IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

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KATHY HOLT WEEDMAN, JACK SANDERS HOLT, JANELLE HOLT, JUDY BAUMAN and DONNA ETHRIDGE,)

Plaintiffs,)

VS.) NO. 16-464-BC

SANDERS MANUFACTURING COMPANY, OWEN SANDERS, JAMES J. SANDERS III, ERIC O. SANDERS, and LOREN G. KIRKPATRICK;)

Defendants.)

MEMORANDUM AND ORDER: (1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' REQUEST FOR JUDGMENT AS A MATTER OF LAW; (2) DENYING DEFENDANTS' 11/30/16 MOTION TO RECOVER SUBPOENA COSTS; AND (3) SETTING 2/10/17 DEADLINE TO SCHEDULE TELEPHONE CONFERENCE

This lawsuit was filed by five shareholders holding a minority interest in an approximately 20-shareholder corporation. The Plaintiffs' lawsuit is asserted to have been brought on behalf of the Defendant Corporation, Sanders Manufacturing Company. The case has been filed as a derivative claim. The Plaintiffs have sued the Corporation, its chairman of the board and two directors. The Individual Defendants are also shareholders.

In issue is a "Top Hat," ERISA retirement plan.[1] "Top Hat" reflects that the Plan benefits are for upper level management or highly-compensated employees.[2] While Top Hat plans are subject to ERISA's administrative and enforcement provisions, these plans are exempt from the substantive provisions that impose fiduciary duties, and the standards required of other ERISA retirement plans, such as participation, vesting, accrual, funding, fiduciary responsibility, disclosure, and reporting. *See*, *In re IT Grp., Inc.*, 448 F.3d 661, 664 (3d Cir. 2006), *as amended* (July 10, 2006); *Tate v. Gen. Motors LLC*, 538 F. App'x 599, 602 (6th Cir. 2013). "[T]op hat plans form a rare sub-species of ERISA plans, and Congress created a special regime to cover them." *In re New Valley Corp.*, 89 F.3d 143, 148 (3d Cir. 1996).

A year ago, February 2016, in this case the Corporation began consideration of liquidating some or all of its assets. This was after four years (2011-2015) of losses in

[1] "No reference to the term 'top hat' plan appears anywhere in ERISA. It is a 'colloquial term used to refer to certain unfunded plans specially exempted from ERISA's participation, vesting, funding, and fiduciary requirements.'" *In re Alpha Nat. Res., Inc.*, 554 B.R. 787, 793 (Bankr. E.D. Va. 2016) (quoting *Guiragoss v. Khoury*, 444 F.Supp.2d 649, 658 (E.D.Va.2006)).

[2] In *Simpson v. Mead Corp.*, the Sixth Circuit Court of Appeals described the unique nature and elements of a "top hat" plan:

> 'A 'top hat plan' is...'a plan which is unfunded and is maintained by an employer primarily for the purposes of providing deferred compensation for a select group of management or highly compensated employees.' Top hat plans are almost completely exempt from 'ERISA's substantive requirements.' Under 29 U.S.C. § 1051(2), top hat plans are exempted from 'ERISA's minimum participation standards, minimum vesting standards,...various other content requirements,' and 'ERISA's anti-cutback provision.' Under § 1081(a)(3), top hat plans are exempted from 'ERISA's minimum funding requirements.' Under § 1101(a)(1), top hat plans are exempted from 'ERISA's fiduciary responsibility provisions, including the requirement of a written plan, the need to give control of plan funds to a trustee, the imposition of liability on fiduciaries, and limitations on transactions and investments.' Under § 1051(2), top hat plans are exempted from 'ERISA's reporting and disclosure requirements' but subject to administrative regulations. Top hat plans are basically only 'subject to the enforcement provisions' of ERISA.

187 F. App'x 481, 483–84 (6th Cir. 2006) (citations omitted).

the range of $400,000 to $500,000 each year and a direct total loss to shareholder equity of $2.45 million. Since February 2016, some assets have been sold, but not all, and dissolution has not occurred.

Nevertheless, at that time in February of 2016, the Board of Directors of the Corporation passed a resolution that if the Corporation was sold or a substantial amount of its assets, the Board would be authorized to review, approve and execute documents to pay $896,000 to fund the Corporation's Top Hat Plan: "Sanders Manufacturing Company Supplemental Executive Retirement Plan" (the "Plan"). That Plan had been adopted by the Corporation in 2008. Some of the Individual Defendants are presently receiving Plan benefits: Loren G. Kirkpatrick and Eugene Sanders are receiving benefits (payments for 15 years) under the version of the Plan adopted in September 2008, and Owen Sanders is receiving benefits (payments for life) under a prior version of the Plan. The Defendants assert that James J. Sanders, III is eligible to receive benefits upon cessation of employment, and that Eric O. Sanders will be eligible for benefits upon reaching retirement age sixty-two (62). The current value of the specified benefits is installments of $2,493, increasing by 3% every January 1, paid once a month for 15 years.

The Plaintiffs assert as a key element of their lawsuit that it was the vote of the Individual Defendants' majority shares which passed the February 2016 Resolution to fund the Plan upon sale of corporate assets. This vote was wrongful and ineffective, Plaintiffs assert, because it was a self-dealing, conflict of interest transaction which

prefers the Individual Defendants and did not comply with the Safe Harbor provisions of Tennessee Code Annotated sections 48-24-703 and 704. The Resolution is in contrast to cuts to the 401K plan, which, Plaintiffs assert, effectively eliminates a retirement plan for everyone else but the Individual Defendants. In addition to preferring retirement benefits for the Individual Defendants, funding the Top Hat Plan will leave nothing to distribute to shareholders. As well as challenging the actions of the Individual Defendants in passing the Resolution on the basis of a self-interested, conflict of interest transaction, the Plaintiffs assert that the Corporation has the contractual right and it is in the best interest of the Corporation to terminate the Plan, but because of self-interests the Defendants have not done so.

Based upon various theories of law, the relief the Plaintiffs seek in their lawsuit, with respect to the Plan, is for the Court to find the Resolution to fund the Plan is ineffective as a conflict of interest transaction; that the Corporation has an obligation to terminate the Plan; that the Corporation has misconstrued and misapplied the terms of the Plan; that the Plaintiffs' attorneys fees are recoverable; and that the Defendants are not entitled to indemnity.

The case is presently before the Court on the Defendants' *Motion for Summary Judgment* to dismiss the Plaintiffs' lawsuit.

In addition to defending against the Defendants' *Motion For Summary Judgment*, the Plaintiffs seek judgment as a matter of law on their claims even though they have not

filed a cross motion for summary judgment. The Plaintiffs argue that, pursuant to *Brewer v. Argo-Collier Truck Lines Corp.*, 592 S.W.2d 322, 326 (Tenn. 1979) (citing Thomas v. Transport Ins. Co., 532 S.W.2d 263, 266 (Tenn. 1976)), judgment as a matter of law is proper, when (1) the judgment in favor of the nonmoving party is not based on an issue of material fact needed to be tried, (2) the nonmoving party is entitled to judgment as a matter of law, and (3) the moving party has had a full and fair opportunity to respond to the nonmoving party's contentions that there are no issues of material fact upon which they rely and that they are entitled to judgment as a matter of law.

