IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOSEPH NEMEC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 3878-CC
RALPH W. SHRADER, C.G. APPLEBY, GARY D. AHLQUIST, SHUMEET BANERJI, PETER BERTONE, MARTIN J. BOLLINGER, CHRISTIAN BURGER, FRANCIS J. HENRY, LLOYD W. HOWELL, JR., WILLIAM C. JACKSON, CHRISTOPHER M. KELLY, PAMELA M. LENTZ, JOSEPH W. MAHAFFEE, JOHN D. MAYER, HELMUT MEIER, PATRICK F. PECK, JOE SADDI, ERIC A. SPIEGEL, STEVEN B. WHEELER, AND BOOZ ALLEN HAMILTON INC.,	)	
	)	
Defendants.	)	
GERD WITTKEMPER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 3934-CC
RALPH W. SHRADER, C.G. APPLEBY, GARY D. AHLQUIST, SHUMEET BANERJI, PETER BERTONE, MARTIN J. BOLLINGER, CHRISTIAN BURGER, FRANCIS J. HENRY, LLOYD W. HOWELL, JR., WILLIAM C. JACKSON, CHRISTOPHER M. KELLY, PAMELA M. LENTZ, JOSEPH W.	)	

MAHAFFEE, JOHN D. MAYER,)
HELMUT MEIER, PATRICK F. PECK,)
JOE SADDI, ERIC A. SPIEGEL, STEVEN)
B. WHEELER, AND BOOZ ALLEN)
HAMILTON INC.,)
)
Defendants.)

MEMORANDUM OPINION

Date Submitted: March 30, 2009
Date Decided: April 30, 2009

Peter J. Walsh, Jr. and Scott B. Czerwonka, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Attorneys for Plaintiff Joseph Nemec.

Henry E. Gallagher, Jr. and Meredith L. Gaudio, of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware, Attorneys for Plaintiff Gerd Wittkemper.

David J. Teklits and Kevin M. Coen, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Everett C. Johnson, Jr., J. Christian Word, and Rebecca S. Giltner, of LATHAM & WATKINS LLP, Washington, D.C., Attorneys for Defendants.

CHANDLER, Chancellor

In this consolidated action, plaintiffs Joseph Nemec and Gerd Wittkemper allege that defendants Ralph W. Shrader, C.G. Appleby, Gary D. Ahlquist, Shumeet Banerji, Peter Bertone, Martin J. Bollinger, Christian Burger, Francis J. Henry, Lloyd W. Howell, Jr., William C. Jackson, Christopher M. Kelly, Pamela M. Lentz, Joseph W. Mahaffee, John D. Mayer, Helmut Meier, Patrick F. Peck, Joe Saddi, Eric A. Spiegel, and Steven B. Wheeler (collectively, "Directors") have breached their fiduciary duty of loyalty and that defendant Booz Allen Hamilton Inc. (the "Company" or "Booz Allen") has breached the implied covenant of good faith and fair dealing in connection with a retirement contract that was entered into between the Company and plaintiffs. In addition, plaintiffs also bring a claim of unjust enrichment against defendants. Defendants have responded by filing a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6). This is the Court's opinion on defendants' motion.

For the reasons set forth herein, I grant defendants' motion and dismiss all of plaintiffs' claims against defendants.

I. BACKGROUND

After nearly 36 years with the Company, Joseph Nemec retired from Booz Allen on March 31, 2006. At the time of his retirement, he ranked third in seniority among all Booz Allen partners. He was elected three times to the Company's board of directors, where he served on the Finance and Professional

Excellence Committees and chaired the Audit Committee. Gerd Wittkemper retired from Booz Allen on March 31, 2006, after nearly twenty years of service as a partner. Wittkemper built the foundation for Booz Allen's German business, and helped expand Booz Allen throughout Europe. He also led the establishment and growth of Booz Allen's successful Middle East business. Wittkemper was a member for nine years of Booz Allen's Worldwide Commercial Business Leadership Team, where he served as head of the Communications Media Technology practice and later as head of Booz Allen's European business. Another Booz Allen partner, defendant C.G. Appleby, referred to both Nemec and Wittkemper as "founding fathers" of Booz Allen's modern business.[1]

