

# Moukawsher & Walsh, LLC

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UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

DONALD E. BRIERE, JR., ET AL  
Plaintiffs,

V.

GARY D. MOORE and  
MOORE BENEFIT SYSTEMS, INC.

Defendants

CIVIL ACTION NO.

3:98 CV00983 (WWE)

JULY 10, 1998

A M E N D E D C O M P L A I N T

Jurisdiction and Venue

1. This action arises under the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1001 et seq. and 18 U.S.C. §1961, et seq. of the Racketeer Influenced and Corrupt Organizations act ("RICO").
2. This Court has jurisdiction over this action pursuant to ERISA §§501(a)(3), 501(a)(1)(B) and 501(a)(2), 29 U.S.C. §§ 1132 (a) (3), 1132 (a) (1) (B) , 1132 (a) (2) and pursuant to RICO under 29 U.S.C. §1964.
3. Venue of this action lies in the District of Connecticut pursuant to ERISA § 502 (e)(2), 29 U.S.C. § 1132 (e) (2) and pursuant to RICO under 29 U.S.C. §1965.

The Parties

4. The plaintiffs are all individuals now or formerly employed by a Connecticut corporation known as Emergi-Lite, Inc. (hereinafter "Emergi-Lite"). The plaintiffs are participants in and/or beneficiaries of a certain employee pension benefit plan sponsored by Emergi-Lite known as the Emergi-Lite, Inc. Savings and Security Plan, a plan intended to qualify as a 401(k) Profit Sharing Plan under Section 401(a), 401(k), and 501(a) of the Internal Revenue Code of 1985 as amended. (hereinafter " Plan"). The plaintiffs are each a "person" as that term is defined in §1961(3) of RICO.
5. At all relevant times herein, the defendant, Moore Benefit Systems, Inc., a Connecticut corporation (hereinafter "Moore Benefit Systems" or "MBS") was the

trustee or nominal trustee under the Plan and was the entity or nominal entity that acted as a co-administrator of the Plan, and exercised discretionary authority or discretionary control in the administration of the Plans and thus, at all relevant times, was a fiduciary within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21). Moore Benefit Systems is a “person” as that term is defined in §1961(3) of RICO. At all times relevant hereto, Moore Benefit systems maintained offices in Granby, Connecticut and Wellington, Florida.

6. At all relevant times herein, the defendant, Gary B. Moore, (hereinafter “Moore”) was a de facto trustee under the Plan and was a de facto entity that acted as a co-administrator of the Plan, and exercised discretionary authority or discretionary control in the administration of the Plans and thus, at all relevant times, was a fiduciary within the meaning of ERISA § 3 (21), 29 U.S.C. § 1002 (21). Moore is a “person” as that term is defined in §1961(3) of RICO. At all times relevant hereto, Moore Benefit systems maintained offices in Granby, Connecticut and Wellington, Florida.

7. Moore and Moore Benefit Systems are each an “enterprise” as that term is defined in § 1961(4) of RICO.

#### Facts

8. The Plan was established by Emergi-Lite July 1, 1985. Pursuant to an August 1, 1985 Agreement and Declaration of Trust (hereinafter “the First Trust Agreement”) Midlantic National Bank was named Trustee of the Plan and Emergi-Lite was named as record keeper of the Plan.

9. According to the Second Trust Agreement, the Trustee was to receive its instructions concerning the receipt and distribution of contributions and benefits from the record keeper and its investment instructions from the Plan participants.

10. Pursuant to a Trust Agreement dated March 25, 1986 (hereinafter “the Second Trust Agreement”), Central Fidelity Bank was named Trustee of the Plan and Brookfield Associates of America Ltd., was named record keeper.

11. According to the Second Trust Agreement, the Trustee was to receive its instructions concerning the receipt and distribution of contributions and benefits from the record keeper and its investment instructions from the Plan participants.

12. Pursuant to a Trust Agreement dated October 26, 1986 (hereinafter “the Third Trust Agreement”), Moore Benefit Systems was named Trustee of the Plan and Moore Benefit Systems was named record keeper.

13. According to the Third Trust Agreement, the Trustee was to receive its instructions concerning the receipt and distribution of contributions and benefits from the record keeper and its investment instructions from the Plan participants.

14. On information and belief, Moore Benefit Systems was created by Moore for the sole principal purpose of acting as an instrument through which he would act as trustee and a co-administrator under the Plan and by means of which he intended to and/or did commit the fraudulent and negligent acts set forth herein and, that furthermore, Moore was the president, a director and a shareholder of Moore Benefit Systems and Moore Benefit Systems was directly or indirectly under the complete dominance and control of Moore to such an extent that it had no separate, mind, will or existence of its own.