The Defendants' *Motion for Summary Judgment* has three parts. The first part pertains to the Plaintiffs' claims in paragraphs 1.40-1.77 of the *Verified Complaint* and section 1 of the *Prayer For Relief* that the February 2016 Resolution is ineffective and should be declared a nullity by this Court as a self-interested, conflict of interest transaction. As to these claims, the Defendants' asserted basis for dismissal is that the Board of Directors had no choice under Tennessee Code Annotated section 48-24-109 but to adopt the February 2016 Resolution to take action to fund the Plan. "Although the Plaintiffs claim that the Defendants had a conflict of interest that prevented them from voting on a resolution recommending that the Plan be funded, the Board of Directors had no choice but to take action to fund the Plan in compliance with Tennessee law. Failure to fund the Plan would not only violate Tennessee law, but also expose the Directors to liability." *Memorandum in Support of Motion Summary Judgment by Defendants*, October 28, 2016 at p. 2.

The second part of the Defendants' *Motion For Summary Judgment* pertains to paragraphs 1.78-1.91 of the *Verified Complaint*. These are the Plaintiffs' claims that the Court should terminate the Plan based upon an alleged condition in the Plan and a termination provision. On this element of Plaintiffs' case, the Defendants assert that on summary judgment the Court can construe the Plan provisions as a matter of law with the outcome that the Plaintiffs' claims, that the Plan is not enforceable because certain conditions have not been met or that the Plan can be terminated, fail as a matter of law.

The third ground for summary judgment asserted by the Defendants applies across the board and is made as to all the Plaintiffs' claims. The Defendants' third summary judgment ground is that the Plaintiffs do not have standing to bring the case as a shareholder derivative suit. The Defendants assert that the persons allegedly damaged and the persons who would receive the benefit from any of the claims asserted by the Plaintiffs are only minority shareholders. Thus, the Defendants assert, the claims are, actually, minority dissenters' rights claims rather than a shareholders' derivative suit. Consequently, the Defendants assert that the shareholder derivative claims and the claims for attorneys' fees should be dismissed.

After conducting lengthy oral argument on December 21, 2016, the Court took the Defendants' *Motion For Summary Judgment* and Plaintiffs' motion for judgment as a matter of law under advisement. During this time, the Court has studied the cases cited by Counsel and conducted its own research concerning Top Hat plans, particularly because

under ERISA there are preliminary matters of preemption and standing which must be analyzed to assure a state court is ruling in an area where it has concurrent jurisdiction or where the case has too tenuous an ERISA connection to preempt the state court litigation. The Court's conclusion from its research about preemption and standing is incorporated below as part of its analysis.

After studying the law, the record and argument of Counsel, the Court determines that the Defendants' Motion for Summary Judgment shall be granted in part and denied in part, and the Plaintiffs' request for judgment as a matter of law shall be denied.

It is ORDERED that the Defendants' claim, that the Board of Directors had no choice but to adopt the February 2016 Resolution to take action to fund the Plan because Tennessee law requires that, is denied. As explained in detail in the analysis below, the record at this time does not establish that the adoption of the Resolution under Tennessee Code Annotated section 48-24-109 was required. Moreover, the record at this time establishes that adoption of the Resolution was premature. Under these circumstances of premature action, competing inferences can be drawn.

One inference is the one asserted by Defendants that adoption of the Resolution was a "proactive" plan, made upon advice of counsel and financial consultants, to make reasonable provision for a known claim of the Corporation as it determines to sell off assets. The competing inference is that because the Resolution was not required at the time by Tennessee Code Annotated section 48-24-109 and was premature, adoption of the Resolution was a way to prefer payment of the retirement benefits of the Individual

Defendant Directors' and to assure those were paid even before the Corporation was dissolved and before the claims of other creditors were dealt with as provided in Tennessee Code Annotated sections 48-24-106, 107, and 109. The latter inference, that the retirement benefits of the Individual Defendants are being preferred, states a claim for a conflict of interest transaction that did not comply with Tennessee Code Annotated sections 48-24-703 and 704. Accordingly, the claims contained in paragraphs 1.40-1.77 of the Verified Complaint remain pending.

Further, with respect to the third ground of Defendants' motion for summary judgment which asserts the Plaintiffs do not have standing to bring this action as a shareholder derivative suit because the case is, actually, a minority dissenters' rights case, summary judgment is denied as it relates to the claims in paragraphs 1.40-1.77 of the *Verified Complaint* for the Court to declare the February 2016 Resolution void. Combining the assertion of a derivative action with the other claims in paragraphs 1.40-1.77 of the *Verified Complaint* that remain pending, a competing inference can be drawn that because the Resolution prefers the retirement claims of the Individual Defendants in the winding up process and does not wait to gather and identify all claims after the assets have been sold, the Resolution was not in the best interest of the Corporation and should be rectified by the Plaintiffs' derivative action that the Resolution was ineffective as a conflict of interest transaction, asserted in paragraphs 1.40-1.77 of the *Verified Complaint*.

The above rulings on the first and third grounds of Defendants' *Motion For Summary Judgment* leave the second ground concerning contract construction of the Plan. On this ground, Defendants prevail. The Court adopts the arguments and authorities of the Defendants that neither the Preamble nor paragraphs 7.1 or 7.2 of the Plan on termination authorize termination of the Plan. Additionally, the Court's independent research on ERISA is that Plaintiffs' claims regarding construction of the Plan are preempted by federal law and must be asserted in federal court. Accordingly, it is ORDERED that the Plaintiffs' claims in paragraphs 1.78-1.91 of the *Verified Complaint* and sections 3 and 4 of the *Prayer For Relief* are dismissed on Defendants' *Motion For Summary Judgment.*

In sum, then, Plaintiffs' derivative claims contained in paragraphs 1.40-1.77 of the *Verified Complaint* and the temporary and permanent injunctive relief it seeks in section 1 of the *Prayer For Relief* for the Court to declare the February 2016 Resolution ineffective withstand summary judgment and remain pending. With respect to Plaintiffs' claims contained in paragraphs 1.78-1.91 of the *Verified Complaint* and sections 3 and 4 of the *Prayer For Relief* seeking the relief of termination of the Plan, Defendants' *Motion For Summary Judgment* is granted, and these claims are dismissed with prejudice.

With respect to Plaintiffs' request for judgment as a matter of law, it is denied. As to paragraphs 1.40-1.77 of the *Verified Complaint* and section 1 of the *Prayer For Relief,* for the reasons stated above, at this stage of the proceedings competing inferences can be drawn on whether the February 2016 Resolution should be declared a nullity as a self-

interested, conflict of interest transaction. In opposition to Plaintiffs' facts and inferences, the Defendants have not had the opportunity under Tennessee Civil Procedure Rule 56 to counter designate facts such as advice of counsel or financial advisors. As to paragraphs 1.78-1.91 of the *Verified Complaint* and sections 3 and 4 of the *Prayer For Relief*, as stated above, these have been dismissed with prejudice in granting that part of Defendants' *Motion For Summary Judgment*.

The authorities and analysis on which these rulings are based are as follows.

(1) **Paragraphs 1.40-1.77 of *Verified Complaint* and Section One of the Prayer For Relief**

(a) No Preemption

Beginning with the Defendants' summary judgment argument under Tennessee Code Annotated section 48-24-109 for dismissal of Plaintiffs' claims that the February 2016 Resolution is ineffective, the Court first concludes that federal law does not completely or as a conflict claim preempt state court determination of this issue.

