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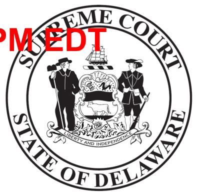

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT A. MAGINN, JR., Appellant-Defendant, -and- NEW MEDIA INVESTORS II-C, LLC, Nominal Defendant, v. EDWARD DEANE, GEORGE WIHBEY, and JASON CUNNINGHAM IN HIS CAPACITY AS ATTORNEY-IN-FACT FOR WILLIAM CUNNINGHAM, for themselves and in the right and for the benefit of New Media Investors II-B, LLC, and New Media II-B, LLC Plaintiffs-Appellees.	No. 288, 2024 Court Below: Court of Chancery of the Stat e of Delaware, C.A. No. 2017-0346-LWW **PUBLIC VERSION FILED SEPTEMBER 17, 2024**

APPELLANT'S OPENING BRIEF

Jody C. Barillare (# 5107)
Amy M. Dudash (# 5741)
MORGAN, LEWIS & BOCKIUS LLP
1201 N. Market Street, Suite 2201

Wilmington, DE 19801
(302) 574-3000

Dated: September 10, 2024

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NATURE OF PROCEEDINGS

In 1998, Appellant Maginn co-founded Jenzabar, Inc. In 1999 and 2000, Maginn formed New Media Investors II, LLC ("II") and II-B, LLC ("II-B") for individuals to indirectly invest in Jenzabar, with Maginn as manager of each.

Plaintiffs were 3/88 investors in II-B, contributing 2.37% of the total invested. Following a 2004 Jenzabar recapitalization, II-B's only assets were: (i) a warrant for Jenzabar stock and (ii) preferred shares, to be redeemed by Jenzabar over six years with the proceeds to be distributed to II-B's members. By 2011, II-B had received the last Jenzabar redemption to distribute to II-B's investors. II-B's out-of-the-money warrants were expiring; II-B was concluding. Maginn lobbied Jenzabar's special committee of independent directors ("Committee") to issue a new warrant ("II-C Warrant") to Maginn-managed New Media Investors II-C, LLC ("II-C") through which II&II-B's members might reinvest. With little member interest, Maginn wound up owning II-C.

Plaintiffs commenced books and records proceedings in 2014 and filed a plenary action in 2016 claiming breach of fiduciary duty regarding the original warrants' expiration. In a deposition in 2021, Plaintiffs learned that Maginn beneficially owned the II-C Warrant shares. Plaintiffs amended the complaint to allege usurpation of the II-C Warrant through inadequate disclosure, removing II-B as nominal defendant and seeking to exclude II-B's other members from any

recovery. In 2022, the case was tried. In November 2022, the Court of Chancery held that Plaintiffs' warrant expiration and disclosure theories were time-barred but the usurpation theory was timely, and that the claim for usurpation of II-B's *members'* opportunity was derivative and awarded rescissory damages. *See* Ex. A ("Decision"). Plaintiffs then litigated whether they were entitled to the entire damages award, unsuccessfully. Final judgment entered in 2024. *Id.* Maginn appeals.

SUMMARY OF ARGUMENT

I. The Decision erroneously applied equitable tolling to the usurpation claim (and related unjust enrichment claim) on the ground that Plaintiffs "were entitled to rely on 'the competence and good faith' of Maginn" (Decision 26) from accrual in 2013 until 2021—the same period during which Plaintiffs investigated and then sued Maginn for breaches of fiduciary duty. Finding "reliance" on Maginn's good faith was error where Plaintiffs were not so relying, and could not have been "reasonable." As the court observed on Page 1: Plaintiffs' "beliefs that Maginn acted to advantage himself at the expense of the members of [II-B] have remained constant." Decision 1.

The Decision also erroneously held that Plaintiffs were not on inquiry notice of the usurpation claim—a finding irreconcilable with multiple other conclusions reached by the court in finding Plaintiffs' other claims time-barred. Plaintiffs were on inquiry notice of their usurpation claim when they received Maginn's solicitation to invest in II-C in 2013 ("II-C Solicitation"), which expressly stated that, while Maginn-managed II-B "concluded," Maginn was offering another Jenzabar investment through II-C. That alone triggered inquiry notice of Plaintiffs' usurpation claim. The court also found that: (i) Plaintiffs were on notice in 2012 of their claim regarding the original warrant expiration ("Warrant Expiration Claim"), which was the basis by which Plaintiffs claimed entitlement to the II-C Warrant; and

(ii) Plaintiffs were on notice of their claim that Maginn duped them into not investing in II-C through the 2013 II-C Solicitation ("Disclosure Claim"), *i.e.*, the means by which Maginn allegedly "usurped" the opportunity. Plaintiffs have not appealed these findings. Plaintiffs' adjudicated notice of these component parts of their usurpation claim compelled holding they had inquiry notice of the usurpation theory.

II. The court erred by holding Maginn liable for usurpation of a corporate opportunity. Usurpation of a corporate opportunity is a derivative claim addressing harm to the business entity when a fiduciary takes an opportunity within *the company's* line of business or for which *the company* has an interest or expectancy, *the company* is financially positioned to exploit the opportunity and by pursuing it the fiduciary is placed in a position inimical to *the company*. In substance, Plaintiffs' claim was not a derivative claim for usurpation of an opportunity of II-B, but instead a direct claim for usurpation of II-B's *members' opportunity*. The II-C Warrant was, as the name suggests, issued by Jenzabar's Committee to II-C—not II-B. II-B could not have exercised a warrant that Jenzabar's Committee did not provide to II-B. And, Plaintiffs pled and pursued the claim as one for usurpation of an opportunity for II-B's members—a claim that Delaware law does not recognize as derivative. Moreover, Plaintiffs' theory of usurpation was that Maginn's II-C Solicitation, through inadequate disclosure, misled II-B's members to not invest in II-C—akin to fraudulent inducement of inaction—a direct claim. Plaintiffs also pursued the claim

consistent with a direct action by claiming that they alone were entitled to damages, seeking to exclude all other II-B members from a recovery.

The court also erred in holding that Plaintiffs satisfied the *Broz* factors in finding usurpation. Fundamentally, the court misapplied *Broz* because it failed to account for the fact that the only reason the II-C Warrant came into existence was because II-B was concluding as a business. II-B's only assets were an out-of-the-money warrant that was expiring and a final redemption payment from Jenzabar that, like all prior redemptions, was intended for distribution to II-B's members in accord with their prior expressed desires. The court elevated form over substance to hold that, because II-B was legally authorized to invest in Jenzabar under its operating agreement, II-B had an interest or expectancy in the II-C Warrant, and because II-B possessed funds from the redemption, notwithstanding they were to be distributed, II-B was financially capable of exercising the II-C Warrant. Delaware law does not hold a fiduciary liable for usurpation of an opportunity that the business may theoretically exploit, but as a matter of practical reality, would not and could not.

In any case, the opportunity was not "usurped" as it was expressly offered to and rejected by Plaintiffs and II-B's members. Plaintiffs' only challenge to that defense—insufficient disclosure by virtue of requiring that members sign an NDA—is time-barred and in any case fails under controlling precedent that allowed Maginn to require an NDA before disclosing confidential information.

III. The court erred by awarding derivative damages on a direct claim. As the claim was direct, if Plaintiffs were entitled to damages at all, they should have been limited to their pro-rata percentage (2.37%) of the value of the II-C Warrant. Moreover, given the court's finding that Plaintiffs had inexcusably delayed prosecuting the case during the books and records phase and for years during the plenary litigation, awarding rescissory damages was error. So was taxing Maginn with $4 million in interest for a year-and-a-half between the Decision and Judgment during which Plaintiffs sought to take the absent II-B members' share of the damages for themselves.

