Docket #0153 Date Filed: 09/11/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	
QLESS, INC.,	Chapter 11, Subchapter V
Debtor.	Case No. 24-11395 (BLS)

SUPPLEMENTAL BRIEF IN SUPPORT OF ELIGIBILITY AND PLAN CONFIRMATION

QLess, Inc., the debtor-in-possession in this case ("**Debtor**") submits this brief in further support of the Debtor's eligibility for Subchapter V relief ("**Eligibility**") and confirmation of the *Amended Plan* [Doc. 122] (the "**Plan**") and in response to the *Supplemental Memorandum in Support of the Objection of Alex Bäcker and Certain Preferred Shareholders to Debtor's Subchapter V Eligibility and Plan* [Doc. 147] (the "**Supplemental Objection**") filed by Alex Bäcker and his aligned former shareholders (the "**Objectors**"). This brief is supported by the entire record of this case and the *Declaration of Andrew De Camara in Support of Confirmation* (the "**De Camara Declaration**") attached as **Exhibit A** to the Debtor's *Brief in Support of Plan Confirmation* [Doc. 130] (the "**Confirmation Brief**"). In this brief, the Debtor once again demonstrates that it is and always has been eligible for relief under Subchapter V of Chapter 11, that the Debtor and the Plan meets all requirements under Bankruptcy Code § 1191 for confirmation of the Plan, and that the Supplemental Objection (together with the initial objection filed at Doc. 118) should be overruled in all respects.

PRELIMINARY STATEMENT[1]

The claims properly counted under Bankruptcy Code § 1182(1)(a) total $6,786,483.42

There is even enough room left under the $7.5 million cap that the contingent Shareholder Claims of $504,979.31 *could still be counted without bringing the total claims above the cap.* The Debtor has annotated Exhibit A to the Supplemental Objection to show this:

[1] Capitalized terms used but not defined in this brief are defined in the Plan.

Claimant	Amount	Objector Shareholder Claim	Counted for Eligibility	Notes
AAA American Arbitration Association	$10,000.00		$ 10,000.00	
Arizona Dept. of Revenue	$4,455.00		$ -	Claim estimated and unliquidated on face
Brex Credit Card	$23,832.75		$ -	Paid prepetition
Brex Credit Card	$70,000.00		$ -	Paid prepetition
Brex Credit Card	$18,904.11		$ 18,904.11	Assume *arguendo* not paid prepetition
California Franchise Tax Board	$856.78		$ -	Claim estimated and unliquidated on face
Celtic Bank	$6,445,047.91		$ 6,445,047.91	
Cerocaru Investment Trust	$249,998.61	$ 249,998.61		
Chipman Brown Cicero & Cole	$17,332.44		$ 17,332.44	
City of Philadelphia	$304.56		$ 304.56	
City of Philadelphia	$119.50		$ 119.50	
Colorado Dept. of Revenue	$9,004.00		$ 9,004.00	
Colorado Dept. of Revenue	$5,561.00		$ 5,561.00	
Comcast	$655.81		$ 655.81	
Dailey LLP	$44,723.65		$ -	D&O Insurance Claim - insider, contingent
Dept of Treasury – IRS	$5,000.00		$ -	Claim estimated and unliquidated on face
Epic Systems Corp.	$285.00		$ 285.00	
Global Data Risk LLC	$4,955.00		$ 4,955.00	
Insivia Technologies LLC	$20,000.00		$ 20,000.00	
Kevin Grauman and Mark Tapling	$54,208.65		$ -	Duplicates Dailey; insiders; contingent
Louisiana Dept of Revenue	$424.58		$ 424.58	
Louisiana Dept of Revenue	$168.00		$ 168.00	
Morris Nichols Arsht and Tunnel LLP	$248,837.64		$ -	Prepetition claim paid in full through settlement; objectors misconstrue settlement
Potter Anderson & Coroon	$67,408.90		$ -	D&O Insurance Claim - insider, contingent
Providence Partners, LLC	$110,583.85			
			$ -	Rejection damages are contingent on rejection, which hasn't occurred
Ricardo Backer	$24,983.57	$ 24,983.57		
Scherzer International	$380.00		$ 380.00	
Scopia Holdings LLC	$30,352.64		$ -	Duplicates Wilks; insider, affiliate; contingent
Stubbs Alderton & Markiles, LLP	$46,900.00		$ 46,900.00	
Thomas M. Mitchell Living Trust	$216,665.17	$ 216,665.17		
Texas Comptroller of Public Accounts	$2,000.00		$ -	Claim estimated and unliquidated on face
US Small Business Administration	$127,237.00		$ -	No claim filed by Lender; contingent at best
Wilks Law LLC	$30,352.64		$ -	D&O Insurance Claim - insider, contingent
Wolflick Khachaturian & Bouayad, APC	$139,260.07		$ 139,260.07	
Xianzhong Chen	$13,331.96	$ 13,331.96		
Prepetition Employee Wage, Reimbursement and Benefit Obligations	$117,500.00		$ 65,067.61	Actual non-insider prepetition Employee Expenses
State of Washington	$1,629.83		$ 1,629.83	
Prepetition Bank Fees	$484		$ 484.00	
	Totals	**$504,979.31**	**$ 6,786,483.42**	**Total with contingent Shareholder Claims counted**
				$ 7,291,462.73

The Objectors presented their Exhibit A without acknowledging that contingent, unliquidated, insider and affiliates claims and claims paid prepetition cannot be counted for Eligibility under Bankruptcy Code § 1182(1). The two right-most columns on the chart above correct the Objectors' misleading characterization of several claims and demonstrates—using the Objectors' own numbers in almost all respects[2]—that the Debtor is and always has been an eligible Subchapter V debtor, with debts—*even counting the contingent Shareholder Claims*, which the Debtor maintains should not be counted under § 1182(1)—**below the applicable cap of $7,500,000**. The Debtor has carried its burden to demonstrate Eligibility. The Objectors' arguments to the contrary should be rejected and their objections to Eligibility should be overruled.

Additionally, the Supplemental Objection narrows the Objectors' opposition to confirmation to three arguments: (1) that the "best interests" test under Bankruptcy Code § 1129(a)(7) is not met; (2) that the Debtor filed the Plan in bad faith; and (3) that there is something improper about the Plan's now-moot "death trap" provision. All three arguments fail. The Liquidation Analysis attached to the Plan uses reasonable assumptions about asset value in the context of a forced liquidation in a non-operating posture and is based on the expert assessment of Andrew De Camara, the Debtor's Chief Restructuring Officer. Mr. De Camara is a seasoned, highly-experienced restructuring professional with Sherwood Partners (which has liquidated hundreds of small technology-based companies). Mr. De Camara will testify to that experience at the confirmation hearing and to the veracity, reasonableness, and reliability of the values assumed in the Liquidation Analysis. The Objectors cannot overcome this evidence by stubbornly repeating the nonsensical argument that a going-concern valuation performed for investment purposes some two years ago bears any relevance to a Liquidation Analysis under a hypothetical Chapter 7 liquidation. There is no contrary evidence to the Liquidation Analysis, and the Objectors have proffered no expert report, declaration, or witness.

