Moore v IGPS Co LLC
2012 NY Slip Op 33364(U)
July 10, 2012
Supreme Court, New York County
Docket Number: 651907/11
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. PART 54
Justice

Index Number : 651907/2011
MOORE, BOBBY L.
vs.
IGPS COMPANY LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 4, 5

Answering Affidavits — Exhibits _____ No(s). 7, 8

Replying Affidavits _____ No(s). 10

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/10/12

SHIRLEY WERNER KORNREICH J.S.C., J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BOBBY L. MOORE,

Plaintiff,

-against-

IGPS COMPANY LLC, PEGASUS CAPITAL ADVISORS LLP, PEGASUS PARTNERS III (AIV), L.P., PEGASUS INVESTORS III, L.P., PEGASUS INVESTORS III GP, L.L.C., PEGASUS IGPS, LLC, IGPS CO-INVESTMENT LLC, IGPS EMPLOYEE PARTICIPATION, L.P., IGPS EXECUTIVE (GP) LLC, PP IV IGPS HOLDINGS, LLC, KELSO & COMPANY, KIA VIII (IGPS) GP, L.P., KEP VI AIV (IGPS), LLC, KELSO GP VIII, LLC, RICH WEINBERG, CRAIG COGUT, FRANK NICKELL, AND PHIL BERNEY,

Defendants.

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Index No.: 651907/11

DECISION

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this breach of contract action, defendants, IGPS Company LLC (IGPS or the Company), Pegasus Capital Advisors LLP, Pegasus Partners III (AIV), L.P., Pegasus Investors III, L.P., Pegasus Investors III GP, L.L.C., Pegasus IGPS, LLC, IGPS Co-Investment LLC, IGPS Employee Participation, L.P., IGPS Executive (GP) LLC, PP IV IGPS Holdings, LLC (collectively Pegasus), Kelso & Company, KIA VIII (IGPS), L.P., KIA VIII (IGPS) GP, L.P., KEP VI AIV (IGPS), LLC, Kelso GP VIII, LLC (collectively Kelso), Rich Weinberg (Weinberg), Craig Cogut (Cogut), Frank Nickell (Nickell), and Phil Berney (Berney) move, pursuant to CPLR 3211 (a) (1), (2) and (7), to dismiss the second, third, fourth, fifth, sixth and eighth causes of

action in the amended complaint.

I. Amended Complaint

The amended complaint alleges the following. In 2005, plaintiff, Bobby L. Moore (Moore), and Cogut, the founder and owner of the Pegasus companies, agreed to form IGPS, a company that would distribute plastic pallets for the beverage industry. The parties agreed that Moore would provide his professional expertise to run the company and Pegasus would provide the majority of the funding for the business venture. Thereafter, in 2007, Kelso and Pegasus reached an agreement that allowed Kelso to invest in IGPS (Guha Aff., Ex. A [hereafter, Cmplnt.], ¶¶ 25-27) . Moore alleges that Pegasus and Kelso are majority shareholders in IGPS (Moore Aff., ¶ 8).

Pursuant to a 2006 employment agreement, Moore became the chairman of the board (Chairman) and chief executive officer (CEO) of IGPS. In addition, in 2006 Moore, Pegasus and others, entered into an LLC agreement (the LLC Agreement) which awarded Moore non-preferred shares representing a 6.5% ownership interest in the Company (Cmplnt., ¶ 28).

From December 2007 through September 2008, as IGPS acquired new investments, the LLC agreement, which set forth the ownership interest of all the shareholders, was amended several times to reflect these new investments. Moore alleges that each time the LLC Agreement was amended, he and two other IGPS senior managers were given blank LLC Agreement signature pages and were coerced into signing those signature pages without being permitted to review the entire amended agreement. The LLC Agreement was amended for the sixth and last time in September 2008 (Cmplnt, ¶¶29-34).

