IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MCG CAPITAL CORPORATION, for itself and in the right and for the benefit of Jenzabar, Inc.,	)	
Plaintiff,	)	
v.	)	
	)	C.A. No. 4521-CC
ROBERT A. MAGINN, JR., LING CHAI, JAMISON BARR, JOSEPH SAN MIGUEL, DANIEL QUINN MILLS, JENZABAR, INC.,	)	
Defendants,	)	
and	)	
JENZABAR, INC.,	)	
Nominal Defendant.	)	

DEFENDANTS ROBERT A. MAGINN, JR.'S AND LING CHAI'S
REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Based on its Opposition (the "Opp.") to the Motion to Dismiss filed by defendants Robert A. Maginn, Jr. and Ling Chai, and the separate motion to dismiss filed by the remaining defendants,[1] it is obvious that Plaintiff MCG Capital Corporation ("MCG") itself does not believe its Complaint is sufficient to survive a Motion to Dismiss under Rule 12(b)(6), for it repeatedly supplements the actual allegations in its Complaint with unpled facts and new allegations that appear nowhere in the Complaint.[2] Regardless, none of the newly (and improperly) proffered "facts" nor the arguments proffered in MCG's Opposition are sufficient to sustain any of the legally inadequate claims raised in its Complaint.

First, MCG has not rebutted well-established Delaware law holding that the existence of a contract governing the subject matter of a dispute precludes the unjust enrichment claims it brings against Maginn and Chai. The only case law it cites is factually inapposite, as in the cited case there was no valid contract governing defendant's compensation, whereas here MCG itself relies upon the terms of Maginn's and Chai's Employment Agreements to argue that their compensation was unjust. And the fact remains that MCG alleged no facts in the Complaint to support the necessary element that the compensation received was unjust in comparison to the work performed by Maginn and Chai on behalf of Jenzabar.

Second, MCG has failed to counter the argument that Maginn and Chai are not liable for the breach of fiduciary duty claims under Count 5 because: (i) some of the alleged breaches did not involve conduct in which Maginn and Chai were alleged to have participated – *i.e.*, the votes to set Maginn's and Chai's salaries and bonuses – a point which MCG does not even address in

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[1] Jenzabar, Inc.; two of its independent directors, Daniel Quinn Mills and Joseph San Miguel; and Jenzabar's general counsel, Jamison Barr. Defendants Maginn and Chai hereby join in and adopt the arguments in the separate Reply Brief presented by the remaining defendants.

its Opposition; (ii) Maginn and Chai were exculpated with respect to breaches of the duty of care under the Charter; and (iii) MCG provides no basis under which it has standing as a shareholder to complain about alleged inefficiencies in Board management, given that MCG has not alleged any harm to itself from such alleged inefficiencies.

Third, MCG, for the first time in its Opposition, attempts to convert its legally defective "aiding and abetting" breach of contract claims into inducement of breach claims which are nowhere pled nor mentioned in the Complaint. Even if MCG properly pled its inducement claim – which it did not – it fails in its Opposition to explain where it has alleged facts satisfying the elements of that tort, especially the "without justification" element. In fact, MCG cannot make out that element, as the Employment Agreements expressly provide Maginn and Chai with a legally protected interest in seeking compensation increases. Moreover, there is no allegation or inference that Maginn and Chai acted outside their role in Jenzabar's dispute with MCG over MCG's authority to micromanage Jenzabar's performance under its existing contracts.

Fourth, MCG's argument that the individual defendants, including Maginn and Chai, are "necessary parties" to the case, which involves contracts to which none of them is a party, is a transparent and improper attempt to keep those individuals in the case in order to exert pressure on them to satisfy MCG's buy-out demands. At a minimum, Maginn and Chai are not necessary parties with respect to the non-compensation claims in the Complaint, such as Count 11 and a portion of Count 5. Accordingly, if the compensation claims are dismissed and only the non-compensation claims remain, then Maginn and Chai should be dismissed as defendants.

Fifth, MCG ignores the express terms of the very documents on which it purportedly relies for its compensation-related claims: the Preferred Stock and Warrant Purchase Agreement

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[2] *See* Jenzabar Reply Brief at 3-6.

("PSWPA") between Jenzabar and MCG, the Jenzabar Charter, and the Employment Agreements between Jenzabar and Maginn and Chai. Despite the more than 10 pages of the Opposition that MCG devotes to its theories of contract interpretation, MCG cannot change the facts that: (1) the Employment Agreements, previously approved by MCG in 2004 in connection with MCG's investment in Jenzabar, explicitly vest authority in the Board to increase Maginn's and Chai's base salary and bonuses – indeed, they require the Board to periodically consider whether to do so; (2) the compensation MCG challenges did not necessitate any modification to the existing Employment Agreements; and (3) the Employment Agreements are not, in any event, "affiliate transactions" under the PSWPA and Charter triggering MCG's consent rights.

Finally, Plaintiff's requests for its so-called "secondary" equitable remedies of accounting and rescission are predicated on its underlying claims that the salary and bonus payments conferred to Maginn and Chai violated certain agreements. As MCG's underlying claims are deficiently plead, there is no basis for those equitable remedies.

In summary, for the reasons given herein, in the Opening Briefs of Maginn and Chai and of Jenzabar, and in the Reply Brief of Jenzabar, each of the counts in MCG's complaint must be dismissed as against Maginn and Chai. This will permit the corporate parties and the Court to focus on what is really at issue in this case, the dispute between Jenzabar and MCG over Jenzabar's repurchase of MCG's preferred stock and warrants.

