



3. Plaintiffs also seek a judgment for all other relief to which they deem themselves entitled by law.

## **II. PARTIES**

4. Plaintiff International Consulting & Research Group LLC (“ICAR”) is a Delaware-formed limited liability company. Plaintiff DeSimone is the managing member of ICAR.

5. Plaintiff Christopher DeSimone (“DeSimone”) is an individual Pennsylvania resident. His District of Columbia driver’s license number is 3495465 and the last three digits of his social security number are 572.

6. Plaintiff Adam Oldfield (“Oldfield”) is an individual Texas resident. His Texas driver’s license number is 44592831 and the last three numbers of his social security number are 168.

7. Defendant BalanceCXI, Inc. is a domestic for-profit corporation. It currently operates under the assumed name Zacoustic. BalanceCXI can be served with citation by serving its registered agent:

Brad Young  
5555 N. Lamar Blvd., Suite L149  
Austin, TX 78751 USA

## **III. JURISDICTION AND VENUE**

8. Venue is proper in Travis County, Texas, as a substantial portion of the events giving rise to this lawsuit’s claims took place in Travis County. The damages and issues claimed are within the jurisdictional limits of this Court. This Court has jurisdiction over the parties to this suit.

#### **IV. BACKGROUND FACTS**

9. BalanceCXI, through its DBA Zacoustic, is a Software-as-a-Service tool that primarily combines customer service agent predictions of customer survey responses with call center metrics to try to improve call center experiences for customers.

10. On or about July 5, 2016, ICAR entered into a formal consulting relationship with BalanceCXI. The individuals who executed the consulting agreement were BalanceCXI CEO Tim Lavin and ICAR managing member Chris DeSimone.

11. After a successful first month, ICAR and BalanceCXI entered into a Contract Amendment Agreement (1.1) (“Amendment Agreement”). Relevant to this suit, the Amendment Agreement provided for ICAR to receive a monthly grant of shares (in addition to cash compensation), beginning in September 2016 through July 2017. The total shares that could be obtained by ICAR through July 2017 were 65,000. ICAR performed its obligations under the Amendment Agreement through July 2017, thus earning a right to the full allotment of 65,000 shares. Pleased with ICAR service delivery, BalanceCXI and ICAR entered into a Contract Amendment & Extension Agreement (1.2) (“Extension Agreement”). Relevant to this suit, the Extension Agreement provided for ICAR to receive a monthly grant of shares, beginning in August 2017 through December 2017. The total shares that could be obtained by ICAR through December 2017 were 25,000. ICAR performed its obligations under the Amendment Agreement through December 2017, thus earning a right to the full allotment of 25,000 shares. ICAR performed its obligations under both the Amendment Agreement and the Extension Agreement, thus earning a right to the full allotment of 90,000 shares.

12. Subsequent to executing the Extension Agreement, BalanceCXI became aware that, pursuant to Internal Revenue Code § 1361(b)(1)(B), an S-Corp such as BalanceCXI could only have individuals as investors. Although that regulation was clarified to allow for single-member LLCs to be investors in an S-Corp (see IRS letter ruling 200107025), ICAR was never a single-member LLC during the events upon which its claims are based. Therefore, with respect to the first 30,000 shares due to ICAR, BalanceCXI granted 15,000 shares to DeSimone individually and the other 15,000 shares to Michael Frey individually, as each LLC member held a 50% interest in ICAR at that time. Pursuant to the Extension Agreement, BalanceCXI continues to owe ICAR the remaining 60,000 shares. ICAR demands as damages the cash value of the shares that were promised but not delivered. In the alternative, because ICAR continues to be a multiple-member LLC, ICAR seeks reformation of the Agreement to specify that the shares owed to ICAR shall be granted to the current individual members of ICAR on a pro rata basis based on their ownership in ICAR. In the alternative, ICAR seeks a court order requiring BalanceCXI to issue the remaining 60,000 shares to recipients as directed by ICAR in writing, and in conformance with BalanceCXI by-laws and applicable law.

