



IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

MCG CAPITAL CORPORATION, for itself  
and in the right and for the benefit of Jenzabar,  
Inc.,

Plaintiff,

v.

ROBERT A. MAGINN, JR., LING CHAI,  
JAMISON BARR, JOSEPH SAN MIGUEL,  
DANIEL QUINN MILLS, JENZABAR, INC.

Defendants,

JENZABAR, INC.,

Nominal Defendant.

C.A. No. 4521-CC

ROBERT A. MAGINN, JR, LING CHAI

Plaintiffs-in-Counterclaim,

v.

MCG CAPITAL CORPORATION,

Defendant-in-Counterclaim.

**MCG CAPITAL CORPORATION'S ANSWER TO COUNTERCLAIMS  
FILED BY DEFENDANTS ROBERT A. MAGINN, JR. AND LING CHAI**

Plaintiff MCG Capital Corporation ("MCG"), by and through its undersigned counsel,  
submits the following Answer and affirmative defenses to the Counterclaims filed by Robert A.  
Maginn, Jr., and Ling Chai (collectively, "Counterclaim-Plaintiffs").

**Introduction**

The Introduction to the Counterclaims of Mr. Maginn and Ms. Chai purports to  
characterize this action and their alleged motives in asserting the Counterclaims, which are only

now being asserted by Defendants some four years (or more) after most of the events about which Mr. Maginn and Ms. Chai complain. Though the Introduction barely calls for a response and is largely denied by MCG, as set forth below, the “Introduction” and the Counterclaims as a whole must be viewed in context and seen for what they are: a patently obvious attempt to shift the focus away from both (a) Defendants’ own repeated violations of Jenzabar, Inc.’s (“Jenzabar” or “Company”) Charter and the Preferred Stock and Warrant Purchase Agreement (“PSWPA”), and (b) the excessive compensation that Mr. Maginn and Ms. Chai, Jenzabar’s CEO and President respectively, both of whom also serve as fiduciaries to the shareholders, have improperly wrung (and seek to wring) from the Company to the detriment of MCG and the other shareholders. Instead, the Defendants are now stretching to complain belatedly about having to adhere to the terms of the agreements that they bargained for and expressly agreed to with MCG in June 2004.

After the gratuitous hyperbole in the Counterclaims is put aside, discovery will show that the story is clear. In 2004, at a time when software companies such as Jenzabar were generally still out of favor in the capital markets, MCG provided \$35 million of much-needed capital to Jenzabar on commercially reasonable terms and with standard protections for a lender and institutional investor. This investment of significant capital by MCG enabled Mr. Maginn and Ms. Chai to proceed with continuing to grow Jenzabar and also with resolving litigation with another institutional investor in which they had embroiled the company in a dispute over control. Then, in 2006, as Jenzabar’s performance improved and the capital markets became more favorable, Jenzabar, with MCG’s support, successfully refinanced MCG’s debt investment with new financing on more favorable terms, leaving MCG’s equity investment in place. The Counterclaims, however, turn the facts upside down and inside out, painting MCG as a rapacious

interloper and faulting MCG for collecting an expressly bargained-for prepayment fee that was specifically negotiated into the agreements memorializing MCG's investment.

Taking things even a step further, the Counterclaims also accuse MCG of somehow inflating the valuation of MCG's investment in Jenzabar, as reflected in MCG's public filings, notwithstanding that such valuations reported by MCG have been supported by periodic investment appraisals prepared by nationally recognized independent third party appraisal firms. In doing so, however, Defendants completely ignore that Jenzabar's performance, facilitated by MCG's \$35 million investment and MCG's strategic participation on Jenzabar's Board of Directors ("Jenzabar's Board"), has improved in the years since MCG's investment (although Jenzabar's financial results have been meaningfully below the expected performance levels represented to MCG by Jenzabar at the time of MCG's investment and subsequently). During this period, Jenzabar's adjusted revenue has increased by approximately 18 percent, operating cash flow has increased by approximately 23 percent, and cash balances have increased by approximately 120 percent or \$14.7 million, while debt has been reduced by approximately 40 percent or \$13 million. During the same period, market multiples for educational software companies similar to Jenzabar have doubled. In fact, at least one company comparable to Jenzabar was acquired at approximately 11 times operating cash flow in 2009, a multiple that is 28 percent higher than that used by the nationally recognized appraisal firm engaged by MCG to value its investment in Jenzabar. These favorable market events, and not any inappropriate actions by MCG, are the underlying factors that have resulted in the increase in the value of everyone's equity ownership in Jenzabar, including MCG's 18 percent.

