DOCKET NUMBER
09-12665-DD

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT H. HEPTINSTALL et al.

APPELLANTS

v.

MONSANTO COMPANY, INC. et al.

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

CV 06-01564-CLS-M

BRIEF FOR APPELLANTS

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Davis, Harwell, Magistrate Judge

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Elisa S. Rives, LLC, Law Firm for Appellants

Employee Benefits Plan Committee, Appellee

Former Employees and Employees of Monsanto Company, Incorporated

Former Employees and Employees of Pharmacia Corporation

Former Employees and Employees of Solutia Incorporated

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Monsanto Company Employee Benefits Executive Committee, Appellee

Monsanto Company, Inc., Appellee

Monsanto Salaried Employees' Pension Plan, Appellee

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Pharmacia Corporation, Appellee

Propst, Robert P., United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves important issues concerning the scope of discretion afforded in ERISA cases when claims for equitable or "make-whole" relief are brought for breach of fiduciary duty and violation of ERISA when there is a clear record of an abuse of discretion. The forfeiture of a "vested right" to a pension benefit is a "taking" of a property. The District Court dismissed the instant class action for equitable relief brought on behalf of a putative class, the plan and Plaintiffs' individually based on its finding *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007) was dispositive as to Plaintiffs' claims. Plaintiffs believe oral argument will assist the Court in reaching the full understanding of the constitutional and legal issues presented.

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STATEMENT OF JURISDICTION

The district court had original subject matter and equitable jurisdiction over the civil action filed in the Middle Division of the Northern District of Alabama pursuant to 28 U.S.C. § 1331 and the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1001 *et seq*. ("ERISA").

This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a). On May 15, 2009, the District Court dismissed this action seeking equitable relief on behalf of seven Plaintiffs, a putative class, and the plan based on this Court's decision in *Gilley v. Monsanto Company, Inc.,* 490 F.3d 848 (11th Cir. 2007). *See Gilley v. Monsanto Co., Inc*., 490 F.3d 848 (11th Cir. 2007) (*Gilley I*); *Gilley v. Monsanto Co., Inc.*, No. 08-13646, 309 Fed. Appx. 362; 2009 U.S. App. LEXIS 2073 (February 3, 2009) *petition for certiorari filed and docketed* (June 9, 2009) No. 08-1511 ("*Gilley II*"). [R 119]. On June 20, 2009, Plaintiffs timely filed a Notice of Appeal within 30 days as required by Federal Rules of Appellate Procedure Rule 4(a)(1)(A) when the magistrate judge denied a Rule 58 motion. [R 122].

STATEMENT OF THE ISSUES ON APPEAL

Did the district court abuse its discretion by refusing equitable jurisdiction over plaintiffs' individual, representative, and derivative claims denying redress for grievances resulting from Defendants' violation of ERISA and breach of fiduciary duty as a result of an actual conflict of interest?

Does this Court's decision in *Gilley v. Monsanto Company, Incorporated* offend the Constitution by holding as a matter of law that a non-reversionary trust vitiates a conflict of interest so that the highly deferential standard of review applies in all pension cases permitting forfeiture of "property" held in trust as a matter of Defendants' discretion?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Prior Litigation

This is the second class action filed by counsel against Monsanto Company, Inc. "Old Monsanto" and several of its successor entities and pension plans. The District Court dismissed this action based on the disposition of the first class action for equitable relief, *Gilley et al. v. Monsanto Company, Incorporated*, 490 F.3d 848 (11th Cir. 2007). In the *Gilley* action Defendants recast the class action for equitable relief as a discretionary claim for individual benefits, and this Court found on interlocutory appeal that the employer-administrator was entitled to discretion in the ERISA benefit denial setting because "a non-reversionary, periodic trust 'eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies'". *Gilley v. Monsanto Company, Inc.,* 490 F.3d 848, 856-7 (11th Cir. 2007) ("Gilley I") *cert. denied*, 2008 U.S. LEXIS 1054,*; 128 S. Ct. 1086; 169 L. Ed. 2d 810; 76 U.S.L.W. 3372 (January 14, 2008). This Court on subsequent appeal affirmed the lower court's dismissal for lack of standing of all Gilley's remaining claims for equitable relief based on the law of the case doctrine established in Gilley I. *Gilley v. Monsanto Company, Inc. et al.*, 490 F.3d 848 (11th Cir. 2007), No. 08-13646, 309 Fed. Appx. 362; 2009 U.S. App.

