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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ROBERT A. MAGINN, JR.,<br><br>Appellant-Defendant,<br><br>-and-<br><br>NEW MEDIA INVESTORS II-C, LLC,<br><br>Nominal Defendant,<br><br>v.<br><br>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,<br><br>Plaintiffs-Appellees. | No. 288, 2024<br><br>Court Below:<br>Court of Chancery of the State of Delaware,<br>C.A. No. 2017-0346-LWW<br><br>**PUBLIC VERSION FILED**<br>**November 21, 2024** |

# APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

Plaintiffs' Answering Brief ("Ans. Br.") follows the same "pizza principle" strategy as they applied litigating below.[1] For example, Plaintiffs devote pages to their time-barred and irrelevant "Disappearing Securities Claim," arguing that "securities [were supposedly] shuffled over a series of complex, value-dissipating transactions in 2004" (Ans. Br. 7-9), even while ignoring virtually every critical case cited in the Opening Brief ("Op. Br."). When Plaintiffs do purport to address the issues on appeal, they merely repeat the trial court's flawed analysis without confronting (let alone rebutting) the Opening Brief's arguments as to why that analysis is wrong. In short, the Answering Brief answers nothing.

***Limitations/Laches***. Nowhere do Plaintiffs explain how they could have reasonably relied on Maginn's good faith while simultaneously suing him for bad faith. Nor do they address case law holding that subjective suspicion negates reasonable reliance, precluding equitable tolling. Instead, Plaintiffs contend that Maginn did not argue that Plaintiffs' suspicion of the Warrant Expiration Claim defeats reasonable reliance. Maginn expressly argued below that Plaintiffs' inquiry notice arose from *all* the red flags, including those related to the Warrant expiration claim. There was no waiver and Plaintiffs' suspicion defeats equitable tolling.

[1] All conventions used in Maginn's Opening Brief are employed here. All emphasis is added unless otherwise noted.

Plaintiffs fare no better in arguing that they were not on inquiry notice because certain details of their claim were unknown. The law requires only that red flags raise suspicions, and the II-C Solicitation more than met this standard. Indeed, the II-C Solicitation, standing alone, provided sufficient grounds to plead a reasonably conceivable usurpation claim. And it is undisputed that Plaintiffs actually *were* suspicious. But the II-C Solicitation was far from the only red flag. To the contrary, the same red flags that led the trial court to hold time-barred the Warrant Expiration and Disclosure Claims show that Plaintiffs' interrelated usurpation claim likewise is time-barred.

Regarding laches, Plaintiffs' response to the court's finding of delay and prejudice is to simply disagree with the court's findings. But Plaintiffs did not appeal those findings. Their usurpation and unjust enrichment claims are barred by laches.

***Usurpation.*** Plaintiffs fail to address the first issue Maginn raises, that Plaintiffs' usurpation claim should have been treated as a direct claim. This claim is based on an opportunity presented to the *members*—not the entity—and mechanically treating it as derivative is contrary to the law, the facts, and both Plaintiffs' and the court's treatment of the claim as direct. The Answering Brief ignores *In re Digex Inc. S'holders Litig.*, 789 A.2d 1176 (Del. Ch. 2000) (cited at Op. Br. 35), in which Chancellor Chandler rejected treating a usurpation claim as derivative where "the purported opportunity," as here, was an investment

opportunity for individual stockholders. *Id.* at 1190. Yet the Answering Brief does not even mention *Digex*, let alone try to distinguish it. Plaintiffs' silence is waiver. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

But even if Plaintiffs' claim could be deemed derivative, Plaintiffs' application of *Broz* is the same "form over substance" approach that renders the court's application of *Broz* infirm. *Broz v. Cellular Info. Sys. Inc.*, 673 A.2d 148 (Del. 1996). Worse, Plaintiffs' *Broz* analysis is dependent on their contention that the expiring II-B Warrant could have been cashlessly exercised—a factual predicate barred by the court's holding that the Warrant Expiration claim is time-barred.

