

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ JAN 16 2004 ★

Civil Action No. **BROOKLYN OFFICE**

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CEMENT AND CONCRETE WORKERS DISTRICT
COUNCIL WELFARE FUND, PENSION FUND,
ANNUITY FUND and EDUCATION AND
TRAINING FUND and SILVANA BALDO,
in her fiduciary capacity
as Administrator of the Cement and
Concrete Workers District Council
Welfare Fund, Pension Fund and Annuity
Fund

CV 04 0180

GLEESON, J.

and

BARRY KAPLAN, as President of the
CEMENT AND CONCRETE WORKERS DISTRICT
COUNCIL and in his fiduciary capacity
as a Trustee of the EDUCATION AND
TRAINING FUND

COMPLAINT

GOLD M.J.

Plaintiffs,

-against-

PILE FOUNDATION CONSTRUCTION COMPANY, INC.
and ANTHONY RIVARA

Defendants.

-----X
Plaintiffs, CEMENT AND CONCRETE WORKERS DISTRICT
COUNCIL WELFARE FUND, PENSION FUND, ANNUITY FUND and OTHER FUNDS
and SILVANA BALDO, in her fiduciary capacity as Administrator of
the Cement and Concrete Workers District Council Welfare Fund,
Pension Fund and Annuity Fund and, as well, the EDUCATION AND
TRAINING FUND (hereinafter collectively referred to as the
"FUNDS") of which BARRY KAPLAN is a fiduciary and trustee and
SILVANA BALDO is a collection agent, and BARRY KAPLAN, as
President of the CEMENT AND CONCRETE WORKERS DISTRICT COUNCIL

(hereinafter referred to as the "UNION"), by and through their attorneys KAMING & KAMING, as and for their Complaint, respectfully allege as follows:

NATURE OF THE ACTION AND JURISDICTION

1. This is a civil action brought pursuant to sections 502(a)(3) and 515 of the Employee Retirement Income Security Act of 1974, as amended (hereinafter referred to as "ERISA") (29 U.S.C. §§ 1132(a)(3), 1145), and section 301 of the Labor-Management Relations Act of 1947, as amended (hereinafter referred to as the "Taft-Hartley Act") (29 U.S.C. § 185), by an employee welfare benefit fund, an employee pension benefit fund, an employee annuity fund, an employee education and training fund and other funds as identified by the collective bargaining agreement; by the Administrator of the FUNDS; and by the UNION through its President, for injunctive and other equitable relief under ERISA, and for breach of contract to secure performance by an employer of specific statutory and contractual obligations to submit the required monetary contributions and/or reports to the FUNDS and dues and amount checkoffs to the UNION. This Complaint alleges that by failing, refusing, or neglecting to submit the required monetary contributions and/or reports to the FUNDS and dues and amount checkoffs to the UNION when due, defendant violated its collective bargaining agreement, the respective trust agreements of the FUNDS, and ERISA. Further, the UNION

acts on behalf of its members as an employee organization pursuant to Labor Law §220-g.

2. Jurisdiction of this Court is invoked under the following statutes:

- (a) Section 502(e)(1) and (f) of ERISA (29 U.S.C. § 1132(e)(1) and (f));
- (b) Section 301 of the Taft-Hartley Act (29 U.S.C. § 185);
- (c) 28 U.S.C. 1331 (federal question);
- (d) 28 U.S.C. 1337 (civil actions arising under Act of Congress regulating commerce); and
- (e) principles of supplementary jurisdiction.

3. Venue properly lies in this district under section 502(e)(2) of ERISA (29 U.S.C. § 1132(e)(2)). Service of process may be made on defendants in any other district in which they may be found pursuant to section 502(e)(2) of ERISA (29 U.S.C. § 1132(e)(2)).

PARTIES

4. Plaintiffs Taft-Hartley FUNDS are jointly administered, multi-employer, labor-management trust funds established and maintained pursuant to various collective bargaining agreements and various trust agreements in accordance with section 302(c)(5) of the Taft-Hartley Act (29 U.S.C. § 186(c)(5)). The Taft-Hartley FUNDS are employee benefit plans within the meaning of sections 3(1), 3(2), 3(3) and 502(d)(1) of ERISA (29 U.S.C. §§ 1002(1), (2), (3), and 1132(d)(1)), and multiemployer plans within the meaning of sections 3(37) and 515 of ERISA (29 U.S.C. §§ 1002(37) and 1145). The Taft-Hartley

FUNDS are authorized to maintain suit as independent legal entities under section 502(d)(1) (29 U.S.C. § 1132(d)(1)) and are tax exempt entities pursuant to sections 401(a), 501(a) and 501(c)(9) of the Internal Revenue Code (26 U.S.C. §§ 401(a), 501(a) and (c)(9)). The purpose of the Taft-Hartley FUNDS is to provide various fringe benefits to eligible employees on whose behalf employers contributed to the Taft-Hartley FUNDS pursuant to collective bargaining agreements between the employers in the building and construction industry and the UNION (as hereinafter defined) and to collect contributions as required by the collective bargaining agreement. The Taft-Hartley FUNDS maintain their offices and are administered at 35-30 Francis Lewis Boulevard, Whitestone, New York 11358 in the City and State of New York, County of Queens and said offices serve as the collection agent for other funds pursuant to the collective bargaining agreement.

