

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

GEORGE DEARLOVE, and
ANNAREGINA ROBERTS

Plaintiffs,

v.

GENZYME TRANSGENICS CORPORATION,

Defendant.

: November Term, 2001

: No. 1031

:

: Commerce Program

:

: Control No. 081218

ORDER

AND NOW, this 9th day of July 2003, upon consideration of the Motion for Summary Judgment filed by defendant, GTC Biotherapeutics, Inc. f/k/a Genzyme Transgenics Corporation (“GTC”), the plaintiffs’ response in opposition, GTC’s reply, the respective memoranda, after oral argument, all matters of record, and in accord with the contemporaneous Opinion filed of record, it is hereby **ORDERED** that the Motion is **Denied**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. July 9, 2003

Defendant, GTC Biotherapeutics, Inc. f/k/a Genzyme Transgenics Corporation (“GTC”), has filed a Motion for Summary Judgment to dismiss plaintiffs’ class action Complaint. The court has considered the parties’ memoranda of law, as well as the presentations at oral argument. For the reasons set forth, this court will issue a contemporaneous Order denying the Motion for Summary Judgment.

FACTS

The operative facts may be briefly stated. Plaintiffs, George Dearlove and Annaregina Roberts, filed this putative class action alleging that GTC canceled the plaintiffs' stock options, originally granted to them pursuant to GTC's 1993 Equity Incentive Plan ("Plan"), in violation of that Plan. Compl., ¶¶ 29-31.

GTC is a biopharmaceuticals company with its headquarters and principal place of business at 175 Crossing Boulevard, Framingham, Massachusetts. Compl., ¶ 3. Previously, GTC owned a subsidiary called Primedica Corporation, also a biotechnology company with its headquarters and principal place of business in Worcester, Massachusetts. Compl., ¶ 5. GTC also previously owned Primedica's five subsidiaries: Primedica Worcester, Inc., Primedica Cambridge, Inc., Primedica Argus Research Laboratories, Inc., Primedica Redfield, Inc., and Primedica Rockville, Inc. Compl., ¶ 4. (Primedica Corporation and its subsidiaries will be referred to, collectively, as "Primedica.")

Plaintiffs have been and currently are employees of Primedica Argus Research Laboratories, Inc. Compl., ¶ 4; Def's Motion, p. 9. In February 1996, Mr. Dearlove entered into a Severance Agreement with GTC, Primedica's parent corporation at the time. Def's Motion, Green Aff., Ex. 8.

In 1993, GTC instituted an incentive stock option plan entitled the 1993 Equity Incentive Plan ("Plan") to award stock options to employees of GTC and its Affiliates. Compl., ¶¶ 6, 9. The Plan stated that its purpose was to "attract and retain key employees and consultants to provide an incentive for them to assist [GTC] to achieve long-range performance goals, and to enable them to participate in the long-term growth of [GTC]." Pltfs' Response, Ex. 2, §1.

The Plan defined “Affiliate” to mean any business entity in which GTC owned directly or indirectly 50% or more of the total combined voting power or had a significant financial interest. Pltfs’ Response, Ex. 2, §2. Under this definition, Affiliate included Primedica, and therefore, GTC awarded stock options pursuant to the Plan to employees of Primedica, including plaintiffs.

During the period from 1993 until 2000, GTC issued stock options to George Dearlove eight times, in different amounts and at varying prices per share. Compl., ¶ 6 and Exs. A, B (Notice of Grant of Stock Options and Option Agreement, reflecting some stock options which would expire on May 19, 2005 and some of which would expire on May 24, 2010); Def’s Motion, p. 10 and Nagle Aff., Ex.1; Pltfs’ Response, Ex. 20. During that same time period, GTC issued stock options to Annaregina Roberts seven times, in different amounts and at varying prices per share. Compl., ¶ 6; Def’s Motion, p. 10 and Nagle Aff., Ex.1; Pltfs’ Response, Ex. 21. GTC gave plaintiffs several documents each time it issued these stock options, including a Notice of Grant of Stock Options and Option Agreement, the Plan Prospectus, and Incentive Stock Option Terms and Conditions (also known as the reverse side of the “Incentive Stock Option Certificate” or “Award Agreement”). Compl., ¶¶ 7-8 and Ex. C, p. 5; Pltfs’ Response, Exs. 20, 21; Def’s Motion, p. 10.

