to

1 August 31, 2017 = \$570,705.63

- 2 • 12% per annum interest compounding monthly on \$570,705.63 from September 1, 2017 to
3 October 20, 2021 = \$935,280.14 (representing \$508,022.00 principal plus **\$427,258.14** interest)

4 **b. Interest Rate Compounding Monthly, Remaining at 7.5% Throughout**

- 5 • 7.5% per annum interest compounding monthly on \$508,022.00 from February 10, 2016 to
6 October 20, 2021 = \$777,735.95 (representing \$508,022.00 principal plus **\$269,713.95** interest)

7 **c. Interest Rate Compounding Annually, Changing to 12% on September 1, 2017**

- 8 • 7.5% per annum interest compounding annually on \$508,022.00 from February 10, 2016 to
9 August 31, 2017 = \$568,537.50
10 • 12% per annum interest compounding annually on \$568,537.50 from September 1, 2017 to
11 October 20, 2021 = \$908,601.40 (representing \$508,022.00 principal plus **\$400,579.40** interest)

12 **d. Interest Rate Compounding Annually, Remaining at 7.5% Throughout**

- 13 • 7.5% per annum interest compounding annually on \$508,022.00 from February 10, 2016 to
14 October 20, 2021 = \$766,975.83 (representing \$508,022.00 principal plus **\$258,953.83** interest)

15 Next, Respondent may also argue that the \$55,962.00 and \$23,557.00 numbers (\$79,519.00
16 combined) are a proper calculation of Respondent’s tax gross-up obligations under Amendment No. 2 to
17 the Employment Agreement. As discussed *infra*, this is also incorrect. These numbers were calculated
18 using the combined state and federal corporate tax rate. The proper tax rate, as conceded by QLess and
19 company counsel in deposition, is the combined maximum state and federal personal tax rates for 2021,
20 which is 49.3%. Accordingly, the amount due to Dr. Bäcker for tax grossing-up was \$131,377.09
21 (representing $\$266,485.00 \times 0.493 = \$131,377.09$), not \$78,519.00.

22 Respondent may claim that it properly deducted \$276,490.00 for “Stockholder Notes Recv – due
23 at change of control” to pay off a promissory note Dr. Bäcker entered into on February 10, 2016 in
24 exchange for shares of the company. QLess had no right to make that decision for Dr. Bäcker, as
25 conceded by then-CEO Mark Tapling, who stated that Dr. Bäcker had the opportunity to relinquish his
26 shares and keep the bonus payment rather than using it to pay for the shares. **Exh. 17.**

27 Therefore, the amount paid to Dr. Bäcker, purportedly to cover QLess’ obligations to him
28 regarding his pre-2016 compensation is incorrect. In reality, before addressing waiting time penalties and

1 prejudgment interest, Dr. Bäcker was due **\$1,333,142.23** on October 20, 2021. This represents the sum of
2 \$508,022.00 pre-2016 principal; \$427,258.14 interest; \$266,485.00 change of control bonus; \$131,377.09
3 tax gross-up. In other words, in paying Dr. Bäcker \$457,385.00 on October 20, 2021, Respondent
4 underpaid him by **\$875,757.23**³ before considering waiting time penalties.

5 Of the \$1,333,142.23 due to Dr. Bäcker on October 20, 2021, \$704,541.91⁴ was pre-2019
6 compensation which, had it been paid upon his June 7, 2019 termination, represents the sum of

- 7 • \$508,022.00 pre-2016 compensation principal;
- 8 • plus \$62,683.80 in interest at 7.5% per annum compounding monthly from February 10, 2016 to
9 August 31, 2017;
- 10 • plus \$133,836.11 in total interest that compounded monthly at 12% per annum compounding
11 monthly from September 1, 2017 to June 7, 2019;

12 **ii. Unpaid Severance**

13 Dr. Bäcker received eight months of severance but is owed an additional four months in the
14 amount of **\$91,666.67**. QLess claims it only agreed to eight months, but the evidence will show that the
15 Compensation Committee recommended one year to the Board, which the Board approved. **Exhs. 8, 9.**

16 **iii. Pro-Rated Bonus for 2019**

17 Pursuant to the Board Approved 2019 Bonus Plan, Dr. Bäcker is owed a pro-rated bonus for the
18 2019 year of **\$84,787.50**. To date, the Company has not compensated Dr. Bäcker for this work, yet the
19 Company has provided compensation to other members of the Company's team.

20 On March 18, 2019, the Board of Directors voted to set Dr. Bäcker's bonus to \$100,000 for 2019,
21 dependent on two events: 67% of this bonus would be due to Dr. Bäcker should the company achieve its
22 Annual Recurring Revenue ("ARR") growth targets for 2019, and 33% of this bonus would be due to Dr.
23 Bäcker should the company achieve its cash burn targets. Further, if the company outperformed these

24
25 ³ Even if the Court rules in QLess' favor with respect to the interest rate to be applied to Dr. Bäcker's
26 pre-2016 principal and the frequency of compounding (7.5% compounded annually throughout), on
27 October 20, 2021, QLess would have owed Dr. Bäcker **\$1,164,848.92** (\$508,022 principal + \$258,953.83
28 interest + \$266,485.00 change of control bonus + \$131,388.09 tax gross-up), resulting in an
underpayment of **\$707,463.92**.

