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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

AHMED D. HUSSEIN,

Plaintiff,

SHELDON RAZIN, STEVEN PLOCHOCKI, QUALITY SYSTEMS, INC. and DOES 1-10, Inclusive

Defendants.

Case No. 30-2013-00679600-CU-NP-CJC

DEFENDANTS' AMENDED PRETRIAL BRIEF

Assigned For All Purposes To:
Judge Glenn R. Salter

Action Filed: October 4, 2013
Trial Date: July 6, 2021

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I. INTRODUCTION

Ahmed Hussein's decades-long distrust for QSI and its senior leadership, along with his chronic inability to tell the truth, undermines every claim in his lawsuit. While Hussein attempts to portray himself as a noble crusader, the evidence that will be presented at trial—mainly consisting of Hussein's *own* statements and sworn testimony—will show him for what he is: an obsessed, ego-driven, vengeful individual who has manufactured a story out of whole cloth, which he continuously has been forced to change as his contradictions and inconsistences have been exposed.

After amassing enough shares to secure a seat on QSI's Board in 1999, Hussein began a decades-long campaign of second-guessing QSI's business strategy and bemoaning its financial performance. He tried to take control of QSI's Board of Directors by waging four proxy contests between 2004 and 2012—all unsuccessful. Throughout this continuous quest, Hussein continuously and publicly lauded himself as all-knowing—and criticized the Company's board and management as incompetent. He openly questioned the veracity of QSI's financial statements and proclaimed that investors should not trust the assumptions underlying the Company's budget. He urged the SEC to investigate supposed inaccuracies in QSI's public disclosures. He even called Sheldon Razin, QSI's Chairman, a "dictator" who was "worse" than Saddam Hussein and Muammar Gaddafi. Along the way, Hussein promised to harm the Company if he was not given control of the board. He declared that he "would fight the Corporation in a series of lawsuits, even if it meant forcing an expenditure of the entire net worth of the Corporation in the process." Nearly eight years of costly litigation have demonstrated Hussein's resolve—and the baseless nature of his claims. There is one critical point that Hussein has been forced to admit, however, on which not even he can backtrack: from 1999 until the present day, he has never voluntarily sold a share of QSI stock. Notwithstanding the ever-changing landscape of his story, he cannot change that immutable fact—and it is devastating to his "holder's claim."

In late July 2012, QSI announced disappointing financial results for its first fiscal 2013 quarter (April-June 2012), described a reduction in its sales pipeline, and retracted its guidance for the fiscal year ending March 31, 2013. QSI's stock price declined that day, and Hussein quickly

pounced, hoping that bad news for the Company would finally mean good news for his latest proxy battle to take control of the Board. With the hope of winning corporate control, Hussein publicly boasted that he had predicted QSI's financial downfall, and that only he (and his director nominees) could lead the Company to greener pastures. QSI's shareholders disagreed, and his fourth proxy contest ended just like the previous three—in defeat. In a fit of pique, Hussein quit the Board and filed this lawsuit, asserting claims that are completely inconsistent with the undisputed facts—and with his own actions. Most bizarrely, Hussein argues that he was planning to *sell* all of his QSI shares (at some unspecified time, to some unspecified person, at some unspecified price) sometime in 2011 or 2012—but that senior management fraudulently induced him to *hold* those shares, by purportedly lying about the Company's future prospects. The federal securities laws forbid these types of "holder's claims" because they are so obviously subject to abuse. California allows them, albeit in very limited circumstances not present here. Indeed, to prevail on his "holder's claim," Hussein must persuade the jury on *all* of the following elements:

1. QSI made *materially false* statements;
2. QSI *intended* Hussein to rely on the statements in deciding whether to hold his shares;
3. Hussein *actually relied* on the statements;
4. Hussein *reasonably relied* on the statements; and
5. Hussein suffered *cognizable damages*.

The evidence shows that Hussein will not be able to establish *any* of these elements, let alone all of them.

