EFiled: Dec 31 2024 03:03PM EST
Filing ID 75351998
Case Number Multi-Case

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 REPLY BRIEF

Dated: December 31, 2024

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REPLY ARGUMENT

Plaintiff believes that the parties' briefing has generally provided this Court with sufficient background information to evaluate the appeal. Accordingly, Plaintiff will assume that this Court is familiar with the record on appeal. Plaintiff will, therefore, focus on legal arguments.

A. Plaintiff's claim arose in October of 2023 when she presented Maginn with the October 26 Written Consent.

Maginn breached the Stockholders Agreement when he refused to execute the October 26 Written Consent. In other words, although Mills could have been removed when the Senior Investor Designated Director ceased to have the right to designate, neither Plaintiff nor Maginn, as parties to the Stockholders Agreement, sought to do so. That is, Maginn first breached the Stockholders Agreement when he was presented with the October 26 Written Consent and refused to vote his shares to remove Mills as required by Section 4.2(b) of the Stockholders Agreement. A1288. That claim for breach of the Stockholders Agreement was not ripe until Maginn refused to execute that written consent.

Nonetheless, the wrong here is continuing in nature. Vice Chancellor Laster considered the discrete act approach, the continuing wrong approach, and the separate accrual approach in the context of equitable claims. *Leb. Cty. Employees' Ret. Fund*, 287 A.3d at 1178 ("Both the Red-Flags Theory and the *Massey* Theory are equitable claims . . . ."). Plaintiff's claims here (i.e., specific performance

compelling Maginn to vote his shares to remove Mills pursuant to the Stockholders Agreement) sound in equity. The discrete act method is amenable to "a specific decision that was complete when made . . . ." *Id*. Whereas the separate accrual approach lends itself to ongoing harms during which there are separate acts of wrongful conduct. *Id*. at 1199. Maginn's obligation to sign the October Written Consent arises from the Stockholders Agreement, a living document that has not been terminated. Accordingly, the parties' obligations and duties under the Stockholders Agreement are ongoing and continuous, just like the fiduciary duties directors owe to the shareholders and the company. Maginn refused to execute a written consent removing Mills after the Senior Investor Designated Director ceased to have the right to designate Independent Directors, thereby constituting a separate act of wrongful conduct in further derogation of his contractual imperative, one which cannot be dismissed because the parties agreed to an anti-waiver clause.

Other courts have reached the same conclusions. For example, in the context of copyright infringement, the United States Supreme Court has adopted the separate accrual approach "holding that an ongoing infringement should be treated as a series of infringing acts such that the limitations period extends backward from the time of suit." *Id*. at 1200 (citing *Petrella v. MGM*, 134 S. Ct. 1962, 1969 (2014)). Vice Chancellor Laster noted that ongoing breaches of fiduciary duty

under ERISA are governed by the separate accrual approach. *Id*. The Vice Chancellor explained that the United States District Court for the Southern District of New York, in rejecting the argument that the claim was time-barred because the initial decision occurred outside the limitations period, applied the separate accrual approach because the fiduciaries were under a continuing obligation to advise a fund to divest itself of unlawful or imprudent investments, and their "failure to do so gave rise to a new cause of action each time the Fund was injured. . . ." *Id*. In that case, however, recovery was limited to damages sustained during the limitations period. *Id*. at 1200-01 (citing *Buccino v. Cont'l Assurance Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983)). Vice Chancellor Laster opined that the court, in deciding which accrual method should apply, should consider "the gravamen of the claim and the nature of the harm, the accrual method's ability to maximize the equities and efficiencies of litigation, and the extent to which the method appropriately balances the policy considerations associated with statutes of limitations." *Id*. at 1201. As discussed infra, Plaintiff does not seek to unwind ten years' worth of Board action. Moreover, the gravamen of the Second Action is whether the October Written Consents are valid. When Plaintiff voted to appoint Mills to the Special Committee, Plaintiff and Maginn were in the midst of the Divorce Proceeding. At the time, Jenzabar's Board consisted of Plaintiff, Maginn, Mills, and San Miguel. It was only upon San Miguel's death, resulting in a one-

man Special Committee, that Plaintiff sought to remove Mills. And because Plaintiff is not challenging Mills's status as a Board member before October of 2023, the separate accrual method maximizes the equities. That is, Plaintiff does not seek to recover for any alleged harm that may have occurred outside of the statute of limitations period.

