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IN THE SUPREME COURT OF THE STATE OF DELAWARE

LING CHAI MAGINN, Plaintiff Below/Appellant, v. ROBERT MAGINN, JR. and D. QUINN MILLS, Defendants Below/Appellees, and JENZABAR, INC., a Delaware corporation, Nominal Party Below/Appellee.	Cons. Nos. 372, 2024 and 430, 2024 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2023-1140-LWW

APPELLANT'S OPENING BRIEF

Dated: November 15, 2024

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NATURE OF PROCEEDINGS

On June 30, 2004, Jenzabar, Inc. ("Jenzabar" or "Company") and certain stockholders, including Ling Chai ("Plaintiff") and Defendant/Appellee Robert Maginn, Jr. ("Maginn"), signed the Fourth Amended and Restated Stockholders Agreement (the "Stockholders Agreement"). A1277-1307; A1958. The Stockholders Agreement and the Amended and Restated Bylaws of Jenzabar (the "Bylaws") govern Jenzabar directors' appointments and removals. A1277-1307; A1264-75.

In 2019, Plaintiff and Maginn filed for divorce in the Probate and Family Court in the Commonwealth of Massachusetts (the "MA Court"). A1961. On January 4, 2023, the MA Court issued an Amended Master's Report (the "Master's Report") dividing the couple's marital property, which included Jenzabar voting stock owned through various family entities. *Id*.; A1319-31. At that time, Jenzabar's Board consisted of Plaintiff, Maginn, D. Quinn Mills ("Mills"), and Joseph San Miguel ("San Miguel"). A1959; A1964. Mills and San Miguel were appointed to the Board as "Independent Directors" as that term is defined in the Stockholders Agreement. *Id*.

On July 16, 2023, San Miguel died. A1964. Fearing that San Miguel's death would create an imbalance on the Board in Maginn's favor, Plaintiff filed an emergency motion in the MA Court, seeking confirmation of the Master's Report's

division of the couple's Jenzabar stock. *Id*.; A287-88. The MA Court granted that motion the same day, August 3, 2023. A1964; A2065.

Plaintiff then executed a written consent on behalf of herself and the jointly owned family entities, attempting to restore balance to the Board by removing Mills (the "August 2023 Written Consent"). A49; A1449-51; A1964. On August 8, Plaintiff filed a DGCL § 225 action in the Court of Chancery seeking to validate the August 2023 Written Consent (the "First Action"). A49; A1964. On October 16, 2023, the Court of Chancery granted Mills and Maginn's motion for summary judgment finding the August 2023 Written Consent to be invalid because, at that time, Plaintiff lacked authority to sign the consent on behalf of the couple's Nevada limited partnership, the Chai-Maginn Family Limited Partnership (the "Family LP"). *Id*.; A1469; A1480-81.

On October 23, Maginn filed a complaint in the District Court of Clark County Nevada (the "Nevada Court") seeking to prevent Plaintiff from acting unilaterally on behalf of the Family LP (the "Nevada Action"). A51; A1964.

On October 24, the MA Court issued a supplemental judgment of divorce (the "Supplemental Judgment"), which appointed Special Master Mayer (the "Special Master") in the event either party failed to comply with its terms. A1964-65; A2068-69. Maginn failed to comply and, so, Plaintiff and the Special Master executed transfer documents in accordance with the Supplemental Judgment. A53;

A55; A1556-58. Plaintiff then executed a new written consent removing Mills and appointing three new directors (the "October 26 Written Consent"). A55-56; A1487-89; A1964.

Out of concern over Maginn's argument in the Nevada Action, Plaintiff executed another written consent, in which she claimed to have transferred the Family LP's shares to herself (the "October 29 Written Consent" and, together with the October 26 Written Consent, the "October Written Consents"). A491-95; A1491-93; A1559.

On November 8, 2023, Plaintiff filed a complaint (the "Second Action") seeking, *inter alia*, a declaratory judgment validating the October 26 Written Consent ("Count II"). A1453-64. Plaintiff also sought specific performance requiring Maginn to vote his shares to remove Mills as a director by written consent ("Count III") and a declaratory judgment that the Stockholders Agreement required Maginn and Plaintiff to cast their votes to remove Mills as a director ("Count IV"). *Id*.

Following Maginn's attempt to vacate the Supplemental Judgment, on November 20, the MA Court issued an Amended Supplemental Judgment of Divorce (the "Amended Supplemental Judgment"). A1965; A2072-73. Again, Maginn did not comply and, so, Plaintiff and the Special Master ratified the Family LP's execution of the October 26 Written Consent and confirmed the transfer of all

Jenzabar shares out of the Family LP—validating the October 29 Written Consent (the "Ratification"). A491-95; A1560-61. Plaintiff then supplemented the Second Action's complaint. A1546-68.

On December 5, 2023, the MA Court entered the Second Amended Supplemental Judgment of Divorce, which addressed the MA Court's concern that it lacked authority to order the distribution of assets to Maginn and Plaintiff's adult children. A1441-42; A1965.

Back in Nevada, on January 8, 2024, the Nevada court entered a preliminary injunction keeping Maginn in place as a general partner of the Family LP (the "Nevada PI"). A1572-94; A1965.

On January 12, 2024, the trial court issued a bench ruling on Count II of the Second Action finding that the October 26 Written Consent was invalid. A1609 at Tr. 14:11-15:9. The trial court requested supplemental briefing on Counts III and IV. A11615 at Tr. 20:14-21.

On March 8, the MA Court issued the Third Amended Supplemental Judgment of Divorce (the "Third Amended Judgment"), requiring Maginn to assign his Family LP interests to Plaintiff. A1444-47; A1966-68. The Third Amended Judgment appointed the Special Master to act on Plaintiff and Maginn's behalf should either fail to comply. A1444.

On March 11, the trial court issued a bench ruling granting Mills and Maginn's motions for summary judgment on Counts III and IV holding that laches and acquiescence barred Plaintiff's claims. A1867 at Tr. 21:18-22. On August 5, the trial court issued a partial final order on Counts II, III, and IV. *See* Order A. Plaintiff filed her notice of appeal on September 4. *See* C.A. No. 372,2024C at Dkt. 1.

On March 12, 2024, in accordance with the Third Amended Judgment, Plaintiff and the Special Master—acting in Maginn's stead—executed an Assignment of Limited Partnership Interest and General Partnership Interest in the Family LP (the "Interest Assignment"). A1968; A2088-91.

With the Third Amended Judgment and the Interest Assignment now before it, on April 9, 2024, the Nevada Court dissolved the Nevada PI and ruled that Maginn was no longer a general partner of the Family LP. *Id*. A2103; A2110. Plaintiff then transferred the Family LP's stock to Maginn and herself. A1969-73; A2114-16; A2119-20.

On April 12, Plaintiff signed and delivered new written consents (the "April Written Consents") removing Mills and the newly appointed Torrence Harder ("Harder") as Independent Directors and removing Maginn due to his bad faith and willful misconduct. A2143-44; A2147-49.

Plaintiff then filed a DGCL § 225 action seeking to validate the April Written Consents (the "Third Action"). Mills and Harder and, separately, Maginn, filed motions for summary judgment. A1812-36; A1226-57. On October 1, the trial court issued its Memorandum and Opinion finding that *res judicata*, laches, and acquiescence barred Plaintiff's claims. *See generally* Op. On October 4, Plaintiff appealed the Third Action. *See* C.A. No. 430,2024C at Dkt. 1.

Although the Third Amended Judgement effectively mooted Plaintiff's claims in Count II of the Second Action, Plaintiff appealed the Second Action to preserve her arguments against Defendants' affirmative defenses as applied to Counts III and IV. Moreover, if Plaintiff had not appealed the trial court's finding on Counts III and IV, Plaintiff's claims in the Third Action could be precluded. Plaintiff is not appealing the trial court's ruling on Count II in the Second Action.

SUMMARY OF ARGUMENT

1. The trial court erred in its strict application of the statute of limitations and finding that the breach occurred in 2013. Maginn refused to sign the October Written Consents in October of 2023—the date of the breach. Furthermore, Defendants showed no material prejudice from any alleged delay, particularly as the Stockholders Agreement includes a non-waiver provision that expressly protects Plaintiff's rights. Ultimately, Plaintiff's right to enforce the Stockholders Agreement is intact, and any delay should not nullify her claims.

2. The trial court erred in applying *res judicata* to bar Plaintiff's claims in the Third Action because her rights only recently became enforceable. Specifically, her ability to remove the Defendants unilaterally was contingent on the April 9, 2024 ruling that gave her control over the Family LP, allowing her to comply with the Third Amended Judgment and transfer the necessary shares to Maginn and herself. Therefore, because Plaintiff's claims could not have been raised in the Second Action, *res judicata* should not apply to prevent her from asserting them in the Third Action.

STATEMENT OF FACTS

i. History of Jenzabar and its Directors.

Under the Stockholders Agreement, Plaintiff and Maginn are "Founders". A1277; A1959-60. As Founders, Plaintiff and Maginn designated themselves as the Founder Designated Directors. *Id*.; A1287-88, § 4.2(a)(ii). MCG Capital Corporation was Jenzabar's Senior Investor. As such, it designated Peter Malekian as Jenzabar's Senior Investor Designated Director. A966; A1958. Plaintiff, Maginn, and Malekian, pursuant to Section 4.2(a)(iii), designated Mills and San Miguel as Independent Directors. A967; A1958-59.

ii. The Deane Action.

Maginn was also the managing member of New Media II-B, LLC ("New Media II-B"), a vehicle formed to facilitate investments in Jenzabar. A1732. New Media II-B held warrants giving it rights to purchase shares of Jenzabar common stock. *Id*. Those warrants were set to expire in June 2011. *Id*. Maginn proposed to the Board that new warrants could be issued for the benefit of New Media II-B but held by a new entity in which New Media II-B's members could then invest—New Media II-C, LLC ("New Media II-C"). A1732-33. Maginn borrowed money from the New Media II-B investors to purchase the then-recently approved warrants for New Media II-C without telling New Media II-B's investors about the investment

opportunity. *Id*. When these warrants neared expiration, Maginn, as New Media II-C's sole member, used $3 million of his personal funds to exercise them. *Id*.

On November 1, 2022, the Court of Chancery issued an opinion in *Deane v. Maginn* finding "that Maginn breached his fiduciary duty of loyalty by usurping from New Media II-B the opportunity to obtain II-C warrants" and that Maginn prevailed upon Jenzabar's special committee into believing that those warrants were being issued to those same investors (the "*Deane Action*"). A1779. As a result, Maginn is potentially liable for tens of millions of dollars to those investors. These findings and Maginn's ownership of New Media II-C were relevant to the MA Court's division of Maginn and Plaintiff's marital property. That is, New Media II-C's Jenzabar stock was to be counted towards Maginn's share of the marital property. A1324; A1326.

iii. Plaintiff and Maginn file for divorce.

In January 2019, Plaintiff and Maginn filed a divorce proceeding in the MA Court. A1961. Given the potential distraction, Jenzabar's General Counsel at the time advised Jenzabar's Board to form a Special Committee to settle any matters relating to the divorce proceeding and any resulting dispute over marital assets. A46; A946. Mills and San Miguel were appointed to that Special Committee. A47; A946.

On March 5, 2021, the MA Court issued the Judgment of Divorce Nisi, which incorporated Maginn and Plaintiff's stipulation of agreed upon facts (the "Stipulation") and an appointment of a special master to divide the marital estate. A1309-17; A1319. Relying, in part, on the Stipulation, Special Master Robert J. Rivers issued the Master's Report. A1319.

iv. The Master's Report.

The Master's Report divided the marital assets. A1319-31. Plaintiff and Maginn collectively owned 62.27% of Jenzabar's voting stock.[1] A1324. The Master's Report divided the couple's collective 62.27% shares of Common Stock, expressing each allocation as a percentage. A1324-25, ¶¶ 8(a)(i)-(v). Maginn retained his unilateral interest in New Media II-C, allocating its 19.09% of Common Stock to him. A1324, ¶ 8(a)(i); A1326. Maginn was also to receive his portion of the Family LP's Common Stock, which was 12.04% of the total issued and outstanding shares of Jenzabar Common Stock (the "Total"). A1324, ¶ 8(a)(iii). Plaintiff was to retain the balance (29.67%). *Id*. The Master's Report

[1] A1324 at ¶ 8(a). The Stipulation references all the Jenzabar stock owned by Plaintiff, Maginn, and the various family entities and includes all classes of Jenzabar stock. For purposes of this Appeal, Plaintiff will refer only to Jenzabar's voting stock (the "Common Stock") and not to the division of Jenzabar's Non-Voting Common Stock, which is not relevant to the issues sub judice. A2025-26, Article IV, §§ 2-3; A2027-31, Article V. Furthermore, Plaintiff and Maginn each own 0.06% nonvoting shares of Jenzabar stock in the form of Series B Junior Preferred Stock and Subordinated Preferred Stock, which do not bear on the issues before this Court.

noted that the couple served as general partners of the Family LP and that once Maginn's 12.04% had been assigned, Plaintiff was "to solely retain the parties' interest [in the Family LP] [and that] [t]he parties shall … transfer the parties' interest in this [Family] LP solely to the [Plaintiff] and remove [Maginn] therefrom." A1326, ¶ 8(e). Consequently, Plaintiff would own the couple's entire interest in the Family LP. *Id*. Plaintiff would, moreover, retain her five percent interest in the Chai-Maginn Family LLC (representing 1.47% of the total Common Stock). A1324-25, ¶ 8(a)(iv). When the dust settled, 31.14% of Common Stock was attributable to Plaintiff and her interests while Maginn and New Media II-C would own 31.13%. A1324-26.

v. San Miguel dies triggering an ex parte Order from the MA Court and actions in Delaware and Nevada.

