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, and JENZABAR, INC.,	)	C.A. No. 4521-CC
Defendants.	)	
and	)	
JENZABAR, INC.,	)	
Nominal Defendant.	)	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS JENZABAR, INC., JAMISON BARR, JOSEPH SAN MIGUEL, AND DANIEL QUINN MILLS

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INTRODUCTION

In their Opening Brief, defendants Jenzabar, Inc. ("Jenzabar"), Jamison Barr, Joseph San Miguel and Daniel Quinn Mills (San Miguel and Mills are hereinafter referred to as the "Independent Directors") showed that MCG's claims against them were hopelessly deficient, as a matter of law, in virtually every respect.[1] In the face of this showing, MCG could have amended its Complaint to add allegations that it had failed to plead in the first instance. It could have pared down its Complaint, omitting the obviously defective claims against individuals and focusing on what is really at issue in this case: MCG's technical challenge to Jenzabar's notice of repurchase of the securities that MCG holds. But an efficient resolution of that issue has never been part of MCG's strategy; MCG has always preferred to bluster, threaten, and seek leverage to force Jenzabar into repurchasing MCG's holdings at a premium.

It is no surprise, then, that MCG elected not to amend and pare down its Complaint. It instead filed an Opposition that tacitly concedes many of the defendants' points, but then tries, surreptitiously and impermissibly, to rehabilitate its Complaint by alleging a multitude of new "facts." For instance, MCG makes unwarranted suppositions about the Independent Directors' financial resources, relying on un-alleged and irrelevant information about average salaries of professors, in an improper effort to make up for the Complaint's failure even to approach the particularized factual showing necessary to excuse demand. Confronted with an irresolvable conflict between direct claims against Jenzabar and its derivative claims ***on behalf of*** Jenzabar, MCG declares that its fiduciary duty claims are both direct and derivative at the same time, an irrelevant point that further ignores the well-settled law precluding fiduciary duty claims with respect to matters governed by a preferred stock contract. In response to defendants' argument

[1] Count Eleven, to the extent it is alleged with respect to Jenzabar and not the individual defendants, is not the subject of a motion to dismiss. Jenzabar will, at the appropriate time, offer facts to defeat it.

that the operative documents do not give MCG veto power over Jenzabar's executive compensation, MCG ignores the critical language giving MCG consent rights only when Jenzabar "***enters into***" a transaction with an Affiliate and instead combats a straw man version of defendants' argument. All but admitting that it has no basis for its claims against Barr and the Independent Directors, MCG asserts, without any reference to any facts concerning these three individuals, that they are somehow "necessary parties." MCG even admits that it did not mean to assert the theory that it actually pleaded in Counts Three and Four, and asks this Court to re-write those counts for it.

MCG's Opposition, despite its improper factual assertions, cannot save the Complaint, which is defective as a matter of law. Defendants' motions to dismiss should be granted.[2]

[2] Defendants Barr, San Miguel, Mills, and Jenzabar, Inc. join in, and expressly incorporate herein by reference Defendants Robert A. Maginn, Jr.'s and Ling Chai's Reply Brief In Support Of Their Motion to Dismiss.

ARGUMENT

I. MCG HAS IMPROPERLY ATTEMPTED TO SUPPLEMENT THE INSUFFICIENT ALLEGATIONS OF ITS COMPLAINT BY ALLEGING AND RELYING ON PREVIOUSLY UNALLEGED "FACTS."

MCG's Opposition is replete with factual allegations that never appear in its Complaint, and, worse, MCG attempts to rely on these unpled "facts" as a basis to avoid dismissal.[3] MCG's furtive supplementation of its Complaint is procedurally proscribed, of course, but it is also telling: it shows that MCG itself recognizes that the allegations in its Complaint are inadequate.

A. Rule 15(aaa) Gave MCG The Option To Amend Its Complaint Or Answer The Motion.

Court of Chancery "Rule 15(aaa) was written [to require] plaintiffs, when confronted with a motion to dismiss pursuant to any of Ch. Ct. R. 12(b)(6), (c) or 23.1, to elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion was due." *Braddock v. Zimmerman,* 906 A.2d 776, 783 (Del. 2006); *Stern v. Lf Capital Pr's, LLC,* 820 A.2d 1143, 1146 (Del. Ch. 2003). MCG has chosen to "answer the motion," and is therefore precluded from any amendment to save its Complaint.

[3]MCG complains in its Opposition that defendants supposedly introduced facts in their Opening Brief. While defendants did provide the Court with the relevant Employment Agreements (which MCG inexplicably omitted from the copious attachments to the Complaint despite the Complaint's repeated reference to the documents), they otherwise accepted MCG's self-serving version of events as true for the purposes of the Motion. Defendants did also provide some general information about the parties' relationship and this dispute in the background section of their brief for context, but never relied on unpled facts as a ground for dismissal in their arguments, unlike MCG.

B. MCG Chose Not To Amend Its Complaint; It Cannot Avoid Dismissal By Relying On Previously Unalleged "Facts."

Because Rule 15(aaa) precludes MCG from using its Opposition to augment its Complaint with new facts, the Court cannot consider these additional facts and extraneous information on a motion to dismiss. As this Court noted in *Orman v. Cullman*,

> at this stage of litigation, the Court is only permitted to consider the well-pleaded facts contained in the complaint and any documents incorporated by reference into that complaint. Should a plaintiff become aware that the allegations set forth in his complaint are inadequate to support his claim, he should request leave of the Court to amend his complaint rather than attempt to expand its scope through briefing. *See* Court of Chancery Rule 15(aaa). ***Briefs 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.***

794 A.2d 5, 28 (Del. Ch. 2002) (emphasis added).

MCG's Opposition goes far beyond the allegations of its Complaint, no doubt because MCG realized that they were indeed insufficient. It has, for instance, added the following "facts" to overcome the complete absence of any allegations in the Complaint that could excuse demand:

- an allegation that Maginn and Chai hold voting control over Jenzabar. Plaintiff's Opposition to Defendants' Motion to Dismiss (hereinafter "Opp."), p. 6.
- allegations that Maginn holds a proxy giving him voting control over Jenzabar stock held by Pegasus. Opp., pp. 6-7, n.3.[4]
- citations to a news article about nationwide average salaries for business school professors. Opp., p. 6, n.2.
- an allegation that Maginn and Chai have been invited to speak to Mills' class at Harvard Business School. Opp., p. 39, n.33.

[4] With respect to the proxy, MCG acknowledges that it is adding new facts, hoping to be excused by the case law that allows a defendant to submit a document that is repeatedly referenced by and thus incorporated into a complaint. *See* Opp., p. 5 n.3. This rule, based on simple fairness to the defendant, cannot possibly justify MCG's submission of a document that it could have referenced in or attached to its Complaint. MCG cites no case law that approves such gamesmanship, and there is none.

- allegations and inferences based upon Jenzabar's successful opposition to MCG's attempt to obtain an injunction -- well after the complaint was filed -- that would severely hamper the ability of Jenzabar's board to conduct the company's business. Opp., p. 38.

These allegations and inferences cannot be considered, but they are also untrue or irrelevant, or both. For example, generalized information about average professor salaries says nothing at all about the actual financial resources of the Independent Directors.