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[2] For the Court's convenience, the Debtor hid additional columns in the Objectors' Exhibit A chart that contained information irrelevant to this brief and with which the Debtor has no dispute. Although the Debtor does not concede that proofs of claim filed later in the case should count for Eligibility—*see In re Parking Mgmt.*, 620 B.R. 544 (Bankr. D. Md. 2020)—the Debtor nonetheless is counting non-insider, non-contingent, liquidated proofs of claim in the Corrected Chart toward Eligibility.

As for bad faith, the Objectors clearly don't like the Debtor or its management, but that doesn't mean the Debtor has acted in anything short of good faith at all times relevant to this case. Obtaining unsecured credit from its largest shareholder before the filing to shore up operations and maximize the chance of a soft landing into bankruptcy is not bad faith. Engaging in well-advised strategic planning before filing by arranging for financing, paying a small number of critical vendors and professionals and settling a large legal bill for counsel critical to ongoing litigation are not acts in bad faith. Finally, incentivizing creditors voting on the Plan—a group that would not have included the Objectors had the Debtor not generously declined to invoke Bankruptcy Rule 3018—to vote affirmatively by offering an enhanced recovery for an affirmative plan vote, thereby minimizing litigation, is not bad faith. The Objectors cite no precedent for any of their arguments that the Debtor has engaged in bad faith here. There isn't any. Their opposition to confirmation should be overruled.

PROPER INCLUSION AND EXCLUSION OF DEBTS

In the complete, annotated chart on Page 2 of this Supplemental Brief (the "**Corrected Chart**"), the Debtor has noted the specific reasons for excluding several debts for purposes of Eligibility that the Objectors erroneously include in their Exhibit A and throughout their Supplemental Objection. More detail regarding each of the inclusions and exclusions follows:[3]

Tax Claims Unliquidated On Face

Arizona Dept. of Revenue. Claim No. 4 (Hearing Exhibit 15) should not be counted for Eligibility because the amounts claimed are stated as estimated (and, therefore, unliquidated) on the face of the proof of claim. Each of the four listed items on the fifth page of that proof of claim reads "Est. due to non-filing"—an admission that the claim is unliquidated. Bankruptcy Code § 1182(1)(a) counts only "liquidated" claims for Eligibility purposes.

California Franchise Tax Board. Claim No. 22 (Hearing Exhibit 19) should not be counted for Eligibility because the amount claimed is estimated (and, therefore, unliquidated) on

[3] Except as set forth in this brief, the Debtor agrees that the claims set forth on the Corrected Chart should be counted for Eligibility purposes.

the face of the proof of claim, which indicates that "FTB's records indicate a tax return has not been filed for the following tax year(s): 2024, 2023. Accordingly, FTB reserves the right to amend this claim based upon receipt of such income tax return(s), any audit or investigation of such tax return(s), or any other audit or investigation." Bankruptcy Code § 1182(1)(a) counts only "liquidated" claims for Eligibility purposes.

Dept. of Treasury – IRS. Claim No. 23 (Hearing Exhibit 14, which amended Claim No. 1, included on the Objectors' Exhibit A) should not be counted for Eligibility because the amounts claimed are stated as estimated (and, therefore, unliquidated) on the face of the proof of claim. Each of the two entries on the fourth page of Claim No. 23 reads, "ESTIMATED-SEE NOTE … LIABILITY IS ESTIMATED BASED ON AVAILABLE INFORMATION BECAUSE THE RETURN HAS NOT BEEN FILED." Bankruptcy Code § 1182(1)(a) counts only "liquidated" claims for Eligibility purposes.

Texas Comptroller. Claim No. 15 (Hearing Exhibit 18) should not be counted for Eligibility because the amount claimed is estimated (and, therefore, unliquidated) on the face of the proof of claim, which states both that "This claim is based, in whole or in part, on estimated liability due to the debtor's non-filing of a return or returns" and the single line item for 2024 franchise tax is noted with an "ER" basis, which the claim indicates means "Estimated Return." Bankruptcy Code § 1182(1)(a) counts only "liquidated" claims for Eligibility purposes.

Claims Satisfied Prepetition

Brex Credit Card. Despite receiving documentary proof that two of the Debtor's three payments to Brex in the days before the Petition Date were received by Brex before the petition was filed at approximately 6:00 p.m. Eastern on June 19, 2024—although not "posted" to the relevant accounts until days later, a common phenomenon the Court is surely familiar with—the Objectors persist in their baseless belief that these debts remained unpaid as of the petition's filing. The Debtor provided to Objectors' counsel credit card statements for Brex in documents QLESS 00799-825. [Hearing Exhibit 10] Because those statements reflect payments paid prepetition but only *credited* by Brex to the Debtor's account post-petition, the Debtor also provided QLESS 00826-830, a statement from Bridge Bank showing that two payments—one for $70,000 and one

for $23,832.75—were debited from the Debtor's checking account at Bridge Bank on June 18. [Hearing Exhibit 11] Even the Objectors acknowledge that those two remittances paid prepetition debt before the Petition Date—see Page 11 of the Supplemental Objection.

As for the last of the Debtor's three payments to Brex, for $18,904.11, which the Debtor initiated on the Petition Date, because the Bridge Bank statement indicates that payment didn't clear Bridge Bank until June 20, the Debtor will treat the $18,904.11 payment made on the Petition Date as unpaid as of the Petition Date and count that claim for Eligibility purposes. It is so reflected on the Corrected Chart.