Defendants' Counterclaims also attempt to obfuscate and exaggerate MCG's overall return on its investment by focusing on only one element of MCG's \$35 million investment—the

warrants for 18 percent of the common equity, to which the parties allocated approximately \$422,000 at the time of closing in 2004. As Defendants were and are aware, however, and as discovery in this action will demonstrate, the warrants were designed to enhance the yield on MCG's \$35 million total investment, including \$5 million of fixed coupon, non-convertible preferred equity, only if and to the extent that the enterprise value of Jenzabar increased after MCG invested its \$35 million. So it should come as no surprise to Defendants or anyone else that the value of all common equity, including MCG's warrants, has increased with the increase in Jenzabar's enterprise value over the past six years.<sup>1</sup>

At the time of MCG's investment in 2004 and the issuance of MCG's warrants, in what now appears to have been a futile attempt to align the economic interests of Mr. Maginn and Ms. Chai with the interests of all holders of common equity and to return value to the holders of common equity, Mr. Maginn and Ms. Chai (who also have other warrants and common equity) were granted four million options to purchase common stock, with a nominal exercise price. These options currently have a value in excess of \$8 million using a similar valuation methodology as is applied to MCG's warrants. Mr. Maginn and Chai also own warrants and common equity in the Company. These facts, however, are also conveniently overlooked and not acknowledged by Defendants in the Counterclaims.

Instead, Mr. Maginn and Ms. Chai now complain that MCG and the MCG director designees have resisted increasing their cash compensation, which collectively has exceeded \$10 million during the past six years. Jenzabar's performance, however, has been artificially depressed by such excessive management compensation and other actions of management, and

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<sup>1</sup> The reason that the value of Jenzabar's common equity, including MCG's warrants, as well as Mr. Maginn's and Chai's options (*see infra*), have increased significantly on a percentage basis relates to the relatively small value allocated to those securities at the time of issuance in 2004. Moreover, increases in enterprise value only inure to the benefit of common equity holders and not to other aspects of what was Jenzabar's highly-leveraged capital structure.

neither Mr. Maginn nor Ms. Chai can make a legitimate claim that their Employment Agreements or any other document require MCG to support a raise in their current cash compensation. As a result, they are left to accuse MCG of “promising” prior to MCG’s investment to continue their compensation at pre-investment levels (despite the integration clauses in each of the Employment Agreements that explicitly foreclose reliance on such extracontractual communications, which MCG denies having made, in any event). Interestingly, and true to form, Mr. Maginn and Ms. Chai seek to hold MCG to such alleged pre-contractual promises about their own compensation while conveniently overlooking that their own promises regarding Jenzabar’s future financial performance—promises that induced MCG’s investment and subsequent promises that compelled MCG’s designated directors to approve an increase in Jenzabar’s sales and marketing budget in 2005—have never materialized as represented.

As discovery in response to Defendants’ Counterclaims will also demonstrate, and as further evidence of Mr. Maginn’s and Ms. Chai’s modus operandi, in June 2005, Jenzabar repurchased shares of common equity from Ms. Chai based on a Company valuation that was premised on a higher multiple than Jenzabar had consistently used to repurchase shares from other holders of common equity and that was also in line with the valuation multiple used by MCG’s Independent Appraiser (not to mention *much* higher than the valuation multiple used by Jenzabar’s own appraiser in the instant dispute with MCG).