Booz Allen is a Delaware corporation, with headquarters in McLean, Virginia. It is a leading strategy and technology consulting firm providing services to government agencies, institutions, and infrastructure organizations. In July 2008, Booz Allen had approximately 300 stockholders, 21,000 employees, and annual revenues of approximately $4.8 billion. Originally founded as a partnership in 1914, Booz Allen has since changed its legal structure from a partnership to a Delaware corporation, retaining, however, the attitude and culture of a partnership, owned and led by a relatively small cadre of corporate officers, referred to as the "partners" of Booz Allen. The Directors served on Booz Allen's board of directors

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[1] Pls.' Compl. ¶ 40.

when the Company was presented with a game changing opportunity—a transaction with The Carlyle Group to sell Booz Allen's government business. At the time of the transaction, each of the Directors owned significant amounts of Booz Allen stock. Collectively, the Directors owned approximately 11% of the outstanding common stock of the Company at the time of the transaction.

Throughout their tenure, Nemec and Wittkemper, along with all other officers of the Company, were partially compensated with annual stock rights that could be converted into common stock of the Company. Nemec, at the time of his retirement, owned 76,000 shares of Booz Allen stock, comprising approximately 2.6% of the issued and outstanding stock of the Company. Wittkemper, upon his retirement, owned 28,000 shares of Booz Allen stock. The Booz Allen stock program (the "Stock Plan") under which the plaintiffs and the other "partners" acquired stock in the Company was initially adopted in 1988, and was amended by the Booz Allen board of directors in 1996. Under the Stock Plan, each retired officer held a "put" right, for a period of two years from the date of his or her retirement, to sell his or her shares back to the Company for book value. After the two-year put right expired, the Company had the right to redeem part or all of the retired officer's stock at book value. Nemec chose to retain all of his Booz Allen stock during the two-year period following his retirement. Wittkemper also

decided to retain most of his Booz Allen stock after retirement, but chose to exercise his option for part of his stock.

The transaction with The Carlyle Group began to emerge in early 2007. At that time, Booz Allen had two principal lines of business. One side of the Company provided consulting services to governments and governmental agencies, and the other provided services to commercial and international businesses. In February 2007, Booz Allen reorganized its two lines of business into separate business units: Government and Global Commercial. At that time, Booz Allen's leadership began considering a spin-off of one of those businesses.

During the summer of 2007, Booz Allen's firm leaders held discussions about a potential transaction in which Booz Allen would sell its government business. Discussions between Booz Allen and The Carlyle Group began around October 2007. In November 2007, The Carlyle Group submitted a proposal to purchase Booz Allen's government business for $2.54 billion. Booz Allen's board of directors then engaged in active discussions regarding the transaction.

In late 2007, the Booz Allen board convened a nominating committee, comprised solely of partners from the commercial side of the business, to select members for a board of a yet-to-be-formed company—Booz & Company, Inc. ("Booz & Co.")—that would operate Booz Allen's commercial business after completion of the sale to The Carlyle Group of Booz Allen's government business.

On January 16, 2008, the *Wall Street Journal* confirmed that Booz Allen was "in discussions to sell its government-consulting business to private-equity firm Carlyle Group," and that "the sale price will likely be around $2 billion."[2] Also in January 2008, it was reported that the deal was expected to close by March 31, 2008, the end of Booz Allen's fiscal year. With the transaction targeted to close by March 31, 2008, plaintiffs expected to participate in the benefits of the transaction, which was to be completed before any redemption of the plaintiffs' Booz Allen shares could have occurred. At some point before March 31, 2008, however, Booz Allen's board of directors and management decided to close the transaction past the target closing date of March 31, 2008.

