



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

JENZABAR, INC.,

Plaintiff-in-Counterclaim,

v.

MCG CAPITAL CORPORATION,

Defendant-in-Counterclaim.

**MCG CAPITAL CORPORATION'S ANSWER TO  
COUNTERCLAIMS FILED BY DEFENDANT JENZABAR, INC.**

Plaintiff MCG Capital Corporation ("MCG"), by and through its undersigned counsel,  
submits the following Answer and affirmative defenses to the Counterclaims filed by Jenzabar,  
Inc. ("Jenzabar" or "Company").

**Introduction**

Jenzabar's Introduction purports to characterize this action and Jenzabar's alleged motive  
in asserting its Counterclaims, which are only now being asserted by Defendants some four years

(or more) after most of the events about which Jenzabar complains. 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’s Charter and the Preferred Stock and Warrant Purchase Agreement (“PSWPA”), and (b) the excessive compensation that Jenzabar’s CEO and President, 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, Defendants are now stretching to complain belatedly about having to adhere to the terms of the agreements that Jenzabar, Mr. Maginn and Ms. Chai 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 a 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. These facts, however, are also conveniently overlooked and not acknowledged by Defendants in the Counterclaims.

Instead, Jenzabar now complains—transparently on behalf of Mr. Maginn and Ms. Chai and further supporting MCG's premise that Jenzabar is run by them solely for their own personal pecuniary benefit—that MCG and the MCG director designees have resisted increasing Mr. Maginn's and Ms. Chai's current cash compensation, which collectively has exceeded \$10 million during the past six years. Jenzabar's performance, however, has been artificially

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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 Ms. 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.

depressed by such excessive management compensation and other actions of management, and 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, Jenzabar is left to assert some mysterious “assurances” that it supposedly received prior to MCG’s investment (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 “assurances” about their own compensation while conveniently overlooking that their own “assurances” regarding Jenzabar’s future financial performance—assurances that induced MCG’s investment and subsequent assurances 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). This fact notwithstanding, Jenzabar now also attacks the valuation done by MCG’s Independent Appraiser as too high.

Consistent with the fact that Jenzabar is plainly pursuing these Counterclaims for the benefit of Mr. Maginn and Ms. Chai, the lack of any damage to Jenzabar is apparent in much of the Counterclaims. For example, the claim that MCG breached the stockholders agreement

ultimately will also fail because Jenzabar cannot prove any damages that flow from MCG's alleged delay in approving the purported independent directors, which "delay" was simply a result of MCG's legitimate efforts to determine whether two academics with little to no prior corporate board experience belonged on the Jenzabar's Board. Given that the only consequence of that alleged delay was the inability of Jenzabar to pay additional excessive, retroactive compensation to Mr. Maginn and Ms. Chai, it is difficult to conceive of how Jenzabar was harmed; if anything, MCG's actions saved the Company money and preserved shareholder value.

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**

1. Paragraph 1 of the Counterclaims purports to describe content from various Internet websites, which speak for themselves.
2. MCG denies the allegations contained in Paragraph 2 of the Counterclaims.
3. MCG admits that it invested approximately \$35 million in Jenzabar, including \$30 million in the form of loans pursuant to a Credit Facility Agreement on June 30, 2004. MCG further admits that Jenzabar paid off these loans by March 17, 2006, including a prepayment fee that had been negotiated at the time of MCG's initial investment. MCG denies the remaining allegation contained in Paragraph 3 of the Counterclaims.

