

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

GEORGE GRAYSON, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 5051-CC  
 )  
 IMAGINATION STATION, INC., and )  
 RICHARD H. COLLINS, )  
 )  
 Defendants. )  
 )

**MEMORANDUM OPINION**

Date Submitted: June 11, 2010  
Date Decided: August 16, 2010

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Wilmington, Delaware; OF COUNSEL: Brian N. Hail and Demarron A. Berkley,  
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Defendants.

CHANDLER, Chancellor

Plaintiff George Grayson is a shareholder and director of Imagination Station (“iStation” or the “Company”). He brings this action—derivatively as to certain claims and directly as to others—to both enforce a voting agreement (the “Voting Agreement”) between certain directors, the Company, and himself, and to void certain transactions entered into between iStation and the chairman of the board, defendant Richard Collins. Grayson alleges that defendants Collins and iStation breached the Voting Agreement by deliberately blocking the appointment of a director Grayson was contractually entitled to nominate. Grayson further alleges that Collins individually breached his fiduciary duty to Grayson as a shareholder and that defendants collectively violated 8 *Del. C.* § 141 by authorizing certain transactions without the approval of the Company’s duly constituted board (that is, the board comprised in accordance with the Voting Agreement). Defendants have moved to dismiss two of the three counts in the complaint for failure to state a claim upon which relief may be granted. I grant Defendants’ motion in part and deny in part.

## **I. BACKGROUND**

The facts set forth below are based upon the allegations in the complaint. Defendant iStation is a Delaware corporation which is privately held and has its principal place of business in Richardson, Texas. The Company provides Internet-based software and services that improve student performance and productivity for

educators. Grayson founded iStation and was the sole shareholder until December 2006. Grayson also served as iStation's chairman and CEO from July 1998 until October 2007.

In December 2006, iStation recapitalized and, as part of this recapitalization, Randall Goss and Collins agreed to make additional investments in the Company. In return, Grayson arranged to create a five-member board. Grayson has the right to designate two directors. Collins and Goss each has the right to designate one director. The fifth director is elected by vote of all shareholders. To effectuate these terms, iStation, Grayson, Collins, and Goss entered into the Voting Agreement in December 2006. The Voting Agreement provided that:

Each of the Parties shall vote or cause to be voted all shares owed by them or over which they have voting control (i) to remove from the Board any director designated by any Party pursuant hereto at the request of such Party, and (ii) to fill any vacancy in the membership of the Board with a designee of the Party whose designee's resignation or removal from the Board caused such vacancy.<sup>1</sup>

The Company, as a party to the Voting Agreement, agreed to take all acts necessary to accomplish the objectives of the Voting Agreement and to protect the rights of the parties from impairment. The Voting Agreement further provides for specific performance as the sole remedy for breach and requires the loser in a dispute over the Voting Agreement to pay the winning party's reasonable

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<sup>1</sup> Voting Agreement ¶ 2(c).

attorneys' fees and other costs. Pursuant to the Voting Agreement, Grayson designated himself and Juana Daniels to the board. Collins and Goss both designated themselves. Robert Blevins holds the fifth seat. Blevins is the current president of iStation, and his wife and son also work for the Company.

As often happens when a corporation's sole shareholder sells partial control of the enterprise to new investors, disagreements soon began to arise over the management of iStation. One such conflict arose approximately one year after the Voting Agreement was signed, when Collins called a board meeting without any apparent purpose or agenda. Collins announced at that meeting that he had agreed to purchase \$1 million of Goss's stock in iStation. Goss and Collins also announced that Grayson was to be terminated as CEO of iStation. Although the Company's bylaws granted Collins the ability to unilaterally remove Grayson as CEO,<sup>2</sup> Grayson believes Collins's purchase of Goss's stock was a quid pro quo for Goss's vote in favor of Grayson's termination.

