

**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. :

CONSENT JUDGMENT

Plaintiff, Thomas E. Perez, Secretary of Labor, United States Department of Labor (“Secretary”), has filed a Complaint in this action pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, alleging certain violations by each of the above-captioned defendants.

Counsel for the Secretary has engaged in settlement discussions with defendants David Kephart, Timothy Kephart, and Kephart Trucking Company (“the Company”). The parties have agreed to resolve this case without further litigation. The defendants waive service, answering the Complaint, and consent to the entry of this Consent Judgment against them by this Court, the terms of which are set forth herein:

1. The Secretary’s Complaint alleges that defendants David and Timothy Kephart and the Company violated Sections 403, 404, and 406 of ERISA, 29 U.S.C. §§ 1103, 1104, and 1106 and are liable as co-fiduciaries under Section 405 of ERISA, 29 U.S.C. § 1105. The Kephart Trucking Company 401(k) Plan (“the Plan”) was included in the Complaint as a Rule 19 defendant only so that complete relief could be granted.
2. For purposes of this Consent Judgment, the defendants admit that the Court has jurisdiction over them and the subject matter of this action.

3. The Secretary has agreed to resolve all claims asserted in the Complaint against the defendants for the relief set forth below.

4. The Secretary, David and Timothy Kephart and the Company understand and agree that entry of this Consent Judgment is without prejudice to the Secretary's right to investigate and redress violations of ERISA, if any, not alleged in the Complaint, including the Secretary's right to institute future enforcement actions with respect to any other such matter or any other employee benefit plans. It is further understood that this paragraph shall not constitute a waiver by the defendants of any defenses, legal or equitable, to any such future action.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that:

- a. This Court has jurisdiction over this action and the defendants.
- b. Timothy Kephart shall restore the greater of \$142,341 or the balance of his individual Plan account to the Plan as restitution and shall further restore \$22,025 to the Plan for the costs and expenses of the independent fiduciary. The total amount Timothy Kephart shall restore to the Plan is \$164,366.
- c. David Kephart shall restore the greater of \$67,811 or the balance of his individual Plan account to the Plan as restitution and shall further restore \$22,025 to the Plan for the costs and expenses of the independent fiduciary, to the extent Timothy Kephart does not restore the costs and expenses of the independent fiduciary to the Plan. If Timothy Kephart restores the costs and expenses of the independent fiduciary to the Trust, the total amount David Kephart shall restore to the Plan is \$67,811. If Timothy Kephart fails to restore \$22,025 to the Plan to cover the costs of the independent fiduciary, David Kephart shall restore \$67,811 plus \$22,025, for a total of \$89,836 to the Plan.
- d. David and Timothy Kephart are participants in the Plan. The Plan is hereby amended to allow forfeiture of the individual Plan accounts of David and Timothy Kephart to the extent necessary to satisfy paragraphs (b) and (c) and to permit the

reallocation and distribution of the restitution to Plan participants. This Order shall be attached to the Plan document as an amendment.

- e. The Plan shall set off the individual account balance of Timothy and David Kephart, if any, against the amount of the losses, including lost opportunity costs, resulting from their fiduciary breaches, as authorized by 29 U.S.C. § 1056(d)(4), and in accordance with paragraphs (b) and (c) above, if the losses are not otherwise restored to the Plan by defendants David and Timothy Kephart;
- f. If the individual Plan accounts of David and Timothy Kephart are less than the total amount necessary to restore the full amount of \$232,177 to the Plan, David and Timothy Kephart shall pay the deficiency out of other personal assets within thirty (30) days of entry of this consent judgment.
- g. David and Timothy Kephart represent and warrant that they are or were married. David and Timothy Kephart's spouses or ex-spouses has each waived any right he or she may have had to qualified joint and survivor annuity/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205 (c) of ERISA, 29 U.S.C. § 1055(c). A copy of their executed waivers are attached as Exhibits A and B,
- h. The Plan shall redistribute the restitution to the Plan participants in amounts necessary to restore their losses incurred as a result of the fiduciary breaches alleged in the Complaint. David and Timothy Kephart waive their right to receive any restitution which is owed to them as a result of their fiduciary breaches. No part of the restitution amount shall be redistributed to the individual account balance of David or Timothy Kephart.
- i. The Plan shall provide to the Regional Director of EBSA satisfactory proof of the reallocations of the Defendants accounts and satisfactory proof of each subsequent payment made to the Plan, within 7 days of such reallocation and each subsequent payment. Satisfactory proof of the reallocation shall include, at a minimum, copies of records maintained by a the Plan's third party record keeper before and after the