In 1993, GTC’s Board of Directors established a Compensation Committee (“Committee”). Pltfs’ Response, Ex. 4. Alan Tuck and Henry Blair have served as voting members of the Committee since 1993, and Francis J. Bullock has served as a voting member of the Committee since 1994. Def’s Motion, Tuck Aff., ¶ 1; Blair Aff., ¶ 1; Bullock Aff., ¶ 1. (Mr. Bullock has served as the chairman of the Committee since 1996 or 1997. Pltfs’ Response, Bullock Dep., p. 131.)

On February 6, 2001, GTC entered into a Stock Purchase Agreement with Charles River Laboratories International, Inc. (“Charles River”) to sell all of the capital stock of Primedica.¹ The closing of the sale occurred on February 26, 2001, and Primedica became and remains a subsidiary of Charles River. Def’s Motion, p. 9. (GTC states that it has never had any corporate affiliation with Charles River. Def’s Motion, p. 9.) Significantly for plaintiffs, the Stock Purchase Agreement states that all options issued by GTC to optionees, other than to certain identified individuals holding management positions, would terminate according to the terms of the options. Def’s Motion, Green Aff., Ex.1.

On March 9, 2001, GTC contends that it notified Primedica employees who held stock options that they had until May 26, 2001 to exercise their options that were vested as of February 26, 2001, the date that the sale of Primedica to Charles River closed. Def’s Motion, Nagle Aff., Ex. 4. Plaintiffs dispute that GTC gave such notice to any Primedica employee from Pennsylvania. In any event, stock options held by Primedica employees which were not exercised by May 26, 2001, were canceled by GTC. Compl., ¶ 31. Specifically, if an optionee held a stock option that was vested as of February 26, 2001, and the optionee did not exercise it by May 26, 2001, GTC canceled that option. If an optionee held a stock option that was unvested as of February 26, 2001, GTC determined that the option could not be exercised and canceled it. Def’s Motion, p. 11. On May 26, 2001, GTC canceled stock options held by plaintiffs. Def’s Motion, pp. 12-13; See also Def’s Motion, Nagle Aff., Ex. 6.

¹ TSI Corporation held Primedica’s capital stock and GTC, in turn, held TSI’s capital stock, so TSI was another party to the Stock Purchase Agreement for the sale of Primedica. Def’s Motion, Green Affidavit, Ex. 1 (Stock Purchase Agreement); Pltfs’ Response, Bullock Dep., p. 13.

On November 13, 2001, Dearlove and Roberts filed the Complaint on behalf of a putative class which they assert includes “all employees of Primedica Corporation and it[s] subsidiaries who, as of February 7, 2001, had been awarded stock options and who had not yet exercised their options.” Compl., ¶ 13. The Complaint alleges three counts against defendant GTC: breach of contract, breach of covenant of good faith and fair dealing, and unjust enrichment. Compl., ¶¶ 28-36; 37-42; 43-47.

Defendant filed this motion for summary judgment, and plaintiffs filed a response in opposition. Defendant filed a reply to the response and oral argument on the motion ensued.

DISCUSSION

The parties agree that Massachusetts law applies to plaintiffs’ claims because the Plan at issue states that it is governed by and should be interpreted in accordance with the laws of the Commonwealth of Massachusetts. Pltfs’ Response, Ex. 2, §12(e) (Plan provision regarding governing law). However, the procedural law of the forum state provides the rules by which the court applies the substantive law. Crawford v. Manhattan Life Ins. Co. of New York, 208 Pa. Super. 150, 162 n.2, 221 A.2d 877, 884 n.2 (1966).

Under Pennsylvania law, a proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed, or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95, 100 (Pa. Super. 2001), *appeal denied*, 569 Pa. 714, 806 A.2d 857 (2002). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, the defendant may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. “Summary judgment is proper when the pleadings, depositions, answers to interrogatories,

admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may be granted only in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.” Id. (citations omitted); See also Aggarwal v. Nexabit Networks, Inc., Civ. A. No. 99-6174, 2001 WL 34032503, *8 (Mass.Super. May 30, 2001) (summary judgment standard is the same under Massachusetts law).