Another conflict arose less than one year later at the annual board meeting held on September 4, 2008. That conflict is the origin of the current dispute between the parties. At the meeting, Grayson informed the board that Daniels, his designee, had resigned. Grayson then moved that Doug Kittelson be appointed to

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<sup>2</sup> See iStation's Bylaws art. V, § 3 ("Any officer or agent elected or appointed by the Board may be removed by the Chairman of the Board of Directors whenever, in his judgment, the best interest of the corporation will be served thereby.").

the board to replace Daniels as his second designee. The motion was seconded and the board unanimously approved. Later in the meeting, Collins sought approval of a self-interested transaction in which iStation would award Collins additional stock in exchange for his making a \$150,000 gift to Southern Methodist University for a study that supposedly would be favorable to the Company. Kittelson stated that approval of the transaction should require a majority of disinterested directors. Collins thereafter chose not to pursue the transaction further and no vote was held on the matter.

Five days after the September 4, 2008 board meeting, the Company's attorney sent an email to Kittelson contesting his appointment to the board. The email stated that Collins believed it was his right as Chairman to fill the board position left open by Daniels' resignation because the previous board meeting was not a shareholders' meeting and, thus, the Voting Agreement was not controlling. Collins believed that the Company's bylaws controlled instead, which state that "[a]ny vacancy occurring in any office of the corporation by death, resignation, removal or otherwise, shall be filled by the Chairman of the Board."<sup>3</sup> Based on this bylaw, Collins asserted that he had the right to elect the replacement for Daniels to serve as director until the next shareholders' meeting, at which time Collins would vote according to the Voting Agreement. The email further stated

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<sup>3</sup> iStation's Bylaws art. VI, § 1.

that Collins had appointed Sandra Thomas—iStation’s chief financial officer, who also happens to be in a romantic relationship with Collins, or, as Grayson expresses it, is Collins’ “paramour”<sup>4</sup>—to serve in Daniels’ place, and that the next shareholders’ meeting would be scheduled sometime after October 15, 2008.

In December 2008, Collins sent notice that the 2009 shareholders’ meeting would be held on March 25, 2009, which is the month the Company’s bylaws state shareholders’ meetings should be held. The meeting, however, was rescheduled to September 2009 without explanation and without board action. The shareholders’ meeting was later set for September 14, 2009, with a board meeting to occur on September 11, 2009 via teleconference. Collins notified the board of the board meeting on September 6, 2009 and provided a list of matters to be discussed and approved by the board. One of the stated purposes of the board meeting was to approve a \$3 million loan to the Company from Collins (the “Loan Transaction”). Collins did not notify Kittelson of the meeting, as Collins believed Thomas was the true member of the board.

Grayson, however, believed Kittelson to be a legitimate member of the board—as he had been unanimously approved by the board a year earlier. On September 6, 2009, Grayson forwarded the board meeting information to Kittelson and reminded Collins that Kittelson was Grayson’s second board representative.

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<sup>4</sup> Pl.’s Answering Br. 7.

The next day, Collins responded that Kittelson was not currently a director, but would be on the ballot at the shareholders' meeting. Grayson then emailed the board on September 8, 2009 contesting the denial of Kittelson's status as director and requesting information regarding the Loan Transaction. Grayson stated that he expected Collins to abstain from the vote and voiced his suspicion that Collins was trying to block a deadlock by replacing Grayson's representative with his own.<sup>5</sup>

On September 11, 2009, both Grayson and Kittelson attempted to participate in the board meeting by telephone. Collins demanded that Kittelson remain silent during the proceeding, as Collins did not recognize Kittelson as a member of the board. Kittelson refused to remain silent, and Collins thereafter disconnected the telephone line. Because Kittelson and Grayson were sharing a telephone line, Grayson was also disconnected, although Collins allegedly did not know this at the time and maintains he attempted to reconnect them both. After disconnecting Grayson and Kittelson, the remaining directors (Collins, Thomas, Blevins, and

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<sup>5</sup> By replacing Kittelson with Thomas, Collins allegedly was attempting to stack the board in his favor. Grayson alleges that Blevins is not independent of Collins because Blevins, and Blevins' wife and son, are employed by the Company and receive approximately \$500,000 in compensation from iStation. Grayson further alleges that Goss was indebted to Collins, and therefore not independent, because Collins purchased \$1 million worth of Goss' illiquid iStation shares in 2007—allowing Goss to liquidate an otherwise illiquid investment. Therefore, if Collins allowed Kittelson to fill the board seat, and if Collins was asked to refrain from voting on approval of the Loan Transaction because he was interested, the result would be a deadlock, with two directors voting in favor of the Loan Transaction (Blevins and Goss) and two voting against it (Grayson and Kittelson). Grayson believes that Collins hoped to avoid this result by filling the board seat with Thomas instead of Kittelson, so that even if he was asked by Grayson to abstain from voting on the Loan Transaction, three directors (Blevins, Goss, and Thomas) would still approve the Loan Transaction, with only Grayson dissenting.