MCG must similarly have realized that its Complaint is barren of any allegations that the compensation paid to Maginn and Chai is excessive. Its Opposition attempts to cure this omission by adding the following:

- an allegation that Maginn and Chai have attempted to extort more than $8.1 million. Opp., p. 8. MCG cites to paragraph 25 of the Complaint, which includes no such information.

- an allegation that Maginn's and Chai's compensation is "well in excess of their peers at public companies." Opp., p. 8, n.5. Knowing that it has made no allegations that touch on this issue, MCG does not even bother to cite to the Complaint.

- a discussion of an article in the Boston Business Journal regarding CEO compensation in the Boston area. Opp., p. 8, n.5.[5]

- references to proposed SEC regulations regarding executive compensation. Opp., p. 8, n.6; p. 11, n.9.

- an allegation that Jenzabar's compensation committee did not seek the advice of independent counsel or an independent compensation consultant. Opp., p. 11. MCG does not include any cite to the Complaint.[6]

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[5] Even MCG's discussion of this article is misleading. The article states that in the Boston area, average CEO salaries increased by 9.44%, to $606,000, more than 33% higher than Maginn's. Moreover, the article states that average total compensation, including bonuses, was $2.6 million -- more than twice Maginn's compensation.

[6] This allegation is particularly disingenuous because MCG is using the procedural limitations of a motion to dismiss to present a false picture to the Court. MCG knows full well that the Compensation Committee -- which included Malekian -- obtained advice from a former justice of the Delaware Supreme Court, as well as the Company's regular outside counsel (as the Complaint concedes), and also considered information from leading compensation consultants.

This Court is not permitted even to consider any of these belated allegations, and, moreover, MCG has foreclosed any opportunity to amend its Complaint. *See Orman*, 794 A.2d at 28. Having chosen to stand on its original Complaint, MCG may not now attempt to save itself with "facts" it never alleged in the first place.

II. MCG'S DERIVATIVE CLAIMS MUST BE DISMISSED BECAUSE MCG CANNOT JUSTIFY ITS FAILURE TO MAKE A DEMAND.

A. MCG's Fiduciary Duty Claims, If Any, Are Derivative.

In an effort to avoid dismissal of its derivative claims under Rule 23.1, MCG insists that its fiduciary duty claims are simultaneously both direct and derivative. *See* Opp., p. 61. MCG cites no authority and provides no analysis, and MCG's fiduciary duty claims -- to the extent such claims can be stated at all -- are clearly derivative under *Tooley*.

At the very outset of its Opposition, MCG tells this Court that "this is a case about bargained-for special voting and repurchase notice rights." Opp., p. 1. But MCG then ignores the well-established principle that these "bargained for" preferred stock rights give rise only to direct contract claims, and cannot support any fiduciary duty claims, whether direct or derivative, as discussed in Section IV.A below. On the other hand, to the extent that MCG seeks relief for harm allegedly suffered by Jenzabar, whether for allegedly excessive compensation or for allegedly poor administrative practices, those claims are plainly derivative in nature. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). Accordingly, all of Count Five, Counts Six through Eight, and Count Twelve,[7] are derivative.

B. MCG Failed To Make The Required Pre-Suit Demand.

Because MCG did not make a pre-suit demand, "the complaint must plead with particularity facts showing that a demand on the board would have been futile." *In re Citigroup*

[7] MCG apparently does not dispute that Counts Six through Eight and Count Twelve are derivative.

Inc. S'holder Deriv. Litig., 964 A.2d 106, 120 (Del. Ch. 2009) (citation omitted). Demand is excused only where a complaint alleges ***particularized facts*** creating a reason to doubt that "(1) [a majority of] the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). The sparse allegations of the Complaint do not satisfy either prong of *Aronson*, and the facts and theories newly introduced in MCG's Opposition fare no better.[8]

1. MCG Has Not Alleged With Particularity That The Independent Directors Are Beholden To Maginn or Chai.

MCG rationalizes its failure to make demand by claiming that the Independent Directors are controlled by Maginn and Chai, who are allegedly interested in the challenged transactions.[9] Opp., p. 33. MCG's Complaint, however, alleged no facts to show that the Independent Directors' discretion was "sterilized" by the possibility of gaining or the fear of losing a material benefit from Maginn or Chai. *See Kahn v. Portnoy*, 2008 WL 5197164, at *10 (Del. Ch. Dec. 11, 2008). Even with the introduction of countless facts in its Opposition that were not alleged in the Complaint, MCG does not demonstrate that either San Miguel or Mills are beholden to or are in any way controlled by Maginn and Chai.[10]

[8] Rule 23.1 requires demand futility to be alleged with particularity in the complaint, not in a party's subsequent papers. Ct. Ch. R. 23.1.

[9] MCG alleges that Maginn and Chai are interested for purposes of the claims concerning their compensation, but it does not allege that any of the directors are interested with respect to the so-called "Board Management Fiduciary Claims" or "Repurchase Notice Claim" in Count Five. Thus, with respect to these claims, every director should be presumed to be capable of impartially considering a demand, and Count Five must be dismissed. *See, e.g., CalPERS v. Coulter*, 2002 WL 31888343 (Del. Ch. Dec. 18, 2002) (determining demand futility on a claim-by-claim basis).

[10] MCG seems to contend that the involvement of Peter Malekian, MCG's representative on the Board, could somehow taint the Board's independent assessment of whether to pursue MCG's claims. MCG's Complaint refers to every director *but* Malekian to excuse its failure to make a demand, however, *see* Compl., ¶¶ 80-87, and it makes no sense for MCG to claim that demand would have been futile precisely because its appointed director would have sided with it.

The only facts MCG ***alleged*** to support its claim that the Independent Directors are controlled are that they are former professors of Maginn at Harvard Business School (Compl., ¶¶ 33, 87) and that they are each compensated $100,000 per year for their service as directors of Jenzabar. Compl., ¶ 35. For the reasons discussed in the defendants' Opening Brief ("OB") at pp. 21-25, those allegations fail to raise even an inference that San Miguel and Mills are controlled by Maginn and Chai.

MCG's Opposition now embellishes these facts, but still MCG cannot satisfy the first prong of *Aronson*. MCG refers to the most general of data about average professor compensation, Opp., p. 6 n.2, but it does not allege with particularity any facts from which the Court can conclude that $100,000 per year is subjectively "significant and material" to the Independent Directors, two tenured professors at top-tier business schools. The Complaint conspicuously says nothing, for instance, about the Independent Directors' personal and family wealth, or their other income from their own businesses, consulting engagements, and book publishing deals -- all sources of income, beyond an academic salary, that can be substantial for many professors, especially those at the nation's top business schools.[11]

MCG's allegation that the Independent Directors know Maginn from his student days at Harvard Business School does not move the needle even slightly. This Court has firmly rejected the notion that these professional or personal ties are sufficient to excuse demand. *See, e.g.*, *Beam v. Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004) ("Mere allegations that they move in the same business and social circles . . . is not enough to negate independence for demand excusal purposes."); *Orman*, 794 A.2d at 27; *Litt v. Wycoff*, 2003 WL 1794724, at *4 (Del. Ch. Mar. 28,

[11] Even if the fees could be deemed material to the Independent Directors, that would not make them beholden to Maginn and Chai. The Stockholders' Agreement specifies very narrow and limited circumstances in which the Independent Directors can be removed, and they cannot be removed at the unilateral discretion of Maginn and Chai. Compl. Ex. 3, §§ 4.2(a)(iii), 4.2(b).

