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. ROBERT A. MAGINN, JR., LING CHAI, JAMISON BARR, JOSEPH SAN MIGUEL, DANIEL QUINN MILLS, JENZABAR, INC. Defendants, and JENZABAR, INC. Nominal Defendant.	CASE NO. 4521-CC

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

Nature and Stage of Proceedings

Plaintiff MCG Capital Corporation ("MCG") is an investor in Defendant Jenzabar, Inc., ("Jenzabar" or "the Company"). MCG holds Senior Preferred Stock, Subordinated Preferred Stock, and Warrants to purchase Common Stock. In connection with its Senior Preferred Stock and its Warrants, MCG has special consent and voting rights.

MCG files this Motion for a Preliminary Injunction to halt efforts made by Defendants since the filing of this matter to make an end-run around this litigation, to force MCG out of its investment in Jenzabar involuntarily, and to deprive MCG of its special consent and voting rights.

Specifically, MCG seeks preliminary relief because Defendants purport to have initiated unilaterally a process whereby the value of MCG's Warrants will be determined and potentially

paid to MCG despite the fact that the issue of whether that process properly may be commenced is pending before the Court.

Defendants' actions with respect to MCG's Warrants follow on the heels of their purported consummation of the repurchase of MCG's Senior Preferred Stock—again unilaterally and after the filing of this lawsuit—even though the timeliness and sufficiency of the Repurchase Notice, and thus whether the repurchase can go forward, is also pending before the Court.

On April 21, 2009, MCG filed a Verified Complaint against Jenzabar, and Robert A. Maginn, Jr., Ling Chai, Jamison Barr, Joseph San Miguel, and Daniel Quinn Mills, (each of whom is an officer and/or director of Jenzabar) to halt an escalating campaign by the Defendants to enrich themselves and their friends at the expense of the Company and its shareholders. As part of that campaign, Defendants are attempting to deprive MCG of its special consent and voting rights, which have been critical to MCG's efforts to stop the Defendants' from taking excessive and unauthorized compensation from the Company.[1]

In Count Eleven of the Complaint, MCG seeks a declaratory judgment that Jenzabar's March 31, 2009 notice of intent to repurchase MCG's Senior Preferred Stock—the first step in Defendants' efforts to terminate MCG's special consent and voting rights—was not timely and was otherwise deficient. MCG further seeks a declaration that the repurchase cannot go forward, MCG's special consent and voting rights in connection with its Senior Preferred Stock are preserved, and MCG need not

[1] One such special consent and voting right is the requirement that MCG either consent in writing to, or vote in favor of, transactions with officers and directors of the Company. Defendants' violation of that right is central to the Complaint, but not to this Motion.

exercise its Warrant Put to prevent losing the special consent and voting rights in connection with its Warrants.

Following the filing of this action, and solely to preserve its special consent and voting rights should this Court later determine that Jenzabar's repurchase notice was valid, MCG served Jenzabar with a conditional notice of its intent to put its Warrants. The conditional notice was explicitly made contingent on any future finding by this Court that Jenzabar's repurchase notice was valid.

Ignoring both the pendency of this action and MCG's conditional put notice, Defendants have pushed forward, purporting to consummate unilaterally the repurchase of MCG's Senior Preferred Stock, and Defendants now have indicated to MCG that they have begun the process of determining the sum that Jenzabar shall pay to MCG for its Warrants—again without the participation of MCG—which is required under the Preferred Stock and Warrant Purchase Agreement ("PSWPA").

Because of Defendants' refusal to await the resolution of this matter by the Court, MCG now is forced to seek a preliminary injunction in order to preserve the status quo and to prevent Defendants from taking any further action to deprive MCG of its special consent and voting rights or otherwise interfere with MCG's interest in Jenzabar until such time as the Court rules.

Statement of Facts

On June 30, 2004, pursuant to the PSWPA (attached to Verified Complaint, Ex. 2), MCG invested $5,000,000 in Jenzabar in exchange for 5,000 shares of Senior Preferred Stock, 109,800 shares of Subordinated Preferred Stock, and Warrants to purchase 5,879,150 shares of Common Stock with contractual, anti-dilution provisions.

