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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 Defendant Below/Appellee.	Cons. Nos. 372,2024 and 430,2024 Court Below: Court of Chancery of the State of Delaware C.A. No. 2023-1140-LWW

ANSWERING BRIEF OF APPELLEES ROBERT MAGINN, JR., D. QUINN MILLS AND TORRENCE C. HARDER

MCCOLLOM D'EMILIO SMITH UEBLER LLC
Thomas A. Uebler (#5074)
Kathleen A. Murphy (#5215)
Sarah P. Kaboly (#6673)
2751 Centerville Road, Suite 401
Wilmington, DE 19808
(302) 468-5960

Attorneys for Appellee Robert Maginn, Jr.

BAYARD, P.A.
Thad J. Bracegirdle (#3691)
Sarah T. Andrade (#6157)
600 N. King Street, Suite 400
Wilmington, DE 19801
(302) 655-5000

Attorneys for Appellees D. Quinn Mills and Torrence C. Harder

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NATURE OF PROCEEDINGS

Appellant/plaintiff below Ling Chai ("Chai") appeals two related rulings of the Court of Chancery holding that her attempts to reconstitute the board of directors of Jenzabar, Inc. ("Jenzabar" or the "Company") were barred by laches, acquiescence and res judicata.

Chai and her then-husband, appellee/defendant below Robert Maginn, Jr. ("Maginn"), co-founded Jenzabar in 1998 and together owned a majority stake in the Company. Jenzabar is governed by the Amended and Restated By-Laws (the "Bylaws") and the Fourth Amended and Restated Stockholders Agreement, dated June 30, 2004 (the "Stockholders Agreement").

In 2019, Chai filed for divorce in the Probate and Family Court in the Commonwealth of Massachusetts (the "Massachusetts Court"). After the Massachusetts Court attempted to equally divide the marital Jenzabar stock between Chai and Maginn, Chai executed a series of written consents, five in total, each purporting to remove and elect Jenzabar directors. Between August 2023 and April 2024, Chai initiated three successive actions in the Court of Chancery under 8 *Del. C.* § 225 ("Section 225") seeking validation of those written consents. The first four written consents sought removal of Jenzabar's Independent Directors (as defined in the Stockholders Agreement) and the fifth sought removal of Maginn. In each action, Chai alleged that she was Jenzabar's majority stockholder and had authority to vote

sufficient shares of Jenzabar stock to reconfigure Jenzabar's board. In the second action, Chai also argued that the Stockholders Agreement compelled Maginn to vote with her to remove the Independent Directors and that Maginn breached that contract by failing to do so.

The Court of Chancery rejected all five written consents and entered judgment against Chai in all three actions. The Court of Chancery held that the first three consents were invalid because Chai did not, in fact, control a majority of Jenzabar's stock. Chai does not challenge those rulings on appeal.

This appeal concerns the Court of Chancery's findings that Chai's claim for breach of the Stockholders Agreement and enforcement of the fourth and fifth written consents are equitably barred. In the second action, Chai's attempt to force Maginn to vote with her to remove the Independent Directors was barred by laches and acquiescence. Because the event triggering Maginn's purported voting obligation arose in 2013, and Chai did not seek to enforce this contractual obligation until 2023, while accepting substituted performance for over a decade, the Court of Chancery rejected Chai's claim for breach of the Stockholders Agreement on laches and acquiescence grounds.

The Court of Chancery invalidated the fourth and fifth written consents, the subject of the third action, on res judicata, laches and acquiescence grounds. As the trial court found, Chai purported to vote Jenzabar shares in the fourth and fifth

written consents under theories of authority that she could have been, but were not, raised in the first two actions but did not and, therefore, the prior judgment against Chai barred her claims in the third action under principles of res judicata. Similarly, the trial court barred Chai's claims relating to the fourth and fifth written consents due to laches and acquiescence because Chai raised new arguments in the third action that she could have been raised earlier (but did not).

Chai then appealed the Court of Chancery's rulings in the second and third actions. Defendants Maginn, D. Quinn Mills ("Mills") and Torrence C. Harder ("Harder") respectfully submit this Answering Brief and ask this Court to affirm the trial court's judgments in all respects.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly concluded that Chai's claims for breach of contract and declaratory judgment are barred because Chai first asserted them 10 years after the purported breach occurred. The trial court correctly applied a laches analysis, which considers the analogous statute of limitations to determine whether claims are equitably barred as untimely. Chai not only sat on Jenzabar's board with the Independent Directors for a decade without questioning their authority, she also never claimed the Company's Bylaws gave her a right to remove the Independent Directors before filing her third action in the Court of Chancery. Chai's unreasonable delays caused the defendants prejudice that supported the trial court's judgments against Chai on the equitable grounds of laches and acquiescence.

2. Denied. The Court of Chancery correctly held that its prior judgment against Chai barred her claims in the third action under principles of res judicata because Chai's final attempt to remove and elect directors relied on arguments that she could have raised, but did not raise, in the first two actions.

COUNTERSTATEMENT OF FACTS

I. Jenzabar

A. Formation and Ownership of Jenzabar

In 1998, Chai and Maginn co-founded Jenzabar, a provider of software services for the education sector. Op. at 2. [1]

Before their divorce, Chai and Maginn owned approximately 62% of Jenzabar voting stock both directly and indirectly through three entities: (i) the Chai Maginn Family LP, a Nevada limited partnership (the "LP"), with Chai and Maginn serving as General Partners; (ii) the Chai Maginn Family LLC, a Delaware limited liability company (the "LLC"); and (iii) New Media Investors II-C, LLC, a Delaware limited liability company ("New Media"). Op. at 4-5. Chai and Maginn have three daughters who, together, own approximately 27.90% of Jenzabar voting stock indirectly through the Chai Maginn Family Trust 2012 (the "Trust"). A1316. The Trust is a member of the LLC and Chai's sister, Li Chai, is the trustee of the Trust. A1316; A1235.

B. Jenzabar's Management

Jenzabar is governed by the By-Laws and the Stockholders Agreement, to which Chai and Maginn are parties. Op. at 2-3. The Stockholders Agreement was

[1] "Op." refers to the Memorandum Opinion issued by the Court of Chancery on October 1, 2024.

executed in connection with a senior preferred investment by MCG Capital Corporation ("MCG") and governs how Chai and Maginn, as founders of Jenzabar, share control of Jenzabar with MCG and Jenzabar's other shareholders. *Id.*

The Bylaws and Stockholders Agreement dictate how Jenzabar directors are elected and removed. Op. at 2-4. The Stockholders Agreement permits MCG to designate one "Senior Investor Designated Director," Chai and Maginn to designate two "Founder Designated Directors," and the two remaining seats to be filled by Independent Directors designated by the Founder Designated Directors and approved by the Senior Investor Designated Director. *Id.* The Senior Investor Designated Director may not unreasonably withhold or delay his consent for the Independent Directors. *Id.* at 3. The Independent Directors must meet the NASD definition of "independent." A238-A240, §4.2(a)(iii).

