EFiled: Oct 28 2024 04:20PM EDT
Filing ID 74887175
Case Number 288,2024

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 INVESTORS II-B, LLC,

Plaintiffs-Appellees.

No. 288, 2024

Court Below:
Court of Chancery of the
State of Delaware
C.A. No. 2017-0346-LWW

PUBLIC VERSION FILED OCTOBER 28, 2024

APPELLEES' CORRECTED ANSWERING BRIEF

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

Dated: October 22, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

NATURE OF PROCEEDINGS

Appellant Robert A. Maginn, Jr., abused his dual-fiduciary role to take a corporate opportunity belonging to New Media Investors II-B, LLC ("II-B"). Maginn was Chief Executive Officer, Chair of Jenzabar's Board of Directors, and Managing Member of II-B. Over the course of a decade, he orchestrated a series of subtle, value-dissipating transactions that reduced the value of II-B's Jenzabar securities by half, while simultaneously increasing his stake in Jenzabar. He churned millions of dollars from his Members to himself, and then arranged a make-whole new warrant for his suffering Members. But he then secretly used II-B's funds to purchase that Jenzabar warrant and took the opportunity for himself, without ever telling II-B's Members about it.

The statute of limitations unfortunately provides him redoubt for a decade of clandestine self-dealing through churning II-B's Jenzabar securities and thwarting the exercise of a valuable warrant. He now uses sophistry and obfuscation to seek absolution for his grand finale of a giant warrant that he represented was for the benefit of II-B. He did not mention that the opportunity was to pay $3.055 million for 20% of Jenzabar's fully-diluted equity, when Jenzabar had recently paid $25 million to repurchase 18% of the same equity from MCG Capital Corporation ("MCG"). But he used his control of Jenzabar to have the new warrant issued to a separate entity owned solely by him and his then-spouse. He never told the II-B

Members about this opportunity. Instead, approximately eighteen months after obtaining the new warrant, he returned the funds he used to the II-B Members' capital accounts on the condition that they release claims against him.

Maginn relies on the clever but casuistic argument that the new Jenzabar warrant that he paid for with II-B's funds somehow was not within II-B's line of business or corporate purpose. He caused II-B's Jenzabar securities to morph into a variety of classes and amounts, always losing value. Now, he claims that II-B's corporate purpose was limited to holding only *certain* Jenzabar securities, but not the new ones that he obtained with II-B's resources and expressly for its benefit. But II-B's purpose was not confined to owning only certain Jenzabar securities but not others. Maginn claims he decided to wind down II-B in 2017 after he took the new warrant for himself to argue that II-B no longer had any ongoing purpose. These rarefied distinctions are just *ipse dixit* maneuvers to try to bless self-dealing verging on theft. The time-bar has given Maginn a free pass for a decade of corporate chicanery, but he wants more. Maginn told II-B's Members that their investments were concluding, at a loss, but that they were invited to invest in an unspecified new Jenzabar opportunity. From that, he argues that the Members should have known, or could have discovered, that he had leveraged their interests, and used their money, to capture that opportunity – of their own company – for himself. Jenzabar's independent directors did not even know that. He expects to be spared by the statute of limitations again on the theory that his taking of the new warrant was of a piece with his other time-barred breaches. It is not. The warrant was a new opportunity that Jenzabar's putatively-independent directors approved based on Maginn's representations that it was for the existing Members of II-B. And the argument for inquiry notice does not reconcile with the claim that II-B had no remaining business purpose because it no longer had any assets and Maginn had decided to terminate II-B. It had the enormously valuable warrant he had just obtained for its account – before he diverted it.

Maginn usurped a corporate opportunity belonging to II-B. He made no effort to inform his Members other than a performative pretense followed by zero information even for those who signed a non-disclosure agreement. His conduct served to touch the bases of pretend-loyalty but really to avoid detection. This Court should affirm the Chancery Court's judgment.

SUMMARY OF ARGUMENT

I. DENIED. It was not clear error for the Chancery Court to conclude that the II-C claim was tolled and not discoverable until Maginn's deposition in March 2021. The December 2013 letter provided no notice that the New Warrant was an opportunity for II-B, that he had paid II-B's funds for it, or that he had diverted it to II-C. Instead, he only told the II-B Members that their investments were concluding, that they would need to give a release of claims to receive the balance of their capital accounts, and that they could learn more about "another Jenzabar opportunity" if they executed an onerous non-disclosure agreement. But that was misleading. That information would not give a reasonable Member any reason to believe that Maginn had converted II-B's warrant that he claimed was underwater into a valuable asset.

DENIED. Nor would immediate inquiry have led to the discovery of the claim. Jenzabar's Special Committee was not aware. Those who executed the non-disclosure agreement learned nothing more. Plaintiffs were denied documents in their 220 Action to investigate any misconduct beyond the expiration of the 2004 Warrant on the basis that they lacked a credible basis to investigate misconduct.

DENIED. Maginn has waived his new argument that Plaintiffs could not have reasonably relied on him because they were suspicious and investigating a claim that the 2004 Warrant had expired unnecessarily. He never raised this argument below. Even if he had, Plaintiffs had no choice but to rely on II-B's Manager to protect their interests and had no reason to suspect that he had been disloyal in usurping a new asset that they were not even aware of.

DENIED. Maginn's arguments only illustrate that Plaintiffs could not have learned anything further through inquiry in 2013 because he fraudulently concealed any information that would have put a reasonable person on notice of the II-C claim. This Court can affirm on the ample evidence of Maginn's fraudulent concealment, even if it does not find his reliance argument to be waived or concludes that Plaintiffs could not have reasonably relied on II-B's Manager.

II. DENIED. The Chancery Court committed no error in concluding that the New Warrant that Maginn diverted to II-C was a corporate opportunity belonging to II-B. The New Warrant was expressly obtained for the benefit of the Members of II and II-B, paid with their funds. The Special Committee understood that it was for their benefit. II-B also had the means to pay the price to exercise the New Warrant. Plaintiffs could have and would have invested more to pay for it. And it could have been exercised cashlessly in any event. The warrant was plainly within II-B's line of business and Maginn could not cabin II-B's business to holding only the Jenzabar securities that lost money but not the ones that had substantial value. Nor could Maginn engineer the opportunity to fall outside of II-

B's business by unilaterally deciding to wind up II-B, which he had no authority to do.