As to the defense to liability arising from Plaintiffs' (and virtually all II and II-B members') rejection of the II-C Solicitation, Plaintiffs merely attack the absence of substantive disclosure in the II-C Solicitation without ever addressing *Stroud v. Grace*, 606 A.2d 75 (Del. 1992), which permits a fiduciary to condition disclosure of confidential information on a non-disclosure agreement ("NDA").

***Damages***. Instead of attempting to defend the legal errors pervading the court's rescissory, derivative damages award, Plaintiffs spend pages attempting (unsuccessfully) to excuse their efforts at excluding II-B's members from receiving any of the damages. Plaintiffs' nonresponse does not address that the damages served neither of the purposes for awarding rescissory damages while conferring an

extraordinary windfall by monetizing the theoretical value of an otherwise illiquid investment that no one was interested in making. By awarding rescissory damages on a direct claim, the court also dispensed with causation by effectively presuming that all II-B members would have invested. Nor do Plaintiffs explain why it was equitable for the court to saddle Maginn with prejudgment interest for the extended time period between the Decision and judgment, during which Plaintiffs litigated against absent II-B members. Op. Br. 52-53.

The judgment should be reversed.

## ARGUMENT

### I. The Usurpation And Unjust Enrichment Claims Were Time-Barred.

#### A. Equitable Tolling Is Inapplicable.

Nowhere do Plaintiffs explain how they can avail themselves of equitable tolling by their reasonable reliance on Maginn's good faith when they sued him for bad faith. Op. Br. 24-27. Plaintiffs do not mention, let alone distinguish, *Buddenhagen v. Clifford*, 2024 WL 2106606, at *24-25 (Del. Ch. May 10, 2024), which underscored that "[w]hen reliance is no longer reasonable, tolling under the equitable tolling doctrine ends." *Id*. at *26; *see also* Op. Br. 26 (citing *Buddenhagen*). And Plaintiffs acknowledge the facts that dictate that their reliance could not be reasonable, i.e., that by "2012, Plaintiffs became suspicious" (Ans. Br. 15), the reason the court held they were on inquiry notice in finding their Warrant Expiration Claim time-barred (which they do not appeal).

Rather than address the merits, Plaintiffs argue only that "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." Ans. Br. 4-5. Not so. Maginn argued, at every stage, that "fraudulent concealment and equitable tolling [are] irrelevant" because "Plaintiffs were on inquiry notice." A1052 (post-trial brief). At summary judgment, Maginn could not have made this point any clearer. AR97 (arguing in reply in support of summary judgment that "[t]he doctrine of equitable tolling, which stops the statute from running while a

plaintiff has reasonably relied upon the competence and good faith of a fiduciary and thus could not learn of the facts constituting the wrong, cannot salvage Plaintiffs' belated claims"); AR45 (arguing in brief in support of motion for summary judgment that Plaintiffs were on inquiry notice "and there is no basis for tolling"); AR103 (arguing at summary-judgment hearing that "critically for this motion today, there can be no tolling of the statute of limitations on any theory after a plaintiff has inquiry notice of the claim," calling that "a basic proposition of Delaware law"); AR119 (addressing, at summary-judgment hearing, Plaintiffs' "tolling theories," noting that "they try to rely on an equitable tolling theory saying they relied on a fiduciary," but could not satisfy the requirements for equitable tolling); *see also* A582 (noting, in Maginn's brief in support of motion to dismiss amended complaint, that "Plaintiffs may claim equitable tolling" and explaining why "there is no basis for tolling" under any doctrine); A697 (arguing, in pre-trial brief, that Plaintiffs were on inquiry notice and their usurpation claim was time-barred).