STATEMENT OF FACTS

A. Inception Of Jenzabar, New Media And The Bursting Dot.com Bubble

In 1998, Maginn co-founded "Jenzabar.com," hoping to ride the dot.com investment wave to an early IPO. Apart from his own funds, Jenzabar.com was financed by seed capital from II&II-B—LLC's Maginn formed through which he and his Bain partners indirectly invested in Jenzabar. A798, 15:7-17:23. Plaintiffs purchased II-B units for $155,000 (A948, 542:1-16), representing 2.37% of the $6,547,789 invested by 88 members in II-B. A799, 19-20. Maginn invested $300,000. A799, 19:1-4. Shortly thereafter the dot.com bubble burst and what was expected to be a short-term trade became an illiquid investment of indefinite duration. A799-800, 20-24.

B. 2004 Recapitalization

In 2004, Jenzabar completed a Recapitalization, which was conditioned upon receiving the consent of II&II-B's members. As an inducement to consent, "a key point" was to allow "Jenzabar to redeem" II&II-B's preferred shares, "a major concession … to secure … approval of the [Recapitalization] by [II&II-B]." A1327-28. II&II-B's members voted overwhelmingly in favor, and in 2005 they were told Jenzabar "will redeem the remaining [preferred] ratably over the next six years" with II&II-B planning to distribute the same. A1333-34. In addition to the preferred shares, II&II-B were each provided warrants for Jenzabar shares following the Recapitalization. A1482. Jenzabar made redemptions every year as anticipated,

which II&II-B distributed to members every year. A1335; A1349 (recounting "junior preferred" redemption dates).

C. The End Of II&II-B And The Creation Of II-C

In 2011, II&II-B received final redemptions, earmarked for distribution as described in the Recapitalization. A803, 35:6-24; A1327. With the II-B Warrant expiring under water, II&II-B would have no assets. Decision 6. With no rights to a "capital call" from members (A808-09, 56:20-57:10), II&II-B's business was effectively concluded.

Instead of distributing the redemption payments, allowing II's warrant and the II-B Warrant to expire, and immediately concluding II&II-B, Maginn considered whether there might be interest in a continued investment in Jenzabar. While II&II-B's warrants were out-of-the-money on a cashless basis, they could be exercised at $0.89 per share. Decision 5-6. Maginn discussed options with a sophisticated investor, including using the redemption proceeds to exercise portions of the warrants, but rejected the idea because II&II-B's members wanted liquidity, and exercising for illiquid Jenzabar shares meant extending the decade-long investment indefinitely while incurring tax liabilities. A810-811; A1340. He considered asking II&II-B's members, on an individual basis, whether they would want to pay a portion of their redemption proceeds towards exercising and drafted a questionnaire to that effect. A814-15, 80:2-84:23; A1522. Instead, Maginn negotiated an extension of

the warrant expiration from Jenzabar's Committee and sought alternatives including "pool[ing]" the II&II-B members into a new investment. A1354. The fully empowered Committee (Decision 7 n.32) granted the extension (A1354) "believing [Maginn was] seek[ing] further opportunities for [II&II-B's] members to invest in Jenzabar" (Decision 7) and that "the better approach" was to allow the warrants to expire and "the Company later offer the right to buy stock." A1355. The II-B Warrant expired unexercised at the end of 2011. Decision 10.

In June, 2012 II&II-B (through Maginn) proposed and the Committee agreed to sell a warrant to "a successor entity, New Media Investors II-C." A1356 (Committee minutes). The Committee's "expectation was that [II-C] would offer the investment opportunity to the members" of II&II-B. Decision 11. Maginn borrowed $65,000 from II&II-B's redemption proceeds (later reimbursed) for II-C to purchase the II-C Warrant "for the benefit of [II&II-B's] members." Decision 12.

D. The II-C Solicitation

In May 2013, Maginn prepared a detailed letter by which to transmit the final redemption/distribution and offer the II-C opportunity to the members, including confidential information about the earlier warrants expiring under water and a summary of a non-public Jenzabar valuation dictating that result, the II-C Warrant and Maginn's insider-views on Jenzabar's future. A1527-28. Jenzabar's General

Counsel edited the letter to delete the details, leaving only: (i) that the II&II-B investments "concluded," accompanied by a "final check" for their last redemption/distribution; and (ii) that Maginn was offering "another Jenzabar opportunity" through "II-C" for which information could be obtained by signing an enclosed NDA. *Id*.; A1414. The edited letter explained that by cashing the check, the member agreed to an enclosed release, the terms of which purported to repurchase the II&II-B units ("Release") (the edited Letter, NDA and Release, the "II-C Solicitation"). A1414.

In June 2013, immediately before the II-C Warrant expired, Maginn paid $3 million (of his money) to exercise it on II-C's behalf. Decision 14. Maginn then addressed logistical issues (confirming member addresses, securing checks etc.), (A840, 181:22-183:5; A1407-13) and in December 2013, sent the II-C Solicitation. A1407-13.

E. II&II-B Members' Rejection Of The II-C Solicitation

Virtually all II&II-B members cashed their checks. A1476-77. Only 14 (out of approximately 150) II&II-B members returned NDAs. Decision 17 n.81. No members invested in II-C. Maginn wound up owning the II-C Warrant shares, through II-C.

The only evidence in the record from any NDA-signatory was from Charles Farkas, who testified he had no memory of the II-C opportunity but did remember

the reason he signed the NDA—not to obtain information about IIC, but because he was "eager to be out of this investment altogether." A1049. As Farkas requested, Jenzabar repurchased his interests. *Id.*

F. Plaintiffs Commence Litigation Claiming Maginn Breached Fiduciary Duties

Plaintiffs neither cashed their checks nor signed the NDA. Decision 16-17.[1] Rather, Plaintiffs were already "suspicious" Maginn was favoring his interests over his investors and "misappropriating funds" (A1001, 610:14-21); at least one had already retained counsel to investigate. A601, 19:24-20:5 ("Q:... [W]hen did you first speak with a lawyer regarding the possibility of making this [books and records] demand? … A: It was before [December 2013].").

In July 2014, Plaintiffs instituted books and records litigation, investigating suspicions that Maginn breached fiduciary duties, languishing[2] until the end of 2015. A178 ¶¶ 62-64.

Plaintiffs took until December 2016 to file this action. A309. After an initial hearing, Plaintiffs abandoned the case until 2020 when they received a dismissal

[1] Testifying a decade later, Cunningham who signed NDAs on Wall Street "every week" (A1002, 613:18-20) claimed that, while the NDA was "fairly standard," (A1002, 614:15) he did not sign the NDA because he (wrongly) perceived it "required a release." Decision 17. Nothing in the II-C Solicitation nor NDA stated the NDA operated as release. A1414-17.

[2] "[P]laintiffs pursued their claims with little zeal … the case lay dormant … [observing] over five years separating the expiration of the II-B Warrants from the filing of plaintiffs' Complaint." A648.

notice for failure to prosecute. Chancellor Bouchard wrote "this is a really old matter" that moved at "a snail's pace" and Plaintiffs' excuses for the delays were "not overwhelmingly persuasive" (A610, 4:12-16) setting the case for trial.

