IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11 (Subchapter V)
QLESS, INC.,[1]	Case No.: 24-11395 (BLS)
Debtor.	**Objection Deadline: September 7, 2024 at 5:00 p.m. (ET)** **Hearing Date: September 13, 2024 at 9:30 a.m. (ET)** **Re: Docket Nos. 70, 118, 122, & 130**

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE OBJECTION OF ALEX BÄCKER AND CERTAIN PREFERRED SHAREHOLDERS TO DEBTOR'S SUBCHAPTER V ELIGIBILITY AND PLAN

Alex Bäcker ("Bäcker") and Cerocaru Investment Trust, Ricardo Bäcker, Tom Mitchell and Xianzhong Chen (together, the "Preferred Shareholders," and with Bäcker, the "Creditors"), by and through their undersigned counsel, hereby file this supplemental memorandum (this "Supplemental Memorandum") in further support of the *Objection of Alex Bäcker and Certain Preferred Shareholders to Debtor's Subchapter V Eligibility and Plan* [D.I. 118] (the "Initial Objection")[2] to (1) QLess, Inc.'s election and representation that it is a small business debtor eligible for relief under subchapter V of chapter 11 of the Bankruptcy Code and (2) the *Amended Plan* [D.I. 122] (the "Amended Plan").[3] In support of this Supplemental Memorandum, the Creditors respectfully state as follows:

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

[2] Creditors incorporate, to the extent not inconsistent with the arguments in this Supplemental Memorandum, the arguments made in their Initial Objection as if fully stated herein.

[3] Capitalized terms used but not otherwise defined herein shall have the meaning given to them in the Initial Objection.

PRELIMINARY STATEMENT

1. The Debtor's efforts to use its manufactured subchapter V eligibility as a sword should not be rewarded with the unique benefits that subchapter V offers debtors in allowing a more expedited process, more limited oversight, and lesser requirements for confirmation that are afforded to eligible small business debtors who appropriately qualify to be a debtor under section 1182 of the Bankruptcy Code.[4]

2. Although the Debtor filed an Amended Plan shortly after the Creditors filed the Initial Objection, the Debtor cannot solve the eligibility problem that it created by attempting to pay its way into being a subchapter V debtor and ignore countable debts, cannot solve its lack of good faith in filing this case and pursuing confirmation of the Amended Plan, and did not solve the failure of the Amended Plan to be in the best interest of the Debtor's creditors.

ARGUMENT

A. The Debtor is Not Eligible to Proceed Under Subchapter V

3. The Debtor asserts that on the Petition Date, the value of its non-contingent, liquidated, non-affiliate debt was $7,032,645.41 and that it "hardly bears noting that $7.03 million is less than the statutory threshold of $7.5 million." *See Brief in Support of Plan Confirmation*, D.I. 130, p. 20. However, what is notable here, is that the $467,354.59 margin by which the Debtor claims it is below the eligibility limit under its calculations entirely disregards the filed proofs of claim and the Debtor's other admissions and prepetition claims paid post-petition, is completely

[4] Unless otherwise specified, all statutory references to "Section" are to 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code").

eliminated if the claims of the Preferred Shareholders are properly treated as not contingent, and was manufactured by the Debtor through substantial preferential payments on the eve of bankruptcy and converting $250,000 of debt that would have counted against the eligibility limit to excluded debt through a loan made by Palisades to the Debtor the day before the Petition Date.

4. In fact, under a proper accounting of the Debtor's liquidated, non-contingent, non-insider[5] liabilities as of the Petition Date, the Debtor owed $8,109,535.97 as of the Petition Date, including the Preferred Shareholders' claims, or $7,604,556.66 as of the Petition Date, excluding the Preferred Shareholders' claims. A summary showing the proper calculation of the Debtor's liquidated and non-contingent liabilities as of the Petition Date is attached hereto as Exhibit A.

5. As most courts have recognized, the debtor bears the burden of proof for demonstrating satisfaction of the eligibility requirements for subchapter V. *In re Sullivan*, 626 B.R. 326, 330 (Bankr. D. Colo. 2021); *see also In re Zhang Med. P.C.*, 655 B.R. 403, 409 (Bankr. S.D.N.Y. 2023).

6. When considering whether the debtor has met is burden to prove subchapter V eligibility by a preponderance of the evidence, courts have recognized that they may look to a debtor's schedules and the creditors' proofs of claim. 8 COLLIER ON BANKRUPTCY P 1180.02 (16th 2024); *see In re Parking Mgmt., Inc.*, 620 B.R. 544, 550 (Bankr. D. Md. 2020) (when making eligibility determination "the court: should neither place total reliance upon a debtor's characterization of a debt nor rely unquestionably on a creditor's proof of claim, for to do so would place eligibility in control of either the debtor or the creditor. ***At a hearing on eligibility, the court***

[5] These calculations exclude the $250,000 purportedly owed to Palisades, as well as the proof of claim filed by Kevin Grauman and Mark Tapling in the amount of $54,208.65 because, upon information and belief, Mr. Grauman and Mr. Tapling may be considered insiders or affiliates of the Debtor. If they are not, these total debt amounts would be increased by the $54,208.65 asserted in their proof of claim.

should thus, canvass and review the debtor's schedules and proofs of claim, as well as other evidence offered by a debtor or the creditor to decide only whether the good faith, facial amount of the debtor's liquidated and non-contingent debts exceed statutory limits.") (quoting *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1015 (B.A.P. 8th Cir. 1997)) (emphasis added); *In re Corson*, No. 03-18160F, 2004 WL 5865045, at *8 (Bankr. E.D. Pa. Jun. 25, 2004) ("Recognizing that a debtor's schedules are a potentially imperfect measure of the debtor's debts, the Court concludes a more appropriate approach is to use the debtor's schedules as a starting point in the section 109(e) inquiry, ***but also to consider postpetition events and developments to the extent (and only to the extent) they shed light on the amount of secured and unsecured debt actually owed by the debtor at the time of the filing of the petition.***") (quoting and adopting *In re Hatzenbuehler*, 282 B.R. 828, 833 (Bankr. N.D. Tex. 2002)) (emphasis added).

7. Although bankruptcy courts have looked to chapter 13 cases and how they treat the debt limitation that is applicable in chapter 13 for guidance in subchapter V cases, most courts have not adopted the Ninth Circuit's holding in *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2000) and *EmCyte Corp. v. Stahl (In re Stahl)*, Bk. No. 2:20-bk-11739, 2021 WL 1293853, at *6 (9th Cir. B.A.P. Apr. 7, 2021) that in chapter 13 cases, only the schedules are to be considered in determining eligibility under section 109(e). Specifically, in *In re Hall*, the Bankruptcy Court for the Middle District of Florida rejected the application of *Stahl* in a subchapter V case, holding: "While the schedules offer some probative value, the Court ***will not restrict its inquiry solely to the schedules. . . . Eligibility is determined by what the Debtors owe on the petition date, not by what the Debtors think they owe***." 650 B.R. 595, 600 (Bankr. M.D. Fla. 2023) (citations omitted) (emphasis added); *see also, In re Zhang Medical P.C.*, 655 B.R. 403, 409 (Bankr. S.D.N.Y. 2023) ("The court may look ***both to the debtor's schedules and to creditor's***

proofs of claim. Proofs of claim are prima facie valid. Because the debtor bears the ultimate burden of proving its eligibility for subchapter V, proofs of claim that the debtor does not challenge may be deemed valid for subchapter V eligibility purposes.") (citations omitted) (emphasis added); *In re McKenzie Contracting, LLC*, Case No. 8:24-bk-01255-RCT, 2024 WL 3508375, at *1 (Bankr. M.D. Fla. Jul. 19, 2024) ("The procedural requirements for determining noncontingent, liquidated debt for eligibility purposes are well-established. The Court may look to Debtor's schedules and to the creditors' proofs of claim. Absent objection, proofs of claim are prima facie valid. However, in evaluating eligibility, the Court does not purport to adjudicate the extent or validity of any specific claim, only how it is filed and/or scheduled.") (quoting *In re Carter*, Case No. 23-54816, 2023 WL 9103614, at *2 (Bankr. N.D. Ga. Dec. 13, 2023)).

8. Furthermore, although contingent and unliquidated debts are not counted towards a debtor's subchapter V eligibility, disputed debt is considered. *See In re Corson*, No. 03-18160F, 2004 WL 5865045, at *12 (disputed debt is considered for chapter 13 eligibility purposes); *In re Leggett*, 335 B.R. 227, 229–30 (Bankr. N.D. Ga. 2005) ("A dispute over the debtor's liability does not make a debt contingent or unliquidated.") (citations omitted); *In re Knight*, 55 F.3d 231, 234 (7th Cir. 1995) ("a disputed claim is a debt to be included when calculating § 109(e) requirements"); *In re Claypool*, 142 B.R. 753, 755 (Bankr. E.D. Va. 1990) ("[a] liquidated, noncontingent claim whose validity is in dispute must nevertheless be included in determining eligibility").

9. In this case, the Debtor's eleventh-hour efforts to manufacture contingent and unliquidated debts, convert debt that count against the eligibility limit to purportedly excluded debt owed to insider Palisades, and pay down debt through massive (in the context of this case) preferential transfers to generate the appearance of eligibility should be rejected. The Debtor can

only meet the eligibility limit if the Court (i) ignores the filed proofs of claim, conversion of debt to insider debt, Debtor's other statements and actions in this case, post-petition payment of existing prepetition debt, and preferential transfers, or (ii) concludes that the claims of the Preferred Shareholders are properly designated as contingent. If the Court looks beyond the schedules, as it is entitled to do, the Debtor's liabilities exceed the subchapter V liability cap.

i. Prepetition Employee Wage, Reimbursement and Benefit Obligations

10. The Debtor did not include in its schedules or its debt calculation any amounts owed for prepetition wages, reimbursements or benefits, despite having sought and received court approval of $117,500.00 in prepetition wages, reimbursement, and benefit obligations.

11. Although at least $117,500.00 (but potentially up to $131,498.00)[6] in prepetition claims were paid post-petition under the Court's authority, these amounts were still non-contingent, liquidated, and non-affiliate debt that were owed by the Debtor on the Petition Date, which the Debtor inexplicably ignores in its calculation.

ii. The U.S. Small Business Administration Loan

12. The Debtor also excluded from its subchapter V calculation the $127,237.00 that it scheduled as a "contingent" debt for the Debtor's "PPP loan audit" from the U.S. Small Business Administration ("SBA"). *See* Schedule E/F, § 3.18.

13. The Debtor asserts that this amount is "contingent" because after borrowing $1,130,767.00 in 2020 pursuant to the SBA's Paycheck Protection Program and obtaining forgiveness of that amount, the SBA asserted that $151,793.00 was not eligible for forgiveness. The Debtor did not challenge the SBA's conclusion that a portion of the debt that was forgiven was ineligible for forgiveness but, instead, in written correspondence dated December 28, 2022,

[6] *See* June Monthly Operating Report [D.I. 73] at p. 7.

asserted that only $127,238.00 (rather than $151,793.00) was not properly the subject of forgiveness. That correspondence is attached hereto as Exhibit B. Thus, the Debtor does not actually dispute that it still owes money on account of the PPP loan because $127,238.00 was not eligible for forgiveness. Instead, the Debtor asserts that the claim is somehow "contingent" because the SBA has not commenced collection activity against the Debtor. This is not the standard for rendering a claim "contingent" and, if it were, all sorts of claims that are routinely considered non-contingent in bankruptcy would suddenly be subject to abusive scheduling by debtors as most creditors in commercial bankruptcy cases have not commenced collection activity before the commencement of a bankruptcy case.

14. The failure to commence collection activity does not mean the debt is not owed, and collection activity (whether that be a demand letter, lawsuit, or other action) is simply not required to make a claim non-contingent. Moreover, the deadline for the SBA to file a proof of claim is not until December 16, 2024—more than three months from now. *See Notice of Chapter 11 Bankruptcy Case* [D.I. 40].

15. There is simply no good faith basis for the Debtor to have marked the unforgiven portion of the PPP Loan as contingent, and thus, it should be included in the subchapter V debt calculation.

iii. Providence Partners, LLC's Rejection Damages Claim

16. The Debtor also does not include in its calculation of its subchapter V eligible debt the rejection damages for the office lease between the Debtor and Providence Partners, LLC ("Providence").

17. Providence timely filed a Proof of Claim in the total amount of $110,583.85, which included a rejection damages claim for $101,959.40 [Claim No. 14] arising under the lease, which is now proposed to be rejected pursuant to the Amended Plan. *See* Amended Plan, Exhibit D-2.

18. The Debtor includes the prepetition portion of Providence's Proof of Claim, $8,506.45, in the schedules and the calculation of the subchapter V debts, but not the $101,959.40 rejection damages portion.

