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

GIRL SCOUTS OF MIDDLE TENNESSEE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil Action No. 3-12-cv-00575**
GIRL SCOUTS OF THE UNITED STATES OF AMERICA, INC.,	)	**Judge Nixon**
	)	**Magistrate Judge Knowles**
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, IN THE ALTERNATIVE, TO TRANSFER VENUE OR STAY PROCEEDINGS

Plaintiff, Girl Scouts of Middle Tennessee, Inc. ("GSMT"), responds as follows to the Motion to Dismiss or, in the Alternative, to Transfer Venue or Stay Proceedings filed by Defendant, Girl Scouts of the United States of America, Inc. ("GSUSA").

PRELIMINARY STATEMENT

GSMT seeks relief from GSUSA for GSUSA's breach of its fiduciary duties under GSUSA's written agency contract with GSMT, and specifically, for unilaterally amending, or otherwise unilaterally adding beneficiaries to, the National Girl Scouts Council Retirement Plan (the "Plan") in breach of its fiduciary duty as GSMT's agent, thereby subjecting GSMT to potentially ruinous liability. The Complaint alleges both federal question jurisdiction pursuant to 28 U.S.C. §1331 (because the litigation may affect a plan covered by ERISA) and diversity jurisdiction pursuant to 28 USCA §1332 (because GSMT and GSUSA are citizens of different states, and the amount in controversy exceeds $75,000, exclusive of interest and costs). GSUSA has moved to dismiss, or alternatively, to transfer venue or stay proceedings.

GSUSA's Memorandum of Law filed in support of its motion mischaracterizes the

Complaint as seeking relief for violation of ERISA (which it does not), and argues that the Court lacks jurisdiction under ERISA because GSMT, as an employer, lacks standing to file a claim under ERISA. GSUSA fails to address binding Sixth Circuit authority that federal question jurisdiction exists over a breach of contract claim by an employer which may affect an ERISA plan, nor does it address that, in addition to alleging federal question jurisdiction, the Complaint alleges that the Court has diversity jurisdiction.

GSUSA also argues that the Complaint fails to state a claim for violation of ERISA because GSUSA was not acting in a fiduciary capacity under ERISA when GSUSA unilaterally amended the Plan. While GSMT is not asserting a claim for GSUSA's breach of fiduciary duties ***under ERISA***, and agrees entirely that GSUSA was not acting in a fiduciary capacity under ERISA when it amended the Plan, GSUSA certainly ***was*** acting in a fiduciary capacity ***as agent for GSMT as employer*** when it amended the Plan in its capacity as Sponsor. GSUSA apparently is arguing that it was free to amend the Plan to suit its own purposes without any accountability to anyone. However, GSUSA agreed to act "on [GSMT's] behalf in regard to the Plan…subject at all times to [GSMT's] instructions." (Complaint, Exhibit B, at 2.)

GSUSA also argues that GSMT's alterative Tennessee statutory *ultra vires* claim should be dismissed on grounds which, as shown below, are simply not supported by the authorities cited.

Finally, GSUSA has moved, in the alternative, to transfer venue to New York pursuant to 28 USCA §1404(a) on the basis of assertions in supporting Declarations stating (often upon information and belief only) that important witnesses live in New York, even though GSUSA has not yet contradicted a single factual averment in the Complaint, and the great majority of the facts are set forth in written documents exhibited to the Complaint (including GSUSA's own written

communications to GSMT) and will therefore be undisputed and indisputable.[1]

GSUSA's Motion should be summarily denied.

STATEMENT OF FACTS

I. RESPONSE TO SPECIFIC FACTS CITED IN GSUSA'S MEMORANDUM.

Paragraph 7 of the Complaint alleges that, as stated in the letter addressed from GSMT to GSUSA which was part of the form Application By Employer to become a member of the Plan, GSMT appointed GSUSA as GSMT's:

> Agent, effective immediately, and authorize you [GSUSA] to act on our behalf in regard to the Plan…subject at all times to our instructions, which until changed are set forth herein. You [GSUSA] shall act solely in accordance with this Agreement as our Agent with respect to information and directions which we are required under the terms of the Contract, through which benefits under the Plan are funded, to furnish the Underwriter, as follows…

(Complaint, Exhibit B, at 2.) At footnote 2 on page 2 of GSUSA's Memorandum, GSUSA pays lip service to the rule that, for purposes of GSUSA's Motion, this Court will "accept as true the facts as [GSMT] has pleaded them," 583 F. Supp. 2d 885, 895 (M.D.Tenn. 2008). However, at page 4 its Memorandum, GSUSA dishonors that rule, asserting, "***GSUSA did not countersign the Request*** [GSMT's letter in its application, appointing GSUSA its agent]." (GSUSA's Memorandum at 4, emphasis supplied.) While the significance which GSUSA attaches to this improper factual assertion is not entirely clear (there is no obvious place on the form application for any countersignature), GSUSA apparently takes the position that GSMT never effectively appointed GSUSA as GSMT's agent. Such a position conflicts not only with the factual allegations in paragraphs 5, 7, 8, 10, 11,15, 19, 28, and 30 of the Complaint which must be taken as true, but with Section 1.8 of the Plan itself, which states, in relevant part:

[1] Typical of GSUSA's assumption that it may amend the Plan to suit its own purposes, GSUSA refers in its Memorandum to yet another unilateral amendment to the Plan under which GSUSA apparently contemplates the possibility of seeking to require GSMT to arbitrate this dispute in New York. Of course, as discussed below, absent agreement, one party to a dispute cannot compel another to arbitrate.