LEXIS 2073 (February 3, 2009) *petition for certiorari filed and docketed* (June 9, 2009) No. 08-1511 ("Gilley II").

B. *Varity* Scheme

Critical to these proceedings is the reorganization of Old Monsanto between 1997 and 2003 into its three separate business lines: the chemical business, the agricultural business, and the pharmaceutical business. [R 64 ¶¶ 8 to 17]. In 1997, Old Monsanto spun off its chemical business renaming the spinoff entity Solutia, Inc. "Solutia". *Id.* Pursuant to the parties' Distribution and Separation Agreements, Old Monsanto assigned qualified pension liabilities including defense costs and judgments for pre-spinoff and post-spinoff retirees of Old Monsanto's chemical business to Solutia. [R 117-2; 117-2 at p. 11; 117-8; 117-9]. Among the liabilities assigned to Solutia was liability for pensions to "working class" participants such as Plaintiffs as well as other "working class" participants. *Id.* Because Old Monsanto did not report separated "working class" participants with an entitlement to a separated accrued benefit assets held in Old Monsanto's trust belonging to these participants, if forfeited, would inure to the benefit of the executives, officers, and other HCEs who acted as trustees of the plan. [R 51, 64].

Between 1999 and 2002, Old Monsanto, through spinoffs and mergers, became Pharmacia which encompassed the pharmaceutical business of Old Monsanto, and the new Monsanto, which retained the agricultural and life science

business.[1] [R 117 at p. 19; 117-2]. After the split, Solutia, Pharmacia, and New Monsanto each established "cash balance" pension plans from assets formerly held in trust by Old Monsanto under a Master Trust Agreement. [R 51, R 96, R 118]. The Solutia Inc. Employees' Pension Plan "Solutia plan" is a "cash balance" plan created from assets formerly held in Old Monsanto's Trust. [R 117-2].

Gilley, who worked at the North Alabama Sand Mountain plant, was one of the first former employees of Old Monsanto's chemical business to inquire about his pension benefit after the spinoff. [Gilley Document[2] "GDoc." 35]. As an employee with a vested benefit under the 1976 Monsanto Pension Plan Gilley was told he was entitled to an early retirement benefit at age 55 or a full retirement benefit at age 65. [GDoc. 35 ¶ 51]. Gilley was initially told there was no problem, but then he received a letter from Pharmacia's benefit center informing him he was not entitled to a pension benefit "at this time." [GDoc. 35 ¶ 58]. In 2004, the Committee informed Gilley that he was not entitled to his separated deferred vested accrued "pension" benefit based on the 1981 plan, an *ex post facto* amendment adopted after he became vested and after his layoff. [GDoc. 35 ¶ 42].

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[1]"Pfizer Inc and Pharmacia Corporation began operating as a unified company on April 16, 2003, forging one of the world's fastest-growing and most valuable companies." http://www.pfizer.com/about/history/pfizer_pharmacia.jsp

[2]References to the record in *Gilley et al. v. Monsanto Company, Inc.* et al. 04-cv-0562 are included in the expanded record excerpt under tab "G."

In March 2004, after being denied internal relief, Gilley filed a class action suit in his individual, representative, and derivative capacity against the Monsanto Salaried Employees' Pension Plan ("Old Monsanto's Pension Plan"); Pharmacia Corporation ("Pharmacia") f/k/a Old Monsanto's pharmaceutical business; the new Monsanto Company, Inc. ("new Monsanto") Old Monsanto's agricultural and life science business; the Employee Benefits Plan Committee (the "Committee"), a committee of executives with authority over benefit review; and the Monsanto Company Employee Benefits Executive Committee (the "Executive Committee"), a committee of executives with delegated authority to amend employee benefit plans, collectively (the "Monsanto Defendants"), pursuant to the Employment Retirement Insurance Security Act "ERISA", 29 U.S.C. § 1000 et seq. *Gilley et al. v. Monsanto Company, Inc*. et al., Northern District of Alabama 04-CV-0562.[3]

After the Gilley class action was filed, Monsanto Defendants filed a plan document that was misidentified as the 1976 plan document in support of a Rule 12(b)(6) motion. [GDoc. 19]. Gilley then amended his class complaint, specifically bringing claims for equitable or "make-whole" relief on behalf of Gilley individually and on behalf of a putative class and the plan pursuant to 29

[3]Solutia Inc. "Solutia" was not a party to the *Gilley* action because it was under bankruptcy protection at the time suit was filed, and the District Court in Gilley dismissed *sua sponte* without addressing a motion to join Solutia and its plan as a party.