Under Massachusetts law, the interpretation of a contract is generally a question of law. Suffolk Construction Co. v. Lanco Scaffolding Co., Inc., 47 Mass.App.Ct. 726, 729, 716 N.E.2d 130, 133 (Mass.App.Ct. 1999). An unambiguous contract “must be enforced according to its terms.” Woolf v. Sapient Corp., No. 99-1421, 2001 WL 34038577, *3 (Mass.Super. Feb. 2, 2001). A court may determine that a contract’s terms are ambiguous, however. “A contract provision is ambiguous ‘only if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one.’” EMC Corp. v. Kempel, 14 Mass. L. Rptr. 131, 2001 WL 1763451, *6 (Mass.Super. Nov. 20, 2001) (citation omitted). “When an element of ambiguity does appear in a contract, the Court considers the entire instrument and the general scheme it reveals to determine the significance and meaning of the ambiguous terms.” Id. (citation omitted). “The object of the Court is to construe the contract as a whole, in a reasonable and practical way, consistent with its language, background and purpose.” Id. (citation omitted). “Even in the case of an ambiguous agreement, interpretation is a matter of law for the Court except insofar as it may turn on facts in genuine dispute.” Id., citing Gross v. Prudential Ins. Co. of America, Inc., 48 Mass.App.Ct. 115, 119 (1999), *review denied*, 430 Mass. 1114 (2000). Also, under Massachusetts law, “every contract contains an implied covenant of good faith and fair dealing that neither

party will do anything to deprive the other of the fruits of the contract.” Aggarwal, 2001 WL 34032503, at *8.

GTC urges that plaintiffs’ breach of contract claim fails as a matter of law because the stock options issued by GTC to plaintiffs terminated upon GTC’s sale of Primedica to Charles River and were properly canceled pursuant to the Plan, the Plan Prospectus and the Award Agreement. Def’s Motion, pp. 19-21. Thus, it is these documents which must be analyzed.²

Since 1993, the Plan was amended several times. GTC has provided the court with the Plan as amended by the Board of Directors on March 1, 2000, as well as the Plan as amended by the Board of Directors on March 7, 2001. Def’s Motion, Blair Aff., Ex. 1. Plaintiffs have provided the court with what appears to be an earlier version of the Plan. Pltfs’ Response, Ex. 2. Despite the three versions, the pertinent provisions of each version of the Plan are the same.

Upon review of the Plan with respect to the terms and conditions of exercising a stock option, the Plan directs the optionee to the Award Agreement. The Plan states:

Each Option shall be exercisable at such times and subject to such terms and conditions **as the Committee may specify in the applicable Award** or thereafter. The Committee may impose such conditions with respect to the exercise of the Options, including conditions relating to applicable federal or state securities laws, as it considers necessary or advisable.

Pltfs’ Response, Ex. 2, §6(c) (emphasis added); Def’s Motion, Blair Aff., Ex.1, §6(c) (emphasis added).

² GTC has also submitted affidavits for the court to consider. Plaintiffs request that the affidavits be stricken on the basis that they state general conclusions and contain only “one-sided, self-serving understandings, intentions, interpretations, and expectations.” Pltfs’ Response, pp. 23-24. The court declines to strike the affidavits at this time.

The Plan gives the Committee discretion with respect to an option held by an optionee whose employment is terminated. The Plan states:

The Committee shall determine the effect on an Award of the disability, death, retirement or other termination of employment of a Participant and the extent to which, and the period during which, the Participant's legal representative, guardian or Designated Beneficiary may receive payment of an Award of exercise rights thereunder.

Pltfs' Response, Ex. 2, §11(f); See also Def's Motion, Blair Aff., Ex.1, §11(f) in first Plan and §12(f) in second Plan (contains slight variation). However, the Committee's discretion to amend or terminate an outstanding Award Agreement is limited, as the Plan states:

The Committee may amend, modify or terminate any outstanding Award, including substituting therefor another Award of the same or a different type, changing the date of exercise or realization and converting an Incentive Stock Option to a Nonstatutory Stock Option, provided that the Participant's consent to such action shall be required unless the Committee determines that the action, taking into account any related action, would not materially and adversely affect the Participant.

Pltfs' Response, Ex.2, §11(j); Def's Motion, Blair Aff., Ex.1, §11(j) in first Plan and §12(j) in second Plan.

