E-FILED
9/12/2017 11:09 AM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

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

RISK SOLUTIONS CAPTIVE, INC., ("Captive") and HEALTH COST SOLUTIONS ("HCS"),	)	
Plaintiffs,	)	
VS.	)	**No. 16-0583-BC**
EVERS CONSTRUCTION COMPANY INC. ("Evers"),	)	
Defendant.	)	

MEMORANDUM AND ORDER: (1) DENYING DEFENDANT'S MOTION TO REVISE AND REVERSE 7/5/17 ORDER; (2) DENYING THE ALTERNATIVE OF AN INTERLOCUTORY APPEAL; AND (3) REVISING SUMMARY JUDGMENT SCHEDULE

The Plaintiffs have filed this lawsuit to recover $72,496.87 of premium the Plaintiffs assert that the Defendant owes. The basis asserted for collection of the premium is that as a protected cell captive insurance company,[1] operated pursuant to Tennessee Code Annotated sections, 56-13-101, *et seq.*, Plaintiff Risk Solutions provided medical stop loss insurance to the Defendant for the medical care claims of its employees for two

[1] "A 'Protected Cell captive insurance company' is any captive insurance company that, among other things, 'insures the risks of separate participants through participant contracts' and 'that funds its liability to each participant through one (1) or more protected cells'. Tenn. Code Ann. § 56-13-202(6)." *Defendant's Educational Narrative*, p. 2 (January 23, 2017). "In the medical stop loss arena, captive insurance companies have characteristics similar to self-insurance employers. The main difference, however, is that self-insured employers pay claims from their own assets, whereas captive insurance companies are separate corporations that receive premiums and pay claims like any other insurance company." *Plaintiff's Educational Narrative*, pp. 2-3 (November 1, 2016).

years until the relationship was terminated. Plaintiff Health Solutions served as the administrator for processing the medical claims of Defendant's employees.

The Plaintiffs allege that the Defendant's claims ultimately came in at a greater than anticipated dollar amount. Under the terms of the parties' contract, the Defendant paid premium at a lower "Expected Rate" which is 80% of the Maximum Rate. That the claims came in at a greater than anticipated dollar amount, the Plaintiffs assert, requires the Defendant to pay premium at the Maximum Rate. Collection of the shortfall between the premium paid at the Expected Rate versus the premium owed at the Maximum Rate is the relief the Plaintiffs seek.

The Defendant denies it owes additional payments asserting that it made all of the employer contributions required of it under the parties' Participation Agreement contract. Additionally, the Defendant disputes the Plaintiffs' construction of the parties' agreement, including allocation of the Defendant's contribution, after deducting a fixed premium to another insurer. Also, the Defendant has filed a Counterclaim to compel payment of all outstanding covered claims or, alternatively, for return of remaining Plan assets with any income generated.

Filed in June of 2016, the lawsuit was on a track of narratives filed to educate the Court on this niche area of insurance law on captive cells, and discovery was exchanged to lead up to summary judgment. At that point a preliminary issue emerged: whether this Court has jurisdiction to decide the case. The Defendant filed a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(1) for lack of subject matter

jurisdiction asserting federal preemption under the Employment Retirement Income Security Act ("ERISA") of 1974.

The determinative issue on Defendant's motion to dismiss was whether the *Complaint* fit the criteria contained in 29 U.S.C. § 1132(a)(3), as asserted by the Defendant, for which federal courts retain exclusive jurisdiction; or, as asserted by the Plaintiffs, whether the *Complaint* constituted a state law claim, over which this Court has jurisdiction, merely in the context of an ERISA plan.

On July 5, 2017, a *Memorandum And Order* was entered denying Defendant's motion to dismiss. In the July 5, 2017 decision, the Court concluded as a matter of law that the *Complaint* is a state law breach of contract claim for compensatory damages of $72,496.87 and that the Plaintiffs have sued for compensatory damages under a legal duty independent of ERISA or the plan terms. Under these circumstances, the Court determined that the lawsuit did not come within the provisions asserted by the Defendant of 29 U.S.C. § 1132(a)(3) of complete preemption of the federal courts and this Court has subject matter jurisdiction to decide the case. Deadlines were set in the July 5, 2017 Order for the filing of Plaintiffs' summary judgment motion.

The Defendant then filed, on August 4, 2017, a *Motion To Revise And Reverse Order Denying Motion To Dismiss Or, In The Alternative, For Interlocutory Appeal* ("*Motion to Revise and Reverse*"). For the first time, the Defendant asserted another statutory basis for ERISA preemption: 29 U.S.C. § 1132(a)(2). The Defendant also disputed the Court's analysis and application of cases with respect to the ground previously asserted by Defendant, 29 U.S.C. § 1132(a)(3).

Summary judgment proceedings were held in abeyance, and briefing on the *Motion to Revise and Reverse* proceeded and concluded on August 23, 2017 with the filing of Plaintiffs' *Sur-Reply*. Decided herein is the *Motion to Revise and Reverse*.

After researching the newly asserted 29 U.S.C. § 1132(a)(2) challenge to jurisdiction, and considering again the analysis and application of law under 29 U.S.C. § 1132(a)(3) to this case, the Court denies the *Motion to Revise and Reverse*. The Court continues to conclude that it does have subject matter jurisdiction. The Court concludes that the *Complaint* does not constitute an enforcement action under the Defendant's newly asserted ground for preemption, 29 U.S.C. § 1132(a)(2). The Court also maintains its analysis and conclusions of the July 5, 2017 *Memorandum And Order* that the *Complaint* does not constitute an enforcement action under 29 U.S.C. § 1132(a)(3).

With respect to the other aspect of the *Motion* seeking an interlocutory appeal, it is denied. The Court concludes that an appeal at this juncture would protract the litigation and be more expensive because, while the subject matter of the case may be complex, the litigation to process the issues is not and can be completed fairly promptly. There are only two parties, the claims are well-defined, and Counsel are knowledgeable about and prepared on the lawsuit. Additionally, there is no need to develop a uniform body of law on this small slice of ERISA law. Lastly, Counsel and the Court have so thoroughly researched and analyzed the ERISA issues that the Court is certain of the correctness of the decision, making reversal unlikely.