U.S.C. §§ 1132(a)(2) and (3) for breach of fiduciary duty and violation of ERISA. [GDoc. 35]. Refusing class discovery and certification, the Monsanto Defendants recast the action as a mere discretionary claim for Gilley's benefit and demanded a limited hearing stipulating Gilley was vested if he had 1000 hours of credited service in 1972. [GDoc. 77 to 81; 101 at pp. 1 to 11]. The District Court, finding an actual conflict of interest, permitted Gilley to prove he had 1000 hours of service based on a non-discriminatory equivalency and social security records he produced showing his earnings for 1972.[4] [GDoc 116, 117]. Defendants then reneged on their stipulation regarding vesting and appealed the award of Gilley's accrued benefit resulting in the published decision of this Court in Gilley I wherein this Court held Judge Propst erred by "forcing on the Plan two equivalencies that the Plan had never adopted". *Gilley,* 490 F.3d at 857.

C. Dismissal Under Rule 12(b)(6)

Appellants here and Plaintiffs below worked for the chemical division of Old Monsanto at the same North Alabama plant from August 1972 to early 1981 when they were laid off. [R 35]. Solutia and the Solutia plan were added as Defendants after Solutia exited bankruptcy. [R 50]. Defendants filed motions to

[4]During the pendency of the first *Gilley* appeal Solutia personnel shredded all records from the Sand Mountain plant that had been stored at the plant in Decatur, Alabama since 1981. [R 97]. The district court in the instant action denied a motion to enjoin Monsanto Defendants and Solutia or those acting in concert with them from destroying evidence. [R 28-9, 36].

dismiss under Rule 12(b)(6) for failure to state a claim maintaining Plaintiffs, like Gilley, lacked standing and *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007) was *res judicata*. The District Court, failing to address Plaintiffs' motion for sanctions and motions to compel, dismissed all claims for "make-whole" or equitable relief brought on behalf of the plan, the putative class and Plaintiffs individually to redress Defendants' violation of ERISA and breach of fiduciary duty finding this Court's holding in Gilley I & II dispositive as to Plaintiffs' claims. [R 119].

D. The Plan

In 1941 Monsanto Company, Incorporated "Old Monsanto" established a defined benefit retirement pension plan for its salaried and hourly employees. Beginning in 1951, Old Monsanto amended the plan every five years *as to certain groups of* employees, either covering or excluding "working class" hourly employees as participants, setting out each amendment in a separate document as a restatement and continuation of the "Predecessor Plans": the 1951 plan, 1956 plan, 1961 plan, 1966 plan, 1971 plan, 1976 plan, 1981 plan, the 1986 plan etc.[5] [R 10 Exh. C at p.7; 64]. Plaintiffs, like Gilley and other production level employees, were participants in the 1976 Monsanto Company Salaried Employees' Pension

[5]A plan refers to a written instrument or a benefit plan. IRS Publication 575 at http://www.irs.gov. Old Monsanto held assets of various plans in a collective trust. [R 96-3].

Plan "the 1976 Monsanto Pension Plan" as salaried nonexempt employees subject to overtime provisions under the Fair Labor Standards Act of 1938 "FLSA".[6] 29 U.S.C. §§ 201 et seq. [R 64 ¶ 30]. Old Monsanto closed the North Alabama Sand Mountain plant in February 1981 approximately nine and a half years after production at the plant began. [R 64 ¶ 9]. The 1976 Monsanto Pension Plan was in effect when the plant closed. [R 64 ¶ 69].