III. DENIED. Once liability is found, the Chancery Court has broad discretion to fashion a remedy. The usurpation claim was a derivative claim because the New Warrant was intended to benefit Members, and the extant II-B Members all suffered the same harm when Maginn diverted that opportunity. It was issued to an entity because it was a corporate opportunity consistent with Jenzabar's Special Committee's mandate to "simplify the cap table." Plaintiffs pleaded the claim by II-B and, in the alternative, as a derivative claim. It was well within the Chancery Court's discretion to award rescissory damages to disgorge the benefit that Maginn improperly usurped from II-B. The Court carefully balanced that by limiting pre-judgment interest so as to avoid any double-counting that might otherwise result. It was also well within the Chancery Court's discretion to structure the award to be issued directly to II-B's Members. That is what would ultimately happen if the award was issued to II-B, and it addressed Maginn's feigned concern that all of the II-B Members were not before the Court.

STATEMENT OF FACTS

Maginn was a senior executive at Bain & Company. In 1998, he co-founded Jenzabar with his then-spouse, Ling Chai. Jenzabar is a private Delaware corporation in the education technology market. At all relevant times, Maginn was Jenzabar's Chief Executive Officer and Chairman of its Board of Directors. Chai was at all relevant times President and a Director of Jenzabar. In 1999, Maginn formed New Media Investors II, LLC ("II"), and in 2000, he formed II-B to attract seed investment for Jenzabar. A798, 15:7-A799, 17:23. II and II-B are Delaware limited liability companies. II-B is governed by a Limited Liability Company Agreement ("Operating Agreement"). B185. Maginn primarily solicited his former Bain colleagues to invest in II and then II-B. Plaintiffs-Appellants are Members of II-B. At all relevant times, Maginn was the sole Managing Member of II and II-B. A802, 32:17-20; A837:11-15; A854, 238:20-24.

A. History of II-B's Asset Holdings.

II-B's Jenzabar securities shuffled over a series of complex, value-dissipating transactions in 2004. The result of these serial transactions was that the approximate $8,800,000 that II and II-B paid for Jenzabar securities in 2000 and 2001 was ultimately reduced to approximately $4,000,000 over 12 years. Then, in 2012, Maginn received 6,500,000 voting shares of Common stock and 65,000,000 non-voting shares of Common stock through a new warrant using funds and an opportunity belonging to II and II-B. A1103.

In 2000, Jenzabar took a $25 million debt investment from Pegasus Partners II, L.P. and OF Venture L.P. ("Pegasus"). Pegasus had the right to gain control of the Board in the event of a default. A236. This investment ultimately resulted in litigation, which was resolved in 2003 through an agreement with MCG to recapitalize and refinance Jenzabar to remove Pegasus, which II-B was asked to ratify. A219; B193.

As a result of this recapitalization, in January 2004, II-B owned at least 2,398,940 "Series B Preferred" shares of Jenzabar sock and 353,648 "Series B Warrants," a total of 2,752,588 units. A278; A279. However, those securities were exchanged in a complex series of transactions that ultimately reduced the quantity and classes of those securities. These transactions ultimately exchanged Common shares that II-B held outright for a warrant for the same amount of Common shares at a strike price of $0.89 per share in the absence of a cashless exercise. The transactions also left unaccounted approximately 772 shares of Jenzabar Series A Junior Preferred Stock that II-B held.

In 2004, II-B was issued 1,129,275 shares of Jenzabar Common stock. A day later, it was issued a warrant for 1,129,275 shares of Jenzabar Common stock (the "2004 Warrant"), with no accounting or record of what happened to the shares that had actually been issued before. A1304. II-B had also acquired 46,470 shares of a newly-created “Series 1 Preferred Stock” for 1,789,013 shares of a newly-created “Series B Preferred” class of shares in Jenzabar. A1482. The next day, Maginn caused II-B to exchange the Series 1 Preferred Stock for 4,647 shares of another newly-created “Series A Junior Preferred Stock.” This information was never disclosed to II-B’s Members and is only reflected in passing in the Financial Statements of Jenzabar from 2009-2010. A1482.

A sparse disclosure that some II-B Members received in 2004 suggested that there was a possibility that Jenzabar would redeem the Series A Junior Preferred Stock. A452. There was no obligation to redeem the shares nor any guarantee that Jenzabar would agree to do so. *Compare* A1327, at 1 with B248. Between 2005 and 2011, when the 2004 Warrant was set to expire, Jenzabar paid $2.1 million to redeem 2,058.43 shares of Series A Junior Preferred Stock. Under the Operating Agreement, Maginn had the exclusive discretion to determine when to issue distributions to Members. The redemptions occurred in three tranches in 2007, 2008, and 2011. The redemptions left 772 shares of II-B’s Series A Junior Preferred Stock in Jenzabar unaccounted for.

B. Maginn Uses the 2004 Warrant to Obtain the New Warrant on Behalf of II and II-B.

Following the Series A Junior Preferred Stock redemptions, II-B held only the 2004 Warrant (and the unaccounted-for 772 shares of Series A Junior Preferred Stock). The 2004 Warrant was set to expire in 2011. A807, 52:6-A808, 53:1. In mid-2011, as the expiration date approached, Maginn began lobbying a putative Special Committee of Jenzabar's Board convened to address matters in which Maginn had a conflict to provide an "alternative" to exercising the 2004 Warrant. A811, 67:5-8; A813, 76:4- 11. Maginn threatened the Special Committee that its mandate was to "simplify" Jenzabar's capital structure, a euphemism for reducing the number of Jenzabar's stockholders. B301; B303.

Maginn led the Special Committee to believe that Jenzabar would face an existential crisis if the 2004 Warrant expired because the New Media Members would sue. Jenzabar would need a valuation to determine whether a cashless exercise was possible by forfeiting shares as payment for the strike price. That could not be done if the value of the underlying shares was lower than the strike price of $0.89 per share. A valuation would show that Jenzabar's shares easily exceeded the strike price, enabling a cashless exercise. Maginn did not want to set a benchmark of a high valuation, and he began scheming for an alternative.

The Special Committee relied on a prior IRC § 409A valuation, applying aggressive control and marketability discounts, to conclude that the fair market value of Jenzabar's Common stock was $0.66 per share. B250. Former Chancellor Bouchard acknowledged that "everyone wants" an IRC § 409A valuation "to be low because they don't want to . . . declare any more income than necessary on their tax return . . . ." B455 at 20:21-24.

Although Maginn claims that most of the Members did not care about their investments in II-B, he told Jenzabar's Special Committee that they did and that they deserved a new opportunity as recompense. Otherwise, Maginn threatened that the Members would exercise the 2004 Warrant individually, which would contravene the Special Committee's mandate. B303.

In October 2011, Maginn proposed to establish a new "New Media" entity and give existing Members of II or II-B the option to re-invest in the new entity. Jenzabar's then-General Counsel told Maginn that "[a]s a managing member, it may expose yourself to claims from current NM members who might try to assert that you were trying [to] squeeze them out of their ownership interests in the warrants by only letting those who roll into the NM entity get the warrants." B301. Maginn paid no attention to this prescient warning.