2003). Moreover, as MCG admits, Opp., p. 41, at the time it voted for San Miguel and Mills as Independent Directors, MCG was well aware of their prior relationships with Maginn and that they would be paid fees for serving as directors. MCG nevertheless then agreed that San Miguel and Mills were independent within the meaning of the NASD regulations and the Stockholders' Agreement, and nothing has changed since.

Having nothing else to rely upon, MCG argues that San Miguel and Mills ***must*** be controlled by Maginn and Chai simply because they approved an increase in compensation and because they successfully opposed MCG's efforts to have this Court enter a preliminary injunction against the valuation process specified by the PSWPA. Opp., p. 38.[12] This latter point is curious: MCG never explains how ***post-complaint*** conduct -- opposing an unwarranted request for an overbroad injunction -- could have informed its decision not to make ***pre-suit*** demand. The first point ignores the familiar principle that "the primary basis upon which a director's independence must be measured is whether the director's decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences." *Beam*, 845 A.2d at 1049 (citation omitted). MCG's disagreement with the Independent Directors' votes, however, is no basis upon which the Court can infer that they are beholden. *Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (quoting *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 364 (Del.Ch. 1998)) ("[W]here, as here, there is no reasonable doubt as to the disinterest of or absence of fraud by the Board, mere disagreement cannot serve as grounds for imposing liability based on alleged breaches of fiduciary duty and waste.")

[12] MCG also recites, for the first time, other innocuous conduct as "evidence" that the Independent Directors are beholden, such as allowing management to communicate their compensation requests to the Committee, Opp., p. 35, or obtaining advice from the Company's regular outside counsel at Ropes & Gray LLP whose independence MCG has inexplicably questioned. Opp., p. 36. None of these newly alleged "facts" supports MCG's unreasonable perception that the Independent Directors are controlled.

2. MCG's Argument That The Independent Directors Face A <u>Substantial Likelihood Of Liability Is Hopelessly Muddled.</u>

With respect to the second prong of *Aronson*, MCG argues that demand is excused because San Miguel and Mills face a substantial likelihood of liability in connection with the compensation decisions. *See* Compl., ¶ 86; Opp., pp. 33, 42-45. These arguments are meritless.

First, MCG cannot demonstrate demand futility by invoking *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994), a freeze-out merger case. The Complaint does not properly allege any fiduciary duty claims concerning self-dealing by a controlling stockholder. Indeed, the Complaint is markedly devoid of any allegation that Maginn or Chai are controlling stockholders of Jenzabar. Other than alleging the number of shares held by Maginn and Chai, Compl., ¶ 30, the Complaint alleges no facts that demonstrate actual control over Jenzabar. MCG cannot supplement its Complaint and establish a controlling stockholder claim by citing to a proxy held by Maginn that MCG never referred to in its Complaint. *See Orman*, 794 A.2d at 28 ("any attempt contained within [a plaintiff's brief] to plead new facts or expand those contained in the complaint will not be considered").

Second, MCG's argument that merely alleging the existence of a controlling stockholder excuses demand improperly conflates the notice pleading standard of Rule 8(a) and the more stringent pleading standard of Rule 23.1, and the standards for evaluating a motion to dismiss pursuant to each. Such confusion among plaintiffs is not infrequent, *see In re Tyson Foods, Inc.*, 919 A.2d 563, 582 (Del. Ch. 2007), but it is not excusable. The mere conclusory allegation of a breach of the duty of loyalty by a majority or controlling stockholder, without more, may be sufficient to permit a claim to survive a Rule 12(b)(6) motion to dismiss going to the merits, but such an allegation is patently insufficient to meet the heightened pleading standards necessary to establish a lack of independence for purposes of Rule 23.1. Neither the presence of a majority or controlling stockholder nor the potential application of entire fairness review (neither of which are adequately pled in any event) affects the ability of an independent and disinterested majority of directors to impartially consider a demand. Indeed, MCG's argument -- that demand is excused whenever the allegations of a complaint include allegations of an interested transaction involving a controlling stockholder -- would eviscerate the stringent pleading requirements of Rule 23.1 and strip an independent and disinterested majority of the board of directors of their power to oversee claims belonging to the Company.[13]

Moreover, MCG's argument is fundamentally inconsistent with long-standing Delaware Supreme Court precedent. As the Delaware Supreme Court stated in *Aronson* itself:

> [I]n the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.

Aronson, 473 A.2d at 815. *See also Beam*, 845 A.2d at 1054 ("A stockholder's control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder.") (footnote omitted).

The real question under the second prong is whether the independent and disinterested directors are unable to impartially consider a demand because those directors face a substantial

[13] The principle underlying *Kahn* is the protection of minority stockholders from the possibility of coercion by a controlling stockholder where minority stockholders are required to vote on a merger in which the controlling stockholder has an interest. *See Kahn*, 638 A.2d at 1116-17. *Kahn* did not broadly hold, as MCG suggests, Opp., pp. 33-34, that independent and disinterested directors are incapable of freely exercising their own business judgment in the mere presence of a controlling stockholder. Indeed, *Kahn* was a direct action in which Rule 23.1 issues were never implicated.

likelihood of liability in connection with the challenged transaction. This Court has recognized as much:

> With respect to analysis under *Aronson*'s second prong, . . . courts are instructed to ask whether the "challenged transaction was otherwise the product of a valid exercise of business judgment" -- *i.e.*, the pertinent question, in this context, is whether an underlying breach has occurred and not whether a substantial threat of liability exists, regardless of breach. ***The crucial factor, however, would seem to be questions of the potential for personal liability which affect capacity to consider demand***.

Khanna v. McMinn, 2006 WL 1388744, at *25 (Del. Ch. May 9, 2006) (emphasis added). Thus, whether or not a controlling stockholder may face the burden of demonstrating the entire fairness of a transaction has no bearing on the ability of the disinterested and independent directors to consider demand, and therefore has no bearing on the analysis under Rule 23.1.

As this Court has recognized, "[i]t is a 'rare case' in which a director or member's actions are sufficiently egregious that a 'substantial likelihood' of personal liability exists." *Spellman v. Katz*, 2009 WL 418302, at *6 (Del. Ch. Feb. 6, 2009) (citation omitted).[14] The conclusory allegations asserted against the Independent Directors do not meet this stringent standard. Indeed, they do not raise even a mere threat of liability. As a threshold matter, the Independent Directors face no threat of liability at all because MCG's fiduciary duty claims against the directors fail as a matter of law. *See* Section V, *infra*.