The Employee Insurance Security Act "ERISA" was enacted in 1974 to ensure that "working class" employees receive promised benefits in accordance with the terms of their plans. 29 U.S.C. §§ 1000 et seq. ERISA codified the law of contracts, trusts, and property as it pertains to employer-sponsored employee benefit plans.[7] 29 U.S.C. §§ 1001 *et seq.* The 1976 Monsanto Pension Plan was the first ERISA plan offered by Old Monsanto to its employees. [R 64 ¶ 35]. ERISA § 1001(b) declares the purpose of the Act is "to establish standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). Under the 1976 plan, a participant was credited with service for both pre-ERISA years of service as well as years of service under

[6]The plant where Plaintiffs worked operated on a Rotating Shift Schedule that incorporated substantial amounts of both mandatory and voluntary overtime into the standard work year. [R 35].

[7]While courts complain about ERISA's complexity it is founded upon basic legal concepts such as contract, property, and trust that date back to this country's inception.

the 1976 plan according to ERISA's 1000 Hour Rule, including a year in the event of a layoff. [R 64 ¶¶ 36 to 44]; *see also* 29 U.S.C §§ 1053(a)(2)(A) & (C); 29 C.F.R. § 2530.200b-2. Plaintiffs and others situated similarly to them were all participants with ten years of service for calendar years from 1972 to 1980 plus a year for 1981 due to lay off. Plaintiffs were fully vested under the 1976 Monsanto Pension Plan when they were laid off in early 1981.[8] [R 64 ¶¶ 44 to 72]. In early 1982 Old Monsanto amended, restated, and continued the 1976 plan as the 1981 plan pursuant to 29 U.S.C. § 1082(c)(8) without notice to participants pursuant to 29 U.S.C. § 1054(h). [R 64 ¶ 96]. Old Monsanto made the effective date of the amendment retroactive to January 1, 1981. 29 U.S.C. § 1082(c)(8). [R 64 ¶ 83; GDoc 182-14 at JBH 0069].

II. PROCEEDINGS

The lead Plaintiff in this action, Robert H. Heptinstall "Heptinstall", contacted counsel during the *Gilley* litigation about the denial of his pension benefit. The Committee denied Heptinstall relief despite records that revealed he had ten years of service under the plan with an employment date of 8/30/1972 and a termination date of 11/01/1982 adjusted to reflect a full year of service for 1972

[8] *See infra* Argument Section I-B.

and social security records proving he had over 1000 hours of service for 1972.[9] [R 1; R 64 ¶¶ 82 to 88].

In answer to a local newspaper advertisement, two more individuals, Wendell E. Sims ("Sims") and James Larry Collins ("Collins"), who were also situated similarly to Heptinstall, contacted counsel about the denial of their pensions. [R 51, 64]. In August 2006, a class action suit was filed on behalf of Heptinstall, Sims, and Collins in their individual, representative and derivative capacity against the Monsanto Defendants seeking a declaration of rights under § 29 U.S.C. 1132(a)(1)(B) and equitable or "make-whole" relief individually and for a putative class and the plan for violation of ERISA and breach of fiduciary duty under 29 U.S.C. § 1132(a)(2) & (3). *Heptinstall et al. v. Monsanto Company, Inc. et al.*, 06-cv-01564, Northern District of Alabama Middle Division.[10] Plaintiffs, Sims and Collins, like Heptinstall, were former Old Monsanto chemical division employees who participated in and fulfilled the service requirements under the 1976 Monsanto Pension Plan. [R 51, 64]. Defendants filed a motion to dismiss,

[9]Records maintained by Old Monsanto reflected that Gilley also had been credited with ten years of service with an employment date of 8/31/1972 and a termination date of 9/27/1982 adjusted to reflect a full year of service for 1972. [Gilley Doc 101 Hearing 2005 Exhibit "HExh" 17]. The 1981 amendment excluded credit for overtime.

[10]Plaintiffs' served the complaint on the Secretary of Labor and Treasury as required by 29 U.S.C. § 1132(h), but the return of service was never docketed. Plaintiffs' served the Second Amended Complaint and the Amended Second Amended Complaint on the Secretaries and return of service was docketed after Plaintiffs complained. [R 55, 70, 87].

which the court dismissed without prejudice. [R 9, 10, 11].[11] Plaintiffs filed a motion for class certification. [R 15, 16, 20, 21, 24]. Monsanto Defendants renewed their motion to dismiss. [R 9, 10, 13, 14, 18, 22, 23]. Defendants refused class certification. [R 21]. Plaintiffs filed opposition to the motion to dismiss and a motion to compel discovery when Monsanto Defendants failed to timely respond or object to their discovery requests served on October 20, 2006. [R 22, 25, 26, 31, 32].