Finally, in the event of litigation, the Plan states that its provisions "shall be governed by and interpreted in accordance with the laws of the Commonwealth of Massachusetts." Pltfs' Response, Ex. 2, §12(e); Def's Motion, Blair Aff., Ex.1, §12(f) in first Plan and §13(f) in second Plan.

The Plan Prospectus, which summarizes certain provisions of the Plan, similarly directs the optionee to the Award Agreement for the terms of exercising an option, as it states:

The Award Agreements [sic] limit the exercise of options following termination of employment with the Company, including termination by reason of disability or death, to short periods of time and provide for the termination of options that were not exercisable at the time employment terminated.

Compl., Ex. C, p. 6.

Because both the Plan and the Prospectus direct the optionee to the Award Agreement, the court finally looks to the Award Agreement which is actually the reverse side of the Incentive Stock Option Certificate. Pltfs' Response, Ex. 3 (see both sides of the exhibit). As to the general terms of exercising an option, the Award Agreement states:

This Option may be exercised at any time and from time to time up to the number of shares and in accordance with the exercisability schedule set forth on the face of this certificate, but only for the purchase of whole shares. This Option may not be exercised as to any shares after the Expiration Date.

Pltfs' Response, Ex. 3, §3; See also Compl., Ex. D. The term "Expiration Date" is not defined within the text of the Award Agreement, but appears on the face of the Incentive Stock Option Certificate as a blank for a date to be inserted, presumably the last day of the full term of the option, as it was issued.

Significantly, Section 8 of the Award Agreement contains a specific provision relating to the exercise of an option after termination of employment, which states:

If the Optionholder's employment with (a) the Company, (b) an Affiliate, or (c) a corporation (or parent or subsidiary corporation of such corporation) issuing or assuming a stock option in a transaction to which section 424(a) of the Code applies, is terminated for any reason other than by disability (within the meaning of section 22(e)(3) of the Code) or death, the Optionholder may exercise the rights which were available to the Optionholder at the time of such termination only within three months from the date of termination. Notwithstanding the foregoing, no rights under this Option may be exercised after the Expiration Date.

Pltfs' Response, Ex. 3, §8 (emphasis added); See also Compl., Ex. D. It is this provision upon which GTC principally relies as the basis for its Motion. Def's Motion, pp. 19-20.

GTC argues that Section 8 of the Award Agreement unambiguously means that when it sold Primedica on February 26, 2001, Primedica ceased to be an Affiliate of GTC and plaintiffs' employment terminated. Def's Motion, p. 20; Blair Aff., ¶ 15; Bullock Aff., ¶ 13; Tuck Aff., ¶ 15. The Plan, as

incorporated by the Award Agreement, defines “Affiliate” as “any business entity in which the Company owns directly or indirectly 50% or more of the total combined voting power or has a significant financial interest as determined by the Committee.” Def’s Motion, p. 20; Pltfs’ Response, Ex.2, §2; Def’s Motion, Blair Aff., Ex.1, §2 in first Plan and §2 in second Plan. GTC contends that once it sold Primedica, Primedica ceased to be an Affiliate as GTC did not own any more than 2% of the outstanding stock of Charles River, and the Committee determined that GTC did not have any “significant financial interest” in Primedica or Charles River. Def’s Motion, p. 20. GTC argues that plaintiffs’ employment was terminated with GTC and its Affiliate, Primedica, when Primedica ceased to be an Affiliate. Def’s Motion, p. 20. GTC further asserts that according to Section 8 of the Award Agreement, plaintiffs could exercise only the rights which were available to them as of the termination date for a three month period of time beginning from the termination date. Def’s Motion, p. 21.

In response, plaintiffs argue that GTC’s reliance on Section 8 of the Award Agreement is misplaced because the plaintiffs’ employment never terminated. Pltfs’ Response, p. 25. Plaintiffs assert that after February 26, 2001, when the sale of Primedica closed, and until the present, they have remained employees of Primedica and continue to receive salary checks from Primedica. Pltfs’ Response, pp. 25-26 and Ex. 17. As plaintiffs state, “Plaintiffs’ employment did not ‘come to an end.’ What came to an end was Primedica’s ownership by defendant. But §8 does not address that.” Pltfs’ Response, p. 28.