False Statements. Hussein challenges seven Company statements between November 2011 and July 2012, virtually all of which are projections or predictions of QSI's future financial performance. None of these statements was false or misleading. The projections were made on the heels of an unbroken (and undisputed) string of consecutive record-breaking quarters, and Defendants believed—and had reasonable grounds to believe—that their projections were achievable. Moreover, Hussein himself conceded that such projections were not guarantees—testifying that projections do "not mean that you're going to achieve this result" because you "might do better, you might do worse." Trial Ex. 969 (Hussein Dep. Tr.) at 243:1-9. And indeed,

when QSI issued its financial guidance, the Company told investors that forecasting was difficult and that its projections were subject to several risks and uncertainties.

Reliance. Nor will Hussein be able to prove actual *and* reasonable reliance. With regard to actual reliance**,** Hussein must establish that he took "actions, as distinguished from unspoken and unrecorded thoughts and decisions," which prove that he actually relied on the challenged statements in deciding not to sell. *Small v. Fritz Cos., Inc.,* 30 Cal. 4th 167, 184 (2003). The undisputed evidence establishes just the opposite. Hussein never took actions suggesting he would sell *at all*—let alone actions showing that he actually relied on the challenged statements in deciding not to do so. In fact, Hussein still has not submitted any evidence—after almost eight years of litigation—establishing *when* he would have sold, *how many* shares he would have sold, to *whom* he would have sold, at *what* price, or *how* he would have sold.

Instead, Hussein's allegations have constantly morphed as the flaws in his theory have been exposed. When Hussein first filed this lawsuit in 2013, he swore under oath that in "late 2011" and "early 2012," he "discussed the possibility of selling his QSI shares with more than one trading firm." Trial Ex. 931 ¶ 68. He did not identify any specific firm. Then in 2014, Hussein filed a second complaint, that he again signed under penalty of perjury, this time stating that he "had multiple telephonic meetings and negotiations" to "start the process of selling his all" his QSI shares in late 2011 and early 2012 with "(1) Moe Cohen, Managing Director and head of investment banking at Jones Trading, (2) Devin Hill, managing director at JP Morgan, and (3) David Horowitz, Director at Credit Suisse." Trial Ex. 933 ¶ 54. Then, at his deposition in 2015, Hussein added *another* banker to the mix, testifying that he also talked to Ed Mirsky at UBS about selling his QSI shares, even though he never mentioned Mirsky in either of his complaints. Trial Ex. 969 at 376. *But after Hill, Mirsky, and Horowitz testified at their depositions that Hussein had, in fact, made no plans to sell*, he simply dropped them from his case altogether. This left Hussein with Moe Cohen. Although Hussein said he spoke with Cohen about selling his shares in "late 2011 to early 2012," Cohen testified that he could not recall the dates or times when these conversations happened. Trial Ex. 960 (Cohen Dep. Tr.) at 72:2-11. And of course, "speaking" about selling shares does not remotely begin to satisfy the requirements for a holder's claim laid

down by the California Supreme Court in *Small*. *Small*, 30 Cal. 4th at 184 (plaintiff must prove "actions, as distinguished from unspoken and unrecorded thoughts and decisions, that would indicate that the plaintiff actually relied on the misrepresentations"). Confronted with a series of setbacks, Hussein changed his story again—claiming that in the six months following *July 2011*, he had "at least twenty conversations" with Cohen to work "out the logistics of selling Hussein's QSI holdings." ROA No. 1525 at 12-13. Like so many of Hussein's claims, this newly fabricated story, set forth for the first time in his November 2020 trial brief, contradicts his own prior sworn statements. More profoundly, as the evidence will show, it reflects the conduct of someone who knows he has been caught in a web of deceit, and is desperately trying to "patch the holes" in his story.

