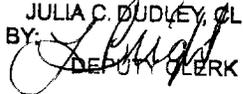


**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**

FEB 26 2014

JULIA C. DUDLEY, CLERK
BY:  DEPUTY CLERK

THOMAS E. PEREZ,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

MARK KINSER, JOYCE BENNETT,
UNLIMITED CONSTRUCTION, INC. and,
UNLIMITED CONSTRUCTION, INC.
RETIREMENT PLAN.

Defendants.

Civil Action

No. 7:14-CV-80

COMPLAINT

Thomas E. Perez, Secretary of Labor, United States Department of Labor (“the Secretary”), 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. Unlimited Construction, Inc. Retirement 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 Radford, Virginia.

4. Venue with respect to this action lies in Western District of Virginia, 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. Unlimited Construction, Inc. (“the Company” or “unlimited”) is the Plan Sponsor and Plan Administrator of the Plan. At all relevant times, the Company exercised discretionary authority and discretionary control respecting management of the Plan, exercised authority and control respecting management and disposition of the Plan’s assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Unlimited is therefore 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, Mark Kinser (“Kinser”) was the sole owner and Chief Executive Officer of Unlimited, as well as trustee of the Plan. Kinser made decisions regarding the Plan, including decisions as to the disposition of plan assets, and performed functions of the Plan Administrator. At all relevant times, Kinser exercised discretionary authority and discretionary control respecting management of the Plan, exercised authority and control

respecting management and disposition of the Plan's assets, and had discretionary authority and discretionary responsibility in the administration of the Plan. Kinser is therefore 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. From 2004 until on or about July 15, 2011, Joyce Bennett ("Bennett") was a trustee of the Plan. As a trustee, Bennett made decisions regarding the Plan, including decisions as to the disposition of plan assets. During this time period, Bennett exercised authority and control respecting management and disposition of the Plan's assets. Bennett is therefore 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 Section 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 in 2004 to provide retirement benefits to its employees.

11. The Plan is defined benefit plan funded through contributions to the Plan by Unlimited. Unlimited's contributions to the Plan account are assets within the meaning of ERISA.

12. The Plan participants are employees of Unlimited.

13. As of 2007, all Plan assets were maintained in one account with Fidelity

Investment (the “Fidelity account”).

14. On August 10, 2010, Kinser withdrew \$491,000 from the Fidelity account. This withdrawal was in the form of a check. The check was payable to: Mark Kinser and Joyce Bennett Trustees of Unlimited Construction Inc. Defined Benefit Plan. Kinser and Bennett endorsed the check. Bennett took no steps to ascertain why Kinser withdrew the Plan assets or where he intended to deposit the assets.

15. On August 18, 2010, the check was deposited into a personal banking account in Kinser’s name (“Kinser account”) at the First Bank of Virginia. The balance of the Kinser account shortly before the check was deposited was \$2,475.74.

16. During the period of August 18, 2010 and March 11, 2011, Kinser made multiple withdrawals from the Kinser account, leaving a balance of \$319.58.

17. Some of the funds withdrawn from the account were used to pay Unlimited’s operating costs.

18. On April 18, 2012, Kinser executed a promissory note on behalf of Unlimited whereby Unlimited, as borrower, agreed to pay the Plan, as lender, \$491,000 plus interest at the rate of 5% on or before April 18, 2014.

19. Unlimited, Kinser, and Bennett did not investigate any lending or investment alternatives for the Plan’s assets prior to removing the Plan assets from the Fidelity Account.

20. Unlimited, Kinser, and Bennett participated knowingly in acts or omissions by each other that they knew to be a breach of fiduciary duty.

21. Unlimited, Kinser, and Bennett failed to comply with Section 404(a)(1) of ERISA in the administration of their specific fiduciary responsibilities and each enabled the other to

commit breaches of ERISA.

22. Kinser, Bennett, and Unlimited each knew that the others had breached their fiduciary duties, but did not make reasonable efforts under the circumstances to remedy the breaches.

Violations

23. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, the Secretary adopts by reference the averments and allegations of paragraphs 1-22 inclusive.

24. By the actions and conduct described in paragraphs 1-18, defendants Unlimited, Kinser and Bennett, 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. 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

25. By the actions and conduct described in paragraphs 1-18, defendants Kinser and Unlimited, as fiduciaries of the Plan:

- a. caused the Plan to engage in transactions which they knew or should have known constituted a direct or indirect lending of money or other extension of credit between the Plan and a party-in-interest, in violation of Section 406(a)(1)(B) of ERISA, 29 U.S.C. § 1106(a)(1)(B);

- b. 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); and.

- c. acted in a transaction involving the Plan on behalf of a party (or represented a party) whose interests are adverse to the interests of the Plan or the interests of its participants or beneficiaries, in violation of Section 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2).