While lobbying the Special Committee, Maginn made no effort to argue that the value of Jenzabar's Common stock was far higher than $0.66 per share. He knew that it was because, at that time, he was negotiating with MCG to repurchase a warrant for Common stock that it held and believed was worth at least $2.85 per share. A801, 25:15-26:2m 28:3-6; A802, 29:21-30:8; *see also* A805, 43:10-44-24.

In 2012, based on Maginn's threats, the Special Committee granted a new warrant for far more shares than the 2004 Warrant had been, at a lower exercise price of $0.47 per share, below the $0.66 share price that the Special Committee had adopted, with a $0.01 issuance premium (the "New Warrant"). B307. Maginn used approximately $35,453.28 of II's and $31,186.86 of II-B's funds for the New Warrant's premium. A1407.

The Special Committee approved the New Warrant to "New Media," thinking, until learning in 2021, that the New Warrant had been for the benefit of the existing "New Media" Members. A1356. At Maginn's direction, the New Warrant was issued to New Media Investors II-C, LLC ("II-C"), a separate entity that Maginn had previously formed and in which he and his spouse were the sole Members and Managers. A834, 157:23-158:2; A842, 191:14-24; A847, 209:8-15. In June 2012, II-C exercised the New Warrant and was issued 6,500,000 voting shares of Jenzabar Common stock and 65,000,000 non-voting shares of Jenzabar Common stock. B317.

Maginn never told II-B's Members that he had obtained this opportunity represented to be a rain-check for II-B's expired 2004 Warrant, that he used II-B's funds to purchase the New Warrant, or had the New Warrant directed to II-C. A1414.

Although II-B had received the last of its Series A Junior Preferred Stock redemptions (less the 772 unaccounted-for shares) in 2011, Maginn delayed distributing it to the Members of II-B until 2013. A1414. In May 2013, Maginn prepared a draft letter to the Members of II and II-B to inform them that their investments in II-B were concluding and that he was distributing to them the balance of their capital accounts. A1523. That draft recounted the existence of the New Warrant and its origins. *Id*. But that letter was not sent to the Members. Instead, Maginn, supposedly at the direction of Jenzabar's General Counsel, sent a wholly different, abbreviated version that removed any mention of the New Warrant. A1414.

On December 19, 2013, six months after Maginn exercised the New Warrant, he sent the II-B Members a letter, enclosing a check (the "December 2013 letter"). The letter explained that the check was the Member's "final check(s) for you [sic] investments in New Media together with a payment acknowledgment that indicates these checks complete your New Media II and/or New Media IIB investments." A1414. The letter also stated that "New Media Investors has formed a new New Media entity, New Media Investors IIC, LLC, to invest in another Jenzabar opportunity." *Id.* The letter invited recipients to execute an onerous non-disclosure agreement and told them that "we will contact you to provide you with information regarding this new opportunity." *Id.*

This was misleading. Maginn, not "New Media Investors," had formed II-C long before. II-C was not making a new investment in Jenzabar. It used funds from II and II-B to obtain the New Warrant that Jenzabar had issued for *their* benefit. A1407.

The December 2013 letter mentioned none of this. The II-B Members were not aware that Maginn had been lobbying, and even threatening, the Special Committee to provide some consolation for the 2004 Warrant that he allowed to expire unexercised. Nor were they aware that the result was the issuance of the New Warrant to II-C. Approximately eighteen Members executed the non-disclosure agreement. But none of them received any additional disclosure about the New Warrant, its origin in II-B's 2004 Warrant, or the intent that it serve as a make-whole for II's and II-B's benefit. A1119.

The December 2013 letter also included a Payment Acknowledgement and Release. It states that by accepting the payment, the recipient "hereby releases, cancels and terminates any and all right, title and interest in New Media . . ." and would "no longer be a member of New Media." A1415 § II. It stated that cashing the "final check" would operate as a repurchase of that Member's equity interest and a quitclaim to any remaining value, as well as a release of any claims against

Maginn, II-B, Jenzabar, and their employees and affiliates. Plaintiffs did not cash the "final checks," nor did approximately three other Members. A1476.

C. Plaintiffs Investigate the 2004 Warrant

The Chancery Court found that in 2012, Plaintiffs became suspicious that II-B had not exercised the 2004 Warrant. A1051; A1113. Jason Cunningham, who was attorney-in-fact for his father and a Citigroup investment banker in Jenzabar's education technology space, believed that the Jenzabar Common stock was worth significantly more than $0.89, sufficient for a cashless exercise. A1108; B510. Edward Deane served a books and records demand on II-B on June 23, 2014. B325. After the demand was refused, on July 31, 2014, he filed an action under 8 Del. C. § 220 (the "220 Action"). *Id*. William Cunningham, Sr.,[1] and George Wihbey filed books and records actions on March 6, 2015, and March 16, 2015. B377; B383. When they filed Motions to Expedite Proceedings, II-B (controlled by Maginn) *opposed* those motions. *See, e.g*., B386. Those actions were consolidated in May 2015, were tried in August 2015, and Vice Chancellor Noble issued a decision on December 23, 2015. B362.

[1] Appellee William Cunningham, Sr., has recently passed away. Counsel for Appellees are working with his Personal Representative to file a suggestion of death and to substitute the Personal Representative as the relevant party in this action.

Vice Chancellor Noble concluded that "[t]he purposes of their inspection demands range from valuation of their holdings of New Media to investigation into misconduct by Maginn and others in the course of operating New Media." *In re New Media Books and Records Action*, No. 9984-VCN (Del. Ch. 2015), Post-Trial Letter Opinion at 2. Plaintiffs sought what Vice Chancellor Noble described as a "wide-ranging designation of documents," including *all* documents concerning any Jenzabar warrants and decisions not to exercise them.

II-B, controlled by Maginn, argued that "the Court should only require inspection of New Media's records sufficient to allow Plaintiffs to assess the current value of their interests – not the historical financial and valuation information spanning over a decade that Plaintiffs seek." *Id.*, Dk. No. 26 at 26.

Vice Chancellor Noble concluded that Plaintiffs had insufficient evidence to present a credible basis for mismanagement. *Id.,* Post-Trial Letter Opinion at 3.

II-B produced some documents on February 17, 2016.

D. <u>Chancery Court Litigation</u>

Plaintiffs then brought this action, originally in the Superior Court, on December 6, 2016. A190. After the case was transferred to the Chancery Court, Maginn filed a Motion for Summary Judgment in response to the Complaint. Then-Chancellor Bouchard heard and denied that Motion on November 28, 2017. A152. As he explained, the summary judgment motion asked the Chancery Court and the Plaintiffs "to accept everything [he says] as true without anybody kicking the tires. It's just not the way it works. . . ." B540 at 15:19-21. That was emblematic of Maginn's general approach to disclosure. Then-Chancellor Bouchard called the tactic "pretty audacious." *Id.* at 16.