13. To provide it with the ability to incentivize DeSimone with stock options for his future work, BalanceCXI had to hire DeSimone as an employee. DeSimone began employment on January 1, 2018, in the role of Chief Operating Officer. His employment was subject to a written Employment Agreement. In relevant part, the Employment Agreement promised DeSimone share vesting in the amount of 83,333 shares on January 1, 2019; 83,333 shares on January 1, 2020; and 83,333 shares on January 1, 2021, with a “formal plan to be distributed to you soon.” The “formal plan” reflected the fact that

DeSimone would be entitled to a greater equity interest, but that the inappropriate structure of the company as an S-Corp made a further equity distribution at this time untenable. Per discussions with Lavin, DeSimone expected the formal plan to significantly augment his stock option incentives. Furthermore, DeSimone's Employment Agreement stated that "Should the Company not be [sic] to continue operations due to lack of funding ability, the Company will pay you \$45,000, backed by one or more of the current investors." DeSimone's Employment Agreement was drafted by BalanceCXI.

14. DeSimone, in his capacity as COO, arranged via a recruiter for BalanceCXI to hire Oldfield, with his employment beginning March 13, 2017.

15. Oldfield's Employment Agreement provided for a 3-year term of employment, running from March 13, 2017 through March 12, 2020. Purportedly pursuant to the terms of Oldfield's Employment Agreement, if BalanceCXI terminated Oldfield with "cause," as defined by the Agreement, Oldfield's right to accrue additional compensation and benefits would cease. While the Agreement also provided BalanceCXI the right to terminate Oldfield "for any reason other than for just cause," such termination would have no effect on BalanceCXI obligations with respect to Oldfield's compensation and benefits through March 12, 2020. Furthermore, the Agreement promised that bonuses determined to be awarded to Oldfield would be paid within 30 days of such determination. Oldfield's Employment Agreement was drafted by BalanceCXI.

16. The company's structure as an S-Corp was impeding its ability to create and distribute the formal stock option plan with greater incentives, and thereby disburse additional stock option incentive compensation to DeSimone and Oldfield. On March 23, 2017, in response to the fact that BalanceCXI was not meeting repeated promises to

DeSimone to provide him with additional equity compensation beyond that specified in his Employment Agreement, Lavin transferred 150,000 shares of Lavin's personal stock to DeSimone by written agreement. Lavin also promised Oldfield a non-specific percent of shares at that time. That promise developed with more specificity as Oldfield's employment continued.

17. To say that DeSimone and Oldfield brought value to BalanceCXI is an understatement. During their tenures in 2017 and 2018, they were able to take BalanceCXI from approximately \$2 million in debt to approximately \$10 million in valuation. They created the original code for the company's software offerings, and also brought in new customers, including a 5-year contract worth \$3,000,000, payable annually and upfront in \$600,000 installments. This is in addition to critical structural guidance that DeSimone and Oldfield provided to Lavin and the company toward the goal of making it both profitable as well as attractive for venture capital investment. Throughout 2018 and even into 2019, Lavin privately expressed praise and gratitude to DeSimone in the highest terms possible. However, despite the best efforts of DeSimone and Oldfield, Lavin and others at BalanceCXI engaged in ethically and legally questionable decision making, which upon information and belief, included paying bonuses as 1099 payments to avoid employer tax withholding liabilities, Chief Commercial Office and Maine resident Brad Young using Lavin's Texas apartment address to create the impression of Texas residency to avoid Maine's income tax, and failing to collect and remit sales tax for its provided software service sales for years.

18. Throughout the latter part of 2018, BalanceCXI had been working with outside counsel to reorganize the company into a C-Corp, convert debt to equity, and recapitalize

the equity interests of the shareholders. These changes were intended to make the company more attractive for future rounds of VC funding. Initially, BalanceCXI had promised Oldfield 125,000 shares of the company. On July 18, 2018, Lavin promised that DeSimone would be granted 1 million shares, and Oldfield 500,000. After further discussions throughout the remainder of the year, and an ongoing examination and consideration of proper capitalization structures and the best interests of the company, BalanceCXI promised DeSimone 10% equity and Oldfield 8% equity. Pursuant to Lavin's promise, the equity for each would be treated as 50% vested upon issuance, with the remainder vesting at 25% after future Year 1 and 25% after future Year 2. The equity would be deemed 50% vested upon issuance because DeSimone and Oldfield were considered, in substance, "company founders" due to their indispensable contributions to the company over their respective tenures. The Board was scheduled to vote on this reorganization and recapitalization on January 18, 2019.