In short, the Counterclaims are yet more evidence that Mr. Maginn and Ms. Chai cannot see the difference between their own pecuniary self-interests and those of Jenzabar and its shareholders. Throughout, the Counterclaims also reflect a philosophy that says those who do business with Mr. Maginn and Ms. Chai can expect to have their agreements tossed aside when Jenzabar’s CEO and President see a benefit in doing so. MCG expects the course of this

litigation will show otherwise. With the appropriate context now outlined, MCG below answers and responds to each of the allegations set forth in the Counterclaims.

### **Answer to Counterclaims**

#### **Introduction.**

The Introduction purports to characterize this action and the Counterclaims, and as such, no response is required. To the extent a response to the Introduction is required, MCG denies every allegation in the Introduction except the following:

MCG admits that Mr. Maginn and Ms. Chai are respectively the CEO and President and Chief Operating Officer, and are members of Jenzabar's Board. MCG admits that it reported the value of its warrant to purchase Jenzabar common stock was \$422,000 on June 30, 2004, and that it reported the value of its warrant was nearly \$22 million in the first quarter of 2009. MCG further admits that this litigation was filed shortly after Jenzabar purported to exercise its contractual option to repurchase Jenzabar preferred stock held by MCG, which Defendants allege triggered an election by MCG whether to sell back its warrant for common shares to Jenzabar.

1. On information and belief, MCG admits that Jenzabar, Inc. ("Jenzabar") is a Delaware corporation with a principal place of business in Boston, Massachusetts. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1 and on that basis denies them.
2. On information and belief, MCG admits that Robert A. Maginn, Jr., is a resident of Massachusetts. MCG further admits that Mr. Maginn served as Jenzabar's CEO and Chairman of Jenzabar's Board at all times relevant to this action.
3. On information and belief, MCG admits that Ling Chai is a resident of Massachusetts. MCG further admits that Ms. Chai is the founder of Jenzabar and served as its President

and Chief Operating Officer and a member of Jenzabar's Board at all times relevant to this action.

4. MCG admits that it is a Delaware corporation and that its principal place of business is in Arlington, Virginia.
5. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5 and on that basis denies them.
6. MCG admits that Mr. Maginn is Jenzabar's Chairman and CEO. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6 and on that basis denies them.
7. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7 and on that basis denies them.
8. MCG admits that it is a publicly traded company. To the extent Paragraph 8 purports to quote from MCG's 2009 Form 10-K, filed with the Securities and Exchange Commission ("SEC") on March 4, 2010, that document speaks for itself. MCG denies that Jenzabar's quotation is accurate and/or complete. MCG denies the remaining allegations contained in Paragraph 8 of the Counterclaims.
9. MCG admits that it invested approximately \$35 million in Jenzabar, including \$30 million in the form of two Term Loans. MCG further admits that pursuant to a PSWPA dated June 30, 2004, MCG invested \$5,000,000 in Jenzabar in exchange for 5,000 shares of Senior Preferred Stock, and 109,800 shares of Subordinated Preferred Stock. MCG denies the remaining allegations contained in Paragraph 9 of the Counterclaims, and further states that it was issued 5,879,150 Jenzabar Warrants pursuant to the PSWPA,

which Warrants were intended to provide MCG the right to purchase 18 percent of Jenzabar's Common Stock on a fully diluted basis.

