

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>QLESS, INC.,¹</p> <p style="text-align: center;">Debtor.</p>	<p>Chapter 11 (Subchapter V)</p> <p>Case No.: 24-11395 (BLS)</p> <p>Re: Docket No. 122</p>
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MOTION TO CONTINUE CONFIRMATION HEARING

Alex Bäcker (“Bäcker”) and Cerocar Investment Trust, Ricardo Bäcker, Tom Mitchell and Xianzhong Chen (together, the “Preferred Shareholders,” and with Bäcker, the “Movants”), by and through their undersigned counsel, hereby file this motion (the “Motion”) to continue the hearing to consider confirmation of the *Amended Plan* [D.I. 122-1] (the “Plan”),² presently scheduled for Tuesday, August 27 at 2:00 p.m. (ET) the (the “Confirmation Hearing”). In support of this Motion, the Movants respectfully state as follows:

PRELIMINARY STATEMENT

1. As set forth in more detail in Movants’ *Objection of Alex Bäcker and Certain Preferred Shareholders to Debtor’s Subchapter V Eligibility and Plan* [D.I. 118] (the “Objection”), Movants assert that the Debtor is not eligible for subchapter V, and that confirmation of the Plan should be denied, for all of the reasons enumerated therein. What the Objection may not make clear, is the time frame within which confirmation of the Plan is being sought by the

¹ The Debtor’s principal place of business and service address is 21 Miller Alley, Suite 210, Pasadena CA 91105.

² Capitalized terms used but not otherwise defined herein shall have the meaning given to them in the Plan or the Objection, as applicable.



Debtor a mere 69 days after the Petition Date. For the benefit of the Court, below is a time line of all of the events that fall within the eight (8) days leading up to the proposed Confirmation Hearing:

<u>Date</u>	<u>Event</u>
August 19, 2024	General Bar Date; Movants timely file proofs of claim
August 20, 2024	Debtor objects to all proofs of claim timely filed by Movants
August 20, 2024	Debtor responds, in part, to Movants' informal document requests
August 21, 2024	Deadline to vote on the Plan; Movants vote to reject the Plan
August 21, 2024	Deadline to object to confirmation of the Plan; Movants filed the Objection
August 21, 2024	Debtor files Amended Plan
August 22, 2024	Movants file 3018 Motion and related motion to shorten
August 23, 2024	Deadline to file notice of agenda for Confirmation Hearing
August 27, 2024	Confirmation Hearing

2. The parties met and conferred on August 2, 2024, at which time Movants raised their concerns with respect to subchapter V eligibility, the valuation of the business contained in the liquidation analysis, the deathtrap for general unsecured claims, and the gatekeeper, exculpation, and injunction provisions of the Plan. Debtor waited until just four (4) business days before the Confirmation Hearing (and after the objection deadline) to file its Amended Plan to address some, but not all, of these issues.

3. Before the Court can even consider confirmation of the Plan (which Movants assert should be denied, in any event), the Court will have to address the Debtor's eligibility to be a subchapter V debtor and the Movant's 3018 Motion. These are fact and evidence intensive issues, for which discovery is not complete and briefing is not complete. Logic dictates that a hearing to

consider these crucial gating issues precede any hearing to consider confirmation of the Plan, as the Plan is moot if the Debtor is ineligible for subchapter V and the 3018 Motion will determine whether the Class 4 Unsecured Creditors have accepted or rejected the Plan.

4. Moreover, there is no true urgency to rush to confirmation in this case—which is funded by an insider who is also the sole beneficiary of the entire bankruptcy process—while trampling the due process rights of Movants and the requirements of the bankruptcy code and bankruptcy rules.

5. For these reasons, Movants request that the Confirmation Hearing be adjourned for two weeks to allow sufficient time to complete all necessary discovery related to eligibility and confirmation, allowed the parties to complete briefing on the eligibility objection and 3018 Motion, and adjudicate the Debtor’s eligibility for subchapter V, and consider the 3018 Motion.

BACKGROUND

A. The Bankruptcy Filing

6. On June 19, 2024, (the “Petition Date”), QLess, Inc. (“QLess” or the “Debtor”) commenced this case by filing a voluntary petition for relief under subchapter V of chapter 11 of the Bankruptcy Code (the “Petition”) [D.I. 1]. On the Balance Sheet that was included with the Petition, the Debtor listed its “Total Current Liabilities” as \$6,934,907.79 and its “Total Liabilities” as \$13,504,290.20. *See* Petition, p. 14.

7. Debtor is authorized to continue to operate its businesses and manage its properties as debtor and debtor-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.³ On June 2, 2024,

³ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

David M. Klauder was appointed as the subchapter V trustee [D.I. 12]. No committee of unsecured creditors was appointed in these cases.