Goss) approved the Loan Transaction between iStation and Collins. The effect of the Loan Transaction would result in an increase in Collins' share ownership from approximately 44% to 52%, making Collins the outright majority shareholder of iStation. The other shareholders would be diluted by the Loan Transaction, and Grayson's interest in the Company would decrease from 32% to 23%.

Three days after the board meeting, the shareholders' meeting was held. At that meeting, Kittelson was formally elected to the board, replacing Thomas. On September 17, 2009, Grayson requested a new board meeting to be scheduled to reconsider the Loan Transaction approved on September 11, 2009. Collins refused to call a new board meeting to review the Loan Transaction, and iStation has continued to treat the Loan Transaction as valid.

Grayson now sues in an attempt to void the Loan Transaction, obtain damages and attorney's fees for breach of the Voting Agreement, and force Collins to disgorge any benefits received in the Loan Transaction and to reimburse the Company. Grayson first alleges defendants breached the Voting Agreement by failing to recognize Kittelson as Grayson's second designee to the board ("Count I"). Grayson also asserts Collins breached his fiduciary duties by denying Kittelson's status as director and approving the interested Loan Transaction ("Count II"). Finally, Grayson alleges defendants violated 8 *Del. C.* § 141 by



agreeing to the Loan Transaction without the approval of the properly authorized board of directors (“Count III”).

Defendants move to dismiss Count III (violation of 8 *Del. C.* § 141) and Count II (breach of fiduciary duty) of the complaint. They argue Count III should be dismissed because it states a derivative claim and (1) Grayson failed to comply with Court of Chancery Rule 23.1 requiring derivative claims to plead sufficient facts demonstrating that demand on iStation’s board should be excused as futile, and (2) Grayson has not filed the affidavit required by Court of Chancery Rule 23.1(b). Defendants further argue that Count II is redundant of Count I and, therefore, Count II should be dismissed.

## II. ANALYSIS

The standard for a motion to dismiss for failure to state a claim upon which relief may be granted is well established. The well-pleaded allegations of the complaint are taken as true, and all reasonable inferences from such allegations are made in favor of the non-movant.<sup>6</sup> No credence is given to conclusory allegations which lack the support of specific factual allegations.<sup>7</sup> Dismissal is only

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<sup>6</sup> *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del. 2006).

<sup>7</sup> *In re Santa Fe Pacific Corp. S’holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995).

appropriate if the Court determines with reasonable certainty that the plaintiff could not prevail on any set of facts that can be inferred from the complaint.<sup>8</sup>

Because Count III states a direct claim, I deny defendants' motion to dismiss the claim on the ground Rule 23.1 was not followed. I conclude, however, that Count II is duplicative of Count I, and on that basis I grant defendants' motion to dismiss Count II.

*A. Count III States a Direct Claim*

Defendants assert that Count III of the complaint should be dismissed because it alleges a derivative claim, yet Grayson has failed to comply with the requirements Court of Chancery Rule 23.1 places on such claims. Defendants first argue that Grayson failed to comply with Court of Chancery Rule 23.1 requiring that derivative claims plead facts sufficient to demonstrate that demand on iStation's board would be futile. Defendants next assert that Grayson has not fulfilled the requirements of Court of Chancery Rule 23.1(b), in that he has failed to file an affidavit stating that he has not and will not accept compensation for bringing the derivative action except (1) as approved by the Court, or 2) as reimbursement for reasonable expenses incurred and paid by Grayson's attorneys. Because Rule 23.1 only applies to derivative claims by shareholders, if Count III is

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<sup>8</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001).

a direct claim—rather than a derivative claim—Rule 23.1 does not apply and I will not dismiss Count III on the grounds defendants argue.