Simply put, there is no evidence that Hussein ever took actions to sell his shares. Indeed, as a QSI director and second-largest shareholder, Hussein would have had to jump through significant regulatory hoops just to position himself for sale—none of which he even began to plan for, let alone execute. And we know why. As two of his bankers testified at their depositions, Hussein never wanted to sell his QSI shares. On the contrary, he wanted to take over the Company. The record is filled with evidence of Hussein's plans to launch yet another proxy contest in 2012—hiring lawyers, approaching potential Board nominees, obtaining shareholder lists, seeking website designers, and much more—and he needed *all* of his shares to support that effort. During this same time period, Hussein margined millions of his QSI shares as collateral for personal loans, a practice that allowed him to maintain liquidity without selling his shares. In June 2012—at the end of the relevant time period—Hussein boasted that he *had never sold a single QSI share*.

Hussein's reasonable reliance case is even weaker. Judge Schulte, the trial judge who presided over this lawsuit for more than a year, already concluded that no reasonable juror could find that Hussein justifiably relied on any of the alleged misstatements, given his deep-seated and well-documented distrust of QSI and its management. The appellate court similarly noted that this record presented a *strong case* for summary judgment, but remanded the case because of Hussein's eleventh-hour plea that while he hated Razin and distrusted the Board, he believed in management and considered CEO Steve Plochocki "a trustworthy person." Like Hussein's other arguments,

this "about-face" does not pass the "straight-face" test. To start, Plochocki was QSI's CEO *and* a Board member. Hussein stated publicly that Razin handpicked Plochocki as CEO in order to do Razin's bidding. Numerous witnesses will testify—and substantial documentary evidence confirms—that *no one* was immune from Hussein's criticisms, including Plochocki specifically. On the contrary, Hussein constantly (and publicly) distrusted the Company's budget and financial projections—which were *management's* responsibility (including Plochocki's), not the Board's. Hussein himself admitted that he was "proud" to have predicted QSI's financial decline.

Damages. Finally, Hussein cannot prove cognizable damages. To do so, he must establish a "complete causal relationship" between the fraud and his alleged damages. *Williams v. Wraxall*, 33 Cal. App. 4th 120, 132 (1995). "[N]o liability attaches if the damages sustained were . . . due to unrelated causes." *Patrick v. Alacer Corp.*, 167 Cal. App. 4th 995, 1017 (2008). The Court recently explained that Hussein is limited to his "actual," "out-of-pocket" losses from actual sales of QSI stock. ROA No. 1818 ("Damages Opinion") at 4. Hussein is *not* entitled to recover as damages a "diminution or 'paper loss' in the value of the stock." *Id*. This means Hussein can only recover damages for shares that he *actually* sold "at a price depressed by revelation of the" fraud. *See Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 194-95 (2003) (conc. opn. of Baxter, J.); *see also* Damages Opinion at 4 ("The court believes Justice Baxter's approach is the better one.") Therefore, at most, Hussein can recover damages based upon the 3.6 million shares involuntarily sold in July and August 2012— and depending on the jury's findings, the number of "damaged shares" for which he may recover could well be less than this amount. Hussein has admitted much of this. *See* ROA No. 1762 (Hussein Damages Br.) at 6 & n.6 (acknowledging that Hussein only suffered "realized losses" on the 3.6 million shares sold in July 2012); *see also* ROA No. 1798 (Hussein Supp. Damages Br.) at 3 (same).

Hussein must then establish the specific date he "detrimentally relied on" Defendants' alleged misrepresentation. *See* Damages Opinion at 4. Hussein has *never* been able to establish any date he would have sold his shares, constantly changing his story, even as recently as two weeks ago. *See* ROA No. 1838.