Morris Nichols. There is no prepetition debt owed to Morris Nichols. Although not responsive to any of the Objectors' informal discovery requests, on September 6 the Debtor provided the Objectors with a copy of a settlement agreement between the Debtor and the Morris Nichols firm executed and performed on June 18, 2024 (one day before the Petition Date) (Hearing Exhibit 25), resolving a prepetition claim of $398,837.64 in full with the payment (accomplished by wire transfer completed on June 18) of $150,000. The Objectors grudgingly acknowledge this on Page 12 of their Supplemental Objection. But they mischaracterize the settlement agreement and attempt to mislead this Court regarding its effects. It is not "unclear that the Morris Nichols agreement actually reduced its claim at all …" The agreement provides: "Upon payment on June 18, 2024, of $150,000.00 (the "Settlement Amount") by the [Debtor] to [Morris Nichols] by wire transfer in accordance with the instructions below, [Morris Nichols] agrees (i) to accept the Settlement Amount in **full and final satisfaction** of the Gross Claim against the [Debtor] …" (The "Gross Claim" is defined as the "Principal Claim" of $398,837.64 and "all additional costs and other amounts owing and associated in any way with the Principal Claim …") The Objectors appear to be arguing that because Morris Nichols retained the right to assert a claim against the Debtor for the full amount *if* the payment were recovered as a preference, that means that the claim existed on the Petition Date and was *not* contingent.[4]

[4] The Objectors' argument is internally inconsistent. On one hand, they argue that the claim should be *included* for purposes of Eligibility but then also argue that the Debtor's payment of the settlement amount of June 18 "reduced the Debtor's liabilities that would have counted against the eligibility limit by $298,837.64." The Objectors discuss the Debtor's settlement with Morris Nichols (its own litigation counsel that continues to represent the Debtor in the

The Objectors' tortured logic regarding the possibility that the payment to Morris Nichols might constitute a preference shouldn't persuade anyone. Eligibility for Subchapter V (or for Chapter 12 and Chapter 13, for that matter) could never rely on the possibility that some of a debtor's prepetition payments were preferential and, therefore, the paid debts should be counted as unpaid. Were that so, every Subchapter V petition, every Chapter 13 petition, and every Chapter 12 petition would compel a full preference analysis and litigation to test defenses at the very outset of the case to assess eligibility. That is not only practically impossible, and not only incompatible with the purposes of Subchapter V, but it is also not contemplated by anything even hinted at in the Bankruptcy Code.

Small Business Administration (CIBC Claim). There is no claim to count. The Debtor inadvertently may have contributed to the lack of clarity regarding the PPP loan the Debtor was forgiven in 2021 by referring in previous submissions to the Court and the Schedules to the SBA as the creditor. That is inaccurate, as the correspondence attached to the Supplemental Objection as Exhibit B (and the correspondence it responded to, Hearing Exhibit 22 (the "**CIBC Letter**")) clearly shows. The Debtor borrowed its PPP loan from a private bank—in this instance, CIBC Bank USA—not from the SBA. [*See* Hearing Exhibit 21.] In all cases, PPP loans were made by private banks and guaranteed by the SBA. Servicing of the PPP loans was performed by the lending bank, not the SBA, and forgiveness applications were submitted to and processed by the lending bank, not the SBA. Here, the Debtor borrowed its PPP loan from CIBC Bank USA and applied for and received loan forgiveness from CIBC Bank USA. That is precisely why the CIBC Letter, which initially raised only the *possibility* of a clawback of borrowed funds in the first place, came from CIBC, not the SBA (which wasn't even copied on the CIBC Letter).

That's also why there is no claim to count. The Debtor scheduled this possible debt as contingent and unliquidated, and provided notice of the claims bar date to CIBC, who never filed

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Shareholder Litigation) as though the Debtor did something untoward. As people that claim to be creditors, why would they be arguing that *more* unsecured debt should be recognized to dilute their eventual recoveries from this case? Is it because their motives here are not as creditors but, rather, as disruptors who are making arguments directly against their own economic interests, just as voting against the Plan harmed their own economic interests by ensuring a far smaller payout to unsecured creditors?

a claim or even contacted the Debtor. In fact, CIBC never responded to the Debtor's years-old prior letter about this matter. Not only was the PPP loan-related claim contingent and unliquidated[5] as of the Petition Date, the subsequent claims process in this case demonstrates the correctness of that position and the Schedules in that the claim never existed, anyway.[6] CIBC never filed a proof of claim in this case (nor did the SBA, for that matter) and has never corresponded with the Debtor at any time on any topic since the CIBC Letter dated December 21, 2022. The claim doesn't exist and shouldn't be counted.[7]

Contingent Claims

Providence Partners. The rejection damages claim of the Debtor's Colorado office landlord should not be counted for Eligibility. The debt is contingent. The characterization of rejection damages claims—especially when the debtor did not seek to reject the lease at the beginning of the case but, rather, only later as part of plan confirmation, and the rejection of the subject lease would only occur if and when the Court confirms the Plan and it goes effective—is

[5] Because CIBC and the Debtor disagreed on the amount of the *potential* clawback and there was never a fixing of a determined amount, the claim is both contingent as to liability and unliquidated. *See, e.g., In re Burdock & Assocs.,* 2024 Bankr. LEXIS 1530 at *7 (Bankr. M.D. Fla. June 14, 2024) (considering Subchapter V eligibility, and finding a would-be disqualifying debt unliquidated, the court held, "the focus for liquidity is on the calculation or computation of the debt. A liquidated claim is one capable of simple calculation or computation where no judgment or discretion is involved. If judgment, discretion, or opinion, as distinguished from calculation of computation is required to determine the amount of the claim, it is unliquidated"); *In re Pennypacker,* 115 B.R. 504, 506 (Bankr. E.D. Pa. 1990) (considering a claim for Chapter 13 eligibility, the court held, "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion"). Here, as evidenced by the mere fact that the PPP lending and forgiveness formulae were so complicated that CIBC and the Debtor didn't agree on how they should be calculated, any claim based on an improvidently forgiven portion of a loan would be unliquidated because figuring out the amount of the claim is not a "simple calculation" but, rather, requires judgment, discretion, and even opinion and cannot be computed with exactness without such judgment and discretion.

[6] The SBA was not the lender of the Debtor's PPP loan and, therefore, not the creditor with respect to that loan. Thus, the Objectors' reference to the governmental bar date is completely irrelevant. Moreover, the SBA has made it clear to private PPP lenders that it is the private lender's responsibility, not the SBA's to file a proof of claim when a borrower becomes a debtor in a bankruptcy case: "Unless the loan has been fully forgiven, if the borrower files bankruptcy other than a Chapter 7 no asset bankruptcy, the Lender must provide SBA with a notice of the bankruptcy filing, file a proof of claim, and continue to monitor the bankruptcy." *SBA Procedural Notice,* dated as of July 15, 2021, downloaded from sba.gov on September 9, 2024, Hearing Exhibit 30. That the Debtor's PPP loan has been fully satisfied and forgiven is the only logical conclusion

[7] Now that the claims bar date of August 19, 2024, has passed without CIBC or the SBA filing a proof of claim, the Debtor will delete the reserved expense for the PPP loan from its balance sheet. As stated in its brief supporting confirmation, that expense was only ever included on the Debtor's balance sheet out of an abundance of caution by an exacting former CFO.

clear as a matter of logic and applicable precedent. The Objectors acknowledge, as they must, that there are three reported bankruptcy court opinions (and no reported appellate decisions) addressing the issue of whether a lease rejection damages claim is contingent for purposes of Eligibility. Two of those cases—*Zhang*[8] and *Parking Mgmt.*[9]—are directly on point, holding that a lease rejection damages claim is contingent and, therefore, not counted for purposes of eligibility.

