



IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

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

Plaintiff,)

v.)

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

Defendants,)
and)

JENZABAR, INC.,)

Nominal Defendant.)

C.A. No. _____

VERIFIED COMPLAINT

INTRODUCTION

Plaintiff MCG Capital Corporation (“MCG”) seeks by this Complaint to put a stop to the continuing stream of unlawful payments by Defendant Jenzabar, Inc. (“Jenzabar,” or the “Company”) of millions of dollars to Defendants Robert A. Maginn, Jr. and Ling Chai in violation of Jenzabar’s Charter and its preferred stock and warrant purchase agreement with MCG, to disgorge the unlawful payments from Defendants Maginn and Chai and secure the immediate return to the Company of all such payments, to require the management of Jenzabar to take basic steps to ensure that all members of its Board of Directors are timely informed about the Company so that the directors may

fulfill their fiduciary duties as directors of the Company, and a declaration that Jenzabar's recent notice for the repurchase of MCG's Senior Preferred Stock is ineffective under the Company's Charter.

MCG is a substantial investor in Jenzabar and it negotiated for and is entitled to special consent and voting rights both by contract and under the organic documents of the Company. Under the plain and unambiguous terms of the Fifth Amended and Restated Certificate of Incorporation of Jenzabar, Inc. ("the Jenzabar Charter") (attached hereto as Exhibit 1) and pursuant to the Preferred Stock and Warrant Purchase Agreement ("PSWPA") between MCG and Jenzabar (attached hereto as Exhibit 2), Defendants may not, among other things, increase the compensation of Defendants Maginn and Chai, the Chairman and CEO and President and Chief Operating Officer of Jenzabar, respectively, without the prior written consent or affirmative vote of MCG.

Rather than comply with their known contractual obligations and fiduciary duties, the Defendants have allowed Mr. Maginn and Ms. Chai, his wife, to use the Company as their own piggy bank, withdrawing excessive bonuses and other compensation without regard to MCG's contractual rights. Over the objection of MCG's designee to Jenzabar's Board, Defendants have purportedly approved bonuses for Defendants Maginn and Chai well in excess of the amounts permitted under their respective Employment Agreements. Since December 2008, these unlawful bonuses have exceeded \$1.5 million in wrongfully approved bonuses with another \$6.6 million likely to be approved in the near future.

Specifically, in December 2008, Defendants San Miguel and Mills, members of the Jenzabar Board of Directors and its Compensation Committee, voted to award Defendants Maginn and Chai \$794,000 in excess of the bonuses permitted by their

Employment Agreements. On information and belief, these excessive and unlawful retroactive bonuses were paid by Jenzabar to Defendants Maginn and Chai in December 2008.

At a Compensation Committee meeting in December 2008, Defendants San Miguel and Mills voted to approve a 12.5% increase in salary to Defendant Maginn and a 12% increase in salary for Defendant Chai. All of this occurred without the required written consent or affirmative vote of MCG and at a time when market conditions have led other companies to decrease, not increase, executive compensation.

On the same day, Defendant Maginn demanded another \$750,000 bonus, which he and Defendant Barr – Jenzabar’s General Counsel – represented to the Board of Directors had been approved in 2002, but supposedly (and fortuitously) never paid. In reality, it appears that the Board had only conditionally approved that bonus in 2002 and the necessary precondition – approval from a third-party investor in Jenzabar—has never been obtained (nor even sought). On information and belief, Defendants Barr and Maginn knew these true facts, but concealed them from the Board until after the vote by the Board in December 2008. Only two out of five members of the Board present at the meeting voted for the bonus, and for this reason, among others, the bonus given Maginn is invalid.

Finally, Defendant Maginn has made a further demand for retroactive bonuses to him and his wife for a five-year period in the amounts of \$3.5 million and \$3.1 million, respectively, even though there is no dispute that the bonuses due to Defendants Maginn and Chai for those years have already been calculated and paid according to the terms of their Employment Agreements. Again, Plaintiff believes that, based upon their previous

course of conduct, Defendants San Miguel and Mills will approve these outlandish, extracontractual bonuses, notwithstanding MCG's refusal to consent.

Meanwhile, Defendants Maginn, Chai, and Barr have, as a matter of course, marginalized the Board of Directors and, in particular, MCG's representative on the Board. They have impeded the Board's efforts to fulfill its responsibilities by, among other things, circulating agendas for Board meetings only moments before meetings – if at all, by circulating draft minutes many months after such meetings and by refusing to incorporate in such minutes the comments of MCG's Board designee.

More recently, and likely because MCG's Board designee has repeatedly attempted both to thwart Defendants' efforts at self-enrichment and to insist on basic standards of corporate governance, Defendants have now attempted to strip MCG of its special consent and voting rights. The Defendants seek to force MCG to choose between selling its interest in the Company to Jenzabar (at a price Defendants would likely artificially deflate by improperly not accounting for in the valuation process the unlawful excessive compensation that has the effect of reducing Jenzabar's cash flow), which MCG may not want to do at this time, or retaining its interest in the Company, but losing its special consent and voting rights, which would strip MCG and the other shareholders of the only effective brake on Defendants' looting of the Company for the benefit of themselves and their friends. Because Defendants have failed to comply with the notice provisions of the Charter, however, Defendants' recent efforts to strip MCG of its ability to prevent the continued looting of the Company has failed, and MCG seeks a declaration from this Court to that effect.