Furthermore, Hussein can only recover damages for what the "stock would have been

valued at without the unlawfully inflated value induced by the alleged fraud"—in other words, the jury *must* subtract from the stock's open-market value the amount by which the price was artificially inflated on Hussein's "reliance date." *See* Damages Opinion at 4.; *see also Small*, 30 Cal. 4th at 190, 196, 203 (conc. opn. of Kennard, J.; conc. opn. of Baxter, J.; conc. & dis. opn. of Brown, J.) (a holder-plaintiff is not entitled to damages based on a stock price that was "unlawfully inflated" by the alleged misrepresentations); ROA No. 1793 at 19-20 (Defs.' Supp. Damages Br., detailing cases examining holder-claim damages). But Hussein continues to flip flop on the alleged existence of artificial inflation, even though his damages expert conceded that if there is an "economically material misstatement" (*i.e.*, the statement was important to reasonable investors), "there would be artificial inflation *by definition*." ROA No. 1832, Ex. I (Zmijewski 2020 Dep. Tr.) at 180:12-181:8 (emphasis added); *see also id.* ("So it is tautological. . . . It is like, here's material information and will it cause inflation, if it is misstated, and the answer is well, of course, because that's the definition of material information.").

Hussein also has flip flopped on another key element of any damages claim: the "value of the stock after the alleged misrepresentations became known to the public," which "may be based on a date within a reasonable time after the misrepresentations were made." Damages Opinion at 4. Although his expert asserts the proper calculation date is July 26, 2012 (when the stock price closed at $15.95), Hussein alleged in another case against UBS Bank that QSI's stock price "increased substantially . . . less than six weeks after" UBS involuntarily sold millions of his QSI shares, closing at $19.62 on September 14, 2012. *Hussein v. UBS Bank USA*, No. 15-cv-00529 (D. Utah), Dkt. No. 1, ¶ 36.

And even if Hussein is able to prove all of these damages elements, any recovery must be offset against the benefits Hussein received. For example, Hussein admits that any alleged damages figure must remove the millions of dollars of QSI dividends he received in late 2011 and early 2012. *See* Plaintiff's Proposed Instruction: Damages – "Out Of Pocket" Rule (CACI No. 1923 – Modified). Other amounts (*e.g.*, the $2 million he received from UBS for their involuntary stock sales) must also be deducted.

Hussein's entire case is a sham—belied by the evidence, and by common sense. He needed

as many QSI shares as possible to sustain his proxy contest. He held those shares *in spite of—not because of*—the people he had strenuously and consistently distrusted for years. Hussein has been able to evade final judgment by changing his position whenever backed into a corner. He claimed he would have sold *all* of his QSI shares *until he learned he couldn't have done so*; he sought to recover artificial-inflation damages *until he learned he couldn't do so*; he berated Plochocki and QSI management *until he decided that he needed to say he trusted them*. But the shape-shifting that has sustained Hussein's case to this point soon will become his curse. At trial, Hussein can only be himself. His contradictions will be laid bare for the jury to see. Hussein says he has waited more than seven years to receive his "long overdue justice." ROA No. 1525 at 1. But the truth is quite different. Defendants have endured Hussein's unfounded (and unending) diatribe for much longer than seven years—and are equally eager to secure the justice (and the peace) to which they are entitled.

II. THRESHOLD LEGAL ISSUES

Before trial begins, the Court must decide key threshold issues, including those set forth in the motions *in limine* and the *Sargon* motions argued earlier this year. A few of those issues are discussed below, but all are reflected in the briefing and hearing transcripts. The Court also must decide between several competing jury instructions on key issues (*e.g.*, reliance and damages), as well as competing verdict forms (Hussein propose a general verdict form, Defendants submit a specific verdict form).

A. The Challenged Statements At Issue

California Supreme Court law makes clear that a plaintiff asserting holder's claims, like the ones at issue here, must plead fraud with specificity. *Small*, 30 Cal. 4th 167; *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 645 (1996). When asserting a fraud claim against a corporate entity, "the plaintiff must 'allege the names of the persons who made the allegedly fraudulent misrepresentations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Lazar*, 12 Cal. 4th at 645.

In accordance with *Small*, this Court has identified the seven statements at issue in this litigation: (1) November 7, 2011, (2) and (3) January 25, 2012, (4) January 26, 2012, (5) May 17,

2012, (6) June 26, 2012, and (7) July 13, 2012, as alleged in paragraphs six through nine of Plaintiff's Verified FAC. ROA No. 112 (Order Overruling Defs.' Demurrer, July 29, 2014). The California Court of Appeal confirmed that these seven statements define the scope of this case. ROA No. 1290 at 3-4; Trial Ex. 995 ¶ 24 ("I finally decided to launch a proxy contest in late May 2012.").

