STEPHEN E. MORRISSEY (187865)
BRYAN J. CAFORIO (261265)
AMANDA BONN (270891)
SUSMAN GODFREY L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150
Email: smorrissey@susmangodfrey.com
Email: bcaforio@susmangodfrey.com
Email: abonn@susmangodfrey.com

KEMPER DIEHL *(pro hac vice)*
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Fax: (206) 516-3883
Email: kdiehl@susmangodfrey.com

Attorneys for Plaintiff Ahmed D. Hussein

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

AHMED D. HUSSEIN, Plaintiff, vs. SHELDON RAZIN, STEVEN PLOCHOCKI, QUALITY SYSTEMS, INC. and DOES 1-10, Inclusive, Defendants.	Case No. 30-2013-00679600-CU-NP-CJC *Assigned For All Purposes To: Judge Glenn Salter* **PLAINTIFF AHMED D. HUSSEIN'S TRIAL BRIEF** Date: July 6, 2021 Time: 9:00 a.m. Dept.: C22 Action Filed: October 4, 2013 Trial Date: November 6, 2020

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I. INTRODUCTION

Plaintiff Ahmed Hussein has waited almost eight years for the opportunity to present his fraud, negligent misrepresentation, and constructive fraud claims to a jury and receive his long overdue justice for the tremendous harm he suffered at Defendants' hands. After completely defeating QSI's baseless breach of fiduciary duty claim against Hussein in 2017, and getting a unanimous reversal of Judge Schulte's initial order granting Defendants' motion for summary judgment on Hussein's claims from the Court of Appeal in 2019, Hussein is eager to present his claims to a jury so that he may recover the more than $400 million he lost due to Defendants' wrongful conduct.

In 2011 and 2012, defendants Sheldon Razin and Steve Plochocki orchestrated a scheme to portray the company's financial foundation as rock solid. In a series of board presentations, public statements, and direct statements to Hussein, Defendants asserted the company had a sales pipeline that was continuing to grow to record levels, that it expected to grow revenues at 20-24% and earnings at as much as 30% or more in its 2013 fiscal year, which began in April 2012. Those statements were a complete fabrication and concealed the fact that Defendants in fact had *no basis* for their projections, knew their business was slowing down, and were desperate to portray the company's situation favorably in order to entrench themselves and profit from QSI's then sky-high stock prices.

Unfortunately, Hussein believed what QSI management said and had no knowledge about the truth being concealed, and he therefore reversed plans to sell his QSI stock, as he had taken steps to do since the fall of 2011 and through early 2012. Instead, Hussein pursued a proxy contest to seek the election of an independent board and the institution of what he viewed as long-needed corporate governance reforms. Based on Defendants' statements, Hussein believed that effort would be successful, and that the company would achieve unprecedented heights. But the value of Hussein's investment in the company was destroyed on July 26, 2012, when Razin and Plochocki—unilaterally and without notice to or approval by the company's board, and contrary to what had been represented to Hussein, the board, and the investing public until the very eve of that announcement—withdrew the projections, leading QSI's stock price to drop by an additional 30%

in a single day. Based on the stock price he would have realized had Defendants' representations been true, *which is the same price at which Defendant Plochocki himself unloaded his QSI shares while the frauds were ongoing*, Hussein's damages exceed $400 million.

Hussein's claims fall squarely under those expressly permitted under California law by the Supreme Court in *Small v. Fritz*, 30 Cal. 4th 167 (2003), which held that companies do not receive a free pass when they defraud their shareholders by inducing them not to sell company stock. *Id.* at 190. In doing so, the Supreme Court made clear that "California has long acknowledged that if the effect of a misrepresentation is to induce forbearance—to induce persons not to take action—and those persons are damaged as a result, they have a cause of action for fraud." *Id.* There is no "exception to this rule when the forbearance is to refrain from selling stock." *Id.* The Supreme Court therefore expressly acknowledged that holder's claims fit within a long line of common law fraud cases appropriately brought under California law.

At all relevant times, Hussein was QSI's second largest shareholder. After spending years tirelessly attempting to improve QSI's business and enhance its corporate governance, in 2011 Hussein started taking steps to exit his position and move away from the company and its founder as they continued to target and harass Hussein in direct violation of California and corporate law. Hussein started working closely with an experienced trader who would be able to assist Hussein in selling his 9.33 million QSI shares while it was trading at almost $50 per share. Absent Defendants' representations and omissions, that sale would have been completed in February 2012, shortly after QSI accurately announced record revenue and earnings for the prior quarter. In the middle of Hussein's work towards that sale, however, Defendants made a series of concrete projections regarding QSI's short-term revenue and earnings growth prospects and the status of its sales pipeline. In hours-long presentations at company board meetings in October 2011 and 2012, in public statements, and directly to Hussein, Plochocki and QSI's management team depicted a company that was poised for a period of phenomenal future growth at levels far higher even than it had achieved thus far. Throughout, Defendants concealed the fact that QSI's pipeline was shrinking, its projections were jerry-rigged to fuel Razin's demands for growth in excess of 2012, and it was not in fact securing the long-term contracts needed to sustain its historical levels of

revenue and earnings growth. Together, Defendants' misstatement and omissions convinced Hussein to step back from selling his stock so that he could benefit from QSI's robust growth on the near horizon.