Plaintiff sues here directly on its own behalf and in a derivative capacity on behalf of Jenzabar. In its direct claims, Plaintiff principally seeks: (1) a declaration that the excessive compensation to Defendants Maginn and Chai violates MCG's consent and voting rights under the PSWPA and the Jenzabar Charter, and was not properly approved by the Board or properly designated committee; (2) a declaration that Jenzabar's recent repurchase notice to MCG is ineffective under the Company's Charter; and (3) an order restraining Defendants from further violations of MCG's consent and voting rights.

On behalf of Nominal Defendant Jenzabar, Plaintiff seeks by this Complaint: (1) damages for the Defendants' breach of their fiduciary duties; (2) an order requiring Defendants Maginn and Chai to repay with interest immediately to Jenzabar in full all unlawful and invalid payments received in violation of MCG's consent and voting rights and/or otherwise unauthorized; and (3) an order restraining any such further unlawful payments in the future.

PARTIES

1. Plaintiff MCG is a Delaware corporation with its principal place of business in Arlington, Virginia. MCG is a publicly traded business development company. It provides capital (equity and debt) and advisory services generally to U.S. middle market companies with annual revenue of \$20 million to \$200 million.

2. Nominal Defendant Jenzabar is a Delaware corporation with a principal place of business in Boston, Massachusetts. Jenzabar is a private software and services company that provides business intelligence applications and services, Internet enterprise software, and "e-learning solutions," to the higher education market. Jenzabar was founded in Cambridge, Massachusetts in 1998.

3. Defendant Robert A. Maginn, Jr., has been Chairman of the Board of Directors of Jenzabar since December 1998 and Chief and Executive Officer since March 2001.

4. Defendant Ling Chai founded Jenzabar, is a member of the Board of Directors of Jenzabar, and has been its President since its inception and Chief Operating Officer since March 2001. Ms. Chai is married to Mr. Maginn.

5. Defendant Jamison Barr is Vice President and General Counsel of Jenzabar.

6. Defendant Joseph San Miguel is member of the Board of Directors and the Compensation Committee of Jenzabar, with a term expiring April 2009.

7. Defendant Daniel Quinn Mills is a member of the Board of Directors and the Compensation Committee of Jenzabar.

8. Nominal Defendant Jenzabar is a Delaware corporation, with Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, as its registered agent.

9. Section 7.9 of the PSWPA between MCG and Defendant Jenzabar states that any litigation in connection with or in any way related to the PSWPA, or any course of conduct, course of dealing, statements, actions or inactions of MCG or Jenzabar will be brought and maintained exclusively in the courts of the State of Delaware or in the United States District Court for the District of Delaware. (Ex. 2 at 47).

10. Section 5.7 of the Fourth Amended and Restated Stockholders Agreement (“Stockholders Agreement”) (attached hereto as Exhibit 3) states that any litigation arising out of

or relating to the Stockholders Agreement shall be brought exclusively in a federal or state court located in the State of Delaware. (Ex. 3 at 16).

BACKGROUND

I. The Relationship Between the Parties

11. On June 30, 2004, pursuant to the PSWPA, 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.

12. MCG is the only holder of Jenzabar Senior Preferred Stock.

13. MCG currently holds a majority of the outstanding warrants.

14. Pursuant to section 3.3 of the PSWPA, the Jenzabar Charter was made a legal, valid and binding obligation of Defendant Jenzabar enforceable against it. (Ex. 2 at 19).

15. Pursuant to Section 5.12 of the PSWPA, MCG is afforded certain 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. Those prohibited actions include, 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, importantly, transactions, contracts, agreements, or arrangements with shareholders, officers, or directors. (Ex. 2 at 39-41).

16. MCG has similar rights pursuant to Article V, Section 1.A. of the Jenzabar Charter. (Ex. 1 at 3-7). 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. As under the PSWPA, those prohibited actions include, 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, importantly, transactions, contracts, agreements, or arrangements with shareholders, officers, or directors. The special consent and voting rights described in this paragraph and in paragraph 15 above are hereinafter referred to collectively as "special voting rights."

17. 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. (Ex. 1 at 12-15).

18. 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 its Senior Preferred Stock, as described in paragraph 17 above. (Ex. 2 at 37).

19. Under section 5.11(g) of the PSWPA, if MCG's Senior Preferred Stock is repurchased prior to April 30, 2009 (the "Term Loan B Maturity Date") and MCG does not give notice that it seeks to exercise its right to put its warrants, then MCG's voting rights under Section 5.12 of the PSWPA will lapse. (Ex. 2 at 38-39). On the other hand, if the repurchase of MCG's Senior Preferred Stock occurs on or after April 30, 2009, MCG does not need to give notice that it seeks to exercise its put right in order to maintain its bargained-for special voting rights.