The most recent of these cases, *Zhang,* expressly declines to follow the older, third case, *Macedon,*[10] bluntly questioning its reasoning: "that decision overlooks the distinctive nature of a debtor's obligations under its executory contracts and unexpired leases, which differ in key respects from other debtor obligations."[11] Ultimately, *Zhang* concluded that a bankruptcy court should "rarely, if ever" treat a lease rejection damages claim as non-contingent:

> until the debtor elects either to assume or to reject an executory contract or unexpired lease, the amount and nature of its obligations under that contract or lease are contingent and unliquidated. … Because the amount and nature of the debtor's obligations, as well as whether these are even "debts," depend on an uncertain future event—the debtor's election to either assume or reject—any eventual debt is both contingent and unliquidated prior to that election…. If a debtor were to reject a contract or lease on the petition date, it could be argued that the debtor's rejection damages liability is a noncontingent debt as of that date for purposes of the subchapter V debt limit. However, such a circumstance is relatively rare … And even a debtor that rejects a contract or lease on the petition date may well have strong arguments that its rejection liability is contingent and/or unliquidated. For example, at least one court has held that a debtor's rejection liability is contingent, for subchapter V eligibility purposes, until the court approves the debtor's decision to reject rather than assume. *See Parking Management,* 620 B.R. at 553-54.[12]

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[8] *In re Zhang Med. P.C.,* 655 B.R. 403 (Bankr. S.D.N.Y. 2023).

[9] *In re Parking Mgmt.,* 620 B.R. 544 (Bankr. D. Md. 2020).

[10] *In re Macedon Consulting, Inc.,* 652 B.R. 480 (Bankr. E.D. Va. 2023) (repeatedly stating that it "agrees" with *Parking Mgmt.* but then bizarrely ruling exactly contrary to *Parking Mgmt.*).

[11] *Zhang*, 655 B.R. at 411.

[12] *Id.* at 412. The bankruptcy court then noted: "In *Macedon Consulting,* the debtor moved to reject its leases on the petition date … but the court did not base its decision on this fact and, as a result, did not address these issues" *Id.,* n.8. The *Zhang* court also noted that the *Macedon* court might have avoided its "curious[ ]" ruling by basing its "decision on the unusual fact that the debtor had moved on the petition date, rather than on a later date, to reject its leases, even though this fact arguably could have provided a sounder basis for the court's conclusion that the debtor's lease liability was noncontingent on the petition date." *Id.* at 411, n.6.

The *Zhang* court also noted the illogic of the *Macedon* ruling: "If this ruling were followed, it would greatly restrict subchapter V eligibility, since many debtors otherwise eligible for that subchapter are parties to long-term leases or contracts with future payment obligations well in excess of $7.5 million."[13]

The Objectors, of course, prefer the outlier *Macedon* ruling despite that the later *Zhang* court expressly rejected it and its facts demonstrate why it can't help the Objectors here. Even the *Macedon* court noted that the debtor in that case moved to reject two leases *on the petition date* and put lease rejection damages claims on its Schedule F *on the petition date.*[14] None of that happened here. The Debtor has *never* moved to reject the Providence Partners lease outside of a Plan that has not yet been confirmed. If the Objectors get their way, the Plan will never be confirmed and the Providence Partners lease will still not be rejected and their lease rejection claim will still be contingent and unliquidated. The Providence Partners claim was contingent and unliquidated on the Petition Date and remains so today.[15] That claim cannot be counted for Eligibility.

Here, the first time the Debtor evinced its intention to reject the Providence Partners lease was when it included the lease in the exhibit of rejected contracts in its original plan filed on July 19, 2024, a full month after the Petition Date. This fact alone distinguishes this case from *Macedon.* More importantly, that lease is still not rejected and may never be, since this Court has not yet ruled on the rejection of that lease, either as part of confirmation or otherwise. Providence Partners' lease rejection claim is *still contingent* today, just as it was on the Petition Date.

Shareholder Claims. The only belated argument the Objectors advance in opposition to the Debtor's position that the Shareholder Claims, totaling just over $500,000, are contingent claims and not appropriately counted for Eligibility under Bankruptcy Code § 1182(1)(a) is to

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[13] *Zhang,* 655 B.R. at 411. Now that the debt limit for Subchapter V has returned to just over $3 million, the *Zhang* court's concerns are all the more relevant.

[14] *Macedon,* 652 B.R. at 484.

[15] Under Colorado law, a lease rejection damages claim remains subject to the duty of mitigation, which makes the claim unliquidated and contingent on that basis, as well. *See, e.g., In re Shane Co.,* 464 B.R. 32 (Bankr. D. Colo. 2012); *Schneiker v. Gordon,* 732 P.2d 603 (Colo. 1987).

point out that neither the Merger Agreement nor the Debtor's Amended Articles of Incorporation (only the latter of which, oddly, was attached to the Supplemental Objection—the Merger Agreement is Hearing Exhibit 26) require the Preferred Shareholders to execute a release as a condition to receiving their per-share merger consideration. True enough.[16] But that has never been the basis for the Debtor's position that the Shareholder Claims are contingent. Rather, the Merger Agreement expressly requires that each Preferred Shareholder tender to the Debtor a Letter of Transmittal and Form W-9 as a condition precedent to receiving the merger consideration:

> To receive payment of the consideration ("Consideration") represented by your Securities, you (the "Undersigned") must complete and sign this Letter of Transmittal, including the applicable exhibits, and deliver this Letter of Transmittal to QLess. … The Undersigned understands that (i) unless and until the Undersigned submits a properly completed Letter of Transmittal according to the terms herein, no payments of Consideration pursuant to the Merger Agreement shall be made to the Undersigned or its designee.

The Objectors do not dispute that the Preferred Shareholders never submitted a Letter of Transmittal to the Debtor. The Debtor, in its *Debtor's First Omnibus Objection to Proofs of Claim* [Doc. 111], asserted that the Shareholder Claims should be disallowed in part because of this failure. But for purposes of Eligibility, the Shareholder Claims are contingent because they depend on a future event (that is, the submission of Letters of Transmittal) that has not occurred and may never occur.[17] Both the *Zhang* and *Macedon* courts relied on the same definition of "contingent": "a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy."[18]

The Objectors do not and cannot argue that the Preferred Shareholders (that is, the holders of the Shareholder Claims totaling approximately $505,000) *ever* tendered Letters of Transmittal,

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[16] The Objectors have never raised this argument before now. They sought and obtained from this Court a continuance of the confirmation hearing precisely so the Objectors could conduct further discovery on this issue. They did none, which is unsurprising because they already had all the information they needed.