*Tooley v. Donaldson, Lufkin, & Jenrette, Inc.* articulated the test under Delaware law for distinguishing between a direct and derivative claim. The distinction turns on two factors: (1) who suffered the alleged harm (the shareholder or the corporation), and (2) who would receive the benefit of the remedy.<sup>9</sup> For the claim to be direct, the shareholder must be the one purportedly harmed and the injury must be “independent of any alleged injury to the corporation.”<sup>10</sup> The shareholder must further “demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.”<sup>11</sup> To determine whether the claim is direct or derivative, the Court must read the complaint as a whole to determine the nature of the alleged wrong and the relief that may be ordered.<sup>12</sup>

After reviewing the entire complaint, I conclude that Count III asserts a direct claim. Under the first *Tooley* factor, the alleged violation of 8 *Del. C.* § 141 directly harmed the shareholders of iStation. The Delaware General Corporation Law (“DGCL”) establishes a structural relationship between the corporation and its

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<sup>9</sup> 845 A.2d 1031, 1033 (Del. 2004).

<sup>10</sup> *Id.* at 1039.

<sup>11</sup> *Id.*

<sup>12</sup> *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at \*7 (Del. Ch. May 5, 2010) (citing *Tooley*, 845 A.2d at 1038).

officers, directors, and shareholders. Although the DGCL empowers corporate directors and officers to act for the corporation, the DGCL also imposes certain restraints on the use of this authority. If a corporate officer acts in a manner that the DGCL prohibits, then the officer has violated this structural relationship by disregarding the specific restraints placed on him or her by the shareholders. It is consequently the rights of the shareholders, not those of the corporation, that are injured by the encroachment. Thus, any shareholder who was harmed by the violation of the structural relationship established between the corporation and the shareholder is harmed directly and has an individual cause of action.

Section 141 of the DGCL provides that the business and affairs of the corporation are to be managed under the direction of a board of directors. Only the duly authorized board has the power to act for the corporation, and all members of the corporation's board must be given an opportunity to participate meaningfully in board meetings. By disconnecting Grayson and Kittelson—effectively neutralizing their ability to participate in the board meeting—and by creating and causing an illegitimate board to approve the Loan Transaction, defendants are alleged to have gone beyond the authority granted to them by the Company's shareholders. Defendants purportedly allowed unauthorized directors to participate in the management of iStation and denied authorized directors the ability to participate in the management of the Company. These alleged acts go against the structural

relationship established by the shareholders, and it is consequently the shareholders who were directly harmed—not the Company. Because Grayson is one of the shareholders harmed by these alleged actions, the first prong of the *Tooley* analysis indicates that Count III is a direct claim.

This conclusion is supported by *Grimes v. Donald*, in which the Delaware Supreme Court found a claim asserting the violation of the structural relationship between the corporation and one of its shareholders was an individual claim.<sup>13</sup> In *Grimes*, the Supreme Court affirmed a determination by the Court of Chancery that an abdication claim for violation of Section 141 was an individual claim. In doing so, the Supreme Court noted that in some instances certain actions involving the structural relationship of the shareholder and the corporation can give rise to both a direct and derivative claim. The Supreme Court stated that an example of such a situation would be when “a corporate official knowingly acts in a manner that the . . . [DGCL] denied the official the authority to do, thereby violating both specific restraints imposed by the shareholders [through the DGCL] and the official’s duty of care.”<sup>14</sup> The Supreme Court’s example thus illustrates that a violation of the structural relationship between the corporation and the shareholders directly violates the restraints placed on the officer by the shareholders, including the

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<sup>13</sup> 673 A.2d 1207, 1213 (Del. 1996).

<sup>14</sup> *Id.* at 1213.

plaintiff shareholder, and that the resulting claim by the plaintiff shareholder is a direct claim.

The *Grimes* Court further reasoned that the board of directors cannot make a determination of whether the structural relationship between the corporation and the shareholders—established by Section 141—was violated because that determination involves a question of law.<sup>15</sup> Such questions of law can only be determined by the Court and, therefore, the business judgment rule does not apply. Because the business judgment rule does not apply, the derivative suit requirements have no relevance, and claims asserting a violation of the structural relationship are necessarily individual.