Before the Master's Report could become final, San Miguel died leaving Mills as the sole Independent Director and member of the Special Committee. A1964. On August 3, 2023, Plaintiff filed an emergency motion in the MA Court seeking to confirm the Master's Report's division of the couple's Jenzabar stock, resulting in the issuance of an ex parte order. A277-78; A1964; A2065. Based on that order, Plaintiff executed the August 2023 Written Consent. A49; A1449-51; A1964. On October 16, 2023, the Court of Chancery granted Mills and Maginn's motion for summary judgment in the First Action finding that until the relevant interests and shares transferred, Plaintiff's attempts to vote the Family LP's shares

would fail because she still needed Maginn's consent as a co-general partner. Op. at 8; A49; A1469; A1480-81; A1964.

Plaintiff then filed a complaint for contempt in MA Court due to Maginn's failure to comply with the ex parte order. A421; A1504. Maginn retaliated by firing Plaintiff from her position as Jenzabar's CEO and filing the Nevada Action on October 23, 2023. A1505. The next day, the MA Court issued the Supplemental Judgment, which stated that if either party does not comply with the Master's Report by October 26, 2023, a new special master would be empowered to execute all documents necessary to effectuate the judgment. A1505-06; A2068-69.

Maginn refused to comply. A1058.[2] And so, Plaintiff and the newly appointed Special Master executed the documents necessary to effectuate the Supplemental Judgment. *Id*. With those documents in hand, Plaintiff executed the October 26 Written Consent. A55-56; A1487-89; A1964. In doing so, Plaintiff purported to act as the Family LP's sole general partner and, along with Li Chai, co-managers of the Chai-Maginn Family LLC. *Id*. Later that day, Maginn and Mills appointed Harder to a vacancy on Jenzabar's Board. A56; A975-76.

Concerned with the Nevada Action, Plaintiff executed the October 29 Written Consent. A491-95; A1491-93; A1559. Plaintiff, personally, and, along

[2] The original language cited refers to Mills. This was a typographical error. ("It was then that [Maginn] refused to comply. . . .")

with Li Chai, as co-managers of the Chai-Maginn Family, LLC, purported to act as Jenzabar's majority shareholders. *Id*. On November 8, Plaintiff filed the Second Action. A1453-64. Plaintiff filed for summary judgment arguing that the Supplemental Judgment was final and, as a result, the October 26 Written Consent was valid. A41-67. Maginn, in response, moved the MA Court to vacate the Supplemental Judgment. A562-68. This resulted in the MA Court's issuance of the Amended Supplemental Judgment, which slightly amended the Master's Report by creating new deadlines to effectuate the necessary transfer documents and declaring that 12.045% (as opposed to 12.04%) of the Total be distributed from the Family LP to Maginn. A2072-72. Maginn again refused to comply. A408; A491-95. Accordingly, on November 22, Plaintiff and the Special Master signed the Ratification. A491-95; A1560-61.

On summary judgment, Maginn and Mills argued, *inter alia*, that the October Written Consents were invalid because (i) Maginn remained a general partner of the Family LP and, so, Plaintiff could not act unilaterally on its behalf and (ii) Plaintiff and Li Chai could not act on the Chai-Maginn Family LLC's behalf because its operating agreement prevented Maginn's removal as manager and their appointment as co-managers. A513-21. Additionally, they argued that Sections 4.1(a)(iii) and 4.2 of the Stockholders Agreement barred Plaintiff from unilaterally voting her shares to remove Mills as an Independent Director. A521-

25. Finally, they argued that a stockholder could not fill San Miguel's Board seat because the Bylaws only authorize the remaining Independent Director to fill that seat. A525-27

Mills and Maginn further argued that the Nevada PI invalidated the October Written Consents. A732-38. Plaintiff argued that the Nevada PI was not retroactive and did not affect the Ratification because the Ratification assumed that Maginn was a general partner of the Family LP. A853.

On January 12, 2024, the trial court issued a bench ruling, holding that the October 26 Written Consent "is not and cannot be valid because [Plaintiff] was not authorized to unilaterally act on behalf of the Family LP without Mr. Maginn's consent" and that the October 29 Written Consent was invalid because Maginn's consent was required to transfer the Family LP's shares and, in any event, the Amended Supplemental Judgment vacated those transfers. A1609 at Tr. 14:19-23; A1611-12 at Tr. 16:10-17:11; A1613-14 at Tr. 18:23-19:5 ("the October 29th consent is invalid because [Plaintiff] did not hold or control the Family LP's Jenzabar shares she purported to represent as of October 29th"); Op. at 11. The trial court also provided that:

> I'm hoping we don't do this every time there is an interim development in Massachusetts or Nevada. ***If there is a true and meaningful change in who controls the majority of the Jenzabar shares as a matter of law and a final transfer that the plaintiff can point me to in support of a written consent in that capacity, maybe it's a different***

> ***matter***; but this is the second time now that there were written consents improperly and prematurely executed. . . . A1861 at Tr. 21:5-19 (emphasis added).

On February 8, due to Maginn's contention that he remained the Chai-Maginn Family LLC's Manager, which, if true, would have given Maginn control over Jenzabar shares that the MA Court intended Plaintiff to retain and control,[3] the Chai-Maginn Family LLC's members merged the Chai-Maginn Family LLC (hereinafter referred to as the "Merged LLC") into the Chai Family LLC (the "Surviving LLC"), which assumed all of the former's assets and liabilities. A2076-85.[4] Plaintiff is the Surviving LLC's sole manager and, as such, empowered to distribute the Surviving LLC's assets in kind. A1966.

On March 8, 2024, the MA Court issued the Third Amended Judgment, which amended and replaced Paragraphs 8(a)(iii) and 8(e) of the Master's Report, such that the Family LP's distribution of shares to Maginn and the attribution of its shares to Plaintiff were decreased proportionally to account for their children. A1444-47. Accordingly, the Family LP would assign to Maginn 12.045% of the Total reduced by a percentage tantamount to half of the shares attributable to the children's interests. A1444-45. Likewise, Plaintiff's retention of Family LP

[3] A1324-25, ¶ 8(a)(iv).

[4] According to the Agreement of Merger, "Emmanuel G. Fournais [was] designated as an 'authorized person' within the meaning of [the] Act[, 6 *Del. C.* § 18- 101, et, seq.,], … [and] caused the Certificate of Merger … to be properly filed with the Office of the Secretary of the State of Delaware . . . ." A2076-77.

interests would be reduced. *Id*. The Third Amended Judgment also revised Paragraph 8(e) of the Master's Report removing any doubt about Maginn's obligation to transfer his entire Family LP interest to Plaintiff. A1445-46.

On March 11, the trial court granted Mills and Maginn's motions for summary judgment on Counts III and IV, holding that laches and acquiescence barred Plaintiff's claim to compel Maginn to join in removing Mills under the Stockholders Agreement. A1888 at Tr. 21:18-22; Op. at 11-12. Notably, the trial court did not address the parties' competing interpretations of the Stockholders Agreement and the Bylaws. Its ruling on Counts III and IV were limited to whether laches and acquiescence prevented an order compelling Maginn to vote his shares to remove Mills. *Id*.

On March 12, Plaintiff and the Special Master executed the Interest Assignment, assigning the entirety of Maginn's general and limited partnership interests in the Family LP to Plaintiff. A1968; A2114-16.

On April 9, the Nevada Court dissolved the Nevada PI and validated the Interest Assignment. A1968; A2103, ¶¶ 41-46, 49; A2110 ("[Maginn] ceased to be a limited partner and general partner of the Family LP and … all of [Maginn's] Partnership Interests in the Family LP were assigned and transferred to [Plaintiff] pursuant to the terms and provisions of the [Third Amended Judgment] and

[Interest Assignment]. . . .")]. As a result, Maginn was no longer a general partner of the Family LP. *Id*.

vi. Plaintiff complies with the Third Amended Judgment and becomes the Founder with the most voting securities.

In compliance with the Third Amended Judgment, Plaintiff and the Special Master executed an Assignment of Stock of Jenzabar Inc., assigning 4,077,730 shares of Common Stock from the Family LP to Maginn, representing Maginn's 12.045% of the issued and outstanding Common Stock less half the shares attributable to their children's interests. A1972; A2114-16. The remaining 10,249,742 shares of Common Stock remained in the Family LP until Plaintiff, acting as the sole remaining general partner, executed the Assignment of Stock of Jenzabar, Inc. In Furtherance of Dissolution of the Chai-Maginn Family Limited Partnership, which distributed 10,122,944 shares of Common Stock to herself. A1972; A2119-2120.

On April 12, 2024, Plaintiff, as the Surviving LLC's manager, executed the Assignment of Assets to Member, distributing 500,000 shares of Common Stock to herself. A1972; A2139-40. With this latest assignment, Plaintiff holds a total of 10,622,944 shares of Common Stock. A2119-2120; A2139-40. As between the two Founders, Plaintiff holds more voting securities. A1972-73.

vii. The April Written Consents.

After becoming the Founder with the most voting securities, Plaintiff executed a written consent acting pursuant to Section 4.2(b) of the Stockholders Agreement and Section 5.2 of the Bylaws to remove Maginn from the Board due to Maginn's bad faith and willful misconduct as described, in part, in the *Deane Action*. A1973; A2143-44.

Additionally, Plaintiff—as a Founder Designated Director and pursuant to Section 5.2 of the Bylaws—executed a written consent removing Mills and Harder as Independent Directors, appointing two new Independent Directors, and appointing a third Board member (Li Chai) to Malekian's vacant seat pursuant to Section 3.4 of the Bylaws. A1973; A2147-49. Plaintiff and those new Board members executed a unanimous written consent removing Maginn as Jenzabar's CEO, President, and Chairman of the Board and appointing Plaintiff as interim CEO, President, and Chairwoman of Jenzabar's Board. A1973-74; A2152-53.

viii. The Third Action.

After executing the April Written Consents, Plaintiff filed the Third Action seeking a judgment declaring the April Written Consents valid. On May 24, 2024, Defendants Mills and Harder, and Maginn separately, filed motions for summary judgment. A1226-57; A1812-36. They all argued that the trial court's rulings in the Second Action barred Plaintiff's latest claims on grounds of *res judicata*. A1225-

26; A1832-35. In Defendants' view, affirmative defenses raised in the Second Action equally applied to the Third Action. *Id*. They, however, did not specifically argue that the affirmative defenses raised in the Second Action precluded Plaintiff's appointment of Li Chai to the Board.

On October 1, the trial court held that *res judicata* barred Plaintiff's claims and, notwithstanding that finding, Plaintiff's claims were nonetheless barred by laches and acquiescence. *See generally* Op. The trial court did not specifically address whether Plaintiff's appointment of Li Chai to the Board was also ineffective.

ARGUMENT

I. The Trial Court erred in finding that laches and acquiescence barred Plaintiff's claims in both the Second and Third Action.

A. Questions Presented.

Did Defendants demonstrate that there were no genuine issues as to any material fact regarding their affirmative defenses of laches and acquiescence? A40-197; A404-96; A497-529; A702-21; A722-48; A848-78; A883-902; A961-81; A1143-68; A11798.

Did the trial court err in determining that, as a matter of law, Plaintiff was barred from seeking relief on grounds of laches and acquiescence? Op. at 11-12, 29-30; A1867 at Tr. 21:18-22; A1226-57; A1812-36; A1952-2012; A2289-2316; A2380-2401.

B. Scope of Review.

"In an appeal from a trial court's decision to grant summary judgment, [the Supreme Court's] scope of review is *de novo*, not deferential, as to both the facts and the law. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009) (citing *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)). "On a summary judgment record, which is a paper record not involving credibility assessments, '[the Court is] free to draw [its] own inferences in making factual determinations and in evaluating the legal significance of the evidence.'" *LaPoint,* 970 A.2d at 191

(quoting *Williams*, 671 A.2d at 1375). Those facts, however, "must be viewed in the light most favorable to the nonmoving party." *Id*.

C. Merits of Argument.

1. The Second Action.

Mills and Maginn argued that the equitable defense of laches barred Plaintiff's claim for specific performance. The trial court, however, applied the legal defense of statute of limitations. A1885 at Tr. 18:5-7 (holding that it "need not engage in a traditional laches analysis"). Notably, Defendants did not argue that the trial court should apply a strict application of the statute of limitations for breach of contract. When a plaintiff seeks equitable relief, however, the court must apply the doctrine of laches. *Leb. Cty. Employees' Ret. Fund v. Collis*, 287 A.3d 1160, 1194 (Del. Ch. 2022). Rather than applying the strict defense of statute of limitations, the trial court should have analyzed the elements of laches in deciding whether Plaintiff's claims were time barred. It still would have had the discretion to use the analogous three-year limit for determining whether there was an undue delay, but the trial court should have also considered the alleged prejudice.

Finding that there was no dispute that Malekian resigned from the Board in 2013, the trial court held that if Maginn had an obligation under the Stockholders Agreement to vote his shares to remove the Independent Directors, that obligation

and the corresponding breach occurred then. A1878 at Tr. 11:7-12; A1884 at Tr. 17:10-15; A1885-86 at Tr. 18:19-19:20.

Malekian was the Senior Investor Designated Director. A966; A1958. Pursuant to Section 4.2(a)(iii) of the Stockholders Agreement, the two Independent Directors are "designated by mutual agreement of the Founder Designated Directors and the Senior Investor Designated Directors." A966-67; A1287-88; A1958-59.

