IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

W.R. BERKLEY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 03C-12-146 WCC
v.	)	
	)	
GARY L. HALL,	)	
	)	
Defendant.	)	

Submitted: October 13, 2004
Decided: February 16, 2005

CORRECTED MEMORANDUM OPINION

Upon Plaintiff W.R. Berkley's Motion for Summary Judgment . GRANTED. Upon Defendant Gary L. Hall's Cross-Motion for Summary Judgment. DENIED.

David E. Brand, Prickett, Jones & Elliott, P.A., 1310 King Street, P.O. Box 1328, Wilmington, Delaware 19899-1328. Victoria A. Cundiff and Theodore A. Kittila, Paul, Hastings, Janofsky & Walker LLP., 75 East 55th Street, New York, New York 10022-3205. Attorneys for Plaintiff.

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CARPENTER, J.

After consideration of the parties' Cross-Motions for Summary Judgment, the Court will grant Plaintiff's Motion for Summary Judgment and deny Defendant's Motion.

I. Introduction

Gary L. Hall (the "Defendant") had been employed by Acadia Insurance Company ("Acadia"), a subsidiary of W.R. Berkley Corporation (the "Plaintiff" or "WRBC"), since 1992 and during that period of time was provided stock options for his performance and continued loyalty and commitment. On July 31, 2003, Defendant exercised nearly 7,000 WRBC incentive stock options, and realized approximately $180,000 in gains. Approximately two months later, Defendant gave Plaintiff notice that he would be leaving Acadia for a position with CNA Insurance Company ("CNA") which he commenced on October 13, 2003.

On October 20, 2003, WRBC's Compensation and Stock Option Committee (the "Committee") held a telephonic meeting and determined that the Defendant had engaged in "Noncompetitive Action" within 6 months of termination and exercised some of his options within that time frame. As a result, the Committee concluded that Defendant's actions invoked Plaintiff's right to recapture the profits Defendant had

derived under the 1992 Stock Option Plan (the "Plan") and its subsequent corresponding agreements (the "agreement").[1]

On December 15, 2003, Plaintiff initiated this litigation to enforce the agreement against Defendant and recapture the profits Defendant obtained by exercising his options. Subsequently, both Plaintiff and Defendant moved for summary judgment on August 23, 2004.

Plaintiff claims it is entitled to summary judgment because they have a legally enforceable option agreement which allows them to recapture the spread of approximately $178,925.06 plus prejudgment interest. Plaintiff argues that the options, exercised by Defendant, carried with them certain obligations, which were set forth in express terms in the agreement. Plaintiff contends that because Defendant chose to exercise the options within 6 months of leaving Acadia, and engaged in "Noncompetitive Action", he is obligated to repay the gains he realized.[2]

Defendant argues that the Court should grant summary judgment on his behalf contending that Plaintiff acted in bad faith in determining that he was obligated to repay the profits. More specifically, Defendant states that Plaintiff failed to consider

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[1]Plaintiff granted Defendant the option to purchase up to 2,700 shares in 1996; 3,500 shares in 1998; and 2,500 shares in 2000. All of the stock awards could be exercised by the Defendant at intervals spanning from 1999 until 2006.

[2]Incentive Stock Option Agreement § 4(f) (May 21, 1996).

whether CNA "engages in any business activities which are competitive to a material extent, with any substantial type or kind of business activities conducted by the Company as required by the option agreement."[3] In addition, Defendant asserts that the clause requiring repayment of the profits, amounts to an unenforceable penalty which seeks to punish Defendant's decision to breach the non-competition clause of the agreement.

II. Discussion

From all accounts, Mr. Hall was a trusted and highly regarded employee of Acadia, a regional property and casualty insurance company based in Maine but operating throughout New England. Acadia is a subsidiary of the Plaintiff, W.R. Berkley Corporation, an insurance holding company incorporated in Delaware and headquartered in Greenwich, Connecticut. At the time Mr. Hall decided to leave Acadia, he was Senior Vice President for marketing and field operations and was one of the top three senior officers of the company reporting directly to the President. Mr. Hall had joined Acadia in 1992 and had risen in the company to be in charge of its field operations.

In 1992, the Plaintiff adopted an incentive stock option plan as a reward and incentive to its key employees. The Plaintiff executed stock option agreements in

[3]Def.'s Mot. Summ. J. § 4 (Def.'s emphasis added) (referring to the specific language of the agreement § 4(f)).

1994, 1996, 1998, 2000 and 2002. The options would vest 3 to 5 years after being issued and would expire, if not executed, upon the termination of Mr. Hall's employment. The dispute here centers around the exercise of an option in July of 2003 to purchase 6,874 shares for $176,323.26. Based upon the market price of the stock at the time, this exercise resulted in a savings to the Defendant in the amount of $178,925.06. It is this "spread" that the Plaintiff is now seeking to recapture.

Shortly after exercising the above option, the Defendant, who appeared not to be seeking a change of employment, was contacted by a "recruiter" and began a series of interviews with CNA. In September of 2003, approximately two months after executing the option, Defendant accepted a position with CNA as its branch Vice President for New England. CNA agreed to compensate Mr. Hall in the amount of $187,000 per year with a signing bonus of $70,000 and a guaranteed annual incentive bonus of $60,000.00.