[17] The Objectors did not timely submit the required Letters of Transmittal, choosing instead to initiate litigation. Thus, they can never meet the timeliness requirement, absent receiving a court ruling on some basis extending the deadline.

[18] *Mazzeo v. United States (In re Mazzeo),* 131 F.3d 295, 303 (2d Cir. 1997) (Chapter 13 case regarding eligibility).

and certainly not before the Petition Date. Under the widely-relied-on definition of "contingent" from the Second Circuit in *Mazzeo*, the future event—here, the tendering of Letters of Transmittal—has not occurred, so the debts have "not become an obligation" and are, therefore, contingent.

The tendering of Letters of Transmittal was no mere ministerial act. The Letters of Transmittal were used as a means to: (a) surrender the securities canceled in the merger in exchange for the merger consideration; (b) obtain from the Preferred Shareholders the representation that they were the legal and beneficial owner of the surrendered securities as of the closing of the merger and that the securities were owned free and clear of liens; (c) obligate the Preferred Shareholders to execute and deliver any additional documents reasonably necessary to complete the payment of the merger consideration; (d) obtain from the Preferred Shareholders a waiver of appraisal and dissenter's rights; (e) confirm that the Preferred Shareholders were bound by the merger agreement and the indemnification provisions set forth in it; and (f) provide necessary W-9 tax and wire instruction information.[19] The Letter of Transmittal was a significant, material document,[20] and each of the Preferred Shareholders refused to tender one, opting instead to sue the Debtor, members of its board of directors, and its investment banker, among others, in the Shareholder Litigation. *The Preferred Shareholders intentionally chose to refuse to satisfy a condition precedent to the Debtor's obligation to pay merger consideration.* Because that critical future event did not occur by the Petition Date, the Shareholder Claims were at least contingent (if not disallowable) on the Petition Date. The Shareholder Claims cannot be counted for Eligibility under Bankruptcy Code § 1182(1).

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[19] Requiring Form W-9s from creditors is a common provision in most Chapter 11 plans, as this Court surely appreciates. It's a material term of a Chapter 11 plan because obtaining the tax information in a Form W-9 assists the disbursement agent in ensuring that all appropriate reporting of plan distributions are able to be made to the IRS. It's a term in the Debtor's Plan, one the Objectors evidently have no quarrel with despite their apparent antipathy to providing Form W-9s.

[20] At least one bankruptcy court disqualified potential involuntary petitioning creditors because they "had not delivered necessary paperwork, such as releases and settlement verifications forms" to the debtor, rendering those creditors' claims "contingent as to liability …" *In re Raymark Industries, Inc.,* 99 B.R. 298, 301 (Bankr. E.D. Pa. 1989).

D&O Insurance Claims. The Debtor scheduled claims for certain law firms representing Shareholder Litigation defendants who have invoked a right to indemnification from the Debtor and who are covered by the Debtor's directors and officers insurance policy (collectively, the "**D&O Insurance Claims**"). The D&O Insurance Claims arise in connection with claims made by the Debtor's directors and officers in connection with expenses incurred by them through the Petition Date in defending the Shareholder Litigation. The Debtor's Schedules include claims for three law firms representing director or officer defendants—Dailey for $44,723.65, Potter for $67,408.90, and Wilks for $30,352.64, for a total of $142,485.19.

These claims should not be counted because they are claims of insiders and because they are contingent. First, these law firms' claims are really the claims of the directors and officers—that is, insiders—those firms represent, meaning that they are *insider claims* that shouldn't be counted for Eligibility on that basis. Second, the claims are contingent because they will not be paid if, after the litigation concludes, it is determined that the directors and officers are not entitled to indemnification.

The D&O Insurance Claims derive from Section 45(a) of the Debtor's bylaws (Hearing Exhibit 24): "The corporation will indemnify its directors and executive officers … to the fullest extent not prohibited by the DGCL or any other applicable law." Importantly, the bylaws also provide that any defense costs advanced to directors and officers is subject to the Debtor's clawback if it is later determined that the directors and officers are not entitled to indemnification. *See* Bylaws § 45(c). For example, under Delaware law a director or officer is not entitled to indemnification for actions taken in bad faith.[21] Accordingly, as of the Petition Date, the D&O Insurance Claims were also *contingent* on a future event—the directors and officers not later being found to have acted in bad faith at the conclusion of the Shareholder Litigation. The D&O

[21] *See* 8 Del C. § 145 (corporations may indemnify directors and officers "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation"); *New Enter. Assoc. 14 v. Rich,* 295 A.3d 520, 559 (Del. Ch. 2023) ("Section 145(a) … authorizes a corporation to indemnify a director or officer … 'as long as 'the person acted in good faith …'").

Insurance Claims are *both insider claims and contingent claims*, both reasons why they shouldn't be counted for Eligibility.

Kevin Grauman and Mark Tapling. Claim No. 12 (Hearing Exhibit 17) encompasses the scheduled claim for those individuals' counsel, Dailey LLP.[22] Therefore, it is an insider claim and a contingent D&O Insurance Claim, not counted for Eligibility on those bases.

Scopia Holdings. Similarly, Claim No. 10 (Hearing Exhibit 16) cannot be counted for two independent reasons. First, the claim on its face comprises only prepetition invoices for Scopia Holdings' counsel in the Shareholder Litigation, Wilks Law, in the exact amount the Debtor included Wilks Law on its Schedule F. Counting the Scopia Holdings claim would inappropriately double-count the same debt. Second, Scopia Holdings is an insider of QLess Ltd., an affiliate and shareholder of the Debtor. Scopia holds more than 20% of QLess Ltd., which makes Scopia an affiliate of an insider and, therefore, an insider. Even were this claim not duplicative of another claim being counted, it could not be counted for Eligibility as a debt of an insider or affiliate under Bankruptcy Code § 1182(1)(a).