19. Whether lease rejection damages count under the subchapter V debt limit is a live legal issue with a split in the case law, but of course, the Debtor has to exclude this amount to reduce the face amount of its debt below the limit. *See, e.g., In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va. 2023) (holding that where a debtor had moved to reject leases, rejection damage claims count towards the limit); *contra, In re Zhang Medical P.C.*, 655 B.R. 403 (Bankr. S.D.N.Y. 2023) (holding that rejection damage claims are contingent as of the petition date); *In re Parking Mgmt.*, 620 B.R. 544 (Bankr. D. Md. 2020) (holding future rent should not count towards the subchapter V debt limit). *Macedon Consulting* is the better-reasoned opinion, particularly where the Debtor knew it would reject the lease when it filed (as it did here), and should be adopted by this Court.

20. If the Court disagrees with the Debtor's legal argument, then the $101,959.40 in rejection damages must be counted against the subchapter V eligibility limit.

iv. Proof of Claim Higher than the Scheduled Amounts

21. The Debtor scheduled a claim for Wolflick Khachaturian & Bouayad, APC ("Wolflick") in the amount of $91,872.52. *See* Schedule E/F § 3.20. However, Wolflick filed a timely proof of claim in the amount of $139,260.07 [Claim No. 9]—$47,387.55 more than the Debtor's scheduled amount.

v. Proofs of Claim That Were Not Scheduled

22. Other proofs of claim were also filed asserting claims left off the Debtor's Schedules and thus not included in the Debtor's debt calculation, including claims filed by various taxing authorities totaling $33,133, and a claim filed by Kevin Grauman and Mark Tapling for $54,208.65, although that may be insider debt. In total, the Debtor did not schedule any amounts for certain creditors who filed proofs of claim totaling $117,694.71, as shown in the chart below.

Claimant	**Amount**	**Type of Claim**	**Claim No.**
Arizona Dept. of Revenue	$4,455.00	Priority	4
California Franchise Tax Board	$856.78	Priority	22
City of Philadelphia	$304.56	Priority	6
City of Philadelphia	$119.50	Unsecured	6
Colorado Dept. of Revenue	$9,004.00	Priority	3
Colorado Dept. of Revenue	$5,561.00	Unsecured	3
Dept of Treasury – IRS	$5,000.00		1
Epic Systems Corp.	$285.00	Unsecured	5
Global Data Risk LLC	$4,955.00	Unsecured	16
Kevin Grauman and Mark Tapling	$54,208.65	Unsecured	12
Louisiana Dept of Revenue	$424.58	Priority	8
Louisiana Dept of Revenue	$168.00	Unsecured	8
Scopia Holdings LLC	$30,352.64	Unsecured	10
Texas Comptroller of Public Accounts	$2,000.00	Priority	15
TOTAL	**$117,694.71**		

vi. The Preferred Shareholders' Claims

23. The Debtor also does not include in its subchapter V eligibility calculation $504,979.31 it owes to the Preferred Shareholders, which claims the Debtor marked in its schedules as being contingent and disputed.

24. The Preferred Shareholders filed the proofs of claim listed on the chart below for these amounts.

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

25. These claims are owed to the Preferred Shareholders on account of the Merger Transaction and the merger consideration that is owed thereunder pursuant to an established and agreed formula. These claims, while purportedly disputed, are unquestionably owed to the Preferred Shareholders and are therefore not properly and in good faith marked as contingent obligations.

26. "A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event." 2 Collier on Bankruptcy P109.06[2][b] (16th ed. 2024). Here, there is no triggering future event that will establish the Debtor's duty to pay, which arose three years ago.

27. The only purported "dispute" about those amounts is whether the Preferred Shareholders have to execute a release form, not required by any of the governing corporate documents, to receive those payments, but that does not render the amounts "contingent"—they are owed and outstanding as of the Petition Date. The Debtor points to the Merger Agreement as establishing the requirement for a direction letter; however, the Merger Agreement itself does not require a release. Moreover, the Debtor's Amended Articles of Incorporation do not require the Preferred Shareholders to execute and deliver a release to receive the merger consideration payable to them. The applicable Amended Articles of Incorporation are attached as Exhibit C. The Debtor lacks a good faith defense to its failure to pay the merger consideration to the Preferred

Shareholders, the Debtor unquestionably breached section 2 of the Articles of Incorporation by failing to pay the consideration to the Preferred Shareholders, and the Preferred Shareholders' claims are not contingent under any fair reading of the Amended Articles of Incorporation.

vii. State of Washington Department of Revenue's Liquidated Claim

28. The Debtor listed the priority claim held by the State of Washington Department of Revenue for Q2 2024 sales taxes as undetermined and unliquidated on the Schedules. *See* Schedule D, § 2.1;

29. The Debtor concedes in its pleadings that it owed the State of Washington Department of Revenue $1,629.83 for sales taxes as of the Petition Date, which it paid after the Petition Date. Therefore, this prepetition debt counts towards the Debtor's subchapter V cap.

viii. The Large Payments Made on the Eve of Filing to Manufacture Eligibility

30. Not only did the Debtor pay a total of $2,469,749.33 during the 90 days prior to the Petition Date, but by its own admission, it made $216,199.31 in payments on June 17, 2024, and $350,230.34 in payments on June 18, 2024 alone—the day before the Petition Date—which are shown in the chart below.

JUNE 17 AND 18 PAYMENTS	
Party	**Amount**
Charles Meyer	$1,199.31
Interim CFO's LLC	$15,000.00
QLess AM LLC	$200,000.00
Amazon Web Services	$35,447.59
Armanino LLP	$28,350.00
Armanino LLP	$29,400.00
Brex Credit Card	$23,832.75
Brex Credit Card	$70,000.00
Ellucian Company, LP	$10,000.00
Morris Nichols	$150,000.00
Rimon P.C.	$3,200.00
TOTAL	**$566,429.65**

31. Among other large payments, the Debtor paid Morris, Nichols, Arsht & Tunnel LLP ("Morris Nichols"), who is counsel to the Debtor in the Shareholder Litigation, $150,000.00 on June 18, 2024, the day before the Petition Date. However, this payment was not a retainer for future services. Instead, this payment was a partial payment in settlement of $398.837.64 in outstanding prepetition amounts owed to Morris Nichols. The $150,000.00 was paid outside of the ordinary course of business following a last-minute agreement between the Debtor and Morris Nichols for Morris Nichols to accept payment for approximately 37.5% of what it was owed if the $150,000.00 payment was not subject to avoidance. There is certainly no ordinary course or new value defense to this payment on the day before the Petition Date. A copy of the Settlement and Release Agreement between Morris Nichols and the Debtor is attached as Exhibit D.

32. It is unclear that the Morris Nichols agreement actually reduced its claim at all, given the Debtor has essentially conceded the payment was preferential in its pleadings and declarations. However, if it did so, the net result of this agreement and preferential payment was that it reduced the Debtor's liabilities that would have counted against the eligibility limit by $398,837.64.

33. As shown in the chart below, the Debtor also made four large payments to Brex, Inc. during June 2024 in an effort to keep its credit card balance arbitrarily low so that these amounts would not be listed on it schedules.

JUNE BREX PAYMENTS	
Date	**Amount**
8-Jun-24	$206,529.16
18-Jun-24	$23,832.75
19-Jun-24	$70,000.00
19-Jun-24	$18,904.11
TOTAL	$319,266.02

34. There is no evidence that the four Brex payments were required to be made in June to comply with the Brex agreement. Indeed two of the payments appear to have been initiated on the Petition Date by ACH transfer (not wire transfer) and did not clear the Debtor's bank account until a date after the Petition Date. While the Debtor will apparently argue that the date the electronic transfer was initiated is the relevant date, that is contrary to how claims and timing of payments are determined in many other circumstances in bankruptcy, including determining whether a transfer is a voidable unauthorized postpetition transfer or an avoidable preferential transfer.

35. The Debtor's Brex account shows the ACH payments being initiated on June 18 and 19, but not being applied to the account until June 24 or 25, 2024. Further, the Debtor's bank account statement from BridgeBank (notably not from its Brex account) attached to its June Monthly Operating Report shows the ACH transfer in the amount of $18,904.11 to Brex clearing that bank account on June 20, 2024 (the day after the Petition Date).

36. Here, the timing matters because if the transfers to Brex did not occur until a time after the Petition Date, those debts were still owed as of the Petition Date and push the Debtor further toward (or above) the debt limit. Of course, the Debtor has excluded these amounts from its calculation of liabilities owed as of the Petition Date.

ix. The Conversion of "Countable" Debt to "Excluded" Debt on the Eve of the Petition Date.

37. Not only did the Debtor pick winners and losers by choosing to pay preferred creditors' claims just before the Petition Date, they needed more money to do so. To further augment the Debtor's margin from the subchapter V cap, on the day before the Petition Date, Palisades provided the Debtor with a purported $250,000.00 unsecured loan for which there is no written agreement or repayment terms. This loan, which was used to pay prepetition creditors,

effectively transformed another $250,000.00 from debt that would count towards the subchapter V cap into debt that does not.

38. While the Debtor was able to generate a mix of exclusions, assumptions, and legal positions in the right formulation so that it facially was below the subchapter V debt cap as of the Petition Date, this Court should canvass the Debtor's Schedules and the filed claims to evaluate and reach its own conclusion, which the Creditors submit exceeds the subchapter V cap. To facially fall below the debt cap, the Debtor needed to ignore its prepetition employee wages, and exclude the SBA loan, the Providence rejection damages, the Preferred Shareholder Claims, and the State of Washington Department of Revenue's sales tax claim; then make payments totaling $216,199.31 on June 17, 2024, $350,230.34 on June 18, 2024, and $18,904.00 on the Petition Date; and use $250,000.00 of insider debt to make these payments.

39. The Debtor should not be a subchapter V debtor as its debts, when properly counted and characterized, well exceed the $7.5 million cap on non-contingent, liquidated, non-affiliate debt.

B. <u>The Amended Plan Has Not Been Proposed In Good Faith and Does Not Meet the Best Interest Test</u>

40. The Amended Plan has not been proposed in good faith, and still fails to satisfy the bets interest test, and thus remains unconfirmable.

i. <u>The Good Faith Standard Has Not Been Met</u>

41. In addition to failing to qualify for subchapter V, the facts described above demonstrate that this case was not filed in good faith.

42. Here, the Debtor admits that it filed this bankruptcy case, at least in part, due to the "extraordinary expenses and uncertainty associated with the Shareholder Lawsuit," which it blames for interfering with the Debtor's ability to pursue business combinations with strategic

partners, noting that "[d]ischarge of any claims which theoretically could arise as a result of the Shareholder Litigation will facilitate the potential for value accretive transactions in the future." Harvey Decl., D.I. 9, at ¶ 24. Essentially, if it wipes out all liability to its largest unsecured creditors now, then the Debtor (and Palisades) can capture all of the actual value of the business in some potential future transaction.

43. This is in addition to the payoff of numerous preferred creditors on the eve of filing (in addition to understating its liabilities) so that it could argue it qualifies as a subchapter V debtor right before the debt limit adjusted down, with the stated goal of pursuing this case to (1) eliminate the Shareholder Litigation and the Arbitration Claim (which the parties had already litigated for five days and was poised for closing briefing and judgment) and (2) provide Palisades with further equity in the Debtor. *See* Plan, p. 3.

44. These questionable prepetition payments included an apparent $150,000.00 settlement of sorts with Morris Nichols the day before the bankruptcy to artificially reduce its prepetition liabilities by $400,000 that generates a clear preference claim. And yet, the Amended Plan proposes to waive ***all*** preference claims, so those amounts cannot be recovered and shared ratably among all unsecured creditors as they should be. The De Camara Declaration describes that only 10 transfers over $45,000 were reviewed "in detail," and reaches the legal conclusion that "[t]wo Transfers made to certain of the Debtor's lawyers are arguably avoidable but I believe that credible defenses (either or both of the ordinary course defense or the subsequent new value defense) may exist with respect to those Transfers." D.I. 130-1, at p. 8. While Mr. De Camara's education and experience are not described in detail in his declaration, upon information and belief, Mr. De Camara is not an attorney and has no formal legal training. Moreover, Mr. De Camara did not perform any analysis of the preference claims in preparing the liquidation analysis attached to

the original Plan filed in mid-July 2024, even though the original liquidation analysis and the liquidation analysis attached to the Amended Plan both assign no value to the preference claims (and, in fact, do not even mention preference claims). Mr. De Camara did not perform the preference analysis until after undersigned counsel questioned Debtor's counsel about the preference claims during a call on August 2, 2024. The fair inference from this conduct is that the Debtor was determined to assign no value to the preference claims and deprive general unsecured creditors of such claims notwithstanding the miniscule distribution the Debtor proposes to make to general unsecured creditors and the outsized amount of money transferred (in the context of this case) in the 3 months and, in particular, the days leading up to the Petition Date.