⁴ Applying Defendants' preferred calculation at 7.5% compounding annually, this number would be
\$646,043.68.

1 targets, Dr. Bäcker would be owed a larger bonus in proportion to the overperformance.

2 Dr. Bäcker was terminated on June 7, 2019. The company exceeded its ARR growth targets for
3 January-May by 140%. The company also met its cash burn targets in January-May. Accordingly, the
4 calculation of Dr. Bäcker's bonus due is as follows:

- | | |
|----|--|
| 5 | a. $\$67,000.00 \times 2.40$ (representing the 140% excess on the ARR target) = $\$160,800.00$ |
| 6 | b. $\$33,000.00 \times 1$ (representing meeting the cash burn target) = $\$33,000.00$ |
| 7 | c. $\$160,800.00 + \$33,000.00 = \$193,800.00$ |
| 8 | d. Dr. Bäcker's termination on Friday, June 7, 2019 represents 5.25 months, ⁵ therefore $5.25 / 12 =$ |
| 9 | 0.435 |
| 10 | e. $0.4375 \times \$193,800 = \mathbf{\$84,787.50}$ |

11 It is worth noting that after Dr. Backer was terminated, there was a steep drop-off in ARR growth.
12 The company exceeded its ARR growth target by only 22.5% for the full year, despite exceeding it by
13 140% when Dr. Backer was at the helm.

14 **iv. Health Insurance Costs**

15 Pursuant to a resolution of the Company's Board of Directors at a special meeting on June 6,
16 2019, the Company agreed to pay Dr. Bäcker's health insurance and customary benefits for as long as he
17 was a Director of the Company, or at minimum, one year (Dr. Bäcker's memory differs from Carrie
18 Kish's). The Company made no such payments from June 2019 through October 2021, and those 27
19 months of premiums at \$808.58 per month total **\$21,831.66**.

20 **v. Consultant Pay**

21 Dr. Bäcker is owed **\$675,580.00** for work performed as a consultant to QLess between June 2019
22 and October 2021. Since Dr. Bäcker stopped serving as CEO of the Company, Dr. Bäcker has made
23 invaluable contributions to the Company while serving as a consultant for the Company. Then-acting
24 CEO Simon Heyrick promised that Dr. Bäcker would be paid \$350 per hour for hours spent on specific
25 projects (with no minimum hours). Even in the absence of an agreement, \$350 per hour would be a
26 reasonable amount for Dr. Bäcker's services. Dr. Bäcker spent 1,878.8 hours working as a consultant for
27 the Company from June 2019 through October 2021, equaling \$657,580. To date, Dr. Bäcker has not

28 ⁵ QLess pays twice per month in all months.

1 received any compensation for his work as a consultant.

2 **vi. Credit Card Payments**

3 The Company has used cards backed by Dr. Bäcker to pay the Company's expenses. As of June
4 21, 2021, a debt of **\$3,912.12** was incurred on Dr. Bäcker's AMEX account by the Company without his
5 approval. To date, Dr. Bäcker has not been reimbursed for these expenditures. Dr. Bäcker seeks a
6 judgment not only for the payment of this amount, but also commanding Respondent to (1) conduct a
7 proper accounting of expenses paid from Dr. Bäcker's bank account, (2) submit same to the Arbitrator,
8 and (3) pay to Claimant the amount determined.

9 **vii. IRS Payments**

10 Beginning on April 15, 2017, the IRS has intercepted a total of **\$22,068.83** from Dr. Bäcker's tax
11 refunds to pay unpaid payroll tax obligations of the Company.

12 **viii. Waiting time penalties**

13 Pursuant to Labor Code § 203(a), Dr. Bäcker is owed **\$119,232.97** in waiting time penalties. This
14 is calculated as the sum of:

- 15 **a.** 0.0822 (representing $30/365$) x Dr. Bäcker's deferred compensation and interest owed as of June
16 7, 2019 ($\$704,541.91$) = **\$57,913.34**⁶
- 17 **b.** 0.0822 x Dr. Bäcker's annual salary ($\$275,000$) = **\$22,605.00**
- 18 **c.** 0.0822 x Dr. Bäcker's severance ($\$275,000$) = **\$22,605.00**
- 19 **d.** 0.190 (representing $30/158$ where 158 = days worked as CEO in 2019) x Dr. Bäcker's bonus
20 ($\$84,787.5$ per section iv, *supra*) = **\$16,109.63**⁷

21 **ix. Pre-judgment interest**

22 Pursuant to Civ. Code § 3289 and Labor Code § 218.6, Dr. Bäcker is owed **\$477,835.49** which
23 represents 12% contractual interest on his unpaid pre-2016 compensation and 10% prejudgment interest
24 on his unpaid change of control bonus, severance, pro-rated bonus for 2019, health insurance costs,
25 consultant pay, wrongfully charged credit card payments, and personal tax deductions on behalf of the

26 _____
27 ⁶ Applying Respondent's position (7.5% interest throughout, compounding annually) waiting time
penalties on this amount would be **\$53,104.79** (0.0822 x $\$646,043.68$).

