

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

GIRL SCOUTS OF MIDDLE
TENNESSEE, INC.,)
)
Plaintiff,)
)
v.)
)
GIRL SCOUTS OF THE UNITED)
STATES OF AMERICA, INC.,)
)
Defendant.)

Civil Action No. _____

Judge _____

Magistrate Judge _____

**COMPLAINT FOR DECLARATORY JUDGMENT, ACCOUNTING, AND
INJUNCTIVE RELIEF**

Plaintiff, Girl Scouts of Middle Tennessee, Inc. ("GSMT"), makes the following allegations against Defendant, Girl Scouts of the United States of America, Inc. ("GSUSA").

Jurisdiction

1. This action involves construction of the terms of a defined benefit pension plan, known as the National Girl Scout Councils Retirement Plan, governed by 29 U.S.C. § 1132(e) and 29 U.S.C. 1001, et seq., the Employee Retirement Income Security Act of 1974, or "ERISA," and the rights and obligations of the parties in connection therewith and under related documents; consequently, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

2. GSMT and GSUSA are citizens of different states, and the amount in controversy exceeds \$75,000, exclusive of interest and costs; consequently, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

Parties

3. GSMT is a Tennessee nonprofit corporation with its principal place of business in Nashville, Tennessee. GSMT was organized in 1957 to provide Girl Scouting programs in Middle Tennessee. Such Girl Scouting programs help teach values such as honesty, fairness, courage, compassion, character, self-confidence, and citizenship, as well as practical skills, through programs on leadership, financial literacy, healthy living and community service. GSMT seeks to serve girls from all walks of life and every social and ethnic background within its geographic community. GSMT is responsible for raising its own financial support, most of which comes from the Middle Tennessee community. GSMT's primary sources of revenues result from the efforts of Girl Scouts participating in the Girl Scout Cookie Program, sales of uniforms, fees for camps and activities, gifts from individual and corporate donors and receipts from fundraising activities. GSMT is required by its charter to maintain its status as a 501(c)(3) organization, and is governed by the Tennessee Non-Profit Corporation Act, Tenn. Code Annotated §§ 48-51-101 et seq. (the "Act"), requiring each member of its Board to act in good faith, prudently, and in a manner reasonably believed to be in GSMT's best interests.

4. Defendant Girl Scouts of United States of America, Inc. ("GSUSA") is a District of Columbia nonprofit corporation with its principal place of business at 420 Fifth Avenue, New York, New York. GSUSA currently charters 112 Girl Scout councils, including GSMT (together, the "Councils"). Each Council is a separate nonprofit corporation that is independent from all other Councils. Each Council is legally independent from GSUSA. The charter issued by GSUSA allows each Council to use the name "Girl Scouts" and to belong to a nationwide network. As the holder of the rights to the name "Girl Scouts," GSUSA is comparable to a franchisor or licensor. GSUSA essentially collects license fees for the use of its brand name

“Girl Scouts,” the Girl Scout Trefoil and Girl Scout copyrighted materials that are used by each chartered Council. GSUSA’s operations are almost entirely financed by revenues generated by the Councils. According to financial information provided by GSUSA, for its fiscal year ending September 30, 2011, attached as Exhibit A, more than eighty percent (80%) of its operating income comes from revenue sources attributable to the Councils’ efforts, including dues paid by individual Girl Scouts (\$12 annually), uniforms, supplies and merchandise sales, license fees paid by bakeries producing Girl Scout cookies, and revenues from services and products that are sold to the Councils. GSUSA’s own fundraising efforts provided less than five percent (5%) of annual operating revenues for its 2011 fiscal year.

Summary of Complaint

5. In this action, GSMT seeks relief necessary to address unauthorized and improper actions taken by GSUSA as administrator of the National Girl Scout Councils Retirement Plan (“the Plan”), in breach of GSUSA’s contractual and fiduciary obligations to GSMT, which have exposed GSMT to potentially ruinous liability and impaired the Plan’s ability to meet the Plan’s obligations to GSMT’s employees. Until very recently, the Plan was financially sound and provided a valuable pension benefit to employees of GSMT, as well as other Girl Scout Councils across the United States. As recently as 2007, the Plan enjoyed a healthy *surplus* exceeding \$150 million, which should have been enough cushion to weather the financial downturn that adversely impacted all pension plans in 2008. Today, however, as a result of the unauthorized actions of the defendant GSUSA in breach of its contractual and fiduciary obligations as agent to GSMT, that surplus is gone. Specifically, in order to reduce Council resistance to GSUSA’s efforts to substantially reduce the number of Girl Scout Councils, GSUSA, as Plan administrator, (a) unilaterally decreed that a large numbers of employees of other Councils, which were not