19. On or about October 29, 2018, the Board of Directors awarded bonuses to the company's employees. The Board awarded DeSimone a \$50,000 bonus and Oldfield a \$35,000 bonus.

20. By December 13, 2018, BalanceCXI had not yet paid DeSimone and Oldfield their awarded bonuses. CEO Lavin admitted that the company was underfunded and was in breach of its agreements with its few clients, who contractually require that BalanceCXI maintain sufficient capitalization to ensure that it can securely and reliably perform its commitments through the duration of the contract period. BalanceCXI had been relying almost exclusively on its funding from one individual, Dan Pearce, who started refusing to fund the company's operations any further. Lavin was concerned that

without additional funding, the company could only conceal its precarious financial position from its few customers for so long. In essence, BalanceCXI was hanging on by a thread, financially-speaking. Both founder Dan Pearce as well as a Board member Jim Burdett expressed their respective concerns about the high levels of compensation for the key individuals given the company's precarious financial situation, as well as the fact that the key individuals were directly involved in determining their own compensation.

21. Effective January 1, 2019, BalanceCXI increased Oldfield's annual salary compensation to \$250,000, DeSimone's to \$300,000, and Lavin's to \$360,000.

22. On January 15, 2019, by telephone, Lavin told DeSimone and Oldfield that instead of meeting the company's legal payroll obligations to DeSimone and Oldfield at their promised compensation rates, he would instead use excess revenue to reimburse himself for expenses. DeSimone and Oldfield objected to this, and Lavin responded "Then I accept your resignations." Oldfield terminated the call. DeSimone stayed on the call and spoke with Lavin further, and Lavin stated that if DeSimone and Oldfield wanted to stay onboard then their salary compensation would be retroactively reduced to \$150,000 per year, applying illegally to the previous pay period, and that the equity that was promised to DeSimone and Oldfield would only begin vesting at the time of issuance, over a 4-year instead of 2-year period. This would essentially eliminate their sweat equity that was promised multiple times throughout their employment to induce their valuable work and ongoing retention. DeSimone then terminated the call. Lavin then emailed both and told them that he believed they had both resigned. When DeSimone responded that they hadn't resigned, Lavin confirmed that the previous pay period had been "impacted by lack of funds" and that DeSimone and Oldfield were not to contact the



company's employees. The company also cut off DeSimone and Oldfield's access to its computer systems, thereby making impossible for DeSimone and Oldfield to perform additional work on behalf of the company.

## **V. CAUSES OF ACTION**

### **1. Breach of Contract, Quantum Meruit, Unjust Enrichment, and Declaratory Judgment**

23. Considering the above factual allegations, Defendant has breached its contracts both written and oral, with respect to Plaintiffs, concerning various aspects of their compensation, including but not limited to ICAR's stock options due; DeSimone and Oldfield's bonuses; DeSimone and Oldfield's promised stock options and promised vested equity compensation; other compensation due to DeSimone under his employment agreement; and Oldfield's right to compensation through the end of the term of his employment agreement. Plaintiffs seek all damages available by law concerning these breaches. Plaintiffs further seek the fair market value of shares that would have resulted from exercisable stock options that BalanceCXI wrongfully failed to issue. Plaintiffs further seek relief from any costs and expenses related to the exercise of such options, given Defendant's breach. In addition or in the alternative, Plaintiffs further seek the damages described below.

24. ICAR seeks all monetary damages available pursuant to law, including economic and consequential damages, and attorney fees. ICAR further seeks monetary damages in the form of the fair market value of the stock options due but not issued. In the alternative to monetary damages in the form of the fair market value of the stock options due-but-unissued, ICAR seeks an order from the Court:

- a. reforming the Amendment Agreement & Extension Agreement to make the promised-but-unissued options issuable to individual members of ICAR pursuant to ICAR's written instructions, as fully vested shares, without expense to ICAR, to allow for a legally compliant distribution of shares due to ICAR, and
- b. requiring BalanceCXI to issue such shares within 7 days of the order of the court becoming final.