4. MCG admits that it invested \$5 million in Jenzabar in exchange for Senior Preferred Stock, warrants to purchase Jenzabar Common Stock (“Jenzabar Warrants”), and Subordinated Preferred Stock. MCG denies the remaining allegations contained in Paragraph 4 of the Counterclaims.
5. MCG lacks knowledge or information sufficient to form a belief as to the truth of the alleged communications by Mr. Mitchell contained in Paragraph 5 of the Counterclaims, and on that basis denies them. MCG denies the remaining allegations contained in Paragraph 5 of the Counterclaims.
6. MCG denies the allegations contained in Paragraph 6 of the Counterclaims.
7. MCG denies the allegations contained in Paragraph 7 of the Counterclaims.
8. MCG denies the allegations contained in Paragraph 8 of the Counterclaims.
9. MCG denies the allegations contained in Paragraph 9 of the Counterclaims.
10. MCG admits that it has reported the value of its Jenzabar Warrants in quarterly and annual public filings with the Securities and Exchange Commission (“SEC”) beginning in with its June 2004 Quarterly Report. MCG denies the remaining allegations contained in Paragraph 10 of the Counterclaims.
11. To the extent that Paragraph 11 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 and denies the remaining allegations in Paragraph 11 of the Counterclaims.
12. To the extent that Paragraph 12 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 and denies the remaining allegations in Paragraph 12 of the Counterclaims.
13. To the extent that Paragraph 13 purports to describe MCG's March 2009 Quarterly Report (Form 10-Q) (May 8, 2009), that document speaks for itself. MCG denies that its \$35 million investment in Jenzabar yielded a return on investment of more than 5,130 percent. 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 denies the allegations contained in Paragraph 14 of the Counterclaims.
  15. Paragraph 15 of the Counterclaims purports to describe the relief sought in the Counterclaims, which speak for themselves. MCG denies that the relief sought is warranted or permissible under the law and/or the facts.
  16. On information and belief, MCG denies that Mr. Maginn was a founder of Jenzabar. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 16 of the Counterclaims, and on that basis denies them.
  17. MCG admits that it is a Delaware corporation with a principal place of business in Arlington, Virginia, and that it is a publically traded business development company. MCG denies the remaining allegation contained in Paragraph 17 of the Counterclaims.
  18. MCG admits that on or about June 30, 2004, it invested a total of \$35 million in Jenzabar pursuant to several agreements, but otherwise refers to the agreements, which speak for themselves.
  19. MCG admits the allegations contained in Paragraph 19 of the Counterclaims.



20. MCG admits that pursuant to the PSWPA, MCG invested \$5,000,000 in Jenzabar and, in connection with MCG's investment, MCG was issued 5,000 shares of Senior Preferred Stock, 109,800 shares of Subordinated Preferred Stock, and 5,879,150 Jenzabar Warrants, which Warrants were intended to provide MCG the right to purchase 18 percent of Jenzabar's Common Stock on a fully-diluted basis. The remainder of Paragraph 20 of the Counterclaims purports to describe MCG's June 2004 Quarterly Report (Form 10-Q) (Aug. 6, 2004), which speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete.
21. MCG admits that it executed the Fourth Amended and Restated Stockholders Agreement ("Stockholders Agreement"). The remainder of Paragraph 21 of the Counterclaims purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description is accurate and/or complete.
22. Jenzabar's interpretation of its Bylaws and the Stockholders Agreement contained in Paragraph 22 of the Counterclaims states a conclusion of law to which no response is required. To the extent any response is required, MCG denies that the description is accurate and/or complete.
23. Paragraph 23 of the Counterclaims purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description is accurate and/or complete.
24. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Counterclaims, and on that basis denies them.
25. MCG admits that it designated Peter Malekian and its former CEO Bryan Mitchell to serve as the Senior Investor Designated Directors on Jenzabar's Board.

26. MCG admits that Mr. Mitchell had formerly been Chairman of its Board of Directors and its CEO. MCG denies the remaining allegations contained in Paragraph 26 of the Counterclaims. MCG answers further that on November 1, 2002—nearly two years before its investment in Jenzabar—MCG announced in a press release and in a public filing with the SEC the results of an investigation conducted by MCG’s Audit Committee into allegations that Mr. Mitchell misrepresented his educational credentials, and that as a result, Mr. Mitchell resigned as Chairman of MCG’s Board of Directors, but remained a Director and MCG’s CEO.
27. MCG admits that Mr. Maginn and Ms. Chai were the Founder Designated Directors on Jenzabar’s Board. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 27 of the Counterclaims, and on that basis denies them.
28. MCG admits that in the middle of 2004, Jenzabar’s Board was comprised of Mr. Maginn, Ms. Chai, Mr. Mitchell and Mr. Malekian, and that the remaining fifth seat was vacant. MCG denies the remaining allegations contained in Paragraph 28 of the Counterclaims.
29. MCG admits that Jenzabar’s Board approved a growth-oriented budget proposed by Mr. Maginn in January, 2005, but otherwise denies the allegations contained in Paragraph 29 of the Counterclaims.
30. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30 of the Counterclaims, and on that basis denies them.
31. MCG denies the allegations contained in Paragraph 31 of the Counterclaims.
32. MCG denies the allegations contained in Paragraph 32 of the Counterclaims.