In May 2009, Moore learned that, as a consequence of the amendments to the LLC

Agreement, his equity stake in the company had been diluted significantly while the equity stakes of Pegasus and Kelso remained unchanged (Cmplnt, ¶ 35). Moore claims that, when he confronted Pegasus and Kelso about the dilution of his interest, they agreed to restore his shares, but that they never followed through with this agreement (Cmplnt, ¶¶ 39-40).

The complaint alleges that in December 2010, Moore was terminated as CEO of IGPS but that, at a December 17 meeting, senior managers from Pegasus and Kelso, Berney and Weinberg, stated that they wanted Moore to continue his employment as Chairman, pending execution of a new employment agreement (Cmplnt, ¶¶ 45-52). Thus, in early January 2011, Moore entered into a 4 year employment agreement as Chairman with IGPS (the 2011 Agreement). The 2011 Agreement contained a non-compete and non-solicitation agreement that would effectively bar Moore from work in the same industry for two years following his termination as Chairman and would grant him only the "standard benefit"[1] as compensation if he was fired for cause (Cmplnt, ¶¶ 58-62).

Moore claims that, three weeks after executing the 2011 Agreement, the defendants, without explanation, removed him from his office at IGPS and told him not to contact customers, vendors, employees or lenders. Then, on May 10, 2011, Berney contacted Moore and advised him that he was being terminated for cause. Thereafter, on May 25, 2011, Moore received a letter from IGPS advising him, without explanation, that IGPS was terminating his employment

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[1] The standard benefit is defined as, "any amounts earned, accrued or owing to the Executive but not yet paid as of any date of termination, including without limitation, Base Salary, receipt of other benefits, if any, in accordance with applicable plans and programs of the Company, and reimbursement in accordance with Section 7 of any business expenses properly incurred by the Executive but not yet reimbursed as of the date of termination, but specifically excluding any bonus payments or other compensation provided pursuant to the Company's bonus plan or other incentive compensation plan.

for cause (9/2/11 Guha Aff., Ex. D).

Moore commenced this lawsuit, alleging causes of action: 1) against IGPS for breach of the 2011 Agreement, on the ground that the Company allegedly failed to pay him the compensation he was owed under that agreement; 2) against Pegasus, Kelso, Cogut and Nickell for tortious interference with the 2011 Agreement, on the ground that they directed IGPS to terminate Moore; 3) for breach of fiduciary duty against the alleged majority shareholders of IGPS, based on the dilution of Moore's equity interest in IGPS without his knowledge; 4) against the majority shareholders of IGPS for breach of their fiduciary duty to Moore, by directing his discharge for cause as Chairman of the Board because they knew such termination would strip him of his equity interest; 5) against Berney and Weinberg for fraudulently inducing Moore to enter into the 2011 Agreement knowing that they had no intention of retaining him as Chairman of the Board; 6) against Berney and Weinberg alleging that they conspired to defraud him, by inducing him to sign the 2011 Agreement; 7) against Pegasus and Kelso for breach of the LLC Agreement by falsely directing his termination "for cause," thereby denying him his vested equity interest in IGPS; and 8) against IGPS for breach of the implied covenant of good faith and fair dealing in the 2011 Agreement, on the ground that IGPS knew, prior to Moore's execution of the agreement, that it intended to remove him from his position as chairman[2].

II. Contentions

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[2]On January 12, 2012, this court heard argument on defendants motion to dismiss the second through sixth causes of action and eight through tenth causes of action of the original complaint. At that hearing the court dismissed the fifth and sixth causes of action alleging fraud and conspiracy to defraud with leave to replead (Trans. at p. 25). On January 17, 2012, plaintiff filed an amended complaint repleading the fifth and sixth causes of action. Moore has withdrawn his age discrimination claims (ninth and tenth causes of action in the original complaint).

Defendants contend that the second cause of action alleging tortious interference with contract fails because Moore has not alleged that the defendants engaged in any unlawful or independently tortious activity. In addition, defendants argue, for the first time in reply, that Moore has not alleged that a third party interfered with Moore's contract with IGPS, which is an essential element of the tortious interference claim[3].