G. Plaintiffs "Dramatically" Expand The Scope Of The Case

In 2021, the case was reassigned to Vice Chancellor Will and discovery commenced in earnest. Plaintiffs learned in a deposition that no II&II-B members invested in II-C. In a move that would exemplify then-Chancellor Strine's "Pizza Principle"—"it is more time-consuming to clean up the pizza thrown at the wall than it is to throw it"[3]—Plaintiffs then amended the Complaint ("FAC") to triple the length of the original complaint and "dramatically" expand its scope. A639.

The FAC continued to allege the original Warrant Expiration Claim, asserting that Maginn engineered the expiration of the II-B Warrant and leveraged that expiration to compel the Committee to issue the II-C Warrant, resulting in II&II-B's members having an interest in the II-C Warrant. A341-42 ¶ 9(e); A389 ¶ 141. The FAC added a "Disappearing Securities Claim," challenging transactions dating to 2000 and causing the "court [to] struggle[] to parse out both the nature of the claims and their factual foundations." A652 n.109.

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[3] *Auriga Capital Corp. v. Gatz Props., LLC*, 40 A.3d 839, 882 n.184 (Del. Ch. 2012).

The FAC added a claim that the II-C Solicitation's inadequate disclosure ("Disclosure Claim") induced II&II-B's members not to invest in II-C, thereby usurping an opportunity from II-B "and its members." A394 ¶ 165. Plaintiffs alleged Maginn "breached his fiduciary duties *to the New Media Members* by failing to apprise them of an opportunity to obtain a new Warrant for shares in Jenzabar." A386 ¶ 127. Plaintiffs explained, the II-C Solicitation "was designed to appear to abide duties but really to deter any inquiry into, or participation in, II-C …. attracting no interest in the investment." A757; A769-70 ("Maginn failed to satisfy his duty of disclosure and usurped a corporate opportunity" by "purporting to have been offering the new opportunity to the II-B Members, although in a way designed to avoid any real awareness or interest."); A772 ("The issuance of the New Warrant to II-C, coupled with the failure to make these disclosures, reflects Mr. Maginn's usurpation of a corporate opportunity."); A773 (II-C Solicitation "was designed to discourage interest").

Plaintiffs also added an unjust enrichment claim "in the alternative" to the usurpation claim. A639-40.

Now pursuing a claim that was in substance for usurpation of II-B's members' opportunity, Plaintiffs proffered another novel theory, seeking to claim all damages for themselves. Count II of the FAC alleged that, because Plaintiffs did not cash their checks from the II-C Solicitation while the other II-B members did (triggering

the Release and repurchasing their interests), Plaintiffs were "the only remaining members" of II-B (A396 ¶ 178). As Plaintiffs asserted before trial, "[b]y the actions of the New Media Members and Mr. Maginn releasing their interests, *the only real owner of the New Warrant is Plaintiffs*." A745.[4] The FAC deleted II-B as nominal defendant.

Defendant moved to dismiss on multiple grounds, including Rules 12(b)(7) and 19 for failure to join the indispensable II-B members whom Plaintiffs were seeking to divest of their II-B interests, and Rule 23.1 as Plaintiffs were inadequate derivative Plaintiffs for the same reason. A535-41.[5] The court converted the motion (including the 12(b)(7) motion) to summary judgment (A592-93).

In March 2022, the court issued its summary judgment decision. A628. The court held that the II-B Warrant Expiration Claim was time-barred due to Plaintiffs' inquiry notice from 2011. A645. The court also held that the "Disappearing Securities Claim" was barred by laches, finding it "difficult to imagine that the defendant has access to documents from 2004 to 2013 that might be necessary" and

[4] All emphasis in this brief is added, unless otherwise indicated.

[5] Count II sought a declaration that Plaintiffs were the managers of II-B as its only remaining members, presuming that the Release repurchasing members' interests was enforceable. *Germaninvestments AG v. Allomet Corp.*, 2020 WL 6870459, at *1 (Del. Ch. Nov. 20, 2020) (applying Rule 19—it "easy enough for Plaintiffs to plead in conclusory allegations" that "absent parties no longer have rights under the operative contracts," but it is "not so easy for the Court to accept [that mere allegation] as truth").

observing several "deponents could not respond to numerous relevant questions because of fading memories." A653. The court rejected that inquiry notice proved a limitations defense regarding usurpation of the II-C Warrant, however, because "[n]othing in [the II-C Solicitation] indicates that the opportunity was created specifically for [the members'] benefit," A657, as if the claim were for usurpation of the *members'* opportunity.

Regarding Rule 19, the court perceived fact issues as to whether there were other II-B members, and did not address Plaintiffs' adequacy as derivative representatives.

Plaintiffs' case at trial included evidence concerning the already-time-barred Warrant Expiration Claim, offered to establish "the lack of any good faith reason or entire fairness for [Maginn's] usurpation of the New Warrant." A759. The trial was replete with evidentiary gaps and uncertainties concerning the events from 1-2 decades earlier, including the absence of disclosure in the II-C Solicitation.

H. The Decision

In November 2022 the court issued its post-trial Decision. Ex. A. On limitations/laches, the court held: (i) Plaintiffs' Disclosure Claim, "[s]etting aside the aspects of this argument that bear on their business opportunity claim" (Decision 25), was time-barred because Plaintiffs had inquiry notice upon receipt of the II-C Solicitation; but (ii) the usurpation claim was not time-barred, because: (a) equitable

tolling applied as Plaintiffs were "entitled to rely" on Maginn's "good faith" (*id.*); and (b) while the II-C Solicitation informed II-B members about Maginn's II-C investing in Jenzabar (*i.e.*, the very "business and purpose of [II-B]" (Decision 44)), the II-C Solicitation failed to disclose that the II-C Warrant "was intended for the benefit of New Media II-B and its members," defeating inquiry notice. Decision 27.

The court held Maginn liable for usurping "II-B's and its members'" opportunity because, in part, he failed to disclose it in the II-C Solicitation. *E.g.*, Decision 47 ("II-C Solicitation provided virtually no information about the opportunity"). The court denied unjust enrichment as duplicative of usurpation. The court also held that Maginn's continuous Rule 19 objections were "waived" (Decision 74 n.331) while rejecting the corollary that the claim was direct based on its substance—*i.e.*, three II-B members pursuing damages, exclusively for their own benefit, on a usurpation of the *members'* opportunity (through nondisclosure) claim, without even naming II-B as a nominal derivative defendant. The court awarded rescissory damages, rejecting that the passage of time due to Plaintiffs' delays made it inequitable.

Following the Decision, the court conducted over objection post-trial proceedings to address Plaintiffs' bid to keep 100% of the damages for themselves.

A1212-13 ¶ 5; A1261; A1269.[6] Recognizing that the absent II-B members' interests were at stake and that Plaintiffs could not adequately represent them, the court appointed Special Counsel to represent their interests. A1203-04. Plaintiffs argued that the II-B members should not share in the damages (the court ultimately rejected Plaintiffs' attempt). The court awarded Plaintiffs attorneys' fees, resulting in the absent II-B members paying 26% of the damages to pay the fees of counsel who had attempted to seize that award from them in their absence. A1286. The court also calculated pre-judgment interest beginning from the time of its Decision through the entry of Judgment (over $4 million) (A1319), over objection that the time-period was devoted to adjudicating Plaintiffs' bid to exclude the absent II-B members from the damages award—a dispute Maginn protested. A1288-92; A1295-99. On July 17, 2024—20 months after the post-trial Decision—the court entered judgment. Maginn timely appealed.

[6] As the court later clarified, the purpose was to "address whether the absent members who signed releases and accepted redemption payments might still be entitled to a pro rata distribution of damages." A1265.