A. MCG's Special Consent and Voting Rights

Pursuant to Section 5.12 of the PSWPA, MCG is afforded special consent and voting rights. These special consent and voting rights bar Jenzabar from taking certain actions without MCG's written consent or affirmative vote, including, among other things, certain significant corporate transactions (such as mergers and sales, unless specified conditions are satisfied), certain changes to the size of the Board of Directors, and transactions, contracts, agreements, or arrangements with shareholders, officers, or directors.

MCG has similar rights pursuant to Article V, Section 1.A. of the Jenzabar Certificate of Incorporation (the "Charter") (attached to Verified Complaint, Ex. 1). MCG's special consent and voting rights under the Jenzabar Charter also bar Jenzabar from taking certain actions without MCG's written consent or affirmative vote, including, among other things, certain significant corporate transactions (such as mergers and sales, unless specified conditions are satisfied) certain changes to the size of the Board of Directors, and transactions, contracts, agreements, or arrangements with shareholders, officers, or directors. The special consent and voting rights under the PSWPA and the Jenzabar Charter are hereinafter referred to collectively as "special consent and voting rights."

B. Senior Preferred Repurchase Provisions

Section A.4 of Article V of Jenzabar's Charter permits Jenzabar under certain conditions to give notice to MCG that it intends to repurchase MCG's Senior Preferred Stock.

Section A.4(e) of Article V of the Jenzabar Charter requires that notice of a repurchase of MCG's Senior Preferred Stock be delivered at least 30 days prior to the

scheduled repurchase date. Under Section A.5 of Article V, notice is deemed provided and received: (i) five days after deposit with the United States Postal Service if sent by registered or certified mail, postage prepaid; (ii) one business day after deposit with a nationally recognized overnight courier service; or (iii) on the day it is sent by telecopy, with receipt confirmed by telephone.

Among other things, under Article V, Section A.4(e), a repurchase notice must provide the scheduled Repurchase Date and the applicable Repurchase Price (Article V, Section A.4(e)(i)(B)).

Under Section 5.11(g) of the PSWPA, if MCG's Senior Preferred Stock is repurchased prior to April 30, 2009 and MCG does not give notice that it seeks to exercise its right to put its Warrants, then MCG's special consent and voting rights under Section 5.12 of the PSWPA will lapse. On the other hand, if the repurchase of MCG's Senior Preferred Stock occurs on or after April 30, 2009, MCG's bargained-for special consent and voting rights survive regardless of whether MCG gives notice of its intent to put its Warrants.

C. Warrant Put Provisions

Pursuant to Section 5.11 of the PSWPA, MCG has the right to put its Warrants to purchase common stock in Jenzabar at any time after the occurrence of certain Warrant Put Exercise Events until June 30, 2016. One such Warrant Put Exercise event is the repurchase of MCG's Senior Preferred Stock.

During a 30-day period after the date of a Warrant Put Notice, Jenzabar and MCG must negotiate in good faith to determine the Company Fair Market Value, a component of the Put Exercise Price. The Put Exercise Price is the amount Jenzabar must pay to purchase MCG's Warrant Shares. PSWPA 1.1.

If the Company and MCG do not agree on the Company Fair Market Value during such 30-day period, MCG and the Company each must select one Independent Appraiser within 10 days after the expiration of such 30-day period. In such a case, the Company Fair Market Value will be the average of the Company Fair Market Values determined by the two Independent Appraisers (which determination must be made within 30 days after the date on which the Independent Appraisers are appointed), provided that if the higher determination of the two Independent Appraisers is greater than 110% of the lower determination, the two Independent Appraisers shall jointly select a third Independent Appraiser within 5 days after the last date on which either of such two Independent Appraisers shall have delivered its determination. The third Independent Appraiser shall deliver its report on its good faith determination of the Company Fair Market Value within 30 days after its appointment, and the Company Fair Market Value shall be equal to the average of the two closest determinations, provided that if the highest and lowest of such 3 determinations differ from the middle determination by an equal amount, the Company Fair Market Value shall equal such middle determination.