Plaintiffs further argue that summary judgment is not appropriate because GTC’s analysis has no basis in the Plan or the Award Agreement. Pltfs’ Response, p. 29. Plaintiffs contend that GTC could have drafted the Plan or Award Agreement to say that an optionee only had a right to exercise a stock option if the optionee’s employer remained an Affiliate of GTC at the time of exercise, however GTC failed to do

so. Id. Because GTC drafted these contracts, plaintiffs argue that Massachusetts law requires that they be construed against GTC. Pltfs' Response, p. 28. Furthermore, plaintiffs assert that when an essential term of a contract is missing, the contract is ambiguous and must be interpreted by the factfinder. Pltfs' Response, p. 30.³

In addition, plaintiffs argue that GTC's position with respect to Mr. Dearlove's Severance Agreement precludes its position regarding Mr. Dearlove's stock options. In February 1996, Mr. Dearlove and GTC entered into an employment agreement entitled "Severance Agreement," which stated that in the event that Mr. Dearlove's employment was terminated without cause, then GTC would make severance payments to him. Def's Motion, Green Aff., Ex. 8. GTC has not paid Mr. Dearlove any severance on the basis that he was not terminated from his job. Pltfs' Response, Green Deposition, pp. 43-44. At the same time, GTC contends that Mr. Dearlove was terminated pursuant to Section 8 of the Award Agreement and his stock options were properly canceled. In other words, GTC determined that Mr. Dearlove was not terminated for purposes of the Severance Agreement, but terminated for purposes of his stock options. Plaintiffs argue that GTC's contradictory positions show that the meaning of the word "terminated" is not free from doubt. Pltfs' Response, p. 29.

Upon a review of the pertinent documents, this court agrees with plaintiffs that summary judgment on the breach of contract claim is not justified. The Plan and Award Agreement are ambiguous as to the status of unvested and vested options in the event that an Affiliate ceased to be an Affiliate of GTC.

³ Plaintiffs also argue that the contractual interpretation should take into account GTC's intentions in issuing stock options which were not just to retain key employees for future performance, but also to compensate for below-market pay and skipped raises based on past performance. Pltfs' Response, pp. 36-37.

Section 8 of the Award Agreement could have provided that if an Affiliate ceases to be an Affiliate, then the optionee's employment is deemed to have been terminated under the Plan. However, Section 8 of the Award Agreement does not make such a statement, and in the absence of a specific instruction the contract must be interpreted.

GTC's interpretation of Section 8 is not the only possible interpretation. Although the court declines to conclude exactly what Section 8 means for purposes of this Motion, Section 8 could be understood to address only the relationship between the optionee and the optionee's employer (ie., Dearlove and Primedica), rather than the relationship between the optionee's employer and the issuer of the options (ie., Primedica and GTC). Stated another way, it could be determined that while Section 8 references "Affiliate," the use of that term was merely to reflect the status of the optionee's employer at the time the option was granted, and that a subsequent cessation of an affiliation between Primedica, as an Affiliate, and GTC was irrelevant so long as the optionee continued to be employed by Primedica. Here, plaintiffs continued to be employed by Primedica, so that this interpretation of Section 8 could support their claims. Thus, whether GTC is entitled to summary judgment is not free from doubt.

Contrary to GTC's position, an interpretation of Section 8 favorable to plaintiffs is not contrived because Section 8 could be interpreted as a provision relevant only with respect to termination of an optionee's employment, not with respect to a sale of the optionee's employer by GTC. See Def's Motion, pp. 22-24. For example, Section 8 addresses the question of what happens to stock options held by an optionee who terminates employment by resigning from his or her employment with GTC or Primedica to become employed by another corporation.

Further, this court does not agree with GTC that an interpretation of Section 8 favorable to plaintiffs is contrary to federal law governing stock options. Def's Response, pp. 24-26. GTC contends that Section 8 was drafted to comply with Section 422 of the Internal Revenue Code and its implementing regulations, which provide an optionee with beneficial tax treatment of an incentive stock option. GTC argues that if Section 8 were interpreted to mean that the options never terminated when Primedica ceased to be an Affiliate of GTC, then the options would not satisfy Section 422. Def's Motion, pp. 24-26. This court is not persuaded by this argument, however, because it is not clear that plaintiffs' interpretation of Section 8 of the Award Agreement would fail to satisfy Section 422 of the Internal Revenue Code at the time they were awarded. Even assuming GTC is correct, it is not free from doubt that plaintiffs' contract claim should be dismissed as a matter of law. In addition, GTC's argument is somewhat ironic in that if Section 8 were to be interpreted in accordance with GTC's view, then satisfying Section 422 and ensuring that plaintiffs could claim beneficial tax treatment for the options would be irrelevant because GTC canceled the options.