participating or contributing employers, were nonetheless eligible to receive Plan benefits, and (b) unilaterally amended the Plan to add a voluntary early retirement feature – a benefit in which GSMT’s employees cannot participate. As a result, the Plan now has a *deficit* that exceeds \$340 million. Some of this reversal of fortune is no doubt due to market conditions impacting the value of the assets held by the Plan. However, the bulk of the deficit results from the unauthorized addition of new liabilities to the Plan by GSUSA. In the event of the Plan’s failure and a distress termination under ERISA, GSMT may be subjected to liability for such deficit. In this action, GSMT seeks a judicial determination that GSMT may withdraw from the Plan with no further liability to the Plan; that GSUSA must participate with GSMT in a spin-off and transfer of all assets and liabilities of the Plan attributable to GSMT to a new plan to be formed and maintained by GSMT; and for such other relief as may limit or eliminate GSMT’s potential liability growing out of GSUSA’s unauthorized and improper acts in connection with the Plan.

The Plan and Plan Documents

6. The Plan is a defined benefit pension plan that was established by GSUSA effective January 1, 1974, in order to make available a pension program for employees of Girl Scout Councils that voluntarily chose to participate. GSUSA is the administrator and sponsor of the Plan.

7. On or about November 11, 1974, GSMT applied to become an adopting employer of the Plan by executing an application (the “Application”) with an attached agreement dated October 22, 1974, appointing GSUSA as GSMT’s agent for purposes of Plan administration (the “Voluntary Participation Agreement”). A copy of the Application and the Voluntary Participation Agreement are collectively attached as Exhibit B hereto. A copy of the Plan, as amended and restated by instrument dated January 28, 2008, is attached as Exhibit C hereto. The

Voluntary Participation Agreement and the Plan are sometimes collectively referred to herein as the "Plan Documents."

8. Under the Voluntary Participation Agreement executed by GSMT and GSUSA, GSMT appointed GSUSA to act as GSMT's agent "subject at all times to [GSMT's] instructions." Paragraph 2 of the Voluntary Participation Agreement authorized GSUSA to determine the rate for contribution to be paid by GSMT with respect to GSMT's employees. No other Council participating in the Plan is a party to or has any rights under the Voluntary Participation Agreement between GSMT and GSUSA, and GSMT is not a party to any other Council's plan adoption agreement. Each Council is a nonprofit corporation with a separate state corporate charter and an independent board of directors, and no Council has the ability to control or appoint the board membership or to dispose of the assets of any other Council. Because of the independence and separate corporate identity of each Council, the Plan is deemed to be a multiple-employer plan, as described in section 4063 of ERISA, 29 U.S.C. § 1363, and section 413(c) of the Internal Revenue Code (the "Code"). The Plan is governed by the requirements of ERISA and is intended to be qualified under the requirements of section 401(a) of the Code.

9. The Plan is unusual, in that it is a multiple-employer plan sponsored by a non-participating franchisor (GSUSA) for franchisee participants (those Girl Scout Councils, such as GSMT, which chose to participate). Multiple-employer plans historically were used to provide pension benefits to union workers. This type of plan was authorized under the Taft-Hartley Act and traditionally, was adopted jointly by unrelated employers in certain industries to provide pension benefits to workers through collective bargaining, which determined pension benefits. These plans were intended to be managed by a board of trustees on which management and labor had equal representation. A plan amendment to increase benefits was only possible if agreed to

by all adopting employers through the bargaining process. While the Plan is a multiple-employer plan, benefits are not determined through collective bargaining. Instead, Plan amendments can only effectively be adopted by all Councils that adopted the Plan. Each Council adopted the Plan voluntarily, based on the features and benefits provided under the Plan at the time of adoption. As alleged below, GSUSA has acted as if it can unilaterally increase benefits and the pension liabilities of GSMT, which is contrary to the contractual provisions relating to the Plan's adoption, and each Council's voluntary participation. A few years after the passage of ERISA, Congress determined that a stronger scheme was needed for Taft-Hartley plan funding and administration. The Multi-Employer Pension Plan Amendments Act, passed in 1980 (the "1980 Act"), now governs all collectively bargained Taft-Hartley pension plans maintained for two or more employers. However, the 1980 Act does not apply to plans that are not collectively bargained and so does not govern the Plan. Only a small number of multiple-employer plans remain in existence; those not resulting from collective bargaining continue to be governed by the law as it existed before enactment of the 1980 Act.