Section 4.2(b) of the Stockholders Agreement consists of five rambling sentences, each setting forth the rights and obligations of the parties to remove directors. Relevant to the Second Action, Section 4.2(b) provides that "[i]f a party shall cease to have the right to designate a director or directors, all parties shall vote and take all other necessary actions to promptly remove the director(s) that such party is no longer entitled to designate." A1288. That section finishes with a requirement that "[a]ll Stockholders … agree to execute any written consents required to effectuate the obligations of this agreement . . . ." A1289.

When Malekian resigned, he lost the right to designate Independent Directors per Section 4.2 of the Stockholders Agreement. Thus, the Independent Directors must be removed. Plaintiff first presented Maginn with the October 26 Written Consent on October 24, 2023. A1058. Maginn refused to execute that written consent. *Id*. As such, the breach arose on October 24, 2023, not in 2013.

That breach claim would not have been ripe until Maginn refused to execute the written consent. The trial court erred in focusing on the date Malekian resigned.

Moreover, the obligation to remove Independent Directors falls on all parties to the Stockholders Agreement and has no termination date. That is, the obligation to remove Independent Directors is continuous. The Stockholders Agreement has not been terminated. Maginn's refusal to vote his shares, whether through the October 26 Written Consent or by any other method, means that Maginn is continuously breaching the Stockholders Agreement. The trial court failed to address Maginn's continuous breach.

In determining when a breach occurs, Vice Chancellor Laster recently observed in the context of a fiduciary breach that there are three methods to determine when a claim arises. *See Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1198. This analysis should apply equally to breach of contract claims. The Vice Chancellor identified those methods as the discrete act, the continuing wrong, and the separate accrual method. *Id.* The Vice Chancellor explained that the discrete act method applies in most cases and is focused on a specific wrongful act that was complete when made. *Id.* As here, however, "determining a time of accrual is more difficult when the wrongful act is not a singular decision but rather an ongoing series of … non-decisions that extend over time." *Id.* at 1196.

The continuing wrong method "aggregates into a single unit 'a series of related … failures to act … occurring both within and outside of the limitations period prior to suit." *Id.* at 1197 (citations omitted). Under this approach, the limitations period does not commence until the defendant ceases his wrongful conduct because, as long as the harm is ongoing, the cause of action is not yet complete. *Id.* (citations omitted). Designating a claim as a continuing wrong "has significant implications for liability and damages, because it means that … a plaintiff can recover damages for the entire period during which the continuing wrong took place." *Id.* (citations omitted). That complication is not present here because Plaintiff is seeking neither damages nor to undo past Board actions.

The separate accrual method "takes ongoing conduct and dissects the misbehavior, instead of aggregating it." *Id.* at 1199. (citations omitted). This method contemplates failure to redress a breach as wrongful and actionable in its own right and gives "rise to a series of separate and fresh claims accruing within the limitations period on a day-by-day, act-by-act, or similarly parsed basis." *Id.* (citations omitted). "Under this approach, each continuation or repetition of the wrongful conduct may be regarded as a separate cause of action for which suit must be brought within the period beginning with its occurrence." *Id.* (internal quotations and citations omitted). The Vice Chancellor noted that this method is often confused or conflated with the continuing wrong method. *Id.* at 1199 n.12.

The separate accrual method is best suited for Plaintiff's claims. The ruling in *Teachers' Retirement System of Louisiana v. Aidinoff* is illustrative. 900 A.2d 654 (Del. Ch. 2006). There, defendants argued that the agreements at issue had been put in place thirty years earlier such that any challenge was time-barred. *Id.* at 666. The court rejected that argument, noting that the board "had the business option of choosing not to continue that relationship annually, the complaint is not untimely as to the payments made to [defendant] in the period 2000 to 2004—*i.e.*, those payments beginning three years before the filing of the original complaint." *Id.* Here, every day since Malekian resigned, the stockholders had the choice to continue with the Independent Directors or remove them—a choice that is consistent with the Stockholders Agreement's Section 5.3. A1075. *See* p. 25-34, *infra.*

Because of their close relationship, when taking the separate accrual approach, a trial court should apply the statute of limitations as it would under the continuing breach approach. As the Court of Chancery explained, the separate accrual approach appropriately balances "the important interests served by limitations periods while preserving a litigation vehicle that can provide accountability. . . ." *Leb. Cty. Employees' Ret. Fund*, 287 A.3d 1205. This method recognizes that while there must be some cutoff for past wrongdoing, which is too stale to permit recovery, there must also be a mechanism that allows a plaintiff to

recover so that "the ongoing wrongdoing can[not] continue with impunity." *Id*. And so, this approach "preserves the ability … to recover for harms … suffered during the actionable period and facilitates meaningful litigation oversight … promot[ing] the likelihood of accurate results by centering the litigation on periods of time when the evidentiary record is relatively fresh." *Id*.

Here, the nature of the harm, as revealed through the remedy sought, supports the separate accrual method's suitability. Plaintiff is not seeking damages going back to 2013. *See Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1201 (describing the factors in considering which accrual method to apply, which includes the nature of the harm). Nor is she asking the court to undo ten plus years of Board action. *Id*. That is, Plaintiff is not seeking relief for all harms suffered. *C.f. id*. at 1197 (explaining that under the discrete acts approach "the period limiting actions to recover for *all* harms may commence upon the occurrence of the first invasion of the plaintiff's rights.") (citations omitted). Rather, Plaintiff seeks specific performance and declaratory judgment that Mills was removed from the Board beginning in October of 2023. As such, the Court should consider the breach of the Stockholders Agreement to have occurred in October of 2023 when Plaintiff presented the October 26 Written Consent to Maginn and he refused to sign it.

Crucially, Section 5.3 of the Stockholders Agreement states that "For purposes of this Agreement and all agreements executed pursuant hereto, no course

of dealing between or among any of the parties hereto and ***no delay on the part of any party hereto in exercising any rights*** hereunder or thereunder shall operate as a waiver of the rights hereof and thereof." A1291 (emphasis added). The trial court found that Section 5.3 did not prevent Defendants from raising their defenses of laches and acquiescence without explanation. It merely observed that "that non-waiver clauses are not iron-clad." A1184 at Tr. 15:14-20 (quoting *Viking Pump Inc. V. Liberty Mutual Ins. Co.*, 2007 WL 1207107 at *28 (Del. Ch. 2007)). The trial court also cited the holding in *In re Coinmint, LLC,* adding neither instruction nor analysis as to why Plaintiff's actions prevented her from relying on Section 5.3. A1184-85 at Tr. 15:21-16:13.

The *Coinmint* court held that one member's cash infusions were capital contributions and that the other member agreed to this dilution notwithstanding the operating agreement's anti-waiver provision. *In re Coinmint, LLC*, 261 A.3d 867, 889 (Del. Ch. 2021). *Coinmint's* anti-waiver provision consisted of two sentences. The first was forward-looking and clarified that a past waiver does not imply future waivers for other breaches. *Id.* at 898. The second sentence resembles Section 5.3: "failure on the part of any Member to complain of any act . . . irrespective of how long such failure continues, shall not constitute a waiver hereunder." *Id*. at 898-99. The court held that the second sentence was not applicable because it spoke to tacit waivers and was inapplicable in the face of one member's active assurances to

another. *Id*. For those reasons alone, the trial court's reliance on *Coinmint* was misplaced. *Id*. at 899.

The *Coinmint* court reasoned that this behavior was better addressed by the Supreme Court's holding in *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 33 (Del. 1972). *Pepsi-Cola* held that anti-waiver clauses do not prohibit modifications or waivers of an agreement's written terms. *Id*. Here, the record contains no modifications or waivers of the Stockholders Agreement's written terms. Accordingly, the trial court identified none.

Section 5.3 is unambiguous, and its plain meaning inexorably dictates that no delay on Plaintiff's part in exercising her rights shall operate as a waiver of those rights. She has a right to enforce the Stockholders Agreement to compel Maginn to vote his shares in favor of removing Mills. Section 5.3 protects that right regardless of any delay on her part. Thus, the trial court erred in its finding that Section 5.3 does not apply to Counts III and IV.

The court ruled that laches also barred Count III and IV. A1190 at Tr. 21:18-22; Op. at 11-12. The elements of laches are "(1) knowledge of a claim by the claimant; (2) unreasonable delay in bringing the claim; and (3) resulting prejudice to the nonmovant." *CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011).

Laches is highly fact dependent and, therefore, not amenable to summary judgment. *See, e.g.*, *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 79 (Del. Ch. 2013) ("Whether or not [the elements of laches] exist is generally determined by a fact-based inquiry, and therefore summary judgment is rarely granted on a laches defense."). Nevertheless, because the trial court permitted Defendants' summary judgment motion from the outset, the parties took no discovery.

For instance, any analysis of unreasonable delay should have considered the possibility that Defendants offered an interpretation of Section 4.2 that would have disabled the parties from removing an Independent Director (e.g., that the Senior Investor Designated Director does not designate the Independent Director). The Company is a party to the Stockholders Agreement, and both general and corporate counsel could have weighed in on that subject. Equitable tolling would be available if Plaintiff, in her capacity as a director, relied on the competence and good faith of the Company's counsel to interpret the Stockholders Agreement. *See, e.g.*, *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008); *see also Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1218 ("The doctrine of equitable tolling stops the statute from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary.") (citations omitted).

Moreover, the trial court failed to properly analyze the prejudice to Defendants based on the alleged unreasonable delay. The trial court simply states that they (the Independent Directors and Maginn) "relied on her silence for some time and are now being forced to deal with an ill-timed and expedited demand that Dr. Mills now be removed from the board." A1188 at Tr. 19:3-7. The court ignored the concise duration of the harm suffered and narrow scope of relief sought: the immediate removal of certain directors as of the October Written Consents' execution in a summary proceeding. Defendants, for their part, pointed to no prejudice, either to themselves or the Company, that would render Plaintiff's suit untimely. *See Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1221 (rejecting defendant's laches argument because they "made a straightforward statute of limitations argument ... [and] [t]here is no reason to think that the defendants have suffered any disadvantage in their ability to litigate the case."). Finding otherwise, without explication, implies that the Independent Directors, having not been removed instantly upon Malekian's exit, reasonably expect to be directors for life. Counts III and IV ask the court to compel Maginn to vote his shares to remove Mills. In that regard, Mills serves at the pleasure of the stockholders who could remove him at any time. The trial court's ruling implies that it's reasonable for Mills to expect that he be appointed as a director for life, which would be an absurd interpretation. *Manti Hldgs., LLC v. Authentix Acq. Co.*, 261 A.3d 1199,

1211 (Del. 2021). Indeed, there is a "presumption against disenfranchising the majority stockholder, absent a clear intent by the parties to a contract to do so." *Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014) (citing *Rohe v. Reliance Training Network, Inc.*, 2000 Del. Ch. LEXIS 108, *57 (Del. Ch. Jul. 21, 2000)). In *Rohe*, the Court of Chancery held that "although Delaware law provides stockholders with a great deal of flexibility to enter into voting agreements, our courts rightly hesitate to construe a contract as disabling a majority of a corporate electorate from changing the board of directors unless that reading of the contract is certain and unambiguous." *Rohe*, 2000 Del. Ch. LEXIS at *57.

Nevertheless, any theoretical prejudice to Maginn is mitigated by the fact that he agreed to Section 5.3. Maginn cannot say that he relied on Plaintiff's delay when the Stockholders Agreement, on its face, acknowledges that neither his dealings with Plaintiff nor her delay in enforcing her rights could operate as a waiver of any of her rights. At bottom, in the absence of a damages claim or demand for declaratory and injunctive relief to undo any prior board actions, there is no palpable prejudice to Defendants occasioned by the mere passage of time.

Moreover, section 225 actions are *in rem* proceedings. In applying laches and determining prejudice, the court looks to prejudice to the corporation. *Nevins v. Bryan*, 885 A.2d 233, 254 (Del. Ch. 2005) (explaining that "[d]efendants materially relied on [plaintiff's] delay [and] [b]y waiting a year to bring suit,

[plaintiff] jeopardized" a year's worth of board action.); *c.f. Imo 615 E. 7th St.*, 2019 Del. Ch. LEXIS 1286, at *6 (Del. Ch. Sep. 26, 2019) ("[L]aches is an imperfect fit in [an] *in rem* … action.") (emphasis in original); *Martin v. Med-Dev Corp.*, 2015 Del. Ch. LEXIS 272, at *58 (Del. Ch. Oct. 27, 2015) (finding that a laches defense failed where the defendants "failed to point to any [b]oard action taken during that time period that would constitute a material change in position in reliance on [plaintiff's] delay in bringing [the] action."). Again, Plaintiff is not trying to undo past board actions. Defendants have failed to show that the Company has been harmed by any alleged delay in bringing the Second Action.

Acquiescence is also highly fact dependent. *See Julin v. Julin*, 787 A.2d 82, 84 (Del. 2001) ("Application of the standards underlying the defense of acquiescence is fact intensive, often depending … on an evaluation of the knowledge, intention and motivation of the acquiescing party."). Acquiescence is only applicable where the defendant can show that "(1) the plaintiff remained silent (2) with knowledge of her rights (3) and with the knowledge or expectation that the defendant would likely rely on her silence, (4) the defendant knew of the plaintiff's silence, and (5) the defendant in fact relied to her detriment on the plaintiff's silence." *In re Coinmint, LLC*, 261 A.3d at 896; *see also Lehman Bros. Hldgs. v. Spanish Broad Sys.*, 2014 Del. Ch. LEXIS 28, at *31 (Del. Ch. 2014).