10. To the extent Paragraph 10 of the Counterclaims purports to describe MCG's June 2004 Quarterly Report (Form 10-Q) (Aug. 6, 2004), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete.
11. To the extent Paragraph 11 of the Counterclaims purports to describe MCG's March 2009 Quarterly Report (Form 10-Q) (May 8, 2009), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 11 pertaining to Jenzabar's auditors, and on that basis denies them. MCG denies the remaining allegations contained in Paragraph 11 of the Counterclaims.
12. MCG admits that Jenzabar paid off the Term Loans on March 16, 2006, including a prepayment fee of approximately \$2 million paid collectively to MCG and another lender. MCG denies the remaining allegations contained in Paragraph 12 of the Counterclaims.
13. MCG admits that Mr. Maginn and Ms. Chai hold a minority equity stake in Jenzabar. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 13, and on that basis denies them.
14. MCG admits that it approved certain Jenzabar executive employment agreements, including employment agreements between Jenzabar and Mr. Maginn and Ms. Chai. MCG further admits that Mr. Maginn's and Ms. Chai's employment agreements were



executed on June 30, 2004. MCG denies the remaining allegations contained in Paragraph 14 of the Counterclaims.

15. Paragraph 15 of the Counterclaims states a legal conclusion to which no response is required.
16. Paragraph 16 of the Counterclaims purports to describe Mr. Maginn's employment agreement with Jenzabar, which speaks for itself. MCG denies that this description is accurate and/or complete.
17. Paragraph 17 of the Counterclaims purports to describe Mr. Maginn's employment agreement with Jenzabar, which speaks for itself. MCG denies that this description or quotation is accurate and/or complete.
18. Paragraph 18 of the Counterclaims purports to describe Mr. Maginn's employment agreement with Jenzabar, which speaks for itself. MCG denies that this description or quotation is accurate and/or complete.
19. Paragraph 19 of the Counterclaims purports to describe Ms. Chai's employment agreement with Jenzabar, which speaks for itself. MCG denies that this description or quotation is accurate and/or complete.
20. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Counterclaims, and on that basis denies them.
21. To the extent Paragraph 21 purports to describe Mr. Maginn's and Ms. Chai's respective employment agreements, those documents speak for themselves. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 21 of the Counterclaims, and on that basis denies them.

22. To the extent Paragraph 22 purports to describe the term sheet between MCG and Jenzabar dated November 11, 2003, that document speaks for itself. MCG otherwise admits that Mr. Maginn and Ms. Chai knew the terms of their employment agreements before MCG invested in Jenzabar. MCG denies the remaining allegations contained in Paragraph 22 of the Counterclaims.
23. To the extent Paragraph 23 purports to describe Mr. Maginn's and Ms. Chai's respective employment agreements, those documents speak for themselves. MCG denies the remaining allegations contained in Paragraph 23 of the Counterclaims.
24. MCG admits that the Preferred Stockholder Designees voted to approve bonuses to Jenzabar officers, including Ms. Chai and Jenzabar's CFO. MCG denies the remaining allegations contained in Paragraph 24 of the Counterclaims.
25. MCG denies the allegations contained in Paragraph 25 of the Counterclaims.
26. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to what Mr. Maginn or Ms. Chai would or would not have done under various circumstances alleged in Paragraph 26 of the Counterclaims, and on that basis denies them. MCG admits that Mr. Maginn has repeatedly pressed for an increase in his compensation and that after MCG's June 2004 investment, Mr. Maginn presented the compensation difference between the 12-12 Compensation Model and his compensation pursuant to his employment agreement. MCG further admits that Jenzabar's Board had discretion to perform a compensation review as called for in Mr. Maginn's and Ms. Chai's respective employment agreements subject to achievement of various performance objectives. MCG denies the remaining allegations contained in Paragraph 26 of the Counterclaims, including that Mr. Maginn ever notified Jenzabar's

Board that it failed to perform the compensation review called for in his employment agreement.