The stock option agreement executed by the Plaintiff contained a provision which allowed the company to seek reimbursement between the difference of the option price and the stock price if an individual left their employment within six months of the execution of the option. This provision stated:

> (c) [i]f (I) the Optionee terminates employment with the Company on account of a Noncause Termination and within six months of such termination engages in a Noncompetitive Action and (ii) within the

> period which began six months prior to the date of such termination of employment and which ends on such Optionee's Noncompetitive Action Date the Optionee exercises all or any portion of the Option, the Optionee shall, with respect to each share of Stock so purchased, pay to the Company, upon written demand of the Committee, in a single cash lump sum, the difference between (x) the average of the high and low selling prices of W.R. Berkley Corporation Common Stock on the exercise date and (y) the exercise price for such share.[4]

The agreement further reflects that the option rights are extinguished when these participants choose to engage in "Noncompetitive Action" without the Plaintiff's written consent. The relevant provision states that:

> if prior to or during the Exercise Period (i) an Optionee's service terminates for any reason other than a termination by the Company for Cause (a 'Noncause Termination') and (ii) within six months after such termination such person engages in a 'Noncompetitive Action' (as hereafter defined) without written consent of the Company, upon the first occurrence of such Noncompetitive Action (the 'Noncompetitive Action Date'), the Optionee's right to exercise the Option will terminate and all rights under this Agreement will cease.[5]

In order to clarify precisely the kind of action which rises to the level of "Noncompetitive Action", the agreement states that "an Optionee engages in a 'Noncompetitive Action' if such person, directly or indirectly . . . (i) . . . engages in any business activities which are competitive, to a material extent, with any

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[4]Incentive Stock Option Agreement § 5(c) (May 21, 1996).

[5]*Id.* at § 4(d).

substantial type or kind of business activities conducted by W.R. Berkley Corporation."[6]

Further, the agreement established a "Stock Option Committee" and expressly limited the scope of inquiry into the Committee's determinations regarding what constitutes "Noncompetitive Action" and when recapture is appropriate:

> (e) Whether employment has been terminated for the purposes of this Agreement and the reason for any such termination (including whether such termination is for Cause, or by reason of disability), and whether the Optionee has engaged in a Noncompetitive Action (and, if so, the Noncompetitive Action Date), will, at the *absolute discretion* of the Stock Option Committee of the Company's Board of Directors (the "Committee"), be determined by the Committee in accordance with the provisions of Section 4(f) hereof, whose determination will be *final, binding and conclusive*. If the Committee does not make a determination with respect to any of such foregoing events or occurrences in the case of the Optionee, such event or occurrence shall, for all purposes of this Agreement, be deemed to have not occurred.[7]

In addition, Plaintiff's Plan which provides the basis for the agreement, relegates all decisions regarding the agreement and the Plan to the Committee. The Plan states that the Committee shall have authority, in its discretion:

> (g) to prescribe the form or forms of the option agreements under the Plan (which forms shall be consistent with the Plan but need not be identical;
> (h) to adopt, amend, and rescind such rules and regulations as, in its

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[6]Incentive Stock Option Agreement § 4(f) (May 21, 1996).

[7]*Id.* at § 4(e) (emphasis added).

> opinion, may be advisable in the administration of the Plan; and (I) to construe and interpret the Plan, the rules and regulations and the option agreements under the Plan and to make all determinations deemed necessary or advisable for the administration of the Plan. *All decisions*, determinations and interpretations of the Committee shall be *final and binding* on all Optionees.[8]

Finally, the agreement reinforces the fundamental rule governing all stock option plans, which requires such plans include provisions so that the corporation may reasonably expect to receive the contemplated benefit from the grant of the options.[9] The "Incentive Stock Option Agreement"[10] states that it "is intended as an incentive and to encourage stock ownership by certain employees of the Company and of its subsidiaries in order to increase their proprietary interest in the Company's success and to encourage them to remain in the employ of the Company."[11]

The agreement provides that its recapture provisions are necessary to:

> minimize the substantial financial harm which the Optionee recognizes and agrees that the Company will sustain in the event that the Optionee's service with the Company is terminated by the Company for Cause or the Optionee otherwise engages in a Noncompetitive Action following a Noncause Termination, the Optionee agrees that if either such described event occurs, the Optionee will repay the following amount to the Company.[12]

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[8] 1992 Stock Option Plan, Art. II (as amended as of May 14, 1997) (emphasis added).

[9] *Beard v. Elster*, 160 A.2d 731, 737 (Del.1960).

[10] *See* Incentive Stock Option Agreement (May 21, 1996)

[11] Summary Plan Description p.3 (May 23, 1994).

[12] *Id.* at § 4(f).

There appears to be no dispute that the provisions of the agreement are reasonable, binding and an enforceable contract between the parties. The Court finds the provisions are not ambiguous or confusing and clearly established the rights and obligations of each party relating to the conduct controlled by the agreement.