Moreover, this court believes that the cases cited by GTC are distinguishable. In Berke v. Tambrands, Inc., 114 F.3d 1169 (1st Cir. (Mass.) 1997) (unpublished opinion), the First Circuit Court affirmed the district court's grant of summary judgment dismissing plaintiffs' claims relating to the cancellation of their stock options upon the defendant company's sale of the subsidiary for whom plaintiffs had worked. The Court held that dismissal was appropriate because the plaintiffs were no longer working for either the defendant company or the subsidiary that had been sold, and failed to satisfy the requisite two years of continuous employment to achieve vesting. In contrast, the plaintiffs in this case continue to be employed by Primedica.

In Miller v. American Home Products Corp., 1986 WL 10987 (N.D. Ill. 1986), the district court dismissed plaintiff Miller's claim that his stock options should not have been canceled upon the defendant company's sale of the subsidiary for whom he worked. In that case, the Stock Option Plan provided: "The option may not be exercised during the first year after the date of grant nor after the option is terminated as provided in paragraph (g) of this Section. One year after the date of grant of the option, the optionee may exercise the option at any time or in part from time to time provided the optionee has, at the date of exercise, been in the continuous employment of the company and/or one or more of its subsidiaries for at least two years." Miller, at *1. Six months after the options were granted, the defendant sold the subsidiary. The district court held that Miller was not employed by the company or a subsidiary of the company for a full year after the date of grant. Under the Plan's provisions, "Miller was not entitled to exercise his stock option because he had not held it for one year." Id. at *3. Miller is distinguishable because the Plan's language in that case provided that the optionee had to have been "in the continuous employment of the company and/or one or more of its subsidiaries for at least two years" to exercise an option. Here, Section 8 of the Award Agreement provides only that "If the Optionholder's employment with (a) the Company, (b) an Affiliate . . . is terminated for any reason other than by disability . . . or death, the Optionholder may exercise the rights which were available to the Optionholder at the time of such termination" Pltfs' Response, Ex. 3, §8; See also Compl., Ex. D. The language in Miller specifies actual employment, whereas the language in Section 8 leaves open the question of what is meant by termination.

Similarly, in Doherty v. American Home Products Corp., 2000 WL 777948 (2nd Cir. (Conn.) June 15, 2000) (unpublished opinion), the Second Circuit Court affirmed the district court's dismissal of the complaint which claimed that the defendant company ("AHP") had breached certain stock option agreements. The appellants had been employed by a subsidiary of the defendant company and were granted stock options by the company during that time. The relevant Stock Option Plans provided that "no Option may be exercised unless the optionee . . . is then employed by [AHP] or any of its subsidiaries and shall have been continuously employed by [AHP] or one or more of such subsidiaries since the date of the grant of his or her Option." Doherty, at *1. AHP later sold its interest in the subsidiary which employed the appellants. The Second Circuit Court held that "under the plain language of the Option Plans, appellants were entitled to exercise their options only while employed by a subsidiary of AHP. Thus, . . . when AHP sold its interest in CMS [the subsidiary], they were no longer entitled to exercise their options . . ." Doherty, at *2. Similar to the Miller case, the language of the Plans in Doherty specifies that in order to exercise an option, the optionees had to have been actually employed by the subsidiary at that time. Here, the language of Section 8 frames the issue in terms of "termination," the meaning of which is left ambiguous.⁴

⁴ In its Reply Brief, GTC cited Monsanto Co. v. Boustany, 73 S.W.3d 225 (Tex. 2002). In that case, the plaintiffs sued the defendant company for breach of contract, conversion and fraud based on the cancellation of stock options that had been granted to plaintiffs by the defendant. The plaintiffs worked for the defendant's subsidiary at the time the options were granted, and the defendant subsequently sold the subsidiary. Initially, the trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed based on its finding that the plaintiffs' employment had not terminated when the defendant sold its stock in its subsidiary. Finally, the Texas Supreme Court reversed the Court of Appeals.