Despite having submitted multiple sworn statements to the Court declaring that these seven statements are the only ones at issue, and having failed to plead—let alone plead with specificity—that any other statements are false, Hussein's proposals regarding the scope of relevant issues for trial suggest that he now seeks to challenge additional statements. *See* ROA No. 1635 at 4. Hussein's jury instructions also suggest that he is trying to add a brand new cause of action. *Id.*

Before proceeding with trial the Court will need to establish the proper scope of claims at issue. This question has been brought before the Court through Defendants' Motion in Limine No. 1. *See* ROA Nos. 1507, 1635.

B. Fiduciary Duties And Constructive Fraud

Well-settled California law establishes the distinction between direct and derivative claims. If the gravamen of the claim "is injury to the corporation, or the whole body of its stock and property without any severance or distribution among individual holders," the action is derivative rather than direct. *Bader v. Anderson*, 179 Cal. App. 4th 775, 793 (2009).

In October 2013, Hussein's initial Verified Complaint alleged that Defendants breached their fiduciary duties "by falsely reassuring plaintiff and the market regarding QSI's financial condition and projected future performance . . . by directly making false statements about the company and its anticipated future growth, and by omitting material information from the statements that were made." Trial Ex. 931 ¶ 101. On April 10, 2014, the Court found this claim to be derivative, not direct, and sustained Defendants demurrer. ROA No. 70. As detailed by this Court in its July 29, 2014 order, "Plaintiff abandoned this theory in his FAC." ROA Nos. 112-113.

Hussein now seeks to resuscitate his fiduciary-duty claim—the very claim that was dismissed in October 2013 and abandoned by him in April 2014. Hussein argues that he can re-

assert this abandoned claim because a breach of fiduciary duty is necessary for his constructive fraud claim. *But the applicable model jury instructions make clear that fiduciary duties owed to* ***all*** *shareholders cannot form the basis of a direct claim for constructive fraud.* Rather, a claim for constructive fraud must establish that defendant "acted on [plaintiff's] behalf" for purposes of the "disputed transaction." Model Jury Instructions, CACI No. 4111. Here, the "disputed transaction" is Hussein's claim that he decided to hold rather than sell his QSI shares, based on Defendants' seven statements.

Before proceeding with trial, the Court will need to determine whether Hussein can revive his dismissed and abandoned breach of fiduciary duty claim. This question has been brought before the Court through Defendants' Motion in Limine No. 3. *See* ROA Nos. 1510, 1639.

III. TRIAL PROCEDURE AND LENGTH

Once the Court has addressed the parties' disputes regarding the scope of the allegations and the proper legal framework for resolving the claims at issue, the parties will be ready to select a jury. The parties have agreed on a detailed juror questionnaire that should be provided to jurors at least a day in advance of *voir dire*. Given the revised COVID protocols, the parties have requested 30 minutes per side for *voir dire*.

Based on the parties' proposed witness lists and the expected disputes in this contentious matter, Defendants anticipate that the parties will need 10-15 court days for trial once the jury is empaneled.

IV. THE EFFECT OF PRIOR COURT RULINGS

Hussein's trial brief, jury instructions, and verdict form make clear that he seeks to bypass the very need for a trial by having the Court rule, as a matter of law, that multiple issues in contention must be decided in his favor. In particular, Hussein seeks to string together a hodgepodge of decisions from other proceedings—including proceedings from actions that do not involve him and that addressed only the adequacy of pleadings—arguing that he has established material falsity, reliance, and damages. Try as he might, however, Hussein is not entitled to convert unrelated decisions addressing inapposite legal standards into affirmative claims. Instead, he must establish each element of his claims, by a preponderance of evidence, at trial.