B. Plaintiff has not challenged whether Mills has been properly seated on the Board since 2013 and, thus, the Company has not been prejudiced by any alleged delay in her bringing the Second Action.

Defendants argue Mills did not expect to be a director for life because he can be removed or replaced by mutual agreement of Plaintiff and Maginn pursuant to the Stockholders Agreement. And, in Defendants' view, they argue that the trial court was correct in finding that Plaintiff's silence prejudiced Mills because he relied on that silence in continuing to act as a Jenzabar director. AB 35. These observations miss the mark. The prejudice prong of the laches analysis in an *in rem* proceeding looks to the corporation, not the individual directors. That is, because section 225 actions are *in rem* proceedings, for laches to apply, the court weighs the prejudice to the corporation, not individual defendants. *Nevins v. Bryan*, 885 A.2d 233, 254 (Del. Ch. 2005) (analyzing prejudice to corporation in the context of a DGCL § 225 proceeding); *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).

Here, contrary to Defendants' argument, Plaintiff is not challenging whether "Mills has been properly seated on the board for over a decade." AB at 35-36. Plaintiff has not sought to undo past Board actions and, by extension, is not challenging whether Mills has been properly seated on the Board for over a decade. OB at 32. Rather, in the Second Action, Plaintiff sought to validate the October Written Consents, which would have removed Mills from Jenzabar's Board in October 2023. The October Written Consents did not seek Mills's removal retroactively to 2013. As such, the October Written Consents did not and would not jeopardize Board action that predates October of 2023. Accordingly, Defendants have failed to establish any purported harm to the Company by any alleged delay in bringing the Second Action.

C. Defendants tacitly acknowledge that the MCG litigation only addressed Mills's appointment to the Board and did not address an Independent Director's removal pursuant to § 4.2(b) of the Stockholders Agreement.

Defendants agree that Plaintiff, among others, countersued MCG (Jenzabar's Senior Investor) over the appointment of Independent Directors. AB at 37. That litigation is the foundation of Defendants' acquiescence argument. *Id*. Defendants, however, ignore the fact that those counterclaims didn't address Section 4.2(b)—the provision at issue here. Rather, they argue that because the MCG litigation involved Malekian's unreasonable withholding of his consent to appoint Mills as an Independent Director, Plaintiff was "aware of how Mills was seated on the

board." AB at 37. But 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. Indeed, Jenzabar and its co-defendants never pleaded allegations related to an Independent Director's removal under the Stockholders Agreement. Defendants point to none. And so, Plaintiff cannot have relinquished 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.

Moreover, Defendants' contention that Maginn and Mills relied on Plaintiff's affirmative behavior (i.e., attending Board meetings) in Mills's continuing appointment as an Independent Director is equally unavailing. As discussed above, when Plaintiff voted to appoint Mills to the Special Committee, Plaintiff and Maginn were in the midst of the Divorce Proceeding. It was only upon San Miguel's death, that Plaintiff sought to remove Mills. Even if Maginn relied to his detriment on Mills continuing as an Independent Director in light of the resolution forming the Special Committee, he fails to identify any real prejudice, and the Stockholders Agreement's anti-waiver provision protects Plaintiff's right. To find otherwise would render the anti-waiver provision meaningless. *Estate of Osborn v. Kemp,* 991 A.2d 1153, 1159 (Del. 2010).

D. Plaintiff's course of dealing and delay are expressly insulated by the Stockholders Agreement's anti-waiver provision.

Defendants argue that the Court of Chancery properly relied on *Coinmint* while simultaneously conceding that any purported acquiescence by Plaintiff was, at best, tacit. Defendants posit that Plaintiff acquiesced to Mills continuing as an Independent Director for life by attending Board meetings and stipulating in MA Court 2021 in that Mills was an Independent Director. AB at 31. Board meeting attendance is, at best, a tacit action that should not preclude application of the Stockholders Agreement's anti-waiver provision. The *Coinmint* Court did not address the second sentence of that operating agreement's anti-waiver provision which stated that "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" because it only spoke to tacit waivers and was, thus, inapplicable given a member's active assurances. *In re Coinmint, LLC,* 261 A.3d 867, 898-99 (Del. Ch. 2021). But, as here, where Plaintiff's actions were tacit, the trial court's reliance on *Coinmint* was misplaced.

Likewise, the trial court did not rely on *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.* held that Section 5.3 of the Stockholders Agreement did not prevent Defendants from raising their equitable defenses. Although *Pepsi-Cola* held that anti-waiver clauses do not prohibit modifications or waivers of an

agreement's written terms, the trial court identified no conduct that served to modify the Stockholders Agreement.