reallocation demonstrating the reallocation from the Defendants' accounts to the accounts of other participants, or (in the case of reallocation to former participants or their beneficiaries) checks written to those participants, or transfers of funds to IRAs established in their names, together with a statement in writing from the Plan Administrator that appropriate 1099Rs will be issued reflecting the reallocations.

Satisfactory proof of the payments by the Defendants shall consist, at a minimum, of documentation obtained from a third party service provider that confirm that the Defendants have made payments to the plan in the form of wire transfers or checks that have cleared, and the amount of such payments. Such proof shall be sent to the Regional Director, EBSA, U.S. Department of Labor, 170 S. Independence Mall West Suite 870 West, Philadelphia, PA 19106.

- j. Upon receiving proof of the restitution payment, the Secretary shall assess a penalty against David and Timothy Kephart of \$ which represents 20 percent of the applicable recovery amount of \$46,435 pursuant to ERISA § 502(l), 29 U.S.C. § 1132(l). David and Timothy Kephart waive their right to contest the assessment of said penalty, but reserve their right to request a penalty waiver.
- k. David and Timothy Kephart are removed as Trustees of the Plan and the Company is removed as the Plan Administrator. David and Timothy Kephart are removed from all fiduciary positions with the Plan.
- l. Metro Benefits, Inc. is appointed as the independent fiduciary of the Plan with plenary authority over Plan administration, management and disposition of the Plan's assets, including termination of the Plan. Metro Benefits, Inc. shall be compensated not more than \$22,025 for the performance of its duties and costs incurred, in accordance with the terms set forth in Exhibit C. That amount shall be paid from Plan assets but David and Timothy Kephart shall reimburse the Plan in that same amount as provided in paragraph (b) herein.

- m. David Kephart, Timothy Kephart, and the Company are permanently enjoined from serving as trustee, fiduciary, advisor, or administrator to any employee benefit plan, as that term is defined at Section 3(3) of ERISA, 29 U.S.C. § 1002(3). David Kephart, Timothy Kephart, and the Company are permanently enjoined from serving in any capacity that involves decision-making authority or custody or control of the moneys, funds, assets, or property of any employee benefit plan.
- n. Defendants are permanently enjoined from violating any provisions of ERISA in the future.
- o. If David Kephart, Timothy Kephart, or the Company files for any form of bankruptcy prior to the full payment of restitution to the Plan, they will: (1) ensure that any assets of the Plan are segregated from and not commingled with the debtor's estate; (2) not oppose any proof of claim that the Secretary files in the bankruptcy proceeding for any amount still owing; and (3) not oppose an adversarial action that the Secretary may file against David or Timothy Kephart to have the debt to the Plan declared non-dischargeable.
- p. The Secretary and the defendants shall each bear their own costs, expenses, and attorneys' fees incurred to date in connection with any stage of this proceeding, including but not limited to, attorneys' fees which may be available under the Equal Access to Justice Act, as amended.
- q. This Consent Judgment shall operate as a final disposition of all claims asserted by the Secretary against the defendants in the Complaint.
- r. Nothing in this Consent Judgment is binding on any governmental agency other than the United States Department of Labor.
- s. This Court retains jurisdiction of this action for purposes of enforcing compliance with the terms of this Consent Judgment.
- t. The Court directs the entry of this Consent Judgment as a final order.