10. The Plan Documents specify the roles of the parties. Section 1.8 of the Plan identifies GSUSA as the Plan Sponsor and the agent for GSMT. Section 1.1(e) of the Plan identifies Mutual of America Life Insurance Company as the Plan Administrator.¹ Section 10.1 provides that GSUSA, as Plan Sponsor, has the right to amend the Plan, provided that no amendment may "alter the basic purposes of this Plan." GSUSA's right to amend the Plan is further limited by the terms of the Voluntary Participation Agreement, which specifies that GSUSA acts solely as the agent of GSMT. GSUSA's right to amend the Plan, read in context with the Voluntary Participation Agreement, is necessarily limited to purely ministerial

¹ In 2010, for reasons not disclosed to GSMT, Mutual of America withdrew from all roles in which it had served under the Plan.

revisions. This constraint on the right to amend is consistent with the nature of multiple-employer plans that are not covered by the 1980 Act. GSMT executed the Voluntary Participation Agreement on the basis of the features and level of benefits set forth in the Plan at the time of such execution. Nothing in the Voluntary Participation Agreement or any other document ever executed or agreed to by GSMT delegates authority to GSUSA to unilaterally increase or change the level of benefits to be provided under the Plan or to unilaterally add participants. Such a delegation would give GSUSA the authority to increase GSMT's unfunded pension liabilities without GSMT consent. As GSMT's agent, GSUSA could only exercise its authority in Section 10.1 in a manner consistent with its agency, and needed specific authority from GSMT to increase GSMT's financial liabilities under the Plan by changing Plan features or benefits.

11. GSUSA is authorized under the Voluntary Participation Agreement to determine contribution rates needed to fund the Plan. This limited administrative authority fits within GSUSA's agency role to calculate the ERISA-required contribution each year, presumably based on the funding calculations of the Plan's pension actuaries. GSMT's authority extends no further than the determination of such contribution rates. There are no terms in the Plan Documents or in any other documents executed by the parties that authorize GSUSA to collect from or enforce against GSMT any amount of funding that would be required by the Plan to pay liabilities. To the contrary, the Plan Documents expressly provide that GSUSA can only act as agent for GSMT and is subject to its directions. Similarly, there is no provision in ERISA that allows GSUSA to create or enforce funding liabilities under the Plan against GSMT.² On information and belief, under GSUSA's contractual arrangements with other Councils, GSUSA has no greater ability to

² Under the 1980 Act, which added a new section 515 of ERISA, 29 U.S.C. § 1145, a multi-employer plan trustee is empowered to collect contributions from a participating employer. Section 515 conferred no such authority on GSUSA, however, because the Plan is "grandfathered," and continues to be governed under pre-1980 law.

enforce payment of contributions to the Plan from other participating Council employers. Therefore, if one or more Councils participating in the Plan becomes unable or unwilling to continue to fund the Plan, all of the unfunded obligations of the Plan potentially may, under ERISA, become the responsibility of the other participating Councils, including GSMT, in the event the Plan fails and is subjected to a distress termination. This unfunded liability currently exceeds \$300 million.

12. Section 10.3 of the Plan permits a Council such as GSMT to withdraw from or cease participation in the Plan by discontinuing contributions on behalf of its employees who participate in the Plan. There is no cost under the Plan or ERISA to GSMT if it chooses to exercise this withdrawal right. Section 10.5 of the Plan contemplates that the Plan may engage in a transfer of assets to another tax-qualified pension plan of a participating employer, such as GSMT, or a Plan “spin-off,” under certain procedures for calculating assets and liabilities. These procedures are identical to the requirements of ERISA that apply to a spin-off of assets and liabilities. In other words, a spin-off, such as that requested by GSMT in this action, is expressly contemplated under and permitted by the Plan.