The Stockholders Agreement permits removal of designated directors in only limited circumstances, including for bad faith and willful misconduct. A240-A242. Section 4.2(b), states, in relevant part:

> Each Investor and each Stockholder agrees to vote all of his, her or its Shares (including all Shares over which he, she or it exercises voting control) for the removal of any director upon the request of the party or parties designating such director (or if the party that designated such director no longer has the right to designate such director) and, if applicable, for the election of the Board of directors of the Company of a substitute designated by such party or parties in accordance with the provisions of Article IV. 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…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…..

Id.

The Bylaws further provide:

> 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 Senior Preferred Stock or the voting securities held by the Founders (as defined in the Stockholders Agreement)…

A308.

C. Litigation Over Appointment of Independent Directors

After executing the Stockholders Agreement, Chai and Maginn appointed themselves as Founder Designated Directors and MCG designated E. Peter Malekian as the Senior Investor Designated Director. Op. at 3. On March 17, 2006, Chai and Maginn proposed appellee/defendant below Mills and San Miguel as Independent Directors and requested Malekian's approval. *Id.* Malekian withheld his consent for two years, until April 17, 2008. A891.

On April 21, 2009, MCG filed an action in the Court of Chancery alleging direct and derivative claims against, among others, Jenzabar, Maginn, Chai, San Miguel and Mills. A892. Chai and Maginn counterclaimed for MCG's breach of the Stockholders Agreement by "directing…MCG's Designees to the Jenzabar Board, to withhold and delay approval of the independent directors…." *Id.* The parties settled and, on June 26, 2013, Jenzabar repurchased all of MCG's Jenzabar stock. *Id.* Malekian resigned from the board, effective June 26, 2013. *Id.* Since that date, Jenzabar has not had a Senior Investor or Senior Investor Designated Director. Op. at 3.

After Malekian's resignation, Jenzabar's board consisted of Maginn, Chai, Mills and San Miguel – the Founder Designated Directors and the Independent Directors. For 10 years, these four directors managed Jenzabar without any question regarding their authority. For example, Jenzabar's records include minutes of board meetings and unanimous board consents dating from 2014 to 2016 that record Mills' continual attendance and participation. A892-A893. As recently as September 13, 2021, Chai stipulated in a Massachusetts court filing that "Mills is a [Jenzabar] Director, and a member if the Special Committee…." A952.

D. Court of Chancery Finds Maginn Breached Fiduciary Duties to Separate Entity

On December 6, 2016, members of New Media Investors II-B, LLC ("New Media II-B"), a Delaware limited liability company formed in 2000 by Maginn to

facilitate investments in Jenzabar, filed an action in the Court of Chancery captioned *Deane v. Maginn*, C.A. No. 2017-0346-LWW (the "*Deane* Action"). A1730-A1808. Plaintiffs in the *Deane* Action alleged that Maginn, who was managing member of New Media II-B from 2000 to 2013, breached his fiduciary duties in connection with the issuance of warrants to purchase Jenzabar common stock on June 29, 2012, by a Special Committee of the Jenzabar board. A1735; A1742. On November 1, 2022, the Court of Chancery found that Maginn breached his duty of loyalty to members of New Media II-B. A1730-A1808. Maginn's appeal of that opinion is pending.

II. Chai and Maginn's Divorce Triggers a Fight Over Control of Jenzabar

A. Jenzabar Forms Special Committee

On January 23, 2019, Chai initiated divorce proceedings in the Massachusetts Court (the "Divorce Proceedings"). Op. at 4. Chai claims that, on January 14, 2019, shortly before she filed for divorce, "all of the members of the [LLC] removed Maginn as manager and appointed Li Chai and me as managers of the [LLC]," purportedly giving Chai control over the LLC's Jenzabar shares. A200.

To address potential conflicts arising from the divorce, the Jenzabar board (including Chai) unanimously adopted resolutions on March 19, 2019, forming a Special Committee of Independent Directors Mills and San Miguel. Op. at 5. The Special Committee was empowered "to consider and take all action it determines to be advisable with respect to any matter relating to the Founders…." A893. On June

30, 2019, the Special Committee removed Maginn as co-CEO and appointed Chai as sole CEO of Jenzabar. *Id.* Maginn complied and stepped down as co-CEO, while Chai remained CEO until her termination on October 17, 2023. *Id.*

B. Massachusetts Court Divides Chai and Maginn's Marital Property

In the Divorce Proceedings, the Massachusetts Court referred the division of Chai and Maginn's marital assets to Special Master Robert J. Rivers, Jr., Esquire (the "Special Master"). A267. On January 4, 2023, the Special Master issued a Master's Report (as amended) (the "Master's Report") intending to divide evenly between Chai and Maginn the 62% of Jenzabar stock held between them and their entities, while giving neither founder majority voting control over Jenzabar. A272-A274. To effectuate this even split of shares, the Special Master awarded shares of Jenzabar stock owned by the LP, LLC, and New Media to Chai and Maginn as follows:

- Maginn retains Jenzabar shares owned by New Media (comprising 19.09% of the total shares);
- Maginn retains Jenzabar shares owned by him individually (comprising 0.06% of total shares);
- With respect to shares held by the LP:
    - Chai shall transfer 12.04% of Jenzabar shares from LP to Maginn;
    - Chai shall retain the balance of the Jenzabar shares owned by LP (comprising 29.67% of total shares); and
    - Chai shall remove Maginn as a general partner of LP and become the sole general partner of the LP;

- Chai shall retain the Jenzabar shares owned by the LLC (approximately 1.47% of total shares) and Chai and Maginn shall cooperate in taking all steps necessary to transfer the parties' interest in this LLC solely to Chai; and

- Chai shall retain the Jenzabar shares owned by her individually (comprising 0.06% of total shares);

Id. On October 24, 2023, the Massachusetts Court adopted the Special Master's ruling that the Jenzabar stock should be divided equally between Chai and Maginn. A322-A323. From there Chai started using increasingly illogical interpretations of the Master's Report to repeatedly (and unsuccessfully) try seizing control of Jenzabar for herself – leading to motion practice in the Divorce Proceeding and litigation in the Court of Chancery. Op. at 6-15.

C. Chai Attempts Multiple Unsuccessful Bids to Control Jenzabar Board

1. First Unsuccessful Written Consent

San Miguel died in July 2023, leaving Chai, Maginn, and Mills as Jenzabar's three directors. A1457. On August 3, 2023, fearing that Mills was aligned against her with Maginn (notwithstanding Mills' years-long tenure as an Independent Director), Chai executed her first of five written consents (the "First Written Consent") purporting to remove Mills from the board. A292-A296. The First Written Consent purported to be signed by:

- Chai, individually;

- Chai, as General Partner of the LP;

- Chai and Li as Managers of the LLC; and
- Chai, as a stockholder of New Media.

A296. On August 8, 2023, Chai then filed an action under Section 225 in the Court of Chancery seeking to validate the First Written Consent (the "First Action"). A1453-A1464. In the First Action, Chai alleged that "there is overwhelming evidence that [Chai] is the majority shareholder" of Jenzabar. A1462. The verified complaint also referenced the Court of Chancery's November 1, 2022 post-trial opinion in the *Deane* Action. A1457.

