

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

BENJAMIN MOORE & CO., a New Jersey Corporation,)	
)	
Plaintiff,)	Case No. 04-C-3299
)	
v.)	Judge Suzanne B. Conlon
)	Room 2325
)	
THE TRAVELERS INSURANCE COMPANY,)	Magistrate Judge
)	Geraldine Soat Brown
)	
Defendant.)	

**TRAVELERS INSURANCE COMPANY'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Defendant, TRAVELERS INSURANCE COMPANY ("TRAVELERS"), by and through its attorneys, Donald A. Murday, Elizabeth G. Doolin, Georgia L. Joyce, and CHITTENDEN, MURDAY & NOVOTNY LLC, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby move to dismiss Plaintiff's Complaint with prejudice. In support of its Motion, TRAVELERS states as follows:

1. Plaintiff filed a two-count Complaint against Defendant TRAVELERS, purporting to state claims against it for breach of fiduciary duty and "equitable relief as against a party in interest" pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.* A true and correct copy of Plaintiff's Complaint is attached hereto and incorporated by reference herein as Exhibit A.
2. Plaintiff's First Claim for Relief fails to state a claim for breach of fiduciary duty under ERISA.
3. Plaintiff's Second Claim for Relief fails to state a claim for equitable relief as against a

party in interest under ERISA.

4. Plaintiff's Complaint does not give TRAVELERS fair notice of the grounds of Plaintiff's purported claims against it.

5. Accordingly, this Court must dismiss Plaintiff's Complaint.

6. TRAVELERS Memorandum of Law in Support of its Motion is filed herewith.

WHEREFORE, for the reasons set forth above and in the corresponding Memorandum of Law in Support of this Motion, Defendant TRAVELERS INSURANCE COMPANY respectfully requests that this Court dismiss Plaintiff's Complaint with prejudice and with its costs awarded.

Respectfully submitted,

CHITTENDEN, MURDAY & NOVOTNY LLC

By: Georgia L. Joyce
One of the Attorneys for Defendant
TRAVELERS INSURANCE COMPANY

Donald A. Murday
Elizabeth G. Doolin
Georgia L. Joyce
CHITTENDEN, MURDAY & NOVOTNY LLC
303 West Madison Street, Suite 1400
Chicago, Illinois 60606
(312) 281-3600

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CLERK, U. S. DISTRICT COURT
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

BENJAMIN MOORE & CO., a New Jersey
Corporation,
Plaintiff,

vs.

THE TRAVELERS INSURANCE COMPANY,

Defendant.

040 3299

CASE NUMBER

JUDGE CONLON
MAGISTRATE JUDGE
GERALDINE SOAT BROWN

COMPLAINT

Complaint

ENGAD 800-631-6883
EXHIBIT
A

Plaintiff Benjamin Moore & Co., for its complaint against defendant The Travelers Insurance Company, states:

1. Plaintiff brings these claims under The Employee Retirement Income Security Act of 1974 ("ERISA") § 502(a)(2), 29 U.S.C. § 1132(a)(2) for appropriate relief under ERISA § 409, 29 U.S.C. § 1109, and under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).
2. This Court has jurisdiction pursuant to ERISA §§ 502(e)(1) and (f), 29 U.S.C. § 1132(e)(1) and (f).
3. Venue is proper pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because J.C. Licht Company 401(k) Profit Sharing Plan was administered in this district and the breaches complained of took place in this district.
4. Benjamin Moore & Co. ("Benjamin Moore") and J.C. Licht Company ("J.C. Licht") are employers engaged in commerce or in an industry or activity affecting commerce within the meaning of ERISA § 4(a), 29 U.S.C. § 1003(a).
5. The Benjamin Moore & Co. Retail Employee Savings & Investment Plan ("the Benjamin Moore Plan") is an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. § 1102 3(3).
6. The J.C. Licht Company 401(k) Profit Sharing Plan was an employee benefit plan within the meaning of ERISA § 3(3), 29 U.S.C. §

1102 3(3). The J.C. Licht Plan was merged into the Benjamin Moore Plan effective December 31, 2002 ("the J.C. Licht Plan").

7. Benjamin Moore is the administrator of the J.C. Licht Plan, and is a fiduciary with respect to the J.C. Licht Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

8. Defendant Travelers Insurance Company ("Travelers") issued contract number 929046-9446014 (5U) (the "Travelers Contract") to the trustees of the J.C. Licht Plan with a contract date of June 22, 1999.