27. MCG admits that it executed the Fourth Amended and Restated Stockholders Agreement (“Stockholders Agreement”). The remainder of Paragraph 27 of the Counterclaims purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description is accurate and/or complete.
28. To the extent Paragraph 28 of the Counterclaims purports to describe the Stockholders Agreement, that document speaks for itself. MCG denies that the description is accurate and/or complete.
29. To the extent Paragraph 29 of the Counterclaims purports to describe the Stockholders Agreement, that document speaks for itself. MCG denies that the description is accurate and/or complete. MCG admits that Mr. Maginn and Ms. Chai designated themselves to as the Founding Director Designees on Jenzabar’s Board.
30. MCG’s interpretation of Section 4.2 of the Stockholders Agreement contained in Paragraph 30 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in paragraph 30 the Counterclaims. MCG admits that E. Peter Malekian serves as MCG’s Preferred Stockholder Designee to Jenzabar’s Board.
31. MCG’s interpretation of Section 4.2 of the Stockholders Agreement contained in Paragraph 31 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in paragraph 31 the Counterclaims.

32. MCG admits that as of June 30, 2004, Jenzabar's Board consisted of Mr. Maginn and Ms. Chai as the Founder Designees and Mr. Mitchell and Mr. Malekian as the Preferred Stockholder Designees. MCG further admits that Jenzabar repaid the Term Loans to MCG by March 17, 2006, and that two independent director vacancies existed as of that date. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to Mr. Fireman stepping down from Jenzabar's Board. The remaining allegations state a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in paragraph 32 of the Counterclaims.
33. MCG admits that on March 17, 2006, Mr. Maginn and Ms. Chai proposed Dr. Joseph San Miguel and Dr. Quinn Mills to fill the two vacant Independent Director seats on Jenzabar's Board.
34. On information and belief, MCG admits that Dr. San Miguel taught at Harvard Business School. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 34 of the Counterclaims, and on that basis denies them.
35. On information and belief, MCG admits that Dr. Mills taught at Harvard Business School. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 35 of the Counterclaims, and on that basis denies them.
36. MCG admits that Dr. San Miguel and Dr. Mills were members of Jenzabar's Advisory Board, which was created by vote of Jenzabar's Board in January 2005 for the purpose of assisting senior management with evaluating key business decisions and strategies. MCG

lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 36 of the Counterclaims, and on that basis denies them.

37. Paragraph 37 purports to describe a resolution passed by Jenzabar's Board, which speaks for itself. Jenzabar's interpretation of this resolution states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in paragraph 37 of the Counterclaims.
38. MCG denies the allegations contained in Paragraph 38 of the Counterclaims.
39. To the extent that Paragraph 39 purports to describe certain of MCG's public filings, they speak for themselves. MCG denies the remaining allegations contained in Paragraph 39 of the Counterclaims.
40. MCG denies the allegations contained in Paragraph 40 of the Counterclaims.
41. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41 of the Counterclaims, and on that basis denies them.
42. MCG admits that on June 21, 2006, Mr. Mitchell was MCG's CEO and the Preferred Stockholder Designee to Jenzabar's Board. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 42 of the Counterclaims, and on that basis denies them.
43. MCG admits that Steven Tunney replaced Mr. Mitchell as MCG's CEO. MCG lacks knowledge or information sufficient to form a belief as to the truth of the alleged communications by Mr. Mitchell, and on that basis denies them.
44. MCG denies the allegations contained in Paragraph 44 of the Counterclaims.

45. MCG admits Mr. Maginn and Mr. Chai proposed the creation of the Jenzabar Foundation, but denies the allegations contained in Paragraph 45 of the Counterclaims.
46. MCG denies the allegations contained in Paragraph 46 of the Counterclaims.
47. MCG denies the allegations contained in Paragraph 47 of the Counterclaims.
48. MCG admits that Mr. Maginn presented to Jenzabar's Board the difference between the 12-12 Compensation Model and his then-current compensation on at least one occasion. The Counterclaim-Plaintiffs' interpretation of Paragraph 5 of Mr. Maginn's and Ms. Chai's respective employment agreements states legal conclusions, to which no response is required. To the extent any response is required, MCG denies the remaining allegations contained in paragraph 48 of the Counterclaims.
49. MCG admits that neither Mr. Maginn nor Ms. Chai received an increase in their base salaries during the period from June 2004 through November 2008, and that the formula used to calculate the bonuses pursuant to their Employment Agreements did not change during this period. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 49 of the Counterclaims, and on that basis denies them.
50. MCG denies the allegations contained in Paragraph 50 of the Counterclaims.
51. MCG denies the allegations contained in Paragraph 51 of the Counterclaims.
52. The Counterclaim-Plaintiffs' interpretation of the Stockholders' Agreement in Paragraph 52 states legal conclusions, to which no response is required. To the extent any response is required, MCG denies the remaining allegations contained in paragraph 52 of the Counterclaims.
53. MCG denies the allegations contained in Paragraph 53 of the Counterclaims.