33. To the extent that Paragraph 33 of the Counterclaims purports to describe MCG's June 2005 Quarterly Report (Form 10-Q) (Aug. 4, 2005), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete.
34. To the extent that Paragraph 34 of the Counterclaims purports to describe MCG's September 2005 Quarterly Report (Form 10-Q) (Nov. 4, 2005), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete.
35. MCG denies the allegations contained in Paragraph 35 of the Counterclaims.
36. MCG admits that an executive session was held at the November 18, 2005 meeting of Jenzabar's Board. MCG denies the remaining allegations contained in Paragraph 36 of the Counterclaims.
37. MCG admits that Jenzabar's Board terminated the growth-oriented budget as it had failed to meet the projections that Mr. Maginn had promised, but MCG otherwise denies the allegations contained in Paragraph 37 of the Counterclaims.
38. MCG denies the allegations contained in Paragraph 38 of the Counterclaims.
39. MCG denies the allegations contained in Paragraph 39 of the Counterclaims.
40. MCG denies the allegations contained in Paragraph 40 of the Counterclaims.
41. MCG denies the allegations contained in Paragraph 41 of the Counterclaims.
42. MCG admits that Jenzabar refinanced its debt through a credit facility funded by Wells Fargo Foothill ("WFF") and used the proceeds to pay off the loans from MCG, including prepayment fees of \$2 million. MCG denies the remaining allegations contained in Paragraph 42 of the Counterclaims.
43. Paragraph 43 of the Counterclaims purports to describe various unspecified documents, which speak for themselves. MCG admits that Jenzabar requested that MCG identify

which of its designated directors would be removed from Jenzabar's Board. MCG denies each of the remaining allegations contained in Paragraph 43 of the Counterclaims.

44. MCG admits that Jenzabar recommended that Dr. Joseph San Miguel and Dr. D. Quinn Mills be seated as Independent Directors to fill two vacant seats on Jenzabar's Board. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 44, and on that basis denies them.
45. MCG denies the allegations contained in Paragraph 45 of the Counterclaims.
46. MCG admits that Mr. Malekian resigned from Jenzabar's Board on April 26, 2006, and that Mr. Mitchell remained as MCG's designee. MCG denies the remaining allegations contained in Paragraph 46 of the Counterclaims.
47. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 47 of the Counterclaims, and on that basis denies them.
48. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 48 of the Counterclaims, and on that basis denies them.
49. 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. To the extent that Paragraph 50 purports to describe MCG's June 2006 Quarterly Report (Form 10-Q) (Aug. 9, 2006), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete. MCG denies the remaining allegations contained in Paragraph 50 of the Counterclaims.

51. MCG admits that Dr. San Miguel was ultimately seated as a member of Jenzabar's Board. MCG denies the remaining allegations contained in Paragraph 51 of the Counterclaims.
52. MCG admits that Mr. Mitchell resigned from MCG on August 24, 2006 and that Steven Tunney replaced him as MCG's CEO. MCG further admits that in September 2006 it informed Jenzabar that Mr. Malekian would serve as MCG's Senior Investor Designated Director. MCG denies the remaining allegations contained in Paragraph 52 of the Counterclaims.
53. To the extent Paragraph 53 purports to describe a letter from Mr. Tunney, that document speaks for itself. MCG denies the remaining allegations contained in Paragraph 53 of the Counterclaims.
54. MCG denies the allegations contained in Paragraph 54 of the Counterclaims.
55. MCG denies the allegations contained in Paragraph 55 of the Counterclaims.
56. MCG admits that Mr. Malekian stated that he reserved his right to meet Dr. San Miguel, and needed more information about the candidates proposed by Jenzabar. MCG denies the remaining allegations contained in Paragraph 56 of the Counterclaims.
57. MCG denies the allegations contained in Paragraph 57 of the Counterclaims.
58. MCG admits that Samuel Rubenstein is MCG's Executive Vice President and General Counsel, and that he asserted that MCG had a right to consent to the appointment of the Independent Directors. MCG denies the remaining allegations contained in Paragraph 58 of the Counterclaims.
59. MCG denies the allegations contained in Paragraph 59 of the Counterclaims.