ARGUMENT

A. The Corporate Opportunity and Unjust Enrichment Claims Were Time-Barred.

A. Question Presented

Whether Plaintiffs' corporate opportunity claim (and unjust enrichment claim) was time-barred? Preserved: A698-701; A1051-53.

B. Standard of Review

"This Court reviews the interpretation and application of legal precepts, such as the statute of limitations and the doctrine of laches, *de novo*." *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013).

C. Merits of Argument

It is undisputed that Plaintiffs' claims accrued by December 2013 (A1114), and that Plaintiffs:

- knew by 2013 that II-B was concluding while Maginn launched II-C, with a business purpose identical to II-B (A176-78 ¶¶ 55-61);
- knew by 2013 that Maginn did not disclose facts regarding the II-C opportunity (Decision 25-26);
- were on notice of the Warrant Expiration Claim by 2012 (A649-50);
- subjectively suspected Maginn breached his fiduciary duties by 2013 (A999, 602:14-603:19; A1000, 608:7-610:24);

- initiated books and records litigation suspecting fiduciary breaches by 2014 (A178-79 ¶¶ 62-64); and
- sued Maginn for breach of fiduciary duty by 2016 (A309);
- but did not bring the usurpation claim until 2021.

The court's conclusion that Plaintiffs were "entitled to rely on the 'competence and good faith' of Maginn" (Decision 26) to apply equitable tolling was legal error. Plaintiffs could not have "reasonably" relied upon Maginn's good faith when they sued him for bad faith. Indeed, the court itself held that "during the five years that this case has been pending, [Plaintiffs'] belief that Maginn acted to advantage himself at [their] expense remained constant…." Decision 1.

Plaintiffs were on notice of their claims by 2013. Further, as the Warrant Expiration and Disclosure Claims that were integral to the usurpation claim were time-barred, so too was the usurpation claim time-barred.

1. Plaintiffs Could Not Reasonably Rely On The Good Faith Of A Fiduciary They Sued For Bad Faith.

Equitable tolling only "stops the statute [of limitations borrowed for laches] from running while a plaintiff has *reasonably* relied upon the competence and good faith of a fiduciary." *Buddenhagen v. Clifford*, 2024 WL 2106606, at *24 (Del. Ch. May 10, 2024).

Reliance on a fiduciary is not reasonable when the plaintiff subjectively distrusts the fiduciary. In *Buddenhagen*, the plaintiff testified "he did not believe

Defendants to be competent or unconflicted fiduciaries who were willing to execute their fiduciary duties in good faith." *Id.* at *25. The court held "it was unreasonable for [plaintiff] to rely on Defendants' 'competence and good faith" and thus equitable tolling was not applicable. The inapplicability of equitable tolling is more apparent here, where Plaintiffs acted on their beliefs by suing Maginn.

Even before receiving the II-C Solicitation in 2013, Cunningham, acting on behalf of a "consortium" of investors (Plaintiffs) suspected Maginn was "misappropriating funds" and breaching his fiduciary duties (A999, 602:14-603:19; A1000, 608:7-610:24), and Deane had retained counsel on suspicion Maginn breached fiduciary duties in connection with the Warrant Expiration Claim. A985, 548:2-18; A991-92, 572:8-573:2. The II-C Solicitation only made Plaintiffs more suspicious. A1001, 610:9-24. In 2014, Plaintiffs filed books and records actions suspecting wrongdoing and mismanagement. A367 ¶¶ 79-81. In 2016, Plaintiffs brought their verified complaint alleging Maginn breached his fiduciary duties, including good faith "by placing his own financial interests ahead of New Media II-B's members." A211 ¶ 73.

In cases where plaintiffs merely *should have been* suspicious, Delaware courts reject equitable tolling as precluded by the impossibility of reasonable reliance. *E.g.*, *Gallagher Indus., LLC v. Addy*, 2020 WL 2789702, at *15 (Del. Ch. May 29, 2020) (rejecting "reasonable reliance [g]iven the red flags that ought to have made

[plaintiff] suspicious"). In light of Plaintiffs' *actual belief* that Maginn breached his fiduciary duties, applying equitable tolling was error.

2. The 2013 II-C Solicitation Triggered Inquiry Notice.

Even where tolling applies, it ends upon inquiry notice. *Buddenhagen*, 2024 WL 2106606, at *23. Plaintiffs were on inquiry notice of their corporate opportunity claim the moment they received the II-C Solicitation in 2013.

a. The II-C Solicitation Gave Inquiry Notice That II-C Was Conducting The Identical Business Of II-B.

Delaware has long recognized that "the essence of [the corporate opportunity] doctrine is 'that a director may not appropriate something for himself that in all fairness should belong to his corporation." *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *9 (Del. Ch. Oct. 29, 1993). Whether that "something…should belong to the corporation" is a function of whether it "falls within the corporation's business … presents an opportunity in which the corporation has an interest … [and] the corporation would be able and willing" to pursue it. *Id.*

In the II-C Solicitation, Maginn simultaneously informed Plaintiffs of "the conclusion" of II-B while "Maginn had 'formed a new New Media entity, New Media Investors II-C, LLC, to invest in another Jenzabar opportunity." A358 ¶ 59. Plaintiffs were thereby put on inquiry notice that II-C, formed by their II-B fiduciary, Maginn, was engaging in exactly the same line of business as the "concluded" II-B once had—investing in Jenzabar. Indeed, later holding that II-C was II-B's

opportunity, the court found that the "business and purpose' of New Media II-B was to make 'investments in securities and other interests of Jenzabar." Decision 42-43. As Plaintiffs were directly provided with actual notice that their II-B-fiduciary had formed a near-identically named LLC pursuing the identical business of II-B—the II-C Solicitation, standing alone, gave inquiry notice of usurpation.

b. That The II-C Solicitation Did Not Disclose That The II-C Warrant Was Created For *The Members'* Benefit Is Irrelevant

Rejecting inquiry notice, the court reiterated its summary judgment ruling, reasoning "[n]othing in [the II-C Solicitation] indicates either that the [Jenzabar] opportunity [referenced therein] was *created specifically for [plaintiffs'] benefit* or that it was (allegedly) redirected for Maginn's exclusive benefit … [a]nd a reasonable person would not understand that 'another Jenzabar opportunity' was intended *for the benefit of New Media II-B and its members*, much less that Maginn had himself exercised the II-C Warrant six months earlier." Decision 27. The ruling is wrong on multiple levels.

First, even if Plaintiffs "may not have had specific knowledge of the intricacies of [Maginn's] alleged breaches of fiduciary duty," Plaintiffs "certainly had enough information to cause a reasonable stockholder to raise his eyebrows and investigate further." *Buddenhagen*, 2024 WL 2106606, at *27. "Inquiry notice does not require full knowledge of the material facts; rather, plaintiffs are on inquiry

notice when they have sufficient knowledge to raise their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued would lead to the discovery of the injury." *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005).

Second, the court's concern that Maginn did not reveal that the II-C Warrant "was created specifically for [plaintiffs'] benefit" is irrelevant to whether Plaintiffs had notice of a usurpation of a *corporate—i.e.*, *II-B's*—opportunity. Even if the law required "full knowledge of the material facts" (it does not), that the II-C Warrant was for *II&II-B members' benefit* is not "material." As explained below, there is no legally cognizable, derivative claim for usurpation of an opportunity *from individual investors*. *Infra* p.35.