28 ⁷ Assuming the full-year calculation of the bonus as described in section iii., *supra*, this amount would be
\$9,565.61 (0.190 x $\$50,345.31$).

1 company. This prejudgment interest is calculated as follows:

- 2 a. Severance beginning June 7, 2019: **\$45,707.75**
- 3 b. Pre-2016 compensation beginning on June 7, 2019: **\$115,846.23**
- 4 c. Change of Control Bonus beginning October 20, 2021: **\$69,651.15**
- 5 d. Prorated 2019 bonus beginning June 7, 2019: **\$42,277.59**
- 6 e. Health Insurance Costs beginning June 7, 2019: **\$10,885.92**
- 7 f. Consultant pay beginning October 20, 2021: **\$176,576.25**
- 8 g. Credit card charges beginning on June 21, 2021: **\$1,152.20**
- 9 h. Personal tax deductions beginning on April 15, 2017: **\$15,738.40**

10 *See also* Attachment A.

11 **x. Reasonable attorneys' fees**

12 Because Dr. Bäcker is owed unpaid wages in the form of deferred compensation, severance,
13 change of control bonus, prorated bonus, health insurance costs, and consultant pay, he is entitled to
14 recover reasonable attorney's fees pursuant to Labor Code Labor Code § 218.5 and the Arbitration
15 Agreement permitting attorneys' fees and costs available under applicable law. Claimant will submit his
16 motion for same upon the Arbitrator's ruling on the merits of this case.

17 **III. ARGUMENT**

18 **A. QLess breached its contractual obligation to pay to Dr. Bäcker his (i) pre-2016**
19 **compensation, (ii) change of control bonus, (iii) severance, (iv) pro-rated bonus for 2019,**
20 **and (v) health insurance premiums.**

21 The elements of a cause of action for breach of contract are (1) the existence of the contract, (2)
22 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting
23 damages to the plaintiff. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 124 Cal. Rptr. 3d 256,
24 263, 250 P.3d 1115, 1121 (2011). The evidence and testimony will show (1) that Dr. Bäcker and
25 Respondent entered into contracts regarding each of these obligations; (2) that all conditions precedent
26 were met regarding each of these obligations, (3) that Respondent failed to pay Claimant the amounts due
27 under these contracts, and (4) the amount due for this breach.

28 Regarding items the pre-2016 compensation and the change of control bonus, Claimant expects

1 Respondent to argue that it lawfully withheld payment of a portion of this amount in a lawful exercise of
2 its right to offset for monies due to Respondent by Claimant. However, Respondent did not raise the
3 “right to offset” as an Affirmative defense in its answer. Moreover, the contracts in question include no
4 offset provision. Additionally, none of the “debts” which Respondent withheld arose from the same
5 contracts. Further, the proper recourse on the promissory note was for the company to demand payment
6 from Dr. Bäcker, and if there was a default, to then claw back the stock. Lastly, Respondent withheld
7 hundreds of thousands of dollars purportedly previously paid to Dr. Bäcker or on his behalf, but never
8 provided proper accounting of these withholdings, let alone any proof that they were paid to him *as*
9 *payment for his pre-2016 salary*. In fact, upon review of his financial accounts, most of the monies
10 Respondent claims to have paid to Dr. Bäcker were never received. Moreover, some of the payments
11 were purportedly made *before* February 10, 2016 – and thus should have been accounted for in the
12 amount stated in the employment agreement entered into on that date.

13 Respondent simply denies that it ever approved the severance, pro-rated bonus for 2019, and
14 health insurance premiums. The evidence and testimony will show otherwise.

15 **i. Pre-2016 compensation**

16 Dr. Bäcker’s employment agreement clearly provides for compound, not simple, interest. The
17 parties agree that the annual rate of interest before September 1, 2017, in accordance with Dr. Bäcker’s
18 employment agreement, was 7.5%.

19 The dispute arises when it comes to (1) whether the Parties agreed to change the interest rate from
20 7.5% to 12% beginning September 1, 2017; (2) whether, in light of the Employment Agreement’s silence
21 on the frequency of compounding, QLess’ consistent practice of compounding interest monthly supports
22 Dr. Bäcker’s position that the interest on his loan should compound monthly as well; and (3) whether
23 Respondent correctly withheld pre-2016 compensation from Dr. Bäcker on the grounds that the monies
24 withheld were purportedly previously paid to him or owed to Respondent by him. These questions are
25 addressed in this section.