> The Plan Sponsor, [GSUSA], is the agent of its Employers for all retirement plan purposes. The Employers are those organizations listed on the attached Schedule A which sets forth their Entrance Date.

(Complaint, Exhibit C, at 10.) GSUSA admits that GSMT is an Employer listed in the schedule.

At page 5 of its Memorandum, GSUSA selectively quotes from Section 10.1 of the Plan as giving GSUSA authority to amend the Plan, "when and as it deems advisable without the consent of any Employers…." This broad characterization of GSUSA's authority to amend the Plan ignores GSUSA's express representation in the first sentence of such paragraph, that "the Plan Sponsor expects the Plan as adopted by executing the Adoption Agreement to remain in effect indefinitely…" Section 10.1(c) of the Plan prohibits an amendment which would alter the basic purposes of the Plan. Regardless of the Plan's grant of authority to GSUSA to amend the Plan, such authority was plainly subject to GSUSA's fiduciary duty to act in the best interests of GSMT in amending the Plan, and not in GSUSA's own selfish interests. The Complaint plainly alleges that GSUSA breached that duty in making the amendments complained of for improper purposes.

> 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 large numbers of employees of other Councils, which were not participating or contributing employers, were nonetheless eleigible 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.

(Complaint, ¶5.)

II. DETAILED DISCUSSION OF ADDITIONAL FACTUAL ALLEGATIONS PERTAINING TO COUNT IV.

At page 17 of its Memorandum, GSUSA argues that the Fourth Count of the Complaint does not offer sufficient factual matter which, if accepted as true, would state a claim to relief that is plausible on its face as necessary to withstand a motion to dismiss under *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Count IV seeks a declaration that, assuming the Court may determine that

the Plan Documents authorized GSUSA to subject GSMT to unlimited liability under the Plan, GSMT's grant of such authority to GSUSA was *ultra vires* and void under TCA §48-53-104(c). Paragraph 31 of Count IV incorporates all previous paragraphs of the Complaint, all of which need to be considered to determine whether Count IV meets the standards of *Iqbal.* The following allegations of the Complaint are certainly sufficient to show it satisfies such standards.

The Complaint alleges at paragraph 4 that GSUSA currently charters 112 Girl Scout councils (together, the "Councils"), one of which is GSMT. Each Council is a separate nonprofit corporation that is independent from all others. Each Council is legally independent from GSUSA. 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, TCA §§ 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. (Complaint, ¶3.) *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc*., 549 F.3d 1079, 1090 (7th Cir. 2008). The charter issued by GSUSA allows Councils 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. (Complaint, ¶4.)

The Plan is a defined benefit pension plan intended 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. 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"). As already

mentioned, a copy of the Application and Voluntary Participation Agreement are attached as Exhibit B to the Complaint. A copy of the Plan, as amended and restated by instrument dated January 28, 2008, is attached as Exhibit C. The Voluntary Participation Agreement and Plan are sometimes collectively referred to as the "Plan Documents." (Complaint, ¶¶6, 7.)

Under the Voluntary Participation Agreement, GSMT appointed GSUSA to act as GSMT's agent "subject at all times to [GSMT's] instructions." 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. 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.[2] (Complaint, ¶8.)

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 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 revisions. GSMT executed the Voluntary

[2] As alleged in the Complaint, the Plan 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. A plan amendment to increase benefits was only possible if agreed to by all adopting employers through the bargaining process. Benefits in this Plan are not determined through collective bargaining. Instead, Plan amendments can only effectively be adopted by all Councils that adopted the Plan. 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. (Complaint, ¶9).

Participation Agreement on the basis of the features and level of benefits set forth in the Plan at the time of such execution. (Paragraph 10.1 of the Plan, Exhibit C to Complaint, at 61.) 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's 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. (Complaint, ¶9.)

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. (Complaint, ¶11.)

The Complaint alleges that 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 112[3] 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. One of the principal reasons for Council resistance to Realignment was that the merger of Councils eliminated jobs of many Council employees. (Complaint, ¶¶13-14.)

Prior to Realignment, roughly one-third of the Councils had elected not to participate in

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

the Plan. Those Councils never contributed to the Plan and had no expectation that Plan benefits would be conferred on their employees. However, 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 became 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. (Complaint, ¶15.) 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, attached as Exhibit E to the Complaint (Section 1, Summary, at 8). 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. The Complaint alleges that GSUSA's unilateral action in having the Plan assume the enormous new Plan liability represented by the Windfall Participants was for an improper purpose: to assist GSUSA in implementing Realignment, not for the benefit of GSMT, none of whose employees are Windfall Participants. (Complaint, ¶15.)