GSUSA’s “Realignment” of the Councils

13. In 2005, GSUSA made the decision to “realign” the Councils to reduce the number of separately chartered councils in the United States from 312 to 112³ through corporate mergers and combinations (hereafter, the “Realignment”). The Realignment was not substantially completed until 2010. The stated intention of GSUSA in promoting Realignment was to improve the financial health of the Councils. While GSUSA was adamant that it was entitled to require the Councils to participate in the Realignment, a number of Councils resisted doing so. To coerce those Councils resisting Realignment into cooperating, GSUSA went so far

³ Originally, GSUSA intended to cut the number to 108 Councils.

as to bring a lawsuit to enforce Realignment against one such resisting Council in Manitou, Wisconsin. The Manitou Council ultimately prevailed and continues today as a chartered Council under a ruling by the United States Court of Appeals for the Seventh Circuit.⁴

14. One of the principal reasons for Council resistance to Realignment was that the merger of Councils eliminated the jobs of many Council employees. According to an email dated April 17, 2006, from Kathy Cloninger and Florence Corsello (respectively, Chief Executive Officer and Chief Financial Officer/Senior VP, Business Services of GSUSA), Councils “expressed great concern for council staff members who may be adversely impacted by council realignment as they near important retirement eligibility dates.” A copy of such email is attached as Exhibit D hereto.

**To Lessen Opposition to Realignment, GSUSA
Adds the “Windfall Participants” Liability to the Plan**

15. Prior to Realignment, roughly one-third of the Councils had elected not to participate in the Plan. Those Councils never contributed to the Plan and had no expectation that Plan benefits would be conferred on their employees. However, in order to make Realignment more palatable to Councils resisting Realignment, GSUSA caused non-participating Councils to be merged into participating Councils, thereby effectively requiring all Council employees to become Plan participants, and unilaterally extended prior service credits to some 1,850 employees who had formerly been employed by Councils which had not adopted or contributed to the Plan. These new participating employees, many of whom were long-term employees approaching retirement age, suddenly became eligible to receive an unexpected lifetime pension annuity benefit (such participants hereafter referred to as the “Windfall Participants”), a fact disclosed in the Plan’s 2010 Actuarial Report (see Section 1, Summary, page 8), attached as

⁴ *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 646 F. 3d 983 (7th Cir. 2011).

Exhibit E hereto. GSUSA's addition of the Windfall Participants, which imposed an enormous new unfunded liability on the Plan, was unauthorized by GSMT, and in breach of GSUSA's contractual and fiduciary duties to GSMT. GSUSA's unilateral action in having the Plan assume the enormous new Plan liability represented by the Windfall Participants was for an improper purpose, that is, to assist GSUSA in implementing Realignment, and not for the benefit of GSMT, none of whose employees are Windfall Participants.

16. While GSUSA acknowledged the addition of the Windfall Participants, GSUSA claimed in communications with GSMT and the Councils that the additional cost to the Plan was minimal. See GSUSA presentation dated February 26, 2010, prepared by Mercer, page 6, attached as Exhibit F hereto, which grossly understated the number of Windfall Participants as only 110 employees, and misrepresented that the "past service cost" for adding these employees was no more than "approximately 0.5% of the overall plan liability." In truth, the number of Windfall Participants added to the Plan over the course of Realignment, from 2006 to 2010, numbered approximately 1,850 employees. The addition of the Windfall Employees is believed to be a principal cause of a staggering amount of new pension accruals under the Plan, which has swelled the Plans' accrued benefit liabilities, so that the Plan--and GSMT--are now threatened by an enormous funding deficit.

To Lessen Opposition to Realignment, GSUSA
Adds the "VERIP" to the Plan

17. To further assist GSUSA in making the Realignment more palatable, in addition to adding the Windfall Participants, GSUSA also purported to adopt, as Plan Administrator, an amendment to the Plan to add an "early retirement window" which allowed eligible Council staff employees to voluntarily "retire," and hopefully reduce or eliminate the need for mass layoffs which Realignment would otherwise require. This early retirement feature is known as the