Date: _____

Defendants David Kephart, Timothy Kephart,
Kephart Trucking Company, and
The Kephart Trucking Company 401(K) Plan
waive service and answer of the Complaint and
consent to entry of this Consent Judgment



David Kephart

Timothy Kephart

Kephart Trucking Company

By: _____
Timothy Kephart, President

The Kephart Trucking Company 401(k) Plan


By: _____
David Kephart, Trustee

M. Patricia Smith
Solicitor of Labor

Linda Thomasson
Acting Regional Solicitor

Joanne Roskey
Regional Counsel for ERISA

Ashton S. Phillips
Attorney

U.S. Department of Labor
Office of the Solicitor
170 S. Independence Mall West
Suite 630 E, The Curtis Center
Philadelphia, PA 19147
(215) 861-5142 (t)
(215) 861-5162 (f)
phillips.ashton@dol.gov
jarquin.joanne@dol.gov
zzsol-phi-docket@dol.gov

Attorneys for Plaintiff

United States District Judge

Defendants David Kephart, Timothy Kephart,
Kephart Trucking Company, and
The Kephart Trucking Company 401(K) Plan
waive service and answer of the Complaint and
consent to entry of this Consent Judgment

M. Patricia Smith
Solicitor of Labor

Linda Thomasson
Acting Regional Solicitor

Joanne Roskey
Regional Counsel for ERISA

David Kephart



Timothy Kephart

Ashton S. Phillips
Attorney

Kephart Trucking Company

By: 

Timothy Kephart, President

U.S. Department of Labor
Office of the Solicitor
170 S. Independence Mall West
Suite 630 E, The Curtis Center
Philadelphia, PA 19147
(215) 861-5142 (t)
(215) 861-5162 (f)
phillips.ashton@dol.gov
jarquin.joanne@dol.gov
zzsol-phi-docket@dol.gov

The Kephart Trucking Company 401(k) Plan

By: _____
David Kephart, Trustee

Attorneys for Plaintiff

AND NOW, this 10th
day of September, 2014
IT IS SO ORDERED. 

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
Case 3:13-cv-00269-KRG Document 10 Filed 09/11/14 Page 1 of 2

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. :

EXHIBIT A

CONSENT OF SPOUSE TO WAIVER OF BENEFITS

Kephart Trucking Company 401(K) Plan
(hereinafter, the "Plan")

I, Tommy J. Kephart declare that:

1. I am the wife of David Kephart and hereby consent to my husband's waiver of all rights to receive any benefit payments and return of contributions from the Plan, including my interest in receiving survivorship benefits under the Plan for that amount.

2. This waiver constitutes an effective waiver of any right I may have to that portion of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(c).

Date: 08-25-14

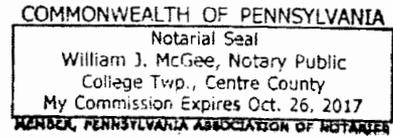
Tommy J. Kephart
Signature

Sworn and subscribed before me

this 25 day of Aug, 2014



My Commission Expires: 10-26-17



(Knowingly and willfully making false, fictitious, or fraudulent statements to the United States Department of Labor is punishable under Title 18, §1001, United States Code.)

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

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UNITED STATES DEPARTMENT OF LABOR, :

Plaintiff, :

v. :

Civ. A. No. :

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KEPHART TRUCKING COMPANY, and :
The KEPHART TRUCKING COMPANY 401(K) :
PLAN, :

Defendants. :

EXHIBIT B

CONSENT OF SPOUSE TO WAIVER OF BENEFITS

Kephart Trucking Company 401(K) Plan
(hereinafter, the "Plan")

Jeremy Kephart
I, Kephart declare that:

1. I am the wife of Timothy Kephart and hereby consent to my husband's waiver of all rights to receive any benefit payments and return of contributions from the Plan, including my interest in receiving survivorship benefits under the Plan for that amount.

2. This waiver constitutes an effective waiver of any right I may have to that portion of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity form of benefit, pursuant to Section 205(c) of ERISA, 29 U.S.C. § 1055(c).