A. The Court Of Appeal Did Not Determine That Hussein Relied On Defendants' Statements, Or That He Established Cognizable Damages

As discussed above, in 2015, the Court granted summary judgment in favor of Defendants—finding the "undisputed material evidence shows [that Hussein] was a sophisticated investor who had a long history of deep distrust for Defendants, their ability to manage the company and their wiliness to provide truthful information about the Company." ROA No. 389 at 6. In light of that evidence, the Court held that "reasonable minds could not conclude that Plaintiff relied on any statements made by Defendants in deciding to hold their shares." *Id*. Hussein appealed, and when he did, he put a new spin on his allegations. Despite claiming in his Complaint that he had "significant concerns about Razin and QSI management" (FAC ¶ 19), on appeal he changed his story—asserting that while he mistrusted Razin, he trusted then-CEO Plochocki. Trial Ex. 1008 at 35, 58; Trial Ex. 1009 at 7-9. Based upon this flip-flop, the Court of Appeal was persuaded that Hussein raised a question of fact for trial. ROA No. 1290 at 18. Contrary to Hussein's suggestion, however, the Court of Appeal did *not* determine that Hussein relied upon (much less, reasonably relied upon) the statements that he challenges. *See generally id.* And, indeed, the evidence will establish that he did not.

Nor did the Court of Appeal find—as Hussein suggests—that his theory of damages is appropriate or cognizable. *See* ROA No. 1525 at 9. An alternative basis for Defendants' motion for summary judgment was the fact that Hussein improperly sought to recover as damages the amount by which QSI's stock price was "artificially inflated." This issue would have been case dispositive under *Small*. But on appeal, Hussein flip-flopped, and convinced the Court of Appeal that his damages expert had conducted an economic analysis in 2015 and "found that QSI's stock price was *not* artificially inflated by the misrepresentations at issue." Trial Ex. 1011 at 6. At the time, the Court of Appeal accepted Hussein's representation at face value. *See* ROA No. 1290 at 23. After the case was remanded, Hussein doubled down, telling this Court that his damages expert had "submitted his expert report and testified at his deposition in 2015 in which he set forth his opinion that QSI's stock price was *not* artificially inflated by Defendants' misrepresentations." *See* ROA No. 1353 at 9 (emphasis added).

But then Hussein flip-flopped again. In response to Defendants' second motion for summary judgment, Hussein reverted to his first position, saying that QSI's stock price was in fact inflated—and that he could recover for the loss of such inflation. Then, in October 2020, his expert testified that actually, his 2015 analysis might, in fact, have shown artificial inflation. *See* Trial Ex. 1300; Trial Ex. 1303 at 34-35; *id*. at 37-39. And in Hussein's trial brief filed in November 2020, he analogized this case to several other cases (securities class actions, not holder's cases)—*all of which involved artificial inflation*. *See* ROA No. 1525 at 16-17 & n.1 (citing *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 924 (9th Cir. 2003) (plaintiffs alleged America West "made misleading statements to artificially inflate the value of America West's stock"); *Todd v. STAAR Surgical Co.*, 2017 WL 821662, at *9 (C.D. Cal. Jan. 5, 2017) (alleging that "misstatements artificially inflated the price of [company's] stock"); *In re Sci.-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1341(N.D. Ga. 2007) (company's statements "maintain[ed] its share price at an artificially inflated level"); *Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 415 (5th Cir. 2001) (alleging that plaintiffs purchased "securities at prices which were artificially inflated")).

Although it's hard to keep up with Hussein's ever-changing positions, one thing has remained constant: the Court of Appeal has never ruled on whether Hussein's damages are actually cognizable in his action. Indeed, this Court explicitly held that "to the extent that it's been argued that the Court of Appeal has already made that determination, I think the answer is probably no." May 13, 2021 Hr'g Tr. at 8:26-9:4.