54. MCG admits that Mr. Maginn and Ms. Chai proposed Dr. Joseph San Miguel and Dr. Quinn Mills to fill the two vacant Independent Director seats on Jenzabar's Board, but denies the remaining allegations contained in Paragraphs 54 of the Counterclaims.
55. MCG denies the allegations contained in Paragraph 55 of the Counterclaims.
56. MCG admits that Mr. Mitchell did not assent to Dr. Mills' appointment as Independent Director. MCG denies the allegations contained in Paragraph 56 of the Counterclaims.
57. MCG admits that Mr. Mitchell resigned from MCG and from Jenzabar's Board in the summer of 2006. MCG denies the remaining allegations contained in Paragraph 57 of the Counterclaims.
58. MCG admits that Mr. Malekian was appointed by MCG as the Preferred Stockholder Designee to Jenzabar's Board in August 2006. MCG further admits that Mr. Malekian and Mr. Tunney held a meeting with Mr. Maginn and Ms. Chai in September 2006, at which Mr. Malekian informed Mr. Maginn and Ms. Chai that Mr. Malekian did not consent to the appointment of Dr. San Miguel as an Independent Director. MCG denies the remaining allegations contained in Paragraph 58 of the Counterclaims.
59. MCG admits that Mr. Malekian assented to the appointment of Dr. San Miguel and Dr. Mills in April 2008.
60. MCG admits that Mr. Malekian challenged Dr. San Miguel's independence at the September 28, 2007 meeting of Jenzabar's Board, and that he objected to Dr. San Miguel's appointment. MCG further admits that Mr. Malekian urged Jenzabar's Board to delay appointment of Dr. San Miguel in light of a then-recently filed lawsuit by Jenzabar against MCG, which had no merit and was ultimately dismissed, because such action would put Jenzabar's Board at odds with MCG. MCG further states that Mr. Malekian

requested that certain changes be made to the minutes of this meeting, which reflected his view that “he did not believe it was appropriate to appoint Dr. San Miguel as an independent director at this time in light of his view that such action was not consistent with the Company’s organic documents and agreements with MCG and that such action would put Jenzabar’s Board and the Company at odds with MCG which would not be in the best interest of the Company’s shareholders and constituents.” MCG denies the remaining allegations contained in Paragraph 60 of the Counterclaims.

61. MCG admits that Jenzabar’s Board voted to approve Dr. San Miguel’s appointment as an Independent Director, over Mr. Malckian’s objections.
62. MCG admits that Mr. Rubenstein contacted Mr. Barr following the September 28, 2007 Board meeting to convey MCG’s disapproval with the appointment of Dr. San Miguel over Mr. Malekian’s objections. MCG denies the remaining allegations contained in Paragraph 62 of the Counterclaims.
63. MCG denies the allegations contained in Paragraph 63 of the Counterclaims.
64. MCG denies the allegations contained in Paragraph 64 of the Counterclaims.
65. MCG admits that Mr. Malekian approved the appointment of Dr. San Miguel and Dr. Mills to Jenzabar’s Board on April 17, 2008, and that on the same date, Jenzabar’s Board appointed Dr. San Miguel and Dr. Mills as Independent Directors. MCG denies the remaining allegations contained in Paragraph 65 of the Counterclaims.
66. MCG admits that on April 21, 2008, Jenzabar’s Board formed a Compensation Committee comprised of Dr. San Miguel, Dr. Mills, and Mr. Malekian.