5. Plaintiff SILVANA BALDO is the Administrator of the FUNDS (except for the EDUCATION AND TRAINING FUND), and is a fiduciary of the FUNDS (except for the EDUCATION AND TRAINING FUND) within the meaning of sections 3(21) and 502 of ERISA (29 U.S.C. §§ 1002(21) and 1132). She brings this action in her fiduciary capacity as Administrator of the FUNDS.

6. Plaintiff UNION is a labor organization within the meaning of section 301 of the Taft-Hartley Act (29 U.S.C. § 185) which represents employees in an industry affecting commerce as

defined in section 501 of the Taft-Hartley Act (29 U.S.C. § 142), section 3(4) of ERISA (29 U.S.C. § 1002(4)) and as further defined in section 12 of the General Associations Law of the State of New York. The UNION is the representative of its constituent locals, numbers 6-A, 18-A and 20, each local being a labor organization operating as a labor union with more than seven (7) members within the City and State of New York. The UNION maintains its offices and is administered at the aforesaid address of the FUNDS.

7. Plaintiff BARRY KAPLAN is the President of the UNION and brings this action for dues and amount contributions in his representative capacity pursuant to section 12 of the General Associations Law of the State of New York and as a fiduciary and trustee of the EDUCATION AND TRAINING FUND.

8. Upon information and belief, at all times material hereto, defendant PILE FOUNDATION CONSTRUCTION COMPANY, INC. (hereinafter the "CORPORATION") is a for-profit corporation doing business in the City and State of New York as an employer within the meaning of sections 3(5) and 515 of ERISA (29 U.S.C. §§ 1002(5) and 1145), and is an employer in an industry affecting commerce within the meaning of section 301 of the Taft-Hartley Act (29 U.S.C. § 185). Further, upon information and belief, the CORPORATION executed certain collective bargaining agreements effective July 1, 1999 to June 30, 2002 and July 1, 2002 to June 30, 2005, annexed hereto as Exhibit A, with the UNION (referred

to hereinafter as the "Agreements") wherein, inter alia, the CORPORATION became obligated to submit and/or pay the required monetary contributions and/or reports to the FUNDS and dues and amount checkoffs to the UNION according to the Agreements, for all work performed by the CORPORATION's employees within the trade and geographical jurisdictions of the UNION.

9. Upon information and belief, at all times material hereto, defendant ANTHONY RIVARA has been a principal of the defendant CORPORATION and is and has been acting in its interests and is further personally liable pursuant to the attached signatory page(s) and commitments included in Exhibit A. Upon information and belief, at all times material hereto, said defendant has been and is vested with authority and control over the submission and/or payment of the required monetary contributions and/or reports to the FUNDS and dues and amount checkoffs to the UNION owed by the CORPORATION under the terms of the Agreements. As such, said defendant is an employer in an industry affecting commerce within the meaning of section 301 of the Taft-Hartley Act (29 U.S.C. § 185). Further, upon information and belief, said defendant executed on behalf of the CORPORATION and individually the Agreements with the UNION wherein, inter alia, the defendant became obligated to submit and/or pay the required monetary contributions and/or reports to the FUNDS and dues and amount checkoffs to the UNION according to the Agreements, for all work performed by the CORPORATION's

employees within the trade and geographical jurisdictions of the UNION. Said defendant (hereinafter referred to as the "INDIVIDUAL") is sued in this action in his personal and official capacities.

AS AND FOR A FIRST CAUSE OF ACTION

(FUNDS' CLAIM FOR A BREACH OF
CONTRACT BY DEFENDANT CORPORATION)

10. Plaintiffs FUNDS repeat and reallege each and every allegation contained in paragraphs 1 through 9 of this Complaint, as if more fully set forth at length herein.

11. As a result of work performed by individual employees of defendant CORPORATION, pursuant to the Agreements, there became due and owing to plaintiffs FUNDS from defendant CORPORATION a sum of money for the period November, 2001 to present, as and for liquidated damages resulting from the non-payment of contributions in a timely manner to be further determined by an audit of the defendant CORPORATION'S books and records and amounts owing as revealed by an audit of defendant CORPORATION'S books.