The D&O Insurance Claims are also contingent for another reason relating to the availability of insurance coverage to satisfy those claims. Before the Petition Date, the Debtor tendered the defense of the directors and officers in the Shareholder Litigation to its insurance carrier, Scale Underwriting Management Liability Insurance, an affiliate of Lloyds of London (the "**D&O Insurer**"), which sent two letters on March 28, 2024, and April 4, 2024, denying coverage of the directors and officers in connection with the Shareholder Litigation. [*See* Hearing Exhibits 27 and 28] But on August 2 the D&O Insurer reversed its decision and is now providing coverage under a reservation of rights. [*See* Hearing Exhibit 29] Thereafter, on August 20, 2024, and August 26, 2024, the Debtor requested that the D&O Insurer pay the D&O Insurance Claims, something the D&O Insurer is required to do under the Debtor's insurance policy. Accordingly, the Debtor's

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[22] Mark Tapling is a current member of the Debtor's board of directors and an insider. Kevin Grauman is the Debtor's former CEO and not presently an insider. Their joint proof of claim seeks only payment of the prepetition fees of their counsel, Dailey LLP, in an amount marginally higher than the amount the Debtor scheduled for Dailey LLP. The difference is attributable solely to the fact that Claim No. 12 includes prepetition June 2024 fees incurred by Dailey that the Debtor was not aware of when it prepared its Schedules.

obligation to pay the D&O Insurance Claims (which are already contingent on the future event of a finding that the directors and officers did not act in bad faith) are also contingent on another future event which may or may not occur—the D&O Insurer not satisfying those claims as they are required to under the applicable policy.

The D&O Insurance Claims are insider, contingent claims that should not be counted for Eligibility under Bankruptcy Code § 1182(1).

Prepetition Employee Expenses. The Corrected Chart above includes a debt of $65,067.61 for a category of non-insider prepetition claims including employee wages, commissions, expense reimbursement, and benefits (collectively, "**Employee Expenses**"). The total comprises all unpaid Employee Expenses paid post-petition.[23] Hearing Exhibit 23 is a breakdown of all prepetition Employee Expenses paid after the Petition Date.[24] This breakdown demonstrates both that (a) although the Debtor received authority to pay up to $117,500 in prepetition Employee Expenses, the actual prepetition Employee Expenses totaled only $70,171.00,[25] and (b) the Objectors are off-base when they incorrectly pull a $131,498 number out of the June MOR without context or explanation. The June MOR (Hearing Exhibit 12) reports the total amount of payroll-related expenses the Debtor paid for the *entire month of June,* which included both the prepetition Employee Expenses as well as the post-petition Employee Expenses accruing from June 20 – June 30. The Objectors are correct only inasmuch as the actual prepetition Employee Expense claims should be counted for Eligibility and, therefore, the Debtor does so. The Corrected Chart above includes the appropriate amount.

[23] The Debtor acknowledges that it inadvertently neglected to include these amounts on Schedule E because, by the time the Debtor prepared its Statement and Schedules, the Debtor had already paid all the prepetition Employee Expenses under the authority the Court granted the Debtor in the first-day order.

[24] The breakdown separates out $5,103.39 of the prepetition Employee Expenses actually paid because that amount constituted payroll for James Harvey, the Debtor's CEO, an insider whose claims are not counted under Bankruptcy Code § 1182(1)(a).

[25] The Debtor estimated all categories of Employee Expenses conservatively in its first-day motion so as to avoid underestimating and having to re-petition the Court for authority to pay higher amounts. Again, this actual amount includes the $5,103.39 for James Harvey not included in the counted claims for Eligibility.

Totals

As demonstrated on the Corrected Chart, and in light of the foregoing discussion of several line items in the Correct Chart, the total amount of claims properly counted under Bankruptcy Code § 1182(1)(a) is **$6,786,483.42**—an amount more than $700,000 below the applicable $7,500,000 cap. In fact, there is enough left under that cap that the Shareholder Claims of $504,979.31—which are contingent claims that should not be counted—*could still be counted without bringing the total claims above the $7,500,000 cap.* (Including the Shareholder Claims brings the total to $7,291,462.73.)

The Debtor is eligible for Subchapter V relief.

RESPONSE TO OBJECTORS' OTHER ELIGIBILITY ARGUMENTS

The Objectors continue to carp about payments the Debtor made in the two days before the Petition Date as though there were something nefarious in doing so, something sinister in borrowing unsecured funds from its largest shareholder—the only viable source of such emergency pre-filing liquidity—to fund some of those payments. The Objectors contend, without *any* evidence, that the reason the Debtor made those payments was to reduce its debts below the $7.5 million cap. Not so. The evidence will demonstrate that the Debtor made these payments for legitimate business reasons as part of appropriate pre-bankruptcy planning to ensure the Debtor would have a soft landing into this bankruptcy case and avoid some of the problems often seen in bankruptcy cases when certain creditors are not paid prepetition. Not surprisingly, the Objectors don't cite a single case that holds that strategic payments of a limited number of critical obligations to critical creditors and advance payments to professionals—the kind of well-advised pre-bankruptcy planning that is the hallmark of effective counsel—is either somehow improper or evidence of bad faith or even a consideration for Eligibility. The Debtor was before the Petition Date and is now operating a business that requires disbursements as appropriate on account of a variety of different obligations. It's mere sophistry to suggest that prepetition payments of important debts should somehow count toward an eligibility debt limit as if they hadn't been paid.

The Objectors list 11 payments to nine entities in a chart on Page 11 of their Supplemental Objection as if merely listing them will persuade this Court that the Debtor did something wrong. The Debtor had legitimate business reasons for each one of these payments:

Creditor	**Amount**	**Reason/What Paid**
Charles Meyer	$1,199.31	Expense reimbursement to relieve burden on employee
Interim CFOs	$15,000.00	Not a prepetition debt; prepayment for post-petition period / retainer for finance professional
QLess AM	$200,000.00	Entity based in Armenia that provides outsourced software engineering for the Debtor. The Debtor has historically made payments mid-month to QLess AM for the entire calendar month's bill and this payment was, therefore, made regularly and timely in the ordinary course of business between the Debtor and QLess AM and consistent in all respects with the long-standing course of dealing between them. The payment partially satisfied a bill of nearly $300,000, which covered June 2024; the $200,000 payment satisfied the $185,719 representing then-current prepetition debt, and the remainder was a payment for the remainder of June.
Amazon Web Services	$35,447.59	For mission-critical preservation of web-hosting services, without which the Debtor could not operate, paid a mid-month estimate of June 1-June 18 since AWS bills in arrears and wouldn't have invoiced June until July. The Debtor would have undoubtedly been authorized to pay AWS as a critical vendor post-petition. Rather than prosecute a critical vendor motion for this payment, the Debtor paid the estimated prepetition amount before the Petition Date.
Armanino LLP	$28,350.00 $29,400.00	Accounting firm was in the middle of lender-mandated audit; paid April and May; if didn't pay, they would have dropped the Debtor causing a material default with Celtic Bank
Brex Credit Card	$23.832.75 $70,000.00	Debtor's sole processor of credit cards and secured creditor. The Debtor was concerned that if it entered bankruptcy with a credit balance, Brex would have immediately ceased credit card processing services. In fact, notwithstanding the Debtor's prepetition payments, Brex terminated all services to the Debtor in July 2024, anyway.
Ellucian Co.	$10,000.00	Payment necessary as access fee for mission-critical trade show access
Morris Nichols	$150,000	Settlement of counsel fee balance for critical counsel representing the Debtor in the Shareholder Litigation
Rimon P.C.	$3,200.00	Invoiced June 18 and due on receipt; continuing need for corporate legal services