Defendants' projections were not mere puffery or vague pronouncements regarding an amorphous future. No, as the Ninth Circuit Court of Appeals already determined when reviewing the corresponding securities class action involving many of the identical statements at issue here, "Plochocki and the others did not just describe the pipeline in subjective or emotive terms. Rather, they provided a concrete description of the past and present state of the pipeline. . . . Plochocki . . . reassured them that the pipeline was full and growing. These statements 'affirmatively create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed].'" *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1144 (9th Cir. 2017).

Unfortunately for Hussein, the material representations he relied upon in holding his QSI stock were totally baseless, as revealed when the truth partially came out on July 26, 2012. That's when QSI announced the results for the first quarter of its 2013 fiscal year. Plochocki revealed that QSI's net income for the first quarter of fiscal 2013 had declined by 18% from the prior year, and QSI retracted the revenue and earnings guidance it had just recently issued and reaffirmed. Although the Board met on July 25, 2012, the Board was not informed of, and never authorized, this extreme retraction. In presentations to the board, QSI management continued to confirm and reconfirm the company's projections right through the July 25 board meeting. Hussein and the QSI board were not informed that QSI management had been fabricating the financial projections for months, and were not provided any opportunity to fulfill their responsibility as directors to address the situation before Razin and management unilaterally withdrew the projections. QSI's retraction of the revenue and earnings guidance it had been affirming for months shocked the market. QSI's stock price plunged from $23.63 per share to $15.95 per share, a one-day drop of 32% that erased hundreds of millions of dollars from the Company's market value and caused Hussein tens of millions of dollars in damages on shares of his stock that he was forced to sell over the course of the next several days.

Facing overwhelming evidence of their rampant fraud, including smoking gun internal QSI

documents confirming that the pipeline was "very weak" and "horrible" at the exact time Defendants were promoting the allegedly rapidly expanding size of the actually decreasing pipeline, and multiple witnesses corroborating Hussein's testimony that he refrained from selling his stock after hearing and relying on Defendants' concrete representations, Defendants now appear determined to turn this case into a circus. They propose re-litigating almost every issue already fully litigated and rejected by Judge Brenner at the cross-complaint trial and unanimously affirmed by the Court of Appeal, prejudicing the jury against Hussein due to his wealth, and presenting irrelevant and improper "expert" testimony based on unreliable and non-existent methodology. Once the Court resolves certain key threshold legal issues, this trial will be able to proceed efficiently and remain focused on Hussein's actual claims, which Hussein expects to establish without any substantial dispute.

II. ORDER OF PRESENTATION AND LENGTH OF TRIAL

This case presents several threshold legal issues that will require the Court's resolution at the outset of these proceedings. Hussein believes these issues are straightforward, and turn largely on prior rulings or clearly established law (including the CACI instructions) governing claims such as those at issue here. Once the trial begins, Hussein will present his case-in-chief first, followed by Defendants. Hussein estimates the trial will take 6-10 days of court time (assuming 6 hours of trial time per day, and excluding the time necessary to empanel a jury).

III. FACTUAL AND PROCEDURAL BACKGROUND TO THE DISPUTE

A. Hussein suffered severe harm from Defendants' fraud.

Hussein has been a QSI shareholder since 1982 and served as an independent director of the company from 1999 to 2013, resigning once the full extent of QSI's frauds (and the rest of the board's complicity in them) became clear. Hussein was QSI's second-largest shareholder, holding approximately 15.7% of the Company's shares before July 2012. In late 2011 and early 2012, Hussein took concrete steps toward selling his entire stake in QSI. He filed a 13D in November 2011 and worked closely with Shlomo Cohen, an experienced trader capable of selling his entire substantial block of QSI stock to potentially liquidate his holdings. Mr. Cohen will confirm at trial that he assured Hussein his firm had "enough buy interest to purchase all the shares" if and when

Hussein gave the green light to sell. (Tr. Ex. 960.)

Hussein ultimately held back from selling after relying on Defendants' specific factual representations in late 2011 and early 2012 about QSI's sales pipeline and growth trajectory. As a means of forecasting its future sales, QSI began reporting on the state of its "sales pipeline," describing it as an objective assessment of how many "new system sales" QSI expected to make in upcoming months. (Tr. Ex. 10.) At the time, QSI was coming off years of strong sales growth driven by the 2009 American Recovery and Reinvestment Act, which had provided billions of dollars of incentives for healthcare providers to convert to electronic records systems—which QSI sold. Rather than allowing investors to assess the company's prospects based on historical results, its business plans, and general market conditions, QSI began making statements regarding its sales pipeline and expected future revenue and earnings growth that purportedly were based on a rigorous analysis of objective data.