12. No part of these liquidated damages resulting from the non-payment of contributions contractually due plaintiffs FUNDS has been paid by defendant CORPORATION, although duly demanded, and plaintiffs FUNDS have been damaged in the amount of this as well as any yet to be determined by audit sums, but at least in the amount of \$11,004.37 composed of liquidated damages

owing from the audit for the period from November, 2001 to March, 2002 in the amount of \$6,127.00 and for the period from April, 2002 to September, 2002 in the amount of \$4,877.37, plus contractual costs and interest and continuing amounts owing as revealed.

13. The failure, refusal or neglect of defendant CORPORATION to make the required contributions to plaintiffs FUNDS constitutes a violation of the Agreements between defendant CORPORATION and plaintiff UNION with respect to which plaintiffs FUNDS are third party beneficiaries.

14. Accordingly, defendant CORPORATION is liable to plaintiffs FUNDS as aforesaid.

AS AND FOR A SECOND CAUSE OF ACTION

(FUNDS' CLAIM FOR BREACH OF ERISA
OBLIGATIONS BY DEFENDANT CORPORATION)

15. Plaintiffs FUNDS repeat and reallege each and every allegation contained in paragraphs 1 through 14 of this Complaint, as if more fully set forth at length herein.

16. Section 515 of ERISA (29 U.S.C. § 1145), requires employers to pay fringe benefit contributions in accordance with the terms and conditions of collective bargaining agreements.

17. Upon information and belief, at all times material hereto, defendant CORPORATION failed to submit and/or pay or timely pay the required monetary contributions and/or reports to

plaintiffs FUNDS. Such failure to make payment or timely payment constitutes a violation of section 515 of ERISA (29 U.S.C. § 1145).

18. Section 502 of ERISA (29 U.S.C. § 1132), provides that upon a finding of an employer violation of section 515 of ERISA (29 U.S.C. § 1145), the Court shall award to a plaintiff fund the unpaid fringe benefit contributions, plus statutory damages and interest on the unpaid principal pursuant to the collective bargaining agreement or otherwise by 29 U.S.C. § 1132, together with reasonable attorneys' fees, and costs and disbursements incurred in the action.

19. Accordingly, defendant CORPORATION is liable to plaintiffs FUNDS for the submission and payment of the required monetary contributions and/or reports to plaintiffs FUNDS, and is liable for the additional amount of said statutory damages, together with reasonable attorneys' fees, interest on the unpaid principal, costs and disbursements incurred in this action, pursuant to section 502 of ERISA (29 U.S.C. § 1132).

AS AND FOR A THIRD CAUSE OF ACTION

(FUNDS' CLAIM FOR BREACH OF ERISA
OBLIGATIONS BY THE INDIVIDUAL DEFENDANT)

20. Plaintiffs FUNDS repeat and reallege each and every allegation contained in paragraphs 1 through 19 of this Complaint, as if more fully set forth at length herein.

21. Section 515 of ERISA (29 U.S.C. § 1145), requires employers to pay fringe benefit contributions in accordance with the terms and conditions of collective bargaining agreements.

22. Upon information and belief, at all times material hereto, defendant INDIVIDUAL failed to submit and/or pay or timely pay the required monetary contributions and/or reports to plaintiffs FUNDS. Such failure to make payment or timely payment constitutes a violation of section 515 of ERISA (29 U.S.C. § 1145).

23. Section 502 of ERISA (29 U.S.C. § 1132), provides that upon a finding of an employer violation of section 515 of ERISA (29 U.S.C. § 1145), the Court shall award to a plaintiff fund the unpaid fringe benefit contributions, plus statutory damages and interest on the unpaid principal pursuant to the collective bargaining agreement or otherwise by 29 U.S.C. § 1132, together with reasonable attorneys' fees, and costs and disbursements incurred in the action.

24. Accordingly, defendant INDIVIDUAL is liable to plaintiffs FUNDS for the submission and payment of the required monetary contributions and/or reports to plaintiffs FUNDS, and is liable for the additional amount of said statutory damages, together with reasonable attorneys' fees, interest on the unpaid principal, costs and disbursements incurred in this action, pursuant to section 502 of ERISA (29 U.S.C. § 1132).

AS AND FOR A FOURTH CAUSE OF ACTION

(FUNDS' PRAYER FOR AN ORDER FOR
AUDIT AGAINST DEFENDANTS,
CORPORATION AND INDIVIDUAL)

25. Plaintiffs FUNDS repeat and reallege each and every allegation contained in paragraphs 1 through 24 of this Complaint, as if fully set forth herein.