E. The April Written Consents were based on new facts and, thus, res judicata cannot bar Plaintiff's claims.

Defendants argue that the Nevada Court did not dissolve the Nevada TRO due to new facts because the "Third Amended Judgment … only reinforced the rulings reflected in the Master's Report (issued in January 2023) that Maginn should be removed as General Partner of the [Family] LP." AB at 42. Defendants, therefore, implicitly acknowledge that Maginn's refusal to comply with, at least, two MA Court ordersnted Plaintiff from accreting to the Jenzabar shares and control of various family entities that the MA Court awarded her in the divorce proceeding. The Court should not reward such gamesmanship.

Even so, the Third Amended Judgment gave rise to new facts. The Nevada Court's second heading in its Conclusions of Law section in its order dissolving the Nevada PI states, "**A Significant Change In Facts Due to the Third Amended Judgment and Assignment of Partnership Interests.**" A2103 (emphasis in original). As the Nevada Court recognized, the Third Amended Judgment, and the Interest Assignment, was that significant change in facts. It went on to state that "Dissolution of the [Nevada PI] is appropriate and required because of ***a significant change in facts*** upon which the [Nevada PI] was based. ***The significant change occurred on March 8, 2024 when the [MA Court] entered the***

Third Amended Judgment … ordering [Maginn] to transfer all of his Partnership Interests (including general partnership interests) in the Family LP to [Plaintiff]." A2103 (emphasis added). It is this kind of "concrete development" that the trial court was looking for when it cautioned the parties that it did not wish "to do this every time there is an interim development in … Nevada." A1163.

In the Second Action, the trial court held that the October 26 Written Consent was invalid due to the "Nevada court's order stating that Mr. Maginn is and shall remain a general partner of the Family LP pending further order of that court provides otherwise." A1156. The Nevada Court, in dissolving the Nevada PI and validating the Interest Assignment, specifically relied on the Third Amended Judgment. A1968; A2103, ¶¶ 41-46, 49; A2110. As the Court of Chancery held in the Second Action, the Nevada PI prevented Plaintiff from transferring the Family LP's general and limited partnership interests and the Family LP's Jenzabar stock to herself. Plaintiff was first able to take those actions when the Nevada Court dissolved the Nevada PI—April 9, 2024. Plaintiff acted three days later. It is these new facts—the dissolution of the Nevada PI and the validation of the Interest Assignment—that allowed Plaintiff to exercise her rights as the Founder with the most voting securities. As in *LaPoint v. Amerisource Bergen Corp.*, those rights did not, and could not have, existed until April 9, 2024 when the Nevada Court dissolved the Nevada PI.

In *LaPoint*, this Court found that the trial court's "record did not support the Superior Court's conclusion that there has been … no new substantive basis upon which Plaintiffs claim to be entitled to relief" because "[c]ontractual rights that are triggered and pursued *after* the initial action is filed … are not barred by *res judicata* because a prior judgment cannot be given the effect of extinguishing claims which did not even then exist." 970 A.2d 185, 194 (Del. 2009) (emphasis in original) (internal quotations omitted). The trial court's prior judgments could not have precluded a ruling on whether Plaintiff, as the Founder with the most voting securities, could remove Maginn, Mills, or Harder, because her claim as the Founder with the most voting securities did not even then exist. The claim did not exist because the trial court determined that she did not yet have enough shares and could not have enough shares until the Nevada Action was resolved. Indeed, in the Second Action, the trial court stated that it "had no evidence in the record at all that the share transfer ever actually occurred. I don't know the status of the transfer now, and that candidly isn't before me." A1160 at Tr. 18:19-22.

As in *LaPoint*, the transfer of Jenzabar stock from the Family LP to Plaintiff and the April Written Consents could not have occurred until the Nevada Court's additional conduct (i.e., the dissolution of the Nevada PI and the subsequent validation of the Interest Assignment). That is, Plaintiff's claims in the Third and Second Actions could not have been ripe until the Nevada Court dissolved the

Nevada PI and validated the Interest Assignment. *See LaPoint*, 970 A.2d at 194-95 (explaining that the "indemnification claim was not ripe until the Court of Chancery adjudicated [defendant's] breach" and, so, the "indemnification claim that arose after a finding that [defendant] breached the [agreement] was not part of the same 'transaction.'"). It is those subsequent actions by the Nevada Court that led to Plaintiff's execution of the April Written Consents. As such, res judicata should not bar Plaintiff's claims in the Third Action.