60. MCG admits that Mr. Malekian opposed seating Dr. San Miguel on Jenzabar's Board and that he warned that Jenzabar's efforts to do so would put it at odds with MCG. MCG denies the remaining allegations contained in Paragraph 60 of the Counterclaims.
61. MCG admits that Mr. Rubenstein contacted Jenzabar's General Counsel, Jamison Barr, and indicated that Jenzabar should rescind its purported ratification of Dr. San Miguel's appointment to Jenzabar's Board. MCG denies the remaining allegations contained in Paragraph 61 of the Counterclaims.
62. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 62, and on that basis denies them.
63. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 63, and on that basis denies them.
64. MCG admits that Jenzabar's Board of Directors purported to appoint Dr. San Miguel to serve as the sole member of an "independent special committee" on November 27, 2007 to consider simplifying Jenzabar's capital structure, which might involve Jenzabar's repurchase of the equity interests held by MCG, among other things. MCG denies the remaining allegations contained in Paragraph 64 of the Counterclaims.
65. MCG admits that it opposed the seating of Dr. San Miguel as an Independent Director because of his lack of prior board service or experience with software companies and because of concerns about his independence. MCG denies the remaining allegations contained in Paragraph 65 of the Counterclaims.
66. MCG denies the allegations contained in Paragraph 66 of the Counterclaims.
67. MCG denies the allegations contained in Paragraph 67 of the Counterclaims.

68. To the extent that Paragraph 68 of the Counterclaims purports to describe MCG's December 2007 Annual Report (Form 10-K) (Feb. 29, 2008), that document speaks for itself. MCG denies that Jenzabar's description of this filing is accurate and/or complete.
69. MCG admits that it consented to the appointment of Dr. San Miguel and Dr. Mills to Jenzabar's Board in April 2008, and that once Dr. Mills was seated, Jenzabar's Board purported to reconstitute the Special Committee to include Dr. Mills. MCG denies the remaining allegations contained in Paragraph 69 of the Counterclaims.
70. MCG admits that Jenzabar's Board established an Audit Committee and a Compensation Committee in April 2008. MCG denies the remaining allegations contained in Paragraph 70 of the Counterclaims.
71. MCG admits that Mr. Malekian objected to continuation of the April 17, 2008 Board meeting because he had not been given any advance notice of the action proposed at the meeting; that he consulted with Mr. Rubenstein, and that Mr. Rubenstein later called Mr. Barr to object to Jenzabar's formation of the Compensation and Audit Committees without proper notice to MCG. MCG denies the remaining allegations contained in Paragraph 71 of the Counterclaims.
72. MCG denies the allegations contained in Paragraph 72 of the Counterclaims.
73. MCG denies the allegations contained in Paragraph 73 of the Counterclaims.
74. Paragraph 74 of the Counterclaims purports to describe various public filings by MCG, which speak for themselves. MCG denies the remaining allegations contained in Paragraph 74 of the Counterclaims.
75. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 75, and on that basis denies them.

76. MCG admits that Mr. Malekian informed Jenzabar's Board that a private equity firm expressed interest in purchasing Jenzabar. 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 denies the allegations contained in Paragraph 79 of the Counterclaims.
80. MCG admits that Jenzabar sent a letter to MCG in November 2007, which speaks for itself. MCG denies the remaining allegations contained in Paragraph 80 of the Counterclaims.
81. MCG admits that Jenzabar repurchased a portion of MCG's Senior Preferred Stock in September 2008, pursuant to the terms of the Charter and PSWPA. MCG denies the remaining allegations contained in Paragraph 81 of the Counterclaims.
82. MCG admits that Jenzabar sent correspondence to MCG in March 2009, which speaks for itself. MCG denies the remaining allegations contained in Paragraph 82 of the Counterclaims.
83. Paragraph 83 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 83 of the Counterclaims.
84. Paragraph 84 of the Counterclaims purports to characterize the Complaint and certain SEC filings, which speaks for themselves. To the extent any response is required, MCG denies the allegations contained in Paragraph 84 of the Counterclaims



85. Paragraph 85 of the Counterclaims purports to characterize the Complaint, which speaks for itself. To the extent any response is required, 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 in the first sentence of Paragraph 87 of the Counterclaims. The remaining allegations in Paragraph 87 purports to describe MCG's Motion for Preliminary Injunction, which speaks for itself. To the extent that any response is required, MCG denies the allegations contained in Paragraph 87 of the Counterclaims.
88. MCG admits that it appointed Stout Risius Ross ("SRR") as an Independent Appraiser, and that SRR had previously performed work for MCG. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to SRR's communications to Jenzabar, and on that basis denies them. MCG denies the remaining allegations in Paragraph 88 of the Counterclaims.
89. MCG denies the allegations contained in Paragraph 89 of the Counterclaims.
90. Paragraph 90 of the Counterclaims purports to characterize the PSWPA, which speaks for itself. MCG denies the remaining allegations in Paragraph 90 of the Counterclaims.
91. Paragraph 91 of the Counterclaims purports to characterize the PSWPA, which speaks for itself. MCG admits that KPMG proposed PricewaterhouseCoopers and Deloitte to conduct the appraisal of Jenzabar, and that SRR proposed nationally recognized alternate firms, including Duff & Phelps and Houlihan Lokey to do so. MCG denies the remaining allegations in Paragraph 91 of the Counterclaims.