26. By participating knowingly in the fiduciary breaches of each other knowing such acts or omissions to be breaches of fiduciary duty, Kinser, Bennett, and Unlimited, are each liable

for the other's breaches of fiduciary duty, pursuant to Section 405(a)(1) of ERISA, 29 U.S.C. § 1105(a)(1).

27. By failing to comply with the Section 404(a)(1) of ERISA in the administration of their specific fiduciary duties and thereby each enabling the other to commit a breach of ERISA, Unlimited, Kinser and Bennett are liable for each other's breaches of fiduciary duty, pursuant to Section 405(a)(2) of ERISA, 29 U.S.C. § 1105(a)(2).

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

Prayer for Relief

29. WHEREFORE, the Secretary prays that this Court issue an order:
- a. Ordering the defendants to restore to the Plan all losses, including interest or lost opportunity costs, which were caused by their fiduciary misconduct;
 - b. Removing Kinser, Bennett, and the Company as fiduciaries of the Plan and of any employee benefit plan for which Kinser, Bennett, and the Company act as fiduciaries;
 - c. Permanently enjoining Kinser, Bennett, and the Company from acting directly or indirectly, in any fiduciary capacity, with respect to any employee benefit plan subject to ERISA;
 - d. Permanently enjoining Kinser, Bennett, 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;
- e. Appointing 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 Plan, with all costs to be borne by the defendants;
 - f. Ordering the defendants, their agents, employees, service providers, banks, accountants, and attorneys to provide the Secretary and the independent fiduciary 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 and to the independent fiduciary of all contributions to the Plan and all transfers, payments, or expenses incurred or paid in connection with the Plan;
 - h. Awarding plaintiff, the Secretary, the costs of this action; and
 - i. Awarding such other relief as is equitable and just.

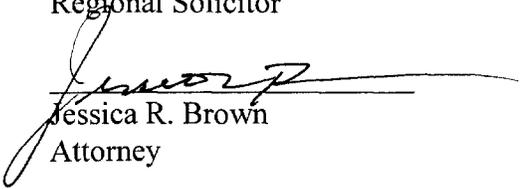
Respectfully Submitted,

Post Office Address:

Catherine Oliver Murphy
Regional Solicitor
Office of the Solicitor
Suite 630E, The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106-3306
Phone: (215) 861-5144
Fax: (215) 861-5162

M. Patricia Smith
Solicitor of Labor

Catherine Oliver Murphy
Regional Solicitor


Jessica R. Brown
Attorney

U.S. DEPARTMENT OF LABOR

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2014, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

Jessica R. Brown, Esquire
U.S. Department of Labor
Office of the Solicitor
170 S. Independence Mall, West, Suite 630 East
Philadelphia, Pennsylvania 19106

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Mark Kinser
140 East Main Street
Radford, Virginia 24141

Joyce Bennett
4756 Lakeland Road
Dublin, Virginia 24084

Unlimited Construction, Inc.
526 East Main Street
Radford, Virginia 24141

Unlimited Construction, Inc. Retirement Plan
526 East Main Street
Radford, Virginia 24141

s/

Jessica R. Brown
PA Bar No. 87322
Attorney for Plaintiff
U.S. Department of Labor, Solicitor Office
170 S. Independence Mall West, 630E
Philadelphia, PA 19106
215-861-5150
215-861-5162 (fax)
brown.jessica.r@dol.gov

7:14CV80

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS Thomas E. Perez, Secretary of Labor, United States Department of Labor,</p> <p>(b) County of Residence of First Listed Plaintiff _____ <i>(EXCEPT IN U.S. PLAINTIFF CASES)</i></p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) Jessica R. Brown, Esquire, U.S. Department of Labor, Office of the Solicitor, 170 S. Independence Mall, W, Suite 630 East, Philadelphia, Pennsylvania 19106, 215-861-5144</p>	<p>DEFENDANTS Mark Kinser, Joyce Bennett, Unlimited Construction, Inc. and Unlimited Construction, Inc., Retirement Plan</p> <p>County of Residence of First Listed Defendant <u>Radford</u> <i>(IN U.S. PLAINTIFF CASES ONLY)</i></p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input checked="" type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%;"> <tr> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF</td> <td style="width:33%; text-align: center;">DEF</td> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF</td> <td style="width:33%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align: center;">PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY	
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
FEDERAL TAX SUITS					
<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609					
IMMIGRATION					
<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions					

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 U.S.C. § 1001, et seq.

Brief description of cause:
relief for breaches of fiduciary duty under ERISA Section 409, 29 U.S.C. § 1109

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT USA APPLYING IFP _____ JUDGE CONRAD MAG. JUDGE _____

7:14CV80