Voluntary Early Retirement Incentive Plan (hereafter referred to as the “VERIP”) and was added through a Plan amendment purportedly adopted by GSUSA in 2006. According to the November 15, 2006, edition of GSUSA’s publication, “Realignment News,” a copy of which is attached as Exhibit G hereto (the “November 15, 2006 Disclosures”), the VERIP was “being offered as a way to support longer term council staff who may be adversely affected by the council realignment.” The VERIP provides eligible participants with additional service and pension credits to subsidize and accelerate eligibility for a pension under the Plan in order to ease the economic effects of lost employment. In the November 15, 2006, Disclosures, GSUSA represented that the costs of offering the VERIP would be paid out of existing assets or funds in the Plan, and that Councils would not have to fund the costs of the VERIP. In truth, the cost of the VERIP was added to the liabilities of the Plan, which now far exceed the value of the Plan’s assets. The VERIP manifestly was not adopted for the benefit of GSMT or its employees, none of whom were eligible to participate in the VERIP.

Because of the Plan’s Deteriorating Financial Condition and Funding Status
GSUSA Attempts to Implement the “Funding Scheme”

18. These two unauthorized actions by GSUSA – adding the Windfall Participants and adopting the VERIP amendment – caused the actuarial liabilities of the Plan to mushroom. Before GSUSA purported to add the Windfall Participants and adopt the VERIP amendment, the Plan was over-funded as late as 2007, with a very comfortable cushion of assets-to-liabilities ratio of 146%. Indeed, GSUSA has often touted that adding the VERIP was acceptable because of this large funding cushion. Today, however, that cushion is only a memory. The addition of the Windfall Participants and purported adoption of the VERIP completely destroyed the prior sound financial condition of the Plan. As of January 1, 2007, the Plan’s assets totaled \$491 million and its liabilities totaled \$336 million, as calculated by the Plan actuary; that is, the Plan

had a funding surplus over \$150 million at the time GSUSA embarked upon Realignment. Each year after GSUSA initiated Realignment and added the Windfall Participants and the VERIP amendment, the Plan's liabilities have substantially increased. As of September 30, 2011, the Plan's assets were \$404.5 million but liabilities had mushroomed to a whopping \$746 million, according to information provided by GSUSA. In a four-year period, the actuarial liability of the Plan has more than doubled, even while measures were taken to freeze future pension accruals. The additional liability is primarily a result of (i) the inclusion of the Windfall Participants in the Plan as new participants with prior service credits; and (ii) the VERIP amendment.

19. Rather than acknowledge its mistakes in adding the Windfall Participants to the Plan and purporting to adopt the VERIP, on or about August 16, 2010, in order to meet the funding shortfalls in the Plan, GSUSA announced increased levels of contribution for all Councils participating in the Plan, whether or not their employees were Windfall Participants or eligible to participate in the VERIP, with dramatically escalating contributions scheduled to continue through the year 2023. Hereinafter, this contribution program is referred to as the "Funding Scheme." Prior to GSUSA's implementation of the Funding Scheme, for the years 2000 through 2008, GSMT's contribution rate was only 3% of total annual staff payroll. However, under the Funding Scheme, such contribution rate increased to 3.8% in 2009; to 9% in 2010 and 2011; and to 10% for 2012. GSMT paid contributions of \$53,986 in 2008; \$64,090 in 2009; \$128,642 in 2010; \$156,811 in 2011; and is projected to pay contributions of \$166,757 in 2012. Under the Funding Scheme, contributions for future years are expected to increase until at least 2023, and to be as high as 16.0% of GSMT's total annual payroll. See slide 2 of the Mercer presentation, dated August 16, 2010, attached as Exhibit H hereto. GSUSA, as agent under the Voluntary Participation Agreement, has no authority under the Plan Documents, under ERISA or

under any other applicable law or legal principle, to collect contributions or otherwise enforce the Funding Scheme against GSMT, its principal.

20. While GSMT is itself presently financially sound, Realignment has left many Councils under financial duress. Fewer than half of the Councils had operating surpluses for 2010; the rest suffered operating losses. Only 18 Councils, including GSMT, had surpluses in both 2009 and 2010. See Exhibit I hereto, "Individual Council Data From 5 Year Analysis 2010." GSUSA itself, which maintains a payroll of some 500 employees – or approximately 5 employees for every Council – experienced operating deficits in each of the years 2008, 2009, and 2010, which deficits totaled more than \$93 million. GSUSA's own financial difficulties are likely to cause it to seek greater financial support from the Councils, which may be difficult or impossible for many Councils to sustain. In short, the Plan's rapidly declining financial condition, coupled with the already precarious financial condition of many of the Councils and of GSUSA itself, and GSUSA's lack of authority to enforce payment of contributions under the Funding Scheme, presents a substantial risk that the Plan will fail, leading to a distress termination. If the Plan is subjected to a distress termination, GSMT and its directors may theoretically be subjected to potentially unlimited liability under ERISA for the Plan's entire funding shortfalls.