During that time period, at Razin's direction, Plochocki and QSI made a series of specific factual assertions about QSI's sales pipeline and earnings expectations that Hussein relied upon in deciding not to sell. For example, on November 7, 2011, when *Investor's Business Daily* reported that QSI's announcement of only a 2% increase in its "pipeline of orders . . . from $170 million to $173.5 million . . . raised concerns of a flattening growth curve," Plochocki rebuked those concerns, asserting that "***worries about flattening and saturation were baseless***" and "***there is nothing drying up and there is nothing slowing down***." (Tr. Ex. 2.) Then on January 25, 2012, at a private meeting of QSI's board that Hussein attended, Plochocki proclaimed that QSI's then-current growth was "***rivaled only by Apple***" and that QSI expected to achieve ***30% revenue and net income growth*** in its next fiscal year. (Tr. Ex. 3) On an investor call the next day, Plochocki asserted that QSI's sales "***pipeline continues to build to record levels***." (Tr. Ex. 4.) In that same call, after stating that he had access to current internal data, another QSI executive stated, "there's nothing out of character in the pipeline that we're reporting today versus what we have seen there the past couple of years." (*Id.*) The very next week, Hussein attended a private dinner with Plochocki in which they discussed how QSI was a company "with some projections that are fantastic" and Plochocki informed Hussein that the Company was doing "great." (Tr. Ex. 969 at 227-28.)

Throughout, QSI and Plochocki concealed the material fact that there was no objective basis for QSI's revenue and earnings projections, and that its sales pipeline was, in fact, receding, not growing. Based on these misrepresentations and omissions, Hussein informed Moe Cohen that he reevaluated his decision to sell his "QSI shares and had instead decided to step back." On February 24, 2012, unbeknownst to Hussein, Plochocki sold most of his own QSI shareholdings for $43.99 per share shortly after making the misstatements at issue. (*Id.* Tr. Ex. 64.)

Defendants continued making false statements throughout the spring of 2012, which reinforced Hussein's decision not to sell and mitigated a steady decline in the company's stock price between March and June. For example, on May 17, 2012, QSI sought to allay concerns about a disappointing earnings release by falsely claiming it was just a "timing" issue and asserting, without any factual basis (and in contravention to facts known to QSI's in-house financial team), that QSI "remain[ed] confident about the growth opportunities" and "expect[ed] revenues to increase 20 to 24%, earnings per share to grow 20 to 25%." (Tr. Ex. 6.) On June 26, 2012, QSI ***again*** stated that it was "confident about our growth prospects" and reaffirmed that "[f]or fiscal 2013, we expect that revenues will increase in the 20-24% range and we expect earnings per share to grow by 20-25%." (Tr. Ex. 7.) QSI ***again*** re-affirmed these growth projections on July 13, 2012. (Tr. Ex. 9.)

To Hussein's severe detriment, QSI's statements were materially misleading because they omitted the fact that QSI had no objective factual basis for its statements regarding its pipeline and its anticipated range of future revenue and earnings growth. Instead, QSI's internal documents reveal that its pipeline was just "whipped up" to satisfy Defendant Razin's desire to portray a rosy picture to investors, that QSI included in its reported pipeline projected sales even its own finance team admitted internally they had no basis to believe would materialize, and that its forecast was reverse engineered to match management's desired numbers, not based on an objective assessment of likely sales. (*See, e.g.*, Tr. Exs. 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25.) The falsity became evident just ***three days*** after QSI's board last publicly verified the false statements in an SEC filing. On July 26, 2012, QSI shocked the market (and Hussein, who had attended the board meeting the evening before, at which there was no mention or discussion of retracting guidance) when

Plochocki announced a complete reversal of QSI's fortunes and ability to project its future growth: QSI's net income was ***decreasing***, its sales pipeline had ***evaporated***—not grown, and it was no longer making ***any projection at all***. (Tr. Ex. 1.) Without any advance warning to the board, QSI retracted the earnings guidance it had issued (and reaffirmed) in May, June, and just three days earlier, and stated that QSI was "not affirming our previous guidance nor providing revised guidance at this time." (*Id.*)

Although Hussein served on the QSI board, and although Hussein is an experienced investor, he was particularly susceptible to QSI's frauds because defendant Razin, who effectively controlled the company's board, excluded him from key information and decision making. Violating the fundamental principle of corporate governance that Hussein was entitled to be treated on an equal basis with Razin—who, as an independent director owned slightly more QSI shares than Hussein and had no greater right to participate in corporate decision making—QSI allowed Razin to manage the company's strategic planning and day-to-day operations, with Plochocki answering to him. Meanwhile, Hussein, who owned almost as many shares as the rest of the board combined, was the only director excluded altogether from all board committees where the company's strategic and financial planning took place. Consequently, Hussein had no choice but to rely on QSI management for financial information relating to his investment in the company, as he was entitled to do under Corporations Code § 5231.

After Defendants' false statements became evident, QSI's stock price, which had been as high as $44 per share in February and March (before the market began to lose confidence in management with negative financial results that began to trickle out in May), plunged from $23.63 to $15.95 per share on July 26, 2012, alone. (Tr. Ex. 1279.) Compounding the problem, the company and its board took no action against Plochocki or Razin, who engineered the flagrant fraud, instead choosing to scapegoat Hussein by pursuing baseless claims against him. The precipitous decline in QSI's stock price caused Hussein hundreds of millions of dollars in damages, including tens of millions sustained when banks that held some of Hussein's QSI shares in margin accounts liquidated 3.64 million of Hussein's shares at fire sale prices. (*See* Parties' Joint Fact Stip.) After QSI's share price collapsed, Razin spitefully told Hussein he was "delighted for your demise."