ARGUMENT

I. MCG's Claim for Unjust Enrichment (Count 6) Against Maginn and Chai Must Be Dismissed

In their Opening Brief, Maginn and Chai explained that Count 6, alleging unjust enrichment, must be dismissed as against them for at least two independently sufficient reasons: first, it is undisputed that valid and enforceable contracts govern Maginn's and Chai's

compensation from Jenzabar, and second, the Complaint utterly fails to allege that the compensation they received was "unjust" in relation to the services they performed for the Company. *See* Maginn/Chai Opening Brief at 16-17.

In an attempt to salvage this claim, MCG resorts to the argument that even though the Employment Agreements undisputedly govern Maginn's and Chai's compensation, unjust enrichment is an available remedy because the compensation at issue allegedly breached another agreement: the PSWPA. *See* Opp. at 63-64. MCG's reliance on *Fleer Corp. v. Topps Chewing Gum, Inc.*, 539 A.2d 1060, 1063 (Del. 1988), the only case it cites to support this argument, is unwarranted. In that case, Topps initially held exclusive contracts with Major League Baseball and the Players' Association to sell baseball cards. *See id.* at 1061. A court permanently enjoined Topps from entering into future exclusive contracts with baseball players and ordered the Players' Association to enter into non-exclusive contract with Fleer. *See id.* The court's judgment was later reversed on appeal and, consequently, the Players' Association terminated its contract with Fleer and reinstated Topps' exclusive contract. *See id.* Topps then brought a new lawsuit, claiming unjust enrichment and seeking an accounting and restitution of Fleer's profits. *See id.* The Court in *Fleer Corp*. simply ignored Fleer's contract, granting it no force or effect – Fleer was treated instead as having expropriated Topps' exclusive property right – wherefore there was no contract governing the amount due Fleer. *See id.* at 1061-63. *Fleer Corp.* is thus distinguishable from the instant case, in which no one disputes the validity and relevance of the Employment Agreements – indeed, MCG's Complaint repeatedly references and relies upon the Employment Agreements as governing Maginn's and Chai's compensation, and MCG continues to rely on the Employment Agreements (which it wrongly claims "set" the compensation for

Maginn and Chai) in its Opposition. *See* Compl. at 1-3, ¶¶ 25-29, 33, 47, 56, 70, 111, 119, 121-22, 130, 135; Opp. at 7-8, 18-19, 24-27, 36-37, 39, 51.[3]

In that regard, unable to counter Defendants' additional argument that MCG has failed to plead or allege that the bonus and salary payments exceed the actual value of the services rendered by Maginn and Chai, *see* Maginn/Chai Opening Brief at 18-19, MCG argues that "[w]hether those amounts are just compensation is a question of fact" inappropriate for resolution on a motion to dismiss. *See* Opp. at 64. MCG cannot, however, create a question of fact in its Opposition, and the fact remains that it *alleged* no facts in Complaint sufficient to support the necessary element that the compensation received was unjust in comparison to the work performed. *See Gilbane Bldg. Co. v. Nemours Found.*, 606 F. Supp. 995, 1008 (D. Del. 1985) ("Count V of the amended counterclaims is devoid of any factual allegations from which one could conclude that Nemours has been ***unjustly*** enriched.") (emphasis in original). Again, MCG cites only one readily distinguishable case in support of its argument. *Weiss v. Swanson*, 948 A.2d 433, 447 (Del. Ch. 2008), does not stand for the proposition that the reasonableness of compensation is an improper ground on which to dismiss an unjust enrichment claim. Instead, the court held that, in the demand futility context, the defendants' arguments about the directors' intent when they granted the stock options at issue were inappropriate grounds for dismissal. *Id*. The court denied the defendants' motion to dismiss the unjust enrichment claims on grounds specific to the option grant context and thus inapposite to these facts. *Id.* at 449-50.

[3] MCG argues in the alternative that, even in the absence of a breach of the PSWPA, Maginn and Chai would be unjustly enriched because the Employment Agreements do not "obligate" Jenzabar to pay the compensation at issue, and therefore do not preclude recovery for unjust enrichment. Opp. at 64. Defendants do not contend that the Employment Agreements "obligate" Jenzabar to increase their salaries or bonuses. Rather, Defendants argue that the Employment Agreements expressly authorized the Board to consider pay increases and that, therefore, the compensation was consistent with those terms.

II. Count 5 Must Be Dismissed Against Maginn and Chai

Maginn and Chai argued in their Opening Brief that Count 5, which consists of a laundry list of supposed breaches of fiduciary duty by members of the Jenzabar Board, must be dismissed as against them for the reasons given in Jenzabar's Opening Brief, and also because (a) some of the alleged breaches did not involve conduct in which Maginn and Chai were alleged to have participated – the votes to set Maginn's and Chai's salaries and bonuses; (b) Maginn and Chai were exculpated with respect to breaches of the duty of care under the Charter; and (c) MCG lacks standing as a shareholder to complain about alleged inefficiencies in Board management relating to the circulation and drafting of Board minutes and provision of notice of meetings to Board members, particularly where MCG draws no connection between the alleged mismanagement and any harm to MCG. *See* Maginn/Chai Opening Brief at 19-21. MCG's counterarguments in its Opposition are each meritless.