Toward that conclusion, Maginn specifically argued that Plaintiffs' inquiry notice was a function of their suspicion of the interrelated facts making up their various theories within their single count for breach of fiduciary duty, including the Warrant Expiration Claim that Plaintiffs assert was waived:

> **Limitations**: On the face of the II-C Solicitation, Plaintiffs were on notice of their claims. That ***conclusion is only bolstered by the fact that Plaintiffs already had actual knowledge that the II-B Warrant expired***, and they had discussions with Maginn that the expiration was

> due to a lowball valuation, and Cunningham testified that he believed upon receipt of the II-C Solicitation that II-C was the property of II-B.

A1032 (Maginn's post-trial brief). Similarly, Maginn noted that Plaintiffs' various theories for breach of fiduciary duty were all "intertwined," so the timeliness issues could not be viewed in isolation:

> ***[The time-bar] only becomes more concrete when viewing Plaintiffs' [usurpation] claim more broadly as a breach of the duty of loyalty, which is intertwined with their time-barred II-B warrant expiration claim***. The gravamen of the claim is that Maginn allowed the II-B Warrant to expire so that he could then use the threat of angry II-B investors to cause a new warrant to issue for himself. Critically, ***this formulation of the claim is entirely dependent upon the assertion (foreclosed by the law of the case) that Maginn breached his fiduciary duties by allowing the II-B Warrant to expire.***

A700 (Maginn's pre-trial brief).

To the extent Plaintiffs are arguing semantics—i.e., that Maginn challenged equitable tolling based on inquiry notice without also saying in the same sentence that "reliance is therefore unreasonable"—that is a distinction without a difference. *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 818 (Del. 2018) (an issue is preserved when a "legal question is implicit" in an argument below even if the party "shines a much brighter light on" it on appeal). In any event, this determination—that Plaintiffs reasonably relied upon Maginn's good faith while they were suing him for bad faith—is so misguided that it would qualify as plain error. *See* Del. Sup. Ct. R. 14(b)(6)(1); *Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005) ("Plain error

is an error that affects the defendant's substantial rights and … [is] so obvious, a judge should be able to avoid it without benefit of objection.").

### B. Plaintiffs' Inquiry Notice Negates All Tolling And Bars Their Claims.

Plaintiffs' usurpation and unjust enrichment claims are time-barred for the additional and independent reason that Plaintiffs were on inquiry notice, which negates all tolling theories. A569-70; A699; A1030-52 & n.7.

#### 1. The II-C Solicitation Alone Put Plaintiffs On Inquiry Notice.

Plaintiffs acknowledge that "II-B's line of business … was holding investments in Jenzabar" (Ans. Br. 38) and that Maginn's II-C Solicitation gave notice of "a new New Media entity, New Media Investors II-C, LLC, to invest in another Jenzabar opportunity." Ans. Br. 14. Plaintiffs also understood that II-B had cash by virtue of the redemption payments in the II-C Solicitation. All this put Plaintiffs on inquiry notice and more—it provided sufficient information to plead a reasonably conceivable usurpation claim. Indeed, Plaintiffs' original complaint acknowledged that the II-C Solicitation raised their suspicions, as they pleaded, "*[c]uriously*, [the II-C Solicitation] informed New Media II-B's members that [Maginn] had [formed] New Media Investors II-C, LLC, to invest in another Jenzabar opportunity." A177, ¶ 60.

Despite the "curious[]" II-C Solicitation, Plaintiffs nonetheless argue that they were not on inquiry notice of their usurpation claim because the II-C Solicitation did

not disclose the details of their allegations. *Id*.; *see also* Ans. Br. 25. But this is not what inquiry notice requires. "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." *Pomeranz v. Museum Partners*, *L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005); *see also Buddenhagen*, 2024 WL 2106606 at *24-27 (same). Tellingly, Plaintiffs do not acknowledge either of these cases, which establish that the missing details (Ans. Br. 30) are mere "intricacies of alleged breaches of fiduciary duty" (*Buddenhagen*, 2024 WL 2106606, at *27), and thus unnecessary for inquiry notice.