26 **a. *The Parties agreed to change the interest rate from 7.5% to 12% beginning on***
27 ***September 1, 2017***

28 After the \$9.3M financing in November 2018, Dr. Bäcker instructed CFO Danny Joe to pay the

1 Deferred Compensation, but the Board intervened and opposed the payment at that time. On March 18,
2 2019, Dr. Bäcker wrote to the Board offering to allow the Company to keep the money for the time being
3 in exchange for certain terms, including an adjustment of the interest rate to that of a fair market rate of
4 an outstanding subordinated loan – which was 12%. The Board never responded to renegotiate those
5 terms, and so Dr. Bäcker, as CEO, instructed CFO Danny Joe to change the interest rate from 7.5% to
6 12% as of August 2017. Because monthly compounding was Respondent’s standard practice for all
7 lenders, it was not necessary to specify that the interest should be compounded monthly. No QLess
8 policy prevented Dr. Bäcker from giving this instruction to Joe. Joe passed the instruction on to
9 Controller Amy Muradyan, who then crated a debt schedule calculating the interest at 12%. **Exh. 13.**

10 ***b. The interest rate should be compounded monthly***

11 The original Employment Agreement states that the interest rate will be “7.5% per annum,” but is
12 silent as to the frequency with which the interest rate is to compound. *See, e.g., Mesa Airlines, Inc. v.*
13 *Davis*, No. 1 CA-CV 20-0040, 2021 Ariz. App. Unpub. LEXIS 208, at *11 (Ct. App. Feb. 23, 2021)
14 (“[T]he term of each note fixing the interest rate at ‘ten (10%) percent per annum’ offers no indication
15 that interest would be compounded, *much less a basis for a particular frequency for compounding.*”)
16 (emphasis added). In most situations, courts look to past practices to fill gaps in agreements or to
17 interpret the express terms of such an agreement. *See, e.g., CSX Transp., Inc. v. United Transp. Union*, 29
18 F.3d 931, 936 (4th Cir. 1994) (“If the parties’ written agreement is ambiguous or silent regarding the
19 parties’ intent, the arbitrator may use past practices and bargaining history to fill the gap in the
20 written contract.”) (internal quotations omitted). QLess’ typical practice is to compound interest monthly,
21 as it did to CIBC and to Dr. Bäcker’s brother, Nicolas Bäcker. Respondent knows this, which is why
22 when Respondent *does* intend for interest to compound annually, Respondent specifically includes a
23 written provision stating same. By way of example, the promissory note executed *the exact same day* as
24 the original Employment Agreement (February 10, 2016), provides: “interest shall accrue on the unpaid
25 principal balance, plus accrued but unpaid interest (**compounded annually**), at the lowest applicable
26 federal rate during the applicable calendar year.”

27 ***c. The deductions were improper***

28 First, several of the purported payments that Respondent claims were intended to pay down the

1 \$508,022.00 principal owed to Dr. Bäcker for his pre-2016 compensation were – according to
2 Respondent’s documentation – made *before* the Employment Agreement was executed on February 10,
3 2016. **Exh. 14**, Tab 2 (showing deductions from January 2016).

4 Second, many of these “payments” were not made to Dr. Bäcker at all.

5 Third, there is no evidence that the payments were *for his pre-2016 compensation*, let alone that
6 credit card bills paid by QLess were effectively such payments. Respondent can point to no agreement
7 that any of these payments was made for the purpose of paying down Dr. Bäcker’s deferred
8 compensation principal, because there are none. Accordingly, Respondent’s decision to retroactively
9 deduct these payments at the date that the payments were purportedly made (thereby reducing the
10 principal base on which interest compounded) was improper.

11 **ii. Change of Control Bonus**

12 Respondent does not dispute the validity of Amendment No. 2 to the Employment Agreement.
13 Instead, Respondent appears to take the position that the maximum state and federal corporate tax rate
14 should apply, rather than the maximum state and federal personal income tax rate.

15 Amendment No. 2 to Dr. Bäcker’s Employment Agreement provides that in addition to the
16 \$266,485.00 owed to Dr. Bäcker as part of his change of control bonus, he is to be paid to cover the taxes
17 he derives from said payment. While Amendment No. 2 goes on to state that his personal income tax will
18 be covered by the “current maximum combined federal and California state corporate income tax rate by
19 such taxable income for the year in which such bonus is paid,” Alderton and Anderson (testifying as the
20 PMK for QLess) both acknowledge that the word “corporate” was a typographical error and the intended
21 tax burden coverage was for the maximum combined state and federal income tax. In 2021, the maximum
22 combined state and federal income tax was 49.3% (37% federally and 12.3% for California). Applying
23 the correct income tax to the \$266,485.00 change of control bonus results in \$131,377.09.

24 In a separate agreement, also on February 10, 2016, Dr. Bäcker signed a promissory note for
25 1,268,976 shares of QLess common stock, agreeing to pay, by February 10, 2025, the value of those
26 shares at the price determined by the Company’s “pending 409A valuation.” (QLESS220181). Despite
27 CEO Mark Tapling’s statement that Dr. Bäcker could return the shares in lieu of payment, Respondent
28 unilaterally decided to withhold \$276,490.00 due to Dr. Bäcker on October 20, 2021.

1 **iii. Severance**

2 Regarding severance, on February 22, 2019, Respondent’s Compensation Committee – consisting
3 of Board Members Anderson, Nam, and Markman, plus Dr. Bäcker who abstained – approved by two to
4 one a recommendation to the full Board to pay twelve months’ severance to a CEO terminated not for
5 cause. The adoption of this recommendation was documented in the Compensation Committee meeting
6 minutes, drafted by Dr. Bäcker. The substance of the events reported in those minutes was never
7 substantively disputed by any Committee member, and were confirmed by company counsel, Barbara
8 Mirza. Then, the recommendations were submitted to the full Board on March 18, 2019 – the full Board
9 being only one additional Director, Mike Bell. The recommendation was then accepted in an omnibus up
10 or down vote with minimal discussion. This approval was reflected in meeting minutes circulated by Dr.
11 Bäcker, which again, were not substantively disputed by any Board member, nor by company counsel
12 Tom Hopkins, who had attended the meeting and who was requested to review the minutes for accuracy.