On October 16, 2023, the Court of Chancery granted summary judgment to Maginn and Mills in the First Action, declaring the First Written Consent invalid because Chai lacked authority to vote Jenzabar shares owned by the LP. A1468-A1484.

2. Second and Third Unsuccessful Written Consents and Litigation in Nevada

On October 26 and 29, 2023, Chai executed her second (the "Second Written Consent") and third written consents (the "Third Written Consent"), respectively, purporting to remove Mills as Independent Director and elect Michael Flaherty, Carmelina Procaccini, and Dr. Li Chai to the board. A1487-A1493.

The Second Written Consent purported to be executed by "the majority of all of the issued and outstanding voting securities of Jenzabar" and was signed by:

- Chai as General Partner of the LP; and

- Chai and Li as managers of LLC

A1487-A1489.

The Third Written Consent, dated three days later, also purported to be executed on behalf of the "majority of stockholders of all of the issued and outstanding voting securities of Jenzabar," and was signed by:

- Chai, individually; and
- Chai and Li as managers of the LLC

A1491-A1493.

On November 8, 2023, Chai filed a second action in the Court of Chancery seeking to enforce the Second and Third Written Consents under Section 225 (the "Second Action"). A1496-A1519. During the Second Action, Chai filed three verified pleadings, each seeking to validate her purported removal and election of directors under constantly evolving theories. A1496-A1568. Chai averred under oath that, on October 26, 2023, she and the Special Master "executed the Assignment of Limited Partnership Interest and General Partnership Interest in the [LP] and Transfer of Shares in Jenzabar, Inc." (A1508) under which Chai also purported to remove Maginn as General Partner of the LP, leaving Chai as the sole General Partner. Op. at 9. Relying upon this assignment and her purported control of the LLC, Chai purported to vote the Jenzabar stock owned by the LP and LLC. A1487-A1489. In all three complaints in the Second Action, Chai alleged that she was

Jenzabar's majority stockholder. A1497; A1522; A1547. Like the complaint in the First Action, all three complaints also referenced the Court of Chancery's ruling in the *Deane* Action that Maginn breached his duty of loyalty to New Media II-B investors. A1500; A1525; A1550.

On November 22, 2023, the Massachusetts Court issued its Second Amended Supplemental Judgment of Divorce (the "Second Amended Judgment") and altered the Master's Report so that "the total stock to [Maginn] and the remainder to [Chai] would ***equalize*** the marital portion of the stock with each party holding 31.195 perfect which 50 percent of the marital share of 62.39 percent of the total stock a stated in the Master's report." A1442 at n.1 (emphasis added).

On March 8, 2024, the Massachusetts Court issued a Third Amended Supplemental Judgment of Divorce (the "Third Amended Judgment") reiterating that it was the "purpose and intent of the Master's rulings proving for an equal division of the marital portion of Jenzabar stock." A1444-A1447. The Massachusetts Court also stated "[i]t is not the Court's intent that [Maginn] remain a general partner of the LP" able to control the LP and Chai's Jenzabar stock in the LP. A1446.

Around then, Maginn filed an action in the District Court of Clark County, Nevada (the "Nevada Court") alleging claims regarding management of the LP under Nevada law. On January 8, 2024, the Nevada Court granted Maginn a

temporary restraining order (the "Nevada TRO") holding that Maginn remained a general partner of the LP. A1572-A1593.

On January 12, 2024, the Court of Chancery ruled in the Second Action that the Second Written Consent and the Third Written Consent were invalid because Chai (again) lacked authority to vote the Jenzabar shares owned by the LP. A1596-A1621. The Court of Chancery based its ruling, in part, on the entry of the Nevada TRO because the LP's operating agreement required a majority of the LP's general partners to act on behalf of the LP and, therefore, Chai did not have authority to unilaterally vote the Jenzabar stock owned by the LP. A1609-A1610. Unable to vote the Jenzabar stock owned by the LP, Chai did not have sufficient votes to execute the Second Written Consent and Third Written Consent. A1610-A1611. The Court of Chancery granted summary judgment for Mills and Maginn on Counts I and II in the Second Action.

3. The Court of Chancery Rules that Chai's Claims Under the Stockholders Agreement Are Equitably Barred

In the Second Action, Chai also asserted two claims predicated on Section 4.2(b) of the Stockholders Agreement. A1513-A1514. Chai alleged that Section 4.2(b) required Maginn to vote "to promptly remove" Mills as an Independent Director after Malekian resigned as the Senior Investor Designated Director on June 26, 2013, because the Senior Investor had "cease[d] to have the right to designate" the Independent Director. A1510. Chai alleged that Maginn breached Section 4.2(b)

by refusing to vote Jenzabar shares to remove Mills and sought specific performance forcing Maginn to do so ("Count III"). A1513. Chai also sought a declaratory judgment that Section 4.2(b) obligated Maginn to vote to remove Mills as Independent Director ("Count IV"). A1514.

On March 11, 2024, the trial court granted summary judgment to Mills and Maginn on the grounds that Chai's claims under Section 4.2(b) (Counts III and IV) were barred by laches and acquiescence. A1170-A1197. The Court of Chancery rejected Chai's reliance on the no-waiver provision of the Stockholders Agreement because no-waiver provisions are not absolute protections for all post-contractual actions and Chai participated in Mills continuation as an Independent Director for years after Malekian resigned. A1183-A1185. The Court of Chancery concluded that Chai's claims under Section 4.2(b) were barred by the three-year statute of limitations of 10 *Del. C.* § 8106(a) because they arose in 2013 when Malekian resigned but Chai did not seek specific performance until 2023. A1185-A1187. The Court of Chancery also concluded that Chai's claims failed under all three elements of laches because Chai (i) knew that the Senior Investor Designated Director resigned in 2013 and knew about Section 4.2(b) because she participated in Jenzabar's litigation with MCG, (ii) waited 10 years before alleging for the first time that the Stockholders Agreement required Maginn to vote to remove Mills, and (iii) Maginn and Mills were prejudiced by the delay because they relied on Chai's silence

for more than a decade of Mills serving as a director without challenge. A1187-A1188.

The Court of Chancery rejected Chai's argument that her claim did not arise until 2023 when Maginn refused to vote his Jenzabar stock to remove Mills, finding that Chai acquiesced to Mills' years of continued service as an Independent Director after the Senior Investor sold its stock. A1188-A1190. As evidence, the Court of Chancery noted that Chai attended numerous board meetings with Mills and stipulated in the Divorce Proceeding in 2021 that Mills was an Independent Director. A1189-A1190. During the intervening years, Maginn and Mills relied on Mills' authority as an Independent Director in the face of Chai's silence. A1190.