45. Implementing the Debtor's prepetition payoff scheme left it so perilously close to the debt limit (under the Debtor's flawed calculation of its liabilities) that it took on $250,000 in purported debt from Palisades the day before the Petition Date to keep paying off preferred creditors, successfully converting $250,000 in debt that would have counted against the liability cap to excluded debt.

46. This bankruptcy case was funded by an insider for the benefit of an insider, to escape liability to the Debtor's largest unsecured creditors—who notably voted to reject the Amended Plan. For these reasons, the Debtor exceeded the equitable limitations of chapter 11 when filing this case and did not do so in good faith.

ii. *The Plan is Not in the Best Interest of Creditors*

47. Here, the Debtor—who bears the burden of proof—continues to state in conclusory fashion that it "easily satisfies the Best Interests Test with respect to any holder of an Allowed General Unsecured Claim that may Vote," *See* Amended Plan, § 1.3.5(c), and misconstrues Creditors' arguments regarding the substantial understatement of the value of the Debtor contained

in the liquidation analysis. The Debtor's Liquidation Analysis and the De Camera Declaration do not provide sufficient support for its depressed valuation of a 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.

48. Contrary to assertions in the Debtor's brief, Creditors do not submit that the liquidation analysis is flawed just because it "ascribed a value to the Debtor's assets in a liquidation posture lower than a prior enterprise value of the Debtor's business as a going concern," but rather, that the Debtor has utterly failed to justify a purported liquidation value that comes in 97% below the 2023 Valuation.

49. The only evidentiary support for the liquidation value included in the Liquidation Analysis is the De Camera Declaration. It does not appear Mr. De Camera has the requisite expertise and qualifications to value IP assets, including patents. Moreover, it does not appear Mr. De Camera conducted any market test or analysis to assess the value of the Debtor's capitalized software, including patents. After noting that the Debtor—a software company—holds "a single patent (granted in three countries), eight active registered trademarks, and 35 owned internet domain names," Mr. De Camara goes on to state that he believes "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) would result in little to no recovered value." D.I. 130-1, p. 7. This conclusion appears to be based on multiple flawed premises, including that a liquidation could not include the sale of the Debtor's customer contracts along with the software and IP assets. Moreover, IP-only sales without a going-concern sale are common in both chapter 11 and chapter 7 cases and often recover

significant value for the estates—a fact of which Mr. De Camera is either unaware or conveniently ignores .

50. Further, as noted above, the Debtor's baseless determination that the estate's avoidance actions have no value is carried through to the flawed liquidation analysis, which similarly ascribes no value to those claims whatsoever, despite the nearly $3 million in known transfers made during the 90-day preference period.[7]

51. These unsubstantiated and easily refuted assumptions render the Debtor's liquidation analysis unreliable and insufficient to establish that the Debtor satisfies the best interest test as necessary to confirm its Amended Plan.

C. <u>Other Plan And Confirmation Order Issues Remain.</u>

52. Although the Amended Plan resolved certain discrete issues, such as the gatekeeper provision, additional issues remain unresolved that need to be addressed if the Court determines the Debtor is eligible for subchapter V and is inclined to confirm the Amended Plan.

i. *The Punitive Death Trap Provision in the Amended Plan Was Triggered and Should Not Be Approved*

53. The punitive death trap provision, which serves no coercive purpose in a subchapter V case and primarily benefits Palisades, remains in the Amended Plan and was triggered because the Creditors voted to reject the Amended Plan. This subversion of the carrot and stick approach utilized in traditional chapter 11 cases, where an impaired accepting class is necessary for confirmation, has no place in a subchapter V case.

54. Here, the deathtrap itself is particularly problematic. If Class 4 voted to accept the Amended Plan, then Palisades would agree to waive its purported unsecured claim related to the

[7] Since the Debtor has failed to schedule an executory contract for QLess AM, the $640,155.00 in transfers made to QLess AM during this time may be particularly ripe for collection by a chapter 7 trustee.

$250,000 loan to the Debtor the day before the Petition Date. As noted above, the Debtor has produced no documentation or communications related to this supposed "loan" and neither the Amended Plan nor the De Camera Declaration describe whether the Debtor has analyzed whether the $250,000 is more properly characterized as an equity investment and is not even a general unsecured claim at all.

55. Now, since the deathtrap has been triggered by Class 4's rejection of the Amended Plan, apparently Palisades' $250,000 purported claim is just going to be treated as a general unsecured claim and share in (and dilute) recovery to other unsecured creditors with no analysis of or challenge to the propriety of that claim.

56. The death trap provision included in the Amended Plan needlessly penalizes General Unsecured Claims in Class 4, which class is largely comprised of the Creditors. This blatant effort to further penalize and frustrate any financial recovery for the Creditors is not consistent with the Bankruptcy Code.

ii. *The Injunction for the Benefit of Insurers is Overbroad and Unclear*

57. Since the filing of the Objection, the Creditors have worked with the Debtor in an effort to further revise the language in the injunction provision so that it is clear that the Amended Plan does not affect the Creditors' rights against non-debtor defendants in the Shareholder Litigation, including with respect to claims against the Debtor's current or former directors and officers and to recover from the proceeds of insurance policies.

58. Although these discussions with the Debtor remain ongoing, the Debtor has expressed an unwillingness to provide clarity in the Amended Plan that the injunction does not enjoin, alter, or in any way modify parties' rights to insurance proceeds (to the extent such rights exist), despite these insurance proceeds not being property of the estate. This clarification is

necessary to preserve the status quo with respect to the Shareholder Litigation and availability of proceeds of insurance policies, and the Creditors' submit such language is customary and appropriate in this case.

CONCLUSION

59. For the reasons stated above as well as the reasons stated in the Initial Objection and this Supplemental Memorandum, the Creditors respectfully request that the Court strike the Debtor's designation as a subchapter V debtor, terminate the appointment of the subchapter V trustee in this case, and deny confirmation of the Amended Plan consistent with this Supplemental Memorandum.

Dated: September 7, 2024
Wilmington, Delaware

/s/ Laurel D. Roglen

Matthew G. Summers (DE No. 5533)
Laurel D. Roglen (DE No. 5759)
BALLARD SPAHR LLP
919 N. Market Street, 11th Floor
Wilmington, Delaware 19801-3034
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: summersm@ballardspahr.com
roglenl@ballardspahr.com

Counsel for Alex Bäcker, Cerocaru Investment Trust, Ricardo Bäcker, Tom Mitchell and Xianzhong Chen

EXHIBIT A

Claimant	Amount	Type of Claim	Source	Scheduled Claim Amount if Proof of Claim	Source	Difference (Proof of Claim Amount - Schedule)
AAA American Arbitration Association	$10,000.00	Unsecured	Schedule F, line 3.1			
Arizona Dept. of Revenue	$4,455.00	Priority	Proof of Claim (No. 4)	Not Scheduled		
Brex Credit Card	$23,832.75	Unsecured	Post-petition payment			
Brex Credit Card	$70,000.00	Unsecured	Post-petition payment			
Brex Credit Card	$18,904.11	Unsecured	Post-petition payment			
California Franchise Tax Board	$856.78	Priority	Proof of Claim (No. 22)	Not Scheduled		
Celtic Bank	$6,445,047.91	Secured	Schedules/Letter from counsel			
Cerocaru Investment Trust	$249,998.61	Unsecured	Schedule F, line 3.3 (Marked as contingent and disputed)	$249,998.61	POC 18	
Chipman Brown Cicero & Cole	$17,332.44	Unsecured	Schedule F, line 3.4			
City of Philadelphia	$304.56	Priority	Proof of Claim (No. 6)	Not Scheduled		
City of Philadelphia	$119.50	Unsecured	Proof of Claim (No. 6)	Not Scheduled		
Colorado Dept. of Revenue	$9,004.00	Priority	Proof of Claim (No. 3)	Not Scheduled		
Colorado Dept. of Revenue	$5,561.00	Unsecured	Proof of Claim (No. 3)	Not Scheduled		
Comcast	$655.81	Unsecured	Schedule F, line 3.5			
Dailey LLP	$44,723.65	Unsecured	Schedule F, line 3.6			
Dept of Treasury – IRS	$5,000.00		Proof of Claim (No. 1)	Not Scheduled		
Epic Systems Corp.	$285.00	Unsecured	Proof of Claim (No. 5)	Not Scheduled		
Global Data Risk LLC	$4,955.00	Unsecured	Proof of Claim (No. 16)	Not Scheduled		
Insivia Technologies LLC	$20,000.00	Unsecured	Schedule F, line 3.7			
Kevin Grauman and Mark Tapling	$54,208.65	Unsecured	Proof of Claim (No. 12)	Not Scheduled		
Louisiana Dept of Revenue	$424.58	Priority	Proof of Claim (No. 8)	Not Scheduled		
Louisiana Dept of Revenue	$168.00	Unsecured	Proof of Claim (No. 8)	Not Scheduled		
Morris Nichols Arsht and Tunnel LLP	$248,837.64	Unsecured	MNAT Settlement Agreement 6/18/24	Not scheduled		
Potter Anderson & Coroon	$67,408.90	Unsecured	Ballot & Schedule F, line 3.12			
Providence Partners, LLC	$110,583.85	Secured: $8,624.45	Proof of Claim (No. 14) – Lease Rejection- Arrears as of the petition date: $8,506.45		Schedule F, line 3.13	$101,959.40
		Unsecured: $101,959.40		$8,506.45		
Ricardo Backer	$24,983.57	Unsecured	Schedule F, line 3.14 (Marked as contingent and disputed)	$24,983.57	POC 19	
Scherzer International	$380.00	Unsecured	Ballot & Schedule F, Line 3.15			
Scopia Holdings LLC	$30,352.64	Unsecured	Proof of Claim (No. 10)			

Stubbs Alderton & Markiles, LLP	$46,900.00	Unsecured	Ballot & Proof of Claim (No. 7)	$46,900.00	Schedule F, line 3.16	$0.00
Thomas M. Mitchell Living Trust	$216,665.17	Unsecured	Schedule F, line 3.17 (Marked as contingent and disputed)	$216,665.17	POC 21	
Texas Comptroller of Public Accounts	$2,000.00	Priority	Proof of Claim (No. 15)	Not Scheduled		
US Small Business Administration	$127,237.00		Schedule F, line 3.18 (Marked as contingent and disputed)			
Wilks Law LLC	$30,352.64	Unsecured	Schedule F, line 3.19			
Wolflick Khachaturian & Bouayad, APC	$139,260.07	Unsecured	Proof of Claim (No. 9)	$91,872.52	Schedule F, line 3.20	$47,387.55
Xianzhong Chen	$13,331.96	Unsecured	Schedule F, line 3.21 (Marked as contingent and disputed)	$13,331.96	POC 17	
Prepetition Employee Wage, Reimbursement and Benefit Obligations	$117,500.00	Priority	Not scheduled. $117,500 final authority. $131,498 funded June 28, 2024 per June MOR [D.I. 73]			
State of Washington	$1,629.83	Priority	Scheduled as undetermined but paid			
Prepetition Bank Fees	$484		Not scheduled but paid June 21, 2024 per June MOR [D.I. 73]			

Total Eligible Debt as of Petition Date including Preferred Shareholders: **$8,109,535.97**

Total Eligible Claims as of Petition Date excluding Preferred Shareholders: **$7,604,556.66**

EXHIBIT B

December 28, 2022

Kurt Nichols
CIBC Bank USA

RE: Small Business Administration, Payroll Protection Program Loan
PPP Request for Production of Documents and Information
Borrower: QLess, Inc.
Loan Approval Amount: $1,130,767.12
Loan Approval Date: 04/09/2020

Dear Kurt Nichols:

Thank you for your email. We understand that the SBA is requesting additional information for the PPP loan amount as noted in your letter dated December 21, 2022.

In reviewing the calculations used to derive at the loan amount, we believe the total 2019 annual wages, less wages in excess of $100K, should be calculated differently for two reasons, specifically:

First, the total wages in your letter ($5,390,592.25) are derived from quarterly Form 941 filings, line 5c. These wages do not include the pre-tax employee deductions ($159,829.62) and thus do not reflect the true wages paid by QLess, Inc.

Second, the total amounts in excess of $100,000 in your letter ($1,114,762) appear to be derived from W2 statements, and if that is true, they are based on figures that exclude the pre-tax employee deductions.

We believe it is more appropriate to utilize 2019 payroll registers from ADP for both the total wages paid, as well as the wages in excess of $100,000. This calculation is summarized below with more details in the attached Excel document.