13 **iv. Pro-Rated 2019 Bonus**

14 Regarding the pro-rated bonus for 2019, on February 22, 2019, Respondent’s Compensation
15 Committee – consisting of Board Members Anderson, Nam, and Markman, plus Dr. Bäcker who
16 abstained – approved by two to one a recommendation to the full Board to approve the draft 2019 Bonus
17 Plan that had been circulated in advance of the Committee meeting. The adoption of this
18 recommendation was documented in the Compensation Committee meeting minutes, drafted by Dr.
19 Bäcker. The substance of the events reported in those minutes was never substantively disputed by any
20 Committee member, and were confirmed by company counsel, Barbara Mirza. Then, the
21 recommendations were submitted to the full Board on March 18, 2019 – the full Board being only one
22 additional Director, Mike Bell. The recommendation was then accepted in an omnibus up or down vote
23 with minimal discussion. This approval was reflected in meeting minutes circulated by Dr. Bäcker, which
24 again, were not substantively disputed by any Board member, nor by company counsel Tom Hopkins,
25 who had attended the Board meeting and who was requested to review the minutes for accuracy.

26 **v. Health Insurance Premiums**

27 Regarding the health insurance premiums, on February 22, 2019, Respondent’s Compensation
28 Committee – consisting of Board Members Anderson, Nam, and Markman, plus Dr. Bäcker who

1 abstained – approved by two to one a recommendation to the full Board to approve health insurance
2 premiums for a terminated CEO during the severance period (12 months). The adoption of this
3 recommendation was documented in the Compensation Committee meeting minutes, drafted by Dr.
4 Bäcker. The substance of the events reported in those minutes was never substantively disputed by any
5 Committee member, and were confirmed by company counsel, Barbara Mirza. Then, the
6 recommendations were submitted to the full Board on March 18, 2019 – the full Board being only one
7 additional Director, Mike Bell. The recommendation was then accepted in an omnibus up or down vote
8 with minimal discussion. This approval was reflected in meeting minutes circulated by Dr. Bäcker, which
9 again, were not substantively disputed by any Board member, nor by company counsel Tom Hopkins,
10 who had attended the Board meeting and who was requested to review the minutes for accuracy.

11 **B. QLess failed to pay Dr. Bäcker the reasonable value of services he provided to QLess as a**
12 **consultant between June 2019 and October 2021.**

13 Dr. Bäcker is owed \$657,580 for work he performed as a consultant to QLess between June 2019
14 and October 2021. “Quantum meruit refers to the well-established principle that the law implies a
15 promise to pay for services performed under circumstances disclosing that they were not gratuitously
16 rendered. To recover in quantum meruit, a party need not prove the existence of a contract, but it must
17 show the circumstances were such that the services were rendered under some understanding or
18 expectation of both parties that compensation therefor was to be made.” *E. J. Franks Constr., Inc. v.*
19 *Sahota*, 226 Cal. App. 4th 1123, 1127, 172 Cal. Rptr. 3d 778, 780 (2014) (internal quotations and
20 citations omitted). The elements of a quantum meruit claim are (1) that QLess requested, by words or
21 conduct, that Claimant perform services for the benefit of QLess, (2) that Claimant performed the
22 services, (3) that QLess has not paid Claimant for the services, and (4) the reasonable value of the
23 services that were provided. Judicial Council of California Civil Jury Instructions (2024 ed.) No. 371.

24 In *Maglica v. Maglica*, 66 Cal. App. 4th 442, 451, 78 Cal. Rptr. 2d 101, 105-06 (1998), the Court
25 clarified that while “the services must be of benefit if there is to be any recovery at all[,] ... the benefit is
26 not necessarily related to the reasonable value of a particular set of services.” As the Court explained,
27 “Sometimes luck, sometimes the impact of others makes the difference. Some enterprises are successful;
28 others less so. Allowing recovery based on resulting benefit would mean the law imposes an exchange of

1 equity for services, and that can result in a windfall--as in the present case--or a serious shortfall in
2 others.” *Id.* In finding that the reasonable value of services should be determined by some reasonable
3 rate, *i.e.*, what it would have cost to pay another equally qualified individual for the services rendered, the
4 Court noted that “Equity-for-service compensation packages are extraordinary in the labor market, and
5 always the result of specific bargaining. To impose such a measure of recovery would make a deal for the
6 parties that they did not make themselves.” *Id.* See also *Hartley v. Dayton Computer Supply*, 106 F.
7 Supp.2d 976, 984 (S.D. Ohio 1999) (in unjust enrichment, damages are conferred in the amount the
8 defendant benefitted; in quantum meruit, damages are the measure of the value of the plaintiff’s services).