Based upon *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987); *Richmond v. Am. Sys. Corp.*, 792 F. Supp. 449 (E.D. Va. 1992); *Smith v. Crowder Jr. Co.*, 280 Pa. Super. 626, 421 A.2d 1107 (1980); and *Cornell Mfg. Co. v. Mushlin*, 70 A.D.2d 123, 420 N.Y.S.2d 231 (1979), the Court concludes that Plaintiffs' cause of action "Interested Shareholder Transaction" at paragraphs 1.40-1.77 of the *Verified Complaint* is not preempted.

The misconduct the Plaintiffs allege of the Defendants in this count does not involve the administration of the ERISA plan, rather it asserts violations of state law duties pursuant to Tennessee's Business Corporations Act which are independent from any ERISA duties owed by a plan fiduciary to a plan and its beneficiaries. *See, e.g.*, *Brown v. Consumer Credit Counseling Serv. of E. Tenn., Inc.*, No. 3:02-CV-290, 2005 WL 1199996, at *3 (E.D. Tenn. May 19, 2005) ("[A] state law claim will not be preempted where the 'effect on employee benefit plans is merely tenuous, remote or peripheral.' As defendant correctly points out, Tennessee's corporate dissolution statute contains no reference to employee benefit plans and ERISA makes no reference to the dissolution of corporations. The Court is aware of no authority, and plaintiffs have provided none, which holds that ERISA preempts all state corporate laws relating to companies in the business of administering ERISA plans. Thus, the Court finds that application of Tennessee's corporate dissolution statute is not preempted by ERISA.").

The causes of action at paragraphs 1.40-1.77 of the *Verified Complaint* are akin to the claims determined not to be preempted in the cases of *Richmond v. Am. Sys. Corp.*, 792 F. Supp. 449 (E.D. Va. 1992); *Smith v. Crowder Jr. Co.*, 280 Pa. Super. 626, 421 A.2d 1107 (1980); and *Cornell Mfg. Co. v. Mushlin*, 70 A.D.2d 123, 420 N.Y.S.2d 231 (1979). Excerpts from these cases explain that federal preemption under ERISA does not apply because the causes of action asserted attack the defendants' duties under the states' business corporation law which is separate and independent from any ERISA duties:

- As the Supreme Court has clearly stated, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a

manner to warrant a finding that the law 'relates to' the plan." [citations omitted] Cases addressing ERISA preemption in light of the "too tenuous, remote, or peripheral" limitation articulated in *Shaw* suggest three guiding principles for applying ERISA preemption. First, state laws involving the exercise of traditional state authority are less likely to be preempted than state laws regulating areas not traditionally left to the states. Second, a state law is more likely to relate to a benefit plan, and thus be preempted, if it affects relations among principal ERISA entities (the employer, the plan, the plan fiduciaries, and the beneficiaries). When it affects relations among principal ERISA entities and an outside party, or between two outside parties, a state law is less likely to be preempted. Third, preemption is less likely to occur where the effect of a state law of general application on an ERISA-covered plan is merely incidental. *See generally Firestone Tire & Rubber Co. v. Neusser,* 810 F.2d 550 (6th Cir.1987) (using these three principles as standard for evaluating ERISA preemption).

These guiding principles applied here point persuasively to the conclusion that Counts I–IV of plaintiffs' complaint are not preempted by ERISA. First, law governing corporations is quintessentially the province of traditional state authority. *See, e.g., Burks v. Lasker,* 441 U.S. 471, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) (corporations are creatures of state law, governed by state law); *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977) (same). More importantly, neither plaintiffs nor Curran and Ramsey are principal ERISA entities; the dispute between them only incidentally implicates an ERISA plan. On this point, the Fifth Circuit decision in *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.,* 793 F.2d 1456, 1467 (5th Cir.1986), *cert. denied,* 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 *and* 479 U.S. 1089, 107 S.Ct. 1298, 94 L.Ed.2d 154 (1987), is instructive. There, an employee profit-sharing trust, in its capacity as the employer corporation's minority shareholder, sued the corporation and its principal shareholder and director alleging a breach of a state common law fiduciary duty owed to the minority shareholder. The Fifth Circuit's preemption analysis focused on the state law's effect on the relations between the parties. The panel found that the state law duties owed by a principal shareholder and director to a minority shareholder were separate and independent from any ERISA duties owed by a plan fiduciary to a plan and its beneficiaries, even where the same individual served as principal

shareholder, director, and plan fiduciary. In reaching this result, the panel made the following instructive remarks:

> The state common law of fiduciary duty that the Trust seeks to invoke in this case centers upon the relation between corporate director and shareholder. The director's duty arises from this status as director; the law imposes the duty upon him in that capacity only. Similarly, the shareholder's rights against the corporate director arise solely form his status as shareholder. That in a case such as ours the director happens also to be a plan fiduciary and the shareholder a benefit plan has nothing to do with the duty owed by the director to the shareholder. The state law and ERISA duties are parallel but independent: as director, the individual owes a duty, defined by state law, to the corporation's shareholders, including the plan; as fiduciary, the individual owes a duty, defined by ERISA, to the plan and its beneficiaries. Thus, the state law does not affect relations between the ERISA fiduciary and the plan or plan beneficiaries as such; it affects them in their separate capacities as corporate director and shareholder.

793 F.2d at 1468. The Court further found that the state law would rarely, if ever, impose conflicting or inconsistent duties on directors who are also plan fiduciaries. 793 F.2d at 1468–69, 1470. In those rare situations where a conflict occurred, the panel reasoned that the director might simply have to resign one of his conflicting positions. 793 F.2d at 1469. Thus, the Fifth Circuit panel concluded that the state common law of corporate fiduciary duty was a law of general application that affected the benefit plan in too tenuous, remote, and peripheral a manner to trigger ERISA preemption. 793 F.2d at 1470.

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The state corporate laws of fiduciary responsibility invoked by plaintiffs (assuming *arguendo* the viability of an equal opportunity claim in Virginia) regulate relations between plaintiffs, as minority shareholders; ASC, as the corporation; and Ramsey and Curran, as controlling shareholders, officers, and directors. The relations between these parties, acting in these capacities, function

irrespective of ASC ESOT, its management, or its administration. *See, e.g., Ingersoll–Rand,* 498 U.S. at ——, 111 S.Ct. at 483; *Sommers Drug Stores,* 793 F.2d at 1468. State laws governing corporate fiduciary duties neither forbid nor permit any particular method of administering or funding an employee benefit plan or calculating plan benefits. *See Pizlo,* 884 F.2d at 120 (breach of contract, promissory estoppel, and negligent misrepresentation claims not preempted by ERISA, because in the context of the case the state law claims would not subject employers to conflicting obligations, nor would they directly affect the administration of plan benefits); *Planned Consumer Marketing, Inc. v. Coats and Clark, Inc.,* 71 N.Y.2d 442, 450, 527 N.Y.S.2d 185, 190, 522 N.E.2d 30, 35 (N.Y.1988) (finding state fraudulent conveyance laws not preempted despite fact that conveyances were directed to an ERISA fund). Simply because events precipitating plaintiffs' state law causes of action occurred in the general context of an employee benefit plan does not create a nexus with ERISA sufficient to trigger preemption.

Richmond v. Am. Sys. Corp., 792 F. Supp. 449, 457–59 (E.D. Va. 1992) (footnotes omitted).

- Similarly, under the circumstances at bar, we hold that plaintiff's cause of action is not so related to the pension plan as to require pre-emption under the provisions of ERISA.