	SBA	QLESS
Wages	5,390,592	5,563,695
> $100K	(1,114,762)	(1,170,058)
Total Wages	4,275,830	4,393,637
SUTA	25,494	25,552
ER Health	397,752	397,752
Total Eligible Payroll	4,699,076	4,816,941
Average monthly payroll	391,590	401,412
Max loan amount	978,974	1,003,529
Excess loan amount	(151,793)	(127,238)

We acknowledge that there is a difference in the original loan amount due the original loan calculations including contractor wages. We presume this error was inadvertent by previous finance personnel no longer employeed with QLess, Inc.

Please contact me if any further information is needed.

Sincerely,

DocuSigned by:
6A3EF2A8A36E484...

Amy Muradyan, Controller
QLess, Inc.

EXHIBIT C

EXECUTION VERSION

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION
OF
QLess, Inc.

(Pursuant to Sections 242 and 245 of the
General Corporation Law of the State of Delaware)

QLess, Inc., a corporation organized and existing under and by virtue of the provisions of the General Corporation Law of the State of Delaware (the "**General Corporation Law**"),

DOES HEREBY CERTIFY:

1. That the name of this corporation is QLess, Inc., and that this corporation was originally incorporated pursuant to the General Corporation Law on July 2, 2009.

2. That the Board of Directors of the Corporation duly adopted resolutions proposing to amend and restate the Amended and Restated Certificate of Incorporation of this corporation, declaring said amendment and restatement to be advisable and in the best interests of this corporation and its stockholders, and authorizing the appropriate officers of this corporation to solicit the consent of the stockholders therefor, which resolution setting forth the proposed amendment and restatement is as follows:

RESOLVED, that the Amended and Restated Certificate of Incorporation of this corporation be amended and restated in its entirety to read as follows:

FIRST: The name of this corporation is QLess, Inc. (the "**Corporation**").

SECOND: The address of the registered office of the Corporation in the State of Delaware is 160 Greentree, Suite 101, Dover, Delaware, 19904, county of Kent. The name of its registered agent at such address is National Registered Agents, Inc.

THIRD: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law.

FOURTH: The total number of shares of all classes of stock which the Corporation shall have authority to issue is (i) 28,355,036 shares of Common Stock, $0.00001 par value per share ("**Common Stock**"), and (ii) 11,252,106 shares of preferred stock, $0.00001 par value per share.

The following is a statement of the designations and the powers, privileges and rights, and the qualifications, limitations or restrictions thereof in respect of each class of capital stock of the Corporation.

State of Delaware
Secretary of State
Division of Corporations
Delivered 03:49 PM 11/19/2018
FILED 03:49 PM 11/19/2018
SR 20187720528 - File Number 4705539

A. COMMON STOCK

1. General. The voting, dividend and liquidation rights of the holders of the Common Stock are subject to and qualified by the rights, powers and preferences of the holders of the Preferred Stock set forth herein.

2. Voting. The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of stockholders (and written actions in lieu of meetings); provided, however, that, except as otherwise required by law, holders of Common Stock, as such, shall not be entitled to vote on any amendment to this Amended and Restated Certificate of Incorporation (as amended and/or restated from time to time, the "**Certificate of Incorporation**") that relates solely to the terms of one or more outstanding series of the Corporation's preferred stock if the holders of such affected series are entitled, either separately or together with the holders of one or more other such series, to vote thereon pursuant to the Certificate of Incorporation or pursuant to the General Corporation Law. There shall be no cumulative voting. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by (in addition to any vote of the holders of one or more series of the Corporation's preferred stock that may be required by the terms of the Certificate of Incorporation) the affirmative vote of the holders of shares of capital stock of the Corporation representing a majority of the votes represented by all outstanding shares of capital stock of the Corporation entitled to vote (on an as-converted-to-Common Stock basis), irrespective of the provisions of Section 242(b)(2) of the General Corporation Law.

B. PREFERRED STOCK

4,163,430 shares of the authorized and unissued Preferred Stock of the Corporation are hereby designated "**Series A Preferred Stock**" and 7,088,676 shares of the authorized and unissued Preferred Stock of the Corporation are hereby designated "**Series A-1 Preferred Stock**" (and together with the Series A Preferred Stock, collectively, the "**Preferred Stock**"), each with the following rights, preferences, powers, privileges and restrictions, qualifications and limitations. Unless otherwise indicated, references to "sections" or "subsections" in this Part B of this Article Fourth refer to sections and subsections of Part B of this Article Fourth.

1. Dividends. In any calendar year, the holders of outstanding shares of Preferred Stock shall be entitled to receive dividends, when, as and if declared by the Board of Directors of the Corporation (the "**Board of Directors**"), out of any assets at the time legally available therefore, at an annual rate of 8% of the applicable Original Issue Price (as defined below) for such series of Preferred Stock (the "**Dividend Rate**"), payable in preference and priority to any declaration or payment of any dividend or distribution on shares of any other class or series of capital stock of the Corporation in such calendar year. No distributions shall be made with respect to any other class or series of capital stock of the Corporation until all declared dividends on the Preferred Stock have been paid or set aside for payment to the holders of Preferred Stock. Payment of any dividends to the holders of Preferred Stock shall be on a pro rata, pari passu basis in proportion to the applicable Dividend Rate. The right to receive dividends on shares of the Preferred Stock shall not be cumulative, and no right to such dividends shall accrue by reason of the fact that dividends on said shares are not declared in any calendar year. The "**Series A Original Issue Price**" shall mean $1.7042 per share for the Series

A Preferred Stock, subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A Preferred Stock. The "**Series A-1 Original Issue Price**" shall mean $1.4107 per share for the Series A-1 Preferred Stock, subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Series A-1 Preferred Stock. The "**Original Issue Price**" shall mean, as applicable, the Series A Original Issue Price and/or the Series A-1 Original Issue Price.

2. Liquidation, Dissolution or Winding Up; Certain Mergers, Consolidations and Asset Sales.

2.1 Preferential Payments to Holders of Preferred Stock. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, the holders of shares of Preferred Stock then outstanding shall be entitled to be paid out of the assets of the Corporation available for distribution to its stockholders, and in the event of a Deemed Liquidation Event (as defined below), the holders of shares of Preferred Stock then outstanding shall be entitled to be paid out of the consideration payable to stockholders in such Deemed Liquidation Event or out of the Available Proceeds (as defined below), as applicable, before any payment shall be made to the holders of Common Stock by reason of their ownership thereof, an amount per share equal to the applicable Original Issue Price, plus any dividends declared but unpaid thereon. If upon any such liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, the assets of the Corporation available for distribution to its stockholders shall be insufficient to pay the holders of shares of Preferred Stock the full amount to which they shall be entitled under this Section 2.1, the holders of shares of Preferred Stock shall share ratably in any distribution of the assets available for distribution in proportion to the respective amounts which would otherwise be payable in respect of the shares held by them upon such distribution if all amounts payable on or with respect to such shares were paid in full.

2.2 Distribution of Remaining Assets. In the event of any voluntary or involuntary liquidation, dissolution or winding up of the Corporation or Deemed Liquidation Event, after the payment of all preferential amounts required to be paid to the holders of shares of Preferred Stock, the remaining assets of the Corporation available for distribution to its stockholders shall be distributed among the holders of the shares of Preferred Stock and Common Stock, pro rata based on the number of shares held by each such holder, treating for this purpose all such securities as if they had been converted to Common Stock pursuant to the terms of the Certificate of Incorporation immediately prior to such liquidation, dissolution or winding up of the Corporation; provided, however, that in no event shall the aggregate amount which the holders of any series of Preferred Stock are entitled to receive under Section 2.1 and the preceding clause of this Section 2.2 exceed an amount per share equal to two (2) times the applicable Original Issue Price plus any dividends declared but unpaid thereon (subject to appropriate adjustment in the event of a stock split, stock dividend, combination, reclassification, or similar event affecting the Preferred Stock), unless the amount the holders of such series of Preferred Stock would have received if all shares of such series of Preferred Stock had been converted into Common Stock immediately prior to such liquidation, dissolution or winding up of the Corporation is greater, in which case the shares of such series of Preferred Stock shall be deemed to have been converted to Common Stock immediately prior to such liquidation, dissolution or winding up of the Corporation. The amount per share payable to each holder of

Preferred Stock under Sections 2.1 and 2.2 is referred to as the "**Preferred Liquidation Amount**").

2.3 Deemed Liquidation Events.

2.3.1 Definition. Each of the following events shall be considered a "**Deemed Liquidation Event**" unless the holders of at least a majority of the outstanding shares of Preferred Stock (voting together as a separate class on an as-converted to Common Stock basis) (the "**Requisite Holders**") elect otherwise by written notice sent to the Corporation at least five (5) days prior to the effective date of any such event:

(a) a merger or consolidation in which

(i) the Corporation is a constituent party or

(ii) a subsidiary of the Corporation is a constituent party and the Corporation issues shares of its capital stock pursuant to such merger or consolidation,

except any such merger or consolidation involving the Corporation or a subsidiary in which the shares of capital stock of the Corporation outstanding immediately prior to such merger or consolidation continue to represent, or are converted into or exchanged for shares of capital stock that represent, immediately following such merger or consolidation, at least a majority, by voting power, of the capital stock of (1) the surviving or resulting corporation; or (2) if the surviving or resulting corporation is a wholly owned subsidiary of another corporation immediately following such merger or consolidation, the parent corporation of such surviving or resulting corporation; or

(b) (i) the sale, lease, transfer, exclusive license or other disposition, in a single transaction or series of related transactions, by the Corporation or any subsidiary of the Corporation of all or substantially all the assets of the Corporation and its subsidiaries taken as a whole, or (ii) the sale or disposition (whether by merger, consolidation or otherwise, and whether in a single transaction or a series of related transactions) of one or more subsidiaries of the Corporation if substantially all of the assets of the Corporation and its subsidiaries taken as a whole are held by such subsidiary or subsidiaries, except where such sale, lease, transfer, exclusive license or other disposition is to a wholly owned subsidiary of the Corporation.

2.3.2 Effecting a Deemed Liquidation Event.

(a) The Corporation shall not have the power to effect a Deemed Liquidation Event referred to in Section 2.3.1(a)(i) unless the agreement or plan of merger or consolidation for such transaction (the "**Merger Agreement**") provides that the consideration payable to the stockholders of the Corporation in such Deemed Liquidation Event shall be paid to the holders of capital stock of the Corporation in accordance with Sections 2.1 and 2.2.

(b) In the event of a Deemed Liquidation Event referred to in Section 2.3.1(a)(ii) or 2.3.1(b), if the Corporation does not effect a dissolution of the Corporation under the General Corporation Law within ninety (90) days after such Deemed Liquidation Event, then (i) the Corporation shall send a written notice to each holder of Preferred Stock no later than the ninetieth (90th) day after the Deemed Liquidation Event advising such holders of their right (and the requirements to be met to secure such right), pursuant to the terms of the following clause, to require the redemption of such shares of Preferred Stock, and (ii) if the Requisite Holders so request in a written instrument delivered to the Corporation not later than one hundred twenty (120) days after such Deemed Liquidation Event, the Corporation shall use the consideration received by the Corporation for such Deemed Liquidation Event (net of any retained liabilities associated with the assets sold or technology licensed, as determined in good faith by the Board of Directors), together with any other assets of the Corporation available for distribution to its stockholders, all to the extent permitted by Delaware law governing distributions to stockholders (the "**Available Proceeds**"), on the one hundred fiftieth (150th) day after such Deemed Liquidation Event, to redeem all outstanding shares of Preferred Stock at a price per share equal to the Preferred Liquidation Amount applicable to such series of Preferred Stock. Notwithstanding the foregoing, in the event of a redemption pursuant to the preceding sentence, if the Available Proceeds are not sufficient to redeem all outstanding shares of Preferred Stock, the Corporation shall ratably redeem each holder's shares of Preferred Stock to the fullest extent of such Available Proceeds and shall redeem the remaining shares as soon as it may lawfully do so under Delaware law governing distributions to stockholders. Prior to the distribution or redemption provided for in this Section 2.3.2(b), the Corporation shall not expend or dissipate the consideration received for such Deemed Liquidation Event, except to discharge expenses incurred in connection with such Deemed Liquidation Event.

2.3.3 Amount Deemed Paid or Distributed. If the amount deemed paid or distributed under this Section 2.3.3 is made in property other than in cash, the value of such distribution shall be the fair market value of such property, determined as follows:

(a) For securities not subject to investment letters or other similar restrictions on free marketability,

(i) if traded on a securities exchange, the value shall be deemed to be the average of the closing prices of the securities on such exchange or market over the thirty (30) day period ending three (3) days prior to the closing of such transaction;

(ii) if actively traded over-the-counter, the value shall be deemed to be the average of the closing bid prices over the thirty (30) day period ending three (3) days prior to the closing of such transaction; or

(iii) if there is no active public market, the value shall be the fair market value thereof, as

determined in good faith by the Board of Directors.