(Tr. Ex. 969 at 264:8.) For seven years, rather than acting proactively to restore investor confidence and move the company back onto the successful track it long was on while Hussein was actively involved in management and oversight, QSI has instead devoted its shareholders' equity to attacking Hussein and shielding Plochocki and Razin from the liability that they ultimately must face.

B. Discovery has confirmed QSI's rampant fraud, which will come out at trial.

In discovery, Hussein has uncovered smoking gun evidence of QSI's knowingly fraudulent conduct, including Plochocki's emails establishing that he knew the "pipeline number" would "be the ***single most important stat*** the analysts will focus on" and that, as a result, QSI executives started "***whipping up the pipeline***" to match analyst expectations. (Tr. Ex. 14.) Internal emails further reveal that QSI's management knew the pipeline was "***horrible***" and "***very weak***" at the exact same time they reported the opposite to the unsuspecting public, including Hussein. (Tr. Exs. 141, 149.) The documents even establish that QSI executives fabricated QSI's financial statements from whole cloth to match market expectations, with one member of the finance team conceding: "***I hate to admit it*** . . . but after hours of playing with the model to make numbers work . . . ***I gave in and made a few plugs to get us to the streets estimate***." (Tr. Ex. 16.)

C. The Court of Appeal unanimously held that Hussein's evidence of actual and justifiable reliance requires trial.

While Judge Schulte initially granted QSI's first summary judgment motion after finding that Hussein could not prove "he reasonably relied on Defendants' alleged misrepresentations," the Court of Appeal ***unanimously reversed***. In October 2019, the Court of Appeal held that while QSI "presented what ***appeared*** to be a strong case for summary judgment by ***excerpting*** letters Hussein sent" and quoting "***selections*** from Hussein's SEC and proxy statement filings," that selective evidence did not establish QSI's argument when considered in its broader context. (ROA No. 1290 at 13-14 [emphases added].) While Hussein was deeply critical of fundamental flaws in QSI's corporate governance and lack of transparency—as, of course, was his right and duty as a corporate director—he "did not state any complaint about the accuracy of QSI's financial data or its sales pipeline." (*Id.* at 17). The Court of Appeal further recognized that to satisfy the justifiable reliance element, Hussein "must show that the reliance was reasonable by showing that . . . the matter was

material . . . ." (*Id.* at 11.) The Court of Appeal therefore concluded: "Based on such evidence, a jury could infer that the 'future [QSI] prospects' contributing to Hussein's decision to refrain from selling his shares included those based on one or more of QSI's alleged misrepresentations about QSI's financial condition and sales pipeline." (*Id.* at 20).

After unanimously losing in the Court of Appeal, Defendants petitioned for rehearing based on their claim that Hussein "has *always* sought damages based on the alleged artificial inflation in QSI's stock price" and the Court of Appeal "misunderstood" his damages claim and wrongly found it suitable for trial. While ***Defendants*** have consistently (and wrongly) argued that Hussein's damages theory depends on "QSI's stock [being] artificially inflated as a result of the challenged statements," (ROA No. 394 at 16), the Court of Appeal rejected this argument and correctly made clear that ***Hussein does not depend on artificial inflation***. As the Court of Appeal recognized: "It appears defendants attribute to Hussein a premise (QSI's share price 'was artificially inflated') that ***by their own briefing they acknowledge he does not share.***" (ROA No. 1290 at 23.) Undeterred, QSI brought its campaign to avoid trial to the California Supreme Court, again claiming the absence of evidence that QSI's stock price was "artificially inflated" "means those statements must have been immaterial." The California Supreme Court summarily rejected the petition.

D. <u>QSI's meritless cross-claim forced Hussein to wait eight years for trial.</u>

Rather than investigate and reform its misconduct, QSI has failed to address its fraud and instead poured tens of millions of dollars into abusive litigation tactics designed to deny or delay justice. Hussein has waited almost *eight* years to put QSI's fraud before a jury because QSI filed a meritless cross-complaint against him in a transparent effort to delay or deny justice on Hussein's fraud claims, and then spent many millions of dollars in corporate resources—a substantial portion belonging to Hussein—hopelessly pursuing that cross-complaint through trial and appeal. After QSI presented its case-in-chief, Judge Brenner granted judgment for Hussein, holding that:

1. Mr. Hussein did not violate his fiduciary duties to QSI.

2. Between July 27, 2011, to May 14, 2013, Hussein acted in what he believed was QSI's best interest whether or not other Board members agreed.

3. Between 2004 and 2012, margin accounts were both lawful and commonplace among directors of public companies.

4. There was nothing risky about Mr. Hussein's activity in placing his QSI stock holdings in margin accounts, and overall, Mr. Hussein lost millions of dollars because of his margin loans.