Rather than deal with these on-point authorities, Plaintiffs cite an inapposite case rejecting inquiry notice because the plaintiffs would have been required 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." *In re Tyson Foods, Inc*., 919 A.2d 563, 590 (Del. Ch. 2007). But the II-C Solicitation required no such sifting. Plaintiffs fare no better in citing *Dubroff v. Wren Holdings, LLC*, 2011 WL 5137175, at *1 (Del. Ch. Oct. 28, 2011). There, the court rejected inquiry notice of self-dealing because there was no indication that a fiduciary stood on both sides of the transaction. Here, it was Maginn who sent and signed the letter explaining that II-C was providing "another Jenzabar opportunity," triggering

reasonable suspicion that he might be operating II-C for his benefit at the same time he determined to "conclude" II-B.

Plaintiffs also argue that the usurpation claim was "inherently unknowable" and could not have been discovered by investigation. Ans. Br. 19. The contention fails for multiple reasons, including because the II-C Solicitation alone disclosed sufficient facts to plead a reasonably conceivable usurpation claim, as noted above. As the elements of the usurpation claim are evident on the face of the letter Maginn sent to Plaintiffs, the notion that the injury was inherently unknowable cannot stand.

Moreover, Plaintiffs' contention of inherent unknowability cannot be reconciled with the fact that they *did* "discover" the details of their claim in discovery in this litigation. It matters not that they discovered the claim in a litigation challenging the Warrant Expiration Claim. In *Gallagher Industries, LLC v. Addy*—another of Maginn's cases ignored by Plaintiffs (Op. Br. 31)—the court held that notice of entire fairness claims served as notice of disclosure claims because "[d]iscovery in [the entire fairness] claim would have made concrete the apparent disclosure violations." 2020 WL 2789702, at *14 (Del. Ch. May 29, 2020). So too here. Discovery on the Warrant Expiration Claim revealed additional details about the usurpation claim.

Although the Court can end its analysis there, Plaintiffs' remaining arguments also cannot withstand scrutiny:

- Plaintiffs cannot avoid inquiry notice by pointing to their failure in the books and records case to establish a proper purpose to investigate the Warrant Expiration Claim (Ans. Br. 32). Plaintiffs never raised this point below, so it is waived. Nonetheless, Plaintiffs' failure to show a proper purpose on their misconduct theory in the books and records action does not mean that an investigation could not have succeeded.
- Plaintiffs claim that an investigation would lead nowhere because the NDA signatories supposedly did not learn about II-C (Ans. Br. 27). But there was no evidence regarding what the NDA signatories did or did not learn. Maginn understandably could not remember. A825. And Plaintiffs never sought the information in discovery after deposing NDA-signatory Farkas, who testified that he signed the NDA not to get information about II-C, but to divest his illiquid Jenzabar interests, A736; A825. Farkas's testimony is consistent with Maginn's testimony, which described II and II-B members' desire for liquidity. Plaintiffs' tactical choice to avoid uncovering additional unfavorable evidence is not proof that no one learned about II-C.
- As "perhaps the strongest evidence that this injury was not previously knowable," Plaintiffs point to Special Committee member Mills's unawareness at his 2021 deposition that Maginn owned II-C. Ans. Br.

27-28. All that proves is that octogenarian Mills's memory had faded by almost a decade later. Maginn introduced undisputed documentary evidence at trial showing that Mills knew Maginn owned II-C in 2014. A822, AR157, AR176 (in 2014, Jenzabar's general counsel, Barr, provided Mills a spreadsheet of Maginn's direct and indirect Jenzabar share ownership, including II-C).