No later than 5 business days after the final determination of the Company Fair Market Value, the Company must deliver to MCG a balance sheet of the Company and its consolidated Subsidiaries as of the date of the Warrant Put Notice, together with a notice setting forth in reasonable detail the calculation of the Put Exercise Price as of such date.

Unless MCG objects to such calculation in writing within 20 days after receiving notice thereof, such calculation shall be final and binding on MCG and the Company.

If MCG objects during such 20 day period, the dispute shall be submitted for determination by a nationally recognized accounting firm selected by agreement of the Company and MCG or, if they cannot agree on such selection within 10 days of MCG's notification of such objection, a nationally recognized accounting firm selected by the Company's independent accounting firm.

The selected firm will be requested to make its determination within 30 days after its appointment.

D. Jenzabar's Purported Repurchase Notice

On March 31, 2009, Jenzabar sent an e-mail with an attachment to MCG titled "Notice to Repurchase" stating:

> In accordance with Article V, Section A.4 (e) of the Company's Fifth Amended and Restated Certificate of Incorporation (the "*Charter*"), please be notified that Jenzabar, Inc. ("*Jenzabar*" or the "*Company*") will repurchase the Senior Preferred Stock that MCG Capital Corporation ("*MCG*") holds in Jenzabar, Inc. on or before April 29, 2009. We would like to have such repurchase occur prior to such date.

(Attached to Verified Complaint, Ex. 4.)

A copy of the purported Repurchase Notice also was received by MCG by certified mail on April 3, 2009.

E. MCG's Response

On April 21, 2009, MCG filed the instant lawsuit, and thereafter delivered and served copies of the Complaint on Jenzabar and the other Defendants. Count Eleven of the Complaint seeks a declaratory judgment that (1) any purported attempt to repurchase MCG's Senior Preferred Stock on or before April 30, 2009 is invalid and (2) any claim by Jenzabar that MCG must elect to exercise its Warrant Put at this time in order to avoid losing its special consent and voting rights under Section 5.12 of the PSWPA is invalid.

Simultaneously with its delivery of the Complaint, MCG advised Jenzabar and the Defendants by letter that the purported notice of the repurchase of the Senior Preferred Stock was invalid and directed Defendants to the substance of the Complaint (attached to Affidavit of Steven F. Tunney filed herewith ("Tunney Aff."), Ex. 1). MCG's letter of April 21 further noted that,

> To the extent the purported notice of the Senior Preferred Stock Repurchase is found valid by a court of competent jurisdiction, then pursuant to Section 5.11 of the Preferred Stock and Warrant Purchase Agreement between Jenzabar and MCG dated June 30, 2004, MCG hereby delivers this Warrant Put Notice. Specifically, pursuant to Section 5.11, MCG elects to sell, and to cause Jenzabar to purchase, all of the Warrants and Warrant Shares received by MCG upon exercise of the Warrants held by MCG in exchange for the Put Exercise Price, as defined in the Preferred Stock and Warrant Purchase Agreement.

F. Jenzabar Persists In Its Purported Repurchase

On April 29, 2009, Jenzabar wrote to MCG claiming that Jenzabar already had carried out the repurchase of MCG's Senior Preferred Stock and had extinguished MCG's special consent and voting rights in connection with the Senior Preferred Stock, despite MCG's opposition to the notice and the pendency of this action (Tunney Aff., Ex. 2). Specifically, Jenzabar wrote,