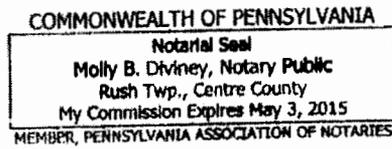
Date: 7/30/14

Jeremy Kephart
Signature

Sworn and subscribed before me

this 30th day of July, 2014

Molly B. Diviney
NOTARY PUBLIC



My Commission Expires: *May 3, 2015*

(Knowingly and willfully making false, fictitious, or fraudulent statements to the United States Department of Labor is punishable under Title 18, §1001, United States Code.)

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PLAN, :

Defendants. :

EXHIBIT C

INDEPENDENT FIDUCIARY CONTRACT

Metro Benefits, Inc.
8150 Perry Highway
Suite 311
Pittsburgh, PA 15237
Phone (412) 847-7600 Fax (412) 847-7601
www.metrobenefits.com

Proposal for : Independent Fiduciary Services

Prepared by : Diane M. Barton, CPC, ERPA, CEBS
Metro Benefits, Inc.

WHO ARE WE?

Metro Benefits, Inc. is a third-party administration firm, which provides a wide array of pension administration and actuarial services for qualified retirement plans. We can provide you with plan implementation and ongoing administrative services.

Metro Benefits, Inc. was established in 1986, and employs a staff of 28 people. Our goal is to "align employee benefits with corporate objectives".

HOW CAN WE ASSIST YOU?

Our services are:

- Efficient
- Flexible
- User - Friendly
- Designed to Minimize your workload
- On Time
- Accurate
- Delivered in a Professional Manner

A binder of sample materials is also available upon request. Please call us at (412) 847-7600 or visit our Web Site at www.metrobenefits.com for more information.

Metro Benefits, Inc.
 8150 Perry Highway
 Suite 311
 Pittsburgh, PA 15237
 Phone (412) 847-7600 Fax (412) 847-7601
 www.metrobenefits.com

Proposal for : Independent Fiduciary Services

PLAN FEE AND SERVICE SCHEDULE

The following outlines the fees for the administrative and consulting services which Metro Benefits, Inc. can provide on behalf of the plan to take over as the Independent Fiduciary with the intention of terminating it and paying out all remaining participants.

Services	Fee
1. Initial review of Plan document and files <ul style="list-style-type: none"> • 5 hours @ \$175/hour 	\$ 875.00
2. Take custody of plan assets; retitle; trust reconciliation, and track owner repayments (assumes basis will be provided) <ul style="list-style-type: none"> • 18 hours @ \$175/hour 	\$ 3,150.00
3. Preparation of employee distribution packages And coordination of distributions in accordance with Participant elections (including setup of any default IRA's, for non-locatable/ non-responding participants and coordination and deposit of any Federal tax withholding, if needed, using the IRS EFTPS) <ul style="list-style-type: none"> • 140 participants @ \$75 per participant 	\$10,500.00
4. Preparation of Form 1099-R and Form 945 <ul style="list-style-type: none"> • 140 forms @ \$45 per form 	\$ 6,300.00
5. Preparation of Final (Terminal) Form 5500 and Required schedules	<u>\$1,200.00</u>
Total Charges	\$22,025.00*

**Metro Benefits,
Inc.**

8150 Perry
Highway
Suit
e

311
Pittsburgh, PA
15237

Phone (412) 847-7600 Fax (412) 847-
7601 www.metrobenefits.com

Proposal for : Independent Fiduciary Services

PLAN FEE AND SERVICE SCHEDULE

*Please note that we will also pass-through any expenses incurred by Metro Benefits in the process of terminating the plan. These fees shall include, but are not limited to, the following:

- Overnight mailing expenses for communications to participants - \$15 per participant
- Charges incurred by Metro Benefits, Inc. to obtain missing participant Addresses - \$6 per participant;
- Charges incurred for establishing default IRA's on behalf of missing participants - \$150 charged to participant's account
- Overnight mailing charges - \$35 each occurrence
- Legal fees

Revised 5/9/2014