This was entirely appropriate pre-bankruptcy planning and nothing more. Pre-bankruptcy planning, by itself, does not indicate bad faith: "The mere fact that pre-bankruptcy planning has occurred is not indicative of bad faith as such. It is only when the pre-bankruptcy planning leaves

the stage of preparation and becomes fraud on creditors that there is a serious problem and the issue of bad faith rears its ugly head."[26]

Even in their attempt to make hay from noting the debts the Debtor paid in the days before the Petition Date, the Objectors do not accuse the Debtor of perpetrating a "fraud on creditors." Nor could they, of course. The Debtor acted on compelling reasons to make a limited number of payments to entities that could impose operational problems on the Debtor if they were not paid. Business considerations motivated those payments and the Objectors offer this Court nothing to question the Debtor's bona fides in yielding to those considerations.

The Objectors point out that paying some debts that would have counted for Eligibility with money borrowed from the Debtor's largest shareholder effectively reduced the amount of "countable" debt. True enough. What the Objectors don't point out is why that's relevant. They cite no statute and no cases that even intimate that doing what the Debtor did in the days before the Petition Date is improper. The Debtor is aware of no such statute and no such case.

CONFIRMATION ISSUES

The Objectors acknowledge, albeit obliquely, that the Plan (which amended several provisions of the Debtor's original plan filed earlier in the case) resolved many of their initial objections to confirmation. The Supplemental Objection reiterates three remaining objections to confirmation—good faith (ostensibly under Bankruptcy Code § 1129(a)(3)), the "best interests" test of Bankruptcy Code § 1129(a)(7), and the propriety of the Plan's now-moot "death trap" provision. The Debtor has already addressed these items in its Confirmation Brief but responds below to specific arguments made in the Supplemental Objection.

Good Faith. The Objectors argue that the Debtor has not proposed the Plan in good faith because the Debtor admits to have filed this case to address the "extraordinary expenses and

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[26] *In re Chilhowee R-IV School Dist.*, 145 B.R. 981, 982 (Bankr. W.D. Mo. 1992). *See also In re Attariwala*, 648 B.R. 335, 356 (Bankr. D.D.C. 2023) ("the mere fact that pre-bankruptcy planning has occurred is not indicative of bad faith"; "the Court finds that the Debtor's prebankruptcy planning is not evidence of bad faith, but instead is evidence of increased prepetition costs and good prepetition legal advice"); *In re Werts,* 410 B.R. 677 (Bankr. D. Kan. 2009) (Chapter 13 debtor's use of a lump sum of $75,000 to advance mortgage payments and pay some routine bills pre-petition did not constitute bad faith).

uncertainty associated with the Shareholder Lawsuit" by hoping to discharge "claims which theoretically could arise as a result of the Shareholder Litigation" to "facilitate the potential for value accretive transactions in the future" (quoting Mr. Harvey's first-day declaration). Quite right. That is not only the genuine reason the Debtor sought Chapter 11 protection but it is also a commendable one.

The Debtor could not obtain needed financing without filing this case. This relatively small company, which has never made an operating profit and has lost millions of dollars partly because it was forced to address the costly but unsuccessful litigation campaign waged by its fired founder, Mr. Bäcker, could never survive continuing to incur massive litigation costs, including large indemnification claims. In this case, winning alone against Bäcker's baseless claims would not be enough because the Debtor could not afford the large and uninsured[27] costs of defense while needing to spend significant sums on research and development of new and upgraded software, along with marketing expenses, to remain competitive. The Debtor, with the approval of its independent director Freddie Reiss, filed this case to preserve jobs, business relationships with vendors and customers, obtain both DIP financing and exit financing, and maximize returns to all stakeholders by preserving a going concern.[28] The Objectors don't attempt to argue otherwise and certainly don't offer any statute or case law to support an opposite conclusion. Instead, they have set out to destroy the Debtor by attempting to block confirmation, forcing a conversion to a Chapter 7 liquidation.[29] They argue that a better path would be to pursue highly questionable preference claims, the proceeds of which would go to the Debtor's secured creditors, not unsecured creditors. They complain that the Plan will—paraphrasing their statement on Page 15 of the Supplement

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[27] As of the Petition Date, the D&O Insurer had denied coverage, a position it only reversed after considerable post-petition negotiations.

[28] In fact, the Plan would discharge all prepetition debt, including indemnification claims of current and former directors and officers, so that the Debtor is no longer burdened with the extreme litigation costs wrought by the Shareholder Litigation.

[29] A small-business debtor like QLess could never survive a standard Chapter 11 with all the additional costs and strictures Subchapter V was designed to alleviate. The Objectors' attempts to defeat Eligibility is motivated by a vindictive desire to destroy the Debtor, not to improve their recoveries as putative creditors. Everything the Objectors have done in this case is directly adverse to their own economic interests. And yet they accuse *the Debtor* of acting in bad faith.

Objection—wipe out all liability to its unsecured creditors so the Debtor can capture value in a potential future transaction. Again, quite right. That is a fairly concise statement of what Chapter 11—and especially Subchapter V—is all about. That's not bad faith. Providing a debtor a fresh start is the way Chapter 11 works. The Objectors' quarrel is with Congress, not the Debtor and not this Plan.[30]

The Objectors also question the reliability of the Debtor's analysis of potential avoidance actions—described in detail in the Confirmation Brief—performed by the Debtor's CRO, Mr. De Camara. To be sure, Mr. De Camara can and will offer ample testimony at the confirmation hearing substantiating and verifying that analysis even further. But, more to the point here, the Objectors ignore that even if every prepetition transfer identified on the Debtor's Statement of Financial Affairs not obviously unavoidable on its face were actually avoided, unsecured creditors would remain entirely unaffected. As the Liquidation Analysis shows, the Debtor's senior secured creditor, Celtic Bank, would receive only $716,000 in value on account of its senior secured claim of more than $6.5 million and the DIP Lender would receive nothing on account of its $3,000,000 junior secured claim. Avoidance Actions remain Celtic Bank's collateral first[31] and the DIP Lender's collateral second. This means that the estate would have to recover almost *$9 million* before any value filtered down to unsecured creditors. There weren't anywhere close to $9 million in prepetition transfers listed on the Debtor's Statement of Financial Affairs. This is all much ado about nothing.