A. The Complaint Does Not Allege That Maginn and Chai Breached Fiduciary Duties With Respect to Their Compensation

In its Opposition, MCG does not even address the argument that Maginn and Chai could not have breached fiduciary duties on the compensation-related votes because they did not participate in those votes. Instead, MCG argues that as "controlling" shareholders they had a duty to receive only benefits and compensation that are "entirely fair," Opp. at 49, and also argues that Maginn and Chai "had a duty to negotiate any further compensation increases honestly and in good faith," *id*. at 50 (citation omitted). Remarkably, this argument completely sidesteps the specific list of alleged breaches of fiduciary duty actually set forth in Count 5, which does not include the receipt of "unfair" benefits and compensation, or failure to negotiate "honestly and in good faith." Instead (with respect to compensation) the Complaint only refers to breaches "in: (a) *approving* bonus payments and salary increases to Defendants Maginn and

Chai, in violation of MCG's known special voting rights as provided by the PSWPA; [and] (b) *approving* bonus payments and salary increases to Defendants Maginn and Chai, in violation of MCG's known special voting rights as provided by Jenzabar's Charter …" Compl. ¶ 108 (emphases added), neither of which Maginn or Chai did because the "approving" was done by the Compensation Committee. Having failed to allege in its Complaint that Maginn and Chai breached any fiduciary duties with respect to the compensation issue by "receiving" unfair benefits or "negotiating" in bad faith, MCG cannot sustain its breach of fiduciary duty claim by introducing such a theory in its Opposition.[4] Indeed, MCG's belated effort to rewrite Count 5 should be taken as an admission by MCG that Count 5, as pled, does not set forth any compensation-related breach of fiduciary duty against Maginn or Chai.[5]

In addition, MCG's argument that Maginn and Chai breached duties owed by "controlling" shareholders of Jenzabar relies entirely on facts *not* pled in the Complaint, in particular allegations concerning a proxy held by Maginn that, together with his and Chai's personal holdings, purportedly gives them control over the company. *See* Opp. at 6-7. That MCG would rely on this argument is somewhat remarkable given that the word "proxy" never even appears in the Complaint nor are Maginn and Chai ever described as controlling shareholders, and given MCG's own belief, as set forth in the Opposition, that the proxy is not

[4] *See Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002) (stating that "[b]riefs relating to a motion to dismiss are not part of the record and any attempt contained within such documents to plead new facts or expand those contained in the complaint will not be considered."); *Lisa, S.A. v. Mayorga*, 2009 WL 1846308, at *6 & n.26 (Del. Ch.) (holding that plaintiff could not rely on basis for long-arm jurisdiction not pled in complaint). A compendium of unreported decisions not found in the Maginn/Chai Opening Brief or Opp. is being filed simultaneously herewith.

[5] In a similar vein, MCG's desperate argument that, although the Complaint does not allege any supporting facts, the Court should infer that Chai was a party to any alleged compensation-related misconduct because the Compensation Committee voted to increase her base salary and bonus at the same time it voted to increase that of Maginn is baseless and must be rejected. *See* Opp. at 50 & n.43.

valid. *See* Opp. at 44 & n.38. Again, MCG's attempt to rely upon facts not in the Complaint should be taken as a concession that the Complaint as filed cannot survive a Rule 12(b)(6) motion.

B. Maginn and Chai Are Exculpated With Respect to MCG's Duty of Care Claims

MCG's arguments that the Section 102(b)(7) provision in Jenzabar's charter does not apply to the breach of fiduciary duty accusations against Maginn and Chai is wholly without merit.

First, although MCG attempts to recast its due care claims by alleging that defendants acted disloyally or in bad faith, it cannot avoid the fact the bulk of the allegations in Count 5 do not allege disloyal or bad faith conduct. What MCG characterizes as the "Fiduciary Charter and Contract Claims," "Board Management Fiduciary Claims," and "Repurchase Notice Fiduciary Claims," *see* Opp. at 48, implicate solely the duty of care: MCG alleges that Defendants failed to properly inform themselves of Jenzabar's obligations under the Charter and PSWPA and that Defendants failed to provide notice and information to all directors and to properly prepare board minutes. See Compl., ¶ 108. Tellingly, in its Opposition MCG itself repeatedly characterizes the claims as violations of the duty of care. *See* Opp. at 47-48 ("Defendants breached their obligation to use *requisite care* to cause Jenzabar to comply with its Charter and contractual obligations … Defendants did not exercise the *requisite care* in determining Jenzabar's obligations ...") (emphasis added); *id*. at 53 ("duties must be performed with the requisite care ..."). These allegations do not implicate issues of loyalty or good faith and therefore do not fall within the exceptions to Section 102(b)(7).

Second, the mere fact that MCG has requested vague injunctive relief is not sufficient to avoid dismissal of its duty of care claims. MCG's prayer for an order requiring defendants to

"provide full and timely information to all members of the Jenzabar Board of Directors and to timely and accurately record the deliberations of the actions of the Board and its Committees" is not sufficient to circumvent the exculpatory provision. *See* Compl., at 32. Even if MCG could prove that defendants failed to act with requisite care in the past, the Complaint does not contain any specific allegations indicating that such conduct is likely to occur in the future. A claim for injunctive relief must be supported by the allegation of facts that "create a reasonable apprehension of a future wrong." *McMahon v. New Castle Assocs.*, 532 A.2d 601, 605-06 (Del. Ch. 1987) (citations omitted). MCG's unsupported concern that defendants will not provide meeting materials and minutes in the future, which it bases solely on "prior practice," is not sufficient. *See Weiner v. Miller*, 1990 Del. Ch. LEXIS 44¸ at *3-4 (Del. Ch.) (Court of Chancery did not have jurisdiction to award injunction because mere allegations of past acts do not raise an inference of future conduct). This Court should not disregard Jenzabar's duly enacted charter provision on the basis of an unsubstantiated allegation that defendants might breach their duties in the future. To do so would render the protections of Section 102(b)(7) virtually meaningless and would "suggest[] that the most powerful expression of a societal prohibition – an express statute forbidding conduct – is somehow insufficient without an 'us, too' from the judicial branch." *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513, 537 (Del. Ch. 2005).