The complaint in this case alleges that, acting as corporate officials, the Mushlins wrongfully wasted the assets of the plaintiff corporation. It is beyond dispute that a corporation may seek redress against any officer or director who breaches his duty of undivided and unqualified loyalty to the corporation's interests (see *Foley v D'Agostino*, 21 AD2d 60, 66-67).

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In our view, the involvement of the pension plan in the fraudulent scheme alleged here was at most incidental. If plaintiff's allegations are true, the Mushlins wrongfully depleted corporate assets by causing excessive payments to be made into the pension plan which they controlled and from which they then received inordinate benefits. In essence, the pension plan was nothing more than the instrumentality by which the Mushlins accomplished the alleged misappropriation of plaintiff's funds. We do not believe that ERISA

> was meant to shield such misconduct from State law especially where, as here, no interest protected by the act is involved. Plaintiff has not brought suit against the Mushlins as former pension plan trustees. Instead, plaintiff is attempting only to enforce rights arising from Mr. Mushlin's duty as director and officer of the corporation.
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> The purposes of section 720 of the Business Corporation Law, under which plaintiff's suit is brought, are wholly unrelated to the purposes of ERISA. The former serves the essential function of providing redress to corporations whose assets have been wrongfully wasted by its officers and directors. In permitting the plaintiff access to our courts to seek such redress under the circumstances at bar, we trespass against no interest protected by ERISA (cf. *National Bank of North Amer. v International Brotherhood of Elec. Workers Local No. 3 Pension & Vacation Funds*, 69 AD2d 679, *supra).*
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> *Cornell Mfg. Co. v. Mushlin*, 70 A.D.2d 123, 129, 130–31, 420 N.Y.S.2d 231 (1979).

(b) Summary Judgment Denied For All Parties On Conflict Of Interest Transaction

Having concluded that this Court does have jurisdiction to determine the claims at paragraphs 1.40-1.77 of the *Verified Complaint* and section 1 of the *Prayer For Relief*, the Court further determines that with respect to these paragraphs Defendants' motion for summary judgment must be denied and Plaintiffs' request for judgment as a matter of law is denied.

Defendants' theory for dismissing this claim is that the Board "had no choice," that the vote passing the Resolution was necessary to fulfill their statutory duty under Tennessee Code Annotated section 48-24-109. Quoting *Morrow v. Iron & Steel Co.*, 87

Tenn. 262, 273, 10 S.W. 495, 499 (1888), that upon the winding up a corporation creditors must be first paid and that the ownership of the corporation by the stockholders of assets is subject to the higher and superior rights of creditors, the Defendants argue that the participants and beneficiaries under the Plan are general unsecured creditors of the Corporation, and, therefore, have a superior right to the Plaintiff Shareholders or any other shareholders of the Company. In support of this the Defendants cite to paragraph 8.5 of the Plan which provides that beneficiaries of the Plan are unsecured creditors of the Corporation:

> 8.5 Unfunded Arrangement: The Participants Beneficiaries under the Plan are general unsecured creditors of the Company for distribution of benefits under the Plan. The benefits are not subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, attachment or garnishment by creditors (whether secured or unsecured) . . . .

Further, the Defendants forecast that the Resolution had to be adopted or litigation by the Top Hat plan beneficiaries would ensue.

> The Plan is unfunded, and the Plan benefits have been paid from the Company's cash flow. The Company has a continuing obligation to pay benefits under the Plan. As the Company is wound up and revenue ceases, there will be insufficient funds to pay the Company's obligations to the beneficiaries of the unfunded Plan. If the Board of Directors had not acted to fund the Plan in the course of winding up Company business, then the Company would have been exposed to claims of the Plan beneficiaries. While funding the Plan leaves less money available to distribute to the Plaintiff stockholders, funding the Plan is actually in the Company's best interest because funding the Plan avoids exposing the Company to liability to litigation costs, which would further deplete Company assets.

Memorandum in Support of Motion Summary Judgment by Defendants, October 28, 2016 at pp. 5-6.

The following facts, particularly the timing of the Resolution, combined with the text of Tennessee Code Annotated section 48-24-109, however, present competing inferences to the Defendants' assertion that the Board had no choice and that adoption of the Resolution was necessary for the Board to fulfill its statutory duty under Tennessee Code Annotated section 48-24-109.

By its terms, section 48-24-109 is triggered when a Corporation is dissolved, and it is marshaling its assets and identifying the claims of creditors to be paid:

> (a) Directors shall cause a dissolved corporation to discharge or make reasonable provision for the payment of claims and make distributions of assets to shareholders after payment or provision for claims.
>
> (b) Directors of a dissolved corporation that has disposed of claims under § 48-24-106 or § 48-24-107 shall not be liable for breach of subsection (a) with respect to claims against the dissolved corporation that are barred or satisfied under § 48-24-106 or § 48-24-107.

In this case at the time the Resolution was adopted, the Corporation had not been dissolved, the condition stated in section 48-24-109(a) for it to be applicable. Even now, a year after the Resolution was adopted, the Corporation is still in the process of selling assets and it has not been dissolved. Further, at the time the Resolution was adopted and even now, claims of creditors have not been identified as provided in the precursive Tennessee Code Annotated sections 48-24-106 and 107 to prompt the condition for the Board's duty under section 48-24-109 to pay the claims of creditors prior to distributing

funds to the shareholders. Thus, the summary judgment record does not establish that the conditions for the Board's duty under section 48-24-109 were present in 2016 when the Resolution was adopted, nor even now, because dissolution has not occurred and claims of creditors are not being identified to be paid prior to distribution to the shareholders.

Also premature in terms of the claims process of a dissolved corporation is that the summary judgment record does not show if there are other creditors of the Corporation. There is no proof in the record on the assets and liabilities of the Corporation and what those will be at time of dissolution. Absent those facts, it is not known if there will be other secured and/or unsecured creditors who will have to be paid, how that will be handled in conjunction with funding the Top Hat plan, and if the Corporation may be insolvent. Under these circumstances, the Defendants have not established on summary judgment that the Defendants' had an affirmative duty to fund the Plan. This is especially the case because under ERISA a Top Hat Plan is not required to be funded. The participants are unsecured creditors who take the risk that if the Corporation is insolvent they will not be paid. Unlike other ERISA plans, the participants of a Top Hat plan are not preferred or guaranteed payments if the Corporation is insolvent. Illustrative of these points are cases showing how Top Hat plans are handled in the context of insolvency and bankruptcy.

In *In re IT Grp., Inc.*, the Third Circuit Court of Appeals explained that Top Hat plans, similar to the one in this lawsuit, are to remain unfunded in the face of insolvency

because of the nature of the participants' rights which are that of a general, unsecured creditor:

> When a plan is "unfunded,"
>
> > [t]he employer promises to pay the employee the deferred compensation at a specified time, but does not set aside the funds in an escrow, trust fund, or otherwise. The assets used to pay the deferred compensation are the general assets of the employer and are subject to the claims of the employer's creditors.
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> *Cartano,* at § 20.02[A], at 721. The employee is not subject to tax on the compensation until he or she actually receives the deferred amount because "the employee may never receive the money if the company becomes insolvent." *Id.*
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> An employer may set aside deferred compensation amounts in a segregated fund or trust without jeopardizing a plan's "unfunded" status if the fund or trust remains "subject to the claims of the employer's creditors in the event of insolvency or bankruptcy." *Id.* at § 20.05[D], at 731.
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> The "centerpiece" of Participants' claim, *see* Appellants' Br. at 22, is that the Plan document obligated the Plan's administrative committee to create and fund a secular trust for their exclusive benefit in the event of impending insolvency. More specifically, they argue: (1) that paragraph 12.1 of the Plan document, which gives the Plan's administrative committee "sole discretion" over the funding decisions related to the Plan, implies a duty to actually fund the Trust in "good faith"; (2) that the duty of good faith carries an obligation to avoid forfeitures, which, in this case, could only have been accomplished by funding an exclusive benefit trust before the Corporation became insolvent; and (3) that the Corporation "pre-approved," in the Trust document, an amendment to the Trust that would convert it from a "rabbi trust," susceptible to general creditors' claims, into a secular trust for the exclusive benefit of Plan participants. Thus, Participants conclude, they have a legal right to payment of Plan benefits greater than that of the Corporation's general, unsecured creditors.