The second factor in the *Tooley* analysis regarding to whom the remedy would flow also favors characterizing Count III as a direct claim. *Grimes* again provides guidance in determining whether this factor is satisfied. In *Grimes*, the Supreme Court noted that the Court is “more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief.”<sup>16</sup> Because the plaintiff in *Grimes* only sought to void the transaction in question on the ground that the board had abdicated its duties to the shareholders—and the plaintiff did not seek monetary damages—the Supreme

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<sup>15</sup> *Id.* at 1212.

<sup>16</sup> *Id.* at 1213 (quoting PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.01 cmt. d (1992)).

Court found the claim to be a direct claim. Here, Grayson primarily seeks injunctive relief: that I void the Loan Transaction. Similar to that case, although Grayson also seeks damages on behalf of himself and iStation, these damages are not sought under Count III, but rather via the breach of contract claim in Count I and the breach of fiduciary duty claim in Count II. The remedy sought via Count III, therefore, also supports a finding that Count III states a direct claim.

Finally, because the alleged harm here was that Collins and iStation purportedly violated the structural relationship between the Company and its shareholders by allowing illegitimate directors on the board to take certain actions, and by preventing legitimate directors from participating, the appropriate remedy would be to void the actions taken by the illegitimate board. Such relief does not necessarily benefit the corporation; it could be that the Loan Transaction does not harm iStation, but rather is a beneficial transaction. Relief under Count III, however, does not turn on whether the Loan Transaction was beneficial, but whether the board had the authority from the shareholders to approve the transaction. If the board did not have the authority and exceeded the rights given to them by the shareholders, then the injunctive remedy would flow directly to the shareholders, not to the Company. Both factors of the *Tooley* analysis are therefore satisfied and Count III states a direct claim.

Although defendants attempt to distinguish *Grimes* by claiming it is no longer good law because it was decided before *Tooley*, this argument fails. The Supreme Court in *Tooley* noted that the proper analysis for characterizing whether claims are direct or derivative was stated in *Grimes*.<sup>17</sup> Specifically, the Supreme Court noted in *Tooley* that to determine whether the Section 141 claim at issue was direct, the *Grimes* Court looked to the nature of the wrong and to whom the relief would flow.<sup>18</sup> The Supreme Court stated that this was the proper analysis, and that the test should remain as stated in *Grimes*.<sup>19</sup> Accordingly, defendants cannot distinguish *Grimes* by contending it was overruled on this particular point of law.

Given that Count III alleges harm to Grayson as a shareholder and seeks relief on his behalf, the *Tooley* analysis supports a conclusion that the claim is direct, not derivative. Because Grayson has asserted Count III directly, Court of Chancery Rule 23.1 does not apply, and I deny defendants' motion to dismiss Count III for failure to comply with Rule 23.1.

*B. Count II is Duplicative of Count I*

Defendants also seek to dismiss Count II of the complaint, arguing it is duplicative of Count I. Count II alleges that by denying Kittelson's status as a director and approving the Loan Transaction, Collins breached his fiduciary duty

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<sup>17</sup> *Tooley*, 845 A.2d at 1039.

<sup>18</sup> *Id.* at 1038.

<sup>19</sup> *Id.* at 1039.



to Grayson as a stockholder in four ways: (1) by purposely preventing the Company's legitimate board of directors from deliberating and acting on the matters considered at the September 11, 2009 meeting; (2) by manipulating the board selection process based on a technical requirement in the bylaws to circumvent the clear rights of Grayson to designate two members of the board; (3) by denying Grayson and Kittelson the ability to participate in the September 11 meeting in order to obtain approval of the Loan Transaction;<sup>20</sup> and (4) by causing the Company to breach its contractual obligations under the Voting Agreement.

Defendants argue that this breach of fiduciary duty claim is merely duplicative of the breach of contract allegations in Count I and, therefore, Count II should be dismissed. Under Delaware law, if the contract claim addresses the alleged wrongdoing by the director, "any fiduciary duty claim arising out of the same conduct is superfluous."<sup>21</sup> The reasoning behind this is that "[t]o allow a fiduciary duty claim to coexist in parallel with [a contractual] claim, would undermine the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations."<sup>22</sup>

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<sup>20</sup> It is unclear how the third allegation of breach of fiduciary duty significantly differs from the first. Both allegations appear to state that Collins breached his fiduciary duty by preventing the legitimate board from deliberating and acting. The third allegation seems merely to add more specifics and a motive to the first allegation.