It is therefore ORDERED that the Defendant's *Motion to Revise and Reverse* is denied, and its application for an interlocutory appeal is denied.

It is further ORDERED that the analysis of the July 5, 2017 *Memorandum And Order* is supplemented as follows to address Defendant's newly asserted 29 U.S.C. § 1132(a)(2) preemption argument and to address Defendant's objections to the Court's July 5, 2017 determination that the *Complaint* in this case is not preempted by 29 U.S.C. § 1132(a)(3). As well, conflict preemption is addressed.

Lastly, a revision of the filing deadlines for Plaintiffs' summary judgment motion is provided.

Analysis

Defendant's New Preemption Theory

In the July 5, 2017 *Memorandum And Order* denying dismissal for lack of subject matter jurisdiction, the Court analyzed and ruled upon the argument asserted by the Defendant for dismissal—that the *Complaint* in this case is preempted by 29 U.S.C.A. § 1132(a)(3). The Court did not analyze and rule upon whether § 1132(a)(2) also preempts the *Complaint* because that argument was not asserted. Section 1132(a)(2) is the first ground asserted by the Defendant in its pending *Motion* for reversal of the July 5, 2017 *Memorandum And Order*.

In its *Motion to Revise and Reverse* the Defendant states that the Court was "incorrect in asserting that Evers had stipulated that § 1132(a)(2) does not apply, and is

likewise incorrect in assuming that 'relief under §1109 is not being sought.'" *See, Memorandum And Order* (7/5/17), p. 7."

Respectfully, the Court did not make any assumptions as to the Defendant's arguments, and the Court has been unable to locate anywhere in its decision stating that the Defendant had "stipulated." The record reveals in its *Motion To Dismiss* that the Defendant did not assert § 1132(a)(2) and § 1109 as bases for preemption. The Defendant asserted only § 1132(a)(3) as shown by the references in the *Motion to Dismiss* located by the Court.

- "[T]his case is a case between ERISA fiduciaries and is **governed by 29 U.S.C. § 1132(a)(3)**, for which jurisdiction is exclusive to the federal courts under 29 U.S.C. § 1132(e)(1) and (f)." *Motion To Dismiss*, p. 3 (May 5, 2017).

- "Unlike the underlying controversy in *Taylor* that fell within 29 U.S.C. § 1132(a)(1)(B), **the controversy in the present case falls within 29 U.S.C. § 1132(a)(3)** for which there is no concurrent jurisdiction with state courts." *Motion To Dismiss*, p. 4 (May 5, 2017).

- "**The present case is one arising within the scope of § 1132(a)(3)** as a case by a plan fiduciary to force Evers to make additional plan contributions and is therefore completely preempted by ERISA." *Evers' Reply To Plaintiffs' Response In Opposition To Motion To Dismiss*, p. 1 (May 25, 2017).

- Regardless of how the Complaint in this cause was originally framed, it seeks to force additional Plan contributions from the Plan Sponsor without any cognizable benefit for any participant or beneficiary of the Plan. **It is, therefore, a cause of action within the ambit of § 1132(a)(3).** It does not matter whether the additional contribution claimed is ultimately called a "premium" or something else. What matters is that the Plaintiffs seek legal or equitable relief to force Evers to make an additional contribution to an ERISA qualified Plan. The enforcement of ERISA or of the terms of an ERISA qualified Plan, by Plan fiduciaries, is governed by ERISA § 502(a)(3) [29 U.S.C. § 1132(a)(3)], and federal courts have exclusive jurisdiction over such claims. *Evers' Reply To Plaintiffs' Response In Opposition To Motion To Dismiss*, p. 3 (May 25, 2017) (footnote omitted).

As provided by Tennessee law, the Court addressed the legal issue presented in the *Motion To Dismiss* as stated by the Defendant. *Byrd v. Buhl*, No. M2001-00070-COA-R3CV, 2001 WL 1216988, at *3 (Tenn. Ct. App. Oct. 12, 2001) ("We agree with Appellant's general assertion that a court may only decide issues and award judgments to the extent requested by the parties in their pleadings or voluntarily litigated.").

It is only now, following the Court's denial of the *Motion To Dismiss*, that the Defendant raises for the first time that "subsequent research" has revealed that 29 U.S.C. § 1132(a)(2) "not only applies, but clearly preempts Plaintiffs' claims on a basis entirely independent of § 1132(a)(3)." *Motion To Revise And Reverse Order Denying Motion To Dismiss, Or In The Alternative, For Interlocutory Appeal,* p. 2 (Aug. 4, 2017).

Ordinarily, under Tennessee's standard of review for motions to revise and/or request for interlocutory appeal, new arguments are not considered. Subject matter jurisdiction, however, can not be waived and can be asserted at any time.

> Plaintiff did not raise this issue in the trial court, and a party who fails to bring an issue to the attention of the trial court will generally not be permitted to raise the issue for the first time on appeal. *See Barnhill v. Barnhill*, 826 S.W.2d 443, 458 (Tenn. Ct. App. 1991); *Pearman v. Pearman*, 781 S.W.2d 585, 587–88 (Tenn. Ct. App. 1989). Subject matter jurisdiction, however, is an exception to the general rule and 'the issue of subject-matter jurisdiction can be raised in any court at any time.' *Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988); *see also* Tenn. R.App. P. 13(b). Thus, the issue of subject matter jurisdiction need not be raised in the trial court to be considered on appeal. *First American Trust Co. v. Franklin–Murray Dev. Co.*, 59 S.W.3d 135, 140–41 (Tenn. Ct. App. 2001).

Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010); *see also Culbertson v. Culbertson*, 455 S.W.3d 107, 126 (Tenn. Ct. App. 2014) (quoting *Dishmon*

v. Shelby State Cmty. College, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999) (citations omitted)) ("A court's subject matter jurisdiction in a particular circumstance depends on the nature of the cause of action and the relief sought. It does not depend on the conduct or agreement of the parties, and thus the parties cannot confer subject matter jurisdiction on a trial or an appellate court by appearance, plea, consent, silence, or waiver.").

For this reason, the Court shall address the Defendant's newly asserted argument that the claims in the *Complaint* fall within the ERISA enforcement provision of 29 U.S.C. § 1132(a)(2) for which the federal courts have exclusive jurisdiction.