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. The VERIP provides

eligible participants with additional service and pension credits to subsidize and accelerate eligibility for a pension under the Plan to ease the economic effects of lost employment. The Complaint alleges that neither GSMT or its employees benefited from the addition of the VERIP, as none of GSMT's employees were eligible to participate in the VERIP. (Complaint, ¶17.)

As alleged at paragraphs 18 through 20 of the Complaint, these two unauthorized actions by GSUSA – adding the Windfall Participants and adopting the VERIP amendment – caused the actuarial liabilities of the Plan to mushroom out of control.

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. (Complaint, ¶¶18-19.) The Complaint alleges that 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, presents a substantial risk that the Plan will fail, leading to a distress termination. The Complaint further alleges that 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. (Complaint, ¶¶19-20.) The Complaint further alleges that GSUSA has ignored GSMT's requests for financial information as necessary to understand the reasons for the Plan's current situation, and has refused to cooperate with GSMT 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. (Complaint, ¶¶20-23.)

ARGUMENT

I. GSUSA's MOTION TO DISMISS THE COMPLAINT SHOULD BE DENIED

A. This Court Has Subject Matter Jurisdiction Over GSMT's Claims

GSUSA argues that GSMT, as an employer, lacks standing to pursue an ERISA claim under 29 USCA §1132(a), and that this Court therefore lacks subject matter jurisdiction of this action. Jurisdiction in this matter is not premised upon jurisdiction under ERISA. Rather, federal jurisdiction exists because the Complaint asserts contractual and common law claims by an employer with respect to an ERISA Plan. *Whitworth Bros. Storage Co. v. Cent. States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 235-36 (6th Cir. 1986) (applying federal common law to employer's claim to recover erroneous payments to an ERISA plan).[4] *See also Ky. Laborers Dist. Council Health & Wel. V. Hope*, 861 F.2d 1003, 1005 (6th Cir. 1988). GSUSA apparently overlooks that this Court also has diversity jurisdiction pursuant to 28 USCA §1332 as alleged in Paragraph 2 of the Complaint. Thus, the Court manifestly does have subject matter jurisdiction over this action, and GSUSA's motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) should be denied.

B. The Complaint States a Claim for Breach of Contract and Fiduciary Duty by GSUSA as GSMT's Agent.

GSUSA argues, at page 9, that even if Plaintiff has standing to assert a claim under ERISA so as to confer jurisdiction, GSMT has failed to state claim for breach of ERISA fiduciary duties. GSMT agrees that the Complaint does not state a claim for relief for violations

[4] In *Whitworth Bros. Storage Co. v. Cent. States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 235-36 (6th Cir. 1986), a participating employer in a multi-employer plan sought to recover erroneous contributions, which is a situation analogous to the current dispute. The court treated the claim as a matter of federal common law and ruled that federal jurisdiction existed under 28 USCA §1331 due to the subject matter of the dispute (a plan governed by ERISA).

of fiduciary duty under ERISA. Instead, the Complaint alleges that GSUSA breached its common law fiduciary duties as GSMT's agent under the Plan Documents.

GSUSA identifies itself as an ERISA fiduciary and argues at page 11 of its Memorandum that it was not acting under that particular fiduciary capacity when in amended the Plan to add the VERIP. GSUSA cites the Supreme Court's decision in *Lockheed v. Spink*, 517 U.S. 882 (1996), for the proposition that amendments to an ERISA-covered plan are performed by a plan sponsor in its "settlor" capacity and are not subject to fiduciary review under ERISA.

There are at least two problems with GSUSA's reliance on *Spink*. First, GSMT is alleging that GSUSA was acting in a fiduciary capacity under familiar principles of agency law whenever it amended the Plan -- not that GSUSA was acting as a fiduciary under ERISA. Second, the plan sponsor in *Spink* was also the employer of the participants in the plan, and responsible to make contributions to the plan. The plan sponsor was, in other words, also the trust settlor. Generally, an employer that sponsors a plan is free to amend the plan as it deems appropriate. As stated in another case cited by GSUSA at page 12, *Gromola v. Royal & Sunalliance* , 87 Fed. Appx. 562 (6th Cir. 2004):

> Employers and plan sponsors are generally free under ERISA to adopt, modify, or terminate plans, for any reason and at any time. When employers or plan sponsors take these actions, they do not act as fiduciaries but are analogous to the settlors of a trust.

(internal citations omitted.) But GSUSA is not an employer of any participants in the Plan and is not responsible to contribute to the Plan; that is, it is not the "settlor" of the Plan. GSUSA blurs this distinction between a plan settlor and a plan sponsor. By definition, a retirement plan must be "established or maintained by employers or by an employee organization." 29 USC §1002(2)(A). GSUSA is neither an employer or employee organization with respect to the Plan, and so did not establish and does not sustain the Plan, and so cannot amend the Plan except as a

representative. Under ERISA, a "plan sponsor" of a multiple-employer plan is described as a "representative" of the employers that establish the plan. 29 USC § 1002(16)(B)(iii).