Finally, contrary to MCG's unsupported argument, *see* Opp. at 57, this Court must consider the effect of a Section 102(b)(7) provision at the dismissal stage. *See, e.g.*, *Malpiede v. Townson*, 780 A.2d 1075, 1092 (Del. 2001) ("[t]he Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss …"); *Am. Int'l Group, Inc. v. Greenberg*, 965 A.2d 763, 795 n.113 (Del. Ch. 2009) (dismissing duty of care claims against defendant director on the basis of exculpatory charter provision). The case relied upon by MCG, *Emerald Partners v. Berlin*,

expressly recognizes that a Section 102(b)(7) provision may be considered on a motion to dismiss pursuant to Rule 12(b)(6). *See* 787 A.2d 85, 91 (Del. 2001). That is because the very purpose of Section 102(b)(7) is to permit corporations to decide to allow their directors to avoid the cost and distraction of litigating duty of care claims, and instead to focus on corporate management. *See, e.g., Malpiede*, 780 A.2d at 1095 (noting that Section 102(b)(7) "freed up directors to take business risks without worrying about negligence lawsuits"). This benefit would obviously be lost if a Section 102(b)(7) defense could not be raised until summary judgment or trial. *See, e.g., In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig*., 2002 Del. Ch. LEXIS 143, at *9 (Del. Ch.) ("To vindicate the statutory purpose behind provisions like . . . § 102(b)(7) of the Delaware General Corporation Law, it is critical that defendants be able to assert those defenses in a motion directed to the face of the complaint, such as a motion under Rule 12(b)(6)"); *In re Lukens Inc. S'holders Litig*., 757 A.2d 720, 734 (Del. Ch. 1999).

C. MCG Lacks Standing to Complain About Alleged Board Mismanagement

MCG's attempt to defend its standing to challenge alleged Board mismanagement relating to Board minutes and notice of Board meetings is similarly meritless. First, MCG observes that shareholders, like directors, have some statutory rights to bring a book and records request, to obtain a ruling as to the outcome of an election, and to apply for a shareholder meeting if one has not been held for 13 months. *See* Opp. at 55-56. This argument is frivolous and a complete *non sequitur*, as MCG of course is not complaining about a violation of any of these statutory rights of a shareholder, nor does it even try to argue that a shareholder can bring an action to remedy an alleged violation of the similar rights of a director. Second, MCG cites a number of cases for the proposition that it need not tie the alleged board mismanagement to some material injury to MCG to have standing (Opp. at 57-58), but none of the cases actually stand for that point. In each case the defendant took some action either directly adverse to the shareholder

in question or to the detriment of shareholders generally.[6] The court in every case simply held that a violation of the legal rights of shareholders provides sufficient basis to bring a claim. Here, on the other hand, MCG has failed to establish that *shareholders* possess any legal right to have Board materials or draft Board minutes distributed to Board members on any particular schedule.

III. Counts 3 and 4 Must Be Dismissed Because MCG Concedes There Is No Aiding and Abetting a Breach of Contract and Charter, and MCG Failed To Plead Inducement of Breach

As defendants explained in their opening briefs, Counts 3 and 4 of MCG's Complaint must be dismissed because they assert "aiding and abetting breach" of contracts, a cause of action that does not exist under Delaware law. *See* Maginn/Chai Opening Brief at 15-16; Jenzabar Opening Brief at 35-37. Apparently conceding the point, *see* Opp. at 31 & n.30, MCG suggests that Counts 3 and 4 implicitly should be read as having asserted instead "inducing a breach of contract," and that the allegations of the Complaint satisfy the elements of that wholly different cause of action. Even if MCG were entitled to switch causes of action in its Opposition, which it is not,[7] it is wrong in its assumption that an inducement of breach of contract claim can survive this motion to dismiss. Thus Counts 3 and 4 should be dismissed both

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[6] *See generally Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) (defendant diluted plaintiff's percentage ownership of the company); *President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784 (Del. Ch.) (trustee discriminated against and misled certain trust beneficiaries); *Leslie v. Telephonics Office Techs., Inc.*, 1993 WL 547188 (Del. Ch.) (diversion of corporate assets from company to defendants).

[7] *See, e.g., Cal. Pub. Employees' Ret. Sys. v. Coulter*, 2002 WL 31888343, at *12 (Del. Ch.) (noting that "the amended complaint does not make the allegation that .... is made in [the plaintiff's] answering brief in opposition to the motion to dismiss. *Arguments in briefs do not serve to amend the pleadings*.") (emphasis added and citation omitted); *Timblin v. Kent General Hosp.*, 1995 WL 44250, at *1-2 (Del. Super. Ct.) (refusing to amend complaint although "[t]here is some continuity with the original complaint" and reasoning that "the liberality of the practice of permitting amendments to pleadings is subject to the principle that such amendments must not

because they do not plead the cause of action MCG has chosen to defend in its Opposition, and because the Complaint does not support the cause of action MCG does try to defend.

A. There Was No Breach of Contract

As explained below, there was no breach of any contract here because the operative documents contradict MCG's argument that its approval was necessary for Jenzabar's Board to increase Maginn and Chai's compensation. *See infra* at 17-18. Without a breach of contract Maginn and Chai obviously cannot be liable for inducement of breach.