That Maginn did not reveal that the II-C Warrant was "redirected for Maginn's exclusive benefit" is also an incorrect ground to reject inquiry notice. Apart from the fact that the II-C Warrant was *not* "redirected exclusively for Maginn's benefit"—it was issued directly to II-C to offer the II&II-B members the opportunity to invest in Jenzabar—the issue is whether Plaintiffs had notice that Maginn may have taken the opportunity. The II-C Solicitation, from Maginn, offering II-C, was at minimum a "red flag" providing inquiry notice.

c. Plaintiffs Were Subjectively On Inquiry Notice.

In any case, the court's narrow focus on whether the II-C Solicitation, standing alone, *objectively* triggered inquiry notice (though it did), improperly ignored the facts establishing *subjective* inquiry notice—*i.e.*, all the facts above, including Plaintiffs' "constant" belief that Maginn was breaching his duties and suing him for it—negating equitable tolling.

d. The Court's Adjudication That The Disclosure And Warrant Expiration Claims Were Time-Barred Applies To Bar The Usurpation Claim

In addition, the court held that the various components making up Plaintiffs' single count for breach of the duty of loyalty—*i.e.*, the Warrant Expiration Claim and Disclosure Claim around the II-C Solicitation—were time-barred. Each of these theories were interrelated components of the loyalty claim: Maginn supposedly "engineered" the expiration of II-B's warrant (the Warrant Expiration Claim) and leveraged the II&II-B's members' dissatisfaction to cause Jenzabar's Committee to issue the II-C Warrant for their benefit, making it II&II-B's "property" and then duped II&II-B's members into not investing in II-C through lack of disclosure (the Disclosure Claim) so that he could then keep II-C for himself (in totality, the usurpation claim). *Supra* p.10. The court held that the Warrant Expiration Claim and Disclosure Claim were time-barred based on inquiry notice, but somehow not

the usurpation claim. This amounts to "an artificial and immaterial distinction on these facts." *Gallagher*, 2020 WL 2789702, at *14 n.209.

Gallagher was a merger case holding a disclosure theory time-barred by inquiry notice of price and process claims: "Our case law does not require … that the red flag relate precisely to the claim ultimately litigated, if the claim arose from the incident serving as the red flag." *Id.* Here, the usurpation claim arose from the same "incident serving as the red flag"—the II-B Warrant expiration and the II-C Solicitation, both of which the court held were time-barred.

Notably, the court's artificial segregation of components of Count I for limitations purposes did not prevent those theories from dominating the trial. Plaintiffs' evidence regarding the Warrant Expiration and Disclosure Claims was both a focus of the trial and part of the court's basis for holding Maginn liable. A1138 (Maginn's interests were inimical to II-B because "[t]he II-C Solicitation provided virtually no information about the opportunity"); *see also* A1276 (itemizing disclosure violations). Those claims were time-barred. So was the usurpation claim.

3. Laches Bars Plaintiffs' Usurpation Claim.

Apart from the equitably imported statute of limitations, the usurpation claim is also barred under a laches analysis. Laches is established by "knowledge by the claimant, unreasonable delay in bringing the claim and resulting prejudice to the defendant." *Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 8 (Del. 2009). For the same reasons equitable tolling is inapplicable and Plaintiffs were on inquiry notice (*supra* pp. 27-28), Plaintiffs had "knowledge" of their claims. And Plaintiffs unreasonably delayed, waiting five years from Cunningham being on notice in 2011-12 regarding the Warrant Expiration Claim before suing, then going dormant until threatened with dismissal for failure to prosecute. Indeed, the court ruled that Plaintiffs unreasonably delayed seeking books and records, (A645-48), and, post-trial, when initially calculating prejudgment interest, "exclude[ed] the time period from August 2018 to August 2020 during which the plaintiffs failed to press this matter." A1281. Accordingly, regardless that Plaintiffs did not "discover" the II-C Warrant claim until a deposition in 2021, the court erred in failing to recognize that, had Plaintiffs proceeded at even a modest pace, that deposition would have occurred by (conservatively) 2016.

In any case, the Decision devotes but one short paragraph rejecting laches because Maginn was supposedly not prejudiced by the extraordinary growth in value of Jenzabar stock from 2013-2021. Decision 29. The basis for the court's holding

of "no prejudice"—because Plaintiffs "lacked knowledge about the II-C Warrant in the first place" so they "could not have used time as an option to their advantage" (*id.*)—misses the point. Whether or not Plaintiffs intentionally "used time as an option," they unquestionably delayed "discovering" the claim resulting in an amplified damages award. Decision 29.

Nor did the trial court explain how the prejudice that drove its finding of laches on summary judgment—finding it "difficult to imagine that the defendant has access to documents from 2004 to 2013 that might be necessary" to Maginn's defense and observing several "deponents could not respond to numerous relevant questions because of fading memories" (A656)—somehow did not apply to a trial of the usurpation claim held even later.

B. The Court Erred By Holding Maginn Liable For Usurping The II-B Members' Opportunity.

A. Question Presented

Whether the court erred by holding Maginn liable for usurpation of a corporate opportunity when, in substance, Plaintiffs pursued a direct claim for usurpation of II-B's *members'* opportunity and, even assuming there was an opportunity owed to the members, Maginn offered it and the members rejected it. Preserved: A712-17; A1062-70.

B. Standard of Review

Legal conclusions are reviewed de novo. *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831 (Del. 2011).

C. Merits of Argument

The usurpation claim in substance was for usurpation of II-B's members' opportunity to invest in Jenzabar, a claim not cognizable as a derivative usurpation claim, as a matter of law. Even if derivative, the court erred holding Plaintiffs satisfied the *Broz* factors. Derivative or direct, the claim fails because the opportunity was offered to and rejected by Plaintiffs and the members.

1. Plaintiffs' Usurpation Claim Is Not Legally Cognizable Because It Was A Direct Claim For Usurpation Of The Members' Opportunity

Usurpation of a corporate opportunity is ordinarily a derivative claim. Plaintiffs' usurpation claim was anything but ordinary, in substance for usurpation of II&II-B's *members'* opportunity. As Chancellor Chandler held in *In re Digex Inc. S'holders Litig.*, "the purported opportunity is that of the Digex shareholders to sell their Digex shares to the highest bidder. Thus, the perceived corporate opportunity is not really a corporate opportunity at all, but more closely resembles an individual opportunity of the shareholders." 789 A.2d 1176, 1190 (Del. Ch. 2000). So too here.

a. The Gravamen Of Plaintiffs' Usurpation Theory Was Direct.

The II-C Warrant was issued by the Committee to II-C, not II or II-B. *Supra* p.10. The whole point of the II-C Warrant—Maginn's proposal on behalf of II&II-B as negotiated with the Committee—was to allow those members who might want a further indirect investment in Jenzabar to be afforded the opportunity to make individual decisions to do so, and if a sufficient number were interested, they could be aggregated in II-C. *Supra* p.16-17. Plaintiffs based their supposed entitlement to the II-C Warrant on the theory that Maginn allowed the previous II-B Warrant to expire (Warrant Expiration Claim) and used that result to negotiate for II&II-B's members to cause the Committee to issue the II-C Warrant. *Supra* p.18. As the

court itself found, the nature of the opportunity was for II&II-B's members based upon individual elections to invest (Decision 11) (the Committee's "expectation was that [II-C] would offer the investment opportunity *to the members*")—not II&II-B making the decision for them with their redemptions.