> We need not dwell on this argument for long, because we reject its fundamental premise. Although we have recognized that terms of top hat plans that confer discretion to plan administrators are subject to the implied duty of good faith, *Goldstein v. Johnson & Johnson,* 251 F.3d 433, 448 (3d Cir.2001), that duty does not extend as far as Participants contend. The implied duty of good faith is merely an "interpretive tool to determine the parties' justifiable expectations," *Northview Motors, Inc. v. Chrysler Motors Corp.,* 227 F.3d 78, 91 (3d Cir.2000); it may not be used to add new terms to an agreement, *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1415 (3d Cir.1993), or to override express contractual terms, *Northview,* 227 F.3d at 91. For Participants to succeed, we would have to do just that—to hold that the duty requires the Plan's administrative committee to fund a trust for their exclusive benefit. This runs directly afoul of the Plan's stated purpose to remain "unfunded" for ERISA purposes and its express provision that Participants are not entitled to any "legal or equitable right, interest or claim in any property or assets of" the Company, and that the Company's obligation under the Plan "shall be merely that of an unfunded and unsecured promise to pay money in the future." Plan ¶ 13.1.
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> Here, the Committee, in failing to fund the trust, did nothing to destroy or injure Participants' rights under the Plan—the Plan granted them only a limited, unsecured right to future payment.

448 F.3d 661, 665, 670–71 (3d Cir. 2006), *as amended* (July 10, 2006) (footnotes omitted).[3]

[3] In addition to the foregoing, other cases have discussed the uncertain nature and risk involved with "top hat" plans in that there is no guarantee that this type of deferred compensation will actually be available in the event of insolvency or other circumstances. *See, e.g., In re The Colonial BancGroup, Inc.*, 436 B.R. 695, 712 (Bankr. M.D. Ala. 2010) (footnote omitted) ("By definition, amounts deferred into an unfunded plan remain part of the general assets of the company subject to the claims of general unsecured creditors. To exclude the assets of an unfunded plan from property of the estate and remove those assets from the reach of general unsecured creditors would therefore fly in the face of the very purpose, structure and function of a top hat plan."); *In re Bill Heard Enterprises, Inc.*, 419 B.R. 858, 869 (Bankr. N.D. Ala. 2009) (footnote omitted) ("Under similar circumstances, this Court finds that the defendants were aware of the risk involved in deferring compensation under these top hat plans which "are excluded from many individual ERISA provisions on the basic assumption that high-level employees are in a 'strong bargaining position relative to their employers and thus do not require the same substantive protections that are necessary for other employees.'" Pursuant to the terms of the Deferred Compensation Plan, each [defendant] agreed to postpone receipt of a certain portion of compensation until a later tax year and under the terms of the plan it was clear that these key employees might never receive the money if BHE

Thus, the adoption of the Resolution to pay the Plan in February 2016, by the very terms of section 48-24-109, was not necessary and it was premature. From this unnecessary, premature adoption of the Resolution, a competing inference, contrary to the Defendants' summary judgment, can be drawn that Defendants' adoption of the Resolution was a conflict of interest transaction requiring the Board to have followed the requirements of Tennessee Code Annotated sections 48-24-703 and 704 Safe Harbor provisions. It is undisputed that those provisions were not followed.

Accordingly, because of the competing inferences that can be drawn, paragraphs 1.40-1.77 of the *Verified Complaint* and section 1 of the *Prayer For Relief* withstand the Defendants' *Motion For Summary Judgment.* Plaintiffs' claim that the Resolution was ineffective because it was not adopted in compliance with Tennessee Code Annotated sections 48-24-703 and 704 remains pending. The above facts and law, as well, present competing inferences with respect to the application of the business judgment rule, and it does not provide a basis for granting Defendants' motion for summary judgment with respect to Plaintiffs' claims at paragraphs 1.40-1.77 of the *Verified Complaint.*

On the other hand, denying Defendants' summary judgment does not require judgment for the Plaintiffs. In opposition to Plaintiffs' facts and inferences, the

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became insolvent.); *Goodman v. Resolution Trust Corp.*, 7 F.3d 1123, 1127 (4th Cir.1993) (holding that "the favorable tax treatment afforded to grantor trusts...is not extended without certain strings attached. Federal tax law conditions the beneficial tax treatment of a grantor trust on the requirement that the trust fund remains subject to the claims of the employer's creditors as if the assets were the general assets of the employer.").

Defendants have not had the opportunity under Tennessee Civil Procedure Rule 56 to counter designate facts such as advice of counsel or financial advisors.

Accordingly, because of competing inferences, the claims at paragraphs 1.40-1.77 of the *Verified Complaint* and the relief requested in section 1 of the *Prayer For Relief* to injoin and declare the February 2016 Resolution a nullity remain pending.

(2) **Paragraphs 1.78-1.91 of *Verified Complaint* and Sections 3 and 4 of *Prayer For Relief***

(a) Construction of the Plan

The next part of Defendants' *Motion For Summary Judgment* seeks dismissal of Plaintiffs' claims that the Corporation has the authority under the Plan and that it is in the best interest of the Corporation to terminate the Plan. These claims are located in paragraphs 1.78-1.91 of the *Verified Complaint* and *Prayer For Relief* sections 3 and 4. On these claims the Defendants assert summary judgment should be granted because the Plaintiffs' construction and implementation of the Plan are not supported by law.

The Plaintiffs' claim is that two provisions of the Plan enable it to be terminated by the Corporation:

— the Preamble; and

— paragraphs 7.1 and 7.2 on amendment and termination.

The Court adopts the reasoning and authorities of the Defendants at pages 11-13 of their *Memorandum* in support of summary judgment and pages 6-10 of their *Reply*.

As analyzed by the Defendants, the Preamble is not part of the express terms of the Plan nor does the Preamble create a requirement for receiving benefits; it is merely an aspirational statement for the Plan.

> The purpose of the Plan is to provide specified benefits to a select group of management or highly compensated employees who contribute materially to the continued growth, development and future business success of Sanders Manufacturing Company.

Sanders Manufacturing Company Supplemental Executive Retirement Plan, p. 1 (Sept. 1, 2008).

Moreover, the Plan has entirely separate sections stating the criteria for receiving benefits. *See*, Article 2 and Article 3. The criteria in these sections does not include the Preamble text. Thus, were the Preamble to constitute a condition for receiving benefits, it would impose additional requirements on the Participants or Beneficiaries rights to receive their benefits not contained in the criteria sections.