> We are in receipt of your letter dated April 21, 2009, wherein you informed us that MCG … did not intend to participate in the closing on or before April 29, 2009 at the offices of Ropes & Gray LLP in connection with the repurchase by Jenzabar … of its Senior Preferred Stock held by MCG. … As is the Company's right, however, Jenzabar has proceeded this day … with the repurchase set forth in our notice dated March 31, 2009 pursuant to Article V, Section A.4(b) of the Company's Fifth Amended and Restated Certificate of Incorporation….
>
> Accordingly, Jenzabar has segregated, set aside, and deposited the Repurchase Price in an escrow account administered by J.P. Morgan as paying agent … and restricted on behalf of MCG….
>
> Pursuant to Article V, Section A.4(e)(iii) of the Charter, . . ., "all rights of the holder of [Senior Preferred Shares] as a stockholder of the Corporation by reason of ownership of such share will cease, except the right to receive the Repurchase Price of such share, without interest, upon presentation and surrender of the

> certificate representing such share, and such share will not from and after such Repurchase Date be deemed to be issued and outstanding." . . . The Senior Preferred Stock is hereby deemed repurchased and is no longer issued and outstanding pursuant to Article V, Section A.4(e)(iii) of the Charter and Section 160(d) of the General Corporation Law of the State of Delaware.
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> The repurchase constitutes a 'Warrant Put Exercise Event' as defined in Section 5.11(a)(i) of the Preferred Stock and Warrant Purchase Agreement…. The Company is hereby providing notice pursuant to Section 5.11(b) of this Warrant Put Exercise Event.

G. MCG Again Responds That Jenzabar's Notice and Repurchase Are Invalid

On April 30, 2009, MCG responded to Jenzabar's purported unilateral repurchase of its Senior Preferred Stock and its alleged extinguishment of MCG's special consent and voting rights and to Jenzabar's purported notice of a Warrant Put Exercise Event, repeating that the notice of the repurchase was ineffective, and the issue was properly before the Court:

> I am in receipt of your letter dated April 29, 2009, wherein Jenzabar … purports to have repurchased the Senior Preferred Stock of MCG … pursuant to a purported (but ineffective) "notice" dated March 31, 2009. In response, I refer you to my letter dated April 21, 2009, and to the Complaint filed by MCG in the Court of Chancery for the State of Delaware on April 21, 2009, each of which sets out the various defects in Jenzabar's prior "notice" and why Jenzabar's assertion that it had the "right" to close is without any basis. . . .
>
> MCG continues to reserve all of its rights with respect to its Warrants, and hereby reiterates and incorporates herein the position previously set forth in the Warrant Put Notice dated April 21, 2009, pursuant to Section 5.11 of the Preferred Stock and Warrant Purchase Agreement ("PSWPA").
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> (Tunney Aff., Ex. 3.)

H. MCG Asked Jenzabar To Give MCG Immediate Notice If Jenzabar Intended To Interfere With MCG's Special Consent And Voting Rights

In its April 30, 2009 letter MCG also indicated it expected that Defendants would not take any further actions premised on the purported repurchase of the Senior Preferred Stock. MCG explicitly asked Jenzabar to provide immediate notice if Jenzabar sought to

contest MCG's special consent and voting rights so that MCG might seek injunctive relief in this Court:

> Finally, MCG expects that Jenzabar will not in any way interfere with MCG's special consent and voting rights, which continue to be guaranteed by Section 5.12 of the PSWPA and Article V, Section 1.A of Jenzabar's Certificate. If MCG is incorrect in this regard, please notify us immediately so that we may take appropriate action before the Chancery Court. To the extent the Chancery Court rules in favor of Jenzabar with respect to the issue of Jenzabar's purported Notice of March 31, 2009, please note that MCG preserved its special consent and voting rights by virtue of its Warrant Put Notice of April 21, 2009.

Jenzabar never advised MCG that its expectation with respect to its continuing special consent and voting rights was incorrect.

I. Jenzabar's Unilateral Efforts To Terminate MCG's Special Consent And Voting Rights Continues

In a June 5, 2009 letter, Jenzabar asserted that MCG and Jenzabar already had negotiated in good faith to determine the Company Fair Market Value, as required by Section 1.1 of the PSWPA, the first step in the determination of the Put Exercise Price (Tunney Aff., Ex. 4). In fact, there have been no such negotiations. (Tunney Aff., ¶ 7).