25. DeSimone seeks all damages available under law, including economic and consequential damages, as well as attorney fees. In addition, DeSimone seeks the fair market value of his promised 10% interest in BalanceCXI. In the alternative, DeSimone would seek an order from the Court requiring BalanceCXI to, within 7 days of the date of the order, issue common shares to DeSimone in an amount equal to 10% of the total shares outstanding as of the date of issuance, and provide DeSimone with a legally enforceable certificate representing DeSimone's ownership in such shares. DeSimone further seeks damages in the form of all distributions, modifications, and other benefits related to such share ownership, as if such shares had been issued when due.

26. In the alternative to the court issuing an award to DeSimone based on DeSimone having a 10% interest in BalanceCXI, DeSimone would seek an award of the fair market value of the due-but-unissued 83,333 shares pursuant to his employment agreement and the 150,000 shares pursuant to the DeSimone-Lavin Agreement. In the alternative, DeSimone would seek an order from the Court requiring BalanceCXI to, within 7 days of the date of the order, issue 233,333 common shares to DeSimone pursuant to these two claims, or the number of shares awarded to DeSimone in this suit otherwise, and provide

DeSimone with a legally enforceable certificate representing DeSimone's ownership in such shares. DeSimone further seeks damages in the form of all distributions, modifications, and other benefits related to such share ownership, as if such shares had been issued when due.

27. Oldfield seeks all damages available under law, including economic and consequential damages, as well as attorney fees. In addition, in the alternative to the awarding of the fair market value of Oldfield's promised 8% interest in BalanceCXI, DeSimone would seek an order from the Court requiring BalanceCXI to, within 7 days of the date of the order, issue common shares to Oldfield in an amount equal to 8% of the total shares outstanding as of the date of issuance, and provide Oldfield with a legally enforceable certificate representing Oldfield's ownership in such shares. In the alternative to the court issuing an award to Oldfield related to Oldfield's promised 8% interest: Oldfield would then seek an order from the court for the fair market value of Oldfield's also-promised 125,000 shares in BalanceCXI, or in the alternative would seek an order from the Court requiring BalanceCXI to, within 7 days of the date of the order, issue 125,000 units of common to Oldfield and provide Oldfield with a legally enforceable certificate representing Oldfield's ownership in such shares. Oldfield further seeks damages in the form of all distributions, modifications, and other benefits related to such share ownership, as if such shares had been issued when due.

28. All Plaintiffs seek pre- and post-judgment interest at the highest rates allowed by law, as well as costs. All Plaintiffs further seek an award of their attorney fees pursuant to Texas Civil Practices & Remedies Code Chapter 37.

29. To the extent that any promise breached by BalanceCXI or any benefit retained by BalanceCXI is not subject to a written agreement, Plaintiffs claim damages in quantum meruit, and/or based on unjust enrichment to BalanceCXI.

**VI. REQUEST FOR DISCLOSURE**

30. Pursuant to Texas Rule of Civil Procedure 194, Plaintiffs demand that Defendant disclose, within 50 days of service of this suit, the information or materials described in Texas Rules of Civil Procedure.

**VII. JURY DEMAND**

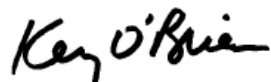
31. Plaintiffs hereby demand a jury and tender the appropriate fee.

**PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that the Court:

- a. assume jurisdiction of this cause and cite Defendant to appear;
- b. award Plaintiffs all damages requested above, including economic and consequential damages;
- c. issue declarations pursuant to the terms described above;
- d. award Plaintiffs costs, attorney fees, and expert witness fees;
- e. award Plaintiffs pre- and post-judgment interest at the highest rates allowed; and
- f. award Plaintiffs any such other relief as the Court may find proper.

Respectfully submitted,



**Kerry V. O'Brien**  
Texas Bar No. 24038469  
Board Certified in Labor & Employment Law by  
the TBLS



1011 Westlake Drive  
Austin, Texas 78746  
email: ko@obrienlawpc.com  
phone: (512) 410-1960  
fax: (512) 410-6171

**COUNSEL FOR PLAINTIFFS**