B. Maginn and Chai Were Justified In Requesting Increased Compensation

It is black letter law that any act taken by defendants to allegedly induce the breach must be "without justification. …" *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265-66 (Del. 2004). Not all conduct which allegedly results in the breach of a contract is "without justification." Courts determining whether a defendant acted "without justification" examine whether the defendant acted to assert a privileged or legally protected self-interest. *See Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 589-91 (Del. Ch. 1994) (holding that complaint failed to state a claim for tortious interference where it failed to allege that affiliated company's discussions with plaintiff's employer leading to her termination were "improper" and not instead motivated by legitimate business interests). Financial self-interest is not by itself a basis for a tortious interference claim. *See Little Peoples, Inc. v. Robin's Nest Child Care, Inc.*, 1996 WL 453350, at *5 (Del. Super. Ct.) ("If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's

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substantially change the cause of action or introduce a different claim or defense.") (citation omitted).

objective that as against the plaintiff the interference may be found to be not improper" (quoting RESTATEMENT (SECOND) OF TORTS, § 977, cmt. j (1977)).

In its Opposition MCG fails to point to any facts alleged in the Complaint to support its *ipse dixit* argument that Maginn and Chai acted "without justification" in seeking a raise from Jenzabar. *See* Opp. at 31. Instead, it cites only to paragraphs in the Complaint which state, without more, that Maginn and Chai "without privilege or justification, purposefully encouraged Defendants San Miguel and Mills to vote to purportedly increase the compensation of Defendants Maginn and Chai, in violation of the special voting rights of MCG." *See id.* (*citing* Compl., ¶¶ 98, 103). Conclusory allegations simply stating a legal element, without any supporting facts, are insufficient to survive a motion to dismiss.[8] MCG's Opposition makes no attempt to explain how any other allegations in its Complaint satisfy the "without justification" element, wherefore any argument by MCG in that regard is waived.[9] MCG's silence in this regard, however, is not surprising: there is in fact no allegation in the Complaint that Maginn

[8] *See, e.g.*, *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008); *White v. Panic*, 783 A.2d 543, 549 (Del. 2001).

[9] *See In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 110 & n.7 (Del. Ch. 2007) ("In their briefs, the plaintiffs attempt to preserve their additional disclosure claims listed in their complaint simply by referencing the complaint. That is not a proper way to brief issues and constitutes a waiver of those arguments.") (citation omitted); *Hartford Ins. Co. v. Cmty. Sys., Inc.*, 2009 WL 1027103, at *5 & n.25 (Del. Super. Ct.) (explaining that the appellate rule that a party's brief fully state the grounds for appeal, as well as the arguments and supporting authorities on each issue or claim of reversible error "applies with equal force to legal arguments that are asserted by counsel in the trial courts") (citations omitted); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("[i]ssues not briefed are deemed waived") (citation omitted); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch.) ("It is settled Delaware law that a party waives an argument by not including it in its brief.") (citation omitted), *aff'd*, 840 A.2d 641 (Del. 2003) (TABLE); *Kosseff v. Ciocia*, 2006 WL 2337593, at *2 n.9 (Del. Ch.) (finding that "while not explicitly waiving [his] claim, plaintiff fails to defend it in a substantive way in his brief opposing dismissal. Because the plaintiff has failed to state a claim on his 'right to vote' allegations, this portion of the action should be dismissed.").

and Chai were acting out of any motivation to harm MCG or Jenzabar, rather than in their own financial self-interest.[10]

Even if MCG had properly alleged action "without justification" or argued this point in its Opposition, dismissal would still be appropriate because the operative documents contradict MCG's baseless theory that Maginn and Chai had no justification in requesting raises from Jenzabar. Maginn and Chai had every right to ask the Compensation Committee to increase their compensation: their Employment Agreements each require the Jenzabar Board to "periodically review" their base salaries and bonuses for potential increase. *See* Maginn/Chai Opening Brief at 6-7. In essence, MCG is arguing that Maginn and Chai acted "without justification" by requesting that the Jenzabar Compensation Committee conduct the review that it is *required* to perform under the Employment Agreements, previously approved by MCG, and grant them a raise. An argument that Maginn and Chai acted "without justification" in asking for the review to which they were legally entitled under Employment Agreements approved by MCG is frivolous and must be rejected.

C. Maginn and Chai Acted Within Their Roles

Even assuming it were permissible, which it is not, any effort by MCG to somehow amend its Complaint via the Opposition to allege inducement of breach would further founder on the fact that the Complaint fails to allege that the Maginn and Chai were not acting within their roles with respect to Jenzabar's alleged breach of its agreements with MCG.[11] To the contrary, in Counts 3 and 4 the Complaint alleges that "[t]he rights, duties, and obligations of the

[10] *Martin v. Franklin Capital Corp.*, 195 P.3d 24, 29-30 (N.M. Ct. App. 2008) (under identical element of New Mexico law, stating that interference with a contract motivated by financial self-interest is not actionable absent motive to harm another) (internal citations omitted).

PSWPA[/Charter] are binding on Defendants Maginn, Chai, and Barr *in their capacity as members of Jenzabar's Board of Directors and/or as officers of Jenzabar*," Compl., ¶¶ 97, 102 (emphasis added) – in other words, the Complaint specifically relies on the alleged fact that Maginn and Chai *were* operating in their roles as corporate officers and directors in allegedly aiding and abetting the breach of contract. Thus, MCG not only failed to plead the claim it discusses in its Opposition, but certain allegations in the Complaint are inconsistent with the elements of that claim.