According to the U.S. Department of Labor, the federal agency responsible for enforcing ERISA, an entity that is not an employer can only serve as sponsor when it is truly acting in a representative capacity. *See* Dept. of Labor Advisory Op., 2012-04A, May 25, 2012 (filed herewith). In other words, unlike the plan sponsor in *Spink*, GSUSA is solely a representative of GSMT and other employers that established the Plan and are responsible for funding of the Plan. GSUSA has no authority to contribute or responsibility for funding the Plan.

GSUSA's role as GSMT's agent under the Plan documents imposes fiduciary duties on GSMT under familiar principles of agency law.

> An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). When GSUSA amended the Plan on behalf of its principal, GSMT, GSUSA was obligated to do so in the best interests of GSMT. GSUSA certainly was not free to amend the Plan, as it did, to further its own interests, such as promoting Realignment of Girl Scout Councils, without violating its fiduciary duty to GSMT. The Complaint plainly describes GSUSA's actions in breach of its fiduciary duties as GSMT's agent.

At page 12 of its Memorandum, GSUSA argues that GSMT, by seeking to require GSUSA to participate with GSMT in a spin-off as contemplated by ERISA, is attempting to alter the Plan through litigation, and that the terms of the Plan may not be so altered. This argument again simply ignores the fact that GSUSA is GSMT's agent, and the Complaint plainly and clearly alleges that GSUSA amended the Plan in breach of its fiduciary duties as GSMT's agent, thereby subjecting GSMT to potentially unlimited liabilities. Any right GSUSA might otherwise have to refuse to consent to the spin-off was certainly abrogated by its breach of fiduciary duty in

adopting Plan provisions for its own selfish purposes, in breach of its fiduciary duties as agent. Even assuming, as GSUSA appears to argue, that under the Plan as written, GSMT is not entitled to have this Court direct GSUSA to cooperate in the requested spin-off, dismissal of the Complaint would not be warranted. Courts can and will modify the terms of an ERISA-covered plan in appropriate circumstances. *See, e.g., Packovich v. Verizon LTD Plan*, 653 F.3d 488 (7th Cir. 2011) (court modified plan language resulting from a scrivener's error). In any event, GSMT would still be entitled to whatever relief to which it may otherwise show itself entitled -- including damages against GSUSA for breach of fiduciary duty in amending the Plan for its own selfish purposes.

At page 14, GSUSA argues that GSMT has not shown that it is entitled to an accounting, as demanded in Count II, because GSMT has not shown that it has a fiduciary relationship with GSUSA or some other special circumstances meriting this remedy. Once more, GSUSA ignores its agency relationship with GSMT which is established by the Plan Documents. It is hornbook law that an agent must account to its principal when it breaches the agency relationship.

> An agent's breach of the agent's fiduciary obligation subjects the agent to liability to the principal. An agent's liability stems from principles of restitution and unjust enrichment, from the agent's duty to account to the principal, and from tort law. The agent's breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal's behalf. The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal.

RESTATEMENT (THIRD) OF AGENCY §8.01 (2006), Comment (d)(1).

Next, GSUSA argues at page 15 that GSMT has not demonstrated it is entitled to any injunctive relief as requested in Count III, because GSMT has not alleged facts sufficient to show that GSUSA interpreted the Plan in an arbitrary and capricious manner. This argument is, with all due respect, patent nonsense. First, the arbitrary and capricious standard of review applies

only when a fiduciary is given discretionary authority to construe the terms of the Plan. *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989). Unless GSUSA has clandestinely amended the Plan to do so, neither the Plan nor the letter appointing GSMT as GSUSA's agent confers such authority on GSUSA. Moreover, the Complaint charges GSUSA with ***breach of fiduciary duty in amending the Plan for its own selfish purposes***, and of improperly refusing to permit a spin-off, consistent with ERISA, as necessary to protect GSMT from potentially limitless liability occasioned by such breach. Even assuming GSMT's refusal to permit the spin-off requested by GSMT was subject to review only if arbitrary and capricious, such allegations are sufficient to show the refusal to be arbitrary and capricious.

C. Plaintiff Has Standing to Assert and Has Stated a Claim for Relief Under TCA §48-53-104.

Finally, in support of its assertion that the Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, GSUSA asserts that GSMT lacks standing to seek the alternative relief, sought in Count IV, pursuant to TCA §48-53-104, and has failed to state a claim for relief under that statute.

1. GSMT has Standing to Assert Its Alternative Claim Under the Express Language of TCA §48-53-104(c).

In Count IV, GSMT alleges alternatively that if GSMT is found to have authorized GSUSA to make the Plan amendments about which GSMT complains, then such authorization was *ultra vires* as submitting GSMT to potentially unlimited liability at the whim of GSUSA, and is subject to challenge under TCA §48-53-104(c), which provides, in relevant part:

> A corporation's power to act may be challenged in a proceeding ***against an*** …***agent of the corporation***. ***The proceedings may be brought by*** …***the corporation, directly***, derivatively, or through a receiver, a trustee or other legal representative.