In early March, 2008, Booz Allen's commercial partners nominated and elected a "shadow" board of directors to prepare for governing the new Booz & Co. commercial entity upon completion of the transaction. By this point in time, the purchase price of the transaction was set and the Booz Allen board and partners knew that the transaction would generate a transaction price of more than $700 per share to Booz Allen's stockholders. In March 2008, Booz Allen's board also preserved the status quo of Booz Allen's stock ownership. This was a departure from Booz Allen's usual practice and reflected the board's recognition that, with

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[2] Pls.' Compl. ¶ 19.

the transaction pending, the stock-ownership status quo should be maintained so as not to disfavor any existing stockholder.

The plaintiffs were well aware of how the transaction would benefit them. On March 10, 2008, in a conversation with Nemec, defendant Ralph Shrader, Booz Allen's chairman and CEO, gave his assurance that both Nemec and Wittkemper would remain as Booz Allen stockholders until the close of the transaction. Shrader stated that this was an "easy moral decision." Nevertheless, in April 2008, before the transaction was formally approved, Booz Allen redeemed plaintiffs' respective shares at the pre-transaction book value—$162.46 per share. At the time of the redemptions, there appeared to be no insurmountable impediments to the closing of the transaction. The board was awaiting the receipt of an IRS private opinion letter regarding the tax treatment of the deal and the completion of an audit for prior fiscal years, which had already been certified. Neither of these conditions was anticipated to be problematic or unlikely to occur within the ensuing days or weeks. But despite Shrader's assurances, plaintiffs' shares were redeemed.

Within weeks after the redemption of plaintiffs' shares, the Company moved forward with formal steps to complete the transaction. On May 15, 2008, Booz Allen entered into a merger agreement to sell its government business to The Carlyle Group. On May 16, 2008, Booz Allen announced publicly the sale of its

government business to The Carlyle Group for $2.54 billion. The Directors collectively owned more than 300,000 shares and the redemption of plaintiffs' shares added almost $6 million to the proceeds that they collectively received through the transaction.

II. ANALYSIS

This Court will dismiss a complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted only if it can be "determine[d] with 'reasonable certainty' that a plaintiff could prevail on no set of facts that can be inferred from the pleadings."[3] In ruling, the Court must accept the factual allegations in the complaint as true and make all reasonable inferences from those facts in the plaintiffs' favor.[4] Conclusory allegations, however, without supporting factual allegations, will not be accepted as true.[5] Under this standard, if plaintiffs plead any set of facts that would entitle them to relief, then the motion to dismiss must fail.

A. Plaintiffs' Claim Against the Directors for Breach of the Duty of Loyalty

Plaintiffs argue that because the Directors knew that they were awarding themselves millions of dollars when they redeemed plaintiffs' stock, while at the

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[3] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (quoting *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).
[4] *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 548 (Del. Ch. 2001).
[5] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995).

same time depriving plaintiffs of economic benefits, the Directors were acting in their own economic self-interest. Thus, contend plaintiffs, the Directors were acting in their own interests at the expense of the shareholders' interests, breaching their duty of loyalty to plaintiff shareholders. This argument fails for several reasons.

First, the relationship between plaintiffs and Directors is governed primarily by contract under the Stock Plan. According to Delaware law where a dispute "relate[s] to obligations 'expressly treated . . .' by contract[, it] will be governed by contract principles."[6] If the "fiduciary claims relate to obligations that are expressly treated" by contract then this Court will review those claims as breach of contract claims and any fiduciary claims will be dismissed.[7] Here, the facts underlying the cause of action alleging a breach of fiduciary duty are identical to plaintiffs' other causes of action. Plaintiffs allege that the Directors caused Booz Allen to improperly redeem plaintiffs' shares. Whether the Directors possessed the right to redeem plaintiffs' shares and whether the Directors properly exercised that

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[6] *Madison Realty Co. v. AG ISA, LLC*, 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001) (quoting *Moore Bus. Forms, Inc. v. Cordant Holdings Corp.*, C.A. No. 13911, 11-12 (Del. Ch. Nov. 2, 1995); *see also Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 828, 833 (Del. Ch. 2006) (dismissing the fiduciary duty claim against directors because "the complaint asserts contractual and fiduciary claims that arise from the same alleged facts and underlying conduct"); *Gale v. Bershard*, 1998 WL 118022, at *5 (Del. Ch. Mar. 3, 1998) (stating that "because the contract claim addresses the alleged wrongdoing by the board, any fiduciary duty claim arising out of the same conduct is superfluous").