4. Fourth and Fifth Unsuccessful Written Consents

On April 9, 2024, after the Massachusetts Court entered the Third Amended Judgment expressing its intent that Maginn not remain a General Partner of the LP, the Nevada Court dissolved the Nevada TRO. A1724-A1725. Days later, on April 12, 2024, Chai executed a series of documents purporting to give her a right to remove directors under Section 5.2 of the Bylaws as the Founder with the majority of the Jenzabar voting shares. Op. at 12-15. Chai had not purported to act under the Bylaws in her prior consents; this was the first time Chai invoked the Bylaws and claimed to be the Founder with the majority of Jenzabar voting shares. *Id.* at 14.

First, Chai purported to transfer Jenzabar stock previously owned by the LP to herself and Maginn. *Id.* at 12-13. Second, Chai claimed to merge the LLC into a newly formed entity that she controls and assigned shares of Jenzabar stock from the new entity to herself. *Id.* at 14-15. Maginn had no knowledge of, or involvement with, these purported transactions and did not consent to them. A1243. While the Massachusetts Court divided the marital Jenzabar stock equally between Chai and Maginn, Chai claimed to be the Founder holding a majority of Jenzabar voting securities following her assignments because Maginn holds some Jenzabar stock he controls through New Media, rather than individually. A2304.

Using her supposed voting power, Chai next sought to reconstitute the board. Op. at 13. She executed a written consent purporting to remove Mills and Harder (who was appointed on October 26, 2023, to fill the Independent Director vacancy cause by San Miguel's death) and elect Flaherty, Procaccini and Li Chai to the board (the "Fourth Written Consent"). *Id.* She executed the Fourth Written Consent as the alleged "Founder Holding the Majority of Voting Securities of Jenzabar." *Id.*

Chai then executed a fifth written consent, again claiming to be the Founder with the majority of voting shares, purporting to remove Maginn from the board pursuant to Section 4.2(b) of the Stockholders Agreement due to "Maginn's bad faith and willful misconduct as described, in part, in the *Deane v. Maginn*, decision" (the "Fifth Written Consent"). *Id.* In the First, Second, and Third Written Consents, Chai

purported to vote shares of Jenzabar stock while it was still titled in the name of the LP and LLC because she (incorrectly) believed that she controlled those entities. A1448-A1451; A1485-A1489; A1490-1493. In the Fourth and Fifth Written Consents, Chai transferred the Jenzabar stock from the LP and LLC to herself first and then purported to vote those shares. Op. at 13-15.

Also on April 12, 2024 – the same day she purported to take the foregoing actions – Chai filed a third action in the Court of Chancery, again under Section 225, seeking validation of the Fourth and Fifth Written Consents (the "Third Action"). *Id.* at 15. This time, Chai alleged that, as the Founder with the most voting shares under Section 5.2 of the Bylaws, Section 4.2(b) of the Stockholders Agreement allowed her to remove Maginn as a Founder Designated Director for bad faith and willful misconduct. *Id.* at 13. Separately, Chai alleged that Section 4.2(b) authorized her to remove Mills and Harder from their positions as Independent Directors because, as she claimed in the Second Action, the Senior Investor lost the right to "designate" the Independent Directors in 2013. *Id.*

The defendants in the Third Action once again moved for summary judgment and, once again, the Court of Chancery ruled in their favor. On October 1, 2024, the Court of Chancery granted summary judgment to Maginn, Mills, and Harder and invalidated the Fourth and Fifth Written Consents on res judicata, laches, and acquiescence grounds. *Id.* at 1. The Court of Chancery concluded that, based on

Chai's sworn representations in the First and Second Actions, she either was or could have been the Founder with the most voting securities when she commenced those proceedings. *Id.* at 22. In the First and Second Actions, Chai averred under oath that she was authorized to act as the sole General Partner of the LP, pursuant to the judgments entered by the Massachusetts Court, and held a controlling interest in the LLC with the cooperation of her sister, Li Chai. *Id.* Since Chai could have attempted to act as the Founder with a majority of Jenzabar stock in the First, Second and Third Written Consents, her decision not to assert that right in the First or Second Actions barred her under res judicata from invoking Section 5.2 of the Bylaws for the first time in the Third Action when she executed the Fourth and Fifth Written Consents. *Id.* at 23-24.

The Court of Chancery also rejected Chai's purported removal of Maginn under Section 4.2(b) of the Stockholders Agreement. Since that provision does not require a predicate judgment for breach of the duty of loyalty to evidence "bad faith or willful misconduct" permitting a director's removal, the Court of Chancery found that Chai knew of the actions purportedly authorizing her to vote to remove Maginn by no later than December 6, 2016, when the *Deane* Action was filed, but Chai did not attempt to remove Maginn on those grounds for nearly eight years. *Id.* at 26-28. The Court of Chancery found Chai's alleged removal of Harder and Mills to be untimely, since Chai knew of Malekian's resignation and the Stockholders

Agreement's terms regarding Independent Directors since 2013. *Id.* at 28-29. The Court of Chancery concluded that Maginn, Mills and Harder were prejudiced by Chai's actions through continuous uncertainty and repeated expedited lawsuits. *Id.*

The Court of Chancery also invalidated the Fifth Written Consent because Chai acquiesced to Maginn's continued service on the board when she failed to remove Maginn with the First, Second, or Third Written Consents, despite knowing about the *Deane* Action and the judgment against him. *Id.* at 30-31.

D. Timeline of Events

Recognizing the complicated factual background and procedural posture of the parties' dispute, below is a timeline of the events previously described:

DATE	EVENT	SOURCE
1/14/2019	Members of the LLC purportedly remove Maginn as manager	A200
1/23/2019	Chai files for divorce in Massachusetts	Op. at 4
11/1/2022	Court of Chancery issues Memorandum Opinion in *Deane* Action	A1730-A1808
1/24/2023	Master's Report recommends an even distribution of marital Jenzabar stock as follows: Maginn retains his personal shares, all shares owned by New Media, and portion of shares owned by LP to be transferred to him by Chai; Chai retains her personal shares, all of shares owned by LLC and remaining shares of LP and becomes GP of LP	A267-A279
8/4/2023	First Written Consent purporting to remove Mills signed by Ling, individually, as GP of LP, as Manager of LLC and her sister as manager of	A293-A296

	LLC, and Ling as a stockholder of New Media	
8/8/2023	First Action Filed (2023-0805-LWW) seeking declaratory judgment that First Written Consent was valid because it was signed by a majority of Jenzabar shareholders	A1452-A1466
10/16/2023	Court of Chancery issues Memorandum Opinion granting Mills and Maginn summary judgment and invalidating First Written Consent because Chai was not authorized to vote LP shares	A1467-A1484
10/23/2023	Maginn files Nevada action seeking TRO against being removed as GP	A1555, ¶ 41
10/26/2023	Chai signs assignment of LP and GP Interest purporting to remove Maginn as GP of LP and leave Ling sole GP of LP	Op. at 9
10/26/2023	Chai signs Second Written Consent purporting to remove Mills and elect directors purportedly as GP of the LP and with her sister as co-managers of the LLC	Op. at 9
10/29/2023	Chai signs Third Written Consent purporting to take same actions as Second Written Consent, but purportedly in personal capacity and as co-manager of the LLC with her sister	Op. at 10
11/9/2023	Second Action filed (C.A. No. 2023-1140) seeking declaratory judgment validating Second Written Consent; Chai avers under oath that she is Jenzabar's majority stockholder	Op. at 10
11/22/2023	Chai files First Supplemental Verified Complaint in Second Action; Chai avers under oath that she is Jenzabar's majority shareholder	A1520-A1543