But even if MCG could bring a claim for breach of fiduciary duty, the Independent Directors would face no threat of liability whatsoever. To the extent MCG attempts to allege a breach of the duty of care, Compl., ¶ 51, those allegations are conclusory at best and, in any event, cannot result in personal liability because Jenzabar's charter contains an exculpatory

[14] *See also Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 553205, at *8 (Del. Ch. Feb. 29, 2008) ("As Chancellor Chandler observed in *info USA*, [a] plaintiff who seeks to excuse demand through the second prong of *Aronson* . . . faces a task closely akin to proving that the underlying transaction *could not have been* a good faith exercise of business judgment.") (internal quotation marks omitted) (emphasis in original).

provision pursuant to 8 *Del. C.* § 102(b)(7).[15] Nor do the Independent Directors face any threat of liability for a breach of the duty of loyalty, because MCG does not allege that the Independent Directors have a personal financial interest in the challenged transactions and it offers no more than conclusory allegations that they acted in bad faith. *See, e.g.*, Compl., ¶ 86. As the Delaware Supreme Court has confirmed, Delaware courts may not impose liability for bad faith conduct without "a showing that the directors knew that they were not discharging their fiduciary obligations." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citation omitted).

Putting aside MCG's rhetorical flourishes, MCG does not allege a single fact that could support the inference that the Independent Directors knowingly failed to discharge their fiduciary obligations. At most, MCG alleges that the Independent Directors were aware of MCG's claim that it had a contractual right, under the PSWPA and the Charter, to withhold consent in connection with the challenged compensation changes. The Complaint also alleges, however, that the Independent Directors consulted with both in-house and outside counsel concerning MCG's claims prior to approving the compensation changes. Compl., ¶ 46. The only reasonable inference that the Court can draw from these facts is that the Independent Directors knew there was a dispute as to the meaning of the relevant contracts. A director does not face a substantial likelihood of being found liable simply for taking action, after seeking advice of counsel, in the face of contractual uncertainty, rather than allowing a preferred investor to hold the company hostage to advance its own interests. *See* 8 *Del. C.* § 141(e) (directors shall be fully protected in relying in good faith upon professionals including attorneys).

[15] The Court may take judicial notice of a certificate of incorporation in deciding a motion to dismiss. *McPadden v. Sidhu*, 964 A.2d 1262, 1273 n.28 (Del. Ch. 2008).

III. BECAUSE ITS INTERESTS ARE DIRECTLY ADVERSE TO JENZABAR'S WITH RESPECT TO THIS LITIGATION, MCG IS AN INADEQUATE REPRESENTATIVE AND ITS DERIVATIVE CLAIMS MUST BE DISMISSED.

In their Opening Brief, the defendants showed that MCG cannot serve as an adequate representative plaintiff for the supposedly derivative claims because MCG is simultaneously pursuing interests that are directly adverse to Jenzabar's in this matter. OB, pp. 14-16.

MCG's Opposition hardly bothers to address this threshold issue; it merely points out that Delaware law allows plaintiffs to simultaneously maintain direct and derivative claims. *See* Opp., p. 46. This is no answer. None of the cases that MCG cites for this proposition involved direct claims ***against*** the corporation on whose behalf the derivative claims were being brought; instead, the direct claims in those cases were against the corporation's directors. *See* Opp., p. 46 (citing *Gentile v. Rossette*, 906 A.2d 91, 99-100 (Del. 2006));[16] *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996) (direct claims were against board for allegedly abdicating its authority to the company's CEO); *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006) (direct claims brought against directors for having breached oral contract not to pay themselves a salary).

IV. MCG'S CREATIVE RE-INTERPRETATION OF THE PSWPA AND CHARTER CANNOT SURVIVE THE MOTION TO DISMISS.

MCG's direct claims, which largely rest upon its interpretation of the PSWPA and Charter, fare no better than its derivative claims. The defendants' Opening Brief showed that those documents unambiguously ***do not*** give MCG veto power over compensation decisions, and particularly with regard to decisions committed to the discretion of the board under the

[16] The dual claim discussed in *Gentile* involved an unusual situation in which a controlling shareholder forced a company to issue new shares to it in return for assets of a lesser value, and thereby increased its holdings to the detriment of the minority shareholders while taking value out of the company. *See id.* MCG's conclusory assertion that such claims are theoretically possible hardly explains why it should be permitted to do so here.

Employment Agreements that MCG had expressly approved. To avoid dismissal, MCG urges the Court to fill in terms that the parties could easily have included but did not.

A. The Provisions In The PSWPA And Charter Granting Rights To MCG Must Be Construed Narrowly As A Matter Of Law.

Rights of preferred stock are contractual in nature, and thus "the construction of preferred stock provisions are matters of contract interpretation for the courts." *Matulich v. Aegis Commc'ns Group, Inc.*, 942 A.2d 596, 600 (Del. 2008) (citation omitted). Because the interpretation of written contracts is a question of law, "a motion to dismiss is a proper framework for determining the meaning of contract language." *Allied Capital v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).[17] "[I]n most instances this contractual level of analysis will exhaust the judicial review of corporate action challenged as a wrong to preferred stock." *Harbinger Capital Pr's Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 906 A.2d 218, 224 (Del. Ch. 2006) (quotation omitted).

Settled law requires this Court to narrowly construe MCG's rights as a preferred stockholder. "The general rule is that preferred stock enjoys only those preferences which are ***specifically*** defined. Before such an exceptional right is recognized it ought to appear ***clearly*** that the parties have intended to create it." *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) (internal quotations and citations omitted) (emphasis added). "[A]ny rights, preferences and limitations of preferred stock . . . must be expressly and clearly stated . . . [and] will not be

[17] The relevant provisions in the PSWPA and Charter are not ambiguous simply because MCG has come up with a contrary interpretation. "Contract language is not rendered ambiguous simply because the parties in litigation differ concerning its meaning." *Matulich*, 942 A.2d at 596 (quotation omitted). "Only where the contract's language is susceptible of more than one *reasonable* interpretation may a court look to parol evidence; otherwise, only the language of the contract itself is considered in determining the intentions of the parties" and "binding effect should be given to its evident meaning." *Allied Capital*, 910 A.2d at 1030 (construing unambiguous contract provisions and granting motion to dismiss on breach of contract claim) (emphasis added).

presumed or implied." *Matulich*, 942 A.2d at 600 (Del. 2008) (affirming motion to dismiss preferred shareholder's challenge to statutory merger because no statutory voting rights were expressly granted to preferred stock in the applicable certificate of designation); *see also Mariner LDC v. Stone Container Corp.*, 729 A.2d 267, 278-79 (Del. Ch. 1998) (preferred stockholders were not likely to prevail on their argument for expansive interpretation of their rights under the certificate of incorporation).

MCG's special consent and voting rights are therefore limited to what is contained "by a clear and express statement" in the Charter and PSWPA. *See Matulich*, 942 A.2d at 600 ("Voting rights may only be derogated, in whole or in part, by a clear and express statement."). Contrary to MCG's apparent hope, "Delaware courts will not distort or twist contract language under the guise of construing it." *Allied Capital*, 910 A.2d at 1030.

B. The Charter and the PSWPA Do Not "Clearly" And "Specifically" Give MCG The Consent Rights That It Claims.

Here, MCG asks this Court to distort and twist the language of the PSWPA and Charter to give MCG an unfettered veto power over the board's statutory authority and contractual duty to make executive compensation decisions. No such right is "clearly and expressly" contained in either Section 5.12(h) of the PSWPA or Article V, § A.1(b)(x)[18] of the Charter, and no reasonable interpretation of this language could suggest that the parties intended such a result.

1. MCG Has Consent Rights Only When Jenzabar Enters Into A New Transaction, Not When It Performs Under The Existing Employment Agreement.