Defendants contend that Plaintiff's continued silence on Mills's removal while verifying a counterclaim in a separate litigation and consenting to the Special Committee's formation demonstrate her acquiescence in Mills's staying on indefinitely. A521; A1826. Plaintiff's course of dealing and delay, however, are expressly insulated from waiver under the Stockholders Agreement. *See Lennox Induss. v. All. Compressors LLC*, 2021 Del. Super. LEXIS 638, at *22-23 (Del. Super. Oct. 25, 2021) (finding that the agreement's "non-waiver clause broadly and unambiguously preserve[d] either party's contractual rights despite a failure or delay in asserting these rights" and the "heightened evidentiary burden and the conflicting evidence" prevented a finding of intentional waiver or acquiescence.).

According to Defendants, Plaintiff countersued MCG for breach of the Stockholders Agreement, alleging that MCG had improperly withheld its "approval" of Mills and San Miguel's appointments to Jenzabar's board. A891-92. Those counterclaims, however, didn't address Section 4.2(b)—the provision at issue here. A616-668; A972-74; A1061-63. And so, there is no evidence in this record or the MCG record of Plaintiff's acquiescence in Mills's appointment becoming irreversible after MCG's shares were redeemed by Jenzabar. That is to say, Jenzabar and its co-defendants never pleaded allegations related to an Independent Director's removal under the Stockholders Agreement. Plaintiff cannot have relinquished or be equitably estopped from exercising a right that was

never challenged or raised, in or outside of litigation, when the parties expressly agreed to a wide-ranging anti-waiver provision.

The Special Committee was formed by resolution of the Board, not by action of the stockholders. A946. Its objective was discrete—to insulate the Board and, thus, the Company, from decisions relating to the Founders during their divorce proceeding—and its formation did not waive the stockholders' removal rights expressly or implicitly, let alone anoint Mills a director ad mortem. A946; A1062. And if Plaintiff's execution of the resolution establishing the Special Committee—regardless of what discovery may yield about the circumstances surrounding that event—exemplifies a course of conduct upon which Maginn relied to his detriment, the non-waiver provision makes that reliance unreasonable. If Maginn's reliance prevents Plaintiff from exercising her rights to remove Mills now, then the Stockholders Agreement's non-waiver provision would be rendered meaningless. For these reasons, the trial court erred in finding that acquiescence barred Counts III and IV.

2. The Third Action.

For purposes of laches and acquiescence, the trial court again erred by focusing on the past conduct of the parties instead of on whether Defendants were in breach of the Stockholders Agreement and Bylaws for failing to recognize the April Written Consents. In other words, for reasons argued above, the claims in the

Third Action arose in April of 2024, and are not time-barred. The trial court also erred in ignoring Section 5.3's anti-waiver clause.

To accomplish Maginn's removal, the April Written Consents make use of Section 4.2(b)'s permission to remove a director for "bad faith and willful misconduct" and Section 5.2 of the Bylaws, which allows the Founder with most voting securities to remove a Founder Designated Director. As explained above, Maginn's bad faith and willful misconduct relate to his defrauding the Board with his scheme to steal Jenzabar stock from New Media II-B's investors. Those events took place in 2012, but Maginn was only found liable for that conduct in 2022. *See* A1730-808.

The April Written Consents also remove Mills and Harder under Section 4.2(b) of the Stockholders Agreement and Section 5.2 of the Bylaws. A2143-44; A2147-49. In contrast to the Second Action, Plaintiff no longer needed to rely on the language in Section 4.2(b) that mandates the stockholders vote to remove the Independent Directors when a party that designated the Independent Directors ceases to have that right. Now that she is the Founder with the most voting securities, Plaintiff can do so unilaterally.

Regarding Maginn's removal, the trial court erred in several ways. First, Plaintiff could not have sought Maginn's removal until she became the Founder with the most voting securities, which only happened in April of 2024. As soon as

Plaintiff had the ability to remove Maginn for his bad faith and willful misconduct, she did so with alacrity. Her rights under the Bylaws and Stockholders Agreement to remove Maginn first arose in April of 2024. If she sought to remove Maginn prior to that, she would have been in a deadlock with him. Accordingly, her delay, to the extent there was any, was not unreasonable. *See, e.g.*, *Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1209 (explaining that when analyzing whether a delay is unreasonable for purposes of laches, in the context of a DGCL § 220 action, Delaware courts have held that pursuit of other litigation can serve to toll the statute if those facts are necessarily involved in the later proceeding) (citing *Cahall v. Burbage*, 119 A. 574, 576-77 (Del. Ch. 1922) ("Delay pending other proceedings has frequently been held excusable, not only where the termination of such proceedings was necessary for the ascertainment of facts involved in the later suit, but also where the former suit had a similar object, but proved unavailing.").

The trial court further erred in finding that Maginn was prejudiced by the alleged delay. Prejudice requires Maginn to demonstrate that he materially changed his position in reliance on Plaintiff's alleged delay in bringing the Third Action. *See Zohar III Ltd. v. Stila Styles, LLC*, 2022 Del. Ch. LEXIS 122, at *20 n.98 (Del. Ch. May 31, 2022) (explaining that prejudice requires the defendant to have made a "material change of position in reliance on [plaintiff's] delay in bringing this action."). Maginn offered no cognizable explanation of prejudice he suffered by the

supposed delay, and the trial court did not recognize any. Instead, the trial court remained singularly focused on the time that had expired since the New Media allegations first arose.

As explained above, in applying laches and determining prejudice, the court looks to prejudice to the corporation. *See* p. 27, 29-31 *supra.* There is no prejudice to the Company because there has been no delay and Plaintiff never sought to have the court vitiate past Board acts. Maginn's only claim of prejudice was that he has been burdened with opposing Plaintiff's repeated attempts to take control of Jenzabar. But Plaintiff did not (and could not) seek to remove Maginn from the Board in those previous actions because, as the trial court held, Plaintiff lacked the sufficient number of shares to undergird the control she attempted to exert through various written consents. Op. at 7-8 ("Without control of the Family LP and a successful transfer of its Jenzabar shares, [Plaintiff] could not direct a majority of Jenzabar's voting shares" when she executed the August 2023 Written Consent); Op. at 11 ("…because [Plaintiff] did not unilaterally direct the Family LP and did not own or control a majority of Jenzabar's voting stock, the [October Written Consents] were unauthorized and invalid."); A1609 at Tr. 14:11-15:9; A1611-12 at Tr. 16:10-17:11; A1613-14 at Tr. 18:23-19:5.

In this case, there is no credible claim of reliance. Maginn can't credibly claim that he, in reliance on Plaintiff's tacit approval, continued his scheme to

defraud the Board with regard to the New Media II-C warrants. Maginn's inscrutable concept of prejudice fails just as miserably from the Company's perspective. Neither Maginn nor the Company have articulated an intelligible claim of prejudice for the purpose of satisfying the third element of laches.

As explained above, Defendants can only prove acquiescence showing that "(1) the plaintiff remained silent (2) with knowledge of her rights (3) and with the knowledge or expectation that the defendant would likely rely on her silence, (4) the defendant knew of the plaintiff's silence, and (5) the defendant in fact relied to her detriment on the plaintiff's silence." *In re Coinmint, LLC*, 261 A.3d at 896.

Plaintiff, acting alone, could not have removed Maginn for bad faith and willful misconduct until she became the Founder with the most voting securities. As such, her "knowledge" of that right only accrued in April of 2024 when she accumulated enough stock personally to become the Founder with the most voting securities. Once she achieved that status, at no point did she remain silent about her right to remove Maginn.

Moreover, Maginn could not have reasonably believed that Plaintiff approved of his bad faith and willful misconduct. In fact, the opposite is true. Plaintiff fought to have the MA Court order that Maginn's marital portion of Jenzabar stock include the stock he duplicitously acquired for New Media II-C because she suspected that it had been fraudulently obtained and was possibly

subject to forfeiture. A1994; A2021 at ¶ 6. As such, Maginn had no reason to believe that Plaintiff approved of his misconduct.

As argued above, acquiescence and laches are highly factual and not appropriate for summary judgment. There has been no discovery taken in the Third Action, and there are legitimate issues of material fact that are in dispute, such as, how and to what extent Maginn or the Company actually relied on Plaintiff's so-called approval of Maginn's bad faith and willful misconduct, and what Plaintiff did to make Maginn think that she had approved of his bad faith and willful misconduct.

With regard to the removal of Mills and Harder, laches and acquiescence fail here for the same reasons they should have failed in the Second Action.

II. *Res Judicata* does not bar Plaintiff from pursuing her declaratory relief in the Third Action.

A. Questions Presented.

Did the trial court err in finding that the doctrine of *res judicata* precluded Plaintiff from seeking declaratory relief in the Third Action? Op. at 25-26.

B. Scope of Review.

See p. 19-20 *supra*.

C. Merits of Argument.

Res judicata will bar a claim where the following is satisfied:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree. *Dover Historical Society, Inc. v. City of Dover Planning Commission*, 902 A.2d 1084, 1092 (Del. 2006).

Of those five elements, Plaintiff only takes issue with the trial court's ruling on the third element: are the claims in Third Action the same as those in the Second Action?

The gist of the trial court's *res judicata* ruling is that Plaintiff could have raised the argument that she was the Founder with the most voting securities in the Second Action and chose not to. But that ruling is fundamentally flawed by operation of the trial court's ruling on Count II in the Second Action when it held

that Plaintiff could not vote the Family LP's shares because she needed Maginn's consent as the co-general partner of the Family LP. Without those shares, Plaintiff could not be a majority shareholder or the Founder with the most voting securities. Indeed, the trial court in its bench ruling admonished Plaintiff for coming to the court prematurely. A1861 at Tr. 21:5-19. Coming back to court to argue that she now has those shares is not grounds for *res judicata*.

In finding that Plaintiff's claims in the Third Action were barred by *res judicata*, the trial court relied on this Court's ruling in *LaPoint v. AmerisourceBergen Corp.*, which supports Plaintiff's argument that *res judicata* should not apply. *See* 970 A.2d at 191. In *LaPoint*, the Superior Court barred a claim for indemnification under *res judicata* where the plaintiff had previously filed a breach of contract claim in the Court of Chancery seeking attorney fees. *Id.* at 190-91. The *LaPoint* Court considered the transactional approach to contracts to determine whether the new cause of action should have been brought in the prior suit—an approach that requires the defendant show "that the plaintiff neglected or failed to assert claims which in fairness should have been asserted in the first action." *Id*. at 193. In rejecting the application of *res judicata*, this Court held that plaintiffs' indemnification rights did not become ripe until after the Court of Chancery action was final. *Id*. at 194-95.

This Court held that "[g]enerally, a contract is considered to be a single 'transaction' for the purpose of claim preclusion." *Id*. at 194. It then held that "[c]ontractual rights that are triggered and pursued after the initial action is filed, however, are not barred by *res judicata* because a prior judgment 'cannot be given the effect of extinguishing claims which did not even then exist.'" *Id*. It quoted its earlier decision in *Dover Historical Society, Inc*., where it held that the Superior Court had improperly applied *res judicata* because:

> [t]he second fee application rested entirely upon facts that did not arise until after the first application had been denied . . . . Because those new facts give rise to a quite different legal theory of fee entitlement that was neither presented nor decided in the first fee application, *res judicata* could not operate to bar the appellants' second application. The *res judicata* ruling was, therefore, legally erroneous, because the doctrine was misapplied to bar a claim for relief that was never adjudicated in the earlier fee proceeding. *Id.* at 194 (quoting *Dover Historical Society, Inc*., 902 A.2d at 1092).

The Court concluded that the same was true in *LaPoint* because the record reflected that the events necessary to support the plaintiffs' claim had not occurred before the conclusion of the Court of Chancery action. *Id.* at 195.

The same is true here. Just as the October Written Consents are not the April Written Consents, any judgment on the former's validity could not have been before the trial court in the Third Action, which sought validation of the latter. In this sense, the written consents are akin to separate contracts, and the exercise of

rights expressed in the October Written Consents cannot preclude a claim for declaratory relief on the exercise of other rights in the April Written Consents.

But even if the Court were to focus its inquiry on the Stockholders Agreement and Bylaws and whether Plaintiff could have argued that she was the Founder with the most voting securities in the Second Action, her ability to exercise her rights as a Founder did not exist until April 9, 2024—the date that the Nevada Court ruled that Maginn was no longer a general partner of the Family LP and dissolved the injunction preventing Plaintiff from transferring the shares.

The trial court was clear that Plaintiff did not have control over the Family LP's shares at the time of the Second Action. Like the plaintiffs in *LaPoint*, Plaintiff's claim that she controls enough shares from the Family LP was not ripe until the Nevada Court ruled. If the claim would not have been ripe in the Second Action, the claims in the Third Action are not barred by *res judicata*.

This analysis applies equally to Maginn's defense of *res judicata* as it does to Mills and Harder's *res judicata* defense. The trial court, however, further erred in *not* acknowledging that Plaintiff did not attempt to remove Maginn in the Second Action—she only tried to remove Mills. Affirming the trial court's *res judicata* ruling would mean that because Plaintiff claimed to be a majority shareholder when she was not, she was forced to bring all conceivable claims that a majority shareholder might have had under the Stockholders Agreement and

Bylaws in the Second Action. Otherwise, even if she acquires additional shares, she has been stripped of her rights under the Stockholders Agreement. That would be an absurd result. *Manti Hldgs., LLC*, 261 A.3d at 1211.

In the Second Action, the trial court determined three issues. First, it considered whether the MA Court judgments were final and enforceable such that Plaintiff had acquired her portion of the Family LP's stock. It held that they were not and, thus, Plaintiff did not have those shares.