12/5/2023	Massachusetts Court issues Second Amended Supplemental Judgment of Divorce with footnote equalizing share distribution between Maginn and Ling at 31.95%	A1439-A1442
12/20/2023	Chai files First Amended Supplemental Verified Complaint adding Third Written Consent; Chai avers under oath that she is Jenzabar's majority shareholder (¶50)	A1544-A1570
1/8/2024	Nevada Court enters Nevada TRO	Op. at 11
1/12/2024	Court of Chancery issues bench ruling granting summary judgment to Mills and Maginn on Counts I and II in Second Action invalidating Second Written Consent and Third Written Consent	A1595-A1621
3/8/2024	Massachusetts Court issues Third Amended Supplemental Judgment of Divorce noting that Maginn should not remain GP of LP because he is frustrating the transfer of Ling's Jenzabar stock in effectuating an equal distribution of marital stock	Op. at 12
3/12/2024	Chai and Special Master Mayer execute purported Assignment of LP and GP interest in LP, making Chai the GP of the LP	Op. at 12
3/19/2024	Court of Chancery issues order granting summary judgment to Maginn and Mills re: Counts III and IV in Second Action	A1185-A1191
4/12/2024	Nevada court vacates TRO	Op. at 12
4/12/2024	Chai, as GP of LP, purports to assign LP's Jenzabar stock to herself	Op. at 12
4/12/2024	Chai, as manager of new LLC, purports to assign LLC's Jenzabar shares to herself	Op. at 14

4/12/2024	Chai signs Fourth and Fifth Written Consents purporting to remove Mills, Harder and Maginn from board and elect directors	Op. at 13
4/12/2024	Chai files Third Action, (C.A. No. 2024-0393) in Court of Chancery	Op. at 15
10/1/2024	Court of Chancery issues Memorandum Opinion granting summary judgment to Mills, Harder and Maginn	Op.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY CONCLUDED THAT CHAI'S BREACH OF CONTRACT AND DECLARATORY JUDGMENT CLAIMS WERE BARRED BY LACHES AND ACQUIESCENCE.

A. Question Presented

Did the Court of Chancery correctly conclude that Chai's breach of contract and declaratory judgment claims raised in the Second Action were equitably barred? Preserved at A1185-1192.

B. Scope of Review

The Court reviews entry of summary judgment *de novo*. *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007).

C. Merits of Argument

1. Chai's Breach of Contract and Declaratory Judgment Claims Arose in 2013

The Court of Chancery correctly rejected Chai's argument that her claim for breach of Section 4.2(b) of the Stockholders Agreement, and related declaratory judgment claim, arose in October 2023 when she presented Maginn with the Second Written Consent seeking Mills's removal.[2] Breach of contract claims are subject to a three-year statute of limitations imposed by 10 *Del. C.* §8106. "A cause of action

[2] The Court did not "fail to address Maginn's continuous breach," as Chai contends, but rejected this argument because Chai acquiesced to Mills' continued service as an Independent Director. A1188.

accrues under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of that cause of action." *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 77 (Del. Ch. 2013) (internal citations and quotations omitted). "For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach." *Id.* Delaware law defines breach as "a failure, without legal excuse, to perform any promise which forms the whole or part of a contract." *Id.* (internal citations and quotations omitted). "To determine the accrual date, therefore, courts must examine the language of the contract." *Id.* "[T]he date of breach typically supplies the accrual date as the elements of the claim can be linked to the act constituting the breach." *AM General Holdings LLC v. The Renco Group, Inc.*, 2016 4440476, at *11 (Del. Ch. Aug. 22, 2016).

Section 4.2(b) states 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 actions necessary, to promptly remove the director(s) that such party is no longer entitled to designate." A240. While Maginn disputes Chai's interpretation of Section 4.2(b), to the extent the Stockholders Agreement imposes an obligation on Maginn to vote for Mills's removal, that obligation arose in 2013 when Malekian, the Senior Investor Designated Director, resigned from the board. Therefore, Chai's claim for breach of contract accrued in 2013 because all elements for a breach of contract claim occurred: (i) existence of contractual obligation (Section 4.2(b)); (ii) breach of that

obligation (Maginn's failure to vote to remove Mills from the board); and (iii) resulting damages (Chai's claim for specific performance).

Chai's assertion that her claim "would not have been ripe until Maginn refused to execute the written consent" is not supported by Section 4.2(b). OB at 23. The triggering event was Malekian's resignation, not when Maginn refused a request from Chai to vote with her to remove Mills. Indeed, Chai concedes that "[w]hen Malekian resigned, he lost the right to designate Independent Directors per Section 4.2….Thus, the Independent Directors must be removed." *Id.* at 22. To the extent Section 4.2(b) obligated Maginn to vote for Mills's removal, that obligation arose in 2013, upon Malekian's resignation, and not in 2023, when Maginn refused to vote with Chai to remove Mills.

Any purported breach of Section 4.2(b) was not continuous. "To determine whether a breach (or series of breaches) is continuing, Delaware courts consider whether the breaches can be divided such that the plaintiff could have alleged a *prima facia* case for breach of contract after a single incident." *AM General Holdings*, 2016 WL 4440476, at *12 (internal citations and quotations omitted). If so, Delaware courts "have determined that the continuing breach doctrine does not apply even when confronted with numerous repeated wrongs of similar, if not same, character over an extended period." *Id.* (internal citations and quotations omitted). "[T]he doctrine of continuing breach will not serve to extend the accrual date for a

breach of contract claim where the alleged wrongful acts are not so inexorably intertwined that there is but one continuing wrong." *Id.* (internal citations and quotations omitted). As explained, Chai could have brought a claim for breach in 2013. Any obligation imposed by Section 4.2(b) required Maginn to vote once to remove Mills and that obligation did not renew every year.

Chai's reliance on *Lebanon County Employees' Retirement Fund v. Collis*, 287 A.3d 1160 (Del. Ch. 2022), is misplaced because that analysis did not apply to breach of contract claims. OB at 23-24. In a matter of first impression in Delaware, *Collis* addressed the accrual of breach of fiduciary duty claims arising under *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), and *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011). *Collis*, 287 A.3d at 1175-76. Chai argues that the analysis in *Collis*, addressing a specific subset of breach of fiduciary duty claims arising in a limited set of circumstances, "should apply equally to breach of contract claims." OB at 23. Not only does Chai fail to provide any authority for her argument extending *Collis* to contract claims, she ignores case law holding that the continuing breach doctrine for contract claims is "narrow and typically is applied only in unusual situations." *AM General*, 2016 WL 4440476, at *11 (internal citations and quotations omitted).