[7] *Madison Realty*, 2001 WL 406268, at *6.

right is simply a matter of contract interpretation. For this reason alone, the fiduciary duty claim should be dismissed.[8]

Second, even if I were to analyze whether the Directors breached their fiduciary duty, plaintiffs' claim would still fail. The Directors do not owe separate and distinct fiduciary duties to plaintiffs. Plaintiffs' theory surmises that the Directors owed unique duties to them that would have been inconsistent with the Company and the other shareholders. The Court in *Gilbert v. El Paso* makes this point clear:

> [D]irectors 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 affect the interests of a particular shareholder subgroup, will, in certain instances, be unavoidable. Nonetheless, no wrongdoing will have occurred if the directors are able to justify the result as furthering a paramount or overriding corporate or shareholder interest.[9]

Here, although the Directors' action to redeem plaintiffs' shares negatively affected plaintiffs, the Directors' action was not contrary to the exercise of reasonable business judgment. In fact, plaintiffs chose to not even dispute whether the Directors made an informed and reasonable business decision. Moreover, had Booz Allen not exercised its option to redeem plaintiffs' shares, that fact would

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[8] *See, e.g., Madison Realty Co.*, 2001 WL 406268, at *6 (dismissing fiduciary duty claim because parties' dispute was governed by contract); *Gale v. Bershad*, 1998 WL 118022, at *1 (Del. Ch. Mar. 4, 1998); *Tubergen*, 906 A.2d 827, at 833.

[9] *Gilbert v. El Paso*, 1988 WL 124325, at *10 (Del. Ch. Nov. 21, 1988), *aff'd*, 575 A.2d 1131 (Del. 1990).

have reduced the value of the shares held by all of the other shareholders. Thus, because plaintiffs have not adequately pleaded sufficient facts to suggest that they were owed any separate or distinct fiduciary duties from the other shareholders or that the redemption of their shares was not in the best interests of the Company or its shareholders, or that the Directors acted contrary to the exercise of reasonable business judgment, their claim that the Directors breached their fiduciary duty should be dismissed.

B. Plaintiffs' Claim that Booz Allen Breached the Implied Covenant of Good Faith and Fair Dealing

The core of plaintiffs' argument is that in exercising its option to redeem plaintiffs' shares, Booz Allen did not have the obligation to redeem; it had a choice and by exercising that choice, to the plaintiffs' detriment, violated the implied covenant of good faith and fair dealing. Plaintiffs insist that when a contract confers discretion upon a party, that party is required to make the decision reasonably and in good faith.[10] Thus, plaintiffs argue, Booz Allen was required to

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[10] Plaintiffs rely on the following language in *Amirsaleh v. Board of Trade of City of New York*:

> The implied covenant is particularly important in contracts that endow one party with discretion in performance; *i.e.*, in contracts that defer a decision at the time of contracting and empower one party to make that decision later. Simply put, the implied covenant requires that the "discretion-exercising party" make that decision in good faith. *Amirsaleh v. Board of Trade of City of New York, Inc.*, 2008 WL 4182998, at *30 (Del. Ch. Sept. 11, 2008).

Plaintiffs, however, misconstrue the application of *Amirsaleh* in this case, which is factually different from *Amirsaleh* in that the Stock Plan specifically grants Booz Allen the right to exercise an option to redeem plaintiffs' shares. In addition, the Stock Plan did not grant Booz

exercise its option to plaintiffs' benefit. Plaintiffs, however, mischaracterize the parties' agreement under the Stock Plan. Plaintiffs' claim against Booz Allen for breach of the implied covenant is an attempt to alter the terms of the agreement under the Stock Plan so as to limit Booz Allen's negotiated contract rights.