Plaintiffs served discovery on June 6, 2017, asking Maginn to describe the "new investment opportunity" referenced in the December 2013 letter, but he refused to respond. B407. Plaintiffs also asked Maginn for "[a]ll Documents Relating to Your sale or acquisition of Jenzabar's equity," but Maginn claimed not to know who "Your" was referring to. B407-B409. A good-faith response to these requests would have revealed the existence of the New Warrant, as would additional requests served on February 7, 2018, asking for similar information. B485-B486; B490; B492. Maginn again failed to identify the existence of the New Warrant. *Id*.

After a period of dormancy beginning in March 2018, then-Chancellor Bouchard requested a status on the case on June 12, 2020. Plaintiffs had been seeking discovery at that time, including from third parties like Jenzabar, which continued to produce documents into 2019. A44; A52. A status conference was held on August 11, 2020. A148. Although Chancellor Bouchard was critical of the pace at which the case had progressed, he set a revised case schedule and admonished Plaintiffs to "move with greater alacrity to complete discovery without further delay." A133. The parties continued to engage in discovery. Maginn first served discovery requests on December 18, 2020. A145.

E. First Amended Complaint and Trial

In 2020, Maginn suddenly filed a Certificate of Cancellation for II-B. B507. When Plaintiffs learned of this, they revived II-B. B508. Understanding the Payment Acknowledgement and Release to mean that Members (including Maginn) who accepted their "final checks" had sold their equity interest back to II-B, or otherwise resigned from II-B, Plaintiffs understood that they were the only Members remaining, except for perhaps a few others.

On March 26, 2021, Plaintiffs took Maginn's deposition. In response to questioning, he disclosed that he held Jenzabar stock through II-C. He further disclosed that II-C held shares that were set at a number in excess of the shares available in the 2004 Warrant and the similar warrant that II held. This was not previously known or available through any of II-B's investigations or discovery.

Plaintiffs took the deposition of Daniel Quinn Mills, one of Jenzabar's putatively independent Directors and a member of the Special Committee in March 2021. B1. He testified that he did not previously know about the New Warrant until right before his deposition, and that it had been issued for the benefit of the Members of II and II-B. B52 at 202:11-203:6. In late 2021, Maginn produced evidence that he had used II's and II-B's funds to purchase the New Warrant.

Based on this surprise revelation, Plaintiffs, who understood that they were likely the only remaining Members of II-B, sought to amend the Complaint to add a theory that Maginn had usurped the New Warrant from II-B. Plaintiffs' First Amended Complaint ("FAC") added II-B as a plaintiff, rather than a nominal defendant. A333. The FAC alleged a disclosure violation and usurpation claim with respect to the December 2013 letter and Maginn's undisclosed acquisition of the New Warrant. *Id*. The claims were pleaded directly by II-B and, in the alternative, derivatively by Plaintiffs on II-B's behalf. *Id*.

Maginn moved to dismiss the FAC, and the motion was converted to a motion for summary judgment. A525; A594. Maginn moved for dismissal on the grounds that: (a) all of the other [former] Members were necessary parties; (b) Plaintiffs' claim for a declaratory judgment that they were the only remaining Members of II-B as a result of Maginn's Payment Acknowledgment and Release put their interests at odds with the other, former Members whose rights were supposedly at stake; and (c) statute of limitations and laches. A525; A594.

The Chancery Court concluded that the Plaintiffs were on notice of their original theory regarding the 2004 Warrant in 2012 and that it was time-barred. It also concluded that a disclosure claim based on the December 2013 letter was time-barred because the lack of disclosure would have been evident on the face of the letter. However, the Chancery Court concluded that a dispute of fact remained as to whether the December 2013 letter created inquiry notice of the New Warrant and the usurpation claim.

The Chancery Court found that Maginn "[fell] well short" of meeting his burden to show that necessary or indispensable parties to the action existed. A628 at 33. The court reasoned that Maginn cited an undated list of Members, but that document reflected that only two Members other than Plaintiffs had "not cashed the final checks that purportedly concluded their investment in [II-B]." *Id*. The court also questioned why Maginn, who had been the Manager of II-B "for over a decade," could not "provide concrete evidence of who owned membership interests in [II-B] and when." *Id*. at 34. Plaintiffs moved for appointment of a receiver to address any concern that other II-B Members existed. The court denied that motion. A87; A630.

Following a three-day trial, the Chancery Court entered a memorandum opinion finding that Maginn had breached his duty of loyalty in usurping the New Warrant, which was an opportunity belonging to II-B. It also found that equitable tolling applied to the New Warrant claim. The court held that Maginn engaged in "furtive behavior" reflecting that his conflict was inimical to his fiduciary duties to II-B. A1090 at 47. He had "remained silent" about the New Warrant, sent the December 2013 letter with "virtually no information about the opportunity," and

Plaintiffs only learned about it in discovery in this case. *Id.* The Chancery Court found that II-B's damages were $25,451,992, before interest. *Id.* at 77.

Following the trial, the Chancery Court also appointed Special Counsel to identify any remaining Members and to distribute the award. A1274-A1275. The Chancery Court also requested supplemental briefing on the validity of the Payment Acknowledgement and Release.

In connection with entering judgment, the Chancery Court entertained briefing on the pre-judgment interest to be awarded and carefully reviewed periods of time that it concluded reflected delay and excluded those periods from the calculation of pre-judgment interest. A1314. In addition, the Chancery Court later reconsidered its ruling on pre-judgment interest and held that pre-judgment interest should begin on the date of the Memorandum Opinion on November 1, 2022, rather than in 2013 when the wrongdoing occurred. A1090.

Final judgment was entered on July 17, 2024. A3. Maginn appealed.

ARGUMENT

I. THE RECORD ADEQUATELY SUPPORTS THE CHANCERY COURT'S FINDING THAT TOLLING APPLIED TO THE II-C CLAIM.

A. Question Presented

Whether the statute of limitations on the II-C claim was tolled because Plaintiffs were not on inquiry notice of the II-C claim before they learned about it in discovery in March 2021. A784; A1116.