9 Respondent may claim that because the offers of financing secured by Dr. Bäcker were rejected, it
10 does not have to pay him for his time pursuing them. Such an argument would seriously distort the
11 purposes of quantum meruit. According to the Judicial Council of California Civil Jury Instructions, the
12 elements for quantum meruit are:

- 13 1. That Respondent requested, by words or conduct, that Claimant perform services for the benefit
14 of Respondent;
- 15 2. That Claimant performed the services;
- 16 3. That Respondent has not paid Claimant for the services;
- 17 4. The reasonable value of the services that were provided.

18 CACI No. 371 (Common Count: Goods and Services Rendered). CACI does not include a requirement
19 that Claimant prove any specific monetary benefit. That is because none is required, since “performance
20 of services at another’s behest may itself constitute ‘benefit’.” *Earhart v. William Low Co.*, 25 Cal. 3d
21 503, 511 (1979) (citing to the Rest., Restitution (1937) § 1 com. b., p. 12.). Simply put, where services
22 are performed by one party at the express or implied request of another, the law presumes and implies an
23 agreement to pay the reasonable value thereof. *Williams v. Dougan*, 175 Cal. App. 2d 414, 418 (1959).
24 Indeed, it has long been the law that where a company’s director performs services that “were highly
25 valuable” and not “gratuitous,” he has a “legal claim for the value of his services” even if “that value had
26 not been fixed beforehand.” *Bassett v. Fairchild*, 132 Cal. 637, 641, 647 (1901). Dr. Backer’s services
27 were provided at the express and implied request of Respondent, and he is entitled to the reasonable
28 value thereof.

1 Here, the evidence and testimony will show that at QLess' request, Dr. Bäcker served as a
2 consultant for the company between June 2019 and October 2021. Before Dr. Bäcker began performing
3 these services, he notified then-CFO Simon Heyrick that his hourly rate was \$350 per hour. and even
4 provided a detailed explanation of the reasonableness (and in fact discount nature) of the rate. Dr. Bäcker
5 also routinely updated his hours on a spreadsheet with shared access by the acting CEO who had offered
6 him the consulting arrangement. The CFO's offering this rate provides strong evidence of its
7 reasonableness, but it is far and away from the only evidence that it is reasonable. Dr. Bäcker not only
8 holds a Ph.D. from the Massachusetts Institute of Technology, he was *the* institutional memory of QLess,
9 and was a critical asset to the Company, particularly in the early months of transition. Years earlier, in
10 2016, QLess had paid its former Chief Technology Officer, Tim McCune \$250 per hour. Proportionally
11 applying Mr. McCune's total cash compensation at QLess before his work as a consultant (\$241,000) to
12 Claimant's (\$375,000) and applying inflation through 2019, Claimant's fair hourly rate would have been
13 \$428 per hour. Instead, Dr. Bäcker applied a discounted hourly rate of \$350 per hour as a demonstration
14 of his commitment to the company.

15 **C. QLess wrongfully converted Dr. Bäcker's money.**

16 Dr. Bäcker is owed at least \$25,980.95 representing \$3,912.12 in charges QLess caused on Dr.
17 Bäcker's American Express account and \$22,068.83 in tax refunds intercepted from Dr. Bäcker to pay
18 QLess obligations. Conversion is the wrongful exercise of dominion over the property of another. The
19 elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2)
20 the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. *Lee v.*
21 *Hanley*, 61 Cal. 4th 1225, 1240, 191 Cal. Rptr. 3d 536, 548, 354 P.3d 334, 344 (2015).

22 QLess either intentionally or accidentally continued to benefit from Dr. Backer's credit cards and
23 tax refunds, even after the matters had been brought to its attention.

24 **D. QLess must pay waiting time penalties.**

25 Pursuant to Labor Code § 203(a), Dr. Bäcker is owed \$119,232.97 in waiting time penalties.
26 Labor Code § 203 (a) provides in pertinent part,

27 If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections
28 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is

1 discharged or who quits, the wages of the employee shall continue as a penalty from the due date
2 thereof at the same rate until paid or until an action therefor is commenced; but the wages shall
3 not continue for more than 30 days.

4 Labor Code § 200(a) in turn defines “Wages” expansively as “includ[ing] all amounts for labor
5 performed by employees of every description, whether the amount is fixed or ascertained by the standard
6 of time, task, piece, commission basis, or other method of calculation.”

7 “[T]he purpose of the waiting time penalty is ‘to compel the immediate payment of earned wages
8 upon a discharge’ by attaching a substantial penalty to any delay in cutting the final paycheck.” *Diaz v.*
9 *Grill Concepts Services, Inc.* (2018) 23 Cal. App. 5th 859, 875, citing *Smith v. Superior Court* (2006) 39
10 Cal. 4th 77, 92. “Under Labor Code section 203, a ‘willful failure to pay wages ... occurs when an
11 employer intentionally fails to pay wages to an employee when those wages are due.’” *Diaz*, 23 Cal.
12 App. 5th at 868, citing Cal. Code Regs., tit. 8, § 13520. A willful failure to pay wages “does not also
13 require proof that the employer acted with a deliberate evil purpose to defraud work[ers] of wages which
14 the employer knows to be due.” *Diaz*, 23 Cal. App. 5th at 868 (internal quotation and citation omitted).