Defendants take the position that the third and fourth causes of action, alleging breach of fiduciary duty, must be dismissed because they are duplicative of the breach of contract claim and because non-managing members and non-majority members of IGPS do not owe fiduciary duties to the other members of an LLC. Moreover, they argue that Moore has not particularized what fiduciary duty was allegedly breached.

As to the fraud causes of action, defendants contend that the cause of action for fraud in the inducement must be dismissed because it does not meet the heightened pleading standard for fraud claims and is duplicative of Moore's contract claims. They also argue that the conspiracy to commit fraud claim should be dismissed because it fails to allege an underlying fraud, and it fails to properly plead all the elements of conspiracy.

Finally, defendants contend that the cause of action alleging breach of the implied covenant of good faith and fair dealing warrants dismissal as duplicative of the breach of contract claims.

In opposition to dismissal, plaintiff argues that the breach of fiduciary duty claim is not duplicative of the contract claim in that it relies on facts that are independent of the breach of

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[3] In a letter brief, dated November 29, 2011, plaintiff responded to this contention and therefore, the court will consider this argument in this dismissal motion.

contract and seeks damages that cannot be recovered in the contract cause of action. In addition, while plaintiff concedes that there is no fiduciary duty owed by non-controlling members of IGPS, he argues that discovery is necessary before any of the defendants are dismissed, so that it may make a definitive determination as to which signatories to the LLC Agreement are controlling members and which are non-managing members.

Plaintiff takes the position that the tortious interference claim is properly stated and that majority shareholders can be liable for tortious interference where there are allegations that they personally benefitted from their actions and were motivated by such personal benefit. Also, Moore claims that the cause of action alleging breach of the implied covenant of good faith and fair dealing states a claim, because plaintiff alleges that defendants engaged in conduct calculated to deprive him of the fruits of his contractual bargain.

Further, Moore contends that the allegations in the fraud causes of action are specific and particular, that the allegations of fraud are collateral to the contract and, therefore, not duplicative of the contract claims and, because he has properly alleged a cause of action for fraud in the inducement, the allegations of conspiracy to commit fraud state a viable claim.

III. Discussion

It is well settled that on a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken

together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp., supra* [internal quotations marks and citations omitted]).

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible allegations are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). In addition, dismissal based on documentary evidence may only result when the documentary evidence "utterly refutes [a] plaintiff's allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

A. Tortious Interference with Contract

The essential elements of a tortious interference with contract claim are: 1) the existence of a valid contract between plaintiff and a third party; 2) defendants' knowledge of that contract; 3) defendants' intentional and improper inducement of the third party to breach that contract; and 4) damages (*Chung v Wang,* 79 AD3d 693, 694 [2d Dept 2010]). Corporate directors ordinarily are not liable for inducing a breach of a contract with the corporation by merely making decisions or taking actions that result in the corporation's breach or broken promise (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp,* 296 AD2d 103, 109 [1st Dept 2002][citation and quotation marks omitted]). However, they may be rendered personally liable where their acts or conduct benefitted the officers' personal, rather than the corporations's, interests (*Hoag v Chancellor,* 246 AD2d 224, 230 [1st Dept 1998]).

To establish liability, the complaint must allege that the director either acted outside the scope of his/her authority or personally profited from his/her interference with the contract at issue (*id.* at 228-229), such that the benefit obtained from the contract interference was not to the

corporation (*Petkanas v Kooyman,* 303 AD2d 303, 305 [1st Dept 2003]). Such claims are subject to an enhanced pleading standard, in that a plaintiff must make a particularized pleading, in nonconclusory language, of facts establishing that the acts were either (1) beyond the director's scope of authority; or (2) were performed with malice and motivated by a desire for personal gain (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp,* 296 AD2d at 109-110). In *Petkansas v Kooyman,* 303 AD2d at 305, the First Department stated:

> We have construed personal gain in terms that the challenged acts were undertaken with malice and were calculated to impair the plaintiff's business for the personal profit of the [individual] defendant. The same rule applies when the thrust of the complaint is that the individual defendants sought to oust the plaintiff from employment and thereby deprive him of the financial benefits of that employment. That is, the pleadings must allege that the individual defendant corporate officer must have been acting for his or her own personal interests rather than for the corporate interest

(Internal quotation marks and citations omitted).