The second issue asked the trial court to interpret Section 4.2 of the Stockholders Agreement and decide whether an Independent Director must be removed when the Senior Investor Designated Director resigns. It never reached that issue because of its laches and acquiescence rulings.

The third issue in the Second Action was whether the language in Section 4.2(b) required the stockholders to unanimously vote their shares in favor of removing Mills. Maginn's removal from the Board was not at issue in the Second Action. Nor could it have been because Plaintiff's right to remove him only arises if she is the Founder with the most voting securities. She was not.

The same analysis applies to Mills and Harder's *res judicata* defense. Even so, the claims in the Third Action are separate and distinct. The issue in the Third Action is whether Plaintiff, as the Founder with the most voting securities, can

remove Mills and Harder under Section 5.2 of the Bylaws unilaterally. It is not whether Maginn is compelled to vote his shares in favor of removal.

The laches and acquiescence defenses raised in the Third Action are not the same as those raised in the Second Action because the claims are different. The trial court's finding of laches and acquiescence in the Second Action related solely to compelling Maginn to comply with the Stockholders Agreement. The trial court never reached the question of whether Plaintiff could unilaterally remove Mills in the Second Action—having stopped at declaring the written consents invalid for Plaintiff having failed to demonstrate that she owned the shares she purported to vote. In finding that Plaintiff was fatally tardy in exercising her rights under Section 5.2 of the Bylaws, the trial court ignored that Plaintiff only acquired the right to remove the Independent Directors unilaterally on April 9, 2024. Thus, the trial court's reliance on laches and acquiescence overlooks the crucial fact that Plaintiff's right to unilaterally remove the Independent Directors did not even exist until April 9, 2024.

Lastly, Defendants did not argue that Li Chai's Board appointment was invalid. The trial court, nonetheless, declared the April Written Consents invalid without addressing Li Chai's appointment. A disposition without reasons permits this Court to retain jurisdiction and remand the case to require the trial court to

state the reasons supporting its decision. *Ball v. Div. of Child Support Enf't*, 780 A.2d 1101, 1105 (Del. 2001).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court reverse the Final Judgment's rulings against her on Counts II and III of her complaint in the Second Action and the rulings against her in the Third Action.

Dated: November 15, 2024

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LING CHAI MAGINN, Plaintiff, v. ROBERT MAGINN, JR. and D. QUINN MILLS, Defendants, and JENZABAR, INC., Nominal Defendant.	C.A. No. 2023-1140-LWW

[PROPOSED] FINAL ORDER AND JUDGMENT ON COUNTS II, III, AND IV OF PLAINTIFF'S AMENDED COMPLAINT

WHEREAS, on December 20, 2023, Plaintiff Ling Chai Maginn ("Plaintiff") filed a First Amended Supplemental Verified Complaint for Books and Records Pursuant to 8 *Del. C.* § 220(d), Specific Performance, Declaratory and Injunctive Relief (the "Amended Complaint"), alleging Counts II, III, and IV against Defendants Robert Maginn, Jr. and D. Quinn Mills (together, "Defendants");

WHEREAS, on January 12, 2024, the Court issued a bench ruling granting summary judgment in Defendants' favor on Count II of the Amended Complaint (the "January 12 Ruling");

WHEREAS, on March 11, 2024, the Court issued a bench ruling granting summary judgment in Defendants' favor on Counts III and IV of the Amended Complaint (the "March 11 Ruling");

WHEREAS, on June 19, 2024, Defendants moved for the entry of partial final judgment on Counts II, III, and IV of the Amended Complaint pursuant to Court of Chancery Rule 54(b); and

WHEREAS, on July 1, 2024, the Court entered an Order granting Defendants' motion and directed the parties to "confer on and file a partial final order and judgment for Counts II to IV";

IT IS HEREBY ORDERED, ADJUDGED AND DECREED this _____day of _____, 2024, that pursuant to Court of Chancery Rule 54(b), and for the reasons set forth in the January 12 Ruling and the March 11 Ruling, final judgment is entered in favor of Defendants, and against Plaintiff, on Counts II, III, and IV of the Amended Complaint.

_____
Vice Chancellor Lori W. Will

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Lori W. Will
File & Serve Transaction ID:	73894130
Current Date:	Aug 05, 2024
Case Number:	2023-1140-LWW
Case Name:	CONF ORD / Ling Chai Maginn v. Robert Maginn, Jr. and D. Quinn Millis and Jenzabar, Inc.

/s/ Judge Lori W. Will

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EFiled: Oct 01 2024 08:55AM EDT
Transaction ID 74637419
Case No. 2024-0393-LWW

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LING CHAI, Plaintiff, v. ROBERT MAGINN, JR., D. QUINN MILLS, and TORRENCE C. HARDER IV Defendants, and JENZABAR, INC., a Delaware Corporation, Nominal Party.	)	C.A. No. 2024-0393-LWW

MEMORANDUM OPINION

Date Submitted: June 24, 2024
Date Decided: October 1, 2024

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WILL, Vice Chancellor

This is the third expedited action brought by the plaintiff in the past year about the membership of Jenzabar Inc.'s board. At various stages in the divorce of Jenzabar's founders, the plaintiff has executed written consents purporting to remove her ex-husband and other directors from the board. Before, she acted prematurely since divorce proceedings were ongoing and—despite insisting otherwise—she lacked majority control of Jenzabar. In her two prior suits, summary judgment was granted in favor of the defendants on multiple grounds.

Now, the division of marital assets, including Jenzabar shares, is nearly complete. The plaintiff has tried again to change the board's composition. But she makes contractual arguments that were or could have been raised in her earlier suits. Res judicata exists to prevent this sort of piecemeal litigation. Summary judgment is granted for the defendants once more.

I. FACTUAL BACKGROUND

Unless otherwise noted, the following background is drawn from undisputed facts in the pleadings and documentary exhibits submitted by the parties.[1] Certain

[1] *See* Verified Compl. for Declaratory and Injunctive Relief (Dkt. 1) ("Compl."); Def. Robert A. Maginn, Jr.'s Answer to Verified Compl. for Declaratory and Injunctive Relief (Dkt. 50) ("Maginn Answer"); Defs.' D. Quinn Mills and Torrence C. Harder's Answer to Pl.'s Verified Compl. for Declaratory and Injunctive Relief (Dkt. 49) ("Mills and Harder Answer").

Exhibits to the Transmittal Affidavit of Sarah P. Kaboly, Esq. in Support of Defendant Robert Maginn, Jr.'s Opening Brief in Support of his Motion for Summary Judgment (Dkt. 58) are cited as "Maginn Opening Br. Ex. __." Exhibits to the Transmittal Affidavit of Madeline R. Silverman, Esq. in Support of Plaintiff's Answering Brief in

facts were set out in prior summary judgment decisions of this court addressing related claims.[2]

A. Jenzabar's Governance

In April 1998, plaintiff Ling Chai and defendant Robert A. Maginn, Jr. co-founded Jenzabar Inc.[3] Jenzabar is governed by Amended and Restated Bylaws (the "Bylaws").[4] The Fourth Amended and Restated Stockholders Agreement dated June 30, 2004 (the "Stockholders Agreement") provides an additional governance framework.[5] Chai and Maginn are parties to the Stockholders Agreement.

Jenzabar is overseen by a Board of Directors. Section 4.2 of the Stockholder Agreement addresses the election of Board members.[6] As Jenzabar's "Founders," Chai and Maginn can designate two "Founder Designated Directors."[7] They selected themselves.[8] The Stockholders Agreement granted "Senior Investor" MCG

Opposition to Defendants' Motions for Summary Judgment (Dkt. 70) are cited as "Pl.'s Answering Br. Ex. __."

[2] *See Maginn v. Maginn*, 2023 WL 6811011 (Del. Ch. Oct. 16, 2023) ("*Maginn I*"); *Maginn v. Maginn*, C.A. No. 2023-1140-LWW (Del. Ch. Jan. 12, 2024) (TRANSCRIPT) (Dkt. 147) ("*Maginn II*"); *Maginn v. Maginn*, C.A. No. 2023-1140-LWW (Del. Ch. Mar. 11, 2024) (TRANSCRIPT) (Dkt. 165) ("*Maginn III*").

[3] Compl. ¶ 11; Maginn Answer ¶ 11; *see also* Mills and Harder Answer ¶ 11.

[4] Maginn Opening Br. Ex. 1 ("Bylaws").

[5] Compl. Ex. A ("S'holders Agreement").

[6] S'holders Agreement § 4.2.

[7] *Id.* § 4.2(a)(ii); *see id.* at Preamble (defining "Founders" as Chai and Maginn).

[8] Maginn Answer ¶¶ 2, 3.

Capital Corporation the right to designate a "Senior Investor Designated Director."[9] Peter Malekian was chosen for that role.[10]

The Senior Investor Designated Director and Founder Designated Directors have the right to "designate[] by mutual agreement" two "Independent Director[s], provided that the Senior Investor Designated Directors' approval of Independent Director candidates recommended by the Founder Designated Directors [is] not [] unreasonably withheld or delayed."[11] Defendants D. Quinn Mills and non-party Joseph San Miguel were originally the Independent Directors.[12]

Malekian left the Board in 2013, leaving the Senior Investor Designated Director seat unfilled.[13]

The Stockholders Agreement and Bylaws also address the removal of Board members. Section 5.2 of the Bylaws concerns the removal of a Founder Designated Director:

> Any director designated by the holders of the Senior Preferred Stock or *any Founder Designated Director* (as defined in the Stockholders Agreement) may be removed during his or her term of office, either with or without cause, *only by the affirmative vote of the holders of* a majority of the then outstanding shares of

[9] S'holders Agreement § 4.2(a)(i); *see id.* at Preamble (defining "Senior Investor" as MCG Capital Corporation).

[10] Maginn Answer ¶ 13; Mills and Harder Answer ¶ 13.

[11] S'holders Agreement § 4.2(a)(iii) (emphasis removed).

[12] *See Maginn I*, 2023 WL 6811011, at *2; *cf. MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *2 (Del. Ch. May 5, 2010) (addressing a related dispute).

[13] Maginn Answer ¶ 13; Mills and Harder Answer ¶ 13.

> Senior Preferred Stock or *the voting securities held by the Founders* (as defined in the Stockholders Agreement), as the case may be, either at a meeting of such holders duly called for that purpose or pursuant to a written consent of such holders without a meeting, and any vacancy created by such removal may be filled only in the manner provided in Section 3.4.[14]

Section 4.2(b) of the Stockholders Agreement restricts the removal of directors, with exceptions including bad faith and willful misconduct:

> No Investor or Stockholder shall vote to remove any director designated in accordance with the provisions of this Article IV, *except for bad faith or willful misconduct*, or if the party that designated such director no longer has the right to designate such director, or as otherwise provided in this Agreement.[15]

B. The Divorce Proceeding and Jenzabar's Stockholders

On January 23, 2019, Chai initiated a divorce proceeding in the Probate and Family Court of the Commonwealth of Massachusetts.[16] Jenzabar stock was one of the primary marital assets in the divorce.[17]

Before their divorce, Chai and Maginn owned 62.27% of Jenzabar's issued and outstanding voting stock.[18] This stock was held directly or indirectly through

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[14] Bylaws § 5.2 (emphasis added).

[15] S'holders Agreement § 4.2(b) (emphasis added).

[16] Maginn Answer ¶ 14; *see also Maginn I*, 2023 WL 6811011 at *3.

[17] Compl ¶ 15; Maginn Answer ¶ 15.

[18] There is some disagreement over whether Chai and Maginn own 62.39% or 62.27% of Jenzabar's stock. This decision will credit Chai's approach, focusing on the parties' jointly held voting stock, which excludes the 0.06% of non-voting Jenzabar stock Chai and Maginn each own. *See* Pl.'s Answering Br. in Opp'n to Defs.' Opening Br. in Supp. of Their Mots. for Summ. J. (Dkt. 70) ("Pl.'s Answering Br.") 5 n.27 (explaining that another

several entities (the "Affiliates"): the Chai Maginn Family LP (the "Family LP," a Nevada limited partnership), the Chai-Maginn Family LLC (the "Family LLC," a Delaware limited liability company), and New Media Investors II-C, LLP ("New Media II-C," a Delaware limited liability company).[19]

The Family LP previously owned the largest share with 41.71% of Jenzabar's issued and outstanding voting stock.[20] A limited partnership agreement stated that the Family LP's General Partners were Maginn and Chai.[21]

When Chai and Maginn's divorce began, the Jenzabar Board consisted of Chai, Maginn, Mills, and San Miguel.[22] In 2019, the Board formed a Special Committee of Mills and San Miguel to settle divorce-related matters that could affect Jenzabar.[23]

By this time, Maginn was involved in a lawsuit captioned *Deane v. Maginn* for breaching his fiduciary duties to New Media Investors II-B, LLC, a vehicle formed to facilitate investments in Jenzabar.[24] The alleged breach took place in

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0.06% of non-voting Jenzabar shares are held by Chai and Maginn each, which are irrelevant to the issues before this court). The difference has no bearing on the outcome of this dispute.

[19] Maginn Opening Br. Ex. 3 ¶¶ 75, 77; Maginn Opening Br. Ex. 4 ¶ 8(a).

[20] Maginn Opening Br. Ex. 3 ¶ 77.

[21] Pl.'s Answering Br. Ex. 12 at 1.

[22] *Maginn I*, 2023 WL 6811011, at *2.

[23] Maginn Answer ¶ 16; Harder and Mills Answer ¶ 16.