In a separate June 5, 2009 letter, Jenzabar advised MCG that Jenzabar unilaterally had selected KPMG, LLP ("KPMG") to act as an Independent Appraiser to make and provide written notice of its determination of the Company Fair Market Value within 30 days from the date of KPMG's appointment, which date Jenzabar did not specify (Tunney Aff., Ex. 5).

J. Litigation Status

On May 15, 2009, MCG served discovery requests on Defendants. On May 18, 2009, Defendants filed a two-page motion to dismiss. Defendants subsequently requested that MCG agree to an extended briefing schedule. At no time did Jenzabar indicate that it intended to disregard the pendency of this action and proceed with its

efforts to destroy MCG's special consent and voting rights while motion to dismiss papers were prepared (Tunney Aff., ¶ 8). The parties reached agreement and a proposed order regarding briefing was filed on May 18, 2009 and entered by the Court on June 1, 2009. Shortly after the Court extended the briefing schedule, on June 5, 2009, Defendants filed a motion to stay discovery pending resolution of the motions to dismiss.

In short, Defendants have sought consistently to slow the pace of this matter and to avoid discovery while, at the same time, seeking to alter MCG's special consent and voting rights prior to any ruling on MCG's claims.

Argument

I. Standard for Preliminary Injunctive Relief

The standards guiding a court of equity on a motion for a preliminary injunction are well-established: moving parties must prove a likelihood of irreparable harm in the absence of an injunction; the likelihood of successes on the merits of the underlying claim; a balance of the harms plaintiff would suffer in the absence of an injunction against the harms the defendant would suffer by the issuance of an injunction; and the public interest. *See, e.g., Wayne County Employees' Retirement Sys. v. Corti*, 954 A.2d 319, 329 (Del. Ch. 2008).

A. MCG Has a Likelihood of Success

Based on the straightforward, plain language of Jenzabar's charter, MCG has a likelihood of success on its claim that the Repurchase Notice was ineffective.

As noted above, Section A.4(e) of Article V of the Jenzabar Charter requires that notice be delivered at least **30 days prior to** the scheduled repurchase date. Under Section A.5 of Article V, notice is deemed provided and received: (i) five days after

deposit with the United States Postal Service if sent by registered or certified mail, postage prepaid; (ii) one business day after deposit with a nationally recognized overnight courier service; or (iii) on the day it is sent by telecopy, with receipt confirmed by telephone.

Even assuming that Jenzabar's Repurchase Notice were deemed to have been provided and received on March 31, 2009—which it was not, as the Repurchase Notice was not received pursuant to any of the methods authorized under Article V, Section A.5 on March 31, 2009—Jenzabar still did not comply with Section A.4(e) for several reasons.

First, because March 31, 2009 is less than 30 days **prior to** April 29, 2009, Jenzabar did not give MCG the required notice of its intent to repurchase the Senior Preferred Stock as clearly required under Article V, Section A.4(e). *See, e.g., McKesson Corp. v. Derdiger*, 793 A.2d 385, 389 (Del. Ch. 2002) (determining how to calculate 60 days before a meeting for purposes of fixing a record date).[1]

Second, the Repurchase Notice did not contain the information required under Article V, Section A.4(e), such as the scheduled Repurchase Date and the applicable Repurchase Price (Article V, Section A.4(e)(i)(B)). Instead, the Repurchase Notice made clear that the Repurchase Date, indeed the repurchase itself, was contingent on the approval of Jenzabar's Board and the consent of the Company's lender, Wells Fargo Foothill, Inc. And rather than provide a Repurchase Price, which is clearly a material term of the repurchase, the Repurchase Notice simply set out a range of prices that may

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[1] Clear and unambiguous provisions of corporate charters must be enforced. *See, e.g., Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006); *Centaur Partners, Inc. v. Nat'l Intergroup, Inc.*, Civ. A. No. 11354, 1990 WL 28018, at * 1 (Del. Ch. Mar. 7, 1990).

be offered, to be adjusted once the Repurchase Date was set. It was not until Jenzabar's correspondence of April 29, 2009 that any of these essential terms were conveyed to MCG.