67. MCG admits that the Compensation Committee met on May 2, 2008, reviewed historical data and future projections of Jenzabar's growth, and considered whether to review the compensation of Jenzabar's executives.
68. MCG denies the allegations contained in Paragraph 68 of the Counterclaims.
69. MCG admits that Mr. Malekian requested that the Compensation Committee should have independent counsel, but denies the allegations contained in Paragraph 69 of the Counterclaims.
70. MCG admits that Mr. Malekian objected to the retention of Christopher Austin to represent the Compensation Committee because of his prior work for Mr. Maginn and the Company. MCG further states that Mr. Malekian requested that the Compensation Committee engage its own independent counsel who had not been engaged by or provided services to Jenzabar or its management. Upon information and belief, MCG admits that Mr. Austin was a partner at the law-firm of Ropes & Gray. MCG denies the allegations contained in Paragraph 70 of the Counterclaims.
71. MCG admits that on December 18, 2008, the Compensation Committee considered a proposal to approve a 12.5 percent increase in salary to Mr. Maginn and a 12 percent increase in salary for Ms. Chai, but denies the remaining allegations contained in Paragraph 71 of the Counterclaims.
72. MCG admits that Mr. Malekian refused to approve the proposal to increase the salaries to Mr. Maginn and Ms. Chai. MCG denies the remaining allegations contained in Paragraph 72 of the Counterclaims.
73. MCG admits that Dr. San Miguel and Dr. Mills voted to recommend approval of a 12.5 percent increase in salary to Mr. Maginn and a 12 percent increase in salary for Ms. Chai

without the required written consent or affirmative vote of MCG. MCG denies the remaining allegations contained in Paragraph 73 of the Counterclaims.

74. MCG denies the allegations contained in Paragraph 74 of the Counterclaims.
75. MCG admits that on December 29, 2008, the Compensation Committee purportedly recommended approval of a total of \$794,000 in excess “retroactive” bonuses to Mr. Maginn and Ms. Chai for fiscal years 2007 and 2008. MCG further states that these bonuses were approved without MCG’s required consent. MCG denies the remaining allegations contained in Paragraph 75 of the Counterclaims.
76. MCG admits that Dr. San Miguel and Dr. Mills voted to approve the payment of an additional \$750,000 bonus for Mr. Maginn. MCG further states that Dr. San Miguel and Dr. Mills approved this additional bonus without any independent investigation of the facts. MCG denies the remaining allegations contained in Paragraph 76 of the Counterclaims.
77. MCG denies the allegations contained in Paragraph 77 of the Counterclaims.
78. MCG denies the allegations contained in Paragraph 78 of the Counterclaims.
79. MCG lacks information as to the concerns of the Independent Directors regarding the risks of serving on Jenzabar’s Board, and on that basis denies them. MCG further denies the remaining allegations contained in Paragraph 79 of the Counterclaims.
80. MCG admits that Mr. Malekian questioned whether the accounting method used to determine bonuses for Mr. Maginn and Ms. Chai was consistent with the terms of the MCG Purchase Agreement. MCG denies the remaining allegations contained in Paragraph 80 of the Counterclaims.