(emphasis added.) In light of this express statutory language, GSUSA's argument that GSMT

lacks standing is unavailing. GSUSA's citation of subsections (a) and (b) of the statute, while studiously avoiding any mention of subsection (c), is as puzzling as its citation of *State ex rel. Adventist Health Care Sys./Sunbelt Health Care Corp. v. Nashville Mem'l Hosp., Inc.*, 914 S.W.2d 903, 908 (Tenn. Ct. App. 1995), which did not involve an action brought by or on behalf of a corporation, but an action against the corporation in question to enjoin its sale to a third party brought under subsection (b) -- not subsection (c) -- of TCA §48-53-104. GSMT plainly has standing to bring an action against its agent, GSUSA, under TCA §48-53-104(c).

2. GSMT's claim under TCA §48-53-104(c) is not barred by the statute of limitations.

GSUSA argues that GSMT's claim that the grant of authority to GSMT is *ultra vires* is barred by the applicable statute of limitations, and asserts that an *ultra vires* claim must be commenced within six years from the date the plaintiff should have become aware of the allegedly wrongful conduct, citing *Bryson v. City of Chattanooga*, 338 S.W.3d 517, 527 (Tenn. Ct. App. 2010). In fact, however, the court in *Bryson* expressly did not reach the question of what statute of limitations applies to an *ultra vires* claim, or to any of the other state law claims asserted in that case. *Id.* at 526-57. More importantly, however, GSUSA blithely misstates the standard applied in *Bryson* for when any Tennessee statute of limitations begins to run. At page 16 of its Memorandum, GSUSA cites *Bryson* as holding that the applicable limitations period runs from "the date plaintiff should have become aware of the allegedly wrongful conduct." But as noted in *Bryson*, the correct standard is that adopted by the Tennessee Supreme Court in *Shadrick v. Coker*, 963 S.W.2d 726, 733-34 (Tenn. 1998), quoted by *Bryson* at 338 S.W.3d 526:

> [A]s we have recently emphasized, the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care and diligence should know ***that an injury has been sustained*** as a result of wrongful or tortious conduct of the defendant.

(emphasis added.) GSUSA makes no attempt to argue -- as, indeed, it could not successfully

argue -- that GSMT failed to file suit within six years after learning that GSMT had suffered injury as result of GSUSA's amendment to add the VERIP. The Complaint expressly alleges that on November 15, 2006 -- less than six years prior to the filing of this action -- GSUSA falsely represented that the Councils would not have to fund the VERIP. (Complaint, ¶17.) Therefore, dismissal of the Complaint on grounds of the running of any applicable statute of limitations would be improper. While GSUSA also argues that the claim is barred by laches, laches is an equitable remedy which is unavailable to a defendant, such as GSUSA, who has misled its principal as alleged in the Complaint. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

3. GSMT's alternative *ultra vires* claim is not pre-empted by ERISA.

GSUSA argues at page 17 of its Memorandum that the statutory *ultra vires* claim is preempted by ERISA, citing the Sixth Circuit's opinion in *Smith v. Provident Bank*, 170 F.3d 609, 615 (6th Cir. 1999). But, unlike the plaintiff in that case, GSMT is plainly not seeking "in essence…recovery of an ERISA plan benefit" for which, as held in that case, ERISA provides the exclusive remedy.[5] Only state law that:

> duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.

Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004). GSMT's statutory Tennessee *ultra vires* claim does not duplicate, supplement, or supplant the ERISA civil enforcement remedy, and so does not conflict with ERISA, and is not pre-empted.

Even if GSMT's alternative *ultra vires* claim were deemed to affect the Plan's

[5] For a state law claim to be subject to complete preemption, a court must conclude that the common law or statutory claim under state law should be characterized as a superseding ERISA action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan, as provided in 29 USC §1132(a)(1)(b). *Peters v. Lincoln Elec. Co*., 285 F.3d 456, 468 n. 11 (6th Cir. 2002).

administration so as to require application of federal common law, *see Whitworth Bros. Storage Company v. Cent. States*, *supra*, dismissal of the claim would not be warranted because the statutory claim does not conflict with ERISA's purposes or underlying policies. As this Court pointed out in *Greenwood Mills, Inc. v. Burris,* 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001):

> The Sixth Circuit and other circuits have held that the law of the forum state may be looked to for guidance in fashioning a federal ruling where the federal statute is silent, where the matter is "traditionally of state concern," and where the state rule is not in conflict with the policies underlying the federal statute.…***Thus, if Tennessee law does not conflict with ERISA's policies or purposes, this court may legitimately adopt Tennessee's rule as its own.***

(internal citations omitted) (emphasis added).

In this case, GSMT's alternative *ultra vires* claim seeks only a determination that it is not bound by GSUSA's unilateral amendments to the Plan because any grant of authority to GSUSA to amend the plan so as to subject GSMT to potentially unlimited liability was beyond GSMT's corporate power to give. Tennessee law has provided a remedy for such unauthorized corporate action in the form of TCA §48-53-104(c). Nothing in ERISA conflicts with this purpose or policy, so the Tennessee statutory remedy may be applied.

4. GSMT's alternative *ultra vires* claim contains sufficient factual matter which, if accepted as true, would entitle GSMT to relief.