In short, Plaintiffs were on inquiry notice, and that defeats both equitable tolling and fraudulent concealment. *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

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

The court held that Plaintiffs' Warrant Expiration and Disclosure Claims—integrally related to the usurpation theory—are time-barred by inquiry notice. As *Gallagher* explains and Plaintiffs ignore: "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." 2020 WL 2789702, at *14 n.209. Plaintiffs' usurpation claim not only arises from the Warrant Expiration and Disclosure Claims—it is dependent upon them. Indeed, the Answering Brief does not challenge the interconnection between the Warrant Expiration, Disclosure, and usurpation theories, but instead confirms their interdependence. *See* Ans. Br. 10 ("Maginn Uses

the 2004 Warrant to Obtain the New Warrant on Behalf of II and II-B"); Ans. Br. 10-12 (characterizing record as showing that Maginn caused the II-B Warrant to expire to compel issuance of the II-C Warrant); Ans. Br. 29 (Maginn "flipped [the II-B] warrant that he was adamant was underwater into a valuable opportunity"—the II-C Warrant); Ans. Br. 35 (the II-C Solicitation "was designed to appear to abide duties but really to deter any inquiry into, or participation in, II-C"—i.e., Plaintiffs' disclosure theory that Maginn discouraged investment in II-C by omission).

The Decision also confirmed that the claims are related. Decision 47 (holding Maginn's interests were inimical to II-B because, in part, of the Disclosure Claim—the "II-C Solicitation provided virtually no information about the opportunity"). But while the court had held that the II-C Solicitation was itself a "red flag" giving inquiry notice of the Disclosure Claim, it nonetheless found no inquiry notice of the usurpation theory, which the court failed to recognize was a theory that "arose from the incident[s] serving as the red flag[s]" for the time-barred Disclosure Claim (and Warrant Expiration claim). *Gallagher*, 2020 WL 2789702, at *14 n.209. This was legal error. As Plaintiffs had "facts that ought to make [them] suspect wrongdoing," then as a matter of law they were on notice of "everything to which such inquiry might have led." *Pomeranz*, 2005 WL 217039, at *13-14.

### C. Laches Bars Plaintiffs' Usurpation Claim.

Plaintiffs respond to laches by hiding their head in the sand. They proclaim that there was "no delay bringing their claim" (Ans. Br. 36) between "2012 [when] Plaintiffs became suspicious" (Ans. Br. 15) and filing suit in December 2016, ignoring that the court held the Warrant Expiration Claim barred by laches based on their delays. A645-48. They spin that the case "stalled" after being filed (Ans. Br. 36) when in reality the court held that "from August 2018 to August 2020 … plaintiffs failed to press this matter." A1281. They decree that "Maginn identifies no prejudice" from the delays (Ans. Br. 36), ignoring the court's finding prejudice on summary judgment as it is "difficult to imagine that the defendant has access to documents from 2004 to 2013 that might be necessary" to his defense and because several "deponents could not respond to numerous relevant questions because of fading memories." A656. Plaintiffs did not appeal any of these findings and they are dispositive.

Plaintiffs' arguments on laches only serve to confirm that, but for their delays, they could have filed their original case well within the limitations period and "discovered" the details of their usurpation theory long ago, avoiding the prejudice that has resulted.

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

The Opening Brief argues that the court erred in holding Maginn liable for usurpation because: (A) the claim was direct, not derivative; (B) the *Broz* factors cannot be satisfied; and (C) Maginn cannot be held liable for usurping an opportunity he presented and the Plaintiffs rejected. Op. Br. 35-47. The Answering Brief fails to rebut all three arguments.

### A. Plaintiffs' Claim For Usurpation Of *The Members'* Opportunity Is Not A Legally Cognizable Derivative Claim—It Is Direct.

Plaintiffs do not address Maginn's first argument in the usurpation section of their brief at all, instead responding indirectly in their damages section. Ans. Br. 43-46. That discussion, however, is most notable for what it does *not* address:

- That in *In re Digex Inc.*, 789 A.2d at 1190, the court did not reflexively deem a usurpation claim derivative when the relevant "opportunity" concerned the individual investment opportunities of a corporation's stockholders, not the entity. Op. Br. 35.
- That the nature of the opportunity was for II and II-B's *members* to invest per their individual elections (Decision 11) (the Committee's "expectation was that [II-C] would offer the investment opportunity to the members")—not II and II-B making a decision for the members by

redirecting their final redemption payment into a new, illiquid Jenzabar investment of indefinite duration.