B. The Ninth Circuit's Opinion Is Not Relevant To This Action

Hussein also tries to sidestep his burden of establishing that the statements he challenges were materially false or misleading—a bedrock principle of California law. Instead, he says that he doesn't need to do so, because the Court can assume such material falsity based upon the Ninth Circuit's opinion in a securities class action. *See In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017). Hussein's argument fails on every level. To start, the Ninth Circuit found only that the securities class action complaint could survive a pre-discovery motion to dismiss. The Ninth Circuit determined only that for *pleading* purposes, Hussein had stated a claim; the Ninth

Circuit did not determine, based upon evidence, that the challenged statements (many of which are *different* than those at issue in Hussein's complaint) were materially false. *See id*. For that reason alone, and as explained in Defendants' Motion in Limine No. 2, the securities class action is irrelevant. Furthermore, given the substantial differences between that action and Hussein's action (including the very different procedural posture, relevant time period, alleged misstatements, and attendant holdings), any reference or reliance on the securities class action is also unduly prejudicial. *See* Defendants' Mot. in Limine No. 2.

C. Hussein's Inaccurate Characterization Of The Court's Decision On The Cross-Complaint Trial Cannot Be Used To Establish His Affirmative Claims

When Defendants' cross-complaint against Hussein went to trial (after surviving a motion for summary judgment, motion for summary adjudication, and motion for judgment on the pleadings), Judge Brenner stepped in to oversee the case. Judge Brenner made clear from the outset that he would not permit the parties to litigate Hussein's claims against QSI as part of the cross-complaint trial. *See* ROA No. 1204, Ex. 2 at 798:7-9 (Court would not "litigate that complaint in this trial that Judge Schulte granted a summary judgment motion on"). Because the Cross-Complaint pertained to Hussein's alleged breaches of fiduciary duty rather than any alleged wrongdoing by QSI, Judge Brenner told the parties that he was "not interested in the conduct of QSI[.]" *Id*. at 787:10-13.

Though the claims against QSI and QSI's defenses were not at issue in the cross-complaint, Hussein now seeks to construe the Court's statements in that case to avoid his burdens in this case. The claims and facts at issue in that matter, along with the trial court's own statements, make clear that the Court's findings in the cross-complaint trial have no impact on Hussein's claims here.

In the cross-complaint trial, QSI alleged that Hussein had breached his fiduciary duties to the corporation by secretly pledging all 9.33 million shares of his QSI stock as collateral for margin loans. Trial Ex. 1275 ¶ 3. The Court found that Hussein did not breach his fiduciary duty to the Corporation by engaging in margin loan transactions (though did not rule on whether such transactions violated QSI's "insider trading" policy). The Court also found that Hussein did not breach his duty of candor because he had "no duty to disclose his margining of his QSI shares,"

and had alerted QSI that he would not follow its insider trading policy (which included a provision prohibiting directors and officers from pledging their shares as collateral for loans). *Id.* ¶ 14(e).

Contrary to Hussein's current suggestion, the Court did not make broad findings about Hussein's conduct; the Court found only that he did not breach fiduciary duties (including the duty of candor) owed to the Company as a director, by engaging in margin loan transactions. Indeed, because Hussein did not testify at the cross-complaint trial, there was no opportunity for the Court to assess his candor or credibility. *See* Model Jury Instructions, CACI No. 107. Nor did the Court address one of the issues presented here: whether Hussein's decision to pledge his QSI shares as collateral for margin loans so that he could receive cash without giving up his ownership and voting rights, demonstrates that he was not interested in selling his shares as he alleges.

V. ANTICIPATED EVIDENTIARY ISSUES

In addition to these key legal issues, the Court must decide *how* certain evidence is presented to the jury, and *what evidence* can be presented. There are at least two significant evidentiary issues that must be addressed prior to trial.

First, the parties disagree about the proper order for playing deposition designations at trial. Defendants propose that all designations be played in the order that the testimony appears in the deposition transcript, regardless of which party made the designation. Hussein, on the other hand, "proposes that during a party's case-in-chief, the Court should permit the presenting party to play all of its deposition designations consecutively, supplemented only by counter-designations required for completeness, in the same manner that a party would be able to present its entire uninterrupted direct examination." ROA No. 1525 at 18.