Plaintiffs' theory of usurpation (nondisclosure) is direct. Plaintiff alleges: Maginn "breached his fiduciary duties *to the New Media Members* by failing to apprise them of an opportunity to obtain a new Warrant for shares in Jenzabar" (A386 ¶ 127) in the II-C Solicitation, "designed to … deter any inquiry into, or participation in, II-C…. attracting no interest in the investment" (A757) and thus "Maginn failed to satisfy his duty of disclosure and usurped a corporate opportunity" by "purporting to have been offering the new opportunity to the II-B Members, although in a way designed to avoid any real awareness or interest." A769-70; A772 ("The issuance of the New Warrant to II-C, coupled with the failure to make these disclosures, reflects Mr. Maginn's usurpation of a corporate opportunity."); A773 (II-C Solicitation "was designed to discourage interest"). Plaintiffs' theory of usurpation of the members' opportunity—insufficient disclosure when Maginn solicited each member on an individual basis to invest in II-C—boils down to the same (time-barred) Disclosure Claim that the court expressly held was "a direct claim." Decision 25 n.124.

b. Plaintiffs Pursued The Claim For Their Benefit Alone

Plaintiffs, through new Count II, were pursuing damages exclusively for their own benefit and to the exclusion of all other II-B members, seeking a declaration in Count II that Plaintiffs were the only remaining members of II-B and accordingly "the only real owner of the [II-C] Warrant is Plaintiffs." A745. Plaintiffs even deleted II-B as a "nominal defendant" from the FAC. Plaintiffs in substance pursued the claim as direct.

c. The Court Treated The Claim As Direct

The court, in substance, treated the claim as direct. The court relied upon the direct Disclosure Claim as a basis for ruling against Maginn. Decision 47 (holding Maginn inimical to II-B in part because "II-C Solicitation provided virtually no information about the opportunity"). The court also recognized that any actual harm was a function of individual investment decisions. Decision 32 ("Any direct harm to the individual members of New Media II-B would have come later, when making individual investment decisions").[7] And finally, the court allowed Plaintiffs to litigate directly against the interests of the II-B members (A395-97; A1203-04; A1211; A1245 (Plaintiffs seeking to "extinguish the Membership interests of those

[7] Defending against the direct theory, Maginn argued that harm was a function of individual investor reliance/causation. A1062; A1080.

who accepted the final checks”)), proceedings antithetical to the derivative form of action. *See Optimiscorp v. Atkins*, 2023 WL 3745306, at *15 (Del. Ch. June 1, 2023) (holding derivative plaintiffs liable for breaching duty of loyalty and rejecting argument that no Delaware court has done so previously: “[P]erhaps no Delaware court has found a representative plaintiff liable in such a way because no representative plaintiffs have tried to keep a derivative award for themselves”).

d. The Court Erred By Holding The Claim Derivative

“[E]quity regards substance rather than form,” and in this case, the “entity [was] simply an artifice representing the relationship between two legally juxtaposed parties and [was] no longer relevant as a distinct legal creature for the purpose of resolving the final claims between these parties.” *In re Cencom Cable Income Partners*, 2000 WL 130629, at *6 (Del. Ch. Jan. 27, 2000). Even if, *arguendo*, the claim was nominally derivative as a usurpation, the court should have “look[ed] past the derivative characterization” to the actual circumstances of the case. *In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 3655257, at *17 (Del. Ch. Aug. 1, 2018); *In re Cencom*, 2000 WL 130629, at *2 (recognizing derivative/direct distinction may be inapplicable in alternative entities); *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int’l. Fund, L.P.*, 829 A.2d 143, 151 (Del. Ch. 2003) (same).

The Decision rejected that the claim was direct based upon distinctions without a difference, like claiming *Anglo* was inapplicable because “II-B is not a

partnership." Decision 31. The court similarly distinguished *Cencom*, because "the partnership's business [was] complete, the liquidation sale [was] over, and the only two parties to the partnership [we]re now clearly adversaries," (Decision 30 (citations omitted)). II-B's business had ceased for a decade by the time Plaintiffs' filed the FAC and, according to Plaintiffs, they were II-B's only members. The court's "distinctions" supported Maginn's argument.

2. Plaintiffs Failed To Satisfy The *Broz* Factors.

Even if derivative, the court erred by holding the *Broz* factors were satisfied.

"The corporate opportunity doctrine" prevents a fiduciary from taking an opportunity personally if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimical to his duties to the corporation." *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 154-55 (Del. 1996).

The *Broz* factors, properly applied, strongly militate against the usurpation claim. In short, II-B was in no position to exploit the II-C Warrant because II-B was concluding its business. Indeed, *the only reason that the II-C Warrant came into existence was because II&II-B were concluding* and, in light thereof, Maginn obtained an opportunity for II&II-B's members to make follow-on investments, if

they chose. The court's holding that *Broz* was satisfied derived from its observation that, as a technical matter, II-B theoretically *could have* taken the opportunity, notwithstanding that, as a practical matter, the business was over. Substance controls over form when evaluating usurpation claims under Delaware law, and the court erroneously inverted that principle.

a. II-B Had No Interest Or Expectancy In The II-C Warrant—It Was Not Within II-B's Line Of Business.

The II-C Warrant was not II-B's opportunity. The only reason the II-C Warrant became available was because II-B was concluding, providing its investors with their final distribution in deference to their individual discretion as to whether to reinvest. *Supra* p.18. Accordingly: (i) the II-C Warrant was not even available to II-B and (ii) reinvesting the members' final redemption in another illiquid investment was not within II-B's business plans.

Not Available To II-B. As the II-C Warrant was expressly issued to II-C, II-B was "not offered the opportunity to participate and, thus, there is no way that [Maginn] could have usurped a corporate opportunity" belonging to II-B. *Cooke v. Oolie*, 1997 WL 367034, at *12 (Del. Ch. June 23, 1997) (holding no interest or expectancy); *cf. Thorpe*, 1993 WL 443406, at *9 (corporate opportunity claim "would not be viable" if "there was no transaction available to the corporation").

The court expressly recognized that the II-C Warrant was issued to II-C (Decision 32 n.154), but inexplicably rejected that it was unavailable to II-B, as

somehow "belied by Maginn's own insistence that his actions were motivated by a desire to seek a better outcome for [II-B] and its members," citing Maginn's testimony: "[I]f we could get a new deal … *then we'd form the new entity, II-C, and offer it to everybody*." Decision 8 n.34. Maginn's intent to offer the investment "to everyone"—*i.e.*, II&II-B's members, through II-C—lends no support to the conclusion that the II-C Warrant was available *to II-B*. The court cites no evidence for its other premise—that Maginn sought a better outcome *for II-B*—and that was not the case. Apart from perhaps stray references to "II-B" as shorthand for "its members," the evidence is unequivocal that the thesis resulting in the II-C Warrant was built on II&II-B concluding and aggregating those members who wanted to reinvest into II-C. But even if Maginn had in fact "[sought] a better outcome for II-B and its members," the only outcome the Committee granted was the II-C Warrant. It was simply not available to II-B.

The court also supported its conclusion because the Committee "believed that the II-C Warrant would go to a 'successor entity' to [II&II-B]." Decision 11.[8] That

[8] The Decision insinuates that Maginn deceived the Committee—that the "committee approved the issuance of new warrants to what it believed was New Media II-B's successor entity. But the warrants were given to New Media Investors II-C"—as if the Committee was unaware the warrant was issued to II-C. (A1093). The very minutes authorizing the II-C Warrant state it is issued to the *"successor entity, New Media Investors II-C"* (A1356) as the Decision acknowledges elsewhere. Decision 32 n.154. II-C *was* the "successor entity" to II-B—the next in the series of II, II-B and then II-C.

is as true as it is probative of Maginn's point—a "successor entity" to II&II-B is, by definition, *not* II&II-B.