B. Standard of Review

Legal conclusions addressing the statute of limitations or laches are reviewed *de novo*. *Levey v. Brownstone Asset Management, LP*, 76 A.3d 764, 766 (Del. 2013). "Factual findings bearing on the application of the statute [of limitations] are reviewed for clear error." *SmithKline Beecham Pharmaceuticals Co. v. Merck & Co., Inc.*, 766 A.2d 442, 450 (Del. 2000) (citations omitted). This Court "may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. Am. Gen. Corp.,* 651 A.2d 1361, 1390 (Del. 1995) (citations omitted). It may also "rule on an issue fairly presented to the trial court, even if it was not addressed by the trial court." *Id.*

C. Merits of Argument

1. Statute of Limitations and Tolling

Generally, the statute of limitations begins to run "at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action." *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). However, it is tolled until "such time that persons of ordinary intelligence and prudence would have facts sufficient to put them on inquiry which, if pursued, would lead to the discovery of the injury." *In re Dean Witter P'ship Litig.,* 1998 WL 442456, at *7 (Del. Ch. July 17, 1998), *aff'd*, 725 A.2d 441 (Del. 1999).

Courts employ a three-part test in considering statutes of limitations: (1) when the cause of action accrued; (2) whether the statute of limitations has been tolled; and (3) when the plaintiff was on inquiry notice. *Wal-Mart*, 860 A.2d at 319. The II-C claim accrued at the earliest in December 2013. Three tolling theories apply: (a) the discovery rule or inherently unknowable injury; (b) equitable tolling; and (c) fraudulent concealment. Plaintiffs were not on inquiry notice of the New Warrant claim until March 2021 when they learned about that opportunity and that Maginn had usurped it.

2. Discovery Rule

The discovery rule applies "where the injury is 'inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and the injury complained of.'" *Wal-Mart*, 860 A.2d at 319 (citations omitted). When the rule applies, the statute of limitations begins to run "upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of such facts." *Id*. An injury is unknowable where there "have been no observable or objective factors to put a party on notice of an injury . . . ." *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *5.

Although Plaintiffs were aware of the 2004 Warrant claim, they had no basis to suspect that Maginn had induced Jenzabar's Board to issue a replacement warrant, used II's and II-B's funds to purchase it, had the New Warrant issued to II-C, and exercised the warrant. His furtive behavior made the discovery of those facts impossible.

In *In re Tyson Foods, Inc.*, a stockholder was found not to be on inquiry notice of a claim for breach of fiduciary duty based on executive compensation where a proxy statement disclosed only the "mere date and price of the grants" without more. 919 A.2d 563, 590 (Del. Ch. 2007). The court held "it would be inappropriate to infer that plaintiffs were on inquiry notice of injury simply because some relevant information was in the public domain . . . it would be manifest injustice for this Court to conclude, as a matter of law, that 'reasonable diligence' includes an obligation to sift through a proxy statement, on the one hand, and a year's worth of press clippings and other filings, on the other, in order to establish a pattern concealed by those whose duty is to guard the interests of the investor." *Id*. at 591.

In *Dubroff v. Wren Holdings, LLC*, a shareholder update informing shareholders that "[i]n early August [2002] in order to simplify and strengthen its capital structure, debt holders converted debt to equity and [the Company] declared a one for twenty reverse stock split" was insufficient to put shareholders on notice that the transaction was self-interested because the update "did not disclose who benefited from the Recapitalization or what benefits they received." No. CIV.A. 3940-VCN, 2011 WL 5137175, at *3 (Del. Ch. Oct. 28, 2011).

The Chancery Court's conclusion that Maginn's December 2013 letter did not put Plaintiffs on inquiry notice of the II-C claim was sufficiently supported by the record and was based on "orderly and logical" reasoning. *Bäcker*, 246 A.3d at 94. The December 2013 letter identified only that "New Media Investors has formed a new New Media entity . . . to invest in another Jenzabar opportunity." A755. The December 2013 letter did not notify recipients that Maginn had obtained a large and valuable asset for the benefit of II-B and its Members. Nor did it disclose that Maginn, not "New Media Investors," had formed II-C several years prior; that Maginn had used II-B's funds to pay for the warrant; or that he had exercised the warrant several months prior to the December 2013 letter. A754-A758. The draft disclosure that Maginn had prepared in May 2013 would have described the origins of the II-C warrant, but it was never sent. Instead, Maginn sent a pared-back version that barely mentioned II-C and said nothing of the New Warrant or why it was issued.

The December 2013 letter offered to share more about "another Jenzabar opportunity," but only to those who would execute an onerous confidentiality agreement. There is no evidence that anyone who executed that confidentiality agreement received any further information about II-C, the New Warrant, or its origins as a consolation for II-B and its Members. Even in discovery, Maginn refused to identify II-C as an entity that held Jenzabar shares, let alone that it was his entity until his confession years in. The record is uncontroverted that further inquiry would not have led to the discovery of the II-C claim.

Perhaps the strongest evidence that this injury was not previously knowable is that even Jenzabar's own putative "Special Committee" Directors were not aware, until March 2021 when Mills testified. They believed that the New Warrant was issued for the benefit of the Members of II and II-B. A745. If someone with inside knowledge (Mills) was not even aware of Maginn's diversion of the rain-check warrant to II-C, it is not reasonable to expect that anyone else could have or should have known.

Even if the December 2013 letter would have put a reasonable person on notice of a disclosure violation, it would not have given notice that the Managing Member had usurped an opportunity belonging to II and II-B. The December 2013 letter implied that II's and II-B's remaining assets were being distributed and the investments were concluding. For all Plaintiffs knew, II-B had no other assets for Maginn to take. The December 2013 letter refers to a "a new New Media entity, New Media Investors IIC, LLC, to invest in another Jenzabar opportunity." A1414. It required a non-disclosure agreement to learn more (supposedly). These circumstances do not evince that Maginn had somehow converted a supposedly valueless 2004 Warrant that had expired two years prior into a New Warrant for a 20% stake in Jenzabar, tens of millions of dollars in the money. A746. Nor do they provide any reason to believe that the opportunity was intended for II and II-B. Inquiry notice does not require clairvoyance.

The difference in the claims also reflects that Plaintiffs could not have been put on notice from the December 2013 letter. A disclosure violation concerns whether a Board (or in the case of a limited liability company, a Manager) has "fully and fairly" disclosed "all material information within the board's control *when it seeks shareholder action*." *Malone v. Brincat*, 722 A.2d 5 (1998) (quotation omitted; emphasis in *Malone*). Because the letter expressly offered additional information only upon execution of a non-disclosure agreement, it is reasonable to conclude that Maginn's failure to disclose "all material information" within his control was evident on the face of the December 2013 letter.