F. Defendants ignore that Plaintiff could not remove Maginn for bad faith and willful misconduct until she became the Founder with the most voting securities—a right that first arose in April of 2024.

Defendants contend that laches bars Maginn's removal pursuant to the April Written Consents because Maginn's bad faith and willful misconduct acts occurred in 2012 and the Stockholders Agreement does not require a predicate finding of breach of fiduciary duty. AB at 43. Although true that Maginn's removal pursuant to the bad faith and willful misconduct language in Section 4.2(b) of the Stockholders Agreement is not contingent upon a finding that Maginn breached his fiduciary duties, Defendants ignore the fact that Plaintiff could not have sought to remove Maginn until she became the Founder with the most voting securities. As discussed supra, Plaintiff could only become the Founder with the most voting securities after the Nevada Court dissolved the Nevada PI in April of 2024. As soon as Plaintiff obtained the ability to remove Maginn for his bad faith and willful

misconduct, she swiftly exercised that right. And if Plaintiff had sought to remove Maginn prior to becoming the Founder with the most voting securities, she and Maginn would have been in a deadlock. As such, Plaintiff's delay was not unreasonable.

Moreover, aside from the litigation itself, Defendants fail to offer any prejudice that Maginn suffered. AB at 44. Even so, prejudice in a laches context requires Maginn to demonstrate that he materially changed his position in reliance on Plaintiff's alleged delay. *See Zohar III Ltd. v. Stila Styles, LLC*, 2022 Del. Ch. LEXIS 122, at *20 n.98 (Del. Ch. May 31, 2022). Maginn fails to do so. And, as explained in detail supra, the Court looks to the prejudice to the corporation—not the individual. *See* Argument § B.

Defendants also argue that acquiescence bars the April Written Consents at least as to Maginn's removal because, in their view, Plaintiff "inexplicably waited until April 12, 2024 … to seek Maginn's removal. . . ." AB at 44. But, as explained supra, that right did not exist until Plaintiff became the Founder with the most voting securities. Plaintiff first became the Founder with the most voting securities on April 12, 2024, mere days after the Nevada Court dissolved the Nevada PI, which had prevented Plaintiff from unilaterally transferring the Family LP's shares. In other words, upon dissolution of the Nevada PI, Plaintiff, for the first time, had the ability to act as the Family LP's sole general partner allowing her to comply

with the Third Amended Judgment and transfer the Family LP's Jenzabar shares to Maginn and the remaining shares to herself. It was only at that moment that Plaintiff became the Founder with the most voting securities, permitting her to exercise her right pursuant to § 4.2(b) of the Stockholders Agreement to remove Maginn. And so, Plaintiff's knowledge of her right to remove Maginn first accrued in April of 2024 when she accumulated enough stock personally to become the Founder with the most voting securities. Plaintiff did not remain silent about her right to remove Maginn and, instead, acted to remove him immediately.

G. Defendants did not address Li Chai's appointment to the Board.

Defendants quote their reply brief in the Third Action stating that "**any attempt by Plaintiff to** remove Dr. Mills or Mr. Harder or **elect replacements for the Independent Directors** by stockholder vote – whether pursuant to the Fourth Consent or otherwise – **is invalid and ineffective.**" AB at 45 (emphasis in original). This, however, only addresses Plaintiff's attempt to elect replacements for the Independent Directors.

The April Written Consent appointing Li Chai states "Dr. Li Chai is appointed as a director of the Company, effective immediately, and shall assume the vacant board of director seat previously held by the Senior Investor Designated Director, in accordance with Section 3.4 of the Bylaws." A2149. The Senior Investor Designated Director and the Independent Directors are two different

classes of directors. Li Chai, therefore, was not appointed as an Independent Director and, so, Defendants failed to address this argument.

CONCLUSION

Based on the foregoing and Plaintiff's Opening Brief, 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: December 31, 2024

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Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Supreme Court

Document Type: Reply Brief

Transaction ID: 75351998

Document Title: Appellant's Reply Brief. (eserved) (ead)

Submitted Date & Time: Dec 31 2024 3:03PM

Case Details

Case Number	Case Name
372,2024C	Ling Chai Maginn v. Robert Maginn, Jr., et al.
430,2024C	Ling Chai v. Robert Maginn, Jr., et al.