Best Interests of Creditors. The entirety of the Objectors renewed confirmation objection on this ground is based on the risible fallacy that the Objectors repeat from their original objection: that the Liquidation Analysis "do not provide sufficient support for its depressed valuation of a

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[30] The Objectors also attempt to mislead this Court into believing that the Plan would "eliminate the Shareholder Litigation and the Arbitration Claim …" [Supplemental Objection at 15] They know better. The Plan expressly and unambiguously provides that: (a) any allowed claim against the Debtor arising from the Shareholder Litigation will be treated as an allowed claim under the Plan and receive a distribution; (b) the plaintiffs in the Shareholder Litigation are unrestrained in any way from pursuing that litigation against all non-Debtor defendants; and (c) any allowed claim related to the Bäcker Arbitration will be treated as an allowed claim under the Plan and receive a distribution.

[31] Technically, Celtic Bank would have to demonstrate diminution in the value of its collateral before Avoidance Actions become part of its collateral. That, of course, would be obvious where the Plan provides Celtic Bank payment in full of its secured claim but a liquidation would provide it a recovery from its collateral at only cents on the dollar.

business at a 'gross liquidation value between $168,000 and $915,000,' when Palisades purchased the Debtor at an undervalued enterprise value of $24.7 million in 2021, and the 2023 Valuation placed the market value of QLess at $27,692,000." [Supplemental Objection at 17] At the risk of repeating what the Debtor has already pointed out in the Confirmation Brief, this is a silly argument beset with preposterous assumptions.

First, Mr. De Camara provides extensive support for valuing the Debtor's assets (composed almost entirely of intellectual property) as he does. The notes included with the Liquidation Analysis and attached to the Plan provide:

> It is the experience and guidance of Debtor's financial advisor, Sherwood Partners, that asset sale processes in situations where intellectual property is being sold without any existing operations (e.g. customers or established infrastructure) or knowledge base (i.e. employees with technical know-how and experience) usually result in little to no recovered value."

Additionally, Mr. De Camara's August 23 declaration stated:

> It is nonsensical to equate the "gross liquidation value between $168,000 and $915,000" appearing in the Liquidation Analysis with a multi-million-dollar "enterprise value" in 2021 and 2023 when equity investments were made in the Debtor at a time when it was a going concern generating millions of dollars in recurring revenue. The Debtor has not "lost 97% of its value." There is a vast difference between a going concern enterprise value used for equity investment purposes and a liquidation, non-operating asset value used for purposes of a liquidation analysis.

Second, the Objectors have no basis and no evidence to characterize a non-going concern, liquidation value for undeployed intellectual property as "depressed." Third, the Liquidation Analysis does not value "a business"—it values the Debtor's assets in a context in which the business has terminated. It is no longer an "enterprise" if it is being liquidated under Chapter 7. Finally, the "market value" of an operating enterprise with assets deployed in the generation of ongoing revenue, with customers and vendors relationships, and employees, could not be more irrelevant to a Liquidation Analysis that must necessarily assume the cessation of all those things.

The Objectors are also wrong when they imagine that existing customer contracts could be sold by a Chapter 7 trustee for any material value. As already established on the record, the Debtor operates in a highly-competitive market segment for queue management and competes with

several competitors. The instant the Debtor's operations cease under a hypothetical liquidation, all the Debtor's customers—who critically depend on uninterrupted queue management for their own customers and employees—will simply move their business to one of the Debtor's competitors. By the time a Chapter 7 trustee even determined who the customers are, they'd be long gone.[32]

Mr. De Camara will testify at the confirmation hearing not only to the cogent bases for his assumptions underlying the Liquidation Analysis but also his extensive expertise, particularly in the liquidation of IP assets, something Sherwood Partners has done more of than any other firm in the country. The Debtor is confident the Court will be more than satisfied that the Debtor has met its burden regarding Bankruptcy Code § 1129(a)(7) and overcome any misguided protestations raised by the Objectors.

Death Trap. Since the Objectors say nothing different in their Supplemental Objection about this Plan provision than they did in their original objection, the Debtor will reiterate, briefly, what it argued in the Confirmation Brief. Despite another opportunity, the Objectors still haven't cited a single case characterizing a "death trap" provision as improper under the Bankruptcy Code. The Debtor is unaware of any such case. The Objectors still provide this Court with no basis to hold that a "death trap" provision is impermissible in a plan. The Debtor used the "death trap" provision to minimize litigation over Plan confirmation and confer a tangible economic incentive to creditors to vote for the Plan. All creditors but the Objectors did. The Objectors are at least correct when they note that the inclusion of the "death trap" doesn't matter at this point, since the Debtor has conceded for purposes of confirmation that Class 4 has rejected the Plan such that the sole treatment for Class 4 Claims is certain.[33] That treatment must comport with Bankruptcy Code § 1191(b) and, as established in the Confirmation Brief, it does. If the Objectors are so unhappy

[32] Although it is true that IP assets are sometimes sold in Chapter 7 cases, that IP is typically trade names, copyrights, and internet domain names. Selling software patents used in a software-as-a-service business, inextricably tied to customer contracts, is an entirely different matter, especially when those customers will have departed for competitors before the liquidation even starts.

[33] The Objectors argue, without basis, that the $250,000 prepetition loan from Palisades "is more properly characterized as an equity investment and is not even a general unsecured claim at all." If the Objectors think Palisades is not entitled to a recovery from Class 4, nothing in the Plan prejudices any of the Objectors rights in that regard to file and prosecute an objection to the Palisades unsecured claim.

with that treatment, perhaps they shouldn't have voted against the Plan and their own economic interests and purported creditors.

Injunction. The Objectors suggest that additional language be placed in an already unambiguous injunction provision in the Plan—a provision the Debtor already amended to address the Objectors' previous concern regarding their ability to pursue the Shareholder Litigation against non-Debtor defendants. The additional language is not only unnecessary, but the Debtor is concerned that including that language could adversely affect the Debtor's insurance coverage. As noted above, the D&O Insurer only recently reversed its position denying coverage and has begun to defend the Shareholder Litigation on a reservation of rights. Anything that risks disrupting what could still be a fragile situation with the Debtor's D&O insurer would be needlessly harmful and ill-advised, especially where the additional language—"for the avoidance of doubt" when there is no reasonable basis for any doubt—amounts to nothing more than gratuitous surplusage.

CONCLUSION

For the foregoing reasons, the Debtor respectfully requests that the Court enter the Confirmation Order substantially in the form attached to Confirmation Brief as Exhibit B and grant any additional relief the Court deems appropriate.

September 11, 2024

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