Application Of 29 U.S.C. § 1132(a)(2) To The *Complaint*

For ease of reference and context in analyzing Defendant's newly asserted § 1132(a)(2) ground, quoted below is the full civil action and enforcement statute under ERISA, 29 U.S.C.A. § 1132(a), identifying the individuals or entities who may bring a civil action under the Act.

> A civil action may be brought—
>
> (1) by a participant or beneficiary--
>
> > (A) for the relief provided for in subsection (c) of this section, or
> >
> > (B) 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;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C.A. § 1132(a) (West 2017).

Furthermore, as referenced in § 1132(a)(2), 29 U.S.C. § 1109 provides

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C.A. § 1109 (West 2017).

As stated above in § 1132(a)(2), there are two elements of a claim under that subsection: (1) that the party bringing the civil action is either a participant, beneficiary or fiduciary and (2) that the relief sought is § 1109 relief of requiring a breaching fiduciary to "make good to the plan" any losses to the plan and restore profits made through use of plan assets.

With respect to the first element, the Court maintains the determination from the July 5, 2017 decision that Plaintiffs are fiduciaries of the Plan (*see* July 5, 2017

Memorandum And Order pp. 10-12), although, as developed below in analyzing the second element, the *Complaint* is being brought by the Plaintiffs on their behalf, individually.

As to the second element, numerous cases have held that a claim under § 1132(a)(2) must be brought *on behalf of* the ERISA plan to "inure to the benefit of the plan as a whole."

> Section 1132(a)(2) of ERISA provides that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109." Section 1109 then outlines the parameters of personal liability for breach of fiduciary duty. A plaintiff may seek relief under § 1132(a)(2), however, only when the recovery "inures to the benefit of the plan as a whole." As the Supreme Court explained in *Russell*, "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."

Burnside v. Anthem Blue Cross Blue Shield, No. CIV.A. 1:05-CV-570, 2006 WL 3499202, at *9 (E.D. Tex. Dec. 1, 2006) (citations omitted).[2]

[2] *See also, Pilger v. Sweeney*, 725 F.3d 922, 926 (8th Cir. 2013) (citations omitted) ("A plan participant can enforce these duties by filing a claim under § 1132(a)(2), to recover the relief provided by 29 U.S.C. § 1109. A § 1132(a)(2) plaintiff acts 'in a representative capacity on behalf of the plan as a whole,' because § 1109 is designed to 'protect the entire plan[.]' Thus, any relief 'inures to the benefit of the plan as a whole.' As a result, when a defined-benefit pension plan is at issue, § 1132(a)(2) 'does not provide a remedy for individual injuries distinct from plan injuries[.]'"); *Walker v. Fed. Express Corp.*, No. 209CV02820JPMCGC, 2011 WL 13186537, at *3 (W.D. Tenn. Jan. 4, 2011), *aff'd sub nom. Walker v. Fed. Exp. Corp.*, 492 F. App'x 559 (6th Cir. 2012) (footnotes and citations omitted) ("The Sixth Circuit has held that individual recovery is not permitted under § 1132(a)(2). Instead, any recovery obtained under § 1132(a)(2) must 'inure[ ] to the benefit of the plan as a whole.'"); *New Orleans ILA Pensioners Ass'n v. Bd. of Trustees of New Orleans Employers Int'l Longshoremen's Ass'n AFL-CIO Pension Fund*, No. CIV. A. 07-6349, 2008 WL 215654, at *3, *4 (E.D. La. Jan. 24, 2008) ("Under 29 U.S.C. § 1132(a)(2), a plaintiff may only seek remedies that provide a benefit to the plan as a whole, rather than the individual plaintiff.…Although a plaintiff is limited to sue for recovery on behalf of an ERISA plan when asserting a § 1132(a)(2) claim, participants can sue for equitable relief under § 1132(a)(3) for breaches of fiduciary duty that harm them as individuals."); *Pfahler v. Nat'l Latex Prod. Co.*, 517 F.3d 816, 826–27 (6th Cir. 2007) ("Contrary to defendants' contentions, the instant case is distinguishable from cases in which this court has held that a plaintiff was seeking individual relief, a direct benefit, and

Applying this second element – § 1109 relief – to the *Complaint,* the Court concludes from the cases cited in footnote 2 and *Atlantis Health Plan, Inc. v. Local 713, I.B.O.T.U.*, 258 F.Supp.2d 284 (S.D.N.Y. 2003), this element is not present in this case and, therefore, jurisdiction of the *Complaint* in this state court is not preempted. *Atlantis* is particularly instructive and relied upon because it pertains to recovery of premium by an insurer as is in dispute in this case, and, therefore, its facts, analysis and holding are discussed in some detail.

Plaintiff Atlantis was a health maintenance organization ("HMO") that contracted with Defendant Local 713 to provide group medical insurance to members of Local 713. Defendant USGMA acted as a broker in effectuating coverage and collecting premiums from Local 713 for payment to Atlantis. Suit was filed by Atlantis alleging that Defendants failed to remit $1,000,000 in premiums in breach of the Group Remittance Agreement. Defendants removed the case to federal court claiming federal original jurisdiction under ERISA.

Assuming that Atlantis was a plan fiduciary, the Court nevertheless remanded the case to state court based upon the conclusion that neither § 1132(a)(2) nor §1132(a)(3) applied to the dispute. Like this Court's July 5, 2017 *Memorandum And Order*, the

---

therefore could not recover under § 502(a)(2). In denying § 502(a)(2) relief in all of those cases, however, this court relied on the fact that the plaintiffs there explicitly sought personal recovery.").

Atlantis Court ruled out the application of § 1132(a)(3) because the relief sought—recovery of premiums—was not equitable but compensatory damages. *Id.* at 295.

Turning then to § 1132(a)(2) and acknowledging that it allows recovery of monetary damages, the *Atlantis* Court nevertheless found § 1132(a)(2) did not apply because the complaint did not seek recovery on behalf of an ERISA plan, but instead sought recovery in the plaintiff's individual capacity and for its own benefit. *Id.*

That the premiums in issue were "integrally linked" to the ERISA plan and that if successful, the claims in the complaint would have some economic impact on the plan funds were considered by the *Atlantis* Court but were found to be insufficient to bring the complaint within the ambit of § 1132(a)(2). The *Atlantis* Court reasoned that at the "core" of the litigation was enforcement of a contractual relationship between an insurer, a union and an agent of the union. ERISA was only the backdrop for an ordinary contract dispute between the parties. *Id.* at 293.