<sup>21</sup> *Gale v. Bershad*, No. Civ. A. 15714, 1998 WL 118022, at \*5 (Del. Ch. Mar. 4, 1998).

<sup>22</sup> *Id.*

Nevertheless, Delaware law does recognize a narrow exception under which breach of contract and breach of fiduciary duty claims can both arise from the same nucleus of operative facts.<sup>23</sup> Where there is an “independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct . . . the fiduciary duty claims will survive.”<sup>24</sup> The breach of fiduciary duty claim will consequently only be allowed “where it may be maintained independently of the breach of contract claim.”<sup>25</sup> The relevant inquiry then is whether the obligation sought to be enforced arises from the parties’ contractual relationship or from a fiduciary duty owed to the shareholders.<sup>26</sup> If the obligation to be enforced arises from a fiduciary duty owed to the shareholders, then the count is not duplicative and will not be dismissed.

I conclude that under this standard Count II is duplicative of Count I and should be dismissed. The obligation Grayson is seeking to enforce arises solely from the Voting Agreement and not from any fiduciary duty independently owed to the shareholders in general. The gravamen of Counts I and II is that the Voting

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<sup>23</sup> See *Grunstein v. Silva*, C.A. No. 3932-VCN, 2009 WL 4698541, at \*6 (Del. Ch. Dec. 8, 2009) (noting a “narrow exception” in Delaware law “allowing the joint pleading of breach of contract and breach of fiduciary duty claims under the same nucleus of operative facts”).

<sup>24</sup> *PT China LLC v. PT Korea LLC*, C.A. No. 4456-VCN, 2010 WL 761145, at \*7 (Del. Ch. Feb. 26, 2010).

<sup>25</sup> *Grunstein*, 2009 WL 4698541, at \*6.

<sup>26</sup> *MCG Capital Corp. v. Maginn*, C.A. No. 4521-CC, 2010 WL 1782271, at \*15 (Del. Ch. May 5, 2010); *PT China*, 2010 WL 761145, at \*7; *Solow v. Aspect Resources, LLC*, No. Civ.A. 20397, 2004 WL 2694916, at \*4 (Del. Ch. Oct. 19, 2004); *Gale*, 1998 WL 118022, at \*5.

Agreement granted Grayson the power to fill the vacancy Daniels' resignation caused, and that Collins allegedly usurped this authority from Grayson in violation of the Voting Agreement. Grayson is now simply seeking to have the Voting Agreement enforced and to void actions taken by the Company's board while the board was not structured according to the Voting Agreement. If Grayson has the ability to nominate Daniels' replacement, it arises only through contract and not through any fiduciary duty owed to all shareholders. As this Court has previously stated, where the question is simply whether a contract granted a corporate official the right to act in a certain manner, the matter is one of contract interpretation.<sup>27</sup>

For this reason, the breach of fiduciary duty claim in Count II is dismissed.

This conclusion is buoyed by the inability of Count II to be maintained independently of the contract claim in Count I. Grayson cannot prevail under any of the four alleged breaches of fiduciary duty unless he can first show that the Voting Agreement was breached—the very subject of Count I.<sup>28</sup> For example,

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<sup>27</sup> *Nemec v. Shrader*, C.A. Nos. 3878-CC, 3939-CC, 2009 WL 1204346, at \*4 (Del. Ch. Apr. 30, 2009) (finding that whether defendants had the right to redeem plaintiffs' common shares was simply a matter of contract interpretation, and did not give rise to a separate breach of fiduciary duty claim).