Further, the Plan has a provision that addresses the issue raised by the Plaintiffs. The Plaintiffs assert that Plan benefits should not be provided to a Plan participant who does not contribute to the success of the Company. Article 2, Section 2.2, however, provides that Plan Participants who are terminated for cause are not eligible for benefits under the Plan. Thus, the intent argued by the Plaintiffs and attributed to the Preamble is already present through the express terms of Section 2.2 of the Plan.

Also, under Tennessee law the course of conduct of the parties is strong evidence of the partis' original intent. *Pinson & Associates v. Kreal*, 800 S.W.2d 486, 487 (Tenn.

Ct. App. 1990); *Johnson v. Welch*, 2004 WL 239756 (Tenn. Ct. App. 1990). In this case Plan Participants have continued to receive benefits under the Plan irrespective of the financial performance of the Corporation.

Lastly, the Plaintiffs' construction of the Preamble as a criterion for receiving benefits under the Plan is unworkable as demonstrated by the following examples quoted from Defendants' briefing:

- How would [the Plan] be applied when a participant who retired at the end of his 30th year, and the first 29 years were profitable, but the 30th year was not profitable. Is that participant not entitled to receive benefits?

- What if a participant salesman worked for the Company for 15 years and was the highest ranking salesman for 14 years, but had a negative sales year in his fifteenth year?

- How would [the Plan] be applied if a flood destroyed the Company's manufacturing facility and it suffered lost revenues due to the cost of new equipment and the down time when it could not produce goods to sell?

- What if the entire economy of the United States suffered a depression and profitability diminished for 3 years before a participant's retirement year?

- What would happen if one [Plan] participant advocated a different course of action than the course of action ultimately chosen by the Board and the Company suffered financially? Would the dissenting participant be allowed to receive [Plan] benefits in spite of the poor performance of the Company because he advocated business decisions contrary to those ultimately chosen by the Board?

Reply To Plaintiffs' Response To Motion For Summary Judgment By Defendants, Owen Sanders, James J. Sanders, III, Eric O. Sanders, And Loren G. Kirkpatrick, p. 9 (Dec. 20, 2016).

For all of these reasons, the Court concludes the Defendants' construction is correct: the Preamble does not constitute or set criterion for receiving Plan benefits. The Court concludes as a matter of law that the Preamble does not establish a condition which the Defendants must fulfill to be entitled to receive benefits under the Plan.

With respect to the provisions relating to amendment and termination, paragraphs 7.1 and 7.2 of the Plan provide as follows:

> 7.1 Amendment. The Company reserves the right at any time, by action of the Board, to modify or amend, in whole or in part, any or all provisions of the Plan; provided, however, that any such modification or amendment shall comply with Code Section 409A and the regulations thereunder and shall not, in any case, result in the impermissible acceleration of the time or schedule of any payment under the Plan or permit a change in the time or form of payment not permitted under Code Section 409A and the regulations thereunder.
>
> 7.2 Termination. Although it is the intention of the Company that the Plan shall be continued indefinitely, the Plan may be terminated by the Company at any time by action of the Board; provided, however, that any such termination shall comply with Code Section 409A and the regulations thereunder.

Sanders Manufacturing Company Supplemental Executive Retirement Plan, p. 6 (Sept. 1, 2008).

In analyzing these provisions in relation to the parties' positions, the Court is required to apply the federal common law of contracts because the Plan at issue is a Top

Hat plan which is exempt from the substantive provisions of ERISA. *Parker v. Union Planters Corp.*, 203 F. Supp. 2d 888, 899 (W.D. Tenn. 2002).[4]

Under the federal common law of contracts, Top Hat plans are considered unilateral contracts. *Benham v. Lenox Sav. Bank*, 26 F. Supp. 2d 231, 238–39 (D. Mass. 1998) (citations omitted) ("Top hat plans are unilateral contracts and, thus, are governed by contract principles."). In *Kemmerer v. ICI Americas Inc.*, a case relied on by both parties in this lawsuit, the Third Circuit discussed the relevant legal principles governing unilateral contracts in the context of Top Hat plans:

> 'A pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years.' *Pratt v. Petroleum Prod. Management Employee Sav. Plan,* 920 F.2d 651, 661 (10th Cir.1990) (internal quotation marks omitted); *Carr,* 816 F.Supp. at 1488 ('[P]ension benefit plans are unilateral contracts which employees accept by appropriate performance.'). Thus, the plan constitutes an offer that the employee, by participating in the plan, electing a distributive scheme, and serving the employer for the requisite number of years, accepts by performance. Under unilateral contract principles, once the employee performs, the offer becomes irrevocable, the contract is completed, and the employer is required to comply with its side of the bargain. Accordingly, when a participant leaves the employ of the company, the trustee is 'required to determine benefits in

[4] Other examples of cases where the federal common law of contracts was applied to "top hat" plans include: *Davidson v. Henkel Corp.*, No. 12-CV-14103, 2013 WL 3863981, at *8 (E.D. Mich. July 24, 2013) (quoting *Foley v. American Elec. Power,* 425 F.Supp.2d 863, 870 (S.D.Ohio 2006)) ("'[C]ontract principles, applied as a matter of federal common law, govern disputes that arise with respect to [Top-hat] plan administration and enforcement.'"); *Foley v. Am. Elec. Power*, 425 F. Supp. 2d 863, 870 (S.D. Ohio 2006) (citations omitted) ("Since top hat plans are exempt from much of ERISA, including the non-forfeiture and non-alienation provisions, contract principles, applied as a matter of federal common law, govern disputes that arise with respect to plan administration and enforcement."); *In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996) ("Top hat plans are instead governed by general principles of federal common law. *Barrowclough,* 752 F.2d at 936. Here, that law is the federal common law of contract."); *Bigda v. Fischbach Corp.*, 898 F. Supp. 1004, 1016 (S.D.N.Y. 1995), *aff'd,* 101 F.3d 108 (2d Cir. 1996) ("Courts use federal common law to 'fill in the interstices of ERISA's statutory scheme,' *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1027 (2d Cir.1992), deciding claims that are allowed by ERISA but where ERISA does not provide substantive law.").

> accordance with the plan then in effect.' *Pratt,* 920 F.2d at 661. As a corollary, '[s]ubsequent unilateral adoption of an amendment which is then used to defeat or diminish the [employee's] fully vested rights under the governing plan document is ... ineffective.' *Id.*
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> As the *Carr* court recognized, even when a plan reserves to the sponsor an explicit right to terminate the plan, acceptance by performance closes that door under unilateral contract principles (unless an explicit right to terminate or amend after the participants' performance is reserved). 'Any other interpretation...would make the Plan's several specific and mandatory provisions ineffective, rendering the promises embodied therein completely illusory.' *Carr,* 816 F.Supp. at 1494. Thus, there is no presumption that an employer may terminate a top hat plan. Rather, the plan should be interpreted under principles of contract law. Consequently, a court must determine whether an employer has a right to terminate a plan by construing the terms of the plan itself.

