

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT DAYTON**

HILDA L. SOLIS , Secretary of Labor, United States Department of Labor,	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
GARY L. MERRITT , individually and as fiduciary of the BEMCORE, INC. EMPLOYEE INCENTIVE PLAN and BEMCORE, INC. and the BEMCORE, INC. EMPLOYEE INCENTIVE PLAN ,	:	
	:	
Defendants	:	
	:	

COMPLAINT

Plaintiff, Hilda L. Solis, Secretary of Labor, United States Department of Labor (the “Secretary”), alleges:

This action arises under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended, 29 U.S.C. Secs. 1001, *et seq.*, and is brought by the Secretary under ERISA Secs. 502(a)(2) and (5), 29 U.S.C. Secs. 1132(a)(2) and (5), to enjoin acts and practices which violate the provisions of Title I of ERISA, to obtain appropriate equitable relief for breaches of fiduciary duty under ERISA Sec. 409, 29 U.S.C. Sec. 1109, and to obtain such further equitable relief as may be appropriate to redress violations and to enforce the provisions of Title I of ERISA.

PARTIES

1. Plaintiff is the Secretary of the United States Department of Labor who has authority to bring this civil action under ERISA Secs. 502(a)(2) and (5), 29 U.S.C. Secs. 132(a)(2) and (5).

2. At all relevant times, Defendant Gary L. Merritt was a resident of the State of Ohio and was vice-president and part owner of Bemcore, Inc. .

3. At all relevant times, Defendant Bemcore, Inc. ("Bemcore") was an Ohio corporation located in Dayton, Montgomery County, Ohio. Bemcore is a tool and die company. Bemcore sponsors the Bemcore, Inc. Employee Incentive Plan ("the Plan"). Bemcore ceased operating on March 16, 2012.

JURISDICTION AND VENUE

4. This court has jurisdiction over this action pursuant to ERISA Sec. 502(e)(1), 29 U.S.C. Sec. 1132(e)(1).

5. Bemcore, Inc. Employee Incentive Plan is an employee pension benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. Sec. 1002(3), and is, therefore, subject to the coverage of the Act pursuant to Section 4(a) of ERISA 29 U.S.C. Section 1003(a).

6. Venue of this action lies in Southern District of Ohio, pursuant to ERISA Sec. 502(e)(2), 29 U.S.C. Sec. 1132(e)(2) because the Plan was administered in Montgomery County, Ohio, within this district.

DEFENDANTS and PARTIES IN INTEREST

7. At all relevant times, Defendant Gary L. Merritt was a fiduciary of the Plan within the meaning of ERISA Sec. 3(21)(A)(i) and (iii), 29 U.S.C. Sec. 1002(21)(A)(i) and (iii) and a party in interest to the Plan within the meaning of ERISA Secs. 3(14)(A) and (C); 29 U.S.C. Sec. 1002(14)(A) and (C).

8. At all relevant times, Bemcore was an employer and Plan Administrator and therefore a fiduciary of the Plan within the meaning of ERISA Sec. 3(21)(A); 29 U.S.C. Sec. 1002(21)(A) and a party in interest to the Plan within the meaning of ERISA Secs. 3(14)(A) and (C); 29 U.S.C. Sec. 1002(14) (A) and (C).

9. The Plan is named as defendant herein pursuant to Rule 19(a) of the *Federal Rules of Civil Procedure* solely to assure that complete relief can be granted.

GENERAL ALLEGATIONS

10. The Plan, established on January 1, 1989, is an employee pension plan that allows an employee to elect to defer a portion of his or her compensation and have that amount contributed to the employee's 401(k) account by the employer and plan's sponsor, Bemcore. Southwest Securities, Inc. ("Southwest") holds the Plan's assets; e.g the funds in the employee's 401(k) account.

11. At all relevant times, Defendant Merritt managed the day-to-day operations of Bemcore and the Plan and exercised discretionary authority and control with respect to the payment of participant salary deferrals into the Plan.

12. On August 26, 2010, Defendant Gary L. Merritt pled guilty to embezzlement and theft from an employee benefit plan and on November 24, 2010 was sentenced to 5 years' probation and ordered to pay restitution to the Plan. Defendant Merritt's criminal conviction prohibited him from acting as an administrator, fiduciary, officer, trustee, custodian, agent, employee or representative of any employee benefit plan. On December 2, 2010, the Employee Security Benefits Administration ("EBSA") notified Defendant Merritt of this prohibition.

13. At all relevant times, Bemcore was the Plan Administrator.

14. According to Southwest, as of July 6, 2012, the Plan has 9 participants and

\$152,246.14 in plan assets.

15. The last Form 5500 Report of Employee Benefit Plan filed with the Department of Labor was for the Plan year ending 2009.

16. The Plan has not been formally terminated.

COUNT I

Failure to Administer the Plan

17. Paragraphs 1 through 16 above are realleged and incorporated herein by reference.

18. Upon information and belief, from at least December 2, 2010 to the present, Defendant Merritt has not taken any fiduciary responsibility for the operation and administration of the Plan and its assets and, before December 2, 2010, Defendant Merritt did not provide for a successor individual or entity to administer the Plan.

19. Upon information and belief, from at least December 2, 2010 to the present, Defendant Bemcore has not taken any fiduciary responsibility for the operation and administration of the Plan and its assets and, before December 2, 2010, Defendant Bemcore did not provide for a successor individual or entity to administer the Plan.

20. By the conduct described in paragraphs 17 through 19 above, Defendants Merritt and Bemcore:

a. failed to discharge their 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 and its beneficiaries and defraying reasonable expenses of administering the Plan, in violation of ERISA Sec. 404(a)(1)(A), 29 U.S.C. Sec. 1104(a)(1)(A);

b. failed to discharge their 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 man acting in a 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 Sec. 404(a)(1)(B), 29 U.S.C. Sec. 1104(a)(1)(B); and

c. failed to discharge their duties with respect to the Plan solely in the interests of the participants and beneficiaries and in accordance with the documents and instruments governing the Plan insofar as such documents and instruments are consistent with ERISA, in violation of ERISA Sec. 404(a)(1)(D), 29 U.S.C. Sec. 1104(a)(1)(D).

COUNT II

Failure to Obtain a Fidelity Bond.

21. Paragraphs 1 through 16 above are realleged and incorporated herein by reference.

22. At all relevant times, Defendants Merritt and Bemcore failed to ensure that all fiduciaries of the Plan were bonded against losses to the Plan resulting from acts of fraud or dishonesty.

23. By the conduct described in paragraph 22, the Defendants Merritt and Bemcore violated ERISA Secs. 412(a) and (b), 29 U.S.C. Secs. 1112(a) and (b).

PRAYER FOR RELIEF

WHEREFORE, the Secretary prays for judgment:

A. Removing Defendant Bemcore and formally removing Defendant Merritt from their positions as fiduciaries with respect to the Plan and appointing an independent fiduciary to administer the Plan in order to effectuate its termination, and the distribution of Plan assets to the participants and beneficiaries;

B. Permanently enjoining Defendants Merritt and Bemcore from violating the provisions

of Title I of ERISA;

- C. Permanently enjoining Defendants Merritt and Bemcore from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan;
- D. Awarding the Secretary the costs of this action; and
- E. Ordering such further relief as is appropriate and just.

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/s/Maureen M. Cafferkey
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