5. Nothing about Mr. Hussein margining his QSI stock caused damage to QSI.

6. Mr. Hussein was not a wrong-doer with regards to the forced sale of his QSI stock in July and August 2012.

7. The primary cause of QSI's stock dropping in price on July 26, 2012, was QSI's earnings report. QSI's earnings report caused the sale of Hussein's stock, which resulted in Hussein losing a large amount of money.

(ROA No. 1152). Judge Brenner's holdings were later affirmed by the Court of Appeal, which concluded that QSI's cross-claim had "*no merit*." (*Id.* at 2 [emphasis added].) Notwithstanding its failure at every step in the process, the net effect of QSI's frivolous breach of fiduciary duty claim against Hussein is that it has cost Hussein millions of dollars to defend (which QSI has refused to indemnify) and successfully denied justice to Hussein for seven years while he overcame every roadblock put in his path.

IV. THRESHOLD LEGAL ISSUES

Judge Brenner totally and completely rejected QSI's breach of fiduciary duty claim against Hussein after QSI presented its case-in-chief during the cross-compliant trial. The Court of Appeal unanimously affirmed Judge Brenner's rulings and found QSI's claim that Hussein breached his fiduciary duties to the Company had "no merit." (ROA No. 1290 at 2.) Apparently undeterred, and in direct contravention of black letter California law, Defendants nonetheless intend to mislead the jury in this trial by relitigating many of the identical baseless positions this Court (and the Court of Appeal) already rejected. The doctrines of issue preclusion and law of the case both preclude Defendants from injecting into this trial fully litigated positions lacking both evidentiary and legal support. *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 824 (2015) (Issue preclusion "prevents relitigation of previously decided issues."); *Alpha Mech. Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 133 Cal. App. 4th 1319, 1333 (2005) (affirming trial court's order granting motion *in limine* to preclude defendant "from introducing any of the facts related to [defendant's] dismissed cross-complaint" because the defendant already "had a full and fair opportunity to litigate its cross-complaint" before the trial on the plaintiff's complaint).

Defendants' improper trial plan touches on all aspects of the trial, including Defendants' proposed jury instructions, verdict form, areas of proffered expert testimony, and motions *in limine*. Accordingly, as a threshold matter the Court should resolve those fully briefed disputes, which will determine the jury instructions, set the framework for allowable evidence and argument before the jury, and dictate the duration of the trial. As a first step in resolving those disputes, the Court may and should judicially notice Judge Brenner's rulings on the fully litigated cross-complaint trial and the Court of Appeal's unanimous opinion affirming Judge Brenner's judgment so that it may instruct the jury regarding the key issues already determined as a matter of law and fact, including:

- Mr. Hussein did not violate his fiduciary duties to QSI.
- Between July 27, 2011, to May 14, 2013, Hussein acted in what he believed was QSI's best interest whether or not other Board members agreed.
- Between 2004 and 2012, margin accounts were both lawful and commonplace among directors of public companies.
- There was nothing risky about Mr. Hussein's activity in placing his QSI stock holdings in margin accounts, and overall, Mr. Hussein lost millions of dollars because of his margin loans.
- Nothing about Mr. Hussein margining his QSI stock caused damage to QSI.
- Mr. Hussein was not a wrong-doer with regards to the forced sale of his QSI stock in July and August 2012.
- The primary cause of QSI's stock dropping in price on July 26, 2012, was QSI's earnings report. QSI's earnings report caused the sale of Hussein's stock, which resulted in Hussein losing a large amount of money.

As described in the pending motions, Hussein respectfully submits that the legal and equitable issues raised there are issues for the Court to resolve before empaneling any jury. By ruling on these issues, the Court will dramatically streamline the upcoming trial and keep the parties focused on presenting admissible evidence to the jury that will help the jurors decide this dispute, not Defendants' misleading arguments already found lacking any legal or factual basis. To the extent the Court wishes to hear additional evidence and argument before ruling on any or all of these issues, Hussein is prepared to present such evidence and argument at the Court's request.

V. MERITS OF THE CLAIMS

A. California Law Expressly Authorizes Hussein's Claims.

Notwithstanding Defendants' demonstrated propensity to attack the legitimacy of "holder's claims" under California law, the California Supreme Court has long made clear that there is nothing unique or unusual about Hussein's claims. To the contrary, in *Small*, the California Supreme Court squarely held that claims such as those at issue here are part of a long history of fraud cases in which defendants' fraudulent conduct caused plaintiffs to not take action to their detriment. In doing so, the Supreme Court made clear that "California has long acknowledged that if the effect of a misrepresentation is to induce forbearance—to induce persons not to take action—and those persons are damaged as a result, they have a cause of action for fraud." 30 Cal. 4th at 190. There is no "exception to this rule when the forbearance is to refrain from selling stock." *Id.* In fact, already in these proceedings the Court of Appeal further confirmed the legitimacy of holders' actions under California law, holding in certain terms: "A shareholder who alleges he refrained from selling shares in reliance on false representations about the company's financial performance can bring a claim for fraud or misrepresentation under California law." (ROA No. 1290.) Supreme Court precedence and the law of the case should preclude Defendants from advancing any misleading argument to the jury regarding the legitimacy of Hussein's claims. Given that Hussein's claims fall squarely within the general line of fraud claims under California law, there's no reason for the Court to depart from instructing the jury using unmodified CACI series 1900 jury instructions regarding fraud or deceit rather than the confusing, inaccurate, extensively modified instructions Defendants have proposed to confuse the issues and mislead the jury.