At page 17 of its Memorandum, GSUSA makes the now obligatory defense argument that the Complaint does not offer sufficient factual matter which, if accepted as true would state a claim to relief that is plausible on its face, citing *Ashcroft v. Iqbal*, *supra*. As shown above, the Complaint details at length the fact that, as GSMT's agent, GSUSA made amendments to the Plan in breach of its fiduciary duties as agent which threaten GSMT with virtually unlimited liability. While GSMT asserts that GSUSA was not authorized to make these amendments, it alternatively asserts that if GSMT authorized GSUSA to make amendments that would subject

GSMT to such liability, such authorizations were beyond GSMT's corporate power to give. GSUSA does not suggest what factual allegations are missing to make the claim plausible on its face, and indeed, while GSUSA's alleged actions might otherwise seem implausible, they are documented in the exhibits to the Complaint.

5. GSMT is not equitably estopped to assert that GSUSA's unilateral amendments to the Plan was *ultra vires*.

Finally, GSUSA argues that GSMT is equitably estopped to argue that any authorization of GSUSA to make the amendments to the Plan was *ultra vires* because GSMT has accepted the benefits -- the value of GSUSA's services relating to the Plan's administration -- associated with GSMT's execution of the Plan documents. But GSMT is not asserting that its execution of the Plan Documents was entirely *ultra vires.* It asserts only that, to the degree there are provisions in the Plan Documents that might be construed as permitting its agent to unilaterally make amendments subjecting GSMT to potentially ruinous liability, GSMT lacked the corporate power to agree to such provisions. Far from deriving any benefit from these amendments, GSMT alleges that the amendments confer no benefit on any of GSMT's past or present employees.

II. GSUSA'S MOTION TO TRANSFER VENUE SHOULD BE DENIED

28 U.S.C. §1404(a) provides, "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." It "is permissive in nature, and as its language suggests, district courts have broad discretion" in considering motions thereunder. *Encore Med., L.P. v. Kennedy*, 2012 WL 966431, *7 (E.D. Tenn. Mar. 21, 2010). "[T]he burden is on the moving party to establish the need for a change of venue[, and i]f the moving party fails to make such a showing, then the plaintiff's choice of forum will be given deference." *Gomberg v. Shosid*, 2006 WL 1881229, *10 (E.D. Tenn. July 6, 2006). The court may examine facts outside the complaint,

but must draw all reasonable inferences and resolve factual conflicts in favor of the plaintiff. *Nisby v. Barden Miss. Gaming, LLC*, 2007 WL 6892326, *5 (W.D. Tenn. Sept. 24, 2007).

In considering a motion to change venue under Section 1404(a), a "district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the heading of 'interests of justice.'" *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991). Private interest factors for consideration include:

> (1) the convenience to the parties; (2) the convenience of witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; [and] (6) the practical problems indicating where the case can be tried more expeditiously and inexpensively . . .

Smith v. Kyphon, Inc., 578 F. Supp. 2d 954, 962 (M.D. Tenn. 2008). Public interest factors are:

> (1) the enforceability of the judgment; (2) practical considerations considering trial management; (3) docket congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the fora; and (6) the familiarity of the trial judge with the applicable state law. *Id.*

Citing Section 1404(a), GSUSA has moved to transfer this case from this District to the Southern District of New York ("SDNY"). Not only do both the public and private interest factors weigh in favor of denial, but also GSMT as Plaintiff chose this District as the forum in this case -- a choice that commands substantial weight when a court considers a venue transfer motion such as the one filed by GSUSA. This Court should deny the motion.

A. Private Interest Factors Weigh in Favor of this Court's Denial of GSUSA's Transfer Motion.

GSUSA argues that the relevant witnesses, evidence and complained-of conduct took place in New York, thus the case should be heard in New York.[6] In making this argument,

[6] GSUSA also argues at page 18 that "New York is an appropriate venue under ERISA." Under no circumstance should ERISA have any bearing on venue selection in this case. Nowhere in GSMT's Complaint has GSMT alleged an ERISA violation.

however, GSUSA wholly ignores that the factual allegations made by GSMT in the Complaint are presently undisputed and, for the most part, are *indisputable*, as these allegations are based entirely upon the written agreements, Plan Documents and GSUSA's written communications to GSMT. Even if every witness and every piece of evidence in this case was in fact in New York (which they are not), then a transfer would still be unwarranted. Moreover, mooting any need for testimony from any of the 16 individuals listed by GSUSA in its brief,[7] GSUSA has agreed to ***voluntarily produce*** information regarding the number of Windfall Participants in the Plan, as well as information that will provide an explanation for the Plan's underfunded status.[8]

Nevertheless, addressing the factors for consideration of the parties' private interests, it is no more convenient to the parties for this case to be heard in New York than it is in Tennessee. A transfer of venue under Section 1404(a) must render the litigation more convenient as a whole; it cannot merely shift inconvenience between the parties. *McKee Foods Kingman v. Kellogg Co.*, 474 F. Supp. 2d 934, 942 (E.D. Tenn. 2006) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 645-46, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). GSUSA's argument reveals that a transfer to the SDNY would merely be more convenient for itself, and not for both parties. Indeed, GSMT is a Tennessee non-profit corporation based in Nashville, and its employees, witnesses and Plan participants reside in this District. While GSUSA and its witnesses may be located within the

[7] On pages 19-20, GSUSA lists 16 individuals from whom GSMT would "most likely seek information" in this case regarding "why and how the decisions were made to add participants and adopt the VERIP amendment."