Because Solutia was not a party, and because Plaintiffs were unaware of the assignment of pension liability to Solutia, Plaintiffs served a Rule 45 subpoena to inspect the Solutia plant in Decatur, Alabama with service on Monsanto Defendants.[12] Plaintiffs, upon serving the subpoena, learned personnel were in the process of destroying all the documents from the Sand Mountain plant and moved "for an order to restrain and/or enjoin Defendants and Solutia Incorporated, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who are in the process of shredding documents stored in Solutia's facility in Decatur, Alabama, and/or other locations that were from the former Monsanto Sand Mountain plant". [R 28, 33]. Judge

[11]Monsanto Defendants' filed the same exhibits to all three Motions to Dismiss. [R 9, 10, 13, 14, 18, 82, 83]. Plaintiffs reproduced the exhibits only once as exhibits to the first motion to dismiss. [R 9, 10].

[12]During discovery in the *Gilley* matter counsels for the parties learned that documents from the Sand Mountain plant had been stored at a plant in Decatur, Alabama that was now a Solutia plant.

Proctor issued a recusal order. [R 30]. Plaintiffs amended the complaint adding four additional former employees who were similarly situated to Heptinstall, Sims, and Collins, who had also been denied their separated deferred vested accrued benefit, Jacky F. Blackwell ("Blackwell"), Thomas F. Campbell ("Campbell"), James Russell Newman ("Newman"), and Fred D. Works ("Works"). [R 34, 35].

After the case was reassigned the District Court denied Plaintiffs' motion to enjoin or restrain Solutia and/or those working in active concert with them from destroying evidence. [R 36]. The District Court then dismissed without prejudice Monsanto Defendants' second motion to dismiss, Plaintiffs' motion for class certification, and motion to compel suggesting the parties consider filing a motion to stay while this Court dealt with the *Gilley* appeal. [R 37, 39, 40, 41, 42].

In February 2008, Solutia exited bankruptcy with financial assistance from Pharmacia and New Monsanto in exchange for a reacquired ownership interest. [R 117 at p. 10]. After the stay was lifted, Plaintiffs filed a motion to join Solutia and its pension plan. [R 45, 48]. Defendants took no position. [R 49]. The District Court directed Plaintiffs to file a Second Amended Complaint setting out claims against those Defendants. [R 45, 48, 49, 50]. Pursuant to the District Court's Order, Plaintiffs filed a Second Amended Complaint adding another Plaintiff, Billy J. Wright, with service on the Department of Labor and the Secretary of the Treasury. [R 51]. Monsanto Defendants moved to strike Plaintiffs' (First) Second

Amended Complaint and to compel discovery from Plaintiffs adding an additional Plaintiff. [R 54]. Plaintiffs filed a motion for a protective order objecting to Monsanto Defendants' discovery requests because the requests were unduly burdensome and filed for an improper purpose in that they were served at a time to interfere, intimidate, and burden Plaintiffs' counsel and briefing in the *Gilley* action and because the requests sought information already available to Defendants and were written in a manner incomprehensible to Plaintiffs as "working class" participants of an ERISA plan. [R 59, 60, 109].

The District Court granted their motion to strike. [R 63 striking R 51]. In response to the court's order, Plaintiffs filed an amended Second Amended Complaint again with service on the Department of Labor and the Secretary of the Treasury. [R 64, 65, 70]. Plaintiffs, after serving Defendants with renewed discovery requests, filed a second motion to compel when Defendants failed again to fully respond. [R 69, 76, 88]. The District Court then granted Defendants' motion to compel discovery and awarded personal sanctions against Plaintiffs' counsel for failure to timely object to Defendants' discovery requests.[13] [R 71, 84, 85, 91, 98]. Defendants again filed motions to dismiss contending this Court's decision in Gilley I was *res judicata* and another motion for an extension of time to respond. *Gilley,* 490 F.3d 848. [R 82, 83, 89, 93, 94, 104].

[13]In stark contrast the District Court dismissed Plaintiffs' motion to compel without prejudice when Defendants failed to timely respond. [R 25, 26; 37].