The *Atlantis* Court determined that removal to federal court could not be sustained because Atlantis's state law causes of action did not fit within the scope of ERISA's civil enforcement provisions. *Id.* at 295. In pertinent part the *Atlantis* decision is quoted as follows.

> The claim at issue in this case, however, is atypical of the more traditional ERISA dispute—it is not an action brought by an employee to recover benefits, enforce rights or clarify the entitlements under the terms of a qualifying plan, or by a trustee of an ERISA plan to ensure the proper administration or redress violations of the provisions of an ERISA plan, nor does it affect how benefits are calculated or paid. *See Raff v. The Travelers Ins. Co.*, No. 90 Civ. 7673, 1997 WL 473282, at *2 (S.D.N.Y. May 28, 1997). Rather, the issue at the core of this litigation concerns the enforcement of a contractual relationship between a health care insurer, a

union, and an agent of the union assigned the duty of arranging for health care benefits for its members. At bottom, therefore, the ERISA plan in contention here serves only as a backdrop; it is in some respect just the context for an ordinary common law contract dispute among the parties. *See Geller*, 86 F.3d at 23.

To be sure, while Atlantis's underlying claims may not entail typical actions contemplated under ERISA, the resolution of this case may have a significant impact on the Welfare Fund. Ultimately, the monies here in dispute are funds that are integrally linked to the ERISA plan-Atlantis's claim for payment of premiums owed to it by the union and/or the union's agent concern misappropriation of assets of the ERISA plan. Since the Group Remittance Agreement can be fairly characterized as an ERISA plan, this dispute can fairly be characterized as one that concerns the proper administration of an ERISA plan. Furthermore, if successful, Atlantis's claims likely will have some economic impact on the Welfare Fund because the premiums that Atlantis claims the union or its agents have wrongfully withheld from it may be assets that belong to the Welfare Fund or that the plan conceivably may be called to pay out of the Welfare Fund in consequence of this litigation. On the other hand, Atlantis argues that these funds are not plan assets but are premiums that have been improperly retained by USGMA. Without resolving this dispute, which is improper at this stage of the proceedings, the Court can not determine the full effect of this litigation's economic impact on Welfare Fund assets. In any event, the Supreme Court has made clear that an indirect economic impact on an ERISA plan resulting from conduct that may be actionable under ERISA does not, in itself, suffice to compel federal preemption. *See Curiale*, 64 F.3d at 803.

In sum, the Court does not consider the facts presented here to establish a clear case for preemption under ERISA.

***

In this case, Atlantis's lawsuit, properly understood, does not fall within any of the specific civil actions or remedies described above. Even assuming that USGMA and Local 713 are correct in contending that under ERISA the parties in this case qualify as fiduciaries, the litigation would entail Atlantis as a fiduciary suing other fiduciaries on its own account for monies owed to it under a contract, not on behalf of the plan itself. None of the civil actions enumerated in § 1132 contemplates an ordinary common law contract dispute such as that presented here for collection of premiums and/or damages between parties of the kind involved in the matter at hand.

> *Atlantis's* state law claims do not seek to redress, by means of that litigation, violations of rules that ERISA's civil enforcement provisions were designed to remedy. *Cf. Howell,* 126 F.3d at 69-70 (noting that "a state cause of action that acts as an alternative means of vindicating the rights protected by § 502(a) is 'within the scope' of the section even if the suit is directed against a defendant not liable under ERISA.")
>
> As USGMA and Local 713 concede, the only provision potentially available to Atlantis for bringing its suit under ERISA is § 1132(a)(3), which allows a participant, beneficiary, or fiduciary of an ERISA-regulated plan to bring a civil action for injunctive or other appropriate equitable relief. However, Atlantis's action does not seek injunctive or other appropriate equitable relief. Rather, what Atlantis demands is compensatory damages for money it contends is owed to it pursuant to a contract with Defendants. The Supreme Court has explicitly held that the relief contemplated under § 1132(a) does not encompass claims for monetary damages. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Toumajian,* 135 F.3d at 656. The only subsection of § 1132(a) that allows fiduciaries to recover monetary damages is § 1132(a)(2). However, this subsection provides monetary, remedial, and equitable relief to any participant, beneficiary, or fiduciary who brings a civil action for recovery on behalf of an ERISA plan, not in the claimants individual capacity and for its own benefit. *Id.* Therefore, Atlantis's state law causes of action do not fit within the scope of ERISA's civil-enforcement provisions and are thus not subject to removal pursuant to 28 U.S.C. § 1441.
>
> Accordingly, the Court does not have jurisdiction over this case and it must be remanded to the state court for adjudication of Atlantis's claims and any relevant defense that Defendants may raise.

Atlantis Health Plan, Inc. v. Local 713, I.B.O.T.U., 258 F.Supp.2d 284, 293, 295 (S.D.N.Y. 2003).

Comparing the *Atlantis* decision to this case, the Court looks to the *Complaint* to determine whether the Plaintiffs' lawsuit is completely preempted such that this Court lacks subject matter jurisdiction.

> Complete preemption under ERISA 'is a judicially-recognized exception to the well-pleaded complaint rule' and derives from ERISA's civil

> enforcement provision, Section 502(a), 'which has such 'extraordinary' preemptive power that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'' *Connecticut State Dental,* 591 F.3d at 1344 (quoting *Metro. Life Ins. Co. v. Taylor,* 481 U.S. 58, 65–66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). 'Section 502(a) of ERISA creates a civil cause of action for participants and beneficiaries of ERISA plans to recover benefits or enforce rights under an ERISA plan.' *Borrero v. United Healthcare of New York, Inc.,* 610 F.3d 1296, 1301 (11th Cir.2010)(citing 29 U.S.C. § 1132(a)). 'This section definitively 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'' *Id.* (quoting *Aetna Health Inc. v. Davila,* 542 U.S. 200, 209, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004)). 'Consequently, any 'cause of action within the scope of the civil enforcement provisions of § 502(a) is removable to federal court.'' *Connecticut State Dental,* 591 F.3d at 1344 (quoting *Metro. Life Ins.,* 481 U.S. at 66, 107 S.Ct. 1542).