The analysis in *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006), is equally unhelpful to Chai. *Aidinoff* involved breach of

fiduciary duty claims that arose from a decision to enter into a contract. 900 A.2d at 665-66. The Court of Chancery noted that "when a contract is contended to have resulted from fiduciary misconduct, the statute of limitations begins running at the time of the decision to contract, as the date of the key wrong." *Id.* Because the contract at issue in *Aidinoff* had an annual right to terminate without penalty and the board "had the business option of choosing not to continue the relationship annually," the claims arising from contractual performance for the three years preceding the complaint were deemed timely. *Id.* at 666. Unlike the contract in *Aidinoff*, Section 4.2(b) of the Stockholders Agreement did not renew annually or create an annual obligation to remove directors.

2. The Anti-Waiver Clause of the Stockholders Agreement Did Not Defeat the Affirmative Defenses Raised by Maginn and Mills

Chai's attempt to seek refuge for her untimely breach of contract claim in Section 5.3 of the Stockholders Agreement fails. OB at 26-28. Section 5.3 contains an anti-wavier clause providing that "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." A244. The Court correctly concluded that Section 5.3 did not prohibit it from addressing the merits of the affirmative defenses of laches and acquiescence raised by Maginn and Mills. A1183-A1185.

Chai cannot distinguish the facts of *In re Coinmint, LLC*, 261 A.3d 867 (Del. Ch. 2021), a case relied on by the Court of Chancery, from those here. In *Coinmint*, after co-managers of an LLC disregarded the dilutive capital contribution procedure in the operating agreement, one manager filed suit challenging his dilution. *Id.* at 899. The operating agreement contained a broad anti-waiver provision that stated in relevant part:

> No waiver, express or implied, by any Member of any breach or default by any other Member in the performance by the other Member of its obligations hereunder shall be deemed or construed to be a waiver of any other breach or default under this Agreement. Failure on the part of any Member to complain of any act or omission of any other Member, or to declare such other Member in default irrespective of how long such failure continues, shall not constitute a waiver hereunder….

Id. at 898. The court in *Coinmint* rejected the plaintiff's reliance on the anti-waiver provision to defeat the defendant's affirmative defenses of waiver, estoppel, and acquiescence. *Id.* According to the *Coinmint* court, the first sentence of the non-waiver provision "operates prospectively" and "addresses the effect of a past waiver on subsequent waivers; it does not preclude those past waivers." *Id.* For the second sentence, the court concluded that this "sentence is inapplicable to the facts presented here" because, in addition to never challenging the defendant's failure to comply with the dilutive capital contribution process, the plaintiff actively

participated in "shirking those terms" and repeatedly expressed his satisfaction with how the capital contributions were handled. *Id.* at 900.

The Court of Chancery properly relied on *Coinmint*. Indeed, the anti-waiver provision in *Coinmint* was broader than Section 5.3 of the Stockholders Agreement and the Court of Chancery still held that it did not protect the plaintiff from the defendant's affirmative defenses. In noting the similarities between the cases, the Court of Chancery observed that the plaintiff in *Coinmint* "not only never challenged the other manager's failure to comply with the provisions but also actively participated in flouting them for years." A1185. Like the plaintiff in *Coinmint*, not only did Chai never previously seek to force Maginn to vote for Mills's removal, Chai continued recognizing Mills as an Independent Director of Jenzabar for more than a decade by attending board meetings with Mills and stipulating in the Divorce Proceeding in 2021 that Mills was an Independent Director. A1189-A1191.

This Court's ruling in *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28 (Del. 1972), reinforces the Court of Chancery's interpretation of Section 5.3. In *Pepsi-Cola*, this Court concluded that "a written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement….[t]hey may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement." *Id.* at 33. Chai, *by her conduct*, waived any obligation in Section 4.2(b) for Maginn to vote to remove Mills.

3. Chai's Claims are Barred by Laches

The Court of Chancery properly concluded that laches barred Chai's claims for breach of contract and declaratory judgment. Chai argues that the Court of Chancery incorrectly applied the statute of limitations to its breach and declaratory judgment claims and instead "should have analyzed the elements of laches in deciding whether [Chai's] claims were time barred." OB at 21. But Chai's argument is flawed because every laches analysis begins with an examination of the relevant statute of limitations. *Meso Scale*, 62 A.3d at 77 ("The Court of Chancery generally begins its laches analysis by applying the analogous legal statute of limitations."). "The time fixed by the statute of limitations is deemed to create a presumptive time period for purposes of the Court's application of laches absent circumstances that would make the imposition of the statutory time bar unjust." *Id.* "[S]tatutes of limitation that apply to actions at law are deemed to establish a time period beyond which delay in bringing a claim is presumptively unreasonable for purposes of applying laches. *State ex el Brady v. Pettinaro Enterprises*, 870 A.2d 513, 526 (Del. Ch. 2022). Moreover, "it is understood that the bar of laches will typically arise earlier than the end of the limitations period when a plaintiff seeks a judicial order involving compulsions such as an injunction or ***an order of specific performance***. Remedies of this kind will only issue if the plaintiff acts with dispatch, and are

normally foreclosed to a plaintiff who sits on its hands until near the end of the analogous limitations period." *Id.* (emphasis added).

Because Chai's breach of contract and related declaratory judgment claims arose in 2013, and were therefore time barred under 10 *Del. C.* § 8106, it was not necessary for the Court of Chancery to engage in a laches analysis. A1187. The trial court also noted that Chai's prayer for specific performance "of an obligation that arose in 2013 is even more problematic for her, from a timeline perspective." A1186. While the Court was not obligated to engage in a laches analysis, "for the sake of completeness," the Court concluded that "laches would also bar plaintiff's claims." A1187.

"Laches bars an action in equity if: the plaintiff waited an unreasonable length of time before bringing suit and…the delay unfairly prejudices the defendant." *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 8 (Del. 2009) (internal citations and quotations omitted). A showing of laches requires "(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). Maginn and Mills demonstrated each of these elements in the Second Action.

The Court of Chancery aptly held:

> First, there's no doubt that the plaintiff knew that the Senior Investor Designated Director resigned in 2013. She also knew about the terms of the stockholders agreement.
>
> Second, she waited ten years, until it seemingly became convenient for her to press the issue, to raise Mr. Maginn's purported failure to vote out Dr. Mills. And her delay prejudices the defendants, who have 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.

A1188-89.

Chai challenges the conclusions reached by the Court of Chancery because "[l]aches is highly fact dependent and, therefore, not amenable to summary judgment." OB at 29. But Chai ignores the fact that she cross-moved for summary judgment on these claims. *See* Ch. Ct. Rule 56(h) ("Where the parties have filed cross motions for summary judgment…the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits…."). Moreover, this argument also fails because no discovery is necessary. A1190. Notably, Chai did not dispute these facts below and does not dispute them now in her Opening Brief. She does not, because she cannot, identify a single disputed fact that would have changed the Court's analysis. Instead, Chai argues that equitable tolling "would" be available to her "if" she relied on Jenzabar's counsel to interpret the Stockholders Agreement. OB at 29. But Chai never claimed, either below or now on appeal, that she did, in fact, seek advice from Jenzabar's then-counsel.