**GSUSA'S Refusal to Provide Requested Information,
And Refusal to Participate in GSMT's Requested Spin-Off**

21. Following addition of the Windfall Participants and adoption of the VERIP, GSMT has repeatedly requested that GSUSA explain the precipitous deterioration of the Plan's financial condition, but GSUSA has consistently ignored such requests. For example, by letter dated February 9, 2010 addressed to GSUSA's National President and GSUSA's CEO, GSMT

through its counsel requested information necessary to fully understand the circumstances surrounding the Plan, which information was not provided.

22. On February 22, 2011, GSMT through its counsel provided GSUSA with a notice of “withdrawal” from the Plan and a detailed proposal for a transfer or “spin-off” from the Plan to a tax-qualified defined benefit pension plan maintained by GSMT in a manner compliant with ERISA. Under the withdrawal, GSMT ceased to provide further funding to the Plan and began to accrue necessary contributions in a reserve account. The spin-off proposal, which needed GSUSA’s consent, would transfer the Plan’s liabilities attributable to GSMT’s current and retired employees in the Plan to GSMT’s new spin-off plan. Plan assets allocable to these participants would also be transferred. The spin-off would allow GSMT to assume full responsibility to fully fund the pension obligations to its current and retired employees promised under the terms of the Plan. If GSMT withdrew without obtaining the spin-off, that would essentially leave all other Councils, and perhaps GSUSA, with financial responsibility for the unfunded liabilities attributable to GSMT’s employees.

23. GSMT’s February 22, 2011 notice advised GSUSA of its reasons for the withdrawal and spin-off, including: (i) the excessive liabilities of the Plan, which far exceeded the Plan’s assets; (ii) the fact GSUSA does not have an effective enforcement right to collect funding for the Plan from adopting Councils that are unwilling or unable to pay the contributions allocated under the Funding Scheme; (iii) in the event of a distress termination of the Plan under the terms of ERISA, the Pension Benefit Guaranty Corporation would assume the management of the Plan and would be empowered under ERISA to impose a lien on and attach the assets of all Councils that continued to participate in the Plan at the time of the distress termination, in order to fully fund benefits due under the Plan; and (iv) GSMT’s officers and directors might

arguably face personal responsibility under the Act if they did not act prudently to protect the assets of GSMT. A copy of the February 22, 2011, notice to GSUSA is attached as Exhibit J.

24. GSUSA frequently disputed the positions contained in the February 22nd proposal and ultimately informed GSMT in May, 2011, that it would not allow GSMT to withdraw from the Plan and would not participate with GSMT in the proposed spin-off proposal. Without conceding its right to withdraw, GSUSA has since resumed funding all contributions GSUSA seeks to impose under the Funding Scheme and submitted all amounts that GSMT had accrued in a reserve account for the spin-off plan. GSUSA has generally ignored GSMT's financial and fiduciary concerns and continues to insist that it can ignore GSMT's spin-off proposal and that GSMT is obligated to make the payments it mandates under the Funding Scheme. GSUSA has also announced increases to GSMT and other Councils under the Funding Scheme.

FIRST COUNT--DECLARATORY JUDGMENT

25. GSMT here incorporates by reference all of the allegations of paragraphs 1 through 24.

26. GSMT is entitled to a declaratory judgment that: (i) GSMT is entitled to withdraw from participation in the Plan without cost or assessment; (ii) GSUSA is required to participate with GSMT in a spin-off of Plan assets and liabilities attributable to GSMT's employees and former employees in a manner compliant with ERISA; (iii) in calculating GSMT's share of Plan liabilities for the spin-off, GSUSA's addition of the Windfall Participants and the VERIP amendment are not binding upon GSMT; and (iv) GSUSA is required to indemnify GSMT for and hold GSMT harmless against any and all liability arising under ERISA in the event of a distress termination of the Plan.