(b) The method of valuation of securities subject to investment letters or other similar restrictions on free marketability (other than restrictions arising solely by virtue of a stockholder's status as an affiliate or former affiliate) shall take into account an appropriate discount (as determined in good faith by the Board of Directors of the Corporation) from the market value as determined pursuant to clause (a) above so as to reflect the approximate fair market value thereof.

2.3.4 Allocation of Escrow and Contingent Consideration. In the event of a Deemed Liquidation Event pursuant to Section 2.3.1(a)(i), if any portion of the consideration payable to the stockholders of the Corporation is payable only upon satisfaction of contingencies (the "**Additional Consideration**"), the Merger Agreement shall provide that (a) the portion of such consideration that is not Additional Consideration (such portion, the "**Initial Consideration**") shall be allocated among the holders of capital stock of the Corporation in accordance with Sections 2.1 and 2.2 as if the Initial Consideration were the only consideration payable in connection with such Deemed Liquidation Event; and (b) any Additional Consideration which becomes payable to the stockholders of the Corporation upon satisfaction of such contingencies shall be allocated among the holders of capital stock of the Corporation in accordance with Sections 2.1 and 2.2 after taking into account the previous payment of the Initial Consideration as part of the same transaction. For the purposes of this Section 2.3.4, consideration placed into escrow or retained as a holdback to be available for satisfaction of indemnification or similar obligations in connection with such Deemed Liquidation Event shall be deemed to be Additional Consideration.

3. Voting.

3.1 General. On any matter presented to the stockholders of the Corporation for their action or consideration at any meeting of stockholders of the Corporation (or by written consent of stockholders in lieu of meeting), each holder of outstanding shares of Preferred Stock shall be entitled to cast the number of votes equal to the number of whole shares of Common Stock into which the shares of Preferred Stock held by such holder are convertible as of the record date for determining stockholders entitled to vote on such matter. Except as provided by law or by the other provisions of the Certificate of Incorporation, holders of Preferred Stock shall vote together with the holders of Common Stock as a single class and on an as-converted to Common Stock basis.

3.2 Election of Directors. The holders of record of the shares of Series A Preferred Stock, voting exclusively and as a separate class, shall be entitled to elect one (1) director of the Corporation (the "**Series A Director**"), the holders of record of the shares of Series A-1 Preferred Stock, voting exclusively and as a separate class, shall be entitled to elect one (1) director of the Corporation (the "**Series A-1 Director**"), and the holders of record of the shares of Common Stock, voting exclusively and as a separate class, shall be entitled to elect two (2) directors of the Corporation (each, a "**Common Director**"); provided, that from and after the date that is eighteen (18) months from the date that Alex Bäcker ceases to be the Chief Executive Officer of the Corporation, the number of Common Directors which the holders of record of the

shares of Common Stock, voting exclusively and as a separate class, shall be entitled to elect shall be reduced to one (1). Any director elected as provided in the preceding sentence may be removed without cause by, and only by, the affirmative vote of the holders of the shares of the class or series of capital stock entitled to elect such director or directors, given either at a special meeting of such stockholders duly called for that purpose or pursuant to a written consent of stockholders. If the holders of shares of Preferred Stock or Common Stock, as the case may be, fail to elect a sufficient number of directors to fill all directorships for which they are entitled to elect directors, voting exclusively and as a separate class, pursuant to the first sentence of this Section 3.2, then any directorship not so filled shall remain vacant until such time as the holders of the Preferred Stock or Common Stock, as the case may be, elect a person to fill such directorship by vote or written consent in lieu of a meeting; and no such directorship may be filled by stockholders of the Corporation other than by the stockholders of the Corporation that are entitled to elect a person to fill such directorship, voting exclusively and as a separate class. The holders of record of the shares of Common Stock and of any other class or series of voting stock (including the Preferred Stock), exclusively and voting together as a single class, shall be entitled to elect the balance of the total number of directors of the Corporation. At any meeting held for the purpose of electing a director, the presence in person or by proxy of the holders of a majority of the outstanding shares of the class or series entitled to elect such director shall constitute a quorum for the purpose of electing such director. Except as otherwise provided in this Section 3.2, a vacancy in any directorship filled by the holders of any class or series shall be filled only by vote or written consent in lieu of a meeting of the holders of such class or series or by any remaining director or directors elected by the holders of such class or series pursuant to this Section 3.2. Notwithstanding the foregoing, for administrative convenience, the initial Series A Director, Series A-1 Director, and Common Directors may each be appointed by the Board of Directors in connection with the approval of the initial issuance of Series A-1 Preferred Stock without a separate action by the holders of Preferred Stock or Common Stock.

3.3 Preferred Stock Protective Provisions. At any time when at least 2,000,000 shares of Preferred Stock (subject to appropriate adjustment in the event of any stock dividend, stock split, combination or other similar recapitalization with respect to the Preferred Stock) are outstanding, the Corporation shall not, either directly or indirectly by amendment, merger, consolidation or otherwise, do any of the following without (in addition to any other vote required by law or the Certificate of Incorporation) the written consent or affirmative vote of the Requisite Holders, given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a single class and on an as-converted-to-Common Stock basis, and any such act or transaction entered into without such consent or vote shall be null and void *ab initio*, and of no force or effect.

3.3.1 amend, alter or repeal any provision of the Certificate of Incorporation or Bylaws of the Corporation in a manner that adversely affects the rights, preferences, privileges, or powers of, or restrictions on, the Preferred Stock or any series thereof;

3.3.2 increase or decrease the authorized number of shares of Preferred Stock or Common Stock, except with respect to an increase in the authorized number of shares of Common Stock being effected in connection with an issuance of Common Stock in a bona fide equity financing with gross proceeds to the Corporation of not more than $4,000,000;

3.3.3 increase or decrease the authorized number of directors constituting the Board of Directors, except in connection with a financing transaction approved by the Board of Directors in which the rights of the Preferred Stock to elect the Series A Director and Series A-1 Director is preserved;

3.3.4 create, or authorize the creation of (by reclassification or otherwise) any additional class or series of capital stock unless the same (i) ranks junior to the Preferred Stock with respect to the distribution of assets on the liquidation, dissolution or winding up of the Corporation, and the payment of dividends and rights of redemption, and (ii) does not have voting rights other than those granted to the Preferred Stock;

3.3.5 liquidate, dissolve or wind-up the business and affairs of the Corporation, effect any Deemed Liquidation Event, or consent to any of the foregoing;

3.3.6 effect any merger or other corporate reorganization or acquisition;

3.3.7 incur (or permit any subsidiary to incur) any indebtedness for borrowed funds such that the aggregate indebtedness for borrowed funds of the Corporation would exceed the aggregate indebtedness for borrowed funds of the Corporation outstanding as of the Series A-1 Original Issue Date, provided that no consent shall be required for indebtedness in the aggregate principal amount of up to $3,500,000 (including amounts incurred prior to the Series A-1 Original Issue Date) incurred pursuant to the Loan and Security Agreement dated February 25, 2016, as the same may be amended from time to time;

3.3.8 purchase or redeem (or permit any subsidiary to purchase or redeem) or pay or declare any dividend or make any distribution on, any shares of capital stock of the Corporation other than (i) dividends or distributions on the Preferred Stock as expressly authorized herein, (ii) dividends or other distributions payable on the Common Stock solely in the form of additional shares of Common Stock and (iii) repurchases of stock from former employees, officers, directors, consultants or other persons who performed services for the Corporation or any subsidiary in connection with the cessation of such employment or service at a price not to exceed the original purchase price thereof, (iv) as approved by the Board of Directors, including the approval of either the Series A Director or the Series A-1 Director, and (v) repurchases of stock pursuant to that certain option agreement entered into by the Corporation on or about March 15, 2017, which shall not in the aggregate exceed $1,200,237.

4. Optional Conversion.

The holders of the Preferred Stock shall have conversion rights as follows (the "**Conversion Rights**"):

4.1 Right to Convert.

4.1.1 Conversion Ratio. Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time and from time to time, and without the payment of additional consideration by the holder thereof, into such number of fully paid and non-assessable shares of Common Stock as is determined by dividing the Original Issue Price for

such series of Preferred Stock by the Conversion Price (as defined below) in effect at the time of conversion. The "**Conversion Price**" per share for (i) the Series A-1 Preferred Stock shall initially be equal to the Series A-1 Original Issue price and (ii) the Series A Preferred Stock shall be equal to $1.6259. The Conversion Price for each series of Preferred Stock and the rate at which such shares of Preferred Stock may be converted into shares of Common Stock, shall be subject to adjustment as provided below.

4.1.2 Termination of Conversion Rights. In the event of a notice of redemption of any shares of Preferred Stock pursuant to Section 6, the Conversion Rights of the shares designated for redemption shall terminate at the close of business on the last full day preceding the date fixed for redemption, unless the redemption price is not fully paid on such redemption date, in which case the Conversion Rights for such shares shall continue until such price is paid in full. In the event of a liquidation, dissolution or winding up of the Corporation or a Deemed Liquidation Event, the Conversion Rights shall terminate at the close of business on the last full day preceding the date fixed for the payment of any such amounts distributable on such event to the holders of Preferred Stock.

4.2 Fractional Shares. No fractional shares of Common Stock shall be issued upon conversion of the Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the fair market value of a share of Common Stock as determined in good faith by the Board of Directors. Whether or not fractional shares would be issuable upon such conversion shall be determined on the basis of the total number of shares of Preferred Stock the holder is holding at the time converting into Common Stock and the aggregate number of shares of Common Stock issuable upon such conversion.

4.3 Mechanics of Conversion.

4.3.1 Notice of Conversion. In order for a holder of Preferred Stock to voluntarily convert shares of Preferred Stock into shares of Common Stock, such holder shall (a) provide written notice to the Corporation's transfer agent at the office of the transfer agent for the Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent) that such holder elects to convert all or any number of such holder's shares of Preferred Stock and, if applicable, any event on which such conversion is contingent and (b), if such holder's shares are certificated, surrender the certificate or certificates for such shares of Preferred Stock (or, if such registered holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate), at the office of the transfer agent for the Preferred Stock (or at the principal office of the Corporation if the Corporation serves as its own transfer agent). Such notice shall state such holder's name or the names of the nominees in which such holder wishes the shares of Common Stock to be issued. If required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by a written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or his, her or its attorney duly authorized in writing. The close of business on the date of receipt by the transfer agent (or by the Corporation if the Corporation serves as its own transfer agent) of such notice and, if applicable, certificates (or

lost certificate affidavit and agreement) shall be the time of conversion (the "**Conversion Time**"), and the shares of Common Stock issuable upon conversion of the specified shares shall be deemed to be outstanding of record as of such date. The Corporation shall, as soon as practicable after the Conversion Time (i) issue and deliver to such holder of Preferred Stock, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable upon such conversion in accordance with the provisions hereof and a certificate for the number (if any) of the shares of Preferred Stock represented by the surrendered certificate that were not converted into Common Stock, (ii) pay in cash such amount as provided in Section 4.2 in lieu of any fraction of a share of Common Stock otherwise issuable upon such conversion and (iii) pay all declared but unpaid dividends on the shares of Preferred Stock converted.

4.3.2 Reservation of Shares. The Corporation shall at all times when the Preferred Stock shall be outstanding, reserve and keep available out of its authorized but unissued capital stock, for the purpose of effecting the conversion of the Preferred Stock, such number of its duly authorized shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock, the Corporation shall take such corporate action as may be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes, including, without limitation, engaging in best efforts to obtain the requisite stockholder approval of any necessary amendment to the Certificate of Incorporation. Before taking any action which would cause an adjustment reducing the Conversion Price of a series of Preferred Stock below the then par value of the shares of Common Stock issuable upon conversion of the such series of Preferred Stock, the Corporation will take any corporate action which may, in the opinion of its counsel, be necessary in order that the Corporation may validly and legally issue fully paid and non-assessable shares of Common Stock at such adjusted Conversion Price.

4.3.3 Effect of Conversion. All shares of Preferred Stock which shall have been surrendered for conversion as herein provided shall no longer be deemed to be outstanding and all rights with respect to such shares shall immediately cease and terminate at the Conversion Time, except only the right of the holders thereof to receive shares of Common Stock in exchange therefor, to receive payment in lieu of any fraction of a share otherwise issuable upon such conversion as provided in Section 4.2 and to receive payment of any dividends declared but unpaid thereon. Any shares of Preferred Stock so converted shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Preferred Stock accordingly.

4.3.4 No Further Adjustment. Upon any such conversion of shares of Preferred Stock, no adjustment to the Conversion Price of the applicable series of Preferred Stock shall be made for any declared but unpaid dividends on the such series of Preferred Stock surrendered for conversion or on the Common Stock delivered upon conversion.