20. Also on June 30, 2004, MCG, pursuant to a Credit Facility Agreement (“Credit Agreement”), loaned Jenzabar \$20,000,000 (“Term Loan A”), and \$10,000,000 (“Term Loan B”).

21. On March 17, 2006, Jenzabar paid off the Term Loan A and Term Loan B.

22. Section 4.2 of the Stockholders Agreement provides that when the Term Loan A and the Term Loan B are no longer outstanding, Jenzabar’s Board of Directors is to consist of five members: one director is to be designated by MCG (“Preferred Stockholder Designee”); two directors are to be designated by Defendants Maginn and Chai (“Founding Director Designees”); and two directors are to be designated by mutual agreement of MCG and Defendants Maginn and Chai (“Independent Directors”). (Ex. 3 at 12-14).

23. At present, the Jenzabar Board of Directors consists of Defendants Maginn and Chai (the Founding Director Designees), Defendants San Miguel and Mills (the purported Independent Directors), and Peter Malekian (the Preferred Stockholder Designee).

24. The Compensation Committee of the Jenzabar Board consists of Defendants San Miguel and Mills and Malekian.

II. Defendant Maginn’s Nearly Five-Year Campaign for Excessive Compensation

25. From the outset of MCG’s involvement with Jenzabar, Defendant Maginn has relentlessly sought to extract from the Jenzabar Board of Directors compensation for himself and his wife that exceeded what was expressly negotiated and provided for by the terms of their Employment Agreements and notwithstanding the fact that his compensation package has included not only salary and bonuses, but also a significant equity stake in the Company.

26. For example, at virtually every Board meeting since MCG invested in Jenzabar, Defendant Maginn has sought Board approval for increases in salary, options, and/or bonuses beyond those provided for under the Employment Agreements. On one occasion, Defendant Maginn even brought his and his wife's personal lawyer to the Compensation Committee meeting, without any prior notice to the Committee, to deliver a PowerPoint presentation in a lobbying effort to persuade the Committee to further enrich them.

27. Defendant Maginn's efforts have come notwithstanding the fact that pursuant to his Employment Agreement he has been paid a base salary at a rate of \$400,000 per year since June 30, 2004 and his wife has been paid a base salary at a rate of \$340,000 per year.

28. Moreover, Defendant Maginn has received a total of \$3,774,756 in authorized bonuses under his Employment Agreement since June 30, 2004.

29. Defendant Chai has received a total of \$972,235 in authorized bonuses under her Employment Agreement over the same period.

30. Defendants Maginn and Chai also hold considerable equity stakes in Jenzabar, including 4,033,448 in options and 7,727,472 shares of common stock, which are highly valuable and should (at least in theory) align their interests with the interests of the Company. A portion of these equity holdings also represent additional compensation to Defendants Maginn and Chai.

31. Until the Spring of 2008, when Defendants San Miguel and Mills joined the Jenzabar Board of Directors, Plaintiff MCG's Director Designee Malekian and Board members other than Defendants Maginn and Chai successfully rebuffed Defendant Maginn's efforts to enrich himself at the expense of the Company and its other shareholders.

32. Towards that end, Malekian has also repeatedly advocated for hiring independent counsel and an independent employment consultant for the Compensation Committee. As will be discussed below, however, Defendants have rejected Malekian's recommendations and instead relied on Defendant Maginn's handpicked advocates as advisers to the purportedly independent Compensation Committee.

33. Since the Spring of 2008, as described below, Defendants San Miguel and Mills, both of whom were professors of Defendant Maginn at the Harvard Business School, have enabled Defendant Maginn to secure the unlawful compensation he has long sought. They also appear perfectly willing to permit him to continue siphoning monies from the Company, monies not authorized by the terms of the Defendants' Employment Agreements.

34. MCG initially raised questions about the qualifications of Defendant San Miguel to serve on the Jenzabar Board given his lack of industry experience and lack of prior board experience. MCG only consented to the appointment of Defendants San Miguel and Mills on the basis of representations from them and from Defendant Maginn that they would act independently notwithstanding their prior relationship with him.

35. Defendants San Miguel and Mills, who are each paid \$100,000 per year to serve as "independent" directors of Jenzabar, including \$50,000 for their service on the Board and an additional \$25,000 per year for service on the Compensation Committee and \$25,000 per year for service on the Audit Committee, have proved to be anything but independent as it concerns Defendant Maginn's demands for increased compensation.

III. MCG's Consent and Voting Rights and Defendants' Violation of Same

36. Pursuant to section 5.12(h) of the PSWPA, Jenzabar is prohibited from entering into **any** transaction, contract, agreement or arrangement with an Affiliate without the written consent or affirmative vote of the holders of at least a majority of the then outstanding warrants or warrant shares. (Ex. 2 at 40). Affiliate is defined in section 1.1 of the PSWPA to include any director or executive officer of Jenzabar. (*Id.* at 1-2).

37. At all relevant times, MCG has held at least a majority of the then outstanding warrants or warrant shares.

38. Pursuant to Article V, Section A.1.(b)(x) of the Jenzabar Charter, Jenzabar is prohibited from entering into **any** transaction, contract, agreement or arrangement with an Affiliate without the written consent or affirmative vote of the holders of at least a majority of the then outstanding shares of Senior Preferred Stock. Under Section A.1.(b)(x), this provision includes any transaction, contract, agreement or arrangement with an officer or director of Jenzabar. (Ex. 1 at 5).