9. During the time deposits to fund the J.C. Licht Plan were held under the Travelers Contract, Travelers was a fiduciary with respect to the J.C. Licht Plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) and a party in interest with respect to the J.C. Licht Plan within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

10. Travelers had discretionary authority and control over the Travelers Contract and the assets held under the Travelers Contract, including the authority to declare interest rates to be credited to assets deposited in certain funds, the authority to change the investment funds available under the Travelers Contract, the authority to select and determine the compensation of investment advisors and other service

providers to the investment funds available under the Travelers Contract, and the authority to determine surrender charges and market value adjustments paid upon transfer of funds from the Travelers Contract.

11. During the time deposits to fund the J.C. Licht Plan were held under the Travelers Contract, Travelers exercised its discretion to cause Travelers and its affiliates to receive profits from the funds invested under the Travelers Contract.

12. In October 2002, plaintiff notified Travelers that the J.C. Licht Plan was merging into the Benjamin Moore Plan effective December 31, 2002 and instructed Travelers that the entire fund balance held under the Travelers Contract for the J.C. Licht Plan should be liquidated and the assets transferred pursuant to certain wire instructions. Plaintiff asked Travelers to notify plaintiff of the final liquidated values and of any charges prior to liquidating the funds.

13. On January 3, 2003, Travelers transferred assets of \$1,661,137.99 to the J.C. Licht Plan and withheld surrender and penalty charges of \$85,591.13 without advising plaintiff as to the amount of the liquidation value and any charges or penalties.

I. First Claim For Relief: Breach of Fiduciary Duty

14. Plaintiffs incorporate paragraph 1 through 13.

15. Travelers breached the responsibilities, obligations or duties imposed upon fiduciaries by Title I of ERISA, 29 U.S.C. §§ 1001-1144.

WHEREFORE, plaintiff demands judgment in its favor and against defendant:

- A. Permanently enjoining defendant from further violating the ERISA provisions that are the subject of this complaint;
- B. For an accounting of all transactions regarding defendant and assets of the J.C. Licht Plan;
- C. Holding defendant personally liable to make good to the J.C. Licht Plan all losses to the J.C. Licht Plan resulting from defendant fiduciaries' breaches of its responsibilities, obligations and duties and to restore to the J.C. Licht Plan all profits made by defendant and those acting in concert with defendant through the use of the assets of the J.C. Licht Plan;
- D. Entering judgment in favor of the J.C. Licht Plan and against defendant for all compensatory damages;

E. Awarding to plaintiff its costs and disbursements of this action and reasonable attorneys' fees; and

F. Awarding such other and further relief as is just.

II. Second Claim For Relief: Equitable Relief Against A Party In Interest

16. Plaintiffs incorporate paragraph 1 through 13.

17. Travelers knowingly participated in a breach or violation of another person of the responsibilities, obligations or duties imposed by Title I of ERISA, 29 U.S.C. §§ 1001-1144.

18. In the alternative to paragraph 17, Travelers received assets of the J.C. Licht Plan which it did not purchase for value and without notice of a fiduciary's breach of the responsibilities, obligations or duties imposed by Title I of ERISA, 29 U.S.C. §§ 1001-1144.

WHEREFORE, plaintiff demands judgment in its favor and against defendant:

A. Entering judgment for restitution of all assets of the J.C. Licht Plan defendant received in violation of ERISA and disgorgement of all proceeds of all assets of the J.C. Licht

Plan defendant received in violation of ERISA and any profits derived therefrom;

- B. Awarding to plaintiff its costs and disbursements of this action and reasonable attorneys' fees; and
- C. Awarding such other and further relief as is just.

Dated: May 7, 2004.

Benjamin Moore & Co.

By: Robert H. Rhode
One of their attorneys

Robert H. Rhode, Esq.
bob@ sutkowskiandrheads.com
P 309.680.8000 F 309.680.8005

Dean B. Rhoads, Esq.
dean@ sutkowskiandrheads.com
P 309.680.8000 F 309.680.8004

Edward F. Sutkowski, Esq.
ed@ sutkowskiandrheads.com
P 309.680.8000 F 309.680.8002

Sean M. Anderson, Esq.
sean@ sutkowskiandrheads.com
P 309.680.8000 F 309.680.8007

SUTKOWSKI&RHOADS LLP
124 Southwest Adams Street, Suite 560
Peoria, Illinois 61602-1357
P 309.680.8000 F 309.680.8001

Certificate of Service

The undersigned certifies that a copy of the foregoing complaint was served upon the Secretary of Treasury, 1111 Constitution Avenue, N.W., Washington, D.C. 20224 and the Secretary of Labor, 200 Constitution Avenue, N.W. Washington, D.C. 20210 by enclosing the same in an envelope, postage-prepaid, certified mail, and depositing said envelope in a United States Post Office Mail Box at Peoria, Illinois on May 7, 2004.

Robert H. Rhoads