B. Prepetition Litigation, Proofs of Claim, Claim Objections

8. As described in more detail in Movants' Objection, Movants have a number of claims against the Debtor and other defendants related to Palisades Growth Capital II, L.P. ("Palisades") arising from an improper 2021 Merger Transaction through which Palisades usurped control of QLess, which claims are the subject of ongoing litigation commenced prior to the Petition Date.

9. On December 27, 2023, Bäcker and the Preferred Shareholders filed a verified complaint in the Court of Chancery of the State of Delaware ("Chancery Court") bringing various claims for breach of fiduciary duty relating to the Merger Transaction against QLess, Palisades, and the Palisades Directors (the "Shareholder Litigation"). The Shareholder Litigation is now stayed as to the Debtor by operation of the automatic stay, and is temporarily stayed as to the other defendants by consent of the parties, through August 30, 2024.

10. As a result of his termination following the Merger Transaction, in June 2022, Bäcker submitted claims against QLess to arbitration in accordance with his employment agreement for unpaid compensation under his employment agreement and for consulting services, severance, and certain bonuses, which total approximately \$2.4 million (collectively, the "Arbitration Claims"). The arbitration is stayed by operation of the automatic stay.

11. On August 19, 2024, Bäcker (the "Bäcker Shareholder Litigation Claim") and the Preferred Shareholders (the "Preferred Shareholder Claims," and together with the Bäcker Shareholder Claim, the "Shareholder Litigation Claims") filed the proofs of claim listed in the

chart below asserting general unsecured claims against the Debtor based on the claims and causes of action asserted by the Creditors in the Shareholder Litigation:

Claimant	Claim Amount	Claim No.
Alex Bäcker	Unliquidated ⁴	13
Xianzhong Chen	\$13,331.96	17
Cerocar Investment Trust	\$249,998.61	18
Ricardo Bäcker	\$24,983.57	19
Thomas M. Mitchell Living Trust ⁵	\$216,665.17	21

12. Also on August 19, 2024, Bäcker filed Proof of Claim No. 11 in the amount of \$3,500,765.32 (the “Arbitration Claim,” and together with the Shareholder Litigation Claims, the “Claims”). The Arbitration Claim 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.

13. Despite scheduling substantially similar disputed general unsecured claims and amounts for all of the Claims except Bäcker’s claims (for which an arbitration claim was scheduled with a blank amount), the very next day, on August 20, 2024, Debtor filed (i) *Debtor’s Substantive Objection to Proofs of Claim 11 and 13 Filed by Alex Backer* [sic] [D.I. 110] (the “Bäcker Claim Objection”), which seeks to disallow and expunge the Bäcker Shareholder Litigation Claim and the Arbitration Claim, and (ii) *Debtor’s First Omnibus Objection to Proofs of Claim 17, 18, 19, 20, and 21 Filed by Certain Preferred Shareholders (Substantive)* [D.I. 111] (the “Shareholder Claim Objection,” and together with the Bäcker Claim Objection, the “Claim Objections”), which

⁴ The Bäcker Shareholder Litigation Claim was filed in an “unliquidated” amount as such claim was filed to preserve any rights Bäcker may have as part of the Shareholder Litigation. For the avoidance of doubt, Bäcker seeks to have this claim valued at \$1.00 for voting purposes.

⁵ A duplicate claim in the same amount was filed at Proof of Claim No. 20 on behalf of “Tom Mitchell.” Proof of Claim No. 21, which was filed on behalf of “Thomas M. Mitchell Living Trust,” was filed to amend the creditor name on Proof of Claim No. 20.

seeks to disallow and expunge the Preferred Shareholder Claims. The Debtor essentially asserts its untried litigation position in both the Chancery Litigation and Arbitration to say the Claims should be disallowed in their entirety. Notably, neither the Chancery Litigation nor Arbitration had reached a ruling in support of Debtor's position, nor had any of Movants' claims in those actions been dismissed.

14. The Movants' Claims were timely filed prior to the General Bar Date. However, upon information and belief, the Debtor did not provide Movants with ballots to enable them to vote on the proposed Plan by the voting deadline of August 21, 2024 at 5:00 p.m. (ET) (the "Voting Deadline") by returning physical ballots received by the Voting Deadline with no option for electronic submission of ballots. Movants nevertheless obtained ballots from the Debtor's claims and noticing agent and successfully hand delivered ballots to the claims and noticing agent by the Voting Deadline, each voting to reject the Plan.