- That Plaintiffs' theory of usurpation is via inadequate disclosure—i.e., that 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), culminating in the II-C Solicitation "designed to … deter any inquiry into, or participation in, II-C" (A757). The Disclosure Claim is, as the court held, "a direct claim." Decision 25 n.124.
- That the warrant was issued to II-C, not II or II-B, and thus II-B could not have even benefited thereby. Op. Br. 40.
- That Plaintiffs treated the claim as direct by claiming that "the only real owner of the [II-C] Warrant is Plaintiffs" (A745) to the exclusion of the absent II-B members—antithetical to the derivative form of action.
- That the court treated the claim as direct, recognizing that damages were 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.")) and allowing 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 who accepted the final checks").

In the same spirit, Plaintiffs do not address *In re Cencom Cable Income Partners*, 2000 WL 130629, at *6 (Del. Ch. Jan. 27, 2000), let alone attempt to distinguish its holding that "equity regards substance rather than form" in the derivative/direct analysis or attempt to defend the court's improper inversion of that principle in this case. Op. Br. 38-39.

Instead of engaging with Maginn's arguments, Plaintiffs confine their argument to quoting the standard under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033, 1035 (Del. 2004). Notably, they do not attempt to apply it. Ans. Br. 43-44. The absence of an attempt to apply *Tooley* is unsurprising, given the court's recognizing in the Decision that "[a]ny direct harm to the individual members of New Media II-B would have come later, when making individual investment decisions." Decision 32. The court's statement recognizes that the II-C Warrant was intended by Maginn and the Special Committee to permit II and II-B's ***members*** to reinvest ***if they chose***. A809 ("it was the individual decisions of everybody" as to whether to invest); A799 ( "we would pass the hat" for "people [to] make an individual decision"); Decision 11 (stating that the Committee's "expectation was that [II-C] would offer the investment opportunity to the members" of II and II-B); A1355 (Committee's view that "the better approach" was to allow

the warrants to expire and "the Company [to] later offer the right to buy stock to NM Media investors"). That is, each member, depending on their individual investment decisions, would have suffered "individualized harm not suffered by all of the stockholders at large"—a direct claim under *Tooley*. *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008). Variable damages among II and II-B's members based upon "individual investment decisions" is the opposite of a derivative claim, where "the injury is one that affects all partners proportionally to their pro rata interests in the corporation …." *Anglo Am. Sec. Fund, L.P. v. S.R. Global Intern. Fund, L.P.*, 829 A.2d 143, 150 (Del. Ch. 2003). Because the opportunity at issue was the *members'* opportunity, under *Tooley*, the claim is direct.

Plaintiffs' remaining arguments warrant little attention. Plaintiffs contend that it was "misleading" to point to their dropping II-B as nominal defendant in the FAC, but do not dispute doing so. Ans. Br. 44. Plaintiffs claim that Maginn's motion to dismiss them as inadequate derivative plaintiffs is an admission that the claim is derivative. Ans. Br. 45. Maginn has repeatedly recognized that a usurpation claim is typically derivative. That is not the issue here. The issue is whether the typically derivative claim was pursued by Plaintiffs in a manner that is, in substance, direct. Plaintiffs tellingly do not respond to citations in the Opening Brief that, as applied here, compel the conclusion that Plaintiffs' litigating against the interests of the absent II and II-B members is antithetical to a derivative action. Op. Br. 37-38.

In substance, as pursued by Plaintiffs and as treated by the court, the claim for usurpation of the members' opportunity to invest was direct, and thus not a legally cognizable corporate opportunity claim.