[8] As stated at the initial case management conference on July 30, 2012 before Magistrate Judge Clifton Knowles:

> MR. DAVIS [Counsel for GSMT]: [A]ssuming there is an interest in entering settlement discussions, there are two things we're going to need. . . . ***The first is how many of what we call in our complaint windfall employees have been added to the liabilities under the plan. And the second is an explanation of how the liabilities side of the plan has ballooned to the point that we find ourselves in a very severely underfunded situation.*** We believe that as an employer who has made large numbers of contributions to this plan, we're entitled to this information regardless of whether there's pending litigation. . . .
> THE COURT: Are y'all [GSUSA] going to provide the information voluntarily?
> MR. KIRSCHNER [Counsel for GSUSA]: Yes, Your Honor.
> THE COURT: All right. We're in agreement.

(Transcript of Initial Case Management Conference, filed herewith, at 4:4-17, 6:18-22 (emphasis added).)

SDNY, transfer would merely shift the inconvenience that is inherent when two parties from different states are involved in litigation.

Any need to compel the attendance of unwilling witnesses in either Tennessee or New York is equally possible, but also not likely, realistically speaking. Seven of the 16 witnesses listed in GSUSA's brief are GSUSA employees. Because these witnesses "can be compelled to testify on behalf of their employer, their convenience is of lesser relevance." *Kyphon*, 578 F. Supp. 2d at 963 (denying venue transfer motion). The remaining 9 witnesses listed by GSUSA are for the most part, current employees of MOA or Mercer. MOA and Mercer have served as Administrators of the Plan since the Plan's inception, and for all practical purposes, have an interest in appearing in this case to provide testimony. GSUSA has not presented proof that these witnesses are ***not*** willing to testify, regardless of the forum. At any rate, "the convenience of the witnesses factor should not devolve into a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts . . ." C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3851 at 425.

Regarding the location and sources of proof, this case is very unlikely to be document intensive, and certainly not intensive beyond the information that GSUSA voluntarily agreed to produce at the July 30 case management conference. Even if hard copies of relevant documentary information are physically located in the New York area, modern technology allows for easy reproduction of relevant documents and easy transport, as obviously, images of documents can be transmitted electronically. As Judge Robert Echols stated in *Nat'l Indep. Pharm. Coalition v. Amer. Pharm. Coop., Inc.*, 2006 WL 1896991, *10 (M.D. Tenn. July 10, 2006), "[I]t is not unusual for a case to be filed in one forum with most of the pertinent documents located in another. Available technology permits the production of documents in

electronic form to ease the burdens of discovery production." And furthermore, "Where the events in question are spread across two districts, the Court cannot say that systemic fairness compels that the lawsuit be heard only in" one state, particularly when plaintiffs have chosen to litigate in a different district. *Id.* (denying motion to transfer case to Alabama even though "the greater share of the documents appears to be located in Alabama.").

At this early stage in the lawsuit, four New York lawyers have been admitted *pro hac vice* to defend GSUSA. One such lawyer is Mr. Ken Kirschner, who has represented GSUSA since GSMT's concerns with regard to the Plan were first voiced, and long before this litigation was filed. GSUSA has further retained Ken Weber of the Baker Donelson law firm to serve as its local counsel. To move this case to New York would require GSMT, a Middle Tennessee nonprofit corporation, to hire New York lawyers, and would thus place upon it a heavy financial and logistical burden, particularly given the rates charged by lawyers in New York. No doubt both parties are presently faced with the challenge of paying legal fees to litigate this case, but the financial and logistical burden imposed on GSUSA to litigate in Tennessee is far less than the burden that would be imposed on GSMT if it were required to pursue its claims (including its claim for violation of the Tennessee Nonprofit Corporation Act) in New York.

This Court should deny GSUSA's motion to transfer venue. GSUSA's argument, based entirely upon its own private interests, turns a blind eye to the critical fact that it has already agreed to voluntarily produce the information that may otherwise be sought from some of the 16 witnesses it indiscriminately lists in its brief. This critical fact standing alone provides a basis for the Court's denial of GSUSA's motion. For this and all of the other reasons described above, the private interest factors, when considered for both parties, weigh in favor of denial.

B. Public Interest Factors Weigh in Favor of Denial of the Transfer Motion.

Private interests aside, the public interests in this case also weigh in favor of denial of the motion. No doubt there are local interests present which suggest a need to keep this action in Tennessee. These interests are grounded in Plaintiff's existence as a Tennessee not-for-profit corporation, serving and employing citizens of Middle Tennessee, all of whom are directly and adversely affected by the decisions made by GSUSA at the crux of this lawsuit. For these same reasons, this Court has a significant interest in keeping this litigation in this District.

To move this case to the SDNY would be to move this case to an even more congested docket, perhaps further delaying resolution of this dispute, which could be to GSMT's further detriment. Moreover, moving the case to New York would be to move any decision regarding interpretation of the Tennessee Non-Profit Corporation Act to a Court less familiar with that Act. The judges in this District are far better acquainted with the Tennessee law at issue.