4.3.5 Taxes. The Corporation shall pay any and all issue and other similar taxes that may be payable in respect of any issuance or delivery of shares of Common Stock upon conversion of shares of Preferred Stock pursuant to this Section 4. The

Corporation shall not, however, be required to pay any tax which may be payable in respect of any transfer involved in the issuance and delivery of shares of Common Stock in a name other than that in which the shares of Preferred Stock so converted were registered, and no such issuance or delivery shall be made unless and until the person or entity requesting such issuance has paid to the Corporation the amount of any such tax or has established, to the satisfaction of the Corporation, that such tax has been paid.

4.4 Adjustments to Conversion Price for Diluting Issues.

4.4.1 Special Definitions. For purposes of this Article Fourth, the following definitions shall apply:

(a) "**Option**" shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(b) "**Series A-1 Original Issue Date**" shall mean the date on which the first share of Series A-1 Preferred Stock was issued.

(c) "**Convertible Securities**" shall mean any evidences of indebtedness, shares or other securities directly or indirectly convertible into or exchangeable for Common Stock, but excluding Options.

(d) "**Additional Shares of Common Stock**" shall mean all shares of Common Stock issued (or, pursuant to Section 4.4.3 below, deemed to be issued) by the Corporation after the Series A-1 Original Issue Date, other than (1) the following shares of Common Stock and (2) shares of Common Stock deemed issued pursuant to the following Options and Convertible Securities (clauses (1) and (2), collectively, "**Exempted Securities**"):

(i) shares of Common Stock, Options or Convertible Securities issued as a dividend or distribution on Preferred Stock;

(ii) shares of Common Stock, Options or Convertible Securities issued by reason of a dividend, stock split, split-up or other distribution on shares of Common Stock that is covered by Section 4.5, 4.6, 4.7 or 4.8;

(iii) shares of Common Stock or Options issued to employees or directors of, or consultants or advisors to, the Corporation or any of its subsidiaries pursuant to a plan, agreement or arrangement approved by the Board of Directors of the Corporation, including the Series A Director or the Series A-1 Director;

(iv) shares of Common Stock or Convertible Securities actually issued upon the exercise of Options or shares of Common Stock actually issued upon the conversion or exchange of Convertible Securities, in each case provided such issuance is pursuant to the terms of such Option or Convertible Security;

(v) shares of Common Stock, Options or Convertible Securities issued to banks, equipment lessors or other financial institutions, or to real property lessors, pursuant to a debt financing, equipment leasing or real property leasing transaction approved by the Board of Directors of the Corporation, including the Series A Director or the Series A-1 Director;

(vi) shares of Common Stock, Options or Convertible Securities issued to suppliers or third-party service providers in connection with the provision of goods or services pursuant to transactions approved by the Board of Directors of the Corporation including the Series A Director or the Series A-1 Director;

(vii) shares of Common Stock, Options or Convertible Securities issued pursuant to the acquisition of another corporation by the Corporation by merger, purchase of substantially all of the assets or other reorganization or to a joint venture agreement, provided that such issuances are approved by the Board of Directors of the Corporation, including the Series A Director or the Series A-1 Director; or

(viii) shares of Common Stock, Options or Convertible Securities issued in connection with sponsored research, collaboration, technology license, development, OEM, marketing or other similar agreements or strategic partnerships approved by the Board of Directors of the Corporation, including the Series A Director or the Series A-1 Director.

4.4.2 No Adjustment of Conversion Price. No adjustment in the Conversion Price for a series of Preferred Stock shall be made as the result of the issuance or deemed issuance of Additional Shares of Common Stock if the Corporation receives written notice from the holders of a majority of the shares of such series of Preferred Stock agreeing that no such adjustment shall be made as the result of the issuance or deemed issuance of such Additional Shares of Common Stock.

4.4.3 Deemed Issue of Additional Shares of Common Stock.

(a) If the Corporation at any time or from time to time after the Series A-1 Original Issue Date shall issue any Options or Convertible Securities (excluding Options or Convertible Securities which are themselves Exempted Securities) or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares of Common Stock (as set forth in the instrument relating thereto, assuming the satisfaction of any conditions to exercisability, convertibility or exchangeability but without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or, in the case of Convertible Securities and Options therefor, the conversion or exchange of such Convertible Securities, shall be deemed to be Additional Shares of Common Stock issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date.

(b) If the terms of any Option or Convertible Security, the issuance of which resulted in an adjustment to the Conversion Price of a series of Preferred Stock pursuant to the terms of Section 4.4.4, are revised as a result of an amendment to such terms or any other adjustment pursuant to the provisions of such Option or Convertible Security (but excluding automatic adjustments to such terms pursuant to anti-dilution or similar provisions of such Option or Convertible Security) to provide for either (1) any increase or decrease in the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any such Option or Convertible Security or (2) any increase or decrease in the consideration payable to the Corporation upon such exercise, conversion and/or exchange, then, effective upon such increase or decrease becoming effective, the applicable Conversion Price computed upon the original issue of such Option or Convertible Security (or upon the occurrence of a record date with respect thereto) shall be readjusted to such Conversion Price for the applicable series of Preferred Stock as would have obtained had such revised terms been in effect upon the original date of issuance of such Option or Convertible Security. Notwithstanding the foregoing, no readjustment pursuant to this clause (b) shall have the effect of increasing the Conversion Price for the applicable series of Preferred Stock to an amount which exceeds the lower of (i) the applicable Conversion Price in effect immediately prior to the original adjustment made as a result of the issuance of such Option or Convertible Security, or (ii) the Conversion Price for the applicable series of Preferred Stock that would have resulted from any issuances of Additional Shares of Common Stock (other than deemed issuances of Additional Shares of Common Stock as a result of the issuance of such Option or Convertible Security) between the original adjustment date and such readjustment date.

(c) If the terms of any Option or Convertible Security (excluding Options or Convertible Securities which are themselves Exempted Securities), the

issuance of which did not result in an adjustment to the Conversion Price for a series of Preferred Stock pursuant to the terms of Section 4.4.4 (either because the consideration per share (determined pursuant to Section 4.4.5) of the Additional Shares of Common Stock subject thereto was equal to or greater than the Conversion Price for the applicable series of Preferred Stock then in effect, or because such Option or Convertible Security was issued before the Series A-1 Original Issue Date), are revised after the Series A-1 Original Issue Date as a result of an amendment to such terms or any other adjustment pursuant to the provisions of such Option or Convertible Security (but excluding automatic adjustments to such terms pursuant to anti-dilution or similar provisions of such Option or Convertible Security) to provide for either (1) any increase in the number of shares of Common Stock issuable upon the exercise, conversion or exchange of any such Option or Convertible Security or (2) any decrease in the consideration payable to the Corporation upon such exercise, conversion or exchange, then such Option or Convertible Security, as so amended or adjusted, and the Additional Shares of Common Stock subject thereto (determined in the manner provided in Section 4.4.3(a) shall be deemed to have been issued effective upon such increase or decrease becoming effective.

(d) Upon the expiration or termination of any unexercised Option or unconverted or unexchanged Convertible Security (or portion thereof) which resulted (either upon its original issuance or upon a revision of its terms) in an adjustment to the Conversion Price for a Series of Preferred Stock pursuant to the terms of Section 4.4.4, the Conversion Price for the applicable series of Preferred Stock shall be readjusted to such Conversion Price for the applicable series of Preferred Stock as would have obtained had such Option or Convertible Security (or portion thereof) never been issued.

(e) If the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any Option or Convertible Security, or the consideration payable to the Corporation upon such exercise, conversion and/or exchange, is calculable at the time such Option or Convertible Security is issued or amended but is subject to adjustment based upon subsequent events, any adjustment to the Conversion Price of a series of Preferred Stock provided for in this Section 4.4.3 shall be effected at the time of such issuance or amendment based on such number of shares or amount of consideration without regard to any provisions for subsequent adjustments (and any subsequent adjustments shall be treated as provided in clauses (b) and (c) of this Section 4.4.3). If the number of shares of Common Stock issuable upon the exercise, conversion and/or exchange of any Option or Convertible Security, or the consideration payable to the Corporation upon such exercise, conversion and/or exchange, cannot be calculated at all at the time such Option or Convertible Security is issued or amended, any adjustment to the Conversion Price for the applicable series of Preferred Stock that would result under the terms of this Section 4.4.3 at the time of such issuance or amendment shall instead be effected at the time such number of shares and/or amount of consideration is first calculable (even if subject to subsequent adjustments), assuming for purposes of calculating such adjustment to the Conversion Price for the applicable series of Preferred Stock that such issuance or amendment took place at the time such calculation can first be made.

4.4.4 Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock. In the event the Corporation shall at any time after the Series A-1 Original Issue Date issue Additional Shares of Common Stock (including Additional Shares of Common Stock deemed to be issued pursuant to Section 4.4.3), without consideration

or for a consideration per share less than the Conversion Price for a series of Preferred Stock in effect immediately prior to such issuance or deemed issuance, then the Conversion Price for the applicable series of Preferred Stock shall be reduced, concurrently with such issue, to a price (calculated to the nearest one-hundredth of a cent) determined in accordance with the following formula:

$$CP_2 = CP_1 * (A + B) \div (A + C).$$

For purposes of the foregoing formula, the following definitions shall apply:

(a) "CP_2" shall mean the Conversion Price for the applicable series of Preferred Stock in effect immediately after such issuance or deemed issuance of Additional Shares of Common Stock

(b) "CP_1" shall mean the Conversion Price for the applicable series of Preferred Stock in effect immediately prior to such issuance or deemed issuance of Additional Shares of Common Stock;

(c) "A" shall mean the number of shares of Common Stock outstanding immediately prior to such issuance or deemed issuance of Additional Shares of Common Stock (treating for this purpose as outstanding all shares of Common Stock issuable upon exercise of Options outstanding immediately prior to such issuance or deemed issuance or upon conversion or exchange of Convertible Securities (including the Preferred Stock) outstanding (assuming exercise of any outstanding Options therefor) immediately prior to such issue);

(d) "B" shall mean the number of shares of Common Stock that would have been issued if such Additional Shares of Common Stock had been issued at a price per share equal to CP_1 (determined by dividing the aggregate consideration received by the Corporation in respect of such issue by CP_1); and

(e) "C" shall mean the number of such Additional Shares of Common Stock issued in such transaction.

4.4.5 Determination of Consideration. For purposes of this Section 4.4, the consideration received by the Corporation for the issuance or deemed issuance of any Additional Shares of Common Stock shall be computed as follows:

(a) Cash and Property: Such consideration shall:

(i) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation, excluding amounts paid or payable for accrued interest;

(ii) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as

determined in good faith by the Board of Directors; and

(iii) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (i) and (ii) above, as determined in good faith by the Board of Directors.

(b) Options and Convertible Securities. The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 4.4.3, relating to Options and Convertible Securities, shall be determined by dividing:

(i) The total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities, by

(ii) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities.

4.4.6 Multiple Closing Dates. In the event the Corporation shall issue on more than one date Additional Shares of Common Stock that are a part of one transaction or a series of related transactions and that would result in an adjustment to the Conversion Price for a series of Preferred Stock pursuant to the terms of Section 4.4.4, then, upon the final such issuance, the Conversion Price shall be readjusted to give effect to all such issuances as if they occurred on the date of the first such issuance (and without giving effect to any additional adjustments as a result of any such subsequent issuances within such period).

4.5 Adjustment for Stock Splits and Combinations. If the Corporation shall at any time or from time to time after the Series A-1 Original Issue Date effect a subdivision of the outstanding Common Stock, the Conversion Price for the applicable series of Preferred Stock in effect immediately before that subdivision shall be proportionately decreased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be increased in proportion to such increase in the aggregate number of shares of Common Stock outstanding. If the Corporation shall at any time or from time to time after the Series A-1 Original Issue Date combine the outstanding shares of Common Stock, the Conversion Price for the applicable series of Preferred Stock in effect immediately before the combination shall be proportionately increased so that the number of shares of Common Stock issuable on conversion of each share of such series shall be decreased in proportion to such decrease in the aggregate number of shares of Common Stock outstanding. Any adjustment under this section shall become effective at the close of business on the date the subdivision or combination becomes effective.

4.6 Adjustment for Certain Dividends and Distributions. In the event the Corporation at any time or from time to time after the Series A-1 Original Issue Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable on the Common Stock in additional shares of Common Stock, then and in each such event the Conversion Price for the applicable series of Preferred Stock in effect immediately before such event shall be decreased as of the time of such issuance or, in the event such a record date shall have been fixed, as of the close of business on such record date, by multiplying the Conversion Price for the applicable series of Preferred Stock then in effect by a fraction:

(1) the numerator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date, and

(2) the denominator of which shall be the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution.