Moreover, MCG's Opposition assumes that Maginn and Chai must have been acting "outside their role" with respect to the unpled inducement of breach because they were requesting additional compensation for themselves. *See* Opp. at 32. The alleged breaches of contract, however, are not the payment of increased compensation *simpliciter*, but the supposed failure of Jenzabar to obtain permission from MCG before making such payments. In that regard, any purported effort by Maginn and Chai to "induce" Jenzabar not to seek allegedly necessary approval from MCG with respect to executive compensation under the circumstances of this case would be very much "within their role" as officers and directors of Jenzabar. That is because, as the Complaint makes clear, Jenzabar and MCG are embroiled in a dispute over Jenzabar's repurchase of MCG's preferred stock and warrants. In such a dispute it is self-evident that Jenzabar acquiescing in MCG's assertion of authority to micromanage Jenzabar's performance under its existing contracts would be to the detriment of Jenzabar's negotiating position. The "outside their role" theory of MCG's Opposition thus fails when it comes to the specific breach of contract at issue here, the "failure" to obtain MCG's approval; there is no

[11] As explained in the Opening Brief, a corporate officer is only potentially liable for inducing a breach of contract by his company if he or she is acting outside his role with the company. *See* Maginn/Chai Opening Brief at 10.

proper inference that Maginn and Chai were acting "outside their roles" in resisting MCG's invalid assertions of authority.

IV. Maginn and Chai Are Not Proper Defendants With Respect to Counts 1, 2, 9, 10, and 11

Maginn and Chai argued in their Opening Brief that counts 1, 2, 9, 10, and 11 should all be dismissed as against them because all concern conduct which Maginn and Chai are not alleged to have engaged in – voting to increase their compensation, which was done by the Compensation Committee of Jenzabar's Board on which Maginn and Chai do not serve – and breaches of contracts to which Maginn and Chai are not parties. *See* Maginn/Chai Opening Brief at 10-12. MCG's response is that Maginn and Chai (along with the other individual defendants) are "necessary parties" with respect to these claims (as well as claims 5, 7, 8, and 12) within the meaning of Delaware Chancery Court Rule 19(a), which provides that a person "*shall* be joined as a party in the action if … in the person's absence complete relief cannot be accorded among those already parties." Opp. at 29-30 (emphasis in original and citation omitted). In particular, MCG claims that Maginn and Chai must be parties because "complete relief may well include ordering that Defendants Maginn and Chai disgorge their illegitimate compensation. …" *Id*. at 30. (Notably, as yet another example of MCG making frivolous arguments, this argument of course provides absolutely no basis for keeping the other individual defendants in the case (since MCG does not seek to have any compensation returned to Jenzabar from those defendants), yet MCG asserts it as a basis to keep all individual defendants in the case).

This argument fails as a vessel to keep Maginn and Chai in the case on all the claims. Most notably, MCG makes absolutely no argument (nor could it) that the individual defendants, including Maginn and Chai, are necessary parties with respect to Count 11, which does not concern Maginn and Chai's compensation but instead a wholly distinct dispute between Jenzabar

and MCG involving the procedures for Jenzabar's repurchase of preferred stock held by MCG, or the non-compensation related aspects of Count 5. *See* Maginn/Chai Opening Brief at 12. Thus, Count 11 and the non-compensation related aspects of Count 5 must be dismissed as against the individual defendants, including Maginn and Chai.[12] Indeed, if the compensation-related claims are dismissed for the reasons given elsewhere in Defendants' briefing, then Maginn and Chai should be dismissed from the case entirely.

V. The Compensation Claims Must Be Dismissed Because the Operative Documents Contradict MCG's Theory of the Case

A. MCG's Compensation Claims Ignore the Authority of Jenzabar's Board over Compensation Decisions

Of the 12 claims pled in MCG's Complaint, all but Count 11 concern (in whole or in part) base salary and bonus payments made by Jenzabar to Maginn and Chai, which MCG alleges were improper because they were not specifically approved by MCG. As explained in Maginn and Chai's Opening Brief, however, the operative documents referenced in (and in some cases appended to) MCG's Complaint contradict MCG's theory of the case for at least three reasons, none of which MCG is able to rebut in its Opposition.[13]

First, Maginn and Chai demonstrated that the terms of their Employment Agreements, which MCG already approved as part of the PSWPA, explicitly vest authority in the Board to

[12] For the reasons given in the separate briefing by Jenzabar, MCG is not entitled to bring its compensation-related claims on a derivative basis for a number of reasons, including MCG's inadequacy as a representative plaintiff and failure to make demand on the Board before filing suit. *See* Jenzabar Opening Brief at 13-28. MCG explicitly states in its Complaint, however, that it is not, by its direct claims, seeking to have Maginn and Chai repay anything to Jenzabar. *See* Compl. at 5 (stating that the Complaint seeks "declarations" and "an order restraining Defendants from further violations" on the direct claims, whereas the Complaint seeks "an order requiring Defendants Maginn and Chai to repay" only with respect to the claims brought derivatively "[o]n behalf of Nominal Defendant Jenzabar …").

[13] Maginn and Chai also joined the arguments made by the other defendants on this point in their separate opening brief, and join those made in their separate reply brief as well.

increase Maginn and Chai's base salary and bonuses. *See* Maginn/Chai Opening Brief at 14. Thus, even assuming MCG were correct that it is entitled to approve Jenzabar entering into employment "transactions" or "arrangements" with its officers (Opp. at 18), MCG already approved the very Employment Agreements under which the Board acted in increasing Maginn and Chai's compensation.

MCG has no meaningful response to this argument. Instead, it buries its response in a footnote, arguing that the Employment Agreements "did not provide Maginn and Chai any rights, nor impose any obligations on the Company to increase compensation." Opp. at 18 n.16. MCG's first purported counterargument is wrong, and the second is a *non sequitur*. The Employment Agreements explicitly grant the two officers the right to have the Board "periodically review" their base salary and bonuses for potential increase. *See* Maginn/Chai Opening Brief at 6, 7. More importantly, it does not matter that the Employment Agreements do not require the Board to increase compensation; all that matters is that the Employment Agreements, previously approved by MCG, grant the Board *authority* to increase base compensation and bonuses.