The Texas Supreme Court applied Delaware law to its analysis of the Stock Option Plans and held that the sale of the subsidiary constituted a termination of plaintiffs' employment. The relevant

Furthrmore, GTC asserts that, even if the Plan and Award Agreement are ambiguous, the court must defer to the Committee’s good faith interpretation of the pertinent language in those documents because the Committee is given broad discretion to administer the Plan. Def’s Motion, pp. 28-32. The Plan states: “Except as otherwise provided by the Plan or a particular award, any determination with respect to an Award may be made by the Committee at the time of award or at any time thereafter.” Def’s Motion, Blair Aff., Ex. 1, §11(c); Pltfs’ Response, Ex. 2, §11(c). The Plan further states: “The Plan shall be administered by the Committee.” Def’s Motion, Blair Aff., Ex. 1, §3; Pltfs’ Response, Ex. 2, §3.

GTC urges that although there is no controlling Massachusetts authority, based on the caselaw in other jurisdictions, “a Court should defer to the board’s or committee’s interpretation, so long as the interpretation is not arbitrary or made in bad faith.” Def’s Motion, pp. 28-30. Plaintiffs agree that there is no controlling Massachusetts authority, but argue that under any standard of review, the court cannot give deference to the Committee’s determination because the Committee never made a determination that plaintiffs options should be canceled. Pltfs’ Response, pp. 42-43.

In GTC’s recitation of facts, it states that at a March 7, 2001, meeting of the Board of Directors, John Green, the Vice President and Chief Financial Officer of GTC, made a presentation to the Board, including the three voting members of the Compensation Committee, Francis J. Bullock, Alan Tuck and

Footnote 4 - continued

document provided: “The Option term will expire at the end of the day next preceding ten years from the Option Grant Date, or on Termination of Employment of the Optionee, whichever shall first occur . . .” Monsanto, at p. 230. The document defined “Termination of Employment” as “the discontinuance of employment of a participant for any reason other than a transfer.” Monsanto, at p. 230. This court admits that the language in Monsanto is similar to the language in Section 8. However, as the Monsanto case is not controlling law, this court is not bound by Monsanto and respectfully declines to apply its analysis to this case.

Henry Blair. Def's Motion, p. 15. At that presentation, GTC says that Mr. Green showed a "slide showing that 363,238 'Unvested Primedica Options' were available to award . . . [and] explained to the Board that those shares, which previously had been awarded to Primedica employees, were canceled upon the termination of the employment of the Primedica employees by GTC on February 26, 2001." Id. GTC states that at that March 7, 2001, meeting, "the Committee members approved, as consistent with the Plan, Mr. Green's inclusion of the unvested shares in his calculation of the number of options available for distribution." Id. Although the redacted minutes of the March 7, 2001, meeting does not reflect Mr. Green's slide, or any discussion of the termination of options held by Primedica employees, GTC provided affidavits by Messrs. Blair, Green and Tuck to support its position that on March 7, 2001, the Compensation Committee endorsed the termination of plaintiffs' options. Def's Motion, Blair Aff., ¶¶ 13-14 and Ex. 3 (Minutes of Meeting); Green Aff., ¶ 23 and Ex. 7 (Text of the Slide); Tuck Aff., ¶¶ 13-14.⁵

Plaintiffs assert that the Compensation Committee never determined, on March 7, 2001, or at any other time, that the termination of plaintiffs' options was appropriate, and that Mr. Bullock's deposition testimony reveals that the Committee never considered the issue. When asked whether the Committee members ever discussed the cancellation of plaintiffs' unvested stock options, Mr. Bullock stated that he could not recall such a discussion. Pltfs' Response, Bullock Dep., pp. 27-28. At the deposition, plaintiffs' counsel also questioned Mr. Bullock about his August 16, 2002, affidavit submitted in support of this motion for summary judgment. In the affidavit, Mr. Bullock stated: "In my capacity as a voting member of the Committee, I have determined that GTC's cancellation of the plaintiffs' unvested GTC stock options

⁵ Mr. Bullock's affidavit does not mention the March 7, 2001, meeting, although the minutes indicate that he was present at that meeting.

as of February 26, 2001, the requirement that the plaintiffs exercise their vested GTC stock options by May 26, 2001, and the expiry of the plaintiffs' unexercised vested stock options on May 26, 2001, all were in complete accordance with the terms and purpose of the Plan." Def's Motion, Bullock Aff, ¶ 13. When asked when he made these determinations, Mr. Bullock stated that he made these determinations "at the time we were preparing to file this affidavit," at some point between July 16, 2002 and August 16, 2002. Pltfs' Response, Bullock Dep., pp. 28-30. Plaintiffs conclude that Mr. Bullock, the chairman of the Compensation Committee and one of three voting members of the Committee, never endorsed the cancellation of plaintiffs' options until he was asked to write an affidavit for this litigation, and that the Committee never made any determination to which this court should give deference.