Hussein argues that Defendants' proposed order for playing deposition designations is flawed because (1) it "is inconsistent with the presentation of testimony through direct and cross examination," and (2) "has the practical effect of permitting Defendants to bog down Hussein's tight designations with a substantial amount of disconnected and disjointed testimony in an effort to confuse the jury and waste time." ROA No. 1525 at 18. Actually, it is Hussein's suggested ordering of the evidence that is contrived and inefficient. As an initial matter, each deposition is a cross-examination followed by direct examination, and Hussein offers no legitimate reason why

presenting the testimony *in the order it was actually given* is "inconsistent" with any rule—let alone common sense. Hussein took the majority of the depositions that the parties intend to play by video at trial, and in doing so, exercised his "right to present his evidence [] in the manner he chooses." *Id.* at 19. Dissecting witness testimony by each party's designation—rather than playing the designations in the order in which they appear in the transcript—opens the door for the deponents' testimony to be manipulated and runs the risk of misleading and confusing jurors. *Conderback, Inc. v. Standard Oil Co. of Cal., W. Ops.*, 239 Cal. App. 2d 664, 686 (1966) (requiring counsel to introduce deposition counter-designations at the same time as testimony was appropriate "in order to obviate immediately any false or distorted impression the jury might receive from fragmentary introduction" of the testimony).

Efficiency also favors Defendants' proposal. Indeed, if the Court adopted Hussein's proposal—to play each party's designations "consecutively, supplemented only by counter-designations required for completeness, in the same manner that a party would be able to present its entire uninterrupted direct examination"—***both parties*** would play the same designated sections of the deposition in order to accurately portray the witnesses' testimony. *See, e.g.,* Trial Ex. 960 (Cohen Dep. Tr.) 9:8-12, 9:17-10:1, 11:5-19, 23:24-24:8, 26:6-14, 70:18-71:5; Trial Ex. 963 (Walker Dep. Tr.) at 5:8-11, 15:10-12, 15:19-16:5; Trial Ex. 966 (Brennan Dep. Tr.) 5:7-11, 13:11-14:15, 15:6-22, 100:24-101:9, 110:20-112:6. Given the complex issues at stake in this trial, the already lengthy trial estimate, and COVID-19 safety protocols that may delay the trial's course, Defendants urge the Court to adopt their proposal and play each witness's designated testimony in the order in which it appears in the deposition transcript.

Second, Hussein has raised objections to over 1,000 of the documents on Defendants' exhibit list. Nearly all of the objections are boilerplate objections of relevance, hearsay, foundation, and prejudice. Shockingly, nearly 450 of the documents to which Hussein has objected *are documents Hussein produced in this case, or are Hussein's own SEC filings documenting his years-long tirade against QSI and the number of QSI shares he has owned during the relevant period.* In some cases, Hussein objects to documents that are also included on his own exhibit list. *Compare, e.g.*, Plaintiff's Trial Ex. 181 (May 22, 2015 FINRA Dispute Resolution Award) *with*

Defendants' Trial Ex. 981 (same). In other cases, Hussein objects to the expert reports and depositions of his own witnesses. Hussein's objections are baseless and simply intended to harass.

VI. CONCLUSION

After years of dealing with Hussein's chameleon-like theories of liability, causation, and damages, Defendants look forward to defending against the claims that actually have been brought against them.

Dated: June 30, 2021

Respectfully submitted,

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By *Peter A. Wald*
Peter A. Wald

Attorneys for Defendants Sheldon Razin, Steven Plochocki, and Quality Systems, Inc.

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 550 Montgomery Street, Suite 2000, San Francisco, CA 94111-6538.

On June 30, 2021, I served the following document described as:

DEFENDANTS' AMENDED PRETRIAL BRIEF

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail to the following party on June 30, 2021:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 30, 2021, at Costa Mesa, California.

Everett Bulthuis