MCG's consent rights apply only when Jenzabar chooses to "***enter into*** a transaction, contract, agreement or arrangement with an Affiliate." PSWPA, § 5.12(h) (emphasis added).

[18] For the sake of convenience, defendants will hereinafter refer to the language at issue as Section 5.12(h).

The argument in defendants' Opening Brief focused on the phrase "enter into." MCG has little to say in response to this point, preferring to quarrel with a straw man. MCG reformulates the defendants' position, treating it as an argument that MCG has consent rights only when Jenzabar enters into new, ***formal*** contracts or agreements with insiders, *see* Opp., p. 18, and not informal "transactions" or "arrangements." MCG then cites several cases that -- according to MCG's reading -- define compensation decisions as "transactions" or "arrangements." The defendants never argued that a "transaction, contract, agreement or arrangement" needs to rise to the level of a formal contract, only that MCG's consent rights applied only if Jenzabar actually "enters into" a new agreement or arrangement, not when it merely acts upon the provisions of existing, previously approved agreements.

The various cases that MCG cites for the proposition that compensation decisions can be "transactions" or "arrangements" do nothing to support its expansive interpretation of Section 5.12(h). While a few cases are simply inapposite,[19] others favor Jenzabar's position rather than MCG's. Specifically, although courts have admittedly used the terms "transaction" and "arrangement" in the same breath as "compensation" -- a particularly unremarkable fact on which much of MCG's interpretation depends -- they have done so in situations involving a ***new*** grant of rights or entitlements, and not in reference to mere adjustments to previously established rights to compensation or bonuses in accordance with the terms of existing agreements.[20]

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[19] *See*, *e.g.*, *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (identifying "appointment and compensation of CEO" among other corporate acts or transactions -- including mergers, changes in capital structure, and fundamental business changes -- that specifically require the attention of a board of directors in case addressing issues of director inaction); *Carlson*, 925 A.2d at 525 ("transaction" at issue involved director-officers awarding themselves compensation in breach of oral contract promising that distributions to executives would be limited to distribution of profits based on *pro rata* shares of ownership).

[20] *See Hessler, Inc. v. Farrell*, 226 A.2d 708, 710 (Del. 1967) (involving a "semi-retirment arrangement" that allowed employee to take leve in exchange for reduced salary);

MCG's cases, all told, stand only for the unexceptional proposition that words like "transaction" and "arrangement" ***can*** be used to refer to compensation-related actions in some circumstances not analogous to those present here. Indeed, the cases on which MCG relies actually suggest that "transactions" and "arrangements," regardless of how informal they may be, are relationships that companies "enter into" in an affirmative way. Jenzabar entered into the Employment Agreements the same day that MCG became a preferred stockholder. It did not, however, "enter into" any transaction or arrangement with Maginn and Chai when it increased their compensation as contemplated by those very Employment Agreements.

2. The Cases That MCG Cites Support The Defendants' Plain Reading Of MCG's Consent Rights.

MCG cites two cases that, it claims, "g[ave] effect to preferred stockholders' right to consent" to certain actions of a company's board. *See* Opp., p. 27 (citing *ThoughtWorks, Inc. v. SV Investment Pr's*, 902 A.2d 745 (Del. Ch. 2006); *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505 (Del. Ch. Sept. 7, 2001)). To the extent these cases have any relevance, they support the defendants' plain reading of Section 5.12(h).

In *ThoughtWorks*, for instance, the company's charter required it to obtain the consent of its preferred shareholders before it could "enter into any contractual arrangement providing for the payment of $500,000 or more per year . . . that is outside the ordinary course of business or

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Valeant Pharms. Int'l v. Jerney, 921 A.2d 732, 739 (Del. Ch. 2007); (using "transaction" in connection with bonus triggered by spin-off and IPO); *Official Comm. of Unsecured Creditors or Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290 (Del. Ch. Aug. 24, 2004) (referring to questionable loans, subsequently forgiven, as "Challenged Transactions"). Notably, MCG cites *Haywood v. Ambase Corp.*, 2005 WL 5757734, at *6 (Del. Ch. Aug. 22, 2005), as describing a decision "to grant discretionary bonuses" as an "executive compensation transaction." Opp., p. 21, n.23. In fact, the Court's use of the term "transaction" was merely in a quote from *Elkins* discussing the proposition that "[w]hile there may be instances in which a board may act with deference to corporate officers' judgments, executive compensation is not one of those instances. The board must exercise its own business judgment in approving an executive compensation transaction." *See Haywood*, 2005 WL 5757734, at *6 (quoting *Elkins*, 2004 WL 1040290, at *12).

that was not contemplated by the Corporation's annual budget." 902 A.2d at 748. ThoughtWorks had twice previously sought its preferred stockholders' approval, pursuant to this provision, to enter lines of credit; in each case the preferred stockholder approved a smaller line than the company requested. *Id.* at 756. Thereafter, without its investor's consent, and without any disclosure, the company negotiated a $10 million line of credit with a bank. *Id.* at 750. When the preferred stockholders sued, the company argued that the preferred stockholders did not have the right to approve basic debt transactions such as obtaining a line of credit. 902 A.2d at 755. This Court gave this argument appropriately short shrift, noting that the line of credit required payments of more than $500,000 per year and the evidence showed that a $10 million line of credit was outside the company's ordinary course of business. *Id.* at 755-56.

The *Telcom* decision likewise has little to say here. The contract in *Telecom* required the company to obtain the consent of "at least a majority of the then outstanding shares of . . . Preferred Stock" before it could issue "any other equity security." *Telcom*, 2001 WL 1117505, at *4-5. The company sought, unsuccessfully, to convince this Court that this provision did not require it to obtain consent to issue preferred stock, only "***other*** equity securit[ies]." *Id.* at *6 emphasis added. This Court rejected that creative but strained interpretation.

These cases may well support the general proposition that preferred stockholders' rights to consent should be given effect, a proposition that Jenzabar and the other defendants do not dispute -- ***when the consent rights apply by their own clearly expressed terms.*** What is most relevant about these cases is the way this Court decided the issue: by interpreting the relevant contractual language in accordance with its plain meaning. That is exactly what the defendants ask this Court to do here. These cases do not offer any support for MCG's unreasonable and expansive interpretation of the PSWPA and the Charter.

V. EVEN AS RECHARACTERIZED IN ITS OPPOSITION, MCG'S FIDUCIARY DUTY CLAIMS FAIL.

As a holder of preferred stock and warrants, MCG's rights are governed by contract; they do not implicate fiduciary principles. Nevertheless, Count Five of the Complaint purports to state a claim for breach of fiduciary duty against the individual defendants based upon a hodgepodge of unspecified conduct. In its Opposition, MCG tries to "clarify" its claims, giving them grandiose labels: the "Fiduciary Compensation Claims," the "Fiduciary Charter and Contract Claims," the "Board Management Fiduciary Claims," and the "Repurchase Notice Fiduciary Claim." Opp., p. 48. These labels do not change the substance; MCG still fails to state a claim.

A. MCG Cannot Bring Claims For Breach Of Fiduciary Duty Because Its Purported Fiduciary Duty Claims Arise From Its Contractual Stock Preferences.

After declaring that "this is a case about bargained-for special voting and repurchase notice rights," Opp., p. 1, MCG promptly forgets that these preferred stock rights are governed by its contracts, and it argues about fiduciary rights as if it were a common stockholder.