Not Within II-B's Business Model: *Broz* demonstrates that Delaware law looks to the circumstances of the business to determine line of business/interest or expectancy: "Despite the fact that the nature of the Michigan–2 opportunity was historically close to the core operations of CIS…. CIS was actively engaged in the process of divesting its cellular license holdings." 673 A.2d at 156; *see Williams v. Don Yerkes Fine Cars, Inc.*, 4 Del. J. Corp. L. 552, 560-61 (Del. Ch. 1977) (no corporate opportunity claim where prior car dealership was in process of winding down, even where new car dealership was established on same lot with new lease). Here too, the II-C Warrant was within II-B's business, but the business was concluding.

Nonetheless, the court mechanically relied on II-B's operating agreement to find the II-C Warrant an interest of II-B: "The 'business and purpose' of New Media II-B was to make 'investments in securities and other interests of Jenzabar.'" Decision 42-43. That the operating agreement authorized II-B to invest in Jenzabar—*i.e.*, it was legally possible—does not, under Delaware law, override the reality of the business—the II-B members wanted their redemption payments, not another illiquid investment. There can be little doubt regarding the investors' sentiment, established by the small fraction of II&II-B members who even returned

NDAs to learn about the new Jenzabar opportunity, confirmed by the only direct evidence at trial regarding II&II-B members' sentiment—Farkas' testimony about how he signed the NDA to obtain a meeting with Maginn, not to learn of II-C, but to request a buyout of his entire Jenzabar position. *Supra* p.16-17.

The court's rejection of the facts suggesting II-B was concluding is difficult to follow: "[Maginn] could have returned each member's investment and sought to terminate New Media II-B's corporate status" but he instead tried "to find additional Jenzabar investment opportunities for [II-B]" without cancelling II-B until 2020. Decision 44-45. Apart from the counterfactual reference to finding opportunities "for II-B" (as opposed to II&II-B's members) the court's observation proves Maginn's point. There can be no dispute that Maginn *did* return each member's investment, announced that II&II-B had "concluded,"[9] and offered a "new" Jenzabar opportunity to II&II-B's members. A1414.

b. II-B Was Not Financially Capable Of Exploiting The Opportunity.

When the II-B Warrant expired, the only assets that II-B held were the final Jenzabar redemption payment to be distributed to the II-B members, as was each redemption before it since the 2004 Recapitalization. *Supra* p.7. Like *Broz*, while II-B theoretically could have exercised the II-C Warrant, it "was not in a position to

[9] The failure to complete the administrative act of filing a certificate of cancellation cannot control under *Broz*'s substance-over-form analysis.

commit capital to the acquisition of new assets." 673 A.2d at 155. Maginn does not dispute that, as the court held, the final redemption payment *could have been* deployed to exercise the warrant (in part) or that II-B had no legal obligation to distribute that final redemption payment to its members. Decision 40. That it was legally possible to have re-routed the redemption payment to a new investment does not negate the members' expectations of liquidity—especially given that, if investors wanted to reinvest, the II-C Solicitation gave them a chance to do so. Properly applying *Broz* in light of the facts, II-B was not in a position to re-invest the members' redemptions.

c. II-C Is Not Inimical To A "Concluded" II-B.

With II-B concluding, Maginn could not be in a position inimical to it by managing II-C. If managing II-C was inimical to II-B, then managing II-B was inimical to II—it was obviously not as investing in one does not preclude investing in the other.

The immutable fact remains that the II-C Warrant was only negotiated because II-B was concluding. *Supra* p.7. Maginn's position as manager of II-C could not be inimical to his position as manager of II-B—it is only because II-B was concluding that the II-C warrant came into existence.

That aside, to find inimicality, the Decision merely relies on the fact that Maginn ended up owning all of II-C which in turn owned the II-C Warrant. Decision

A1137-38 ("Maginn was able to personally reap a financial benefit not equally shared by the members of New Media II-B."). But that is pure hindsight, a circumstance that resulted because no II&II-B members chose to re-invest—something Maginn could not have predicted. *Cf. In re Columbia Pipeline Grp., Inc. Merger Litig.*, 299 A.3d 393, 454-55 (Del. Ch. 2023) ("The test therefore cannot be whether, in hindsight, the fiduciaries actually achieved the best price.").

d. The Decision's Elevation Of Form Over Substance Runs Afoul Of Delaware Law

The Decision finds the II-C Warrant to be II-B's opportunity based upon a view that any potential investment in Jenzabar that Maginn could obtain, necessarily had to be directed to II-B: "So long as Jenzabar remained a going concern and the New Media entities had a lawful right to invest in Jenzabar securities, that purpose remained viable." Decision 44. By that logic, and given Maginn was CEO of Jenzabar, virtually every investment in Jenzabar's history—even the Recapitalization—had to be first offered to II-B. That cannot be. Such elevation of form over substance runs afoul of the law in light of *Broz* and other cases where—similar to here—the opportunity technically fit within the line of business/interest or expectancy and the company technically could have paid for it, but yielded no breach for usurpation because, in light of the actual circumstances of the business, it was not a *bona fide* corporate opportunity.

3. Maginn Cannot Be Held Liable For "Usurping" An Opportunity That He Offered And Plaintiffs Rejected.

In the usual corporate opportunity case, a fiduciary's presentation of an opportunity to the company and the company's refusal thereof shields the fiduciary from liability for usurpation. *Broz*, 673 A.2d at 151. Applying that principle, Maginn cannot be held liable for usurpation of an opportunity that he offered to Plaintiffs and they rejected. Likely for that reason, Plaintiffs' formulation of their usurpation claim attacks the II-C Solicitation itself. A773 (II-C Solicitation "was designed to discourage interest").

Even if it were not time-barred, Plaintiffs' attack fails under long-standing precedent, *Stroud v. Grace*, 606 A.2d 75 (Del. 1992). *Stroud* involved a stockholder vote to ratify corporate action—a request for discretionary stockholder action which, unlike here, put the burden on defendants. *Id.* at 84. Plaintiffs asserted that the board breached its duties by advising at the stockholder meeting that it would disclose "'current financial statements' upon a written request for the information and execution of a confidentiality agreement." *Id.* at 90. Noting "the essential nature of keeping financial information confidential in privately-held corporations," this Court held there would be no breach of duty if "(1) the withheld information was confidential; and (2) the board only withheld the material confidential information from shareholders, who having been given notice and opportunity, failed to execute a reasonable confidentiality agreement." *Id*. at 89.

Unlike *Stroud,* where the company seeking discretionary stockholder action bore the burden, Maginn had no affirmative disclosure obligations here. *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, *6 n.18 (Del. Ch. July 24, 2009) (no disclosure obligation "when the corporation asks a stockholder as an individual to enter into a purchase or sale"); *Dohmen v. Goodman*, 234 A.3d 1161, 1171 (Del. 2020) (agreeing with "*Wayport* and its decision not to impose an affirmative fiduciary duty of disclosure for individual transactions"). But even if he did, conditioning disclosure on an NDA was reasonable—the exercise price of the II-C Warrant alone was confidential, let alone the summary of the valuation of Jenzabar or Maginn's insider views on Jenzabar's prospects. A1523. Maginn cannot be held liable for usurping an opportunity he offered and Plaintiffs' rejected because he properly conditioned disclosure on signing an NDA.