<sup>28</sup> Three possible exceptions exist. First, Collins may have breached a fiduciary duty owed to the Company by disconnecting Grayson from the board meeting. Because Grayson was unquestionably a legitimate member of the board, he had the right to participate regardless of the Court's findings on the Voting Agreement. But this does not seem to be the heart of Grayson's claim. The real claim Grayson seems to be asserting in Count II is that Kittelson, not Grayson, was denied status as a director and denied the ability to participate. *See, e.g.*, Compl. ¶ 71 ("Collins' acts in denying Kittelson's status as a director and approving the interested transactions constitute a breach of his fiduciary duties as a director and/or officer of the

Collins cannot be found to have breached his fiduciary duty by causing iStation to breach its contractual obligations under the Voting Agreement if the Voting Agreement was not violated. Collins similarly cannot have breached his fiduciary duty by excluding Kittelson from the board meeting and appointing Thomas unless the Voting Agreement granted Grayson the right to replace Daniels with Kittelson at the board meeting. Because the success of Count II completely hinges on whether Collins breached the Voting Agreement, Count II cannot be maintained independently of Count I, and is therefore duplicative.

Grayson, however, attempts to rely on *Schuss v. Penfield Partners, L.P.* to maintain Count II, where this Court held that a fiduciary claim is not duplicative of a contract claim if it depends on additional facts, is broader in scope, and involves

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Company.”). The complaint only mentions the fact that Grayson was not allowed to participate in ¶ 72(c) which states that Collins denied both Grayson and Kittelson the ability to participate; the rest of the complaint seems to be aimed more at the exclusion of Kittelson. Because the heart of Count II concerns Kittelson’s ability to participate as a director, and not Grayson’s, the resolution of the matter turns on the Voting Agreement, and Count II is thus a duplicative claim. Second, Collins may have breached his duty of loyalty by entering into an unfair transaction with the Company. Again, this does not seem to be the heart of Count II. The complaint is chiefly concerned with Collins’ actions denying Kittelson a seat on the board, and only seems to mention the Loan Transaction as a motive. Grayson provides no evidence as to why the Loan Transaction is unfair to iStation, but rather focuses on Kittelson’s exclusion.

Finally, Collins may have breached a duty owed to Grayson as a director by disconnecting him from the board meeting. Directors generally have a duty to deal fairly, openly, and honestly with one another. *See, e.g., Adlerstein v. Wetheimer*, 2002 WL 205684, at \*11 (Del. Ch. Jan. 25, 2002) (holding directors cannot use trickery or deceit to prevent another director from exercising his rights). Whether Collins breached this duty to Grayson need not be addressed because Count II only alleges “Collins’ actions violated his fiduciary duties to Grayson as a stockholder . . . .” Because Grayson only asserts Collins breached a duty owed to him as a shareholder, and not as a director, I need not address whether a duty owed to Grayson as a director was breached.

different potential remedies.<sup>29</sup> Grayson argues that the facts of Count II go beyond those of Count I because Count II alleges Collins manipulated and interfered with the voting process to ensure that Kittelson was not on the board, and thereby violated his fiduciary duty to the Company and Grayson as a shareholder. This argument is unavailing because Grayson only has a contractual right to elect a second member to the board; thus, any alleged interference with Grayson's designated director sounds in contract and cannot support a breach of fiduciary duty claim.

Grayson further argues the remedies for Count II are different from those sought under Count I. He contends that Count II seeks disgorgement of benefits by Collins and reimbursement of costs incurred by the Company, while Count I only seeks to void the acts taken at the September 2009 board meeting. The Voting Agreement, however, states that the sole remedy for breach of contract is specific enforcement.<sup>30</sup> Therefore, if Grayson is successful under Count I, the remedy would be to void any actions of the board taken while the board was structured in violation of the Voting Agreement. Counts I and II accordingly provide Grayson with the same remedy if he ultimately is successful. Although Count II does additionally ask for Collins to reimburse iStation for its costs, this alone is

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<sup>29</sup> 2008 WL 2433842, at \*10 (Del. Ch. June 13, 2008).

<sup>30</sup> Voting Agreement ¶ 6.

insufficient to transform a breach of contract claim into a breach of fiduciary duty claim. Thus, Grayson's reliance on *Schuss* is to no avail; these circumstances distinguish this case from *Schuss*. Because I conclude that Grayson's breach of fiduciary duty claim in Count II is duplicative of his breach of contract claim in Count I, Count II is dismissed.

### **III. CONCLUSION**

For the reasons given above, I deny defendants' motion to dismiss Grayson's violation of Section 141 claim in Count III, and I grant defendants' motion to dismiss Grayson's breach of fiduciary duty claim in Count II.

**IT IS SO ORDERED.**