As discussed above and in the defendants' Opening Brief, *see* OB, pp. 37-40, where a claim relates to a matter that is expressly governed by a preferred stock instrument, the stockholders' rights are defined by the terms of their contract, and the directors owe no fiduciary duty to the preferred stockholder. *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986) ("With respect to matters relating to preferences or limitations that distinguish preferred stock from common, the duty of the corporation and its directors is essentially contractual and the scope of the duty is appropriately defined by reference to the specific words evidencing that contract"); *HB Korenvaes Inv., L.P. v. Marriott Corp.*, 1993 WL 205040, at *5-7 (Del. Ch. June 9, 1993). MCG's claims here relate solely to matters expressly addressed by contract: the "Fiduciary Charter and Contract Claims," the "Board Management Fiduciary Claims," and the "Repurchase Notice Fiduciary Claims" self-evidently seek to hold Jenzabar's directors and officers personally liable for causing Jenzabar to allegedly violate MCG's contractual preferred stock rights. As such, no fiduciary duty was owed to MCG and its fiduciary duty claim against the Individual Defendants must fail. *Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 833 (Del. Ch. 2006) ("[P]laintiffs [may] not prosecute a claim for breach of fiduciary duty that essentially restate[s] their claim for breach of contract").

MCG's response to this settled case law is misdirection. It cites cases that do not even address the interplay of contract claims and fiduciary duty claims. *See, e.g.*, Opp., p. 60 n.52; *Emerald Pr's v. Berlin*, 1993 WL 545409 (Del. Ch. Dec. 23, 1993) (addressing fiduciary duty and corporate waste claims); *Solomon v. Armstrong*, 747 A.2d 1098, 1114 (Del. Ch. 1999) (holding that breach of contract did not occur in connection with challenged transaction); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061 n.84 (Del. Ch. 2004) (controlling shareholder breached fiduciary duties by failing to keep directors informed); *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130-31 (Del. 2003) (ruling that defendants breached fiduciary duties by disenfranchising shareholders).[21] MCG then claims that *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149 (Del. 2002), allows fiduciary and contract claims to overlap. That case says nothing of the sort: the minority shareholders in *Parfi* who brought fiduciary duty claims were holders of common stock, *see Parfi Holding AB v. Mirror Image Internet, Inc.*, 794 A.2d 1211 (Del. Ch. 2001), and there was no dispute as to whether separate fiduciary duty claims

[21] *Tooley v. AXA Fin., Inc.*, 2005 WL 1252378 (Del. Ch. May 13, 2005) and other shareholder disenfranchisement cases are simply inapposite. *See* Opp., pp. 58-59. MCG's voting and notice rights are contractual and are not governed by fiduciary principles, and, even as re-written by MCG's Opposition, the Complaint makes no allegation that the board manipulated the corporate voting process to the detriment of MCG or the other shareholders of Jenzabar.

and contract claims existed. The question, rather, was whether a contractual arbitration provision was applicable to both claims.

B. MCG Fails To State A Claim For Excessive Compensation.

In a nod to the defendants' case authority, MCG's Opposition restates Count Five of the Complaint as a fiduciary duty claim for approving "excessive" compensation to Maginn and Chai. Opp., pp. 49-52. The Complaint cannot fairly be read as stating such a claim; the actual allegations are not that the compensation was excessive, but that it was paid in violation of MCG's contractual rights. Compl., ¶¶ 36-59. As MCG admits, moreover, this "Fiduciary Compensation Claims" is purely derivative in nature, Opp., p. 61, and therefore it must be dismissed on Rule 23.1 grounds, as discussed above. But this claim fails for yet another reason: conclusory assertions that the Compensation Committee awarded "excessive, retroactive bonus payments" and compensation, Compl., ¶ 48, to Maginn and Chai are not sufficient to state a claim for a breach of fiduciary duty. As this Court has previously held:

> To state a claim for excessive compensation, a plaintiff "must either plead facts from which it may reasonably be inferred that the board or the relevant committee that awarded the compensation lacked independence (e.g., was dominated or controlled by the individual receiving the compensation), in which event proof of such allegations would cast upon the officer the burden to prove that the compensation paid was objectively reasonable in the circumstances or plead facts from which it may reasonably be inferred that the board, while independent, nevertheless lacked good faith (i.e., lacked an actual intention to advance corporate welfare) in making the award.

Nelson v. Emerson, 2008 WL 1961150, at *9 (Del. Ch. May 6, 2008) (quoting *Gagliardi v. TriFoods Int'l., Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996)). MCG's Complaint does not include a single factual allegation regarding Maginn and Chai's compensation that even suggests that the compensation was unreasonable or unwarranted by their performance, or that the Compensation

Committee lacked independence or acted in bad faith. MCG's only allegations in the Complaint refer to its alleged right to consent to the board's compensation decisions.[22]

MCG tries to salvage Count Five by arguing that the compensation decision process gives rise to fiduciary duty claims. It suggests, citing *Official Comm. of Unsecured Creditors of Integrated Health Servs. v. Elkins*, 2004 WL 1949290, at *16 (Del. Ch. Aug. 24, 2004), that the Independent Directors may be liable for negotiating in bad faith, *see* Opp., p. 50, but there are no such allegations in the Complaint.[23] The Complaint actually alleges that the Compensation Committee received advice of both in-house and outside counsel, and considered the opposing positions presented by representatives of the officers and by MCG before making the challenged decision. Compl., ¶¶ 41-47.[24] In any event, the Compensation Committee is not required to consult solely with advisors who have done no prior work for the Company,[25] and there is simply

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[22] As discussed above, MCG belatedly realized that its Complaint did not state a claim for excessive compensation and used its Opposition to backfill. The new allegations in the Opposition are too late, but they are also too little: the article on which MCG relies suggests that both Maginn's salary and total compensation are comparatively small, given that average CEO salaries in the Boston area increased 9.44% in 2008 to $606,000, a sum which is more than 33% higher than Maginn's *increased* salary. *See* Tim McLaughlin, *Payout Paradise: Sullivan Is Boston's $57M Man but Comp for Most CEOs Slides*, BOSTON BUS. J., July 24-30, 2009, at 24. Moreover, it shows that a Boston-area CEO's average total compensation, including bonuses, is $2.6 million; more than twice what Maginn received in 2008. *Id.*

[23] The facts of *Elkins* are dramatically different from those here. There, the board had authorized a whole series of amendments to an executive's employment agreement to pay him several multimillion dollar "loans," which the Company later forgave through still more amendments. *See Elkins*, 2004 WL 1949290. Here, by contrast, Jenzabar's board reviewed compensation, as required by existing employment agreements, and authorized increases, as expressly permitted by the employment agreements.

[24] MCG's suggestion that "retroactive" compensation decisions should constitute a per se violation of the Individual Directors' fiduciary duties is barely worth addressing. The very case on which MCG relies states that retroactive compensation is perfectly appropriate so long as "the amount awarded is not unreasonable in view of the services rendered." *Zupnick v. Goizueta*, 698 A.2d 384, 388 (Del. Ch. 1997). Here, the Complaint does not plead any basis on which to determine that the amounts awarded were unreasonable.