[24] Maginn Answer ¶ 17; *see Deane v. Maginn*, 2022 WL 16557974 (Del. Ch. Nov. 1, 2022).

2012. On November 1, 2022, this court found that Maginn usurped a corporate opportunity owed to that entity when he purchased and exercised warrants intended for it.[25]

C. The Special Master and Ex Parte Order

The Massachusetts probate court presiding over Maginn and Chai's divorce referred the division of marital assets to a Special Master.[26] In January 2023, the Special Master issued a report concluding that the Jenzabar common stock owned and controlled by Chai and Maginn should be evenly divided.[27] To accomplish this, the Special Master recommended awarding certain percentages of Jenzabar stock owned by the Affiliates to Maginn and Chai.[28]

Maginn would control the shares held by New Media II-C as the sole member of the entity, which amounted to 19.09% of Jenzabar's common stock.[29] Chai was to transfer 12.045% of the total issued and outstanding shares of Jenzabar common

[25] Maginn Answer ¶ 17; *see Deane*, 2022 WL 16557974, at *19.

[26] *See* Maginn Opening Br. Ex 4 at 1.

[27] *Id.* ¶ 8(a)(i)-(v).

[28] *Id.*

[29] *Id.* ¶ 8(d).

stock from the Family LP to Maginn personally and retain 29.67% as the sole interest holder.[30] She was also credited the Family LLC's 1.47% Jenzabar stake.[31]

On August 3, 2023, Chai filed an emergency motion for an ex parte hearing in the Massachusetts court.[32] The same day, the Massachusetts court issued an ex parte order preliminarily adopting the Special Master's report.[33]

D. The First Written Consent and Section 225 Action

Upon receiving the ex parte order on August 3, Chai executed and delivered to Jenzabar a written consent putatively on behalf of a "majority" of Jenzabar's stock (the "First Written Consent").[34] She purported to remove Mills from the Board.[35] Maginn did not sign or approve the First Written Consent.[36]

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[30] *Id.* ¶ 8(a)(iii); Maginn Opening Br. Ex. 6 ¶ 8. The Massachusetts court later amended the Special Master's report to assign 0.1% of stock previously unaccounted for, and directing the parties to transfer and assign 12.045% of the total Jenzabar shares from the Family LP to Maginn after accounting for stock attributable to the parties' children. *See* Maginn Opening Br. Ex. 6 ¶ 8.

[31] Maginn Opening Br. Ex 4 ¶ 8(a)(iv).

[32] *Maginn I*, 2023 WL 6811011, at *3.

[33] *Id.* (quoting ex parte order).

[34] *Id.* (quoting written consent); Maginn Opening Br. Ex 8.

[35] Maginn Opening Br. Ex 8.

[36] *Maginn I*, 2023 WL 6811011, at *3.

On August 8, 2023, Chai filed an action in this court under 8 *Del. C.* § 225 (the "First 225 Action").[37] She sought, among other things, a declaration that the First Written Consent was valid and that Mills was no longer on the Board.[38]

On October 16, 2023, this court issued an opinion holding that the First Written Consent was invalid because Chai lacked the authority to execute it.[39] "Maginn remain[ed] a General Partner of the Family LP," and "[t]he Family LP Agreement grant[ed] each General Partner one vote."[40] Without control of the Family LP and a successful transfer of its Jenzabar shares, she could not direct a majority of Jenzabar's voting shares.[41] Mills therefore "[remained] a member of both the Jenzabar Board and Special Committee."[42] The First 225 Action is an open matter; Chai filed a letter seeking relief in the matter earlier this year.[43]

[37] *Id.* at *1.

[38] *Id.*

[39] *Id.* at *7.

[40] *Id.* at *6.

[41] *Id.* at *5.

[42] *Id.* at *7.

[43] Letter, *Maginn*, 2023 WL 6811011 (Dkt. 79).

E. The Second and Third Written Consents

On October 23, 2023, Maginn filed a complaint in the District Court of Clark County Nevada (the "Nevada Action") to prevent Chai from acting as the Family LP's sole General Partner.[44]

The next day, the Massachusetts court held that "[t]he parties shall cooperate in taking all steps necessary to transfer the parties' interest in [the Family LP] solely to [Chai] and remove [Maginn] therefrom."[45] It ordered that the Special Master would be "empowered to execute any and all documents necessary to effectuate the terms of [the] Judgment on behalf [of Maginn]."[46] Maginn did not complete the transfer and, on October 26, the Special Master signed documents purporting to transfer Maginn's interests in the Family LP to Chai and remove Maginn as General Partner.[47]

Chai executed a written consent the same day (the "Second Written Consent").[48] Her signature page represented that she was acting as the Family LP's General Partner.[49] The resolution purported to remove Mills as an Independent

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[44] *Maginn II*, No. 2023-1140-LWW, at 6; *see also* Maginn Opening Br. Ex. 16 ¶ 1.

[45] *Maginn II*, C.A. No. 2023-1140-LWW, at 6.

[46] *Id.*

[47] *Id.* at 6-7.

[48] *Id.* at 7; Maginn Opening Br. Ex. 11.

[49] *Maginn II*, C.A. No. 2023-1140-LWW, at 7; Maginn Opening Br. Ex. 11 at 3.

Director and appoint Michael Flaherty, Carmelina Procaccini, and Dr. Li Chai to the Board.[50]

Around the same time, Mills and Maginn held a meeting of the Jenzabar Board. Mills, acting pursuant to Section 3.4 of the Bylaws, appointed defendant Torrence C. Harder IV to the Independent Director seat that became vacant when San Miguel died in July 2023.[51]

On October 29, Chai delivered another written consent (the "Third Written Consent") to the Board.[52] This version was largely duplicative of the Second Written Consent.[53] It adopted the same resolution but purported to unilaterally transfer the Family LP's Jenzabar shares to Chai.[54] Chai's signature page represented that she was acting as the majority stockholder of Jenzabar.[55]

F. The Second Section 225 Action

On November 8, 2023, Chai initiated another lawsuit in this court (the "Second 225 Action") against Maginn, Mills, and Jenzabar.[56] Her complaint

[50] *Maginn II*, C.A. No. 2023-1140-LWW, at 7; Maginn Opening Br. Ex. 11.

[51] *Maginn II*, C.A. No. 2023-1140-LWW, at 7-8; Maginn Answer ¶ 18; Mills and Harder Answer ¶ 18; Bylaws § 3.4 (addressing Board vacancies).

[52] *Maginn II*, C.A. No. 2023-1140-LWW, at 8; Maginn Opening Br. Ex. 12.

[53] *Compare* Maginn Opening Br. Ex. 11, *with* Maginn Opening Br. Ex. 12.

[54] Maginn Opening Br. Ex. 12.

[55] *Id.* at 3.

[56] Maginn Opening Br. Exs. 13-15.

included four counts: a claim for books and records under 8 *Del. C.* § 220; a claim under 8 *Del. C.* § 225; a claim for breach of the Stockholders Agreement; and a claim for a declaratory judgment regarding the rights and duties in the Stockholders Agreement.[57] The parties proceeded to file cross-motions for summary judgment, which were argued on January 2, 2024.[58]

Six days later, a preliminary injunction was issued in the Nevada Action.[59] The Nevada court confirmed that Maginn remained, at that time, a General Partner of the Family LP and barred Chai from acting as sole General Partner.[60]

On January 12, I delivered a bench ruling in the Second 225 Action that granted summary judgment on Count II (the Section 225 claim) in favor of Maginn and Mills.[61] I held that because Chai could not unilaterally direct the Family LP and did not own or control a majority of Jenzabar's voting stock, the Second and Third Written Consents were unauthorized and invalid.[62]

On March 11, I issued a second bench ruling resolving the cross-motions for summary judgment on Counts III (breach of the Stockholders Agreement) and IV

[57] Maginn Opening Br. Ex. 15; *Maginn II*, C.A. No. 2023-1140-LWW, at 8.

[58] Tr. of Oral Arg., *Maginn*, C.A. No. 2023-1140 (Dkt. 146).

[59] Maginn Opening Br. Ex. 16; *Maginn II*, C.A. No. 2023-1140-LWW, at 11-12.

[60] Maginn Opening Br. Ex. 16; *Maginn II*, C.A. No. 2023-1140-LWW at 11-12.

[61] *See* Maginn Opening Br. Ex. 17.

[62] *Maginn II*, C.A. No. 2023-1140-LWW, at 14-15.

(declaratory judgment).[63] Chai had argued that because there was no Senior Investor Designated Director on the Board after Malekian's departure, she and Mills were obligated to vote to remove Mills under Section 4.2(b) of the Stockholders Agreement.[64] I held that Chai's attempt to remove Mills from his position on that basis was equitably barred by laches and acquiescence since Malekian had left in 2013.

G. The Assignment and Additional Written Consents

Meanwhile, on March 8, the Massachusetts court issued its Third Supplemental Judgment of Divorce.[65] It stated that Maginn would cease to be a General Partner of the Family LP by effect of the transfer of his partnership interest to Chai.[66] On March 12, Maginn's general and limited partnership interests in the Family LP were assigned to Chai.[67] In response, the Nevada court dissolved its preliminary injunction.[68]

On April 12, 2024, Chai, as sole General Partner of the Family LP, assigned certain of the Family LP's Jenzabar shares to Maginn and other shares to herself (the

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[63] *Maginn III*, C.A. No. 2023-1140-LWW.

[64] *Id*. at 12; Pl.'s Suppl. Br. in Supp. of Mot. Summ. J., *Maginn*, C.A. No. 2023-1140-LWW (Dkt. 137).

[65] Maginn Opening Br. Ex. 7 at 2.

[66] *Id.* at 2-3.

[67] Pl.'s Answering Br. Ex. 9 at 8.

[68] *Id.* at 10-11, 16.

"Assignment").[69] The Family LP retained some Jenzabar shares for the benefit of Chai and Maginn's children.

The same day as the Assignment, Chai executed three more written consents.

One written consent purports to remove Mills and Harder from the Board and appoint Chai, Flaherty, and Procaccini (the "Fourth Written Consent") under Sections 3.4 and 5.2 of the Bylaws.[70] It purports to once again remove Mills under Section 4.2(b) of the Stockholders Agreement. It also states that since San Miguel's term expired upon his death, Harder's appointment to fill San Miguel's unexpired term was invalid under Sections 3.2 and 3.4 of the Bylaws.[71]

Another written consent purports to remove Maginn from the Board under Section 4.2(b) of the Stockholders Agreement and Section 5.2 of the Bylaws (the "Fifth Written Consent").[72] It states that Maginn's removal under Section 4.2(b) was premised on this court's finding in *Deane* that Maginn "breached his duty of loyalty to the investors of a separate investment vehicle by obtaining [Jenzabar] warrants that were intended for those investors and doing so by having the [Special Committee] believe that those warrants were being issued to those same investors."[73]

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[69] Pl.'s Answering Br. Exs. 10-11.

[70] Pl.'s Answering Br. Ex. 15.

[71] *Id.*

[72] Pl.'s Answering Br. Ex. 14.

[73] *Id.*

A third written consent executed by the "new" Board purports to remove Maginn as CEO, President, and Chair of Jenzabar, and to install Chai into those positions (the "Sixth Written Consent").[74]

Both the Fourth and Fifth Written Consents invoke Section 5.2 of the Bylaws and represent that Chai is acting as the Founder with a majority of Jenzabar's issued and outstanding voting stock. This alleged status as the majority-owning Founder results from the following transfers of Jenzabar common stock purportedly effected on April 12 from certain Affiliates to Chai:[75]

- 10,122,944 Jenzabar shares held by Chai after the Assignment of the Family LP's shares to her,[76] and
- 500,000 Jenzabar shares previously held by the Family LLC that were later assigned to Chai.[77]

Chai and trustees of the Chai-Maginn Family Trust allegedly own the Chai Family LLC.[78] On February 8, 2024, the Family LLC was purportedly merged into the Chai Family LLC, with the latter surviving and assuming all assets and liabilities of the

[74] Pl.'s Answering Br. Ex. 16.

[75] Maginn is not contesting the Assignment from the Family LP to Chai but reserves the right to dispute whether Chai has the authority to act exclusively on behalf of the Family LLC's succeeding entity, the Chai Family LLC. *See* Def. Robert Maginn, Jr.'s Opening Br. in Supp. of His Mot. for Summ. J. (Dkt. 58) ("Maginn Opening Br.") 13 n.1.

[76] Compl. Ex. E; Pl.'s Answering Br. Ex. 11.

[77] Compl. Ex. F.

[78] Pl.'s Answering Br. Ex. 7.

former.[79] According to Chai, these transfers brought the total shares of Jenzabar voting stock in her name to 10,622,944.

Chai alleges that Maginn controls the following holdings:

- 4,077,730 shares due to the Assignment of the Family LP's Jenzabar shares to Maginn,[80] and
- 6,500,000 Jenzabar shares held by New Media II-C.[81]

Based on these figures, Chai maintains that she holds 6,545,214 more shares than Maginn individually, and 45,214 more shares if New Media II-C's Jenzabar shares are considered.[82]

H. The Third Section 225 Action

On April 12—the day the Fourth, Fifth, and Sixth Written Consents were executed—Chai filed this lawsuit (the "Third 225 Action") against Maginn, Mills, and Harder.[83] Jenzabar is named as a nominal party. Her complaint seeks a declaration under 8 *Del. C.* § 225 that Mills, Harder, and Maginn were validly

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[79] *Id.*

[80] Compl. Ex. D.