### B. There Was No Usurpation Under *Broz*.

Like the Decision, Plaintiffs contend that *Broz* is satisfied through a mechanical application of the factors without considering the business reality of II-B—an investment vehicle that outlived its intended duration by a decade, with no assets except a final redemption payment promised for distribution to the members. Ans. Br. 37-41. Apart from quoting the standard for usurpation from *Broz*, Plaintiffs do not dispute that *Broz* itself eschews technical application in favor of evaluating the realities of the business. Plaintiffs ignore that *Broz* held that an "opportunity … historically close to the core" business was nonetheless held not in the line of business/expectancy because, like here, the company was divesting the business. 673 A.2d at 156. For the same reason, notwithstanding that financing the acquisition was a theoretical possibility, *Broz* held that the company as a practical matter "was not in a position to commit capital to the acquisition of new assets." 673 A.2d at 155. So too here—II-B was in no position to redirect the members' final redemption payment back into another illiquid Jenzabar investment of indefinite duration. Op. Br. 40-42. As in *Broz*, so too here—a renewed investment in Jenzabar was

technically possible, but practically incongruent with the business purpose of II-B's end-stage state of existence.

Plaintiffs' response is to argue that Maginn "decided to wind down II-B … to argue that II-B no longer had any ongoing purpose" (Ans. Br. 2), seeking to rebut that the II-C Warrant only came into existence *because* II and II-B were concluding.[2] Op. Br. 11, 39-44. As explained in the Opening Brief, II-B had received its final redemption payment from Jenzabar and its only other asset (the II-B Warrant) was expiring underwater—thus the LLC had no business left to conduct. *Id.* Plaintiffs' argument is predicated on *denying* that the II-B Warrant was expiring underwater, claiming that Maginn engineered that result. Ans. Br. 10-12 (arguing Jenzabar's shares "easily exceeded the strike price" but Maginn "schem[ed] for an alternative" to exercising it by utilizing a lowball 409A valuation).[3]

[2] Plaintiffs' related contention is that Maginn could not unilaterally dissolve II-B. Ans. Br. 39. Dissolution formalities are a red herring. Without assets, II and II-B were both *de facto* concluding.

[3] Relatedly, Plaintiffs attempt to insinuate that the Warrant Expiration was but the first step toward usurpation, with Maginn thereafter negotiating for a new warrant and then "directing" that it be issued to II-C: "*At Maginn's direction*, the New Warrant was issued to New Media Investors II-C, LLC. Ans. Br. 12 (citing A834, A842, A847). Not one of Plaintiffs' citations suggests that the Special Committee issued the warrant to II-C at "Maginn's direction," and the absence of any evidence at trial to show that Maginn controlled the Special Committee is but one more reason why the claim of usurpation fails.

What Plaintiffs gloss over is that this "contrived underwater" theory *is* their time-barred Warrant Expiration Claim. In other words, Plaintiffs' argument that the *Broz* factors have been satisfied presumes II-B was not, as a practical matter, concluding, but that is a contention dependent upon proving their time-barred Warrant Expiration Claim. Under the law of the case, they could not. A696-97. Indeed, the court appears to have recognized as much. Decision 1 ("[T]he value of Jenzabar common stock remained below the warrants' exercise price.").

With the Warrant Expiration Claim forever extinguished, the undisputed fact that *must* underly the *Broz* analysis is that the II-B Warrant expired underwater, II-B had received its final redemption payment and the business was therefore concluding. *Id.* (collecting cases precluding relitigating issues). For that reason, II-C was not in II-B's line of business/an expectancy, II-B did not have financial resources to take the opportunity and Maginn was not placed in an inimical position to the concluding II-B by operating II-C. Op. Br. 39-45. The *Broz* factors cannot be satisfied.

The II-C Warrant was not a II-B opportunity, but a potential investment for those former II and II-B members who wanted to reinvest. Holding Maginn liable was a misapplication of *Broz*.