B. Hussein Relied on Defendants' Misrepresentations in Holding his QSI Stock.

At trial Hussein will testify that he started seriously considering selling all of his QSI stock in July 2011 after the QSI Board harassed and attacked Hussein by purporting to institute a margin policy targeted directly at him and his personal margin loans. Hussein will explain that over the following six months he had at least twenty conversations with Moe Cohen, an experienced stock trader specializing entirely on liquidating large block trades for highly concentrated individuals like Hussein. Mr. Cohen himself will confirm those meetings, as will Hussein's secretary Kristy Walker, who will testify about the more than twenty telephone conversations Hussein had with Mr.

Cohen as they worked out the logistics of selling Hussein's QSI holdings.

While undertaking the process to liquidate his holdings, however, Defendants made a series of concrete projections regarding QSI's short-term growth expectations, which convinced Hussein to step back from selling his stock so that he could benefit from QSI's robust growth on the horizon. Hussein will explain that he relied on the representations to change his mind about selling his stock, and Mr. Cohen will expressly corroborate Hussein and testify that Hussein informed Cohen that Hussein "reevaluated his decision to sell more than 9 million QSI shares" "based on QSI's future prospects." This evidence will establish for the jury that it is more likely true than not true that Hussein would have sold his QSI stock but for Defendants' concrete misrepresentations about the sales pipeline. In fact, Hussein's evidence is dramatically more credible and extensive than the Supreme Court, and the Court of Appeal in these proceedings, have found necessary to succeed on a valid holder's claim:

> For example, the Supreme Court contemplated that the shareholder may have "told his broker, or a friend, or a spouse, of his decision" to sell his stock. (*Id.* at p. 182.) To illustrate "specific reliance on the defendants' representations," the court gave an "example" (*id.* at p. 184) based on the fact that "[a] corporation's financial report invites shareholders to read and rely on it" (*id.* at p. 182). The court found sufficient a hypothetical allegation "that if"—instead of receiving false financial data—"the plaintiff had read a truthful account of the corporation's financial status[,] the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place." (*Id.* at p. 184.)

(ROA No. 1290 at 19.) Hussein's overwhelming, corroborated evidence establishing he was in the process of selling his QSI shares, but reassessed after reviewing and relying upon Defendants' concrete representations about QSI's future prospects, will persuade the jury that Defendants are responsible for the substantial harm they caused to Hussein in convincing him not to sell his QSI stock when it was worth more than $400 million.

C. Defendants' False Statements were Material.

Hussein will introduce abundant evidence of the materiality of QSI's misrepresentations. Under California law, a "misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 332 (2011) (quoting *Engalla*, 15 Cal. 4th at 977). Not only would "a reasonable man" find Defendants' concrete

representations material, but Hussein will introduce substantial evidence confirming that even QSI itself contemporaneously agreed that the very statements Hussein relies upon would be important, and thus material, to investors making trading decisions. In an email Plochocki sent on January 11, 2012, he asked another QSI executive: "any feel for the pipeline number for our call later this month? **It will be the single most important stat the analysts will focus on**." (Tr. Ex. 14. [emphasis added].) This explicit admission by Plochocki that a reasonable investor would attach importance to Plochocki's representations regarding the sales pipeline confirms the materiality of the false statements at issue on its own and beyond any legitimate dispute.

Other emails further establish the critical importance of the pipeline numbers for investors, as they indicate that QSI executives manipulated the sales pipeline to appear full and growing. In one email a QSI executive admits QSI was "working to find dollars" to add to the pipeline. (Tr. Ex. 30.) When QSI employee Scott Decker reported a newly exaggerated pipeline number shortly before an earnings call, Plochocki's response starkly showed its importance: "Man . . . you just made my day." (Tr. Ex. 86.) In another email, Decker wrote: "The pipeline calculation for Inpatient has declined sequentially . . . As you know the street is looking for a growth story. . . I don't want you to manufacture any data but . . . ." (Tr. Ex. 11.) After QSI announced its fiscal 2012 results and growth projections for fiscal 2013, Decker wrote: "We missed the numbers by so much it was material info . . . Putting 2013 guidance out was just as important." (Tr. Ex. 82.) Another internal email demonstrates that QSI understood QSI's Board members, like Hussein, would place great significance in any evidence that the sales pipeline was deteriorating: "we really need to understand the downturn in new system sales. It will be a hot subject next week at the Board meeting and the earnings call." (Tr. Ex. 141.)

QSI's internal recognition of the importance of its misstatements fully aligned with outside investment analysts covering QSI at the time. On January 26, 2012, during the earnings call in which Plochocki publicly misrepresented that QSI's pipeline "continues to build to record levels," multiple analysts asked questions about the pipeline. (Tr. Ex. 664, 667.) Hours after the call, analysts at William Blair & Company published a research report stating that "[p]ipeline activity was generally in line with expectations." (Tr. Ex. 668) Analysts at Caris & Company similarly

stated that QSI's "sales pipeline figures provide investors with hope that HCIT adoption wave is far from over." JP Morgan similarly stated: "The ultimate driver of stock movement today is likely to be the pipeline number which provides an indication of the directional strength of the business." These and many similar comments from research analysts establish the materiality of QSI's assurances about its pipeline.