70 F.3d 281, 287–88 (3d Cir. 1995).

Under the unilateral contract theory, a participants' rights in the Top Hat plan vest immediately upon performance. *Benham v. Lenox Sav. Bank,* 26 F. Supp. 2d 231, 239 (D. Mass. 1998) (citation omitted) ("A unilateral contract is formed when an employee accepts the employer's offer by performing the requisite number of years of performance.").[5]

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[5] The term "vested" in the context of Top Hat plans does not guarantee payment under the Plan and is a separate legal concept from the concept of "funding" the Plan. As analyzed in detail by the Federal District Court in *In re The Colonial BancGroup, Inc.*, the term "vested" in the context of a Top Hat plan means that the participant's claim to the Plan "is not forfeitable" and "accrued when funds were deferred into the plan, and the claim remains despite" for example, unforeseen circumstances such as dissolution or insolvency. 436 B.R. 695, 706 (Bankr. M.D. Ala. 2010). The "vested" right is "not conditional and is legally enforceable against the debtor" as evidenced by a participant's status as an "unsecured creditors." *Id.* at 706-07. A participant's right "became fixed and accrued when they made contributions to the plan. The fact that payment of that claim was subject to certain risks, like insolvency of the company, does not render the claim any less fixed, accrued or vested." For this reason, the Court explained that "vested and funded are different concepts" and an unfunded Top Hat plan "is not ambiguous in that a vested interest in an unfunded plan is not an incongruity." *Id.* at 707.

Because of the nature of these Plans and their immediate vesting upon performance, courts have concluded that an employer can not abrogate, amend or terminate these rights once they are vested unless there is a specific provision in the retirement plan documents that allows for post-vesting amendment or termination. *See Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287–88 (3d Cir. 1995) (""[E]ven when a plan reserves to the sponsor an explicit right to terminate the plan, acceptance by performance closes that door under unilateral contract principles (unless an explicit right to terminate or amend after the participants' performance is reserved).");*Pratt v. Petroleum Prod. Mgmt. Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990) (citations omitted) ("A 'pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years.'. . . Subsequent unilateral adoption of an amendment which is then used to defeat or diminish the plaintiff's fully vested rights under the governing plan document is not only ineffective, but also arbitrary and capricious.").

In support of their position that Sanders Manufacturing Company has the right to terminate the Plan, the Plaintiff's argue that the amendment and termination provisions in paragraphs 7.1 and 7.2 provide the very "explicit right to terminate or amend after the participants' performance" that was referenced in *Kemmerer v. ICI Americas Inc.*, and for this reason Sanders Manufacturing has the explicit right to terminate the plan through action of the Board.

In opposition, the Defendants' argue that the Plaintiffs "assume that the language of the SERP does indeed reserve an explicit right to terminate the SERP not only after the participants' performance but also after participants are receiving benefits under the SERP." *Reply To Plaintiffs' Response To Motion For Summary Judgment By Defendants, Owen Sanders, James J. Sanders, III, Eric O. Sanders, And Loren G. Kirkpatrick*, p.12 (Dec. 20, 2016). Citing to subsequent Third Circuit authority, which authored the *Kemmerer* decision, the Defendants argue the Plan's terms, stating that the Plan may be amended or terminated "at any time," does not constitute a reservation an "explicit right to terminate or amend after the participants' performance." Specifically, the Defendants point to the holding in *In re New Valley Corp.*, where the court stated that the use of the term "at any time" was insufficient to reserve a right to amend or terminate after performance because it was ambiguous:

> In the current case, the plan documents do contain language that could be interpreted as reserving a right for New Valley to terminate even after retirement: the plan says it can be terminated "at any time." As a matter of plain language, New Valley contends, this phrase is unambiguous. But this is not necessarily so.

89 F.3d 143, 151 (3d Cir. 1996).

Adopting the reasoning and authorities of the Defendants at pages 10-13 of the their *Reply*, in particular the cases of *In re New Valley Corp.*, 89 F.3d 143, (3d Cir. 1996) and *Barrett v. Fox & Grove, Chartered*, No. 01 C 5910, 2002 WL 31761410, (N.D. Ill. Dec. 9, 2002), this Court concludes as a matter of law that paragraphs 7.1 and 7.2 do not

provide Sanders Manufacturing with the right to amend or terminate the Plan after the participants' performance.

Based upon the foregoing, Defendants' *Motion For Summary Judgment* is granted to dismiss the claims in paragraphs 1.78-1.91 of the *Verified Complaint* and sections 3 and 4 of the *Prayer For Relief* seeking termination of the Plan.

(b) ERISA Preemption

In addition, from the Court's research on ERISA preemption, an independent basis exists for granting Defendants' summary judgment motion regarding construction of the provisions of the Plan. The Court concludes that ERISA preemption applies to Plaintiffs' construction of provisions of the Plan to obtain the relief of terminating the Plan. This relief pertains to administration of the Plan and/or its regulation. Such claims are preempted by ERISA.

> [A]ny state-law cause of action 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. *See* 481 U.S., at 54–56, 107 S.Ct. 1549; see also *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 143–145, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990).

542 U.S. 200, 208–209 (2004) (emphasis in original).

In the interest of clarity, at the outset we address the two categories of preemption that may apply when considering the effect of ERISA on state law causes of action—complete preemption and conflict preemption. Complete preemption is "a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action."

> *Schmeling v. NORDAM,* 97 F.3d 1336, 1342 (10th Cir.1996). Conflict preemption, on the other hand, codified at 29 U.S.C.§ 1144, "allows a defendant to defeat a plaintiff's state-law claim on the merits by asserting the supremacy of federal law as an affirmative defense." *Cmty. State Bank v. Strong,* 651 F.3d 1241, 1261 n.16 (11th Cir.2011).
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> ERISA's conflict preemption provision, found at 29 U.S.C.§ 1144, "preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' governed by ERISA." *Thurman v. Pfizer, Inc.,* 484 F.3d 855, 861 (6th Cir.2007) (quoting 29 U.S.C.§ 1144(a)). In *Thurman* the Sixth Circuit Court of Appeals set forth three categories of state law causes of actions that ERISA preempts:
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>> [S]tate-law claims "that (1) 'mandate employee benefit structures or their administration;' (2) provide 'alternate enforcement mechanisms;' or (3) 'bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.' " *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 698 (6th Cir.2005) ("PONI") (quoting *Coyne & Delany Co. v. Selman,* 98 F.3d 1457, 1468 (4th Cir.1996)). With respect to claims that do not fall within these three categories, we continue to follow our prior precedent that focuses on the nature of the remedy sought by a plaintiff.

HCA Health Servs. of Tennessee, Inc. v. Bluecross Blueshield of Tennessee, Inc., No. M201401869COAR9CV, 2016 WL 3357180, at *6–7 (Tenn. Ct. App. June 9, 2016) (footnotes omitted).

Thus, the Plaintiffs are required to file these claims in federal court. Additionally, once filed in federal court, the claims of Plaintiffs may be dismissed for lack of standing.[6]

Under either basis – construction of the Plan or preemption – Plaintiffs' claims in paragraphs 1.78-1.91 of the *Verified Complaint* and sections 3 and 4 of the *Prayer For Relief* must be dismissed as a matter of law.