Plaintiffs filed a joint response to Defendants' motions to dismiss and a motion for sanctions for the destruction of evidence. [R 96, 97]. Defendants admitted that records stored at the Solutia plant were shredded, but contended it was part of a "document retention" project initiated in Pensacola, Florida. [R 107, 108]. In response to Plaintiffs' motion for sanctions, Defendants filed a motion for the sanction of dismissal arguing Plaintiffs' counsel failed to answer interrogatories. [R 99]. Plaintiffs' counsel responded that it was improper to answer on behalf of her clients, the issues were well known to Defendants and duplicative of discovery produced in the *Gilley* action, and Plaintiffs had answered the questions relevant to each of them individually that they could understand. [R 109]. When Defendants failed to respond to Plaintiffs' additional discovery requests, Plaintiffs filed a third motion to compel and a motion to continue and for discovery along with a Rule 56(f) motion and a supporting affidavit.[14] [R 101, 105, 106, 112, 113].

A supplemental motion to continue and a revised supplemental motion to continue were filed in response to Defendants' objections. [R 114, 115]. Solutia filed a response to Plaintiffs' motion to continue wherein it denied any responsibility or connection to Plaintiffs' claims for violation of ERISA and breach

[14]Plaintiffs also filed an affidavit from another former employee of Old Monsanto showing benefit inquiries from former Sand Mountain employees were being ignored instead of being answered as required by ERISA.

of fiduciary duty in regards to Old Monsanto's defined benefit plan and relying on this Court's decision in *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007), as grounds for dismissal. [R 116]. Plaintiffs replied and filed a supplemental response outlining Old Monsanto's *Varity* type scheme to cause forfeiture of vested accrued benefits belonging to "working class" participants to be paid out as nonqualified benefits for HCEs. [R 117-2; 117-8; 117-9; 117-13; 117-16; R 118; R 118-9 to R 118-20].

On June 12, 2008, the District Court in the *Gilley* matter, which is the same lower court as here, after cross motions for summary judgment were fully briefed, dismissed all claims for equitable or "make-whole" relief for breach of fiduciary duty and violation of ERISA based on a lack of subject matter jurisdiction finding this Court's decision in *Gilley v. Monsanto Company, Inc.* stripped Gilley of standing. [GDoc. 194]. Finding there was no new evidence and the additional claims for equitable relief or "make-whole" relief on behalf of the putative class and plan were without merit, this Court affirmed in an unpublished decision holding "plaintiff cannot circumvent the law of the case established in *Gilley v. Monsanto Co., Inc.*, 2009 U.S. App. LEXIS 2073,*; 309 Fed. Appx. 362" and petitions for *en banc* review were denied. The District Court then dismissed the Heptinstall Plaintiffs' class action complaint seeking "make-whole" or equitable relief for Plaintiffs individually and on behalf of the putative class and plan for

breach of fiduciary duty and violation of ERISA finding Plaintiffs, like Gilley, lacked standing because they did not vest under the 1981 plan.[15] [R 119]. Plaintiffs filed a Rule 58 motion, which the court denied. [R 120, 121].

STANDARDS OF REVIEW

This case involves two standards of review. The first is the standard by which this Court is to review the District Court's grant of Defendants' Rule 12(b)(6) motions to dismiss based on this Court's decision in *Gilley v. Monsanto Company, Inc*, 490 F.3d 848 (11th Cir. 2007). That standard is *de novo*; accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Shands Teaching Hospital & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1310 (11th Cir. 2000). When ruling on a Rule 12(b)(6) motion to dismiss, the court considers whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The second standard is the one by which this Court and the court below review claims for equitable relief for violation of ERISA and breach of fiduciary duty to redress an abuse of discretion. This standard is also the *de novo* standard of review. *See e. g. La Rocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Coan v. Kaufman*, 457 F.3d 250 (2nd Cir. 2006) citing *Burke v. Kodak Retirement Income*

[15]Plaintiffs, like Gilley, were vested under the 1976 plan before the 1981 plan was adopted.