Here, the complaint specifically alleges that defendants Pegasus, Kelso, Cogut and Nichols interfered with the 2011 Agreement, without any legitimate business rationale, by directing IGPS to materially breach the agreement "*for the purpose of enriching their own equity stake in IGPS at Mr. Moore's expense*" (Cmplnt, ¶ 75 emphasis added). The complaint also states that those defendants acted maliciously in retaliation for Moore's assertion of his legal rights (Cmplnt, ¶ 76) These allegations are sufficient to state a cause of action for tortious interference with contract against those defendants.

B. Breach of Fiduciary Duty based on the LLC Agreement

IGPS is a Delaware company governed by Delaware law.[4] "[D]irectors and officers of a Delaware corporation owe the corporation and its shareholders a 'triad' of duties. This triad is composed of the duty of care, the duty of loyalty and the duty to act in good faith" (*In re Fedders North America*, 405 BR 527, 539 (Bankr, D Del 2009][citation omitted]).

The third cause of action alleging breach of fiduciary duty based on the LLC Agreement is dismissed because plaintiff has failed to sufficiently state a claim for breach of the duty of loyalty, the duty of care or the duty to act in good faith. Each of these separate duties has separate pleading requirements under Delaware Law (*see, e.g. id.* at 539-540).

In *Nemec v Shrader* (2009 WL 1204346 at *4, 2009 Del Ch Lexis 67, *9-10 [Del Ch 2009], affd 991 A 2d 1120 [Del 2010]) the court discussed plaintiff's allegations of breach of the fiduciary duty of loyalty. In that case, plaintiffs alleged that, by redeeming the plaintiffs' shares before selling a portion of the business to a private equity firm, the defendant directors acted to further their own economic interest, at the expense and to the detriment of plaintiff's interest, thereby breaching their fiduciary duty of loyalty to plaintiff. There, the court found that the breach of fiduciary duty cause of action should be dismissed because, *inter alia*, the complaint did not adequately plead facts sufficient to establish that the timing of the directors' redemption decision was not in the best interests of the company or its shareholders or that the directors failed to exercise sound and good faith business judgment.

> Directors may take whatever action that, in their proper exercise of business judgment, will best serve the interests of the corporation or the entire body of shareholders. That such action may adversely

[4] Although the original complaint contends IGPS is a New York company, it apparently is a Delaware entity.

> affect the interests of a particular shareholder . . .
> will, in certain circumstances, be unavoidable.

(*Gilbert v El Paso Co.*, 1988 WL 124325 at *10 [Del Ch 1988] affd 575 A2d 1131 [Del Supr 1990]).

In the case before the court, plaintiff has failed to plead facts sufficient to establish breach of the duty of loyalty. He has not alleged that the amendments to the LLC Agreement that resulted in the diminution of plaintiff's equity shares were not in the best interest of the company or that, in making those amendments, the directors failed to exercise sound business judgment.

The fiduciary "duty to act in good faith, a subsidiary of the duty of loyalty, proscribes conduct that is not disloyal but is qualitatively more culpable than gross negligence" (*KDW Restructuring & Liquidation Services, LLC v. Greenfield*, 2012 WL 2125986 *3, 2012 US Dist Lexis 81459 *12 [SD NY 2012][internal quotation marks and citations omitted]). Bad faith can take several forms, including a fiduciary acting in a manner that does not benefit the corporation (*In re Walt Disney Co. Deriv. Litig.*, 907 A2d 693, 754 [Del Ch 2005] aff'd 906 A2d 27 [Del 2006]), acting in a manner that violates the law and where the fiduciary demonstrates a conscious disregard for a known duty (*id.*). In this case, the complaint does not contain allegations sufficient to allege breach of the fiduciary duty of good faith.