Notwithstanding the foregoing (a) if such record date shall have been fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Conversion Price for the applicable series of Preferred Stock shall be recomputed accordingly as of the close of business on such record date and thereafter the Conversion Price for the applicable series of Preferred Stock shall be adjusted pursuant to this section as of the time of actual payment of such

dividends or distributions; and (b) that no such adjustment shall be made if the holders of Preferred Stock simultaneously receive a dividend or other distribution of shares of Common Stock in a number equal to the number of shares of Common Stock as they would have received if all outstanding shares of Preferred Stock had been converted into Common Stock on the date of such event.

4.7 Adjustments for Other Dividends and Distributions. In the event the Corporation at any time or from time to time after the Series A-1 Original Issue Date shall make or issue, or fix a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in securities of the Corporation (other than a distribution of shares of Common Stock in respect of outstanding shares of Common Stock) or in other property and the provisions of Section 1 do not apply to such dividend or distribution, then and in each such event the holders of such series of Preferred Stock shall receive, simultaneously with the distribution to the holders of Common Stock, a dividend or other distribution of such securities or other property in an amount equal to the amount of such securities or other property as they would have received if all outstanding shares of such series of Preferred Stock had been converted into Common Stock on the date of such event.

4.8 Adjustment for Merger or Reorganization, etc. Subject to the provisions of Section 2.3, if there shall occur any reorganization, recapitalization, reclassification, consolidation or merger involving the Corporation in which the Common Stock (but not a series of Preferred Stock) is converted into or exchanged for securities, cash or other property (other than a transaction covered by Sections 4.4, 4.6 or 4.7), then, following any such reorganization, recapitalization, reclassification, consolidation or merger, each share of such series of Preferred Stock shall thereafter be convertible in lieu of the Common Stock into which it was convertible prior to such event into the kind and amount of securities, cash or other property which a holder of the number of shares of Common Stock of the Corporation issuable upon conversion of one share of such series of Preferred Stock immediately prior to such reorganization, recapitalization, reclassification, consolidation or merger would have been entitled to receive pursuant to such transaction; and, in such case, appropriate adjustment (as determined in good faith by the Board of Directors) shall be made in the application of the provisions in this Section 4 with respect to the rights and interests thereafter of the holders of the such series of Preferred Stock, to the end that the provisions set forth in this Section 4 (including provisions with respect to changes in and other adjustments of the Conversion Price of such series of Preferred Stock) shall thereafter be applicable, as nearly as reasonably may be, in relation to any securities or other property thereafter deliverable upon the conversion of such series of Preferred Stock. For the avoidance of doubt, nothing in this Section 4.8 shall be construed as preventing the holders of Preferred Stock from seeking any appraisal rights to which they are otherwise entitled under the DGCL in connection with a merger triggering an adjustment hereunder, nor shall this Section 4.8 be deemed conclusive evidence of the fair value of the shares of Preferred Stock in any such appraisal proceeding.

4.9 Certificate as to Adjustments. Upon the occurrence of each adjustment or readjustment of the Conversion Price of a series of Preferred Stock pursuant to this Section 4, the Corporation at its expense shall, as promptly as reasonably practicable but in any event not later than ten (10) days thereafter, compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of such series of Preferred Stock a

certificate setting forth such adjustment or readjustment (including the kind and amount of securities, cash or other property into which such series of Preferred Stock is convertible) and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, as promptly as reasonably practicable after the written request at any time of any holder of any series of Preferred Stock (but in any event not later than ten (10) days thereafter), furnish or cause to be furnished to such holder a certificate setting forth (a) the Conversion Price of such series of Preferred Stock then in effect, and (b) the number of shares of Common Stock and the amount, if any, of other securities, cash or property which then would be received upon the conversion of such series of Preferred Stock.

4.10 Notice of Record Date. In the event:

(a) the Corporation shall take a record of the holders of its Common Stock (or other capital stock or securities at the time issuable upon conversion of the Preferred Stock) for the purpose of entitling or enabling them to receive any dividend or other distribution, or to receive any right to subscribe for or purchase any shares of capital stock of any class or any other securities, or to receive any other security; or

(b) of any capital reorganization of the Corporation, any reclassification of the Common Stock of the Corporation, or any Deemed Liquidation Event; or

(c) of the voluntary or involuntary dissolution, liquidation or winding-up of the Corporation,

then, and in each such case, the Corporation will send or cause to be sent to the holders of the Preferred Stock a notice specifying, as the case may be, (i) the record date for such dividend, distribution or right, and the amount and character of such dividend, distribution or right, or (ii) the effective date on which such reorganization, reclassification, consolidation, merger, transfer, dissolution, liquidation or winding-up is proposed to take place, and the time, if any is to be fixed, as of which the holders of record of Common Stock (or such other capital stock or securities at the time issuable upon the conversion of the Preferred Stock) shall be entitled to exchange their shares of Common Stock (or such other capital stock or securities) for securities or other property deliverable upon such reorganization, reclassification, consolidation, merger, transfer, dissolution, liquidation or winding-up, and the amount per share and character of such exchange applicable to the Preferred Stock and the Common Stock. Such notice shall be sent at least ten (10) days prior to the record date or effective date for the event specified in such notice.

5. Mandatory Conversion.

5.1 Trigger Events.

5.1.1 Upon the closing of the sale of shares of Common Stock to the public, in a firm-commitment underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, at an offering price of at least $6.82 per share and resulting in at least $30,000,000 of gross proceeds to the Corporation, then (a) all outstanding shares of Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate as calculated pursuant to Section 4.1.1. and (b) such shares may not be reissued by the Corporation.

5.1.2 Upon the date and time, or the occurrence of an event, specified by vote or written consent of the holders holding a majority of the shares of Series A Preferred Stock, then (a) all outstanding shares of Series A Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate as calculated pursuant to Section 4.1.1. and (b) such shares may not be reissued by the Corporation.

5.1.3 Upon the date and time, or the occurrence of an event, specified by vote or written consent of the holders holding a majority of the shares of Series A-1 Preferred Stock, then (a) all outstanding shares of Series A-1 Preferred Stock shall automatically be converted into shares of Common Stock, at the then effective conversion rate as calculated pursuant to Section 4.1.1. and (b) such shares may not be reissued by the Corporation.

The time of the closing described in Section 5.1.1 or the date and time specified or the time of the event specified in such vote or written consent is referred to herein as the "**Mandatory Conversion Time**").

5.2 Procedural Requirements. All holders of record of shares of Preferred Stock (or any series thereof) shall be sent written notice of the Mandatory Conversion Time and the place designated for mandatory conversion of the shares of Preferred Stock converting pursuant to this Section 5. Such notice need not be sent in advance of the occurrence of the Mandatory Conversion Time. Upon receipt of such notice, each holder of shares of Preferred Stock in certificated form that are converting shall surrender his, her or its certificate or certificates for all such shares (or, if such holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation at the place designated in such notice. If so required by the Corporation, any certificates surrendered for conversion shall be endorsed or accompanied by written instrument or instruments of transfer, in form satisfactory to the Corporation, duly executed by the registered holder or by his, her or its attorney duly authorized in writing. All rights with respect to the Preferred Stock converted pursuant to Section 5.1, including the rights, if any, to receive notices and vote (other than as a holder of Common Stock), will terminate at the applicable Mandatory Conversion Time (notwithstanding the failure of the holder or holders thereof to surrender any certificates at or prior to such time), except only the rights of the holders thereof, upon surrender of any certificate or certificates of such holders (or lost certificate affidavit and agreement) therefor, to receive the items provided for in the next sentence of this Section 5.2. As soon as practicable after the applicable Mandatory Conversion Time and, if applicable, the surrender of any certificate or certificates (or lost certificate affidavit and agreement) for Preferred Stock, the Corporation shall (a) issue and deliver to such holder, or to his, her or its nominees, a certificate or certificates for the number of full shares of Common Stock issuable on such conversion in accordance with the provisions hereof and (b)pay cash as provided in Section 4.2 in lieu of any fraction of a share of Common Stock otherwise issuable upon such conversion and the payment of any declared but unpaid dividends on the shares of Preferred Stock converted. Such converted Preferred Stock shall be retired and cancelled and may not be reissued as shares of such series, and the Corporation may thereafter take such appropriate action (without the need for stockholder action) as may be necessary to reduce the authorized number of shares of Preferred Stock accordingly.

6. Redemption. Shares of Preferred Stock shall not be redeemable at the option of the holder thereof.

6.1 General. Unless prohibited by Delaware law governing distributions to stockholders, shares of Preferred Stock shall be redeemed by the Corporation, to the extent the Corporation has funds legally available therefor, at a price equal to the greater of (A) the Original Issue Price of such series of Preferred Stock, plus all declared but unpaid dividends thereon and (B) the Fair Market Value (determined in the manner set forth below) of a single share of such series of Preferred Stock as of the date of the Corporation's receipt of the Redemption Request (the "**Redemption Price**"), in three (3) annual installments commencing not more than ninety (90) days after receipt by the Corporation at any time on or after the date that is six (6) years from the Series A-1 Original Issue Date, from the holders of at least a majority of the then outstanding shares of Preferred Stock (on an as-converted-to-Common Stock basis), of written notice requesting redemption of all shares of Preferred Stock (the "**Redemption Request**"). In the event that the Corporation does not have sufficient funds legally available to satisfy the Redemption Request in full, the Corporation shall in good faith use commercially reasonable efforts to raise additional capital to finance the Redemption Request in full. For purposes of this Section 6.1, the Fair Market Value of a single share of a series of Preferred Stock shall be the value of a single share of such series of Preferred Stock as mutually agreed upon by the Corporation and the holders of a majority of the shares of such series of Preferred Stock then outstanding, and, in the event that they are unable to reach agreement, by a third-party appraiser agreed to by the Corporation and the holders of a majority of the shares of such series of Preferred Stock then outstanding. The date of each such installment shall be referred to as a "**Redemption Date.**" On each Redemption Date, the Corporation shall redeem, on a pro rata basis in accordance with the number of shares of Preferred Stock owned by each holder, that number of outstanding shares of such series of Preferred Stock determined by dividing (i) the total number of shares of Preferred Stock outstanding immediately prior to such Redemption Date by (ii) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies); provided, however, that Excluded Shares (as such term is defined in Section 6.2) shall not be redeemed and shall be excluded from the calculations set forth in this sentence. If on any Redemption Date Delaware law governing distributions to stockholders prevents the Corporation from redeeming all shares of Preferred Stock to be redeemed, the Corporation shall ratably redeem the maximum number of shares that it may redeem consistent with such law, and shall redeem the remaining shares as soon as it may lawfully do so under such law.

6.2 Redemption Notice. The Corporation shall send written notice of the mandatory redemption (the "**Redemption Notice**") to each holder of record of Preferred Stock not less than forty (40) days prior to each Redemption Date. Each Redemption Notice shall state:

(a) the number of shares of Preferred Stock held by the holder that the Corporation shall redeem on the Redemption Date specified in the Redemption Notice;

(b) the Redemption Date and the Redemption Price;

(c) the date upon which the holder's right to convert such shares terminates (as determined in accordance with Section 4.1); and

(d) for holders of shares in certificated form, that the holder is to surrender to the Corporation, in the manner and at the place designated, his, her or its certificate or certificates representing the shares of Preferred Stock to be redeemed.

If the Corporation receives, on or prior to the twentieth (20th) day after the date of delivery of the Redemption Notice to a holder of Preferred Stock, written notice from such holder that such holder elects to be excluded from the redemption provided in this Section 6, then the shares of Preferred Stock registered on the books of the Corporation in the name of such holder at the time of the Corporation's receipt of such notice shall thereafter be "**Excluded Shares**." Excluded Shares shall not be redeemed or redeemable pursuant to this Section 6, whether on such Redemption Date or thereafter.

6.3 Surrender of Certificates; Payment. On or before the applicable Redemption Date, each holder of shares of Preferred Stock to be redeemed on such Redemption Date, unless such holder has exercised his, her or its right to convert such shares as provided in Section 4, shall, if a holder of shares in certificated form, surrender the certificate or certificates representing such shares (or, if such registered holder alleges that such certificate has been lost, stolen or destroyed, a lost certificate affidavit and agreement reasonably acceptable to the Corporation to indemnify the Corporation against any claim that may be made against the Corporation on account of the alleged loss, theft or destruction of such certificate) to the Corporation, in the manner and at the place designated in the Redemption Notice, and thereupon the Redemption Price for such shares shall be payable to the order of the person whose name appears on such certificate or certificates as the owner thereof. In the event less than all of the shares of Preferred Stock represented by a certificate are redeemed, a new certificate, instrument, or book entry representing the unredeemed shares of Preferred Stock shall promptly be issued to such holder.