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[6] "The ERISA statute enumerates four parties entitled to sue under ERISA: (1) the Secretary of Labor, (2) plan participants, (3) beneficiaries and (4) fiduciaries. 29 U.S.C. § 1132(a). The Supreme Court has held that non-enumerated parties may not bring an ERISA action."*Schrader v. Hamilton*, 959 F. Supp. 1205, 1210 (C.D. Cal. 1997) (citations and footnotes omitted). Because the Plaintiffs have filed this lawsuit derivatively as shareholders of the corporation, it is unclear whether they will have standing to pursue an ERISA claim in federal court. Courts addressing the issue of standing based on derivative claims under the ERISA statute have, for the most part, held that shareholders bringing a derivative lawsuit do not have standing to bring an ERISA claim. *See, e.g., Merriam v. Demoulas Super Markets, Inc.*, No. CIV.A. 11-10577-RWZ, 2012 WL 931347, at *4 (D. Mass. Mar. 20, 2012) (quoting *Schrader v. Hamilton,* 959 F.Supp. 1205, 1212 (C.D.Cal.1997)) ("However, 'the fact that state law provides a means by which a shareholder may assert a corporate cause of action does not necessarily mean that the shareholder is entitled to standing under ERISA simply because the corporation is a fiduciary entitled to bring an ERISA action.'"); *Albradco, Inc. v. Bevona*, 982 F.2d 82, 86 (2d Cir. 1992) ("Appellants here are shareholders. They are not among the enumerated parties [under the ERISA statute]. They could not originally have commenced an action under ERISA in the federal court."); *Richmond v. Am. Sys. Corp.*, 792 F. Supp. 449, 454 (E.D. Va. 1992) (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Provident Life & Acc. Ins. Co. v. Waller,* 906 F.2d 985, 987–88 (4th Cir.), *cert. denied,* 498 U.S. 982, 111 S.Ct. 512, 112 L.Ed.2d 524 (1990)) ("Plaintiffs, as minority shareholders or derivatively on behalf of [corporation], do not fit into any of these categories. Consequently, they have no standing to sue under ERISA."). The only exception this Court was able to locate to the foregoing authority was when a party files a lawsuit as an assignee to the "beneficiary" or "participant" or files a lawsuit derivatively on behalf of a corporation that serves as a "fiduciary" to the ERISA plan. *See, e.g., HCA Health Servs. of Tennessee, Inc. v. Bluecross Blueshield of Tennessee, Inc.*, No. M201401869COAR9CV, 2016 WL 3357180, at *7 (Tenn. Ct. App. June 9, 2016) ("The assignments of benefits HCA received from plan participants gave HCA the standing and ability to bring actions for underpayment or denial of rights under 29 U.S.C.§ 1132(a)(1)(b). *Cromwell,* 944 F.2d at 1277 (holding that "a health care provider may assert an ERISA claim as a 'beneficiary' of an employee benefit plan if it has received a valid assignment of benefits.")); *Levy v. Chandler*, 287 F. Supp. 2d 831, 838 (E.D. Tenn. 2003) ("The Court notes Plaintiffs, in their individual capacities, would not have standing to bring suit under any of the provisions of § 1132(a) because they do not fall into one of the four enumerated categories of parties entitled to sue under ERISA: (1) the Secretary of Labor, (2) plan participants, (3) beneficiaries, or (4) fiduciaries. However, because Plaintiffs are suing derivatively on behalf of UnumProvident, Plaintiffs are entitled to assert the claims available to the company as a fiduciary under §§ 1132(a)(2) and (3).").

(3) **Standing of Plaintiffs**

Lastly, there is Defendants' third ground for summary judgment—that the Plaintiffs' claims actually constitute minority dissenters' rights claims not shareholder derivative claims, and, therefore, must be dismissed for lack of standing.

In *Keller v. Estate of McRedmond*, 2016 Tenn. LEXIS, 506 at *2 (Tenn. July 11, 2016), the Tennessee Supreme Court adopted the two-part test of the Delaware Supreme Court in *Tooley v. Donaldson, Lofkin, & Genrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004):

> (1) Who suffered the alleged harm (the corporation or the suing stockholders, individually); and
>
> (2) Who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually).

As analyzed above, with respect to paragraphs 1.40-1.77 of the *Verified Complaint*, the summary judgment record shows that adoption of the Resolution was premature. From that, competing inferences can be drawn on whether it was in the best interest of the Corporation or in the Individual Defendants to adopt the Resolution. The Defendants have, therefore, not demonstrated at this juncture of the case that the Plaintiffs' claims benefit only them (minority shareholders dissenting rights claim) and do not benefit the Corporation (derivative claim). Thus, the Defendants' motion to

dismiss the lawsuit because the Plaintiffs' do not have standing to assert a derivative claim is denied.

The foregoing analysis is the basis for the summary judgment rulings.

Ruling On The Defendant Corporation's Motion For Payment Of Costs Associated With Subpoena

The motion of the Defendant Company, filed November 30, 2016, for the Plaintiffs to pay or reimburse the Defendant for an invoice it received from a third-party attorney for work he performed to comply with a subpoena served by the Plaintiffs concerning the Top Hat plan, is denied for lack of authority.

In support of its motion, the Defendant cites to two sources of authority: (1) Tennessee Civil Procedure Rule 45.02 and 45.07 and (2) fairness.

With respect to Tennessee Civil Procedure Rule 45.02 and 45.07, after studying the text of the Rule, the Court adopts the Plaintiffs' analysis. These parts of the Rule, by their express terms, apply to "a person who is neither a party nor a party's officer." The movant is the Defendant Company. The movant is, then, a party. The Rule, therefore, does not directly authorize the relief the Defendant Company seeks. The circumstances in issue do not come under Rule 45.02 or 45.07 because the movant is a party who is seeking to shift costs to the opposing party.

As to fairness, the Court's authority with respect to shifting the cost of discovery from one party to its opponent is limited. Under certain circumstances, in Rule 37 expenses and fees can be shifted as sanctions. The Defendant has failed to make out a claim for sanctions. Additionally, Tennessee Civil Procedure Rule 26.03 does not apply because it contains protection measures which must be invoked prior to the discovery being provided. The Defendant's motion comes after the discovery has occurred.

It is therefore ORDERED that Defendant's motion for payment of costs associated with a subpoena issued by Plaintiffs is denied.

Next Step For The Lawsuit

Subsequent to issuance of the above summary judgment rulings, the following matters remain pending.

— That portion of the Defendants' Motion for Summary Judgment which begins at page 8 of the Defendants' October 28, 2016 Memorandum through page 10 entitled "Eric Sanders Holds an Enforceable Claim Against the Plan for Benefits" and which is numbered I(A)(ii) has not been decided. That part of the motion for summary judgment was held in abeyance and not briefed or argued to enable the Plaintiffs first to obtain discovery on that issue. If this part of Defendants' Motion is redocketed, supplements to the briefing, on ERISA preemption, will need to be provided by both sides prior to oral argument.

— Plaintiffs' motion for alternative dispute resolution was held in abeyance until after the Court ruled on the Defendants' motion for summary judgment, and depositions were stayed.

— To the extent Plaintiffs' contentions that they still have not been provided with discovery they served, as argued at pages 5-8 of the November 23, 2016 Plaintiffs' Motion to Continue have not been resolved by Counsel,

Plaintiffs shall file a motion to compel, and the Court will set up briefing on the papers and provide a decision on the papers. In the motion, Plaintiffs shall provide a list of the outstanding discovery for they have already briefed in their November 23, 2016 Memorandum the chronology of events and arguments on why they are not responsible for the delay.

— Disposition of Plaintiffs' claims which were not covered by summary judgment.

To schedule disposition of the foregoing, it is ORDERED that Counsel shall contact the Docket Clerk, Mrs. Smith (615-862-5719), by February 10, 2017, on their availability for a telephone conference on these dates and times:

— February 15, 2017 at 9:00 a.m.
— February 16, 2017 at 10:30 a.m.
— February 21, 2017 at 2:30 p.m.

To be clear the above pending matters will not be argued or decided. Proceedings to dispose of these matters will be scheduled.

ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc: William B. Hawkins III
Eric G. Evans
Ronald H. Pursell
Edward Hadley
James Catalano