Lastly, to state a claim for the breach of the duty of care, a plaintiff must allege gross negligence which is defined as indifference amounting to recklessness (*Zimmerman v Crothall,* 2012 WL 707238 at *6, 2012 Del Ch Lexis 64 *19 [Del Ch 2012]). The complaint in this matter does not contain allegations of gross negligence. Hence, the allegations are not sufficient to establish a claim for breach of the duty of care.

Accordingly, the third cause of action alleging breach of fiduciary duty associated with the LLC Agreement is dismissed.

C. Breach of Fiduciary Duty based on Moore's Discharge (2011 Agreement)

The fourth cause of action, alleging breach of fiduciary duty based on the 2011 Agreement, is dismissed as duplicative of the cause of action alleging breach of the 2011 Agreement. It is well settled that a breach of fiduciary duty claim cannot proceed in conjunction with a breach of contract claim that shares the same underlying allegations that are "either expressly raised in plaintiff's breach of contract claim or encompassed with the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith" (*Brooks v Key Trust Co., Natl. Assoc.*, 26 AD3d 628, 630 [3d Dept 2006]; *see also Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004]).

In this case, Moore complains in both his breach of the 2011 Agreement claim and the second breach of fiduciary duty claim that the defendants improperly terminated him for cause which, in turn, divested him of his right to his equity interest. Here, Moore has not stated specific allegations that the parties "created a relationshop of higher trust than would arise from [their contracts] alone" (*EBC I, Inc. v Goldman, Sachs & Co,* 5 NY3d 11, 20 [2005]), so as to permit a cause of action alleging breach of fiduciary duty that is independent of defendants' contractual duties (*see, Kaminsky v FSP Inc.,* 5 AD3d at 252). I will not address defendants' argument concerning dismissal of the breach of fiduciary duty claims based on the non-majority position of the defendants, since I have dismissed the third and fourth causes of action on other grounds.

D. Fraudulent Inducement and Conspiracy

Under New York law, the elements of fraudulent inducement are: (1) a knowingly false representation of material fact, and (2) detrimental reliance thereon (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 233 [1st Dept 1999]). Where plaintiff pleads both a fraud claim and a breach of contract claim, "the plaintiff must distinguish the two by: (1) demonstrating a legal duty separate from the duty to perform the contract; (2) demonstrating a fraudulent misrepresentation collateral or extraneous to the contract or (3) seeking special damages unrecoverable as contract damages" (*Colodney v Continuum Health Partners, Inc.* 2004 WL 829158 at *9, 2004 US Dist Lexis 6606 *29-30 [SD NY 2004][citations omitted]).

In this case, plaintiff has adequately pleaded his claim for fraud in the inducement by alleging that Berney and Weinberg induced him to execute the 2011 Agreement when they knew full well, at the time they told him that they wanted him to stay on as Chairman for 4 more years, that IGPS had no intention of retaining him as Chairman and that they induced him to sign the agreement so that they could bind him to a non-compete and non-solicitation agreement, preventing him from competing with IGPS for several years following his termination. Moore alleges that he relied on Weinberg and Berney's assurances when he signed the agreement, to his detriment. Moore seeks compensatory and punitive damages as a result of the fraudulent inducement that are not available under the first cause of action alleging breach of the 2011 Agreement.

Colodney v Continuum Health Partners, Inc.(2004 WL 829158 at *9, 2004 US Dist Lexis 6606 at *30), upon which the defendants rely for the proposition that the fraudulent inducement is duplicative of the contract claim is distinguishable. In *Colodney,* the court found that the crux of both the breach of contract claim and the fraudulent inducement claim was that

the defendant promised to hire him for the duration of a certain contract and that it reneged on that promise by firing him. The court stated that a contract action could not be converted to a cause of action for fraud by simply stating that the defendant did not intend to keep its contractual promise. *id.*

However, in *Triangle Underwriters, Inc. v Honeywell, Inc.* (604 F2d 737, 746-747 [2d Cir 1979]), the court held that although a plaintiff may not dress up a breach of contract claim as a fraud claim, a valid fraud claim may be premised on misrepresentations that were made before the formation of the contract that it would be able to carry out its contractual committment, which induced the plaintiff to enter the contract. In that case, the court upheld a claim that alleged that false representations were made before there ever was a contract between the parties, which representations induced the plaintiff to enter the contract. There the court held that the alleged fraud was extraneous to the contract (*id.* at 747-748; see also, *Cohen v Koenig* 25 F3d 1168, 1172-1173 [2d Cir 1994]).