[81] Maginn Opening Br. Ex 3 ¶ 77; Maginn Opening Br. Ex 4 ¶ 8(d). Maginn is the sole member of New Media II-C. Maginn Opening Br. Ex 4 ¶ 8(d).

[82] Pl.'s Answering Br. 15-16; Compl. ¶¶ 29-32. Taking these figures and purported transfers as true, Chai personally controls 10,622,944 (10,622,944 + 500,000) shares. Maginn personally controls 4,077,730 shares from the Assignment. He controls 10,577,730 (4,077,730 + 6,500,000) shares when counting those held in New Media II-C. This would imply that Chai controls 6,545,214 more shares than Maginn, and 45,214 more shares counting those of New Media II-C.

[83] Compl. ¶¶ 33-35.

removed from the Board and that Flaherty, Procaccini, and Li Chai replaced them as directors.[84]

Maginn, Mills, and Harder, filed opening briefs in support of their summary judgment motions on May 24.[85] Chai filed an answering brief in opposition to the motions on June 12.[86] Maginn, Mills, and Harder filed reply briefs in further support of their motions on June 19.[87] Oral argument was held on June 24.[88]

Separately, in the Second 225 Action, Chai's claim for books and records under Section 220 remains. Over her objection, on July 1, I granted a final order and judgment in the Section 225 Action on the Section 225, breach of contract, and declaratory judgment claims.[89] Chai subsequently appealed the January 12 and March 11 summary judgment rulings in the Second 225 Action. That appeal remains pending.

II. ANALYSIS

Under Court of Chancery Rule 56, summary judgment is granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled

[84] *Id.* ¶¶ 40-41.

[85] Dkts. 58, 60.

[86] Dkt. 70.

[87] Dkts. 72-73.

[88] Dkt. 90.

[89] Final Order and J. Counts II, III, and IV, *Maginn*, C.A. No. 2023-1140-LWW (Dkt. 179).

to a judgment as a matter of law."[90] The court must draw all reasonable inferences in the light most favorable to the non-movant.[91]

Maginn, Harder, and Mills seek summary judgment on several grounds including res judicata. Harder and Mills also argue that the Fourth Written Consent is invalid because it violates the Stockholders Agreement. And Maginn argues that the Fifth Written Consent is invalid because Chai is not a Founder with a majority of Jenzabar's voting stock and because it violates the Stockholders Agreement. Because res judicata and other equitable defenses prove dispositive, I decline to reach these other arguments.

A. Res Judicata

In the second summary judgment ruling of the Second 225 Action, I granted summary judgment in favor of the defendants on Chai's claims for breach of Section 4.2(b) of the Stockholders Agreement and for a related declaratory judgment.[92]

Summary judgment was granted in part because these claims were untimely. Chai sought specific performance of an alleged obligation that arose in 2013 upon

[90] Ct. Ch. R. 56(c).

[91] *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009) ("The facts, and all reasonable inferences, must be considered in the light most favorable to the non-moving party.").

[92] *Maginn III*, C.A. No. 2023-1140-LWW, at 13.

Malekian's departure from the Board, which was well outside the applicable statute of limitations.[93] Laches and acquiescence also barred her claim since she had signed the Stockholders Agreement, knew the Senior Investor Designated Director seat was vacated in 2013, and affirmatively behaved as though Mills was a director and Special Committee member for years.[94]

Chai now seeks another bite at the apple. In the present Section 225 action—her third in a year's time—she relies on Section 4.2(b) of the Stockholders Agreement, as in her prior suits. She now invokes a different clause of Section 4.2(b) in addition to Section 5.2 of the Bylaws based on an assertion that she controls a majority of the Founders' Jenzabar voting stock.[95] But Chai could have raised these arguments in the Second 225 Action—if not the First 225 Action. Her claim is therefore barred by res judicata.

Res judicata prevents a plaintiff from undertaking the sort of fragmented litigation strategy Chai has employed.[96] Interim developments in the divorce proceeding prompted impulsive attempts to reconstitute the Board and file expedited

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[93] *Id.* at 16-18.

[94] *Id.* at 18-21.

[95] *See supra* notes 75-82 and accompanying text.

[96] *See LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009) ("Res judicata exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy.") (citation omitted); *see also Hayford v. Citicorp Trust Bank*, 2007 WL 2985049, at *2 (Del. Ch. Oct. 11, 2007) ("Res judicata . . . stands as a foundation of the legal system, judicially created in order to ensure a definitive end to litigation.").

litigation to confirm the validity of her acts. At each step, Chai told the court that she controlled a majority of Jenzabar's voting stock and that she was entitled to remove directors under Section 4.2(b) of the Stockholders Agreement. After twice losing on summary judgment, Chai returns to this court to try her hand at a modified yet unoriginal contractual argument.

Res judicata "prevent[s] [such] multiplicity of needless litigation of issues by limiting parties to one fair trial of an issue or cause of action which has been raised or should have been raised in a court of competent jurisdiction."[97] Even if Chai did not raise the precise theory she presently advances, "[t]he procedural bar of res judicata extends [to] all issues that might have been raised and decided in the first suit as well as to all issues that actually were decided."[98] She cannot "split[] [her] claim and seek[] the same relief in subsequent litigation under a different substantive theory."[99]

Res judicata bars a claim when five factors are met:

> (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided

[97] *LaPoint*, 970 A.2d at 192.

[98] *Id.* at 191-92.

[99] *Id.* at 196.

> adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[100]

Each is easily satisfied.

First Factor. This court had jurisdiction over the First and Second Section 225 Actions.[101]

Second Factor. Chai, Maginn, and Mills were parties to the First and Second 225 Actions.[102] Harder is in privity with Mills, for whom summary judgment was granted in the Second 225 Action. Harder and Mills's interests in applying the prior ruling are aligned.[103] Chai does not argue otherwise.

Third Factor. All three of Chai's actions concern her ability to remove other Board members under Section 4.2(b) of the Stockholders Agreement.[104] In the First and Second 225 Actions, the central issue was whether Chai had the authority to unilaterally remove and replace the Independent Directors. Chai also maintained

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[100] *Id.* at 192 (citations omitted).

[101] *See Maginn I*, 2023 WL 6811011*; Maginn II*, C.A. No. 2023-1140-LWW*; Maginn III*, C.A. No. 2023-1140-LWW.

[102] Compl., *Maginn*, 2023 WL 6811011 (Dkt. 1); Compl., *Maginn*, C.A. No. 2023-1140-LWW (Dkt. 1).

[103] *See Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009) (explaining that parties were in privity where their relationship "is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit") (citing *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. 2005)).

[104] *See* Pl.'s Combined Opening Br. in Support of Mot. for Summ J. and Opp'n to Def.'s Mot. for Summ. J, *Maginn*, 2023 WL 6811011 (Dkt. 35); Compl., *Maginn*, C.A. No. 2023-1140-LWW (Dkt. 1).

that, once the Senior Investor no longer held Jenzabar stock, Section 4.2(b) of the Stockholders Agreement provided an exception to Section 4.2(a) and compelled stockholders to vote their shares to remove the Independent Directors. In the Second 225 Action, that argument was rejected as untimely under the statute of limitations and on laches and acquiescence grounds.[105]

Chai insists that this case is different because she is—for the first time—invoking removal authority under Section 5.2 of the Bylaws.[106] But as noted, res judicata concerns not only whether an issue was raised in a prior proceeding, but also whether it *could have been* raised.[107] The court must pragmatically assess whether the issues "are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[108]

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[105] *Maginn III*, C.A. No. 2023-1140-LWW, at 16-21.

[106] Pl.'s Answering Br. 39-40.

[107] *See LaPoint*, 970 A.2d at 192; *see also Julian v. E. States Const. Serv., Inc.*, 2009 WL 1211642, at *5 (Del. Ch. May 5, 2009) ("Res judicata constitutes an absolute bar to all claims or defenses that were litigated or which could have been litigated in the earlier proceeding."); *Trans World Airlines, Inc. v. Hughes*, 317 A.2d 114, 118 (Del. Ch. 1974) (explaining that res judicata "constitutes an absolute bar to a subsequent action on the same claim as to the parties and their privies on all theories which were litigated or which could have been litigated in the earlier proceeding").

[108] *LaPoint*, 970 A.2d at 193 (citing Restatement (Second) of Judgments § 24(2) (1982)).

Chai reframes the factual allegations in previous actions to suggest that she is now invoking a separate contractual right.[109] She asserts that she could not have previously raised it because "[her] ability to exercise her rights as a Founder with the most voting securities did not exist until April 12, 2024" when the Assignment occurred.[110]

But according to Chai's sworn representations to this court in the First and Second 225 Actions, she was (or could have become) the Founder with the most voting securities. In those actions, Chai allegedly controlled most of Jenzabar's voting stock through shares held personally and through Affiliates. For example, she alleged the following in her prior complaints:

> - Chai is the controlling interest holder in the Chai-Maginn Family Limited Partnership (the '[Family] LP'). The Chai-Maginn Family LLC (the '[Family] LLC'), which together with the Jenzabar shares Chai owns personally effectively make Chai Jenzabar's majority shareholder.[111]
>
> - As of October 26, 2023, Chai became the controlling interest holder in the Chai-Maginn Family Limited Partnership (the 'Family LP'). The Chai-Maginn Family LLC (the 'Family LLC'), which together with the Jenzabar

[109] *DeRamus v. Redman*, 1986 WL 13089, at *5 (Del. Super. Nov. 14, 1986) ("It is generally held that res judicata bars relitigation of the same claim even where a new legal theory is advanced as a basis for relief in a second suit.").

[110] Pl.'s Answering Br. 33-34.

[111] Compl., *Maginn*, 2023 WL 6811011, at ¶ 2 (Dkt. 1).

> shares Chai owns personally effectively make Chai Jenzabar's majority shareholder.[112]

Chai consistently represented that she could act as the sole General Partner of the Family LP pursuant to the Massachusetts court's judgment.[113] She also argued in the Second 225 Action that the Third Written Consent had the effect of transferring the Family LP's Jenzabar shares to her individually, making her Jenzabar's majority stockholder.[114] Chai further maintained that she held a controlling interest in the Chai Family LLC with the cooperation of her sister Li Chai, who is the Chai Family LLC's co-manager.[115] In a sworn affidavit filed in the Second 225 Action, Chai affirmed that she was Jenzabar's "majority shareholder" after becoming a co-manager of the Family LLC and the Special Master's October 26 purported transfer of the Family LP's interests to her.[116]

Chai now cites to Section 5.2 of the Bylaws, which grants a removal right to "the holders of a majority of . . . the voting securities held by the Founders."[117] She

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[112] Compl., *Maginn*, C.A. No. 2023-1140-LWW, ¶ 3 (Dkt. 1).

[113] Pl. Mot. for Summ. J., *Maginn*, C.A. No. 2023-1140-LWW, at 13 (Dkt. 40); Pl. Mot. for Summ. J., *Maginn*, 2023 WL 6811011, at 6 (Dkt. 35).

[114] *Maginn II*, C.A. No. 2023-1140-LWW, at 8.

[115] Pl.'s Mot. for Summ. J., *Maginn*, 2023 WL 6811011, at 11-12 (Dkt. 35); Pl.'s Mot. for Summ. J., *Maginn*, C.A. No. 2023-1140-LWW, at 3 (Dkt. 40).

[116] Aff. of Ling Chai Maginn in Supp. of Pl.'s Mot. for Summ. J., *Maginn*, C.A. No. 2023-1140-LWW, ¶¶ 7, 17, 20, 53 (Dkt. 7).

[117] Bylaws § 5.2.

believes that only shares held by a Founder individually, and not shares held by a Founder's Affiliates, should count.[118] And she asserts that she did not personally hold a majority of the "voting securities held by the Founders" until she received her portion of the Family LP's Jenzabar shares through the Assignment.[119] As the Founder with the most voting securities, Chai claims that she can remove the defendants from the Board under Section 4.2(b) of the Stockholders Agreement—Maginn for bad faith or willful misconduct, and Mills and Harder because the parties that designated them allegedly lost the right to do so.[120]

Chai could have raised these very same arguments under Section 5.2 of the Bylaws and Section 4.2(b) of the Stockholders Agreement before. She chose instead to split her claim. While appealing the summary judgment decision in the Second 225 Action, she filed this action advancing a contract argument based on the same facts and issues raised before.

The present action includes an additional assertion that Harder should be removed from the Board because Mills lacked the authority to appoint Harder to San Miguel's vacant seat.[121] But Harder's appointment predated the Second 225 Action

[118] Pl.'s Answering Br. 19.

[119] *Id.* at. 33.

[120] Compl. ¶¶ 33-34; Pl.'s Answering Br. 26-27, 40-44.

[121] *See* Pl.'s Answering Br. Ex. 15; *see also* Compl. ¶ 33.

and could have been raised then. In fact, Chai acknowledged Harder's appointment in the Second 225 Action but chose not to contest it.[122]

Fourth Factor. Chai lost both the First and Second 225 Actions on summary judgment.

Fifth Factor. The First and Second 225 Actions resulted in a final decree. "[A] decision on a motion for summary judgment is a final decision on the merits, which enables the defense of *res judicata* to be raised in subsequent actions between the parties."[123] Despite Chai's objection, a final judgment was entered on Counts II through IV in the Second 225 Action.[124]

* * *

Chai's claims are barred by res judicata. She needed to bring all related theories of recovery in a single action.[125] Her failure to do so undermined "the conservation of scarce judicial resources, the stability and finality of judicial decrees

[122] *Maginn III*, C.A. No. 2023-1140-LWW, at 22.

[123] *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980).

[124] Final Order and J. Counts II, III, and IV, *Maginn*, C.A. No. 2023-1140-LWW (Dkt. 179).