In contrast, a usurpation claim involves a fiduciary taking for himself an opportunity belonging to the company he is supposed to serve. *See, e.g.*, *Yiannatsis v. Stephanis by Sterianou*, 653 A.2d 275, 278 (Del. 1995). Neither the December 2013 letter, nor any other information available to Plaintiffs, gave any reason to suspect that Maginn had somehow flipped a warrant that he was adamant was underwater into a valuable opportunity. The record demonstrates that no reasonable inquiry would have led to knowledge of the New Warrant, which was not discovered through a Section 220 action or written discovery in this action and was not even known to Jenzabar's independent Directors.

3. Equitable Tolling

The Chancery Court accurately concluded that the II-C claim was equitably tolled because Plaintiffs were entitled to rely on Maginn as a fiduciary obligated to protect the interests of II-B and its Members. "[T]he doctrine of equitable tolling stops the statute [of limitations] from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary. No evidence of actual concealment is necessary in such a case . . . ." *In re Am. Int'l Grp., Inc.*, 965 A.2d

763, 812 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011). "Underlying this doctrine is the idea that even an attentive and diligent investor may rely, in complete propriety, upon the good faith of fiduciaries." *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008) (footnotes omitted).

Equitable tolling serves "to ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing. . . . To allow fiduciaries who engaged in illegal conduct to wield a limitations defense against stockholders who relied in good faith on those fiduciaries when their disclosures provided no fair inquiry notice of claims would be inequitable." *In re Am. Int'l Grp., Inc*., 965 A.2d at 813; *In re Tyson Foods, Inc*., 919 A.2d at 588 (holding that plaintiffs "had the right to rely upon fiduciaries to correctly categorize" certain payments that were described as "business or travel expenses payments" even though such characterization was a mischaracterization until that was known to be the case); *Casanaro v. Bloodhound Tech., Inc.*, 65 A.3d 618, 646 (Del. Ch. 2013), *abrogated on other grounds in El Paso Pipeline GP Co., LLC v. Brickenhoff*, 152 A.3d 1248, 1264 (Del. 2016) (stockholders are only obligated to be reasonably diligent and "are not required to examine every managerial act with a jaundiced eye, independently obtain and cull through corporate filings, and figure out the implications of four numbers in 27 pages of dense, single-spaced, legal text.").

Maginn argues that Plaintiffs could not have reasonably relied on him as a fiduciary because they were already suspicious that he had allowed the 2004 Warrant to expire. Maginn failed to raise that argument below, and it is waived. *See, e.g.*, Super. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . ."). An argument not presented below is reviewed for "plain error." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). Plain error exists only where "the error complained of [is] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* Maginn makes no argument that there was plain error.

Even if the issue was not waived, it does not negate tolling. Plaintiffs' suspicion of one claim does not reflect notice of another claim. Plaintiffs were suspicious that Maginn had allowed the 2004 Warrant to expire. However, they had received distributions in the past, and were not obligated to distrust Maginn completely, especially since most of II's and II-B's Members were his friends and former colleagues.

Vice Chancellor Noble's decision in the Section 220 action also made clear that Plaintiffs' suspicion that the value of Jenzabar stocks supported a cashless exercise of the 2004 Warrant did not support an "investigation into misconduct by

Maginn and others in the course of operating New Media." *In re New Media Books and Records Action*, No. 9984-VCN (Del. Ch. 2015), Post-Trial Letter Opinion, December 23, 2015, at 2-3. Vice Chancellor Noble rejected Plaintiffs' theory that "failure to exercise the warrant before they expire[d] amounts to self-dealing because Maginn is a fiduciary of both New Media and Jenzabar, and Maginn and his wife are substantial owners of Jenzabar stock." *Id.* at 3 n.11.

Moreover, Plaintiffs had to rely on Maginn to protect their fiduciary interests. Minority investors generally "must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot." *Paramount Communications, Inc. v. QVC Network*, 637 A.2d 34, 43 (Del. 1994).

The record reflects no evidence that earlier inquiry would have led to discovery sooner. The idea that a Manager's misconduct should license further misconduct is questionable equitable terrain.

4. <u>Fraudulent Concealment</u>

Even if equitable tolling did not apply, the record establishes that Maginn fraudulently concealed that he had usurped the New Warrant.

Fraudulent concealment "requires an affirmative act of concealment by a defendant – an 'actual artifice' that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry." *In re Dean Witter P'ship Litig.,*1998 WL 442456 (Del. Ch. July 17, 1998). The partial disclosure of facts in a misleading or incomplete way can rise "to the level of actual artifice." *Tyson Foods,* 919 A.2d at 588. "Such partial, selective disclosure – if not itself a lie, certainly exceptional parsimony with the truth – constitutes an act of 'actual artifice' that satisfies the requirements of the doctrine of fraudulent concealment." *Id.* at 590.

Maginn erected a multifaceted artifice to conceal the New Warrant. Maginn: (1) failed to tell Members that he was using the expiration of the 2004 Warrant and the Members' supposed upset to negotiate for the New Warrant, even though Plaintiffs were actively inquiring about the 2004 Warrant; (2) despite the New Warrant being issued in 2012, Maginn waited approximately eighteen months before mentioning anything to the Members about "another Jenzabar opportunity" and failed to mention that the opportunity was to pay $3.055 million for 20% of Jenzabar's fully-diluted equity, when Jenzabar had recently paid $25 million to repurchase 18% of its equity from MCG; (3) when he did, he abandoned the more comprehensive disclosure that he drafted, supposedly at the insistence of Jenzabar's General Counsel, despite Maginn's independent duties to II, II-B, and their Members; (4) instead sent the December 2013 letter, which was misleading, accompanied by a release, and required an onerous non-disclosure agreement to try to learn more; and (5) did not even provide additional information to the several Members to executed the non-disclosure agreement.

Maginn did not want others to learn about the New Warrant, let alone invest in II-C. JX0103. He required the II-B Members to sign a non-disclosure agreement that purported to protect *II-C's* confidential information. However, he has admitted that *Jenzabar's* financial information was the only confidential information that he would have disclosed, which the proposed agreement did not even protect. The agreement limited the use of any information to the "sole purpose of [*sic*] contemplated by this Agreement" but stated no such purpose. A1414 (errata noticed in B324). It also defined "Confidential Information" to mean only *New Media II-C's* information. *Id*. Maginn had simply obtained a bigger and better deal, and even had most of the money needed on hand from the Members' own New Media money.

This presentation was designed to appear to abide duties but really to deter any inquiry into, or participation in, II-C. Maginn successfully frustrated any interest in the investment from the Members who had seen their original investments disappear slowly over a decade.

5. Laches

"A successful laches defense generally requires proof of (1) plaintiff's knowledge of the invasion of his rights; (2) unreasonable delay in bringing suit to vindicate those rights, and (3) resulting prejudice to the defendant." *Forman v. CentrifyHealth, Inc.*, 2019 WL 1810947, at *7 (Del. Ch. Apr. 25, 2019). "[T]he laches inquiry is principally whether it is inequitable to permit a claim to be enforced, the touchstone of which is inexcusable delay leading to an adverse change in the condition or relations of the property or the parties." *Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009) (footnote omitted).