81. MCG repeats and incorporates by reference its responses to the allegations contained above as if fully set forth herein. Paragraph 81 purports to describe the Counterclaims, which speaks for itself.
82. Paragraph 82 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in Paragraph 82 of the Counterclaims.
83. Paragraph 83 purports to describe the Employment Agreement between Jenzabar and Mr. Maginn, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
84. MCG denies the allegations contained in Paragraph 84 of the Counterclaims.
85. MCG denies the allegations contained in Paragraph 85 of the Counterclaims.
86. MCG denies the allegations contained in Paragraph 86 of the Counterclaims.
87. MCG denies the allegations contained in Paragraph 87 of the Counterclaims.
88. MCG denies the allegations contained in Paragraph 88 of the Counterclaims.
89. MCG repeats and incorporates by reference its response to the allegations contained above as if fully set forth herein. Paragraph 89 purports to describe the Counterclaims, which speaks for itself.
90. Paragraph 90 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in Paragraph 90 of the Counterclaims.
91. MCG admits that it was aware that Jenzabar and Ms. Chai entered into an Employment Agreement. The remainder of Paragraph 91 purports to describe the Employment

Agreement between Jenzabar and Ms. Chai, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.

92. MCG denies the allegations contained in Paragraph 92 of the Counterclaims.
93. MCG denies the allegations contained in Paragraph 93 of the Counterclaims.
94. MCG denies the allegations contained in Paragraph 94 of the Counterclaims.
95. MCG denies the allegations contained in Paragraph 95 of the Counterclaims.
96. MCG denies the allegations contained in Paragraph 96 of the Counterclaims.
97. MCG repeats and incorporates by reference its response to the allegations contained above as if fully set forth herein. Paragraph 97 purports to describe the Counterclaims, which speaks for itself.
98. Paragraph 98 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in Paragraph 98 of the Counterclaims.
99. Paragraph 99 purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
100. MCG denies the allegations contained in Paragraph 100 of the Counterclaims.
101. MCG denies the allegations contained in Paragraph 101 of the Counterclaims.
102. MCG repeats and incorporates by reference its response to the allegations contained above as if fully set forth herein. Paragraph 102 purports to describe the Counterclaims, which speaks for itself.
103. Paragraph 103 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in Paragraph 103 of the Counterclaims.

104. Paragraph 104 purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
105. Paragraph 105 of the Counterclaims states a legal conclusion to which no response is required. To the extent any response is required, MCG denies the allegations contained in Paragraph 105 of the Counterclaims.
106. MCG denies the allegations contained in Paragraph 106 of the Counterclaims.
107. MCG denies the allegations contained in Paragraph 107 of the Counterclaims.
108. MCG denies the allegations contained in Paragraph 108 of the Counterclaims.

### **Affirmative Defenses**

#### **First Affirmative Defense**

The Complaint fails to state a claim on which relief can be granted.

#### **Second Affirmative Defense**

Mr. Maginn's and Ms. Chai's claims are barred in whole or in part for lack of standing.

#### **Third Affirmative Defense**

Mr. Maginn's and Ms. Chai's claims are barred in whole or in part by the doctrine of unclean hands.

#### **Fourth Affirmative Defense**

Mr. Maginn's and Ms. Chai's claims are barred in whole or in part by the doctrine of waiver.

#### **Fifth Affirmative Defense**

Mr. Maginn's and Ms. Chai's claims are barred in whole or in part by the doctrine of estoppel.

#### **Sixth Affirmative Defense**

Mr. Maginn's and Ms. Chai's claims are barred because they lack standing to assert some or all of the claims in its Complaint.

### **Reservation of Defenses**

To the extent MCG has not pleaded certain defenses, it reserves the right to add additional defenses pending further investigation and discovery.

### **PRAYER FOR RELIEF**

WHEREFORE, MCG prays this Court to:

- A. Enter judgment for MCG on each of Mr. Maginn's and Ms. Chai's Counterclaims;
- B. Order Mr. Maginn and Ms. Chai to pay MCG's costs and attorneys' fees in defending the Counterclaims;
- C. Grant MCG such other relief as the Court deems fair and just.

Respectfully submitted,

MCG CAPITAL CORPORATION,  
By its attorneys

*/s/ Emily V. Burton*

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Date: August 13, 2010

**CERTIFICATE OF SERVICE**

I, Emily V. Burton, certify that on August 13, 2010, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

**BY LEXISNEXIS FILE & SERVE**

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