Ultimately, public interests, unaddressed by GSUSA, weigh in favor of denial.

C. GSMT's Choice of Forum in this District Is Entitled to Substantial Weight.

Private and public interest factors aside, "one of the most significant factors in considering whether venue should be transferred is the plaintiff's choice of forum. A plaintiff's choice of forum is usually entitled to ***'substantial consideration'*** in balancing the §1404 factors. This is especially true where the plaintiff also resides in the chosen forum." *Smith v. Kyphon, Inc.*, 578 F. Supp. 2d 954, 962 (M.D. Tenn. 2008) (emphasis added); *see also Hoffman v. Blaski*, 363 U.S. 335, 365-66, 80 S.Ct. 1084 (1960) (Courts should not disturb plaintiff's choice of forum unless defendant makes substantial showings of convenience and justice.)

In this case, Plaintiff GSMT *chose* this District in which to file suit. This District is where GSMT, a Tennessee not-for-profit corporation, is based; this District is where the Tennessee citizens served by GSMT reside. In filing suit, GSMT selected this District -- its "home" District

-- to evaluate and determine GSMT's rights and any obligations it has under the Plan Documents. It was GSMT's prerogative as Plaintiff to file suit here, and under Tennessee law, this matters. This Court should afford great weight to GSMT's choice to be here, and should deny GSUSA's motion to transfer accordingly.

Ultimately, GSUSA has not carried its heavy burden of showing that a transfer is warranted. The motion should be denied.

III. GSUSA'S MOTION TO STAY PROCEEDINGS SHOULD BE DENIED

GSUSA argues at page 23 that this Court should stay the litigation proceedings because GSMT's claims are referable to arbitration. It points to an alleged arbitration clause in the Plan.

GSUSA's argument fails. The arbitration clause on which GSUSA relies was added to the Plan by way of a ***unilateral amendment*** by GSUSA as recently as 2009. Indeed, Mary Cavarra, chairwoman of GSMT Board of Directors, testified that neither she "nor any officer, director or employee of GSMT" had even seen a copy of GSUSA's unilateral amendment adding the arbitration provision "prior to June 13, 2012, ***after*** GSMT filed the present action." (Declaration of Mary Cavarra, filed herewith, at ¶ 2 (emphasis added)). Further, she has "no knowledge or information that any officer, director or employee of GSMT ever consented or agreed to submit any disputes between GSMT and . . . [GSUSA], to arbitration." Id. at ¶ 3.

Conceding this point in footnote 11 of its brief, GSUSA redirects this Court to Section 10.1 of the Plan which allegedly "gives GSUSA . . . the authority to amend the Plan 'when and as it deems advisable without the consent'" of GSMT or any of the Councils. While Section 10.1 of the Plan does in fact give GSUSA the right to amend the Plan without GSMT's consent, as discussed above, it does ***not*** give GSUSA the right to amend the Plan more than ministerially.

Moreover, the law says GSUSA cannot unilaterally impose arbitration on GSMT:

> **When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.** *See, e.g., Mastrobuono, supra*, at 62-63, and n. 9, 115 S.Ct., at 1218-1219, and n. 9; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476, 109 S.Ct. 1248, 1253-1254, 103 L.Ed.2d 488 (1989); *Perry v. Thomas*, 482 U.S. 483, 492-493, n. 9, 107 S.Ct. 2520, 2526-2527, n. 9, 96 L.Ed.2d 426 (1987); G. Wilner, 1 Domke on Commercial Arbitration § 4:04, p. 15 (rev. ed. Supp.1993).

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (emphasis added). Moreover:

> **[S]ince arbitration agreements are creatures of contract, a party cannot be required to submit to arbitration unless he or she has agreed to do so.**

***French v. First Union Sec., Inc.*, 209 F.Supp.2d 818, 826 (M.D. Tenn. 2002) (Nixon, J.)** (emphasis added) (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") and *Cooper v. M.R.M. Invest.*, 199 F.Supp.2d 771 (M.D. Tenn. 2002) (Nixon, J.) (same)).

Finally, GSUSA erroneously relies on the decision in *MJR Int'l, Inc. v. Am. Arbitration Ass'n*, 398 F. Appx. 115 (6th Cir. 2010) for the proposition that a principal is bound to an arbitration agreement entered into by the principal's agent. However, the Sixth Circuit in *MJR* held that an agent can bind its principal to arbitrate with a third party -- *not* that an agent can bind its principal to arbitrate with the agent. It is therefore inapposite.

GSMT was not even aware of the arbitration provision now asserted by GSUSA in its motion to stay until after GSMT filed this lawsuit. As a matter of law, the arbitration provision is not enforceable, and this Court should deny GSUSA's motion accordingly.

CONCLUSION

For the foregoing reasons, GSUSA's motion to dismiss Plaintiff's Complaint or, in the alternative, to transfer venue or stay proceedings, should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2012, a true and correct copy of the foregoing document was served electronically through the Court's CM/ECF system upon:

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