6.4 Rights Subsequent to Redemption. If the Redemption Notice shall have been duly given, and if on the applicable Redemption Date the Redemption Price payable upon redemption of the shares of Preferred Stock to be redeemed on such Redemption Date is paid or tendered for payment or deposited with an independent payment agent so as to be available therefor in a timely manner, then notwithstanding that any certificates evidencing any of the shares of Preferred Stock so called for redemption shall not have been surrendered, dividends with respect to such shares of Preferred Stock shall cease to accrue after such Redemption Date and all rights with respect to such shares shall forthwith after the Redemption Date terminate, except only the right of the holders to receive the Redemption Price without interest upon surrender of any such certificate or certificates therefor

7. Redeemed or Otherwise Acquired Shares. Any shares of Preferred Stock that are redeemed or otherwise acquired by the Corporation or any of its subsidiaries shall be automatically and immediately cancelled and retired and shall not be reissued, sold or transferred. Neither the Corporation nor any of its subsidiaries may exercise any voting or other rights granted to the holders of Preferred Stock following redemption.

8. Waiver. Unless otherwise expressly set forth herein, (a) any of the rights, powers, preferences and other terms of the Preferred Stock set forth herein may be waived on behalf of all holders of Preferred Stock by the affirmative written consent or vote of Requisite Holders and (b) any of the rights, powers, preferences and other terms that are specific to any series of Preferred Stock set forth herein may be waived on behalf of all holders of such series of Preferred Stock by the affirmative written consent or vote of the holders of at least a majority of the shares of such series of Preferred Stock then outstanding, voting as a separate class.

9. Notices. Any notice required or permitted by the provisions of this Article Fourth to be given to a holder of shares of Preferred Stock shall be mailed, postage prepaid, to the post office address last shown on the records of the Corporation, or given by electronic communication in compliance with the provisions of the General Corporation Law, and shall be deemed sent upon such mailing or electronic transmission.

FIFTH: Subject to any additional vote required by the Certificate of Incorporation or Bylaws, in furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, repeal, alter, amend and rescind any or all of the Bylaws of the Corporation.

SIXTH: Subject to any additional vote required by the Certificate of Incorporation, the number of directors of the Corporation shall be determined in the manner set forth in the Bylaws of the Corporation.

SEVENTH: Elections of directors need not be by written ballot unless the Bylaws of the Corporation shall so provide.

EIGHTH: Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws of the Corporation may provide. The books of the Corporation may be kept outside the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

NINTH: To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. If the General Corporation Law or any other law of the State of Delaware is amended after approval by the stockholders of this Article Ninth to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the General Corporation Law as so amended.

Any repeal or modification of the foregoing provisions of this Article Ninth by the stockholders of the Corporation shall not adversely affect any right or protection of a director of the Corporation existing at the time of, or increase the liability of any director of the Corporation with respect to any acts or omissions of such director occurring prior to, such repeal or modification.

TENTH: To the fullest extent permitted by applicable law, the Corporation is authorized to provide indemnification of (and advancement of expenses to) directors, officers and agents of the Corporation (and any other persons to which General Corporation Law permits

the Corporation to provide indemnification) through Bylaw provisions, agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the General Corporation Law.

Any amendment, repeal or modification of the foregoing provisions of this Article Tenth shall not (i) adversely affect any right or protection of any director, officer or other agent of the Corporation existing at the time of such amendment, repeal or modification or (ii) increase the liability of any director of the Corporation with respect to any acts or omissions of such director, officer or agent occurring prior to, such amendment, repeal or modification.

ELEVENTH: The Corporation renounces, to the fullest extent permitted by law, any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "***Excluded Opportunity***" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of (i) any director of the Corporation who is not an employee of the Corporation or any of its subsidiaries, or (ii) any holder of Preferred Stock or any partner, member, director, stockholder, employee, affiliate or agent of any such holder, other than someone who is an employee of the Corporation or any of its subsidiaries (collectively, the persons referred to in clauses (i) and (ii) are "***Covered Persons***"), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as a director of the Corporation.

TWELFTH: Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery in the State of Delaware shall be the sole and exclusive forum for any stockholder (including a beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim against the Corporation, its directors, officers or employees arising pursuant to any provision of the Delaware General Corporation Law or the Corporation's certificate of incorporation or bylaws or (iv) any action asserting a claim against the Corporation, its directors, officers or employees governed by the internal affairs doctrine, except for, as to each of (i) through (iv) above, any claim as to which the Court of Chancery determines that there is an indispensable party not subject to the jurisdiction of the Court of Chancery (and the indispensable party does not consent to the personal jurisdiction of the Court of Chancery within ten days following such determination), which is vested in the exclusive jurisdiction of a court or forum other than the Court of Chancery, or for which the Court of Chancery does not have subject matter jurisdiction. If any provision or provisions of this Article Twelfth: shall be held to be invalid, illegal or unenforceable as applied to any person or entity or circumstance for any reason whatsoever, then, to the fullest extent permitted by law, the validity, legality and enforceability of such provisions in any other circumstance and of the remaining provisions of this Article Twelfth: (including, without limitation, each portion of any sentence of this Article Twelfth: containing any such provision held to be invalid, illegal or unenforceable that is not itself held to be invalid, illegal or unenforceable) and the application of such provision to other persons or entities and circumstances shall not in any way be affected or impaired thereby.

THIRTEENTH: For purposes of Section 500 of the California Corporations Code (to the extent applicable), in connection with any repurchase of shares of Common Stock permitted under this Certificate of Incorporation from employees, officers, directors or consultants of the Corporation in connection with a termination of employment or services pursuant to agreements or arrangements approved by the Board of Directors (in addition to any other consent required under this Certificate of Incorporation), such repurchase may be made without regard to any "preferential dividends arrears amount" or "preferential rights amount" (as those terms are defined in Section 500 of the California Corporations Code). Accordingly, for purposes of making any calculation under California Corporations Code Section 500 in connection with such repurchase, the amount of any "preferential dividends arrears amount" or "preferential rights amount" (as those terms are defined therein) shall be deemed to be zero (0).

* * *

3. That the foregoing amendment and restatement was approved by the holders of the requisite number of shares of this corporation in accordance with Section 228 of the General Corporation Law.

4. That this Amended and Restated Certificate of Incorporation, which restates and integrates and further amends the provisions of this Corporation's Certificate of Incorporation, has been duly adopted in accordance with Sections 242 and 245 of the General Corporation Law.

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been executed by a duly authorized officer of this corporation on this 19th day of November, 2018.

By: /s/ Alex Bäcker
Alex Bäcker, Chief Executive Officer

4845-5842-5461, v. 7

EXHIBIT D

CREDITOR SETTLEMENT AND RELEASE AGREEMENT

Morris, Nichols, Arsht & Tunnell LLP ("**Creditor**") is a creditor of QLess, Inc. ("**Company**" and together with the Creditor, the "**Parties**") holding a claim in the amount of $398,837.64 (the "**Principal Claim**"), which reflects the principal amount due only based on invoices and incurred fees and expenses to date, excluding all additional costs and other amounts owing and associated in any way with the Principal Claim (together with the Principal Claim, the "**Gross Claim**").

Upon payment on June 18, 2024, of $150,000.00 (the "**Settlement Amount**") by the Company to the Creditor by wire transfer in accordance with the instructions below, the Creditor agrees (i) to accept the Settlement Amount in full and final satisfaction of the Gross Claim against the Company; and (ii) to forbear from commencing or pursuing any litigation against the Company to collect the Gross Claim. The parties acknowledge and agree that the payment of the Settlement Amount is intended as, and in fact will be, a contemporaneous exchange of value for the waiver of the balance of the Gross Claim as set forth in this Creditor Settlement and Release Agreement ("**Agreement**").

WIRING INSTRUCTIONS:

Beneficiary Bank
Wells Fargo Bank
100 W. 10th Street
Wilmington, Delaware 19801
United States

Beneficiary
Account Name: Morris, Nichols, Arsht & Tunnell LLP
Account [redacted]
Wire Routing/ ABA [redacted]
ACH Routing/ ABA [redacted]

Matter # 61843

SWIFT ID: [redacted]
CHIPS ID: [redacted]

If (i) the Company does not make timely payment under this Agreement or (ii) the Company's payment of the Settlement Amount to Creditor is avoided, recalled, or otherwise clawed back in any way whatsoever, including without limitation as a preference in any bankruptcy proceeding of the Company ("**Avoided**"), the entire Gross Claim between Creditor and Company will be immediately payable to the Creditor, and the Creditor will be free to immediately pursue each and every of its rights and remedies it may have at law or equity. Such remedies include, but are not limited to, invoicing any interest, late fees or other charges for the Principal Claim which would have been due accruing from the original due date.

Other than the rights and obligations of the Parties under this Agreement, upon full payment of the Settlement Amount, the Parties (including their parents, subsidiaries, affiliated companies, officers, directors, employees, agents, attorneys, predecessors, successors, assigns, insurers, and reinsurers) hereby mutually release, remise, and forever discharge the other Party (including its parents, subsidiaries, affiliated companies, officers, directors, employees, agents, attorneys, predecessors, successors, assigns, insurers and reinsurers), of and from any and all claims, debts, demands, liabilities, agreements, obligations, controversies, actions, causes of action, suits, costs, attorneys' fees, expenses, damages, liens, judgments, and orders, of any nature whatsoever, at law or in equity or otherwise, whether asserted or unasserted, whether known or unknown, from the beginning of the world to the date of this Agreement that the Parties have or may have against the other Party in connection with the Gross Claim, including fees, costs, and interest not yet accrued as of the date of this Agreement, but Creditor's release, remission and discharge of the Company is void and of no effect if the Company's payment of the Settlement Amount to Creditor is Avoided.

This Agreement is governed by and construed in accordance with the internal substantive laws of the State of Delaware without regard to Delaware's choice of laws principles. All disputes under this Agreement must be brought exclusively in the state and federal courts located in Delaware and the Parties submit to the personal jurisdiction of such state and federal courts. To the extent necessary, the Parties waive the provisions of the California Civil Code Section 1542 (and any similar provision under the laws of any other state), which states: A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS or HER SETTLEMENT WITH THE DEBTOR.

This Agreement constitutes the entire agreement between the Parties and supersedes all prior or contemporaneous written or oral communications, understandings, and agreements with respect to this Agreement's subject matter. This Agreement cannot be amended except by written agreement between the Parties. If any one or more of the provisions of this Agreement is held invalid or unenforceable, the validity and enforceability of all other provisions of this Agreement remain unaffected.

Each of the Parties acknowledges and agrees that nothing in this Agreement constitutes an admission or concession of any legal or factual issue raised, referred to, or contained in this Agreement.

Each of the Parties acknowledges that it has read all of the terms of this Agreement, has had an opportunity to consult with counsel of its own choosing or voluntarily waived such right, and enters into this Agreement voluntarily and without duress.

The Parties agree to keep the terms and conditions of this Agreement confidential and must not disclose any such terms or the existence of this Agreement, except as may be required by law or to its own employees, agents and representatives that have a need to know and who agree not to make any further disclosures of this Agreement or any of its terms and conditions.

Each Party represents and warrants that it has participated in the drafting and preparation of this Agreement. In any construction of this Agreement, the Agreement may not be construed for or against any Party but must be construed fairly and according to its plain meaning.

The undersigned is authorized to sign this Agreement on behalf of the Parties, and has set forth the contact information for the person in the event of any questions regarding the claim.

CREDITOR NAME
Morris, Nichols, Arsht & Tunnell LLP

AMOUNT OF PRINCIPAL CLAIM:
$398,837.64

SETTLEMENT AMOUNT
$150,000.00

BY: _____

Name: Derek C. Abbott

Title: Partner

Date: 6/18/2024

CREDITOR CONTACT
Name: Derek C. Abbott, Esq.
Telephone: (302) 351-9357
Email:
dabbott@morrisnichols.com

CREDITOR ADDRESS
1201 North Market St., 16th Floor
Wilmington, Delaware 19801

ACCEPTED AND AGREED:
Q Less, Inc.

BY: DocuSigned by: _____
39647694C1F5423...

Name: James Harvey

Title: CEO

Date: 6/18/2024

CERTIFICATE OF SERVICE

I, Laurel D. Roglen, hereby certify that, on this 7th day of September 2024, I caused a true and correct copy of the foregoing ***Supplemental Memorandum in Support of the Objection of Alex Bäcker and Certain Preferred Shareholders to Debtor's Subchapter V Eligibility and Plan*** to be served *via* CM/ECF on all parties who have registered for electronic service in these cases.

Dated: September 7, 2024
Wilmington, Delaware

/s/ *Laurel D. Roglen*
Laurel D. Roglen (No. 5759)
BALLARD SPAHR LLP