SECOND COUNT--ACCOUNTING

27. GSMT here incorporates by reference all of the allegations of paragraphs 1 through 26.

28. Because of GSUSA's breach of contract and breach of its fiduciary duties as GSMT's agent under the Voluntary Participation Agreement and the Plan, and failure to provide GSMT with requested information relating to the Plan, GSMT is entitled to an accounting from GSUSA of its conduct as Administrator of the Plan as necessary to explain fully the financial condition of the Plan and reasons for the Plan's current funding deficit.

THIRD COUNT--INJUNCTIVE RELIEF

29. GSMT here incorporates by reference all of the allegations of paragraphs 1 through 28.

30. Because of GSUSA's breach of contract and breach of its fiduciary duties as GSMT's agent and failure properly to account to GSMT for GSUSA's activities under the Voluntary Participation Agreement and the Plan, GSMT is entitled to a preliminary injunction restraining GSUSA from attempting to collect or otherwise seeking to enforce contributions against GSMT attributable to the Windfall Participants and the VERIP, and to have such injunction made permanent following final hearing. In addition, following final hearing, GSMT is entitled to an injunction requiring GSUSA to participate with GSMT in a spin-off of Plan assets and liabilities attributable to GSMT's employees and former employees in a manner compliant with ERISA.

FOURTH COUNT (ALTERNATIVE RELIEF)

**DECLARATORY JUDGMENT THAT GSMT'S GRANT OF
AUTHORITY TO GSUSA WAS *ULTRA VIRES***

31. GSMT here incorporates by reference all of the allegations of paragraphs 1 through 30.

32. At all times relevant hereto, there was in full force and effect § 48-53-104 (c) of the Tennessee Code Annotated, which provides, in relevant part, as follows with respect to Tennessee nonprofit corporations such as GSMT:

A corporation's power to act may be challenged in a proceeding against...an agent of the corporation. The proceeding may be brought by a director, the attorney general and reporter, or the corporation, directly, derivatively, or through a receiver, a trustee or other legal representative.

This provision of Tennessee law does not purport to affect employee retirement plans, confers upon GSMT an important right and protection as a Tennessee nonprofit corporation, and so is not pre-empted by ERISA.

33. While GSMT avers that the Plan Documents did not authorize GSUSA to subject GSMT to unlimited liability under the Plan, such as those liabilities relating to the Windfall Participants and the VERIP, in the event that the Court may otherwise determine, then GSMT avers that such grant of authority to GSUSA was *ultra vires* and void, and that GSMT is entitled to a declaration to such effect.

WHEREFORE, AND FOR ALL OF WHICH, GSMT prays:

1. Under Count I, for a declaration that (i) GSMT is entitled to withdraw from participation in the Plan at no costs and without assessment of liability to the Plan; (ii) GSUSA is required to participate with GSMT in a spin-off of Plan assets and liabilities attributable to GSMT's employees and former employees; (iii) GSUSA's addition of the Windfall Participants

and the VERIP amendment to the Plan are not binding upon GSMT; and (iv) GSUSA is required to indemnify GSMT and hold GSMT harmless for any and all liability arising under ERISA in the event of a distress termination of the Plan resulting from liabilities attributable to the Windfall Participants or the VERIP.

2. Under Count II, for an accounting from GSUSA as GSMT's agent and fiduciary as necessary to explain fully the Plan's current funding deficit and reasons for such deficit.

3. Under Count III, for a preliminary injunction restraining GSUSA from attempting to collect or otherwise seeking to enforce contributions against GSMT attributable to GSUSA's addition of the Windfall Participants and the VERIP to the Plan and, following the final hearing, for an injunction requiring GSUSA to participate with GSMT in a spin-off of Plan assets and liabilities attributable to GSMT's employees and former employees in a manner compliant with ERISA.

4. In the alternative, under Count IV, to the degree that the Court determines that GSMT granted to GSUSA authority to subject GSMT to unlimited liability under the Plan for liabilities such as the Windfall Participants and the VERIP, for a declaration that GSUSA's grant of authority was void as *ultra vires*.

5. For an award of GSMT's reasonable attorneys' fees, costs, and expenses incurred in this action.

6. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

s/Ames Davis

Ames Davis (BRP #3826)

James B. Bristol (BRP #19251)

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