In the absence of 30 days' notice prior to the repurchase of the Senior Preferred Stock, MCG's special consent and voting rights under the Charter do not lapse because MCG remains a holder of Senior Preferred Stock.

B. MCG's Likelihood of Irreparable Harm

If Jenzabar continues to behave as if it has unilaterally repurchased the Senior Preferred Stock and persists in its similarly unilateral effort to determine the Put Exercise Price, MCG will suffer irreparable harm. First, MCG's special consent and voting rights under the Charter will be wiped out and Defendants will be free to increase or decrease the number of Jenzabar shares outstanding, redeem or purchase shares held by other investors, merge, reorganize, or sell the Company, change the board of directors, and to continue to line the pockets of Defendants Maginn and Chai, among other things, all to the detriment of MCG and other Jenzabar shareholders. *See Telcom-SNI Investors, L.L.C. vs. Sorrento Networks, Inc.*, No 19038-NC, 2001 WL 1117505, at *4-9 (Del. Ch. Sept. 7, 2001) (granting preliminary injunction when movant invoked protective rights in Certificate of Incorporation to prevent the defendant from incurring additional debt or issuing additional shares of preferred stock). Many such actions would be difficult, if not impossible to reverse, if this Court ultimately concludes that the Repurchase Notice was ineffective, MCG's Senior Preferred Stock has not been repurchased, and MCG's Warrants have not been put.

Second, Jenzabar's recent maneuvers are an attempt to force MCG into prematurely cashing out its investment in Jenzabar. That choice—and its timing—are not

for Jenzabar to make under the operative agreements. The right to put the Warrants, and to determine when to do so (after one of the Warrant Put Exercise Events has occurred), belongs to MCG. In essence, Jenzabar has tried to turn MCG's Warrant Put into Jenzabar's Warrant Call, contrary to the provisions of the PSWPA. Jenzabar's actions and its refusal to await the results of the judicial process are an attempt to take away MCG's right to make the decision about whether to remain an investor in Jenzabar, with all of the attendant benefits and responsibilities.

Third, to the extent that Jenzabar is permitted to continue with the Warrant Put process based solely on a Company Fair Market Value assessment put forth by KPMG, MCG would be deprived of the right to select an Independent Appraiser and thereby be an active participant in the process by which its Warrants are valued. For good and obvious reasons, the PSWPA contemplates no such process.

C. The Balance Of Harms Also Favors MCG

The balance of harms also favors MCG. As against the harms outlined above, Jenzabar faces no prejudice from any delay if an injunction is granted. Jenzabar asserts that it has already set aside the repurchase price and loses nothing if it can consummate the repurchase of the Senior Preferred Stock only after a ruling by the Court. Moreover, since the Put Exercise Price is tied to the Company Fair Market Value as of the date of the Warrant Put Notice, if Jenzabar is correct that the Notice already has been given, the price will not change as a result of any delay.

The relief MCG seeks here also is consistent with the public interest, which is served when contracting partners are prevented from benefitting from breaching their agreements. Defendants' goals are obvious: to silence MCG's criticisms of

management's self-aggrandizement while driving it out of the Company on one-sided terms in violation of the PSWPA and the Charter.

Similarly, the public interest is served when litigants respect the judicial process and are prevented from seeking unfair advantage while the courts work to resolve disputes, particularly where, as here, the party seeking unfair advantage has sought an extended briefing schedule and a stay of discovery.

Conclusion

For the foregoing reasons, MCG respectfully urges this Court to grant its motion for a preliminary injunction, and to enjoin Jenzabar from engaging in the process described in Section 1.1 of the PSWSPA relating to the determination of Company Fair Market Value and from taking any other actions that would have any effect on MCG's special consent and voting rights as holder of Senior Preferred Stock and/or Warrants.

Respectfully submitted,

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