Miami Beach Cosmetic & Plastic Surgery Ctr. v. Blue Cross & Blue Shield of Florida, Inc., 947 F. Supp. 2d 1375, 1380 (S.D. Fla. 2013); *Clarkston v. Hubbard*, 91 F.3d 143 (6th Cir. 1996) ("An exception to the well-pleaded complaint rule occurs in cases where the defendant claims that the plaintiff's claim is actually a civil enforcement action under 29 U.S.C. § 1132(a)(1)(B). 'One corollary to the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.' *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987).").

In pertinent part, the *Complaint* avers

> 5. Evers entered into a Participation Agreement with the Captive and HCS on April 1, 2014, and again on April 1, 2015. Evers has a copy of the Participation Agreement. The Participation Agreement transfers a portion of Evers' risk for the medical care benefits of Evers' employees to the Captive.
>
> 6. The Participation Agreement provides for Evers to pay premium to the Captive. HCS collects the premium from Evers for the Captive. Evers owes

> (1) a premium amount for specific and aggregate medical stop loss insurance coverage to be purchased from Gerber Life Insurance Company, and (2) a premium for its aggregate claim factors. 50% of the premium paid for Evers' aggregate claim factors goes to an individual unincorporated protected cell that pays specific claims of Evers up to $10,000 per member. This is self-funded and is referred to as the Participant Cell Coverage. The other 50% of the premium paid for Evers' aggregate claim factors is pooled with premium paid by all other participants in cells of the Captive. This is for each specific claim of all participants in cells of the Captive in excess of $10,000 per member, up to a limit of $90,000 per member. This is referred to as the Captive Coverage.
>
> 7. Evers provided two (2) medical benefit plans for its employees. Plan A provided a deductible of $2000 per employee, Plan B provided a deductible of $5000 per employee. The premium that was owed by Evers for its aggregate claim factors coverage from April 1, 2015 until March 31, 2016 is set forth on Schedule 1 of the Participation Agreement for each plan.
>
> ***
>
> 10. Exhibit 2 sets forth the aggregate claim factors premium paid by Evers for April 1, 2015 to March 31, 2016, the amount of premium owed and the difference. Evers paid premium at what is referred to as the Expected Rate, which is 80% of the Maximum Rate. This is the premium that would be owed if claims come in at an anticipated dollar amount. Evers owed premium at the Maximum Rate, not the Expected Rate. Evers owes the difference in the premium owed and the premium paid. Evers owes premium to Captive of $72,496.87.

Complaint, pp. 2-3, 4, ¶ 5-7, 10 (June 7, 2016).

The foregoing averments of the *Complaint*, like those in *Atlantis*, do not seek recovery on behalf of the ERISA plan but, instead, seek recovery in the Plaintiffs' individual capacity and for their benefit. At the "core" of this litigation is enforcement of a contractual relationship between an insurer and employer. ERISA is only the backdrop for an ordinary contract dispute between the parties. *See, e.g.*, *Union Health Care, Inc. v. John Alden Life Ins. Co.*, 908 F. Supp. 429, 433 (S.D. Miss. 1995) ("Rather, the relationship here involved is that between the employer/plan sponsor and its insurer, i.e.,

between a standard ERISA entity and a third party. And the fact that ERISA is lurking in the background does not alter the fact that this is simply a contract dispute between these parties.").

The Defendant arrives at a different outcome because it asserts that the *Complaint* to recover premium is synonymous with recovery of contributions to the ERISA plan: "Plaintiffs, as ERISA fiduciaries, are suing Evers, who is also a Plan fiduciary, for alleged additional contributions to the Plan, an action which is certainly allowed as a form of money damages under 29 U.S.C. § 1132(a)(2) as appropriate relief under 29 U.S.C. § 1109." [emphasis added]. *Motion to Revise and Reverse*, p. 8 (Aug. 4, 2017). Defendant's characterization of the *Complaint*, however, is not accurate. The Plaintiffs do not plead that they are seeking to recover contributions to the plan. Their pleadings seek recovery of premium. As articulated by the Plaintiffs,

> [t]he premium sought from Evers is for the Captive to partially reimburse it for claims it paid for the Participant Cell and to pay it for its assumption of risk – Captive Coverage. The recovery is based upon the Contracts and will have no effect upon the ERISA Plan or its beneficiaries. This Court has jurisdiction to enforce these contracts.

Plaintiffs' Sur-Reply To Defendant's Reply In Support Of Its Motion To Revise And Reverse Order Denying Motion To Dismiss Or, In The Alternative, For Interlocutory Appeal, pp. 6 (Aug. 23, 2017).

Additionally, the cases cited by the Defendant on this point in support of its *Motion to Revise and Reverse* do not pertain to recovery of premium, the issue in this case. This factual distinction is material because whether a claim fits within sections 1132(a)(2) or (3) depends upon the specific facts of the case.

Further, to the extent the argument the Defendant is making is that there is a link between the premium the Plaintiff seeks to recover and contributions to the plan, the Court refers back to the analysis of the *Atlantis* case. As explained therein, that there will be an indirect economic impact to the plan if a plaintiff recovers is insufficient for preemption. *Atlantis Health Plan*, 258 F.Supp.2d at 293. *See also, NYS Health Maint. Org. Conference v. Curiale*, 64 F.3d 794, 803 (2d Cir. 1995) ("[A]n indirect economic effect upon ERISA plans generally provides a connection too 'tenuous, remote or peripheral' to justify preemption.").

The Defendant also argues that there is no proof that all claims have been paid by the Plaintiffs, and, thus, there could be recovery for the ERISA plan involved in the lawsuit to bring the case within a § 1132(a)(2) enforcement action.