The doctrine of the implied covenant of good faith and fair dealing "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain."[11] This Court, however, has cautioned that "imposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare."[12] Additionally, parties "cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement."[13] Here, the Stock Plan specifically grants Booz Allen the right to redeem plaintiffs' shares at the end of two years after plaintiffs' retirement. The Stock Plan states:

> If an Officer ceases to be an employee of the Company or its subsidiaries by virtue of retirement . . . the Company shall have the right, exercisable at any time following the expiration of twenty-four

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Allen unilateral discretion under the contract. Plaintiffs, for the first two years after their retirement, had the original option to force the Company to purchase their shares, an option which for the most part they chose not to exercise. Under the Stock Plan, the Company is equally entitled to exercise its bargained-for option at a time it believes most beneficial to its interests.

[11] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005).

[12] *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006).

[13] *Dunlap*, 878 A.2d 434, at 442.

> months from such event, to purchase all or any portion of the Class A Non-Voting Common Stock held by Officer . . . at the Repurchase Price in effect at the date of the exercise of the Company's right.[14]

The Stock Plan is a negotiated instrument entered into freely by both parties. The implied covenant is not implicated simply because Booz Allen, by exercising its option, received the fruits of the agreed to bargain under the Stock Plan. Nor is the implied covenant implicated because the exercise of the option had negative effects on plaintiffs' bottom line. Plaintiffs also received their negotiated benefit of the Stock Plan by receiving a substantial payment from the Company upon the exercise of the Company's option. Both parties understood the nature of the bargain they had negotiated and the risk that the outcome of the arrangement may benefit one party over the other. This is the nature of derivative contracts. Contractually negotiated put and call rights are intended by both parties to be exercised at the time that is most advantageous to the party invoking the option. To assume the opposite would be illogical and detrimental to the freedom of contract. Thus, I conclude that plaintiffs have failed to state a cognizable claim that Booz Allen violated the implied covenant of good faith and fair dealing.

C. Plaintiffs' Unjust Enrichment Claim

Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles

[14] Ex. A § 10(b).

of justice or equity and good conscience."[15] A claim for unjust enrichment arises under Delaware law when a party obtains a benefit and "it would be unconscionable to allow them to retain that benefit."[16] Delaware courts, however, have consistently refused to permit a claim for unjust enrichment when the alleged wrong arises from a relationship governed by contract.[17] Here, as stated above, the relationship between the parties is governed by the Stock Plan and Booz Allen properly exercised its bargained for option under the Stock Plan to redeem plaintiffs' shares. Plaintiffs cannot now maintain an unjust enrichment claim in the face of a valid and enforceable contract.[18] Thus, I conclude that plaintiffs' unjust enrichment claim must be dismissed.

III. CONCLUSION

While I sympathize with plaintiffs' sense of betrayal for not ultimately receiving the once-in-a-lifetime benefit they hoped for, plaintiffs entered into a negotiated contract and received the benefit for which they bargained. Plaintiffs' complaint fails to plead sufficient facts to support their claims that the Directors violated their fiduciary duty of loyalty, unjustly enriched themselves, or caused the

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[15] *Fleer Corp. v. Topps Chewing Gum, Inc*., 539 A.2d 1060, 1062 (Del. 1988).
[16] *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999) (quoting *Fleer Corp.* 539 A.2d at 1062).
[17] *Res. Ventures, Inc. v. Ress. Mgmt. Int'l, Inc.*, 42 F. Supp. 2d 423, 440 (D. Del. 1999); *ID Biomedical Corp. v. TM Techs.,* 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995) ("A party cannot seek recovery under an unjust enrichment theory if a contract is the measure of the plaintiff's rights.").
[18] *See, e.g., Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *8 (Del. Ch. Aug. 26, 2005) (stating that there can be no unjust enrichment claim where there is a governing contract).

Company to violate the implied covenant of good faith and fair dealing. Thus, I grant defendants' motion, under Rule 12(b)(6), and dismiss plaintiffs' complaints for failure to state a claim upon which relief can be granted. An order has been entered consistent with this decision.