

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA**

THOMAS E. PEREZ, SECRETARY OF LABOR, :	:	
UNITED STATES DEPARTMENT OF LABOR, :	:	
	:	
Plaintiff, :	:	
	:	
v. :	:	Civ. A. No.
	:	
DAVID KEPHART, TIMOTHY KEPHART, :	:	
KEPHART TRUCKING COMPANY, and :	:	
The KEPHART TRUCKING COMPANY 401(K) :	:	
PLAN, :	:	
	:	
Defendants. :	:	

COMPLAINT

Thomas E. Perez, Secretary of Labor, United States Department of Labor, hereby alleges:

Jurisdiction and Venue

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

2. This Court has subject matter jurisdiction over this action pursuant to Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1).

3. The Kephart Trucking 401(k) Plan ("the Plan") is an employee benefit plan within the meaning of Section 3(3) of ERISA, 29 U.S.C. § 1002(3), and is therefore subject to the coverage of the Act, pursuant to Section 4(a) of ERISA, 29 U.S.C. § 1003(a). The Plan is

administered in Bigler, Pennsylvania.

4. Venue with respect to this action lies in the Western District of Pennsylvania, pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2).

The Parties

5. The Secretary, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. §§ 1132(a)(2) and (5), has the authority to enforce the provisions of Title I of ERISA by, among other means, the filing and prosecution of claims against fiduciaries and others who commit violations of ERISA.

6. At all relevant times, Kephart Trucking Company (“the Company”) has been the Plan Sponsor and Plan Administrator of the Plan. At all relevant times, the Company has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan’s assets and had discretionary authority or discretionary responsibility in the administration of the Plan. The Company, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (C) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (C).

7. At all relevant times, David Kephart has been the Treasurer and Secretary of the Company and Joint Trustee of the Plan. At all relevant times, David Kephart exercised authority or control respecting management or disposition of the Plan’s assets and had discretionary authority or discretionary responsibility in the administration of the Plan. David Kephart, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (H) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (H).

8. At all relevant times, Timothy Kephart has been the President and Vice President of the Company and Joint Trustee of the Plan. Timothy Kephart made decisions regarding the Plan, including decisions as to the disposition of plan assets, and performed functions of a plan administrator. At all relevant times, Timothy Kephart has exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets and had discretionary authority or discretionary responsibility in the administration of the Plan. Timothy Kephart, therefore, is a fiduciary of the Plan within the meaning of Section 3(21) of ERISA, 29 U.S.C. § 1002(21), and a party-in-interest as that term is defined in Sections 3(14) (A) and (H) of ERISA, 29 U.S.C. §§ 1002(14) (A) and (H).

9. The Plan is joined as a party defendant 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 Company established the Plan on or about January 1, 1988. The Plan permits participants to contribute a portion of their pay to the Plan as elective salary deferrals ("employee contributions") through payroll deductions.

11. For payroll periods between September 2011 and the present ("the relevant periods"), the Company has deducted money from the participants' pay as employee contributions and participant loan repayments to the Plan. The Company failed to remit to the Plan employee contributions and participant loan repayments deducted during the relevant periods.

12. Unremitted employee contributions and participant loan repayments are assets of the Plan within the meaning of ERISA. Defendants David Kephart, Timothy Kephart, and the

Company failed to segregate the Plan assets from the general assets of the Company.

13. David Kephart and Timothy Kephart failed to ensure that the Plan assets described in paragraph 12, *supra*, were collected by the Plan.

14. Timothy Kephart and the Company participated knowingly in or knowingly undertook to conceal acts or omissions of each other and David Kephart that they knew to be violations of ERISA.

15. David Kephart, Timothy Kephart, and the Company failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and enabled the others to commit breaches of ERISA.

16. Timothy Kephart and the Company knew that they and David Kephart had violated ERISA, but did not make reasonable efforts under the circumstances to remedy the others' breaches.

Violations

17. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-16 inclusive.

18. By the actions and conduct described above, Defendants David Kephart, Timothy Kephart, and the Company, as fiduciaries of the Plan:

- a. failed to ensure that all assets of the Plan were held in trust by one or more trustees, in violation of Section 403(a) of ERISA, 29 U.S.C. § 1103(a);
- b. failed to ensure that the assets of the Plan did not inure to the benefit of the Company in violation of Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1);
- c. 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 their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A);

- d. 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 person 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 Section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104(a)(1)(B);
- e. failed to discharge their duties in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I and IV of ERISA in violation of Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D);
- f. caused the Plan to engage in transactions which they knew or should have known constituted the direct or indirect transfer of Plan assets to, or use of Plan assets by or for the benefit of a party-in-interest, in violation of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D); and
- g. dealt with assets of the Plan in their own interest or for their own account, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b) (1).

19. By participating knowingly in the fiduciary breaches of the others, knowing such acts or omissions to be breaches of fiduciary duty, the Company and Timothy Kephart are liable

for each other's and David Kephart's breaches of fiduciary responsibility, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

20. By failing to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and thereby enabling the others to commit breaches of ERISA, David Kephart, Timothy Kephart, and the Company are liable for the others' breaches of fiduciary responsibility, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

21. By failing to make reasonable efforts under the circumstances to remedy the others' breaches of which they had knowledge, Timothy Kephart and the Company, as fiduciaries of the Plan, are liable for each other's and David Kephart's fiduciary breaches, pursuant to Section 405(a)(3) of ERISA, 29 U.S.C. § 1105(a)(3).

Prayer for Relief

WHEREFORE, the Secretary prays that this Court:

- a. Order David Kephart, Timothy Kephart, and the Company to restore to the Plan all losses, including interest or lost opportunity costs, which were caused by their fiduciary misconduct;
- b. Require the Plan to set off any individual account balances of David Kephart and Timothy Kephart against the amount of losses, including interest or lost opportunity costs, resulting from their fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), and reallocating the account balances to the non-breaching participants, if the losses are not otherwise restored to the Plan by defendants;
- c. Remove David Kephart, Timothy Kephart, and the Company as fiduciaries of the Plan and of any employee benefit plan for which David Kephart, Timothy

Kephart, and the Company act as fiduciaries;

- d. Permanently enjoin David Kephart, Timothy Kephart, and the Company from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;
- e. Permanently enjoining David Kephart, Timothy Kephart, and the Company from exercising any custody, control, or decision making authority with respect to the assets of any employee benefit plan covered by ERISA;
- f. Appoint an independent fiduciary with plenary authority and control with respect to the management and administration of the Plan, including the authority to marshal assets on behalf of the Plan, to pursue claims on behalf of the Plan, and to take all appropriate action for the termination of the Plan and the distribution of benefits to the Plan's participants and beneficiaries, with all costs to be borne by the defendants;
- g. Order the defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary with all of the books, documents, and records relating to the finances and administration of the Plan, and to make an accounting to the Secretary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;
- h. Award plaintiff, Secretary of Labor, the costs of this action; and
- i. Award such other relief as is equitable and just.

Respectfully submitted,

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