39. At all relevant times, MCG has held at least a majority of the then outstanding shares of Senior Preferred Stock.

40. At a December 18, 2008 meeting, Jenzabar's Board of Directors and the Compensation Committee purported to approve transactions with Defendants Maginn and Chai that violated MCG's consent and voting rights described above.

41. At the commencement of the meeting of the Compensation Committee on that date, Defendant Barr introduced Christopher Austin of the law firm Ropes & Gray as counsel for

Jenzabar and recommended that the “independent” Compensation Committee receive his advice on various compensation matters. Austin had previously been retained by Defendant Maginn to represent Jenzabar in connection with a failed acquisition in early 2008.

42. Plaintiff MCG’s Director Designee Malekian objected to Defendant Barr and Austin having any role with respect to the Compensation Committee on the grounds that no attorney should be both counsel to Jenzabar and counsel to the Compensation Committee. Malekian had previously recommended to the Compensation Committee that it engage its own independent counsel and independent compensation consultant to advise the Committee on compensation matters, but without success.

43. Nonetheless, over Malekian’s objection, the Compensation Committee accepted the representation to be provided by Defendant Barr and Austin.

44. Once Jenzabar’s handpicked counsel had been installed as counsel to the Compensation Committee, the Committee purportedly resolved, again over the objection of Malekian, to increase the salary of Defendant Maginn from \$400,000 to \$450,000. The Committee also purportedly resolved, over the objection of Malekian, to raise the salary of Defendant Chai from \$340,000 to \$380,000, resulting in raises of 12.5% and 12% to Maginn and Chai, respectively.

45. Malekian informed the Committee that any increase in salary required the consent of MCG under both the PSWPA and the Jenzabar Charter, and he suggested that the Committee consult its own counsel on this matter.

46. Defendants Barr, San Miguel, and Mills and Austin then conferred amongst themselves about MCG's consent right before voting to purportedly authorize the unlawful increases in base salary to Defendants Maginn and Chai.

47. Also on the same date, the Board of Directors and/or the Compensation Committee purportedly approved a total of \$794,000 in excess "retroactive" bonuses to Defendants Maginn and Chai for fiscal years 2007 and 2008 over and above what was permitted by the Employment Agreements between Defendants Maginn and Chai and the Company. Again, these unlawful payments were approved without MCG's consent as required by the PSWPA and the Jenzabar Charter.

48. On information and belief, in December 2008, these excessive, "retroactive" bonuses were paid to Defendants Maginn and Chai by Jenzabar.

49. On December 23, 2008, a mere five days after the Compensation Committee and/or the Board had purportedly approved the unwarranted and unlawful windfalls for Defendants Maginn and Chai, Defendants Maginn and Barr informed the Board that as a result of an extensive search of historic documents, they had "discovered" that a \$750,000 bonus owed to Defendant Maginn had not yet been paid.

50. At the Board meeting, Defendants Maginn and Barr represented that the \$750,000 bonus had been approved in 2002 by the then Board, but – as a result of an oversight – had not been paid.

51. Without undertaking any independent investigation of the facts and in the face of Defendants Maginn's and Barr's stated inability to provide any explanation for why the bonus

had not been paid, Defendants San Miguel and Mills hastily “approved” the additional \$750,000 bonus over the objection of MCG’s Director Designee Malekian. At the Board meeting, only two of the five directors present for purposes of a quorum voted for the bonus.

52. On information and belief, Defendants Maginn and Barr knew at the time that they represented to the Board that the \$750,000 bonus had been previously “approved,” that, in fact, it had been only conditionally approved and that the necessary precondition (the consent of a third-party investor in Jenzabar) had never occurred (which likely explains why the bonus was not disclosed to MCG at the time it was considering investing in Jenzabar and reviewing Jenzabar’s then-existing liabilities).

53. On information and belief, Defendants Maginn and Barr disclosed the true facts about the \$750,000 bonus to Defendants San Miguel and Mills only after they had secured the Board’s approval to pay the bonus, and only disclosed the true facts to Mr. Malekian in mid-April 2009.

54. On information and belief, the \$750,000 bonus has been paid.

55. On information and belief, Defendants San Miguel and Mills have done nothing to rescind this fraudulent and unlawful payment.

56. Not yet finished with his compensation demands for 2008, on December 28, 2008, Defendant Maginn further demanded that he be paid an additional retroactive bonus of approximately \$3.5 million and that Defendant Chai be paid an additional retroactive bonus of \$3.1 million, both covering a five-year period, completely disregarding the bonus provisions set out in the Employment Agreements.

57. In light of the actions of the Defendants at the December 18, 2008 meeting of the Board and the Compensation Committee, Plaintiff believes that Defendants San Miguel and Mills are likely to acquiesce again to Defendant Maginn's demands without allowing MCG to exercise its right under the PSWPA and the Jenzabar Charter to grant or withhold consent to the payments sought.