Second, Maginn and Chai noted that their bonuses or salary increases do not trigger the PSWPA or the Charter because the increases did not require Jenzabar to "enter into … any transaction, contract, agreement or arrangement," as the Employment Agreements authorizing the increase had already been in place for several years and the increases did not require Jenzabar to "enter into" anything new. *See* Maginn/Chai Opening Brief at 15 (emphasis added). MCG argues that the phrase "enter into" covers not only Jenzabar entering "a new, formal contract or agreement," but also "making material changes to the terms of the Employment Agreements," such as Jenzabar "'adjust[ing]' or modify[ing] Maginn's and Chai's Employment Agreements

…." Opp. at 18. Even if this argument were consistent with the language of the PSWPA, which it is not, MCG is battling a straw man. As already explained above, the vote of the Jenzabar Board to increase Maginn's and Chai's salaries and bonuses did not "change," "adjust," or "modify" anything in their Employment Agreements, because those Employment Agreements explicitly provided the Board authority to grant such increases.

Third, Maginn and Chai argued that their Employment Agreements are not affiliate party transactions with respect to which MCG has special voting rights under the PSWPA or Jenzabar's Charter, as demonstrated by the interplay between section 3.10 of the PSWPA – in which Maginn's Employment Agreement is described as a "Material Contract" – and section 3.24 of the PSWPA, "Transactions with Affiliates," which states that "No affiliate of the Company and no officer or director of the Company … is party to any material Contract or transaction with the Company." *See* Maginn/Chai Opening Brief at 14 (citation omitted). The implication of this language is that employment agreements, including those between Jenzabar and Maginn and Chai, are not affiliate party transactions for purposes of the PSWPA; if they were, Maginn's Employment Agreement, previously recognized to be Material, would have been a bar to the representation of no material affiliate party transactions in section 3.24 of the PSWPA. *See id*. at 14-15. Moreover, they would not be affiliate party transactions for purposes of Jenzabar's Charter, which was negotiated between MCG and Jenzabar at the same time as the PSWPA and contains the same language concerning affiliate party transactions. *See* Maginn/Chai Opening Brief at 8-9, 14-15.

MCG's first apparent response to this argument is completely backwards as a matter of logic. MCG notes that section 3.10 uses the term "Material Contract" – both words capitalized – while section 3.24 uses "material Contract" – that is, "material" is not capitalized – wherefore

the meaning of material is different in the two provisions. *See* Opp. at 25-26. Even accepting that as true, however, MCG goes on to concede that the meaning of "material" in section 3.24 is **broader** than the meaning of "Material" in section 3.10.[14] This fully supports the argument presented by Maginn and Chai and contradicts MCG's argument: whether or not some contracts could be material for purposes of section 3.24 but not Material for purposes of section 3.10, if the use of "material" in section 3.24 is **broader** than the use of "Material" in section 3.10 then necessarily the "Material Contracts" referenced in section 3.10 are material for purposes of section 3.24.[15] If, in other words, Maginn's **Material** Employment Agreement were an affiliate party transaction, it would have prevented the representation made in the "broader" section 3.24 that there were no **material** affiliate party transactions.[16]

MCG also notes that Chai's Employment Agreement is not listed as a Material Contract for purposes of section 3.10 of the PSWPA, arguing that this somehow undercuts Maginn and Chai's argument on the interplay of sections 3.10 and 3.24. *See* Opp. at 25. Of course it does not. Whether Chai's Employment Agreement is "Material" or "material" is completely irrelevant; that the Employment Agreements are not affiliate party transactions is sufficiently demonstrated by the interplay of sections 3.10 and 3.24 with respect to Maginn's Employment Agreement.

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[14] *See* Opp. at 19 (arguing that section 3.24, "by use of the lower case term 'material,'" is "thus broader than the defined term 'Material Contract' is section 1.1"); *id*. at 26 ("'material contact' (with a lower case 'm'), is used in section 3.24 with a broader scope than the term used in section 1.1").

[15] *Cf*. Opp. at 26 (describing section 3.24 as a "catch-all or residual clause to make sure that there were no *other* undisclosed 'material' events involving the officers or directors or their affiliates" (emphasis added and citation omitted)).

[16] MCG's argument would only make sense if the use of "material" in section 3.24 were *narrower* than the use of "Material" in section 3.10. That section 3.24 is, in MCG's own words, "broader" and intended as a "catch-all" wholly contradicts MCG's position.

B. The Bonus Paid Maginn is Not Invalidated By Maginn's and Chai's Presence at the Board Meeting

MCG's argument, with respect to Count 12, that Jenzabar's Board did not validly approve the $750,000 bonus for Maginn on December 23, 2008 fails for a number of reasons. First, as the Complaint implicitly acknowledges, the bonus had *already* been "approved" some five years earlier. (*See* Compl., ¶ 50). MCG is thus years too late in challenging that approval, even assuming it had a right to do so. An allegedly void Board ratification in 2008 should not operate to invalidate the prior valid approval of the bonus.[17]

Second, board action is not "void" or "voidable" solely because a director has a financial interest; Section 144(a)(1) of the Delaware General Corporation Law permits action by the vote of "a majority of the ***disinterested*** directors, even though the disinterested directors be less than a quorum." 8 *Del. C.* § 144(a)(1) (emphasis added). Moreover, Section 144(b) of the Delaware General Corporation Law provides that "interested directors ***may*** be counted in determining the presence of a quorum at a meeting of the board of directors" (emphasis added), but does not require that such interested directors ***must*** be counted. *See generally,* FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 144.11 (5th ed. 2008) (characterizing Section 144(b) as "permitting interested directors to count toward a quorum"). Thus, despite MCG's argument to the contrary, the Court is not required to count Maginn and Chai as part of the quorum in determining the validity of the board action under Section 141. There is no question that if Maginn and Chai are not counted in the quorum the board action was valid and Count 12 fails to state a claim.