> There is no evidence in the record proving that all claims under the Plan have been paid. Specifically, there is no evidence in the record that Plaintiffs actually furnished all unpaid claims under the Plan existing at the time of the termination of the parties' business relationship (April 1, 2016). In addition, there is no evidence in the record that Plaintiffs have forwarded claims they received after such termination that arose prior to April 1, 2016. Furthermore, without discovery in this action, Plaintiffs cannot possibly know what claims Evers has received and paid. In fact, Plaintiffs have not forwarded claims they received after such termination, despite Evers' request for same, and in fact Evers is continuing to receive new claims (the most recent of which was received just one week ago). Although Evers has been making payments on claims it received after the date Plaintiffs refused to adjudicate claims under the Plan, Evers is without knowledge as to whether it has actually received all claims for medical benefits under the Plan that arose prior to April 1, 2016.
>
> Accordingly, since none of the parties possess knowledge that all claims arising prior to April 1, 2016 have, in fact, been paid, Plaintiffs' averment to the contrary is false. Assuming, arguendo, that Evers owes "premiums" to Plaintiffs, a portion or all of same may be needed to pay claims under the Plan.

Defendant's Reply In Support Of Motion To Revise And Reverse Order Denying Motion To Dismiss, Or In The Alternative, For Interlocutory Appeal, p. 2 (Aug. 16, 2017) (footnotes omitted).

The above arguments are asserted by the Defendant in its Counterclaim. Defenses and counterclaims, however, can not serve as a basis to preempt and confer ERISA federal jurisdiction.

> Under the longstanding well-pleaded complaint rule, however, a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].' *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908). Federal jurisdiction cannot be predicated on an actual or anticipated defense: 'It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of [federal law].' *Ibid.*
>
> Nor can federal jurisdiction rest upon an actual or anticipated counterclaim. We so ruled, emphatically, in *Holmes Group*, 535 U.S. 826, 122 S.Ct. 1889, 153 L.Ed.2d 13. Without dissent, the Court held in *Holmes Group* that a federal counterclaim, even when compulsory, does not establish 'arising under' jurisdiction. Adhering assiduously to the well-pleaded complaint rule, the Court observed, *inter alia*, that it would undermine the clarity and simplicity of that rule if federal courts were obliged to consider the contents not only of the complaint but also of responsive pleadings in determining whether a case 'arises under' federal law. *Id.*, at 832, 122 S.Ct. 1889. See also *id*., at 830, 122 S.Ct. 1889 ('[T]he well-pleaded complaint rule, properly understood, [does not] allo[w] a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction.'); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 10, n. 9, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983) ('The well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction.').
>
> A *complaint* purporting to rest on state law, we have recognized, can be recharacterized as one 'arising under' federal law if the law governing the complaint is exclusively federal. See *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). Under this so-called

> 'complete preemption doctrine,' a plaintiff's "state cause of action [may be recast] as a federal claim for relief, making [its] removal [by the defendant] proper on the basis of federal question jurisdiction." 14B Wright & Miller § 3722.1, p. 511. A state-law-based *counterclaim*, however, even if similarly susceptible to recharacterization, would remain nonremovable.
>
> ***
>
> Under the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim and thus does not provide a key capable of opening a federal court's door. See *supra*, at 1271 – 1273. See also *Taylor v. Anderson*, 234 U.S. 74, 75–76, 34 S.Ct. 724, 58 L.Ed. 1218 (1914) ('[W]hether a case is one arising under [federal law] ... must be determined from what necessarily appears in the plaintiff's statement of his own claim ..., unaided by anything alleged in anticipation o[r] avoidance of defenses which it is thought the defendant may interpose.').

Vaden v. Discover Bank, 556 U.S. 49, 60–62, 66–67, 70, 129 S. Ct. 1262, 1278, 173 L. Ed. 2d 206 (2009) (footnotes omitted); *see also Yoshimura v. Hawaii Carpenters Union Local 745*, No. CV 15-00292 HG-RLP, 2015 WL 6126805, at *7 (D. Haw. Oct. 15, 2015) (citing *Vaden v. Discover Bank* in an ERISA based removal case); *Dist. Council 1707 Local 389 Home Care Employees' Pension & Health & Welfare Funds v. Strayhorn*, No. 11 CIV. 7911 PAC, 2013 WL 1223362, at *6 (S.D.N.Y. Mar. 25, 2013) (citing *Vaden v. Discover Bank* for the proposition that an ERISA based counterclaim would not confer federal court jurisdiction in light of a state law complaint); *B & S Welding LLC Work Related Injury Plan v. Oliva-Barron*, No. 3:10-CV-01491-M, 2011 WL 93064, at *2 (N.D. Tex. Jan. 10, 2011) (relying on *Vaden v. Discover Bank*, "Counterclaims in a state court action, even if they rely exclusively on federal law, do not 'arise under' federal law and therefore cannot be removed to federal court by either the plaintiff or the defendant.").

Furthermore, to the extent the Defendant's Counterclaim is preempted by federal law, this Court is authorized to apply federal law in deciding the Counterclaim. *Vaden v. Discover Bank*, 556 U.S. 49, 62, FN. 12 (2009) ("There is nothing inappropriate or exceptional… about a state court's entertaining, and applying federal law to, completely preempted claims or counterclaims.")

Accordingly, the Court concludes as a matter of law that section §1132(a)(2) does not apply to the *Complaint* to require complete federal preemption.

Reexamination Of 29 U.S.C. § 1132(a)(3) Analysis

With respect to the second ground asserted by the Defendant for revision of the July 5, 2017 *Memorandum And Order*, this is § 1132(a)(3) which the Defendant initially argued as the basis for complete federal preemption, and which was analyzed and denied in the July 5, 2017 *Memorandum And Order*. The need for revision of the July 5, 2017 decision, the Defendant asserts, is

> 2. The Order misconstrues certain cases in its § 1132(a)(3) analysis, primarily with regard to (a) whether monetary remedies are available under § 1132(a)(3); (b) its application of the two-pronged *Davila* test in a case other than a "benefit claims" test (the only type of case to which that test applies) and the incorrect assumption that the participation agreement sued on in this case is not part of a "plan document"; and (c) its holding that the Complaint fails to allege appropriate "equitable relief" as required for § 1132(a)(3) based on opinions that either (1) in fact support Evers' position more than Plaintiffs'; (2) are inapposite; (3) are distinguishable on their facts; or (4) have been overruled.

Motion To Revise And Reverse Order Denying Motion To Dismiss Or, In The Alternative, For Interlocutory Appeal, p. 2 (Aug. 4, 2017).