15 QLess terminated Dr. Bäcker’s employment with the company on June 7, 2019. By all accounts,
16 QLess did not pay him the \$508,022 in deferred compensation in June 2019 or for another two years and
17 four months (October 2021), even though that amount unquestionably represented wages owed him for
18 work performed before 2016. QLess also refused to pay Dr. Bäcker any bonus or severance when they
19 discharged him in June 2019 and still refuses to pay him those monies owed him. *See, e.g., Schacter v.*
20 *Citigroup, Inc.* (2009) 47 Cal. 4th 610, 618 (bonuses constitute wages covered by Labor Code § 203);
21 *Willig v. Exiqon, Inc.* (C.D. Cal., Jan. 3, 2012) 2012 WL 10375 at *12-14 (severance constitutes wages
22 covered by Labor Code § 203).

23 Given the above violations of Labor Code § 203(a), the Arbitrator should award the full 30 days
24 in waiting time penalties to the Claimant. *See Mamika v. Barca* (1996) 68 Cal. App 4th 487, 491-494
25 (court discusses how to calculate 30 days of waiting time penalties). Applying the same approach, the
26 waiting time penalties should also be as follows: \$119,232.97, representing the sum of \$57,913.34 in for
27 deferred compensation, \$22,605.00 for Dr. Bäcker’s salary, \$22,605.00 for Dr. Bäcker’s severance, and
28 \$16,109.63 for Dr. Bäcker’s bonus.

1 **E. Pre-Judgment Interest.**

2 Cal. Civ. Code § 3289(a) provides, “Any legal rate of interest stipulated by a contract remains
3 chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new
4 obligation.” Subsection (b) provides, in pertinent part, “If a contract entered into after January 1, 1986,
5 does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per
6 annum after a breach.” Likewise, Labor Code § 218.6 provides, “In any action brought for the
7 nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest
8 specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the
9 wages were due and payable.”

10 Dr. Bäcker is therefore owed 12% in prejudgment interest on his deferred compensation, and 10%
11 prejudgment interest on all other items at issue (change of control bonus, severance, pro-rated bonus for
12 2019, health insurance costs, consultant pay, credit card charges, and personal tax deductions on behalf of
13 the company). The prejudgment interest owed to Dr. Bäcker is as follows: **\$477,835.49**, representing the
14 sum of:

- 15 a. Severance beginning June 7, 2019: **\$45,707.75**
- 16 b. Pre-2016 compensation beginning on June 7, 2019: **\$115,846.23**
- 17 c. Change of Control Bonus beginning October 20, 2021: **\$69,651.15**
- 18 d. Prorated bonus beginning June 7, 2019: **\$42,277.59**
- 19 e. Health Insurance Costs beginning June 7, 2019: **\$10,885.92**
- 20 f. Consultant pay beginning October 20, 2021: **\$176,576.25**
- 21 g. Credit card charges beginning on June 21, 2021: **\$1,152.20**
- 22 h. Personal tax deductions beginning on April 15, 2017: **\$15,738.40**

23 **F. Reasonable Attorney’s Fees.**

24 The Arbitration Agreement says: “the arbitrator shall have the power to award any remedies,
25 including attorneys’ fees and costs, available under applicable law.” Labor Code § 218.5 provides that
26 “In any action brought for the nonpayment of wages... the court shall award reasonable attorney’s fees
27 and costs to the prevailing party if any party to the action requests attorney’s fees and costs upon the
28 initiation of the action.” Dr. Bäcker brings this action in part for unpaid wages in the form of severance,

1 change of control bonus, prorated bonus, health insurance costs, and consultant pay, and requested
2 attorney's fees upon the initiation of this action; thus, he is entitled to reasonable attorney's fees.
3 Claimant will submit his motion upon the Arbitrator's ruling on the merits of this case.

4 **IV. CONCLUSION**

5 QLess breached its contractual obligations to pay Dr. Bäcker, failed to pay Dr. Bäcker the
6 reasonable value of services requested and rendered, and wrongfully converted Dr. Bäcker's money. The
7 evidence at the hearing will bear out Dr. Bäcker's claims. An award should be entered in Dr. Bäcker's
8 favor.

9
10 Respectfully submitted,
11 Dated: May 15, 2024 HADSELL STORMER RENICK & DAI LLP
12 ROBERT D. NEWMAN, ATTORNEY AT LAW

13
14 By *Morgan Ricketts*
15 Dan Stormer
16 Robert Newman
17 Morgan Ricketts
18 David Clay Washington
19 Attorneys for Claimant ALEX BÄCKER
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ATTACHMENT A