Here, as in Triangle, plaintiff has not pled fraudulent nonperformance of the contract. Moore's claim is *not* that the defendants led him to believe that he would not be terminated. Instead, in the fifth cause of action, Moore claims that he was fraudulently induced to enter into the contract so that the defendants could secure written, non-compete and non-solicitation clauses, which clauses were not in effect when Moore was induced to sign the 2011 Agreement, so that when the defendants terminated Moore, which they intended to do from the beginning, they could enforce the non-compete provisions in the 2011 Agreement.

Because Moore has specifically and adequately pleaded a cause of action for fraudulent inducement, the sixth cause of action alleging that the defendants knowingly agreed to mislead

Moore regarding the 2011 contract, when their intention was to deprive him of his rights, sufficiently states a claim for conspiracy to commit fraud.

F. Breach of the Implied Covenant of Good Faith and Fair Dealing

In *Dalton v Educational Testing Serv.* (87 NY2d 384, 389 [1995]), the Court of Appeals stated that the implied obligation of good faith and fair dealing embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (citation and internal quotation marks omitted). Claims for breach of contract and breach of the implied covenant of good faith and fair dealing can stand together, where the defendant frustrates plaintiff's ability to receive the fruits of his or her contractual bargain (*see, e.g. Frydman & Co. v Credit Suisse First Boston Corp.*, 272 AD2d 236, 237-238 [1st Dept 2000]).

In the case before the court, plaintiff, in his fraudulent inducement and tortious interference causes of action, has pleaded specific factual allegations regarding the ways in which the defendants failed to act in good faith in their contractual dealings with him and how those actions deprived him of the benefits of his bargain. The complaint alleges that IGPS entered into the agreement knowing that it had no intention of retaining Moore, and that it removed him from his office and ultimately claimed that it was firing him for cause, in order to deprive him of his equity stake in IGPS and to prevent him from competing with the Company. These allegations, which, in essence, plead that defendants actions frustrated Moore's ability to receive the benefit of his bargain, are sufficient to state a cause of action for breach of the covenant of good faith and fair dealing which stands separate and apart from his breach of contract causes of action. Accordingly, it is

ORDERED that the motion to dismiss of defendants IGPS Company LLC, Pegasus Capital Advisors LLP, Pegasus Partners III (AIV), L.P., Pegasus Investors III, L.P., Pegasus Investors III GP, L.L.C., Pegasus IGPS, LLD, IGPS Co-Investment LLC, IGPS Employee Participation, L.P., IGPS Executive (GP) LLC, PP IV IGPS Holdings, LLC, Kelso & company, KIA VIII (IGPS), L.P., KIA VIII (IGPS) GP, L.P., KEP VI AIV (IGPS), LLC, Kelso GP VIII, LLC, Rich Weinberg, Craig Cogut, Frank Nickell, and Phil Berney is granted to the extent that the third and fourth causes of action for breach of fiduciary duty are dismissed and the motion is otherwise denied; and it is further

ORDERED that defendants are to answer the amended complaint within 20 days.

Dated: July 10, 2012

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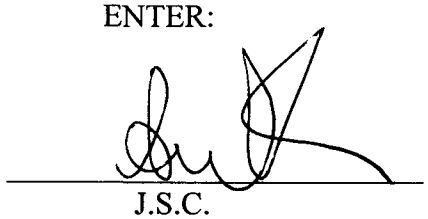

J.S.C.