As it relates to the Defendant's first argument 2(a) concerning monetary remedies, support for the outcome of the July 5, 2017 *Memorandum and Order*, in addition to the authorities and analysis already stated therein, is the reasoning from the *Atlantis* case that § 1132(a)(3) does not preempt an action in state court when the recovery sought is compensatory damages of premium.

> In this case, Atlantis's lawsuit, properly understood, does not fall within any of the specific civil actions or remedies described above. Even assuming that USGMA and Local 713 are correct in contending that under ERISA the parties in this case qualify as fiduciaries, the litigation would entail Atlantis as a fiduciary suing other fiduciaries on its own account for monies owed to it under a contract, not on behalf of the plan itself. None of the civil actions enumerated in § 1132 contemplates an ordinary common law contract dispute such as that presented here for collection of premiums and/or damages between parties of the kind involved in the matter at hand. *Atlantis's* state law claims do not seek to redress, by means of that litigation, violations of rules that ERISA's civil enforcement provisions were designed to remedy. *Cf. Howell,* 126 F.3d at 69-70 (noting that "a state cause of action that acts as an alternative means of vindicating the rights protected by § 502(a) is 'within the scope' of the section even if the suit is directed against a defendant not liable under ERISA.")
>
> As USGMA and Local 713 concede, the only provision potentially available to Atlantis for bringing its suit under ERISA is § 1132(a)(3), which allows a participant, beneficiary, or fiduciary of an ERISA-regulated plan to bring a civil action for injunctive or other appropriate equitable relief. However, Atlantis's action does not seek injunctive or other appropriate equitable relief. Rather, what Atlantis demands is compensatory damages for money it contends is owed to it pursuant to a contract with Defendants. The Supreme Court has explicitly held that the relief contemplated under § 1132(a) does not encompass claims for monetary damages. *See Mertens v. Hewitt Assocs.,* 508 U.S. 248, 260, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *see also Toumajian,* 135 F.3d at 656.

Atlantis Health Plan, Inc. v. Local 713, I.B.O.T.U., 258 F.Supp.2d 284, 293, 295 (S.D.N.Y. 2003).

Next there is the Defendant's argument 2(b) that the Court "misstates and misapplies the *Davila* test" and the "use of the *Davila* test to determine whether a state law cause of action is preempted by any other section of ERISA other than Section 502(a)(1)(B) is erroneous." *Motion to Revise and Reverse*, pp. 8, 9 (Aug. 4, 2017). The Court stands by its analysis and outcome on this matter based upon the analysis and authorities stated in the July 5, 2017 decision and that the following other numerous cases recognize that the *Davila* test applies to ERISA claims under §1132(a)(3). *Mank v. Green*, 350 F. Supp. 2d 154, 158–59 (D. Me. 2004) (emphasis added); *see also Roberts v. Scarcello*, No. 16-2720-JWL, 2017 WL 169035, at *3, FN4 (D. Kan. Jan. 17, 2017) ("While *Davila* discussed complete preemption by reference to § 502(a)(1)(B), the doctrine clearly applies to the other subparts of § 502(a) as well. *See Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011) (collecting cases); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 66 (1987) ("Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.")); *Noetzel v. Hawaii Med. Serv. Ass'n*, No. CV 15-00310 SOM-KJM, 2016 WL 4033099, at *3 (D. Haw. July 27, 2016).

As to the Defendant's additional point that the Participation Agreement and/or Claims Administration Agreement is part of the "plan documents," this is not dispositive and it does not change the outcome. Because *Davila* applies and the *Complaint* is seeking monetary relief, there can be no complete preemption under § 1132(a)(3).

Thus, based upon the authorities cited herein and in the July 5, 2017 *Memorandum And Order*, the enforcement action provided in 29 U.S.C. § 1132(a)(3) is not applicable to the *Complaint* to require dismissal from this Court due to complete federal preemption.

Conflict Preemption Not Applicable As Well

In both its initial motion to dismiss and its subsequent *Motion to Revise and Reverse*, the Defendant's position regarding dismissal is that the Plaintiffs' *Complaint* is completely preempted because it constitutes a civil enforcement action under 29 U.S.C. § 1132(a)(2) or § 1132(a)(3) for which the federal courts retain exclusive jurisdiction.

There is, however, yet another basis for preemption under ERISA law: conflict preemption. For completeness and in the event the Defendant were to subsequently assert this basis for dismissal as well, the Court shall address this third basis for preemption.

The distinction between complete preemption and conflict preemption was provided by the Tennessee Court of Appeals in *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 Court explained that conflict preemption allows a defendant to raise as an affirmative defense that a plaintiff's state law claim is preempted by federal law such that the state court can not hear the claim. If a claim is conflict preempted then the state court lacks subject matter jurisdiction to hear the case.

> 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).

No. M201401869COAR9CV, 2016 WL 3357180, at *7 (Tenn. Ct. App. June 9, 2016).

The difference and distinction between the complete preemption of section 29 U.S.C. § 1132(a)(2) and (3), denied above, and conflict preemption is significant. Even if a plaintiff's causes of action are not completely preempted under the civil enforcement statute discussed above, 29 U.S.C. § 1132(a)(2) and (3) to effect dismissal and removal to federal court, nevertheless a plaintiff's claim may still be conflict preempted such that neither state nor federal court can hear the claim.