Attachment A
Pre-Judgment Interest Equations

- a. Severance beginning June 7, 2019: **\$45,707.75**
 - o 10% per annum statutory interest (simple) on \$91,666.67 from June 7, 2019 to May 31, 2024 (the last day of the arbitration) = \$137,374.42 (\$91,666.67 + \$45,707.75).
- b. Pre-2016 compensation beginning on June 7, 2019: **\$115,846.23¹**
 - o 12% interest compounding monthly: \$115,846.23
 - \$704,541.91 (amount due to Dr. Backer on October 20, 2021), less \$387,871.00 paid² to Dr. Backer on October 20, 2021 = \$316,670.91 due and unpaid to Dr. Backer as of October 20, 2021.
 - 12% per annum interest compounding monthly on \$316,670.91 from October 21, 2021 to May 31, 2024 = \$432,517.14 (representing \$316,670.91 plus \$115,846.23 in interest).
- c. Change of Control Bonus beginning October 20, 2021: **\$69,651.15**
 - o 10% per annum statutory interest (simple) on \$266,485.00 from October 20, 2021 to May 31, 2024 = \$336,136.15 (\$266,485.00 + \$69,651.15).
- d. Prorated bonus beginning June 7, 2019: **\$42,277.59**
 - o 10% per annum statutory interest (simple) on \$84,787.50 from June 7, 2019 to May 31, 2024 = \$127,065.09 (\$84,787.50 + \$42,277.59).
- e. Health Insurance Costs beginning June 7, 2019: **\$10,885.92**
 - o 10% per annum statutory interest (simple) on \$21,831.66 from June 7, 2019 to May 31, 2024 = \$32,717.58 (\$21,831.66 + \$10,885.92).
- f. Consultant pay beginning October 20, 2021: **\$176,576.25**
 - o 10% per annum statutory interest (simple) on \$675,580.00 from October 20, 2021 to May 31, 2024 = \$852,156.25 (\$675,580.00 + \$176,576.25).
- g. Credit card charges beginning on June 21, 2021: **\$1,152.20**
 - o 10% per annum statutory interest (simple) on \$3,912.12 from June 21, 2021 to May 31, 2024 = \$5,064.32 (\$3,912.12 + \$1,152.20).
- h. Personal tax deductions beginning on April 15, 2017: **\$15,738.40**
 - o 10% per annum statutory interest (simple) on \$22,068.83 from April 15, 2017 to May 31, 2024 = \$37,807.23 (\$22,068.83 + \$15,738.40).

¹ Applying Respondent's position (7.5% interest throughout, compounding annually) prejudgment interest would be **\$53,656.31**, calculated as follows:

- \$646,043.68 (amount due to Dr. Backer on October 20, 2021), less \$387,871.00 paid to Dr. Backer on October 20, 2021 = \$258,172.68 due and unpaid to Dr. Backer as of October 20, 2021.
- 7.5% per annum interest compounding annually on \$258,172.68 from October 21, 2021 to May 31, 2024 = \$311,828.99 (representing \$258,172.68 + \$53,656.31 in interest).

² According to Respondent's own spreadsheet, on October 20, 2021, it deducted \$293,620.00 from Dr. Backer's pre-2016 compensation (the sum of \$199,000.00 in "payments to AB-Inventio," \$23,761.00 in "Misc payments for Alex Backer personal" and \$70,859.00 in "AMEX credit card payments for AB-Inventio"). As a result, according to Respondent's records, of the \$457,385.00 paid to Dr. Backer on October 20, 2021, \$387,871.00 was payment for his pre-2016 compensation:

- \$681,491.00 calculated by Respondent as due on October 20, 2021 for deferred compensation (\$508,022.00 + \$173,469.00), less \$293,620.00 calculated by Respondent as due to Respondent = \$387,871.00.

PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 128 N. Fair Oaks Avenue, Pasadena, California 91103.

On May 15, 2024, I served the foregoing document described as: **CLAIMANT ALEX BÄCKER'S ARBITRATION HEARING BRIEF** on the interested parties in this cause by placing true and correct copies thereof in envelopes addressed as follows:

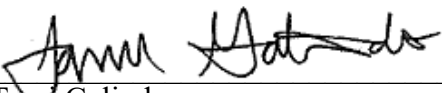
Gregory D. Wolflick Theodore S. Khachaturian Wolflick, Khachaturian & Bouayad, APC 130 N. Brand Blvd., Suite 410 Glendale, California 91203 Email: greg@wolfsim.com theo@wolfsim.com geri@wolfsim.com (Assistant)	Attorneys for Respondent QLESS, INC.
Heather McAdams HOGAN LOVELLS US LLP 390 Madison Avenue New York, New York 10017 Telephone: (212) 918-3000 Email: heather.mcadams@hoganlovells.com	Attorneys for Respondent QLESS, INC.
Jon M. Talotta HOGAN LOVELLS US LLP 8350 Broad Street, 17th Floor Tysons, Virginia 22102 Telephone: (703) 610-6100 Email: jon.talotta@hoganlovells.com	Attorneys for Respondent QLESS, INC.
Arbitrator Christine A. Page c/o Daphne J. Crayne Manager of ADR Services American Arbitration Association Direct Dial: (559) 490-1914 Email: cpage@pagedrs.com daphnecrayne@adr.org	Arbitrator

XX BY E-MAIL

XX I served the above-mentioned document electronically on the parties listed to their e-mail addresses listed above and, to the best of my knowledge, the transmission was complete and without error in that I did not receive an electronic notification to the contrary.

Executed on May 15 2024, at Pasadena, California.

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Tana Galindo
Declarant