[17] The attempted ratification of a prior action should not be interpreted as a concession that the prior action was void or voidable. *See* 2A Fletcher Cyc. Corp. § 754 (Perm Ed. 2006) (suggesting that ratification of validly undertaken prior action "is not illegal or improper").

Finally, even if the facts are as alleged (which Defendants do not believe to be the case), the matter can easily be remedied by the simple expedient of a ratifying vote undertaken by the Board or Compensation Committee in the absence of Maginn and Chai. Thus, it makes no sense to sustain this purported claim which, at best, exists in theory only.[18]

VI. As Plaintiff's Underlying Causes Of Action Do Not State A Claim, Plaintiff Is Not Entitled To The Equitable Remedies Of An Accounting (Count 7) Or Rescission (Counts 8 and 12)

As Plaintiff concedes, counts asserting so-called "secondary claims" such as Counts 7, 8, and 12 are only permitted to go forward "where the underlying causes of action are well pled." (Opp. at 66).[19] As Plaintiff's underlying claims are deficiently plead and subject to dismissal, there is no basis for this Court to provide the equitable remedy of an accounting or the equitable remedy of rescission. *See generally, Addy v. Piedmonte*, 2009 Del. Ch. LEXIS 38, at *79 (Del. Ch.) (holding that requests for equitable relief "are not claims in and of themselves, but types of remedies *dependent on the viability and outcome of the underlying causes of action* …") (emphasis added).

As demonstrated in Maginn's and Chai's Opening Brief, "[a]n accounting is not so much a cause of action as it is a form of relief." *Rhodes v. Silkroad Equity, LLC*, 2007 Del. Ch. LEXIS

[18] MCG's brief contains a seemingly unrelated one-sentence statement that "to the extent that the actions on December 18, 2008 were taken by the Board, in which it 'purported to approve transactions with Defendants Maginn and Chai,' they are invalid for the same reason." (Opp. at 65). This "Hail Mary" argument fails for two reasons. First, it appears nowhere in MCG's Complaint; Count 12 refers exclusively to rescission of the $750,000 bonus. Second, MCG repeatedly acknowledges in the Complaint that the Compensation Committee, rather than the Board, approved raises and a $794,000 bonus for Maginn and Chai. (Compl., ¶¶ 40, 44, 47, 49). Membership on the Compensation Committee is comprised of San Miguel, Mills and Malekian, and a majority of the Committee approved the raises and bonus. (*id*., ¶¶ 24, 44, 47). MCG's argument to the contrary is unsupported and should be rejected.

[19] Indeed, Plaintiff cites *Jacobson v. Dryson Acceptance Corp*., 2002 WL 75473, at *4 (Del. Ch.), which makes clear that where a plaintiff has no enforceable right "the action for an accounting will also fail." (*See* Opp. at 66 n.56).

96, at *43 (Del. Ch.) (citation omitted); *see also Empire Fin. Servs. v. Bank of N.Y.* (Del.), 2003 Del. Super. LEXIS 372, at *3 (Del. Super. Ct.) ("An accounting is a form of relief, not a cause of action."). The Court has no basis to grant an accounting unless a party first asserts a viable underlying claim. *Addy*, 2009 Del. Ch. LEXIS 38, at *79; *Albert v. Alex. Brown Mgmt. Servs.*, 2005 Del. Ch. LEXIS 133, at *40-41 (Del. Ch.) (recognizing that "[a]n accounting is an equitable remedy" and declining to address arguments in favor of granting an accounting unless or until "the plaintiffs ultimately be successful on one or more of their claims …"). Accordingly, a demand for an accounting is "inherently dependent" upon the survival and viability of the related, underlying claims. *Rhodes*, 2007 Del. Ch. LEXIS 96, at *43.

Similarly, Plaintiff's requests for the equitable remedy of rescission are predicated on its underlying claims that the salary and bonus payments conferred to Maginn and Chai violated certain agreements, were "unauthorized" or "not properly authorized," and were therefore "unlawful" and "invalid." *See* Compl. ¶¶ 121–23, 125, 144–45. Because these underlying claims are subject to dismissal, there is no basis for imposing the equitable remedy of rescission. *See, e.g., Hutchinson v. Fish Eng'g Corp.*, 203 A.2d 53, 57 (Del. Ch. 1964) (holding that because plaintiff's patent-related claims were barred by laches, "[h]is complaint for rescission, reconveyance, and an accounting with respect to such patents must therefore be dismissed"), *aff'd* 213 A.2d 447 (Del. 1965).

CONCLUSION

For the reasons given in Maginn and Chai's Opening Brief and herein, as well as those reasons set forth in the briefs submitted by Jenzabar, Maginn and Chai respectfully submit that the Complaint should be dismissed against them in its entirety. Dismissing the compensation-related claims, and Maginn and Chai with respect to the non-compensation claims, will greatly simplify the case, allowing the parties and the Court to focus on what is really at issue. The Court should reject MCG's baseless attempt to gain leverage in its dispute with Jenzabar over Jenzabar's repurchase of MCG's preferred shares by dragging in Maginn's and Chai's compensation.

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2009, a copy of the foregoing was served via *LexisNexis File and Serve* on the following counsel:

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