Aside from Mr. Bullock's testimony, there is additional evidence relating to whether the Committee made a determination. On February 6, 2001, GTC entered into a Stock Purchase Agreement to sell the capital stock of Primedica to Charles River. The Stock Purchase Agreement states that all options issued by GTC to optionees, other than to Mr. Glick and certain individuals holding management positions, would terminate according to the terms of the options. Def's Motion, Green Aff., Ex. 1. On February 26, 2001, the sale of Primedica closed. Therefore, prior to the March 7, 2001, meeting of GTC's Board of Directors at which GTC contends that the Compensation Committee endorsed the cancellation of plaintiffs' options, GTC had already entered into a Stock Purchase Agreement that stated that the plaintiffs' options would terminate. This suggests that the decision to terminate plaintiffs' options was made before GTC contends the Committee considered the issue. Even assuming that the Committee is entitled to deference, someone other than the Committee must have made the decision to terminate plaintiffs' options. Thus, this court declines to grant summary judgment in favor of GTC based on the argument that the court must defer to

the Committee.

In addition, GTC asserted at oral argument that plaintiffs' interpretation of Section 8 of the Award Agreement would nullify Section 5 of that Agreement. Section 5 provides that "the Optionholder shall not have any rights in respect of shares to which the Option shall not have been exercised and payment made." Pltfs' Response, Ex. 3, §5; See also Compl., Ex. D. GTC contends that plaintiffs' interpretation of Section 8 would mean that the options granted would vest at the time of grant, and would, in fact, give the Optionholder rights to shares, contrary to Section 5. The court does not find this argument persuasive because plaintiffs are not claiming rights to shares, but rather rights to exercise options following the sale of Primedica.⁶

The court turns next to plaintiffs' remaining two causes of action. As for plaintiffs' claim for breach of covenant of good faith and fair dealing, GTC argues this claim fails as a matter of law because plaintiffs have failed to establish that GTC injured their rights under the stock option Plan. Def's Motion, p. 39. GTC states that the plaintiffs' rights are contractual, and that if it is determined that GTC has satisfied its obligations under the Plan and the Award Agreement, then plaintiffs cannot, as a matter of law, show that GTC breached a duty of good faith and fair dealing. Def's Motion, pp. 39-40. This court declines to grant summary judgment on this claim, however, because just as for the contract claim, it is not free from doubt whether GTC properly canceled the plaintiffs' stock options.

⁶ Moreover, GTC's emphasis on the Committee's consistency in its interpretation of the Plan and Award Agreement as compared to its interpretation of those documents when GTC sold another subsidiary in 1995, and when GTC negotiated employment agreements with senior management, is not determinative of GTC's Motion. Def's Motion, pp. 33-36.

GTC contends that plaintiffs' third claim for unjust enrichment fails as a matter of law because plaintiffs have failed to show that GTC wrongfully retained any funds to which plaintiffs are entitled. Def's Motion, p. 40. GTC states that this unjust enrichment claim derives from the breach of contract claim, and should fail on the same basis that the breach of contract claim fails. Def's Motion, p. 41. Further, GTC contends that there is no evidence of any other basis to hold GTC legally obligated to expand the plaintiffs' stock option rights or to share the proceeds of the sale of Primedica with Primedica employees. *Id.* For purposes of summary judgment, it is not clear at this stage whether GTC properly canceled the plaintiffs' stock options. If it is found that GTC improperly canceled the plaintiffs' stock options, plaintiffs assert that GTC was unjustly enriched by gaining a "higher price for [Primedica] by failing to provide for preservation of plaintiffs' rights", having more options to award to other optionees, and by increasing the value of the options held by shareholders in having less options outstanding. Compl., ¶¶ 44-47; Pltfs' Response, p. 48. Accordingly, this court denies summary judgment on this claim as well.

CONCLUSION

For the reasons discussed, defendant's Motion for Summary Judgment is denied. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.