C. The Schedules and SOFAs, 341 Meeting, Eligibility Concerns, and Discovery

15. On July 17, 2024, the Debtor filed the *Schedules of Assets and Liabilities for QLess, Inc. (Case No. 24-11395)* [D.I. 66] (the "Schedules"), as subsequently amended on August 2, 2024 [D.I. 91] (the "Amended Schedules"), listing the Debtor's total liabilities as \$8,111,375.37. *See* Schedules, p. 3; Amended Schedules, p. 3.

16. On July 17, 2024, the Debtor also filed the *Statement of Financial Affairs for QLess, Inc. (Case No. 24-11395)* [D.I. 67] (the "SOFA"), as subsequently amended on August 2, 2024 [D.I. 92] (the "Amended SOFA"), which listed \$2,469,749.33 as being paid within the 90 days before the Petition Date. *See* SOFA, pp. 26-28; Amended SOFA, pp. 26-28. Additionally, the Amended SOFA reflects that the day before the Petition Date, the Debtor made several large

payments totaling \$350,230.34, and on the Petition Date, the Debtor made a payment of \$18,904.11. *Id.*

17. On June 28, 2024, the United States Trustee scheduled a meeting of creditors pursuant to Section 341 (the “341 Meeting”) for July 19, 2024 at 2:00 p.m. [D.I. 38, 39].

18. On July 19, 2024, the initial 341 Meeting was held by the United States Trustee, at which the Debtor’s Chief Executive Officer, James Harvey (the “Debtor Representative”) appeared and testified on behalf of the Debtor regarding the Petition, Schedules, and SOFA. A true and correct copy of the transcript of the 341 Meeting is attached to the Objection, but in short, the testimony of Debtor’s witness revealed troubling omissions from the Schedules and SOFA, lacked detail about critical liabilities of the Debtor (such as the secured debt), described for the first time previously undisclosed contractual relationships with potential non-debtor affiliates, could not describe in any way the results of a 2023 valuation of the company, and could not describe any investigation into avoidance actions given no value under the Plan or liquidation analysis, among other deficiencies. At the end of the 341 Meeting, the United States Trustee adjourned, but did not close, the meeting.

19. Following the 341 Meeting, on August 2, 2024 (before the Debtor even filed its Amended Schedules and Amended SOFA), counsel for Movants met and conferred with counsel for the Debtor regarding the deficiencies highlighted at the 341 Meeting. The Debtor would not agree to produce the same documents produced to the United States Trustee to address its concerns regarding eligibility, would not agree to informal discovery, and would not agree to waive or shorten the 30 day period for responses to formal discovery requests (which, even then, would have run five days past the scheduled Confirmation Hearing).

20. Nevertheless, on August 16, 2024, Movants issued informal discovery requests to the Debtor via email. On August 20, 2024, the Debtor produced certain responses to the informal requests and responsive documents, including a copy of a 2023 valuation of the business that was over \$26 million higher than the Debtor's valuation of the business for the purposes of the Plan and liquidation analysis. However, a number of Movants' informal discovery requests remained outstanding.

21. On August 21, 2024, counsel for Movants and Debtor again met and conferred regarding the Claims, Claim Objections, voting, the forthcoming 3018 Motion, the forthcoming Objection to eligibility and confirmation, and the outstanding informal discovery requests. When asked for specific responsive documents, the Debtor refused to produce anything further.

D. The Objection

22. On August 21, 2024, Movants timely filed the Objection, asserting an objection to the Debtor's eligibility for subchapter V,⁶ and objecting to confirmation of the Plan on this basis and others—namely a failure to satisfy the best interest test, failure to meet the requirement of good faith, failure to attribute any value whatsoever to the nearly \$2.5 million in potential preference actions, and several impermissible proposed Plan provisions, including a death trap provision penalizing unsecured creditors who vote against the Plan and a gatekeeper provision blocking litigation against non-Debtor parties.

⁶ Under Federal Rule of Bankruptcy Procedure (“Bankruptcy Rule”) 1020(b), a party in interest may file an objection to a debtor's election to proceed under subchapter V of chapter 11 within 30 days after the conclusion of the 341 Meeting, which in this case would be September 11, 2024, as the 341 Meeting concluded on August 12, 2024. Thus, Movants filed the Objection more than three weeks before the statutory deadline to do so.

23. After the Plan objection deadline, the Debtor filed an amended Plan which addresses some (but not all) of the impermissible or inappropriate Plan provisions, but does not address the other impediments to confirmation.

E. The 3018 Motion

24. On August 22, 2024, just two days after the Debtor objected to all of Movant's Claims, Movants filed the *Motion of Alex Bäcker and Certain Preferred Shareholders for Entry of an Order Pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Debtor's Plan* [D.I. 123] (the "3018 Motion"). The 3018 Motion seeks temporary allowance of Movants' Claims for voting purposes to avoid disenfranchisement in the Debtor's proposed Plan process. Due to the Debtor's refusal to consider adjournment of the Confirmation Hearing, Movants were forced to seek expedited consideration of the 3018 Motion to ensure it can be heard at or prior to confirmation, which motion to expedite remains pending.