[25] *See* E. Norman Veasey, "Separate and Continuing Counsel for Independent Directors: An Idea Whose Time Has Not Come As A General Practice" *Business Lawyer*, August 2004

nothing wrong -- as a matter of law or otherwise -- with San Miguel and Mills' decision to consult with Jenzabar's outside corporate counsel concerning compensation matters.

C. MCG Has Not Stated Any Fiduciary Duty Claims Against Barr

In the Opening Brief, defendant Barr demonstrated that MCG's Complaint particularly failed to state any claims against him, as he was not a director and did not make any of the challenged compensation decisions. OB, pp. 42-43. MCG's response, once again, is to obscure: it insists that Barr's "participation in the process," Opp., p. 52, makes him liable for fiduciary breaches, and then simply lumps him in with the Independent Directors, treating them as if they were one and the same. MCG's Complaint lacks any allegation of "sufficiently detailed acts of wrongdoing" by Barr. *See Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (analyzing breach of fiduciary duty claims against officers). This defect is fatal.

In fact, the cases that MCG cites merely serve to highlight MCG's failure to allege any actual misconduct on Barr's part. *See id.* (involving claims arising out of board's rejection of acquisition proposal where allegations suggested that corporate treasurer had "sabotaged the due diligence aspect of the Sales Process" to preclude buyer from pursuing purchase); *Guth v. Loft, Inc.*, 5 A.2d 503, 506 (Del. Ch. 1939) (corporation's president used employer's facilities, materials, credit and employees to further the financial interests of Pepsi-Cola without the board's knowledge or consent).[26]

("To expect separate counsel on a generalized and continuing basis for the independent directors may not pass the cost-benefit analysis, may not advance constructive skepticism, and may lead to unnecessarily contentious boardrooms. The independent directors must make the decision whether and when they need special outside counsel on a continuing business").

[26] MCG's other cases merely state in dicta that officers owe fiduciary duties, but do not address what allegations are sufficient to state a claim against the officers. Opp., p. 52 (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 358 (Del. 1993) (analyzing only duties of directors)); *In re Am. Int'l Group, Inc.*, 965 A.2d 763, 779 (Del. Ch. 2009) (court lacked personal jurisdiction over non-director employee defendants); *Sample v. Morgan*, 935 A.2d 1046, 1047

MCG's allegation that Barr (and others) "routinely acted to keep the non-management members of the board of directors in the dark so as to better operate Jenzabar for their own advantage," Compl., ¶ 60, falls far short of the "sufficiently detailed acts of wrongdoing" required to state a cause of action for breach of fiduciary duty against a corporate officer. *Gantler*, 765 A.2d at 709. Any allegations made with specificity lack even a hint of the sort of misconduct that gave rise to liability in these other cases. According to MCG, Barr (a) introduced a Ropes & Gray lawyer as counsel for Jenzabar and recommended that the Compensation Committee receive his advice, Opp., p. 10; (b) did not respond to Malekian's suggestion that the Compensation Committee engage its own counsel, *id.* at 11; (c) circulated board meeting agendas shortly before the scheduled meetings, *id.*; and (d) circulated draft meeting minutes well after the meeting and did not incorporate certain edits suggested by Malekian. *Id.* at 12. However dissatisfied Malekian claims to be with Barr, these facts hardly suggest disloyalty or misconduct -- and they could easily have been the subject of a demand.[27]

Finally, MCG's attempt to distinguish *Citron v. E.I DuPont de Nemours & Co.*, 584 A.2d 490 (Del. Ch. 1990), misses the essence of the holding. MCG quotes the Court's description of defendant Heckert's conduct as "bringing the two sides together on terms that addressed specific concerns identified by the Merger Committee and its advisors." *Id*. at 499 n.12; *see* Opp., p. 47. However, the gravamen of the Court's holding was that, ***regardless*** of whether "bringing the two sides together" led to improper decision making, "Heckert is not one of the persons whose

(Del. Ch. 2007) (considering whether corporate lawyers were subject to personal jurisdiction based, in part, on their provision of legal advice to a Delaware corporation).

[27] Many of the allegations regarding Barr do not even involve his conduct. For example, MCG notes that Malekian objected to Barr assisting the Compensation Committee, Opp., p. 11, and that Malekian has complained about the distribution of board meeting materials. *Id.* Paragraph 52 alleges not conduct by Barr, but information allegedly known by him, and only on information and belief. *See id.*, p. 52.

decision making actions caused that result to come about," because he was not a voting board member. *See Citron*, 584 A.2d at 499. In other words, ***even if*** the board's actions violated their fiduciary duties, Barr is not liable for the board's actions because he was not a voting board member. All of the claims against Barr must be dismissed.

D. MCG's Purported "Board Management Fiduciary Claims" Must Be Dismissed.

The defendants showed in their Opening Brief that the exculpatory provision in Jenzabar's Charter, authorized by Section 102(b)(7), defeats MCG's so-called "Board Management Fiduciary Claims," because the Complaint alleges, at most, a breach of the duty of care. *See, e.g.*, *Emerald Pr's v. Berlin*, 787 A.2d 85, 92 (Del. 2001). MCG concedes that the Charter precludes any monetary liability, but argues that the claim should survive because MCG might obtain injunctive relief. Opp., pp. 56-57. Again, MCG misapprehends Delaware law. MCG cites no case where this Court has enjoined a director or officer from unspecified future breaches of fiduciary duty, and with good reason: this Court has held that such an order is not proper. *See State ex rel. Brady v. Pettinaro Enter.*, 870 A.2d 513, 536 (Del. Ch. 2005) ("This court cannot permit its jurisdiction to be invoked simply on the basis of unsubstantiated fear that a legal duty may be breached in an uncertain future."). Such an order would be impermissibly vague, would be impracticable to enforce, and would require improper involvement of the Court in the Board's ongoing internal operations.

MCG also has no meaningful response to the defendants' showing that the business judgment rule bars MCG's "Board Management Fiduciary Claims." The substance of that claim -- quibbles about the timeliness of notice of or distribution of board materials for board meetings and the inclusion or exclusion of specific topics or commentary from the board minutes -- are fundamentally issues of internal board administration, with which this Court will not interfere, absent good reason. *See Cede*, 634 A.2d at, 360 ("The [business judgment] rule operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation."). As alleged in the Complaint, the "Board Management Fiduciary Claims" does not involve any allegations from which this Court could conclude that ***any*** director is interested, and yet MCG never made demand on the board, or even brought its alleged concerns with the board's processes to the attention of the Independent Directors. There is simply no reason to presume that the independent majority of the board could not impartially address any internal board administrative concerns MCG or its director might raise.

VI. THE INDIVIDUAL DEFENDANTS ARE NOT NECESSARY PARTIES TO THE CLAIMS AGAINST JENZABAR.

In response to the defendants' argument that MCG's Complaint fails to state a claim against Barr and the Independent Directors, MCG's answer is merely to insist that the individual defendants are somehow necessary and indispensable to the resolution of this action. Apart from a passing reference to Rule 19, MCG offers no analysis. The slightest analysis makes it obvious that Barr and the Independent Directors are not necessary parties.