58. As a result of the actions of Defendants, Plaintiff MCG has been deprived, and will likely continue to be deprived of its special voting rights.

59. As a result of the actions of Defendants, Jenzabar has been deprived of at least \$794,000, and more likely \$1,544,000, as well as a pro-rated portion of the increased salaries unlawfully granted and paid to Maginn and Chai.

IV. Defendants' Failure to Keep the Board of Directors Informed and Involved

60. Defendants Maginn, Chai, and Barr have 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.

61. For example, MCG's Director Designee Malekian has repeatedly had to complain to Defendant Barr, who acts as secretary to the Board, that Malekian does not receive Board meeting materials sufficiently in advance of Board meetings. Malekian has explained to Defendant Barr that without adequate time to prepare, he (and the other Directors) could not be an effective Board member.

62. Defendant Barr's response to Malekian's request has been, for example, to circulate via email agendas for Board meetings within hours of when Board meetings were to occur and in at least one instance, a mere 13 minutes before the meeting was scheduled to begin.

63. Similarly, Defendant Barr has withheld draft minutes of Board meetings from members of the Board, circulating them many months after the meetings when it would be more difficult (or nearly impossible) for members to assess their accuracy or completeness. Defendant Barr has then resisted Malekian's efforts to ensure that the minutes accurately reflect the Board's actions and deliberation, using as a pretext the fact that other participants did not recall the discussions Malekian sought to include.

64. As just one of numerous examples, on April 29, 2008, Defendant Barr circulated for approval via email: the minutes for the June 2007 Board meeting (ten months after the meeting occurred); the minutes for the August 2007 Board meeting (eight months after the meeting occurred); the minutes for the September 2007 Board meeting (seven months after the meeting occurred); and the minutes for the November 2007 Board meeting (five months after the meeting occurred).

65. On May 2, 2008, Malekian proposed additions and corrections to the same minutes circulated by Defendant Barr. In addition, Malekian asked that the minutes be circulated in a more timely fashion.

66. On December 12, 2008 – seven months after Malekian proposed additions and corrections to these same Board minutes and after Malekian had expressed his concerns about the timeliness with which Board minutes were being addressed (up to 10 months after the meetings had occurred) – Defendant Barr wrote to Malekian to inform him that he could not find

evidence for the corrections suggested by Malekian for the June and September 2007 minutes and that Malekian's comments would not be incorporated in the minutes.

67. On the basis of prior practice, Plaintiff is justifiably concerned that Defendants will continue to withhold meeting materials and minutes in an effort to hinder the Directors' ability to perform their fiduciary duties.

68. Defendants Maginn, Barr, and Chai have also improperly attempted to exclude Malekian from deliberations when they deemed it to be in their personal interests to do so.

69. For example, on December 17, 2008, Defendant Barr announced Jenzabar's intent to exclude Malekian from a portion of the December 18, 2008 Board meeting concerning MCG. Only after Malekian objected, was he allowed to participate in the Board meeting, and, if necessary, recuse himself.

V. Defendants' Ineffective Attempt to Deprive MCG of Its Special Voting Rights

70. Evidently concerned that Malekian and MCG would continue to insist on adherence to the terms of the Employment Agreements and otherwise attempt to ensure that Defendants act in the interests of Jenzabar and all of its shareholders, Defendants have now embarked on a scheme to strip MCG of its special voting rights. Jenzabar seeks to force MCG to choose between putting its Warrants (at a price that Defendants likely would improperly artificially deflate by a reduction in Jenzabar's cash flow created by the unlawful excessive compensation described herein), which it may not want to do at this time, and losing its special voting rights, thereby stripping it of the ability to be the only effective brake on Defendants' self-enrichment schemes.

71. Specifically, on March 31, 2009, Jenzabar sent an e-mail 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.

(Exhibit 4, p. 1; the "Repurchase Notice").

72. Also a copy of the Repurchase Notice was received by Certified mail on April 3, 2009.

73. Jenzabar's Repurchase Notice indicated that it intends to repurchase MCG's Senior Preferred Stock on or before April 29, 2009.

74. If the Repurchase Notice were valid and the repurchase went forward on or before April 29, 2009, MCG may have to give notice that it intends to put its Warrants or lose its special voting rights under section 5.12 of the PSWPA, including the right to grant or withhold consent to Affiliate transactions such as the outlandish bonuses and salary increases demanded by and unlawfully paid to Defendants Maginn and Chai.

75. 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.

76. 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 other reasons.

77. First, because March 31, 2009 is less than 30 days **prior to** April 29, 2009, Jenzabar has not given MCG the required notice of its intent to repurchase the Senior Preferred Stock as clearly required under Article V, Section A.4(e). (Ex. 1 at 14-15). *See, e.g., McKesson Corp. v. Derdiger*, 793 A.2d 385 (Del. Ch. 2002) (determining how to calculate 60 days before a meeting for purposes of fixing a record date).

78. 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 makes clear that the Repurchase Date, indeed the repurchase itself, is conditional on the approval of Jenzabar's Board's 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 sets out a range of prices that may be offered, to be adjusted once the Repurchase Date is set.