C. The Court's $28.6 Million Damages And Interest Award Should Be Vacated Or Reduced.

A. Question Presented

Was the court's derivative, rescissory damages and post-Decision interest award correct when: (1) the usurpation claim was direct; (2) Plaintiffs were found to have unreasonably delayed litigating their claims, and (3) the interest accrued during the time post-Decision in which Plaintiffs litigated against the absent II-B members? Preserved: A726-30; A1078-82; A1314-19.

B. Scope of Review

Although "this Court reviews an award of damages for an abuse of discretion," its "review of embedded legal issues is *de novo*." *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 937 (Del. 2023) (citation omitted). "Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*." *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999).

C. Merits of Argument

1. The Court Wrongly Awarded Derivative Damages On A Direct Claim.

Plaintiffs' usurpation claim was in substance a direct claim. Yet the court awarded $25 million in derivative damages. A party cannot recover derivative damages on a direct claim. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) (rejecting "conflating" damages from "their individual direct claim" with "damages flowing from the … underlying derivative claim").

Because the usurpation claim was direct, any damages should have been limited to Plaintiffs' pro rata percentage (2.37%) of the value of the II-C Warrant.

2. The Court Wrongly Awarded Rescissory Damages.

The court's award of rescissory damages was erroneous given: (i) the court found Plaintiffs unreasonably delayed, a ruling which should bar rescission and thus rescissory damages; and (ii) the award was inconsistent with the purposes of awarding rescissory damages.

First, the court held Plaintiffs had unreasonably delayed litigating the books and records proceeding and this litigation. *Supra* p.12. Rescissory damages—gaining appreciation over a decade—was therefore improper. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1249 (Del. 2012) (citations omitted) ("[B]ecause '[r]escissory damages are the economic equivalent of rescission … if rescission itself is unwarranted because of the plaintiff's delay, so are rescissory damages."). There is no question "plaintiffs unreasonably delayed in asserting their fiduciary duty claims" and "[t]hat delay makes it inequitable for this Court to award rescissory damages in this case." *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 698 (Del. Ch. 1996) (denying rescissory damages in a case "repeatedly permitted to languish").[10]

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[10] In denying prejudgment interest (until the Decision), the court employed exactly that reasoning, citing *Ryan*. A1318 n.15 ("begin[ning] pre-judgment interest in 2013 would needlessly punish [Maginn] while rewarding the plaintiffs for their inordinate delay").

Second, the Court's award comports with neither of the well-recognized objectives of rescissory damages: "(i) to restore the plaintiff-beneficiary to the position it could have been in had the plaintiff or a faithful fiduciary exercised control over the property in the interim and (ii) to force the defendant to disgorge profits that the defendant may have achieved through the wrongful retention of the plaintiff's property." *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 38-39 (Del. Ch. 2014).

Rescissory damages in no way "restored" Plaintiffs or the II-B members to the position they could have been in—II-C was merely an *opportunity to invest.* Indeed, the court recognized that harm to II-B's members was a function of their "making individual investment decisions." Decision 32. Rescissory damages does not "restore" that state of affairs. Rather, it presumed that all II-B investors would have chosen to reinvest their final redemptions. To hold rescissory damages as "restorative" here is to presume causation[11]—itself an inherently speculative endeavor in the abstract (*In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *50-52 (Del. Ch. Sept. 4, 2014) ("calculating damages for a lost opportunity to invest is too speculative")), but a counterfactual one in this case where the evidence

[11] "As captured in *Dohmen*, the traditional formulation of a claim for breach of the duty of disclosure places the burden of proving reliance, causation, and damages on the plaintiff if the plaintiff intends to seek compensatory or rescissory damages." *In re Columbia Pipeline Group, Inc. Merger Litig.*, 299 A.3d 393, 490 (Del. Ch. 2023) (citations omitted).

overwhelmingly negates it. That counterfactual speculation is only exacerbated by Plaintiffs' "inducement not to invest" theory, akin to a "holder" claim of dubious viability in Delaware. *In re CBS Corp. Stockholder Class Action & Derivative Litig.*, 2021 WL 268779, at *21 (Del. Ch. Jan. 27, 2021) ("The question remains whether [an individual holder] claim is (or ought to be) cognizable in Delaware law. In my view of the law, it is not."); *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1141 (Del. 2016) ("securities holders may decide whether to hold or sell stock for various reasons, proving inducement is difficult").

As for the second consideration, the rescissory damages award does not "force [Maginn] to disgorge profits…." No evidence showed that Maginn received a penny from the II-C Warrant shares. The evidence is undisputed that Jenzabar stock was illiquid through the time of trial (and remains so to this day). The damages fixed a theoretical value for those shares at a point in time, but given the absence of a market, that value has little relation to what the shares will ultimately be worth if (not when) they ever are monetized. Rescissory damages in this case causes Maginn to "disgorge" $25 million (before interest) that he has not and may never receive. For that reason, it was also error for the court to reject applying a minority discount. *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *12 n.54 (Del. Ch. Nov. 24, 2009) (distinguishing appraisal decisions that declined to apply discounts and

holding that "marketability discount would be applied in any sensible valuation of the [company founders'] shares").

3. Maginn Should Not Be Penalized For The Period Of Time Post-Decision That Plaintiffs Litigated Against The Absent II-B Members

If derivative damages were appropriate, the court erred in saddling Maginn with millions of dollars in prejudgment interest for the time between the Decision and Judgment, during which Plaintiffs litigated against the absent II-B members. A1317. Because Plaintiffs could not "appropriately represent the interests of the absent [II-B] members" (A1203-04) the court appointed Special Counsel to represent them, and proceedings transpired regarding the enforceability of the Release (*i.e.*, the basis for Plaintiffs' claim against the absent II-B members). A1212. Plaintiffs continued litigating against the absent II-B members, seeking to "extinguish the Membership interests of those who accepted the final checks." A1245. Maginn was unequivocal throughout the proceedings—the absent II-B members could not be divested of their interests *in absentia*. A1207.

The post-trial proceedings between the Plaintiffs and Special Counsel was not Maginn's fight. But for Plaintiffs' disloyal claim of entitlement to the derivative damages award, these post-trial proceedings were unnecessary.[12] To the extent that

[12] Maginn suggested that if interest was applied, it ought to be paid from Plaintiffs' counsel's fees. A1291.

a derivative damages award survives appeal, the interest accruing from the time of the Decision to the judgment should not be borne by Maginn.

CONCLUSION

For the foregoing reasons, the Court of Chancery's judgment should be reversed.

Dated: September 10, 2024

Respectfully submitted,

/s/Jody C. Barillare

Jody C. Barillare (#5107)
Amy M. Dudash (#5741)
MORGAN, LEWIS & BOCKIUS LLP
1201 N. Market Street, Suite 2201
Wilmington, DE 19801
(302) 574-3000
jody.barillare@morganlewis.com
amy.dudash@morganlewis.com

Michael D. Blanchard (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 341-7700
michael.blanchard@morganlewis.com

Counsel for Appellant-Defendant Robert A. Maginn, Jr.

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Dated: September 10, 2024

By: */s/ Jody C. Barillare*
Jody C. Barillare (# 5107)

CERTIFICATE OF SERVICE

I, Jody C. Barillare, hereby certify that on September 10, 2024, a copy of Appellant's Opening Brief and Appendix was served on the following counsel of record via Lexis File&Serve Express:

David H. Holloway (#5762)
Shlansky Law Group, LLP
1504 N. Broom Street
Wilmington, DE 19806
(302) 256-5011
David.Holloway@slglawfirm.com

Dated: September 10, 2024

By: */s/ Jody C. Barillare*
Jody C. Barillare (# 5107)