There is also no question that the Defendant is a sophisticated businessman who had significant responsibility and authority during his tenure with the Plaintiff and now with his new company, CNA. There is no assertion that the Defendant was unaware of the above provisions or of the consequences of his decision and was confused or mislead by the repayment provision of this significant stock option benefit.

In fairness to the Defendant, however, it also appears clear that when he exercised the option he had no intention of leaving the employment of the Plaintiff. CNA's job was simply an opportunity that came along after the exercise of this option which the Defendant could not resist. Therefore, the Court does not intend to imply that Mr. Hall in any way has acted in bad faith or with evil or improper motive. The Defendant has made a logical and proper business decision for which there are consequences. Unfortunately the Defendant has failed to recognize those consequences and litigation has resulted.

In support of his contention, the Defendant makes two arguments. First, he asserts that the Plaintiff failed to act in good faith in determining that CNA was a material competitor of the Plaintiff whose activities would result in substantial financial harm. Secondly, he asserts the payback provisions of the agreement are simply a non-compete liquidated damage provision that is an unenforceable penalty. The Court finds both arguments to be without merit.

The parties agree that when a stock option committee is vested with final, binding and conclusive authority to determine a participant's right to receive or retain benefits, that decision made in accordance with the provisions of the agreement will not be second guessed by the Court absent a showing of fraud or bad faith.[13] The record before the Court simply does not support such a bad faith finding.

The Committee that made this decision was composed of three members with substantial business and insurance experience. They included Richard Merrill who was chairman of the Committee and who had been a Board member since 1994 and previously served as Executive Vice President of Prudential Insurance Company of America. The other two Committee members were Mark Brockbank, a former

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[13] *See Schwartz v. Century Circuit, Inc.*, 163 A.2d 793 (Del. Ch. 1960); *Maher v. N.E.C.A.- Local Union No. 313 I.B.E.W. Pension Trust Fund*, 1978 WL 4954 (Del. Ch.); *Gilbert v. El Paso Co.*, 490 A.2d 1050 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990); *McIntyre v. Philadelphia Suburban Corp.*, 90 F. Supp.2d 596 (E.D. Pa. 2000); *Weir v. Anaconda Co.*, 773 F.2d 1073 (10th Cir. 1985); *Nicely v. Bank of Virginia Trust Co.*, 277 WL 1791874 (Del. Ch.).

insurance underwriter and owner of a Lloyd's of London managing agency and George Daly, the former Dean of New York University's Stern School of Business. Prior to the meeting the Committee was provided a 48 page document reflecting the background of the Defendant as an employee of the Plaintiff, a description of the Defendant's new employment at CNA, and material relevant to the competitive nature of the two business entities. These documents reflect that while CNA is a larger nationwide insurance company, in the New England region primarily served by Acadia, both companies wrote millions of dollars in workmans compensation premiums, commercial multi-peril, commercial auto liability, ocean marine, inland marine and auto physical damage. Each company had sold over $160 million of insurance in the New England region with a significant overlap of business. During the meeting in house counsel were consulted and the Senior Vice President for Regional Operations was questioned regarding Mr. Hall's position and the business of CNA as to its potential threat to the business of the Plaintiff. This review ultimately lead to a unanimous decision that the option agreement had been breached and that the company should seek reimbursement.

The Defendant does not allege that any of the information contained in the "Merrill Affidavit" to be false or incorrect nor do they even argue that the companies are not competitive, since they clearly are. Defendant's argument is best

characterized as that the Committee should have done more and should have been more specific in its findings. However, the Court finds that this is such a clear cut case of a material and substantial competitive business that nothing more was required and clearly Plaintiff has not acted in bad faith in the decisions that have been made.

Finally, the Court is unpersuaded by the Defendant's liquidated damage argument. Counsel may put whatever spin they want on this provision, but to the Court it is simply a contractual obligation that requires a senior management employee to remain with the company for six months if he wants to retain the full benefit of the stock option. If he does so, the financial savings he realized with the purchase of the stock is his to keep regardless of his future employment. On the other hand, if he leaves before the end of the six month period, he must pay the market price of the stock. He knew of this obligation and simply now is asking the Court to free him of this responsibility. The Defendant's freedom of employment and his ability to seek or move to a new job was not abridged by the Plaintiff nor were there any limitations on the Defendant to seek any job he so desired. All that is being sought here is the repayment of the financial benefit provided by the Plaintiff to the Defendant when he decided to exercise the option to leave according to the terms of the option agreement. The Court finds that he is simply contractually obligated to do so.

While perhaps naive, the Court cannot end this opinion without at least questioning whatever happened to the business world of a person being bound by his word and accepting the consequences of his personal decision. When did we turn from a business environment of personal integrity to one of litigation simply for greed and self interest? If one ever hoped that a business world of high integrity existed, it is not evidenced by this litigation. What is clear to the Court is that this litigation can only be characterized as a desperate attempt by the Defendant to avoid an agreement entered into in good faith by all the parties. The Court will not condone the Defendant's conduct nor accept its legally creative arguments in this matter.

III. Conclusion

For the reasons set forth above, Plaintiff's Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.