As described above, Plaintiffs had no knowledge of the New Warrant or any ability to learn about it. Nor did Plaintiffs delay in bringing their claim. Deane filed his Section 220 action on July 31, 2014. Plaintiffs then filed this case on December 6, 2016. There was no delay "in bringing suit," although the Chancery Court concluded that the pace of the litigation, once filed, stalled for a period of time before Plaintiffs learned about the New Warrant in March 2021. As described *supra*, that resulted in no prejudice to Maginn. Maginn identifies no prejudice, disadvantage, or inequity resulting from any delay that would support a laches defense. In fact, he has had the use of tens of millions of dollars while delaying being found out. Pre-judgment interest was also limited so as not to apply to any period of delay. Allowing a laches defense under these circumstances would only reward Maginn's intentional occlusion of the New Warrant from II-B and its Members.

II. <u>THE RECORD ADEQUATELY SUPPORTS THE CHANCERY COURT'S CONCLUSION THAT MAGINN USURPED A CORPORATE OPPORTUNITY BELONGING TO II-B</u>.

A. Question Presented

Whether the New Warrant that Maginn paid for, in part, with II-B's funds and represented was for II-B's benefit, was a corporate opportunity belonging to II-B that Maginn usurped when he took it for himself. A722-A775; A1126-A1139.

B. Standard of Review

Questions of law are reviewed *de novo*. *Levey*, 76 A.3d at 766. Questions of fact are reviewed for clear error, with deference to the trial court. *Bäcker*, 246 A.3d at 94.

C. Merits of Argument

Under the corporate opportunity doctrine, a business opportunity belongs to the company 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 [sic] to his duties to the corporation." *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996).

1. <u>Financial Ability</u>

II-B was financially able to purchase and exercise the New Warrant. II's and II-B's funds were used to purchase the New Warrant. A1407. The New Warrant also had a cashless exercise feature, and would have been eligible for a cashless exercise based on the fair value of Jenzabar's Common stock at the time of exercise in June 2013. A1356. In June 2013, when Maginn exercised the New Warrant, shares of Jenzabar Common stock were worth \$3.62 per share. B510. The strike price for the New Warrant was \$0.47 per share, making a cashless exercise easily possible.

At the time that II-C exercised the New Warrant, II-B also had \$920,837.04, nearly one-third of the total exercise price, in its bank account (even though a portion of the cost of exercise would have been attributable to II and exercised with its funds). B318; A1129. Plaintiffs also testified that, if they had known about the opportunity, they would have also invested further to fund the exercise price, and had the financial means to do so. A1130.

2. Line of Business

The New Warrant was within II-B's line of business. Its business was holding investments in Jenzabar for the benefit of its Members. The Operating Agreement also states that the purpose of II-B was to engage in any lawful business. B185. It was paid for with II's and II-B's money. That it was issued as a make-up for the 2004 Warrant for the benefit of II-B and its Members also reflects that it was within II-B's line of business. A fiduciary cannot attempt to wind up the company and then use that process to argue that it has no business purpose, and its opportunities are up for grabs. Under the Operating Agreement, Maginn lacked the unilateral authority to wind up or dissolve II-B. B187 § 13. He could not decide that II-B's business had come to an end just as it was delivering its sole profitable transaction.

3. Interest or Expectancy

For the same reason, II-B also had an interest in the opportunity. The New Warrant was expressly issued for its benefit. Its funds were used to purchase the New Warrant. Jenzabar even acknowledged to outside counsel that the New Warrant was being issued for "New Media." A745.

4. Inimical Position

Maginn usurped this opportunity, putting him in a position inimical to his duties to II-B and its Members. Maginn was interested in the acquisition of the New Warrant. He was supposedly negotiating on behalf of the Members of II and II-B, as both entities' Manager, and using those Members' dissatisfaction and potential right to exercise the 2004 Warrant to persuade Jenzabar's Special Committee to issue the New Warrant. But he was also a dual fiduciary with competing loyalties to Jenzabar that he ultimately exploited for himself. Former Chancellor Bouchard held that Maginn faced a conflict of interest. JX0165 at 39:11-20. As a dual fiduciary, Maginn faced an "inherent conflict of interest" because "the interests of the beneficiaries to whom the dual fiduciary owes duties diverge." *Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014).

If the New Warrant was for the benefit of the Members of II and II-B, there was no rational or good-faith business reason that served II or II-B to have the New Warrant issued to II-C. Maginn and his family already held approximately 30% of Jenzabar's equity, and he was seeking to amass complete control. The addition of the shares from the New Warrant brought Maginn's families' holding to more than a 90% stake in Jenzabar.

5. <u>No Presentment</u>

Maginn asserts that he presented the opportunity to II-B's Members, but that argument finds no support in the record. The December 2013 letter failed to present the opportunity to II-B's Members sufficient to defeat a usurpation claim. The December 2013 letter was designed to discourage interest. It was presented belatedly at the supposed conclusion of the Members' unsuccessful investments in II or II-B. It was also accompanied by a release of claims. A1414. Maginn also hoped that nobody would show interest. B320.

According to Maginn, the non-party putative Members are far more "sophisticated" than the Individual Plaintiffs, who he derides as "little fish." B130 at 174:8; B231 at 233:19-23. Maginn claims they were not concerned with their investments in II or II-B, which he testified was trivial to them. According to

Maginn, “they don’t care.” *Id.* at 174:7. Yet, he argues that he presented them with the II-C opportunity, supposedly knowing that “they don’t care” and that they were not interested in remaining invested in II or II-B.

Maginn’s supposed presentation of the opportunity also required the Members to execute an unreasonable non-disclosure agreement. Yet, even those who signed it received no information. A735, 13:8-10; A736, 16:24-17:12. In any event, no confidentiality protection was necessary to disclose that Maginn had achieved a rain-check at a lower strike price than was offered for the account of II-B’s Members, and had already been exercised by II-C. There is nothing secret about a fiduciary telling his charges that he has a deal to acquire stock at a fraction of what the company paid for it. The letter contained no explanation that the “opportunity” was to pay recompense to II-B for the 2004 Warrant that expired unexercised. This does not reflect disclosure or presentment of a corporate opportunity compliant with fiduciary obligations.

III. <u>THE CHANCERY COURT VALIDLY EXERCISED ITS DISCRETION TO AWARD PRO-RATA DAMAGES ON A DERIVATIVE CLAIM SO AS TO AVOID GRANTING A WINDFALL TO MAGINN</u>.