Plan, 336 F.3d 103, 111 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004); *Wilkins v. Mason Tenders District Council Pension Fund,* 445 F.3d 572, 581 (2nd Cir. 2006) citing *Long v. Flying Tiger Line, Inc. Fixed Pension Plan for Pilots,* 994 F.2d 692, 694 (9th Cir.1993); *Rhorer v. Raytheon Eng'rs & Contractors Inc.*, 181 F.3d 634, 639 (5th Cir. 1999)(applying *de novo* standard to question of law for breach of fiduciary duty under Section 502(a)(2); *Silvernail v. Ameritech Pension Plan*, 439 F.3d 355 (7th Cir. 2006) citing *Small v. Chao*, 398 F.3d 894, 897 (7th Cir. 2005); *Calhoon v. Trans World Airlines, Inc.* 400 F.3d 593 (8th Cir. 2005) citing *Parke v. First Reliance Standard Life Insur. Co.*, 368 F.3d 999, 1006 (8th Cir.2004); *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004) citing *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (9th Cir. 2003).

SUMMARY OF ARGUMENT

Plaintiffs filed a class action for "equitable or make-whole" relief in their individual, representative, and derivative capacity under 29 U.S.C. § 1132(a)(2) and (3) for breach of fiduciary duty and violation of ERISA seeking relief for themselves individually, the plan, and a putative class that only a court of equity can give. In the *Gilley* action, the case relied upon by the District Court to strip Plaintiffs' of standing, Defendants recast the entire class action litigation as a discretionary claim for benefits demanding a limited hearing stipulating to the

vesting issue and then reneged and appealed. [GDoc. 77 to 81, 101]. The District Court below considered all Plaintiffs' claims for equitable or make-whole relief for themselves, the plan and a putative class, as individual claims and dismissed the above styled class action finding Plaintiffs lacked standing to seek equitable relief because they were not participants based on this Court's clear, "*stare decisis* guidance for the disposition of plaintiffs' claims in this action" as setout in Gilley I and II. [R 119].

This Court in the *Gilley* litigation failed to see how Defendants could profit from a single denial of a pension benefit published a decision in *Gilley et al. v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007) holding as a matter of law that a non-reversionary trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies," denying equitable relief and affirming the dismissal of all remaining claims on remand. *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007), No. 08-13646, 309 Fed. Appx. 362; 2009 U.S. App. LEXIS 2073 (February 3, 2009) *petition for certiorari filed and docketed* (June 9, 2009) No. 08-1511. Defendants have abused their *Bruch* discretion. *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989). A class complaint for "equitable relief" seeking redress for the "taking" of property held in trust and to redress Defendants' violation of ERISA and breach of fiduciary duty should not have been recast as a mere discretionary claim.

This suit involves constitutional issues regarding the "taking" of property belonging to "working class" participants who were never before the court by a conflicted decisionmaker who was erroneously afforded deference. Plaintiffs and other "working class" participants of the defined benefit plan have "vested rights" in the property held in Old Monsanto's trust. The *Gilley* litigation involved a cursory review by this Court on interlocutory appeal of a single benefit decision taking a conflicted employer-administrator's factual and legal presentments as true. Applying *Gilley's* holding to Plaintiffs' and other "working class" participants denies them due process of law by "taking" their property and denying them the right to petition the Government for a redress of grievances under the Fifth and First Amendments to the Constitution. *See Fabiano v. Hopkins,* 352 F.3d 447, 453 (1st Cir. 2003) ("As an initial matter, every citizen has the right 'to petition the Government for a redress of grievances.' U.S. CONST. amend. I. The right of access to the courts is an established aspect of this right." (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)). "The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." *See United States* v. *$ 8,850*, 461 U.S. 555, 562, n.12, 103 S. Ct. 2005, 76 L. Ed. 2d 143 (1983); *Fuentes v. Shevin*, 407 U.S. 67, 82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342,

23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969) (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

ARGUMENT

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION BY REFUSING EQUITABLE JURISDICTION OVER PLAINTIFFS' INDIVIDUAL, REPRESENTATIVE, AND DERIVATIVE CLAIMS DENYING REDRESS FOR GRIEVANCES RESULTING FROM DEFENDANTS' VIOLATION OF ERISA AND BREACH OF FIDUCIARY DUTY AS A RESULT OF AN ACTUAL CONFLICT OF INTEREST?

A. Plaintiffs' Appeal The Dismissal Of Counts I Through VI.

Plaintiffs, individually and in their representative capacity, brought claims under Counts I and II for a declaration of rights under 29 U.S.C. § 1132(a)(1)(B) and for "equitable or make-whole" relief under 29 U.S.C. § 1132(a)(3) for violation of ERISA. Plaintiffs alleged Defendants were intentionally causing a forfeiture of "vested benefits" by revisiting eligibility under an *ex post facto* amendment adopted after rights vested under the prior plan amendment interfering with participants' protected rights. A forfeiture of "vested rights" is contrary to the common law of contracts and property and is prohibited by ERISA. A right is non-forfeitable under §1053(a) if "it is an unconditional right."