79. Notwithstanding Jenzabar's failure to comply with the terms of its own Charter, the purpose of the Repurchase Notice is clear: either to attempt to remove MCG as an investor in the Company at a price that is artificially low on the basis of reductions in cash flow attributable to the unlawful excessive compensation or, failing that, to attempt to strip it of any meaningful ability to object to Defendants' continued use of the Company for their own self-interests.

DEMAND ON THE BOARD OF JENZABAR IS EXCUSED AS FUTILE

80. Plaintiff brings this action, in part, derivatively in the right of and for the benefit of Jenzabar to redress the injuries suffered and to be suffered, by Jenzabar as a direct result of the breach of fiduciary duty and unjust enrichment alleged herein. Jenzabar is named as a nominal Defendant solely in a derivative capacity.

81. Plaintiff will fairly represent the interests of Jenzabar in enforcing and prosecuting its rights.

82. Plaintiff is and has continuously been an owner of Jenzabar stock since June 30, 2004 and at all relevant times alleged herein.

83. Plaintiff did not make a demand on the Board of Directors to bring this action on behalf of Jenzabar because such a demand would have been a futile, wasteful, and useless act, as a majority of the Board is not disinterested.

84. Jenzabar's Board of Directors currently consists of five Directors. Defendants Maginn, Chai, San Miguel and Mills are four of the five Directors now on the Board. Each of these four directors is incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute this action.

85. Defendants Maginn and Chai have substantial and direct financial interests in the events alleged in this complaint, having been recipients of the unlawful payments. They also knowingly sought approval of the unlawful payments.

86. Defendants San Miguel and Mills were members of the Compensation Committee that approved, in breach of their fiduciary duties, the unlawful payments to Maginn and Chai

contrary to their known obligations under the Charter and PSWPA. As members of the Compensation Committee and as Board members that approved the unlawful payments, they are substantially likely to be held liable for the misconduct complained of by Plaintiff. Moreover, by colluding with the recipients of the unlawful payments, San Miguel and Mills have demonstrated that they are unable or unwilling to act independently of the other defendants.

87. Defendants San Miguel and Mills are also former professors of Defendant Maginn, who are now beholden to Defendants Maginn and Chai for their significant and material compensation as directors of Jenzabar. In sum, four of the five current Board members approved and/or accepted the unlawful payments complained of by Plaintiff.

CAUSES OF ACTION

COUNT ONE

(Breach of Contract)

88. MCG restates and realleges paragraphs 1-87 as if set forth fully herein.

89. By approving compensation increases for Maginn and Chai without the consent of, and over the objection of, MCG, Defendants have breached the PSWPA.

90. As a result of Defendants' breach, MCG has suffered the violation of its special voting rights, for which Defendants are liable.

91. All compensation increases in violation or breach of the PSWPA are invalid, and, thus, any such compensation paid must be returned with interest.

COUNT TWO

(Breach of Charter)

92. MCG restates and realleges paragraphs 1-91 as if set forth fully herein.

93. By approving compensation increases for Maginn and Chai without the consent of, and over the objection of, MCG, Defendants have breached the Jenzabar Charter.

94. As a result of Defendants' breach, MCG has suffered the violation of its special voting rights, for which Defendants are liable.

95. All compensation increases in violation or breach of the Jenzabar Charter are invalid, and, thus, any such compensation paid must be returned with interest.

COUNT THREE

(Aiding and Abetting Breach of Contract Against Defendants Maginn, Chai, and Barr)

96. MCG restates and realleges paragraphs 1-95 as if set forth fully herein.

97. The rights, duties, and obligations of the PSWPA are binding on Defendants Maginn, Chai, and Barr in their capacity as members of Jenzabar's Board of Directors and/or as officers of Jenzabar and were known duties at the time Defendants Maginn and Chai sought and later received with Defendant Barr's assistance the unlawful payments in December 2008 and thereafter.

98. Defendants Maginn, Chai, and Barr, without privilege or justification, purposely encouraged Defendants San Miguel and Mills to increase the compensation of Defendants Maginn and Chai, in violation of the contractual consent and voting rights of MCG.

99. As a result of the actions of Defendants Maginn, Chai, and Barr, Defendants San Miguel and Mills voted to purportedly approve compensation increases for Defendants Maginn and Chai, in breach of the PSWPA and MCG's special voting rights.

100. As a result of the misconduct of Defendants Maginn, Chai, and Barr, MCG has suffered damages, including a violation of its special voting rights, for which Defendants Maginn, Chai, and Barr are liable.

COUNT FOUR

(Aiding and Abetting Breach of Charter Against Defendants Maginn, Chai and Barr)

101. MCG restates and realleges paragraphs 1-100 as if set forth fully herein.

102. The rights, duties, and obligations of the Charter are binding on Defendants Maginn, Chai, and Barr in their capacity as members of Jenzabar's Board of Directors and/or as officers of Jenzabar and were known duties at the time Defendants Maginn and Chai sought and later received with Defendant Barr's assistance the unlawful payments in December 2008 and thereafter.