Turning to the second prong of the laches analysis, Chai argues that the Court of Chancery "failed to properly analyze the prejudice to Defendants based on the alleged unreasonable delay." OB at 30. But the Court explained that Chai's "delay prejudices the defendants, who have 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. According to Chai, this finding of prejudice "implies that the Independent Directors, having not been removed instantly upon Malekian's exit, reasonably expect to be directors for life." OB at 30. This is inaccurate. Below, Mills and Maginn noted that, under the Stockholders Agreement, the Independent Directors could be removed and replaced by agreement of both Chai and Maginn. A1831. This does not suggest that Mills expects to be "a director for life," but rather that he will be a director until he is properly removed or replaced, something Chai has yet to successfully accomplish.

Chai incorrectly argues that "in 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." OB at 31. Just because Chai is not seeking to undo a decade of board decisions does not mean that removing Mills now would not give rise to stockholder or third-party challenges to any transaction undertaken by Jenzabar since 2013. Chai is challenging whether Mills has been properly seated on the board for over a decade. In that time, Mills

made numerous decisions on behalf of Jenzabar that would now be vulnerable, resulting in significant prejudice to Maginn, Mills, and Jenzabar.

4. Chai's Claims are Barred by Acquiescence

The Court of Chancery correctly concluded that Chai's breach of contract and declaratory judgment claims are also barred by 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. *Klaassen v. Allegro Dev. Corp.*, 106 A.3d 1035, 1047 (Del. 2014). 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." *Id.* "The doctrine of acquiescence effectively works as 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." *Lehman Bros. Hldgs. Inc. v. Spanish Broad. Sys., Inc.*, 2014 WL 718430, at *9 (Del. Ch. Feb. 25, 2014), *aff'd*, 105 A.3d 989 (Del. 2014). For acquiescence, "conscious intent to approve the act is not required, nor is a change of position or resulting prejudice."

Klaassen, 106 A.3d at 1047. As the Court of Chancery correctly decided, Maginn and Mills satisfied the elements of acquiescence. A1190.

Ignoring that she cross-moved for summary judgment on her breach of contract and declaratory judgment claims, Chai argues that acquiescence is too fact-intensive for summary judgment. OB 32-34. But, again, Chai never disputed the factual record below and does not dispute it now. The Court of Chancery correctly concluded that there were sufficient undisputed facts in the record to support a finding of acquiescence. Because Chai previously litigated with the Senior Investor over the appointment of Independent Directors, the trial court found that "[Chai] has been well aware of the terms of Section 4.2 for over a decade. She knew that the Senior Investor Designated Director resigned in 2013. In fact, the resignation followed a suit in this court where she pursued a counterclaim that certain designees to the Jenzabar board had unreasonably delayed in approving the Independent Directors." A1189. Chai argues that this prior litigation "didn't address Section 4.2(b)" and, therefore, the Court of Chancery's reliance on the prior litigation to demonstrate Chai's awareness of her rights was improper. But that prior litigation did involve the Senior Investor Designated Director (Malekian) unreasonably withholding his consent to appoint Mills as Independent Director proving that Chai was aware of how Mills was seated on the board. Moreover, that litigation resulted

in Malekian resigning from the board, the event Chai now claims gave rise to Maginn's obligation to vote for Mills' removal.

The trial court concluded that Chai "was not only silent but affirmatively behaved as though Dr. Mills was a director and a special committee member." A1190. In support, the Court of Chancery observed that after Malekian's resignation in 2013, Chai "attended board meetings alongside Dr. Mills. She stipulated in Massachusetts in 2021 that Dr. Mills was an Independent Director and a member of the special committee. In other words, she accepted for a decade that Dr. Mills was a director." A1189-A1190. These acts were inconsistent with Chai's later repudiation of Mills's position as an Independent Director.

As for Maginn and Mills's reliance on Chai's decade of inaction, the Court of Chancery properly concluded that "[Maginn and Mills] had every reason to believe that there was no Section 4.2 issue." A1190. The trial court relied on years' worth of Jenzabar board meeting minutes and noted that "[n]owhere in these minutes does [Chai] contest Dr. Mills' position on the board. [Chai] only recently changed course, after multiple rounds of litigation here, amid her divorce from Mr. Maginn." *Id.* Further, Chai's argument that "[t]he Special Committee was formed by resolution of the Board, not by action of the stockholders," is nonsensical. OB at 34. Chai was on the board and voted to appoint Mills as a member of the Special Committee after the Divorce Proceedings began. A944-A948.

II. THE TRIAL COURT CORRECTLY FOUND THAT RES JUDICATA, LACHES, AND ACQUIESCENCE INVALIDATED THE FOURTH AND FIFTH WRITTEN CONSENTS

A. Question Presented

Did the Court of Chancery correctly invalidate the Fourth and Fifth Written Consents based on res judicata, laches and acquiescence? Preserved at Op. at 17-26.

B. Scope of Review

The Court reviews entries of summary judgment *de novo*. *Asbestos*, 940 A.2d at 940.

C. Merits of Argument

1. Res Judicata Bars Chai's Latest Efforts to Remove Mills, Harder, and Maginn from the Board

Res judicata prevents precisely the scenario presented here. Chai initiated **four** actions in the Court of Chancery from August 2023 to April 12, 2024, three of which were brought under Section 225 and two of those three actions are part of this appeal. Chai argues that "[a]ffirming the trial court's res judicata ruling would mean that because [Chai] 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." OB at 43-44. That is the definition of res judicata.

"The doctrine [of res judicata] permits a litigant to press [her] claims but once, and requires [her] to be bound by the determination of the forum [she] has chosen,

so that [she] may have one day in court but not two." *Maldonado v. Flynn*, 417 A.2d 378, 381 (Del. Ch. 1980) (internal quotations and citation omitted). The doctrine exists to "promote the stability and finality of judicial decrees." *Id.* Chai has had her day**s** in court and should not be given any more. Of the five elements that make up res judicata, Chai only challenges whether "the original cause of action or the issues decided was the same as the case at bar." *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006); OB at 40. As the Court of Chancery correctly determined, that element is satisfied.

The fact that Chai would not have been successful if she had claimed to be the Founder with the majority of Jenzabar voting shares in the First and Second Actions is not relevant for purposes of res judicata. Res judicata only examines whether an issue could have been raised and not whether the litigant would have been successful. *See Mott v. State*, 49 A.3d 1186, 1190 (Del. 2012) (holding that res judicata barred plaintiff's claim because, although the issues were not the same as in the prior case, res judicata bars issues that might have been or could have been raised in an earlier proceeding); *see also Fortis Advisors LLC v. Shire US Holdings, Inc.*, 2020 WL 74860, at *4 (Del. Ch. Feb. 13, 2020) (holding that res judicata barred plaintiff's claim where plaintiff made strategic choice not to pursue the claim in a prior action and later regretted its decision).