26. Pursuant to the terms and conditions of the Agreements, defendant CORPORATION and INDIVIDUAL are required, inter alia, to file certain employer contribution reports with plaintiffs' FUNDS, and are further required to permit and cooperate with plaintiffs FUNDS in the conduct of audits of defendant CORPORATION's books and records, to encompass as well related entity books and records, including, but not limited to, payroll, payroll ledgers, computer payroll printouts, W-2 forms, quarterly federal payroll tax returns (form 941), quarterly state payroll tax returns (forms WRS-2 and WRS-30), annual federal tax returns, cash disbursements journals, purchase journals, 1099 forms, New York and New Jersey employment records, insurance company reports, supporting checks, ledgers, vouchers and any and all other items concerning payroll, for the purpose of ascertaining the amount of fringe benefit contributions due plaintiffs FUNDS from defendant CORPORATION and INDIVIDUAL, and of verifying the accuracy of the employer contribution reports, if filed.

27. Accordingly, pursuant to the terms and conditions of the Agreements, plaintiffs FUNDS pray for an order requiring defendant CORPORATION and INDIVIDUAL to permit and to cooperate with plaintiffs FUNDS in the conduct of an audit of defendant CORPORATION's books and records for the period November 1, 2001 to present and continuing.

AS AND FOR A FIFTH CAUSE OF ACTION

(UNION'S CLAIM FOR BREACH OF
CONTRACT BY DEFENDANT CORPORATION
AND INDIVIDUAL)

28. Plaintiff UNION repeats and realleges each and every allegation contained in paragraphs 1 through 27 of this Complaint, as if fully set forth herein.

29. Pursuant to the Agreement, defendant CORPORATION and INDIVIDUAL, inter alia, became obligated to deduct dues and amounts checkoffs from the wages paid to the employees of defendant CORPORATION, performing work within the trade and geographical jurisdiction of the UNION, who authorize such deduction in writing, as provided in the Agreements.

30. Upon information and belief, pursuant to the Agreements and as a result of work performed by individual employees for defendant CORPORATION who authorized said deduction in writing, defendant CORPORATION deducted dues checkoffs for the period November 1, 2001 to present. Defendants are liable for this amount plus contractual costs and interest and continuing amounts owing as revealed.

31. An audit of the books and records of the dues and amounts checkoffs contractually due plaintiff UNION may reveal non-payments by defendant CORPORATION or INDIVIDUAL to plaintiff UNION, although duly demanded, said payment being required not later than one (1) week after its deduction pursuant to the Agreements.

32. Accordingly, defendant CORPORATION and INDIVIDUAL may be liable to plaintiff UNION as aforesaid, plus contractual costs and interest and continuing amounts owing as revealed.

WHEREFORE, plaintiffs FUNDS and plaintiff UNION demand judgment against defendant CORPORATION and INDIVIDUAL for:

1. First Cause of Action against defendant CORPORATION by the FUNDS for the amount of \$11,004.37 and such additional sums as revealed by an audit of Defendant CORPORATION'S books and records due for the period November 1, 2001 to present plus contractual costs and interest and continuing amounts owing;

2. Second Cause of Action against defendant CORPORATION by the FUNDS for statutory interest and damages on all fringe benefits and contributions that include liquidated damages now due and continuing, reasonable attorneys' fees and costs and disbursements in accordance with ERISA § 502(g)(2);

3. Third Cause of Action against defendant INDIVIDUAL by the FUNDS for the amount of contributions that include liquidated damages at least in the sum of \$11,004.37 due for the period November 1, 2001 to present plus contractual costs and

interest and continuing amounts owing and for statutory interest and damages on all fringe benefits now due and continuing, reasonable attorneys' fees and costs and disbursements in accordance with ERISA § 502(g)(2);

4. Fourth Cause of Action against defendant CORPORATION and INDIVIDUAL by the FUNDS requiring defendant CORPORATION and INDIVIDUAL to cooperate and permit the conduct of an audit of the books and records of defendant CORPORATION for the period November 1, 2001 to present and continuing;

5. Fifth Cause of Action against defendant CORPORATION and INDIVIDUAL by the UNION in the amount of dues checkoffs due for the period November 1, 2001 to present plus contractual costs and interest and continuing amounts owing;

6. An Order permanently enjoining defendant CORPORATION and INDIVIDUAL and their agents, representatives, directors, officers, stockholders, successors and assigns, for so long as they remain obligated to contribute to plaintiffs FUNDS and plaintiff UNION, from failing, refusing or neglecting timely to submit and/or pay the required monetary contributions and/or reports and dues checkoffs, and requiring them to permit and cooperate in the conduct of audits in accordance with the applicable collective bargaining agreements and Rules of plaintiffs FUNDS; and

7. Such other and further relief as the Court deems
just and proper.

Dated: New York, New York
January 7, 2004

Respectfully submitted,

KAMING & KAMING
Attorneys for Plaintiffs
FUNDS and Plaintiff UNION

By: 

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