103. Defendants Maginn, Chai, and Barr, without privilege or justification, purposely encouraged Defendants San Miguel and Mills to vote to purportedly increase the compensation of Defendants Maginn and Chai, in violation of the special voting rights of MCG.

104. As a result of the actions of Defendants Maginn, Chai, and Barr, Defendants San Miguel and Mills purportedly approved compensation increases for Defendants Maginn and Chai, in breach of the Charter and MCG's special voting rights.

105. As a result of the misconduct of Defendants Maginn, Chai, and Barr, MCG has suffered damages, including a violation of its special voting rights under the Charter, for which Defendants Maginn, Chai, and Barr are liable.

COUNT FIVE

(Breach of Fiduciary Duty Against All Individual Defendants)

106. MCG restates and realleges paragraphs 1-105 as if set forth fully herein.

107. Defendants, as officers and directors of Jenzabar, owe MCG, as a stockholder of Jenzabar, the fiduciary duties of care, loyalty and good faith under Delaware law.

108. Defendants breached their fiduciary duties to MCG by, among other things, acting in conscious disregard of their known duties and/or in breach of their duties of care, loyalty, and good faith, in: (a) approving bonus payments and salary increases to Defendants Maginn and Chai, in violation of MCG's known special voting rights as provided by the PSWPA; (b) approving bonus payments and salary increases to Defendants Maginn and Chai, in violation of MCG's known special voting rights as provided by Jenzabar's Charter; (c) failing to keep Board members properly informed with timely information; (d) failing to provide adequate notice of the agendas of Board meetings; (e) failing to circulate minutes of the Board meetings in time for meaningful comment; (f) failing to incorporate Malekian's comments, changes, and additions to the Board minutes; and (g) asserting to MCG that it must give its Warrant Put Notice by April 29, 2009 or lose its special voting rights, notwithstanding the fact that Jenzabar's Repurchase Notice did not provide 30 days prior notice of the purported April 29, 2009 repurchase and did not provide information required under Article V, Section A.4(e) of Jenzabar's Charter, and, thus, MCG would not need to give its Warrant Put Notice to preserve its special voting rights.

109. As a result of Defendants' misconduct, MCG and Jenzabar have suffered and continue to suffer substantial damages in an amount to be determined at trial.

COUNT SIX

(Unjust Enrichment Against Defendants Maginn and Chai)

110. MCG restates and realleges paragraphs 1-109 as if set forth fully herein.

111. As a result of the Defendants' misconduct, Defendants Maginn and Chai have improperly received, at a minimum, more than \$1.5 million in excess bonus payments and excess salaries since December 2008, well over and above amounts permitted under the terms of their respective Employment Agreements. Maginn and Chai have been unjustly enriched at the expense of and to the detriment of Jenzabar and should be ordered to return immediately the more than \$1.5 million in excess bonus payments and excess salaries paid since December 2008, with interest.

112. As a result, Jenzabar has suffered damages, for which Defendants Maginn and Chai are liable.

113. To remedy these Defendants' unjust enrichment, the Court should order them to disgorge immediately to the Company all of the unlawful payments, with interest.

COUNT SEVEN

(Accounting)

114. MCG restates and realleges paragraphs 1-113 as if set forth fully herein.

115. As alleged herein, each of the individual Defendants owes a fiduciary duty to the Company to, among other things, refrain from unduly benefiting themselves and other Company insiders at the expense of the Company.

116. As alleged herein, Defendants breached their fiduciary duties by, among other things, requesting, approving, and receiving the unlawful payments.

117. Defendants possess complete control over the books and records of the Company concerning the details of the unlawful payments.

118. As a result of the Defendants' misconduct, the Company suffered damages and is entitled to recovery as a result.

119. Plaintiff demands an accounting be made of all compensation and/or any other payment paid to or for the direct or indirect benefit of Defendants Maginn and Chai, including, but not limited to, the dates of any bonus payments, the amounts of the bonus payments, and the dates and amounts of any other compensation in excess of the salary and bonuses provided for under Defendants' Employment Agreements with the Company.

COUNT EIGHT

(Rescission)

120. MCG restates and realleges paragraphs 1-119 as if set forth fully herein.

121. As a result of the improper conduct and actions of the Defendants alleged herein, Defendants Maginn and Chai have received more than \$1.5 million in excess "retroactive" bonuses for fiscal years 2007 and 2008 over and above what was permitted by application of the terms of the Company's Employment Agreements with Defendants Maginn and Chai.

122. As a further result of the improper conduct and actions of the Defendants alleged herein, Defendant Maginn has received a salary increase of \$50,000 or 12.5%, and Defendant Chai has received a salary increase of \$40,000, or 12%, over and above what was called for by application of the terms of the Company's Employment Agreements.

123. The retroactive bonuses and salary increases were in violation of MCG's special voting rights, were not properly authorized, and are unlawful and invalid.

124. As a result, Jenzabar has suffered damages.

125. The Court should order that all of the unlawful payments be rescinded, with all such sums promptly returned to Jenzabar, with interest.