> ERISA has two distinct preemption provisions: Preemption under section 514 (29 U.S.C. § 1144), known as conflict or ordinary preemption; and so-called complete preemption under section 502(a) (29 U.S.C. § 1132(a)). Conflict preemption is an affirmative defense to a plaintiff's state law cause of action that entirely bars the claim; that is, the particular claim involved cannot be pursued in either state or federal court. Complete preemption, in contrast, is a doctrine that recognizes federal jurisdiction over what would otherwise be a state law claim, an issue that typically arises when the defendant has removed the plaintiff's state court lawsuit to federal court. "Despite the similarity in nomenclature, complete preemption is quite distinct from ordinary preemption...."'"Ordinary preemption" is an affirmative defense to the allegations in a plaintiff's complaint asserting a state law claim claiming that a state law conflicts with, and is overridden by, a federal law. On the other hand, complete preemption does not constitute a defense at all. Rather, it is a narrowly drawn jurisdictional rule for assessing federal removal jurisdiction when a complaint purports to raise only state law claims. It looks beyond the complaint to determine if the suit is actually and entirely a matter of federal law, even if the state law would provide a cause of action in the absence of the federal law.'" (*Totten v. Hill* (2007) 154 Cal.App.4th 40, 50, 64 Cal.Rptr.3d 357; see *Marin Gen.*

> *Hosp. v. Modesto & Empire Traction Co*. (9th Cir. 2009) 581 F.3d 941, 945 [complete preemption "is 'really a jurisdictional rather than a preemption doctrine, [as it] confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim' "].) Despite this difference, case authority discussing ERISA preemption often conflates the two doctrines. (See *Marin Gen. Hosp*., at p. 945 [acknowledging the Ninth Circuit may have contributed to the confusion between the two doctrines by using terminology only relevant to conflict preemption to describe complete preemption].)

Morris B. Silver M.D., Inc. v. Int'l Longshore & Warehouse Union—Pacific Mar. Ass'n Welfare Plan, 2 Cal. App. 5th 793, 799, 206 Cal. Rptr. 3d 461, 465–66 (Ct. App. 2016), *review denied* (Nov. 30, 2016).

To the extent the Defendant, in addition to complete preemption, relies on the doctrine of conflict preemption, the Court concludes as a matter of law that conflict preemption does not apply to the *Complaint*.

Returning to the July 5, 2017 *Memorandum And Order*, the Court reasoned that although the Plaintiffs' claim referenced and related to the ERISA plan, the claim involved an independent legal duty owed to the Plaintiffs by the Defendant that is separate and apart from the ERISA medical benefits plan.

- As noted above, the determinative issue in this case is whether the Complaint fits the criteria contained in 29 U.S.C. § 1132(a)(3), as asserted by the Defendant, for which federal courts retain exclusive jurisdiction; or, as asserted by the Plaintiffs, whether the Complaint constitutes a purely state law claim that merely relates to an ERISA plan for which this Court has concurrent jurisdiction with federal courts. *Memorandum And Order*, pp. 6-7 (July 5, 2017).

- While the two contracts reference the ERISA plan and govern administration of the ERISA plan, the dispute, according to the Complaint, does not involve a claim or denial of benefits under the ERISA plan. *Memorandum And Order*, p. 14 (July 5, 2017).

- While the terms of the agreements necessarily reference and relate to the ERISA medical benefits plan entered into between the Defendant and its employees, the Plaintiffs' Complaint seeks recovery for an independent legal duty owed to the Plaintiffs by the Defendant that is separate and apart from the ERISA medical benefits plan. *Memorandum And Order*, p. 18 (July 5, 2017).

The above analysis from the July 5, 2017 decision is described in the case law in terms that, where claims are too tenuous, remote or peripheral to relate to an ERISA plan, the claims are not preempted.

> Even though [the Plaintiff's] claims can survive § 1132, there remains the question of whether he can prevail in the face of 29 U.S.C. § 1144, ERISA's express preemption provision. Section 1144(a) preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' governed by ERISA. The Supreme Court has explained that Congress used language that was 'deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'' *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (quoting *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981)). A state law may therefore be preempted 'even if the law is not specifically designed to affect such plans, or the effect is only indirect.' *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Thus, the Supreme Court has held that even general state contract and tort laws may also be preempted by ERISA. *See Pilot Life*, 481 U.S. at 48, 107 S.Ct. 1549. Nevertheless, the Court has made clear that some state laws might affect ERISA-governed plans in a way that is 'too tenuous, remote, or peripheral' to say that they 'relate to' the plan. *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (citing *AT & T Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (holding that ERISA did not preempt a state's garnishment of a spouse's pension income to enforce alimony and support orders)); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654–68, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (unanimously holding that a state law imposing surcharges on hospital rates for patients covered by ERISA plans did not 'relate to' the plans, and were therefore not preempted).
>
> In deciding whether a state-law claim is too remote to be preempted by ERISA, our precedents focus on whether the remedy sought by a plaintiff is primarily plan-related. *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 453 (6th Cir. 2003). Recently, however, we have identified three

> categories of claims that ERISA clearly preempts: state-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.

Thurman v. Pfizer, Inc., 484 F.3d 855, 860–61 (6th Cir. 2007).

Applying the case law to the points, quoted above from the July 5, 2017 *Memorandum And Order* that the ERISA plan is the context for but not the reason for this lawsuit, establishes that the claims in the *Complaint* are too tenuous, remote or peripheral to the ERISA plan, and, therefore, conflict preemption does not apply in this case to require dismissal of the *Complaint*.

Conclusion

In sum, as developed in the July 5, 2017 decision and supported herein, the *Complaint* is neither completely preempted as constituting ERISA enforcement actions pursuant to 29 U.S.C. 1132 § (a)(2) or (3) nor conflict preempted because

— the remedy sought in the Complaint is to recover compensatory damages for premiums, not equitable relief;

— if successful, the *Complaint* may have some indirect economic impact on the ERISA plan but the recovery sought by the Plaintiffs is for themselves individually not for the ERISA plan in their fiduciary capacity; and

— the claims in the *Complaint* are too tenuous, remote or peripheral to the ERISA plan.

Thus the Defendant's *Motion to Revise and Reverse Order Denying Motion to Dismiss Or, in the Alternative, For Interlocutory Appeal* is denied.

Summary Judgment Schedule

Having denied dismissal of this lawsuit, the litigation of this case shall proceed.

It is ORDERED that September 25, 2017 is the deadline for Plaintiffs to file their motion for summary judgment. Defendant's response deadline is October 30, 2017. Plaintiffs' reply, if any, is due November 9, 2017. The Docket Clerk shall contact Counsel to schedule oral argument. The October 18, 2017 date agreed to by Counsel is no longer feasible.

Setting a summary judgment deadline for the Plaintiffs is without prejudice to the Defendant to invoke the procedure under Tennessee Civil Procedure Rule 56.07 in response to the motion.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

William B. Hubbard
Robyn E. Smith
Daniel H. Puryear
Thomas T. Pennington
Bynum E. Tudor, III