15. Moore Benefit Systems and Moore commenced a conspiracy, common enterprise and common course of conduct beginning on or about October 26, 1986, and pursued that conspiracy, common enterprise and common course of conduct until November 20, 1997. During the conspiracy, common enterprise and common course of conduct Moore and Moore Benefit Systems engaged in and affected interstate commerce through their travel between Florida and Connecticut, their use of the mails and their wire communications. The purpose

and effect of the conspiracy, common enterprise and common course of conduct complained of was, inter alia, to secretly convert the financial assets of the plan to the use and benefit of Moore Benefit Systems and/or Moore. Moore and Moore benefit systems carried out their conspiracy, common enterprise and common course of conduct by one or more of the following activities:

- a. At all times relevant hereto, Moore and/or Moore Benefit Systems assumed duties not allocated to them under the Third Trust Agreement including discretionary authority and control of Plan investment decisions, and Plan administration, including those regarding the receipt and distribution of Plan contributions and benefits.
- b. Between April, 1988 and August, 1997, Moore and/or Moore Benefit Systems diverted approximately \$1, 141, 973.00, which constituted the vast majority of the Plan's financial assets to Moore and/or Moore Benefit Systems own use.
- c. From April 1988 to November, 1997 Moore and/or Moore Benefit Systems knowingly deceived the plaintiffs concerning the amount of Plan assets through a regular and repeated series of material written and oral misrepresentations communicated to the plaintiffs using the mails and the telephone and knowingly concealed the true amount of assets of the Plan through the artifice of paying Plan benefits out of Plan contributions. Such written misrepresentations were contained in quarterly written reports issued to each of the plaintiffs between April 1988 and May 1997 setting forth false balances in their Plan accounts and reporting false earnings from fictitious investments consistent with the statements made by Moore and/or Moore Benefit Systems as set forth in a letter to Emergi-Lite dated November 20, 1997. Such oral misrepresentations were contained in telephone conversations with plaintiffs, including a telephone conversation with the plaintiff, Henry Dammeyer in early November, 1997 in which Moore knowingly misrepresented the balances in the

plaintiff Dammeyer's account and the reasons for the delay in distributing such amounts to him.

d. From April 1988 to November, 1997 Moore and/or Moore Benefit Systems knowingly filed false annual reports of employee benefits, Form 5500-C/R, reports made under oath and required to be filed with the United States Department of the Treasury.

16. In aid of carrying out the activities set forth in paragraph 14 above, Moore, on behalf of himself and Moore Benefit Systems, regularly traveled between Granby, Connecticut and Wellington, Florida.

17. Moore and Moore Benefit Systems were each a direct, necessary and substantial participant in the conspiracy, common enterprise and common course of conduct complained of herein and each of them acted as agent for each other in the course of the wrongdoing complained of.

18. When in the fall of 1997, Emergi-Lite's announced plans to terminate the plaintiffs' employment resulted in high demand for the withdrawal of assets from the Plan, Moore and/or Moore Benefits Systems in a writing dated November 20, 1997 addressed to Emergi-Lite admitted to having falsely reported the plan assets and the disposition of plan contributions since 1992, but claimed that the vast majority of the Plan assets were lost in a single investment he/they made in a California insurance company that was bankrupted in 1992, a material misrepresentation which Moore and/or Moore Benefit Systems made knowingly.

#### Statutory Violations and Breaches of Contract

19. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems failed to discharge their fiduciary duties with respect to the Plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants of the Plans and their

beneficiaries and defraying reasonable expenses of administering the Plans, in violation of ERISA §404 (a)(1)(A)(i), 29 U.S.C. §1104 (a)(1)(A)(i).

20. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems failed to discharge their fiduciary duties with respect to the Plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, in violation of ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B).

21. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems caused the Plan to engage in a transaction or transactions which they knew or should have known constituted direct or indirect transfers of assets of the Plan to, or use of assets of the Plan by, or for the benefit of, a party in interest, in violation of ERISA §406 (a) (1) (D), 29 U.S.C. §1106 (a) (1) (D).

22. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems dealt with assets of the Plan in their own interest or for their own account, in violation of ERISA § 406 (b)(1), 29 U.S.C. § 1106 (b) (1).

23. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems failed to diversify the investments of the Plan so as to minimize the risk of large losses in violation of ERISA § 404 (a) (1) (C), 29 U.S.C. § 1104 (a) (1) (C).

24. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems failed to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of law in violation of ERISA § 404 (a) (1) (D), 29 U.S.C. § 1104 (a) (1) (D).

25. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems acted in transactions involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan and/or the interests of the Plan participants and beneficiaries, in violation of ERISA § 406 (b) (2), 29 U.S.C. § 1106 (b) (2).

26. Defendants are liable to make good all the losses suffered by the Plans and the plaintiffs herein resulting from their breaches of their fiduciary obligations as described above, plus interest.

27. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems have engaged in or aided and abetted a pattern of criminal acts including, but not limited to, embezzlement from an employee pension benefit plan in violation of 18 U.S.C. §664; filing false statements in relation to a pension plan in violation of 18 U.S.C. §1027; engaging in interstate and/or foreign travel in aid of racketeering enterprises in violation of 18 U.S.C. §1952; mail fraud in violation of 18 U.S.C. §1341 and wire fraud in violation of 18 U.S.C. §1343. Each such act of racketeering activity has similar purposes, involved the same or similar participants and methods of commission and had similar results impacting upon similar victims, namely the plaintiffs, and thus constituted a “pattern of racketeering activity” as that term is defined in §1961(5) of RICO. Moore and Moore Benefit Systems agreed and conspired with each other to commit the above-referenced predicate acts of racketeering activity and to violate §1962(a) and (d) of RICO.

28. In violation of §1962(a) and (d) of RICO, Moore and Moore Benefit Systems conspired to derive and derived substantial proceeds through the above-referenced pattern of racketeering activity and conspired to use or invest and used and invested such proceeds in the operations of Moore and/or Moore Benefit Systems and/or the association-in-fact of Moore and/or Moore Benefit Systems.

29. As a direct and proximate result of the defendants' violations of §1962(a) and (d) of RICO, the plaintiffs have been injured in their business or property. Under the provisions of §1964 (c) of RICO, the plaintiffs are entitled to bring this action and to recover herein treble damages, the costs of bringing this suit and attorney's fees.

30. By the conduct described in paragraphs 12 through 18 above, Moore and/or Moore Benefit Systems have engaged in or aided and abetted a pattern of criminal acts including, but not limited to, embezzlement from an employee pension benefit plan in violation of 18 U.S.C. §664; filing false statements in relation to a pension plan in violation of 18 U.S.C. §1027; engaging in interstate and/or foreign travel in aid of racketeering enterprises in violation of 18 U.S.C. §1952; mail fraud in violation of 18 U.S.C. §1341 and wire fraud in violation of 18 U.S.C. §1343. Each such act of racketeering activity has similar purposes, involved the same or similar participants and methods of commission and had similar results impacting upon similar victims, namely the plaintiffs, and thus constituted a "pattern of racketeering activity" as that term is defined in §1961(5) of RICO. Moore and Moore Benefit Systems agreed and conspired with each other to commit the above-referenced predicate acts of racketeering activity and to violate §1962(c) and (d) of RICO.

31. In violation of §1962(c) and (d) of RICO, Moore and Moore Benefit Systems conspired to conduct and to participate in the conduct of the affairs of the enterprise of Moore and/or Moore Benefit Systems or, in the alternative, an association-in-fact of Moore and Moore Benefit Systems, and conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through the above-referenced pattern of racketeering activity.

32. As a direct and proximate result of the defendants' violations of §1962(c) and (d) of RICO, the plaintiffs have been injured in their business or property. Under the provisions of §1964 (c) of RICO, the plaintiffs are entitled to bring this action

and to recover herein treble damages, the costs of bringing this suit and attorney's fees.

Prayer for Relief

WHEREFORE, the plaintiffs pray that this Court:

1. Order the defendants to make restitution to the plaintiffs;
2. Order the defendants to correct the prohibited transactions in which they engaged;
3. Order the defendants to restore to the Plan all losses attributable to their fiduciary reaches including lost opportunity costs or interest thereon;
4. Order the defendants to pay to the plaintiffs attorney's fees and costs pursuant to 29 U.S.C. § 1132(g).
5. Order the defendants to pay interest to the plaintiffs;
6. Award the plaintiffs compensatory damages in an amount which may be proven at trial, together with pre-judgment interest shown at the maximum rate allowed by law;
7. Award to plaintiffs treble damages;
8. Award plaintiffs their costs and expenses incurred in this action, including reasonable attorneys', accountants' and experts' fees pursuant to 18 U.S.C. § 1964 (c).
9. Make such other and further orders for relief as the court may deem just.