COUNT NINE

(Declaratory Judgment Under Delaware Declaratory Judgment Act (10 Del. C. § 6501 *Et Seq.*)

126. MCG restates and realleges paragraphs 1-125 as if set forth fully herein.

127. An actual and justiciable controversy has arisen and now exists between MCG and Defendants with respect to 5.12(h) of the PWSPA.

128. Pursuant to section 5.12(h), Jenzabar is prohibited from entering into any transaction, contract, agreement or arrangement with an Affiliate without the written consent or affirmative vote of the holders of at least a majority of the then outstanding warrants or warrant shares. Affiliate is defined in section 1.1 of the PSWPA to include any director or executive officer of Jenzabar.

129. At all relevant times, MCG has held at least a majority of the then outstanding warrants or warrant shares.

130. MCG seeks a declaratory judgment that its special voting right contained in section 5.12(h) applies to the payment of any compensation to Defendants Maginn and/or Chai other than sums expressly set forth in their respective Employment Agreements.

COUNT TEN

**(Declaratory Judgment Under Delaware Declaratory Judgment Act
(10 Del. C. § 6501 Et Seq.)**

131. MCG restates and realleges paragraphs 1-130 as if set forth fully herein.

132. An actual and justiciable controversy has arisen and now exists between MCG and Defendants with respect to Article V, Section A.1.(b)(x) of the Jenzabar Charter.

133. Pursuant to Article V, Section A.1(b)(x), Jenzabar is prohibited from entering into any transaction, contract, agreement or arrangement with an Affiliate without the written consent or affirmative vote of the holders of at least a majority of the then outstanding shares of Senior Preferred Stock. Under Article V, Section A.1.(b)(x), this provision includes any transaction, contract, agreement or arrangement with an officer or director of Jenzabar.

134. At all relevant times, MCG has held at least a majority of the then outstanding Senior Preferred Stock.

135. MCG seeks a declaratory judgment that its special voting right contained in Article V, Section A.1.(b)(x) applies to the payment of any compensation to Defendants Maginn

and/or Chai other than sums expressly called set forth in their respective Employment Agreements.

COUNT ELEVEN

**(Declaratory Judgment Under Delaware Declaratory Judgment Act
(10 Del. C. § 6501 *Et Seq.*)**

136. MCG restates and realleges paragraphs 1-135 as if set forth fully herein.

137. An actual and justiciable controversy has arisen and now exists between MCG and Defendants with respect to Article V, Sections A.4 and A.5 of the Jenzabar Charter.

138. Article V, Section A.4(e) requires, among other things, that Defendant Jenzabar provide 30 days notice prior to the date of any repurchase of MCG's Senior Preferred Stock and certain other information such as the Repurchase Date and the Repurchase Price.

139. Under Article V, Section A.5, 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.

140. MCG 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 voting rights under section 5.12 of the PSWPA is invalid

COUNT TWELVE

(Rescission of Unauthorized Compensation)

141. MCG restates and realleges paragraphs 1-140 as if set forth fully herein.

142. On December 23, 2008, Defendants Maginn and Barr informed the Board at a meeting that as a result of an extensive search of historic documents, they had “discovered” that a \$750,000 bonus owed to Defendant Maginn had not yet been paid.

143. A vote was taken at the Board meeting to approve payment of the \$750,000 bonus to Defendant Maginn. At the Board meeting, all five directors of Jenzabar were present, and a quorum established. At the Board meeting, only two of the five directors present voted for the bonus.

144. The \$750,000 bonus was not properly authorized by the Board.

145. The unauthorized \$750,000 bonus has been paid to Defendant Maginn.

146. The \$750,000 bonus should be rescinded, and all such sums promptly returned to Jenzabar, with interest.

PRAYER FOR RELIEF

WHEREFORE, MCG requests that this Court:

- A. Enter judgment for MCG on its Complaint;
- B. Award MCG damages as determined at trial, plus pre-judgment and post-judgment interest and costs;
- C. Award Jenzabar damages as determined at trial, plus interest and costs;

D. Enter a declaratory judgment that the PSWPA, under 5.12(h), does not allow for the increase in compensation of any director or officer without the written consent or affirmative vote of the holder of the majority of the warrants;

E. Enter a declaratory judgment that Jenzabar's Charter, under Article V, Section A.1.(b)(x), does not allow for the increase in compensation of any director or officer without the written consent or affirmative vote of the majority holder of Senior Preferred Stock;

F. Enter 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 voting rights under section 5.12 of the PSWPA is invalid;

G. Enter a judgment prohibiting Jenzabar and its officers and directors from further violation of MCG's special voting rights under the PSWPA and Jenzabar's Charter;

H. Enter an Order that all compensation awarded to Defendants Maginn and Chai for which consent from MCG was not obtained, and for which was not properly authorized, be rescinded with all such sums paid immediately returned to the Company with interest;

I. Order the Defendants to provide full and timely information to all members of the Jenzabar Board of Directors and to timely and accurately record the deliberations and actions of the Board and its Committees;

J. Order the Defendants to pay Plaintiff's costs and attorneys' fees in bringing and prosecuting this action;

K. Grant MCG and/or Jenzabar such other relief as the Court deems fair and just.

Respectfully submitted,

MCG CAPITAL CORP.,
By its attorneys



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