92. MCG admits that SRR recommended Duff & Phelps. MCG lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations, and on that basis denies them.
93. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 93 of the Counterclaims, and on that basis denies them.
94. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 94 of the Counterclaims, and on that basis denies them.
95. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 95 of the Counterclaims, and on that basis denies them.
96. MCG denies the allegations in Paragraph 96 of the Counterclaims.
97. Paragraph 97 of the Counterclaims states a legal conclusion to which no response is required.
98. Paragraph 98 of the Counterclaims purports to quote the PSWPA, which speaks for itself. MCG denies that the quotation is accurate and/or complete.
99. MCG admits that when it invested in Jenzabar on June 30, 2004, it was issued warrants that were intended to provide MCG the right to purchase 18 percent of Jenzabar's Common Stock on a fully diluted basis pursuant to the PSWPA. The remainder of Paragraph 99 of the Counterclaims states a legal conclusion to which no response is required.

100. Paragraph 100 of the Counterclaims purports to describe the PSWPA, which speaks for itself. To the extent that any response is required, MCG denies the allegations contained in Paragraph 100 of the Counterclaims.
101. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 101 of the Counterclaims, and on that basis denies them.
102. MCG denies the allegations contained in Paragraph 102 of the Counterclaims and states further that its position is that its warrants entitle MCG to purchase 18 percent of the Company's common stock.
103. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 103 purports to describe the Counterclaims, which speak for themselves.
104. MCG denies the allegations contained in Paragraph 104 of the Counterclaims.
105. MCG denies the allegations contained in Paragraph 105 of the Counterclaims.
106. Paragraph 106 purports to describe the Complaint, which speaks for itself.
107. MCG admits that on April 21, 2009, it gave notice to Jenzabar of its intent to put the Jenzabar Warrants in the event that this Court found that the purported repurchase was valid.
108. MCG admits that there exists an actual and justiciable controversy as to the effectiveness of Jenzabar's purported repurchase.
109. Paragraph 109 purports to describe the relief sought in the Counterclaims, which speak for themselves. MCG denies the relief sought is warranted or permissible under the law and/or the facts.

110. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 110 purports to describe the Counterclaims, which speak for themselves.
111. Paragraph 111 purports to describe Jenzabar's Charter, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
112. Paragraph 112 of the Counterclaims purports to describe Jenzabar's Charter, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
113. Paragraph 113 of the Counterclaims purports to describe Jenzabar's Charter, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
114. MCG lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 114 of the Counterclaims pertaining to Jenzabar's payment to a paying agent, and on that basis denies them. MCG denies the remaining allegations contained in Paragraph 114 of the Counterclaims.
115. MCG denies the allegations contained in Paragraph 115 of the Counterclaims.
116. MCG denies the allegations contained in Paragraph 116 of the Counterclaims.
117. MCG admits that there exists an actual and justiciable controversy as to the applicable repurchase price of MCG's Senior Preferred Stock.
118. MCG denies the allegations contained in Paragraph 118 of the Counterclaims.
119. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 119 purports to describe the Counterclaims, which speak for themselves.

120. MCG admits that in connection with its investment in Jenzabar on June 30, 2004, it was, among other things, issued warrants to purchase 5,879,150 shares of Jenzabar Common Stock, 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.
121. MCG denies the allegations contained in Paragraph 121 of the Counterclaims.
122. MCG admits that it informed Jenzabar that it holds warrants to purchase 18 percent of Jenzabar Common Stock pursuant to MCG's anti-dilution rights.
123. Paragraph 123 states a legal conclusion to which no response is required.
124. Paragraph 124 of the Counterclaims purports to describe the relief sought in the Counterclaims, which speak for themselves. To the extent any response is required, MCG denies the allegations contained in Paragraph 124 of the Counterclaims.
125. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 125 purports to describe the Counterclaims, which speak for themselves.
126. MCG admits that KPMG asserted that the Company Fair Market Value pursuant to the PSWPA was \$95.5 million, but denies that this valuation is accurate.
127. MCG denies the allegations contained in Paragraph 127 of the Counterclaims.
128. Paragraph 128 of the Counterclaims purports to describe the relief sought in the Counterclaims, which speak for themselves. To the extent any response is required, MCG denies the allegations contained in Paragraph 128 of the Counterclaims.
129. Paragraph 129 of the Counterclaims purports to describe the relief sought in the Counterclaims, which speak for themselves. To the extent any response is required, MCG denies the allegations contained in Paragraph 129 of the Counterclaims.

130. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 130 purports to describe the Counterclaims, which speak for themselves.
131. Paragraph 131 states a legal conclusion to which no response is required.
132. Paragraph 132 purports to describe the Stockholders Agreement, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
133. MCG denies the allegations contained in Paragraph 133 of the Counterclaims.
134. MCG denies the allegations contained in Paragraph 134 of the Counterclaims.
135. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 135 purports to describe the Counterclaims, which speak for themselves.
136. Paragraph 136 purports to describe the PSWPA, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.
137. MCG denies the allegations contained in Paragraph 137 of the Counterclaims.
138. MCG denies the allegations contained in Paragraph 138 of the Counterclaims.
139. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 139 purports to describe the Counterclaims, which speak for themselves.
140. Paragraph 140 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 140 of the Counterclaims.
141. Paragraph 141 purports to describe the PSWPA, which speaks for itself. MCG denies that the description and/or quotation are accurate and/or complete.

142. Paragraph 142 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 142 of the Counterclaims.
143. MCG denies the allegations contained in Paragraph 143 of the Counterclaims.
144. MCG denies the allegations contained in Paragraph 144 of the Counterclaims.
145. MCG repeats and incorporates by reference its response to each and every allegation contained above as if fully set forth herein. Paragraph 145 purports to describe the Counterclaims, which speak for themselves.
146. MCG denies the allegations contained in Paragraph 146 of the Counterclaims.
147. MCG denies the allegations contained in Paragraph 147 of the Counterclaims.
148. MCG denies the allegations contained in Paragraph 148 of the Counterclaims.
149. MCG denies the allegations contained in Paragraph 149 of the Counterclaims.
150. Paragraph 150 purports to describe the relief sought in the Counterclaims, which speak for themselves. MCG denies the relief sought is warranted or permissible under the law and/or the facts.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense**

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

#### **Second Affirmative Defense**

Jenzabar's claims are barred in whole or in part under the statute of limitations and/or the doctrine of laches.

#### **Third Affirmative Defense**

Jenzabar's claims are barred in whole or in part by the doctrine of unclean hands.

#### **Fourth Affirmative Defense**

Jenzabar's claims are barred in whole or in part by the doctrine of waiver.

**Fifth Affirmative Defense**

Jenzabar's claims are barred in whole or in part by the doctrine of estoppel.

**Sixth Affirmative Defense**

Jenzabar's claims are barred because it lacks 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 Jenzabar's Counterclaims;
- B. Order Jenzabar to pay MCG's costs and attorneys' fees in defending these Counterclaims; and
- 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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David C. McBride (No. 408)  
Martin Lessner (No. 3109)  
Emily V. Burton (No. 5142)  
Young Conaway Stargatt & Taylor, LLP  
The Brandywine Building  
1000 West Street, 17th Floor  
Wilmington, DE 19801  
Phone: (302) 571-6600  
Fax: (302) 571-1253

Of Counsel:  
John G. Fabiano  
Daniel W. Halston  
Michael R. Dube  
Wilmer Cutler Pickering Hale and Dorr LLP  
60 State Street  
Boston, MA 02109  
Phone: (617) 526-5000  
Fax: (617) 526-6000

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**

Catherine G. Dearlove, Esquire  
Geoffrey G. Grivener, Esquire  
Thomas A. Uebler, Esquire  
Richards, Layton & Finger, P.A.  
One Rodney Square  
920 North King Street  
Wilmington, Delaware 19801

Peter J. Walsh, Jr., Esquire  
Abigail M. Legrow, Esquire  
Daniel A. Mason, Esquire  
Potter Anderson & Corroon LLP  
Hercules Plaza, 6th Floor  
1313 North Market Street  
Wilmington, Delaware 19801

/s/ Emily V. Burton  
Emily V. Burton (#5142)