### C. Maginn Cannot Be Liable For "Usurping" An Opportunity He Offered And Plaintiffs Rejected.

Plaintiffs do not dispute that, in the abstract, if Maginn offered the II-C opportunity to the members and they rejected it, he would be shielded from liability under a usurpation theory.[4] Instead, they contend that Maginn failed to offer the opportunity because he omitted material information from the II-C Solicitation. Ans. Br. 40-41. This misses the mark. Apart from amounting to their time-barred Disclosure Claim, Plaintiffs do not address *Stroud*, which permitted a fiduciary to condition disclosure of confidential information on an NDA. 606 A.2d at 75. In the same manner that *Stroud* would have negated the time-barred Disclosure Claim (A1060-61), *Stroud* eliminates Plaintiffs' criticism of insufficient detail in the II-C Solicitation. Maginn cannot be barred from the safe harbor against usurpation liability because he asked, as *Stroud* permits, for an NDA as a condition of disclosure.

[4] Stated another way, and as noted in the Opening Brief (Op. Br. 37, 46) and below (A679, A711; A1062-63), Plaintiffs' (and the members') rejection of the opportunity defeats causation.

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

For the reasons set forth above, the judgment should be reversed because the usurpation and unjust enrichment claims were either time-barred or legally non-cognizable. The Court's analysis can end there. If the Court disagrees, however, the Court should at minimum vacate or reduce damages and interest.

### A. The Court Wrongly Awarded Rescissory, Derivative Damages.

Plaintiffs do not dispute that awarding derivative damages on a direct claim is legal error, but instead claim that the usurpation claim was derivative under *Tooley*. Ans. Br. 43. As explained above, Plaintiffs' contention fails. It was also error for the court to award rescissory damages because rescissory damages are only appropriate in service of two purposes, neither of which were served here.

*Restoring The Status Quo Ante*. The Answering Brief does not address (let alone dispute) that the *status quo ante* afforded merely an opportunity to invest, and therefore the court erred in awarding derivative damages by "presum[ing] that all II-B investors would have chosen to reinvest their final redemptions." Op. Br. 50.

*Disgorging Profits*. Plaintiffs have no answer to the fact that the II-C Warrant shares have been illiquid to the present, and thus the award obligates Maginn to monetize and "disgorge" the theoretical value of shares that he has not received and may never receive. Op. Br. 51. Plaintiffs claim that Maginn "had the use of tens of

millions of dollars," but characteristically cite nothing for their false assertion. Ans. Br. 36.

Plaintiffs otherwise argue that there was no windfall because Maginn concealed the II-C Warrant, the point of which is unclear. Ans. Br. 48. And Plaintiffs refute straw-man arguments that Maginn did not make (e.g., Ans. Br. 47 "Maginn argues that II-B's Members were not harmed because the warrant was not going to be issued to them, individually," without citation). As Plaintiffs present no coherent response to the Opening Brief's arguments regarding the damages award, it should be reversed.

### B. Maginn Should Not Pay Interest For Plaintiffs' Disloyalty.

Plaintiffs respond to the Opening Brief regarding the impropriety of requiring Maginn to pay interest for the time that Plaintiffs litigated against the absent II-B members by attempting to blame their disloyalty on the Release. Ans. Br. 45-46 (arguing Plaintiffs litigated post-Decision the validity of the release, which they claim "operates like a tontine"). The Release could not enforce itself. It was Plaintiffs—not the Release or Maginn—who sought to "extinguish the Membership interests of those who accepted the final checks" (A1245) without affording them an opportunity to protect their interests, requested a receiver to do the same and spent the majority of the almost two years between the Decision and judgment seeking to take the II-B members' interests for themselves. Apart from protesting the

illegitimacy of those proceedings, Maginn had "no dog in that fight" and the interest accruing from the time of the Decision to the judgment should not be borne by him.

## CONCLUSION

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

Dated: October 25, 2024

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word for Microsoft 365 MSO.

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Dated: October 25, 2024

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## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2024, a copy of the foregoing *Public Version of Appellant's Reply Brief* was served via *File & ServeXpress* upon the following attorneys of record:

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