A. Question Presented

Whether the Chancery Court abused its discretion in crafting a remedy for Maginn's breach of the duty of loyalty by awarding rescissory damages, tailoring pre-judgment interest, and awarding derivative damages directly to the II-B Members. A790-A794; A1142-A1163.

B. Standard of Review

The Chancery Court's remedy for breach of fiduciary duty is reviewed for breach of discretion. *Berger v. Pubco Corp.*, 976 A.2d 132, 139 (Del. 2009) (en banc).

C. Merits of Argument

1. <u>Proper Derivative Claim</u>

This Court has clarified that the question of whether a claim is direct or derivative "must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033, 1035 (Del. 2004).

Consistent with this framework, former Chancellor Bouchard concluded at the outset of this case that it is "obvious" that Plaintiffs' claims are derivative because the original claims concerning the 2004 Warrant affected all Members. B462 at 27:17-21; B469-B470 at 34:23-35:2. The same is true with respect to the New Warrant. Because it was intended to redound to the benefit of *all* Members of II and II-B, it is derivative because all extant Members suffered the same harm when Maginn took the opportunity for himself. That the New Warrant was a corporate opportunity is further illustrated by the fact that it was issued to a separate entity, II-C, rather than II and II-B. It was never the intent that the New Warrant would be offered directly to individual Members. The whole point, according to Maginn, was "simplifying the cap table," meaning to reduce the number of stockholders and instead corral them into a corporate entity (specifically, ones that Maginn could control).

Maginn argues that Plaintiffs' FAC somehow restyled the parties to drop II-B as a nominal defendant and to assert the claims directly on Plaintiffs' own behalf. That is misleading. Following Maginn's sudden cancellation of II-B's registration while the litigation was pending, Plaintiffs undertook to renew II-B's registration. When they filed the FAC, Plaintiffs included II-B directly as a Plaintiff, since Maginn had abandoned II-B.

Maginn also understood that the claim for breach of fiduciary duty with respect to the New Warrant was being brought derivatively. That is why he sought dismissal on the basis that Plaintiffs were not proper derivative plaintiffs because they supposedly were seeking to exclude other II-B Members and claim to be the only Members of II-B. If there were no other Members, that was a consequence of the Payment Acknowledgement and Release that Maginn, as a fiduciary, imposed on the Members who accepted their "final checks." Presumably, Maginn intended for that to be binding when he sent that to the Members, especially given that he purported to terminate II-B's existence.

Following the trial, the Chancery Court requested briefing on the validity of the Payment Acknowledgment and Release. Plaintiffs argued that it appeared to be valid and in exchange for consideration because Maginn was under no obligation to distribute the Members' capital accounts at the time that he did. Plaintiffs did not cash their checks because they understood the Payment Acknowledgment and Release to be valid.

Accordingly, Plaintiffs understood that they were likely the only remaining Members, in addition to a few others who appeared not to have cashed their checks. When Members resign from a limited liability company, the proportional ownership interests of the remaining Members generally increase *pro rata*, absent an agreement otherwise, which does not exist here. 6 Del. C. § 18-603. The

Operating Agreement also specifies that "[a] Member may resign from the Company at any time." B186 § 17. In this way, II-B operates like a tontine.

2. Award Directly to Members

The claim was brought directly by II-B (or alternatively on its behalf on a derivative basis) and any recovery would be awarded to II-B. That recovery would ultimately be distributed to the Members according to their respective ownership interests in the ordinary course.

The Chancery Court recognized that, administratively and because II-B functionally had no other assets, it made sense to award the relief in this case directly to the Members according to their membership interests. That is otherwise what would have happened in the ordinary course if the award was issued directly to II-B. The decision to issue the award directly to the Members, although the claim was derivative, also served to address Maginn's insincere concern that other Members existed or that Plaintiffs were trying to arrogate a windfall for themselves. The Chancery Court had the discretion to issue the award in this manner.

3. Rescissory Damages and Interest

"Once liability has been found . . . the Court of Chancery has broad discretion to craft a remedy to address the wrong." *Brinckerhoff v. Enbridge Energy Company, Inc.*, 159 A.3d 242 (Del. 2017); *see also Int'l Telecharge, Inc. v.*

Bomarko, Inc., 766 A.2d 437, 440 (Del. 2000) ("the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief."). "[T]he scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). The damages "are to be liberally calculated." *Id.* at 444. "[M]athematical certainty is not required." *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000).

The Chancery Court correctly noted that when the defendant usurps a corporate opportunity, it may order him to disgorge the proceeds of the usurpation. A1142.

Maginn argues that II-B's Members were not harmed because the warrant was not going to be issued to them, individually. But actionable disloyalty occurs even when the "profit or advantage is not gained at the expense of the fiduciary." *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

Maginn also argues that rescissory damages are unavailable because Plaintiffs delayed in pursuing the case. "The Court of Chancery thus has the discretion not to grant rescission where delay allows the plaintiff 'to sit back and 'test the waters,' waiting to assert a claim for rescission until after [the] stock price ha[s] increased." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 174 (Del. 2002) (quotations omitted). The Chancery Court concluded that Plaintiffs could not have opportunistically waited to bring the claim until the shares increased in value. They were simply unaware of the New Warrant (by Maginn's design). A1144.

Nor do rescissory damages result in any windfall to Plaintiffs. It is a result of Maginn's concealment that Plaintiffs did not discover the New Warrant until 2021. Rescissory damages disgorge the value that he improperly achieved from the New Warrant. In calculating damages as of the time of trial, the Chancery Court was careful to avoid applying interest for any period that it concluded Plaintiffs had delayed. A1314; A1321. In addition, the Chancery Court structured the damages award such that the individual derivative Plaintiffs will only share in the award in proportion to their ownership interests. The Chancery Court did not abuse its discretion in crafting a remedy for Maginn's breach.

CONCLUSION

Judgment should be affirmed.

Respectfully submitted,

Dated: October 22, 2024

/s/ David H. Holloway

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

Colin R. Hagan*
David J. Shlansky*
Shlansky Law Group, LLP
1 Winnisimmet Street
Chelsea, MA 02150
(617) 497-7200
Colin.Hagan@slglawfirm.com
David.Shlansky@slglawfirm.com
**Of Counsel*

Attorneys for Appellees-Plaintiffs

CERTIFICATE OF SERVICE

I, David H. Holloway, hereby certify that on October 22, 2024, a copy of Appellees' Corrected Answering Brief was served upon the following counsel of record via Lexis File & Serve*Xpress*:

Jody C. Barillare (DE Bar ID #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

Dated: October 22, 2024

By: /s/ David H. Holloway
David H. Holloway (#5762)