This Court has described Court of Chancery Rule 19(a), requiring joinder of all necessary and indispensable parties, as "categoriz[ing] those persons whose joinder should be required to accord complete adjudication of claims at issue." *Nama Holdings, LLC v. Related World Market Ctr., LLC*, 922 A.2d 417, 436 (Del. Ch. 2007) (finding party with claim to disputed funds not necessary for court to render complete relief to parties before it). To be truly necessary, however, the party in question "must not only have an interest in some part of the controversy but the interest must be such that a final decree ***cannot be made*** which will [not] touch upon that party's interest." *Id.* (emphasis added); *see also Summit Investors II, L.P. v. Sechrist Indus.*, 2002 Del. Ch. LEXIS 117, at *18-19 (Del. Ch. Sept. 20, 2002) (dismissing director defendants from breach of contract action against company because there was no basis for obtaining injunctive relief against individual directors where none of them was a party to the contract and the Court could simply direct an order to the company to comply with its obligations). Here, MCG has utterly failed to offer any indication that a resolution of this action in MCG's favor would ***necessarily*** touch on the personal interests of Barr, San Miguel, or Mills, none of whom were parties to the Charter or the PSWPA or received any of the disputed compensation.[28]

With respect to defendant Barr, who is not even a member of Jenzabar's board, MCG half-heartedly claims, via footnote, that "[c]omplete relief ***should also*** include an order precluding defendant Barr from encouraging or participating in further unjustified payments . . . ." Opp., p. 30 n.29 (emphasis added). That MCG's preferable vision of proper relief in this case would include an order directed at defendant Barr hardly suggests that this Court would, in fact, be unable to fashion a final decree that would not implicate defendant Barr's ***personal*** interests. To the contrary, apart from MCG's arbitrary request for a court order against Barr, there appears to be no set of circumstances under which the resolution of this case actually ***would*** touch on Barr's personal interests. He was not a party to the allegedly breached contracts, and he never voted for the allegedly wrongful compensation. Thus, he hardly has an interest in this matter at all, let alone one that would be necessarily impacted by a resolution in MCG's favor.

The same is true for the Independent Directors, whose personal interests MCG has declared are ***necessarily*** implicated by its claims for relief simply because this Court may declare their votes for Maginn's and Chai's compensation null and void. This makes no sense, as MCG has argued that the proper remedy in this case is to restore the *status quo ante* on comepnsation.

[28] As set forth in detail in the defendants' Opening Brief, OB, pp. 33-34, "[i]t is a general principle of contract law that only a party to a contract may be sued for breach of that contract." *Wallace v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999).

Opp., p. 30. Thus, resolution of MCG's claims could only implicate the rights of Jenzabar, which paid the compensation, and of Maginn and Chai, who received it. No one else's personal rights are even potentially implicated.[29]

Thus, this Court is readily able to fashion a form of relief that in no way implicates the interests of defendants Barr, San Miguel and Mills. None of them are necessary parties.

VII. COUNTS THREE AND FOUR, EVEN AS RE-IMAGINED BY MCG, DO NOT STATE CLAIMS.

Having originally pled claims that do not exist under Delaware law, MCG now attempts to recast Counts Three and Four, formerly for "aiding and abetting" breach of contract and breach of charter, as claims for tortious interference with contract. No matter how MCG styles these counts, however, they cannot survive a motion to dismiss.[30] As a threshold matter, for all of the reasons discussed in Section IV, *supra*, there has been no breach of the PSWPA or Charter, and thus there cannot have been any interference. *See, e.g.***,** *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987) (breach of contract is a necessary element of intentional interference claim). But even if there had been a breach by Jenzabar, the law is clear that actions seeking to hold corporate officers liable for a corporation's breach of contract, whether through direct conduct or by inducement simply cannot lie. *See, e.g.*, *Wallace*, 752 A.2d at 1180 ("Delaware law clearly holds that officers of a corporation are not liable on corporate contracts as long as they do not purport to bind themselves individually."); *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994) ("employees or directors of a

[29] Indeed, the mere fact that restoring the status quo would void the *corporate* act for which Mills and San Miguel voted does nothing to implicate their *individual* rights. *See Summit Investors II, L.P.*, *supra.*

[30] Notably, MCG includes in its Opposition an unabashed request for leave to amend its Complaint "should the Court conclude" that amendment is necessary to fully effectuate MCG's transformation of Counts Three and Four into new claims. As set forth above, however, MCG chose to respond to the motion to dismiss rather than to amend its Complaint and therefore its belated request for leave to amend should be denied pursuant to Rule 15(aaa).

contracting corporation cannot be held personally liable for inducing a breach of contract by their corporations when they act within their role") (citations omitted).

Seizing on this latter part of the language from *Shearin*, MCG has dredged the depths to find a decision in which the Delaware Superior Court denied summary judgment on such a claim because, according to the court, it was "possible to draw the inference that [the defendant doctor] intended to protect himself, to Plaintiff's detriment, when he denied he gave her an order." *See Layfield v. Beebe Med. Ctr., Inc.*, 1997 WL 716900, at *6 (Del. Super. July 18, 1997). Because of this, the Court viewed the doctor as conceivably acting outside his corporate role. *Id.* The "order" referenced in *Layfield* related to a nurse's claim that the doctor ordered her to mix an enema for a patient. *Id.* at *1-3. The doctor denied having given the order, and the nurse was later fired, in part because she had dispensed the enema without a doctor's approval and against hospital policy. *Id.* Layfield's intentional interference claim arose from the doctor's refusal to admit to having ordered her to mix the enema. *Id.*

There is no need to belabor the utterly foreign factual setting of *Layfield*. Whatever minor insight that case has into what it means for a corporate employee or director to act within their role, it simply has no application here. As this Court has recognized, "[m]erely because directors are alleged to have acted in part with adverse motives does not necessarily lead to the conclusion that they acted outside the scope of their authority for the purposes of holding directors personally liable in tort for interfering with the contractual rights of a shareholder." *Goldman v. Pogo.com Inc.*, 2002 WL 1358760, at *9 (Del. Ch. June 14, 2002).

MCG's claim that defendant Barr was somehow acting outside of his corporate role is just baffling. MCG does not even bother to distinguish Barr, about whose compensation it has made no allegations, from Maginn and Chai. It merely alleges, in reference to all three defendants, that "***they*** were . . . siphoning off Company assets for their own personal benefit . . . [and] acting in ***their*** own self-interest . . . ." Opp., p. 32 (emphasis added). The vague use of the word "their" cannot mask the fact that these conclusory statements are completely inapplicable to Barr because he is not alleged to have received any increased compensation or any other benefit. These statements are also grossly inadequate to suggest that Barr's alleged involvement in the challenged transactions involved any conduct by Barr other than in his corporate role as Jenzabar's general counsel. Having barely even attempted to show how Barr could have been acting outside of his corporate role, MCG's attempt to dress Counts Three and Four up in a new theory of liability still fails to state a claim against Barr. *See Shearin*, 652 A.2d at 590 (it is "rudimentary" that an employee cannot be held liable for breaching a contract of his or her employer).

Thus, whether as claims for intentional interference with contract, or the unrecognized "aiding and abetting" claims that MCG originally pled, Counts Three and Four simply do not state a claim and must be dismissed.

CONCLUSION

For the foregoing reasons and those set forth in the briefs filed by co-defendants Maginn and Chai, defendants Jenzabar, San Miguel, Mills and Barr respectfully request that their Motion to Dismiss be granted.

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