When confronted with their statements during their depositions, which will be played before the jury, QSI's witnesses conceded materiality. Asked about his statement that "there is nothing drying up and there is nothing slowing down," Plochocki confirmed that he knew the statement could be published due to its significance:

> Q. And did you know that that statement would be -- or could be published when you made it?
>
> A. We made it at investment banking conferences. We made it on our earnings calls, yes….
>
> Q. And you understood that the market could -- or might rely on the statements that you made?
>
> A. Yes.

(Tr. Ex. 961). Plochocki also testified that he expected the market to rely on the statements made during the Company's January 26, 2012, earnings call:

> Q. Who were you speaking to on this conference call?
>
> A. The – it's a combination of investors, shareholders, research analysts, typically about 200 people on our -- on our broadcast call for third quarter results.
>
> Q. And you expected or understood that the market might rely on the statements that you made during that call, correct?
>
> A. Yes.

(*Id.* at 73:7-16) When asked about QSI's repeated affirmations of its revenue and earnings guidance in May, June, and July 2012, QSI's General Counsel Jim Sullivan testified under oath at the cross-complaint trial that QSI "expected that shareholders like Mr. Hussein could and would rely on" those projections. (Tr. Ex. 975) In fact, Mr. Sullivan conceded that he himself relied on Plochocki and the finance team for the accuracy of those representations because he didn't have the time or ability to confirm the numbers himself. (*Id.*) This testimony makes clear that QSI always

understood the challenged statements were and would be material to the investing public, including Hussein. Indeed, the statements were obviously significant to the SEC, which questioned QSI about its basis for the very "specific projections about the future performance of Quality Systems." (Tr. Ex. 8.)

Given the overwhelming evidence that any reasonable investor would have attached material importance to Defendants' concrete misrepresentations, Defendants appear poised to argue that the Court should adopt a new and illogical standard that isn't the law in California (or anywhere else). Rather than focus on whether a reasonable investor would find a misstatement material, Defendants ask this Court to conclude that the real question of materiality is whether a statement has "an effect on QSI's stock price." Of course, this is the same theory of materiality that the Court *rejected* last year in denying Defendants' second summary judgment motion, holding "there is no clear, bright-line rule in [California] that the materiality of a misrepresentation can be judged only by the stock price's artificial inflation." (ROA No. 1478.) The Court was correct. No California court has *ever* held that the definition of "materiality" under California law requires a statement to move a publicly-traded company's stock price. Instead, California law provides that a "matter is material if a reasonable person would find it important in deciding what to do." (CACI 1908 [Reasonable Reliance].)

Even under the federal securities laws, the Ninth Circuit has rejected a *per se* rule under which "if there has been no immediate change in the stock price, the alleged misrepresentations or omissions must have been immaterial." *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003). *See also, e.g.*, *Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017) (rejecting the argument that "stock price movements" determine "materiality"). Instead, the Ninth Circuit has recognized that regardless of stock price movements, "[s]urely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge." *United States v. Reyes*, 660 F.3d 454, 469 (9th Cir. 2011) (quoting *S.E.C. v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980)).

In *America West Holding Corp.*, the Ninth Circuit explained why a *per se* move-the-market

test for materiality does not apply: (1) the "market is subject to distortions that prevent the ideal of a 'free and open public market' from occurring"; (2) such "distortions may not be corrected immediately"; and (3) "[b]ecause of these distortions, adoption of a bright-line rule assuming that the stock price will instantly react would fail to address the realities of the market." *Id.* The court further observed that "although America West's disclosure of the settlement agreement had no immediate effect on the market price, its stock price dropped 31% on September 3, 1998 when the full economic effects of the settlement agreement and the ongoing maintenance problems were finally disclosed to the market." *Id.* at 935. The court explained:

> This reaction, even if slightly delayed, further supports a finding of materiality. This is particularly true because Plaintiffs offer a reason for the delay, i.e., America West continued to reassure analysts that the settlement agreement and compliance therewith would not have noticeable economic effects on the company.

Id. Numerous other cases are in accord.[1] And the same is true here. Indeed, in the related federal securities class action litigation, the Ninth Circuit held that various QSI statements about its sales pipeline—statements Defendants now contend had no impact on stock price—were materially misleading because they "affirmatively created an impression of a state of affairs that differed in a material way from the one that actually existed." *In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1144 (9th Cir. 2017). The jury will have no doubt that the statements Hussein relied upon to hold his QSI would have been considered important by a reasonable person deciding what to do.