F. The August 27, 2024 Hearing

25. The hearing to consider confirmation of the Plan is currently scheduled for August 27, 2024 at 2:00 p.m. (ET) (the "Confirmation Hearing"). Based on this week's pleadings alone, the matters set for that hearing will include (i) an evidentiary hearing for the Debtor to establish its eligibility for subchapter V, which will undoubtedly require live testimony, (ii) a requested hearing necessary to consider the 3018 Motion for Plan voting purposes, which, subject to the Court's discretion, may require evidence or extended argument regarding the merits of the underlying Claims, and (iii) confirmation of the Plan, which again will require significant testimony from a Debtor witness regarding the proposed depressed valuation, investigation and

lack of investigation into potential estate causes of action, in addition to legal argument related to the remaining problematic Plan provisions.

ARGUMENT

A. The Confirmation Hearing Should Be Adjourned

26. Simply put, proceeding on the timeline proposed by the Debtor here will needlessly, unduly burden the parties and the Court. There are crucial gating issues, such as the Debtor's eligibility for subchapter V and the Movants' voting rights under the 3018 Motion, which logically and legally must be determined before the Debtors plow forward to confirmation of the proposed Plan. Both of these matters will require significant time for the parties to prepare and present to the Court, including substantial evidence with respect to the eligibility issue. Moreover, the Debtor has not even responded to the eligibility arguments raised in the Objection, likely because there has been no time to do so. In order to allow full briefing, completion of discovery, and presentation of evidence and argument to the Court on this matter, the hearing should be adjourned. Similarly, the 3018 Motion was only filed yesterday afternoon (since the Claims were filed Monday and the Claim Objections were filed Tuesday). Movants understand the Debtor intends to file an objection to the 3018 Motion today, but again, Movants are entitled an opportunity to reply in order to put complete legal arguments before the Court to allow the Court to rule on the issues. There is not enough time to do so by Tuesday.⁷

27. It follows that confirmation of the Plan is also not ripe for adjudication on August 27. The Debtor has not filed any brief in support of confirmation, nor has it filed any reply to the substantial legal and factual barriers to confirmation raised by the Objection because there has not

⁷ Movants have sought expedited relief to have the 3018 Motion heard at the Confirmation Hearing, but would certainly agree to a longer briefing and hearing schedule on the 3018 Motion if their hands were not forced by the proposed timing for confirmation.

been sufficient time to do so. The Plan the Debtor has proposed would not be confirmable if it is not eligible for subchapter V, and Movants' votes rejecting the Plan (if the Claims are temporarily allowed for voting purposes) would result in the overwhelming rejection of the Plan by Class 4 General Unsecured Claims. The Confirmation Hearing should be adjourned until after the Court considers and rules on subchapter V eligibility and the 3018 Motion.

28. Importantly, the facts and circumstances of this case do not justify a rush to confirmation in the face of such significant legal and practical hurdles. This case is funded by a junior DIP provided by Palisades, who the Debtor's largest shareholder through the Merger Transaction that was the genesis of the Chancery Litigation and Arbitration Claims. Palisades is also the primary (if not exclusive) beneficiary of the Debtor's proposed Plan, which would result in Palisades' expanded ownership of the Debtor via a debt-to-equity swap of its \$3.5 million junior DIP claims into New Preferred Shares of QLess, free and clear of the litigation triggered by its prepetition bid for control, premised on a steeply discounted liquidation value apparently 97% below the Debtor's value just 18 months ago. The facts here merit a closer look and a reasonable amount of time to do so.

NOTICE

29. Notice of this Motion shall be provided to: (i) counsel for the Debtor; (ii) the United States Trustee; (iii) the subchapter V trustee; and (iv) those parties who have formally filed requests for notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. In light of the relief requested, the Creditors submit that no further notice is required.

CONCLUSION

30. For the reasons stated above, the Movants respectfully request that the Court adjourn the hearing on confirmation of the Plan to a later date, after a reasonable discovery, briefing, and hearing schedule on subchapter V eligibility and the 3018 Motion.

Dated: August 23, 2024
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, Laurel D. Roglen, hereby certify that, on this 23rd day of August, 2024, I caused a true and correct copy of the foregoing *Motion to Continue Confirmation Hearing* to be served by electronic service via Court's CM/ECF system on all parties who have registered for electronic service in these cases, as well as on the following parties in the manner indicated.

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Dated: August 23, 2024
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