While Chai attempts to differentiate the written consents at issue in the Second Action from those in the Third Action, the issues in both actions are the same. In all the Section 225 actions, the central issue was ***always*** whether Chai controlled enough Jenzabar stock to unilaterally remove and replace directors. In the Third Action, Chai "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." Op. at 18. The Court of Chancery properly concluded that "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." *Id.*

Chai's attempt to reframe the factual allegations in the Third Action as invoking a separate right (under Section 5.2 of the Bylaws) that she could not have exercised in the First or Second Actions is undermined by her own prior sworn statements. Indeed, in the Third Action Chai was not invoking a newly obtained contract right but instead advancing a new contract interpretation. The Court of Chancery correctly noted that, based on "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." *Id.* at 22. As early as August 2023, Chai alleged that she controlled the LP and the LLC. *Id.* She consistently alleged that she could act as the sole General Partner of the LP based on the judgments entered by the

Massachusetts Court and maintained a controlling interest in the LLC with the cooperation of her sister Li Chai. *Id.* at 23.

Chai's reliance on *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185 (Del. 2009), is misplaced. In *LaPoint*, this Court reversed the Superior Court's dismissal of an indemnification claim on res judicata grounds. *Id.*, at 190. In reversing the lower court, this Court found that the "indemnification claim was based on events that had not yet occurred at the time they brought their first breach of contract claim." *Id.*, at 194. Chai argues that the Fourth and Fifth Written Consents were likewise based on new facts because "her ability to exercise her rights as a Founder with the most voting securities did not exist until April 9, 2024" when the Nevada Court dissolved the Nevada TRO. OB at 43. But the Nevada Court did not dissolve the Nevada TRO because of new facts and instead relied upon the Massachusetts Court's Third Amended Judgment that, in turn, only reinforced the rulings reflected in the Master's Report (issued in January 2023) that Maginn should be removed as General Partner of the LP. Chai claimed to control the LP since August 2023, *before* the Nevada TRO was entered, and has repeatedly represented that she was Jenzabar's majority shareholder.

Chai attempts to distinguish the Third Action from the Second Action because "Maginn's removal from the Board was not at issue in the Second Action." OB at 44. But as the Court of Chancery found, this issue could have been raised in the prior

actions because Chai referenced the *Deane* Action, the purported basis for Maginn's bad faith and willful misconduct, in the complaints in the First, Second and Third Actions. Op. at 24.

2. The Fourth and Fifth Written Consents are Barred by Laches

The Court of Chancery properly concluded that laches bars the Fourth and Fifth Written Consents. The trial court rejected Chai's reliance on Maginn's conduct in connection with the *Deane* Action because Chai had full knowledge of Maginn's alleged bad faith and willful misconduct regarding New Media II-B since 2012. *Id.* at 27. "Even if Chai were ignorant of these events in 2012, she would have gained knowledge by December 6, 2016 when Deane sued Maginn." *Id.* The fact that Maginn was not found liable until November 1, 2022, did not impact the trial court's ruling because Section 4.2(b) of the Stockholders Agreement does not require a predicate finding of breach of fiduciary duty. *Id.* at 28. The Court of Chancery correctly found Chai's delay in attempting to remove Maginn unreasonable. *See Nevins v. Bryan*, 885 A.2d 233, 247 (Del. Ch. 2005) (concluding that plaintiff was barred by laches from contesting director elections after waiting more than a year to file suit).

Regarding Mills and Harder, the Court of Chancery already ruled in the Second Action that Chai knew about Malekian's resignation since 2013 and the terms of the Stockholders Agreement that required prompt removal under these

circumstances. Op. at 28-29. Waiting until 2023 to enforce Section 4.2(b) was unreasonable delay. *Id.* The Court of Chancery already rejected Chai's argument that she only became the Founder with the majority voting securities under Section 5.2 of the Bylaws in its res judicata analysis.

Finally, as the trial court acknowledged, Maginn, Mills, and Harder have been prejudiced by Chai's delay. *Id.* at 29. The Court of Chancery observed that "[t]hey have been burdened with uncertainty and repeated expedited lawsuits" and "Jenzabar has been under the cloud of a status quo order and a divorce-fueled control dispute for over a year." *Id.* Chai has not demonstrated, because she cannot, that this does not amount to prejudice.

3. The Fifth Written Consent is Barred by Acquiescence

The Court of Chancery correctly rejected the Fifth Written Consent. Chai inexplicably waited until April 12, 2024, and her Fifth Written Consent, to seek Maginn's removal despite admitting for months of knowing of Maginn's actions in connection with the *Deane* Action that occurred years ago. As the Court of Chancery acknowledged, Chai "affirmatively treated Maginn as a director-including as reflected by the First, Second, and Third Written Consents." *Id.* at 30-31. In response, Chai fails to provide any reasonable explanation for why she waited until April 12, 2024. Accordingly, the Court correctly held that Chai acquiesced to Maginn remaining a director of Jenzabar.

4. The Trial Court's Prior Judgment Bars Claims Concerning Chai's Purported Elections to the Board

Chai argues that res judicata does not bar the purported election of her sister as a Jenzabar director because "Defendants did not argue that Li Chai's Board appointment was invalid." OB at 45. That is wrong, however, as the Independent Directors addressed this in their Opening Brief in support of their Motion for Summary Judgment in the Third Action (A1831) and their Reply Brief, as follows:

> [E]ven if Plaintiff's interpretation of this provision was correct, which it is not, it would not matter. A successor to hold office had already been appointed, which Plaintiff admits was allowed and did occur in October. Therefore, there is no basis to appoint yet another temporary successor and nothing in Section 3.4 allows Plaintiff to replace a properly appointed successor. Indeed, unless and until Plaintiff and Mr. Maginn agree to change or appoint Independent Directors, **any attempt by Plaintiff to** remove Dr. Mills and Mr. Harder or **elect replacements for the Independent Directors** by stockholder vote – whether pursuant to the Fourth Consent or otherwise – **is invalid and ineffective.**

A2399 (emphasis added).

Chai's related argument that the trial court "declared the April Written Consents invalid without addressing Li Chai's appointment" (OB at 45) is nonsensical. The trial court concluded that none of Chai's purported stockholder actions were effective, writing that "Chai is not entitled to the declarations she seeks about the validity of the Fourth, Fifth, and Sixth Written Consents; [or] the

composition of the Board," due to her "tactical choices, which triggered the application of res judicata." Op. at 31.

CONCLUSION

The Court should affirm the Court of Chancery's rulings.

MCCOLLOM D'EMILIO SMITH UEBLER LLC

/s/ Kathleen A. Murphy
Thomas A. Uebler (#5074)
Kathleen A. Murphy (#5215)
Sarah P. Kaboly (#6673)
2751 Centerville Road, Suite 401
Wilmington, DE 19808
(302) 468-5960

Attorney for Appellee Robert Maginn, Jr.

BAYARD, P.A.

/s/ Thad J. Bracegirdle
Thad J. Bracegirdle (#3691)
Sarah T. Andrade (#6157)
600 N. King Street, Suite 400
Wilmington, DE 19801
(302) 655-5000

Attorneys for Appellees D. Quinn Mills and Torrence Harder

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