D. Hussein Suffered Substantial Damages from Defendants' Wrongful Conduct.

Had Hussein gone forward with selling his QSI stock in early 2012 as planned, he would have received more than $400 million.[2] By reassessing and deciding not to sell based on Defendants' misrepresentations and concealment, Hussein suffered tremendous harm. On July 26,

[1] *See, e.g.*, *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) (holding "if the market believes the company will earn $1.00 per share and this belief is reflected in the share price, then the share price may well not change when the company reports that it has indeed earned $1.00 a share even though the report is false in that the company has actually lost money"); *Todd v. STAAR Surgical Co.*, 2017 WL 21662, at *9 (C.D. Cal. Jan. 5, 2017) (holding a lack of stock price reaction does not show immateriality when "events do not include any new, unexpected information that would be expected to affect the stock price"); *In re Sci-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1340-41 (N.D. Ga. 2007) (holding "price stability may just as likely demonstrate the market consequence of fraud where the alleged fraudulent statement conveys that the company has met market expectations, when in fact it has not").

[2] Plochocki sold 90% of his QSI stock on February 24, 2012, at an average price of $43.99 per share. At that same price, Hussein would have received approximately $410 million.

2012, after QSI retracted its earlier guidance, the QSI share price cratered to approximately $16 per share, leaving Hussein's holdings worth less than $150 million – a $250 million decline from February 24, and the proper measure of damages under CACI 1924. In addition to that $250 million loss, Hussein is further entitled to 7% compounded prejudgment interest for the last eight years. *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1585-87 (1994). All told, that means Hussein will ask the jury to award more than $400 million in compensation.

VI. ANTICIPATED EVIDENTIARY PROBLEMS

Once the Court resolves the outstanding motions *in limine* and the additional *Sargon* motions to exclude Defendants' improper proffered expert testimony, Hussein does not anticipate any substantial evidentiary issues with regards to presenting the case.

VII. STIPULATIONS

The parties have submitted to the Court the factual stipulations they have agreed upon. The parties have also submitted to the Court an agreed upon jury questionnaire, joint witness and exhibit lists, and numerous agreed upon jury instructions. Additionally, the parties have agreed to divide trial time equally between the sides, and that subject to the Court's approval, the following time maximum limits will apply:

- *Voir dire* – 60 minutes per side
- Opening Statement - 90 minutes per side
- Closing Statement/Rebuttal – 120 minutes per side

VIII. CONCLUSION

Hussein has waited more than seven years to present his case to a jury of his peers in order to seek recourse for the tremendous harm he suffered. Hussein looks forward to presenting the threshold legal issues to the Court, and finally having the jury deliver him the long overdue justice he deserves.

Dated: June 29, 2021

SUSMAN GODFREY L.L.P.

By: */s/ Bryan J. Caforio*

Stephen E. Morrissey
Bryan J. Caforio
Amanda Bonn
Kemper P. Diehl

Attorneys for Plaintiff Ahmed Hussein

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 1400, Los Angeles, California 90067-6029.

On June 29, 2021, I served the foregoing document(s) described as follows:

PLAINTIFF AHMED D. HUSSEIN'S TRIAL BRIEF

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

_____BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

X_____BY ELECTRONIC MAIL: I caused said documents to be prepared in portable document format (PDF) for e-mailing and served by electronic mail as indicated on the attached service list.

_____BY EXPRESS MAIL

_____BY PERSONAL SERVICE

Executed on June 29, 2021, at Los Angeles, California.

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

M. Williams
(Type or Print Name)

s/ M. Williams
(Signature)

SERVICE LIST

Attorneys for Defendants	
Peter A. Wald Whitney B. Weber Latham & Watkins LLP 505 Montgomery Street, Suite 2000 San Francisco, California 94111-6538 Telephone: +1.415.391.0600 E-mail: peter.wald@lw.com E-mail: whitney.weber@lw.com	Colleen Smith Latham & Watkins LLP 12670 High Bluff San Diego, California 92130 Telephone: +1.858.523.5400 E-mail: colleen.smith@lw.com
Michele D. Johnson Andrew Gray Latham & Watkins LLP 650 Town Center Drive, 20th Floor Costa Mesa, California 92626-1925 Telephone: +1.714.540.1235 E-mail: michele.johnson@lw.com E-mail: andrew.gray@lw.com	Michael Kang Latham & Watkins LLP 140 Scott Drive Menlo Park, CA 94025 Telephone: +1.650.328.4600 E-mail: Michael.kang@lw.com
Katie George Nick Siciliano Latham & Watkins LLP 330 North Wabash Avenue, Suite 2800 Chicago, IL 60611 Telephone: +1.312.876.7700 E-mail: Kathryn.george@lw.com E-mail: Nicholas.siciliano@lw.com	Alton G. Burkhalter, Esq. Michael Oberbeck, Esq. Joshua Waldman Burkhalter Kessler Clement & George LLP 2020 Main Street, Suite 600 Irvine, California 92614 Telephone: (949) 975-7500 Facsimile: (949) 975-7501 E-mail: aburkhalter@bkcglaw.com E-mail: moberbeck@bkcglaw.com E-mail: jwaldman@bkcglaw.com
Roman Martinez Latham & Watkins LLP 555 Eleventh Street, NW, Suite 1000 Washington, D.C. 20004-1304 Telephone: (202) 637-3377 E-mail: roman.martinez@lw.com	