[125] *See Maldonado v. Flynn*, 417 A.2d 378, 383 (Del. Ch. 1980); *see also Glaser v. Norris*, 1992 WL 14960, at *15 (Del. Ch. Jan. 6, 1992) (recognizing that res judicata permits a litigant to have "one and only one day in court").

and repose for the litigants from vexatious renewal of the same lawsuit."[126] This is the sort of gamesmanship res judicata is designed to prevent.

My analysis can end here. For the sake of completeness, and to deter further lawsuits based on circumstances that have existed for over a decade, I go on to consider whether equitable defenses also support granting summary judgment.

B. Laches and Acquiescence

Chai asserts that she can remove Maginn under Section 4.2(b) of the Stockholders Agreement for "bad faith and willful misconduct."[127] The purported misconduct she cites occurred in 2012. As to Mills and Harder, her removal argument stems from the fact that the Senior Investor Designated Director seat is vacant—which occurred in 2013. She has, for over a decade, served as a Board member alongside Mills and Maginn without raising these theories. As a result, the defendants argue that her claims are barred by laches and acquiescence.[128] I agree.

1. Laches

"Laches bars an action in equity if '[t]he plaintiff waited an unreasonable length of time before bringing the suit and . . . the delay unfairly prejudices the

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[126] *Glaser*, 1992 WL 14960, at *15 (quoting *Sternberg v. O'Neill*, 1989 WL 137932 (Del. Ch. Nov. 9, 1989)).

[127] S'holders Agreement § 4.2(b); Compl. ¶ 34; *see* Pl.'s Answering Br. 26-32.

[128] Maginn makes these arguments explicitly. Harder and Mills raise Chai's unreasonable delay amid other arguments.

defendant.'"[129] The defense applies to Section 225 claims.[130] A successful showing of laches involves three elements: (1) knowledge of the claim by the claimant, (2) unreasonable delay in bringing the claim, and (3) prejudice to the defendant as a result of the delay.[131] Each element is satisfied here.

Regarding Maginn, the misconduct that Chai relies on to remove him from the Board was addressed in the *Deane* litigation.[132] This court's post-trial decision was issued in November 2022, but the underlying conduct occurred a decade earlier. As explained in *Deane*, in June 2012, Maginn breached his duty of loyalty to the members of New Media Investors II-B, LLC when warrants belonging to that entity were issued to New Media II-C instead, which was "solely owned" by Maginn and Chai.[133] Even if Chai were ignorant of these events in 2012, she would have gained knowledge by December 6, 2016 when Deane sued Maginn.[134]

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[129] *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (citing *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002)).

[130] *See Klaassen v. Allegro Dev. Corp.*, 2013 WL 5739680 (Del. Ch. Oct. 11, 2013) (applying laches and acquiescence to a claim under 8 *Del. C.* § 225), *aff'd*, 106 A.3d 1035 (Del. 2014); *Martin v. Med-Dev Corp.*, 2015 WL 6472597, at 14-15 (Del. Ch. Oct. 27, 2015) (applying laches and other equitable defenses to claims under 8 *Del. C.* § 225); *Zohar III Ltd. v. Stila Styles, LLC*, 2022 WL 1744003, at *9 (Del. Ch. May 31, 2022) (applying laches and acquiescence to a claim under 6 *Del. C.* § 18-110), *aff'd sub nom. Tilton v. Zohar III Ltd., Inc.*, 285 A.3d 1204 (Del. 2022).

[131] *Whittington*, 991 A.2d at 8.

[132] *See Deane*, 2022 WL 16557974, at *19.

[133] *Id.* at *5.

[134] *Id.* at *7.

Chai alludes to the analogous statute of limitations to oppose Maginn's laches argument. She points out that Maginn was not found liable in *Deane* until November 2022—less than three years before she filed this action.[135] Section 4.2(b) of the Stockholders Agreement, however, concerns the removal of directors for bad faith or willful misconduct. It does not require a predicate finding of a breach of fiduciary duty. Accordingly, Chai unreasonably delayed in bringing her claim to remove Maginn for the wrongdoing raised in *Deane*. That is particularly true since a Section 225 action is viewed as a summary proceeding.[136]

Regarding Mills and Harder, Chai argues that they should be removed under Section 4.2(b) of the Stockholders Agreement because Malekian resigned from his position as Senior Investor Designated Director in 2013 when MCG Capital divested from Jenzabar.[137] I addressed this contention in the Second 225 Action. Chai has known of Malekian's resignation since 2013.[138] She also knew that the terms of the

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[135] Pl.'s Answering Br. 34 n.114.

[136] *See, e.g.*, *Stengel v. Rotman*, 2001 WL 221512, at *8 (Del. Ch. Feb. 26, 2001) (citation omitted), *aff'd sub nom. Stengel v. Sales Online Direct, Inc*., 783 A.2d 124 (Del. 2001); *see also Klaassen*, 2013 WL 5739680, at *20 (holding that a plaintiff's seven-month delay in challenging his removal was barred by laches).

[137] Pl.'s Answering Br. 40-45. As noted above, Harder and Mills did not make a specific laches argument in their summary judgment brief. They did, however, raise unreasonable delay in the context of their res judicata arguments. To the extent their delay arguments are properly raised, I address them here. *See* Harder and Mills Answer 20 (raising equitable affirmative defenses). In any event, this exact argument was disposed of in the Second 225 Action.

[138] *Maginn II*, C.A. No. 2023-1140-LWW, at 18-19.

Stockholder's Agreement required prompt removal under these circumstances.[139] But she waited ten years to act. This was an unreasonable delay.

Often, "[t]he reasons for the delay are more critical than the amount of time that has elapsed."[140] Chai argues that she did not delay since she just recently became the Founder with the most Jenzabar voting securities. Still, Chai could have but failed to pursue the removal of Mills or Maginn "promptly," as required by Section 4.2(b).[141] She chose not to raise her ability to remove Maginn in the First or Second 225 Actions but waited until the Third 225 Action.

The defendants have been prejudiced by Chai's delay.[142] They have been burdened with uncertainty and repeated expedited lawsuits. And Jenzabar has been under the cloud of a status quo order and divorce-fueled control dispute for over a year.

Laches therefore supports summary judgment in the defendants' favor.

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[139] *Id.*

[140] *Klaassen*, 2013 WL 5739680, at *20; *see also IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177 (Del. 2011).

[141] S'holders Agreement § 4.2(b) ("If a party shall cease to have the right to designate a director or directors, all parties shall vote, and take all other actions necessary, to promptly remove the director(s) that such party is no longer entitled to designate.").

[142] *See Kraft v. WisdomTree Invs., Inc.*, 145 A.3d 969, 979 (Del. Ch. 2016) ("The Court also may presume prejudice if the claim is brought after the analogous limitations period has expired."); *see also Whittington*, 991 A.2d at 9 ("[A] party's failure to file within the analogous period of limitations will be given great weight in deciding whether the claims are barred by laches.").

2. Acquiescence

Acquiescence applies when the party who could challenge a particular act, having "full knowledge of its rights and the material facts," engages in conduct that leads the other party to believe reasonably that the act had been approved.[143] Approval may be conveyed when the claimant "(1) remains inactive for a considerable time; or (2) freely does what amounts to recognition of the complained of act; or (3) acts in a manner inconsistent with the subsequent repudiation, which leads the other party to believe the act has been approved."[144]

Maginn argues that Chai acquiesced to his Board membership despite the *Deane* litigation.[145] As explained above, Chai has had knowledge of the conduct at issue in *Deane* for years. It was not until the Fifth Written Consent on April 12, 2024 that she first sought to remove Maginn for this conduct. Until then, she affirmatively treated Maginn as a director—including as reflected by the First,

[143] *Klaassen*, 106 A.3d at 1047; *see also Lehman Bros. Hldgs. Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *9 (Del. Ch. Feb. 25, 2014) ("The doctrine of acquiescence effectively works an estoppel: where a plaintiff has remained silent with knowledge of her rights, and the defendant has knowledge of the plaintiff's silence and relies on that silence to the defendant's detriment, the plaintiff will be estopped from seeking protection of those rights."), *aff'd*, 105 A.3d 989 (Del. 2014).

[144] *Klaassen*, 106 A.3d at 1047.

[145] Maginn Opening Br. 23-24.

Second, and Third Written Consents. Through these acts, Maginn had reason to believe that Chai would not seek his removal.[146]

Acquiescence also supports summary judgment for the defendants.

C. Looking Ahead

Chai is not entitled to the declarations she seeks about the validity of the Fourth, Fifth, and Sixth Written Consents; the composition of the Board; the identity of Jenzabar's CEO, President, and Chair; the actions taken by purported Board members; and the existence of the Special Committee.[147] This is primarily because of her tactical litigation choices, which triggered the application of res judicata. To hold otherwise would undermine the finality of judgments and policies against piecemeal litigation.

What this means for the control of Jenzabar, however, is unideal. The instability of Jenzabar's governance persists. If Chai truly holds a majority of Jenzabar's voting securities, she may be entitled to exercise her rights as such under the Stockholders Agreement and Bylaws.

This decision does not bar Chai from doing so in the future. It says nothing about her ability to invoke Section 4.2(b) of the Stockholders Agreement or Section

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[146] In the second summary judgment decision in the Second 225 Action, I held that acquiescence also barred Chai's claim that Mills was to be removed under Section 4.2(b) of the Stockholders Agreement since there is no longer a Senior Investor Designated Director. *See supra* notes 93-94 and accompanying text.

[147] Compl. ¶ 41.

5.2 of the Bylaws based on new facts. What she cannot do is sue again to press the same arguments about misconduct from 2012 and vacancies in 2013 that she could and should have raised before.

After hearing several lawsuits involving Chai and Maginn's divorce, I have little faith that they can amicably agree on the Board's composition.[148] It is my sincere hope, however, that they can place their fiduciary duties to Jenzabar ahead of personal squabbles. A Delaware corporation should not be a pawn in its founders' divorce.

III. CONCLUSION

Maginn's motion for summary judgment is granted. Mills and Harder's motion for summary judgment is also granted. The status quo order is hereby lifted.

[148] Harder can be removed once Chai and Maginn, as the Founder Designated Directors, mutually agree to appoint a successor under Sections 4.2(a)(iii) and 4.2(b) of the Stockholders Agreement. Harder was designated under Section 3.4 of the Bylaws by Mills, the sole remaining director designated by the Founder Designated Directors. Section 5.2 of the Bylaws governs the removal of "[a]ny director designated by the holders of the Senior Preferred Stock or any Founder Designated Director." Bylaws § 5.2. Harder is neither.

C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LING CHAI, Plaintiff, v. ROBERT MAGINN, JR., D. QUINN MILLS, and TORRENCE C. HARDER, Defendants, and JENZABAR, INC., Nominal Defendant.	C.A. No. 2024-0393-LWW

[PROPOSED] ORDER GRANTING DEFENDANTS D. QUINN MILLS AND TORRENCE C. HARDER'S MOTION FOR SUMMARY JUDGMENT

WHEREAS, Defendants D. Quinn Mills and Torrence C. Harder (the "Independent Directors") having filed a Motion for Summary Judgment (the "Motion") pursuant to Court of Chancery Rule 56, and the Court having found good cause therefore;

IT IS HEREBY ORDERED this _____ day of _____, 2024, that:

1. The Motion is GRANTED.

2. Summary judgment is entered in favor of the Independent Directors and against Plaintiff in this action.

_____
Vice Chancellor Lori W. Will

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Lori W. Will
File & Serve Transaction ID:	73232253
Current Date:	Oct 04, 2024
Case Number:	2024-0393-LWW
Case Name:	CONF ORD /Ling Chai v. Robert A. Maginn, Jr., D. Quinn Mills, Torrence C. Harder IV and Jenzabar, Inc.

Court Authorizer Comments:

The motion is granted for the reasons set forth in the court's October 1, 2024 memorandum opinion.

/s/ Judge Lori W. Will

D

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LING CHAI,

Plaintiff,

v.

ROBERT MAGINN, JR., D. QUINN MILLS, and TORRENCE C. HARDER IV

Defendants,

and

JENZABAR, INC., a Delaware Corporation,

Nominal Party.

C.A. No. 2024-0393-LWW

[PROPOSED] ORDER GRANTING DEFENDANT ROBERT MAGINN, JR.'S MOTION FOR SUMMARY JUDGMENT

WHEREAS, on May 24, 2024, Defendant Robert Maginn, Jr. filed a Motion for Summary Judgment (the "Motion"), and the Court having considered the Motion and for good cause shown,

IT IS HEREBY ORDERED, this_____day of _____, 2024 that:

1. The Motion is GRANTED.

2. Judgment is entered in favor of Robert Maginn, Jr.

_____
Vice Chancellor Lori W. Will

This document constitutes a ruling of the court and should be treated as such.

Court:	DE Court of Chancery Civil Action
Judge:	Lori W. Will
File & Serve Transaction ID:	73206368
Current Date:	Oct 04, 2024
Case Number:	2024-0393-LWW
Case Name:	CONF ORD /Ling Chai v. Robert A. Maginn, Jr., D. Quinn Mills, Torrence C. Harder IV and Jenzabar, Inc.

Court Authorizer Comments:

The motion is granted for the reasons set forth in the court's October 1, 2024 memorandum opinion.

/s/ Judge Lori W. Will

CERTIFICATE OF SERVICE

I, Phillip A. Giordano, Esq. hereby certify that on November 15, 2024, I caused a true and correct copy of the foregoing to be served on the following counsel of record via File&Serve*Xpress*:

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