Under Count III, Plaintiffs on behalf of the plan pursuant to 29 U.S.C. §§ 1132(a)(2), and individually and on behalf of a putative class under 29 U.S.C. § 1132(a)(3), brought claims for liability for breach of fiduciary duty under 29

U.S.C. § 1109 for breaching the duties identified in 29 U.S.C. § 1104 by operating the plan in a discriminatory manner in favor of executives, officers, and HCEs who act as trustees of the plan by intentionally causing forfeiture of "working class" participants' "vested benefits" to increase nonqualified benefits paid to top executives of Old Monsanto. When a plan is operated in favor of one cestui que trust over another the trustee breaches its fiduciary duty. Qualified plans under Internal Revenue Service "IRS" regulations must be operated for the benefit of nonHCEs and HCEs alike. 29 U.S.C. § 1104(a)(1). Finally, Plaintiffs individually and on behalf of a putative class in Count IV and V, brought claims for violation of 29 U.S.C. § 1054(g) for the forfeiture of "vested rights" and equitable estoppel.

B. Vested Rights

1. <u>Common Law</u>

Not all benefits, not all claims, not all funds held in trust, and not all trusts are created equal. A "right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent" is a vested right. BLACK'S LAW DICTIONARY 1349 (8th ed. 2004). ERISA did not make new law – it codified the common law of contract, property, and trust as it pertains to employee benefit plans. 29 U.S.C. §§ 1000 *et seq.* This litigation at its core deals with the competing interests of trustees of the plan, HCEs, and the property rights of former "working class" employees, nonHCEs, who have fulfilled the service

requirements under the plan entitling them to the future enjoyment of retirement benefits. The central issue in this litigation is the actual conflict of interest between the trustees' self-interest and the interest of non-HCE participants. Once Plaintiffs and other former employees fulfilled the service requirements under the plan they had a "vested right" to property held in Old Monsanto's trust that could not be forfeited regardless of Monsanto's discretion.

"To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary." *Trustees of Darmouth College v. Woodward*, 17 U.S. 518, 572 (1819). "Attainder and confiscation are acts of sovereign power, not acts of legislation." *Id*. In the Supreme Court's decision in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989)("Bruch"), the Court recognized employers have the right to establish a narrow standard of review as part of their employee benefit contracts, but a narrow standard of review under 29 U.S.C. § 1132(a)(1)(B) does supplant the court's equitable jurisdiction or role as adjudicators. *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989); *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996). Self-reserved discretion is limited to interpretation of plan ambiguities, but **only if** the plan is a qualified plan at inception and in operation. *Blackshear v. Reliance Standard Life Ins.* Co., 509 F.3d 634 (4th Cir. 2007). Reviewing courts affording *carte blanche*

discretion to conflicted decisionmakers abdicate their judicial role and infringe on the constitutional rights of parties both before and not before the court when they fail to consider conflicts of interest and deny equitable relief.

Because defense counsel stipulated Gilley was vested if he had 1000 hours of service in 1972, the District Court awarded him his accrued benefit based on a permissible equivalency that credited service for overtime as "make-whole" relief under the court's broad equitable powers. [GDoc. 116, 117; 134]. This Court's decision in *Gilley et al. v. Monsanto Company, Inc*. finding Judge Propst's ruling clearly erroneous and holding a conflicted decisionmaker was entitled to deference permitted forfeiture of "property" as a matter of discretion rendering ERISA unconstitutional as applied. Rights vest "when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." *Pearsall v. Great Northern Railway Co.*, 161 U.S. 646, 695 (1895).

Once Plaintiffs fulfilled the service requirements under the 1976 contract, they had a "vested right" to future or prospective enjoyment that could not be forfeited by a later amendment. Plaintiffs' "vested right" gave them a beneficial "property" interest in the funds held in Old Monsanto's trust. "In a trust there is a separation of interests in the subject matter of the trust, the beneficiar(ies) having an equitable interest and the trustee having an interest which is normally a legal

interest." RESTATEMENT (SECOND) OF TRUSTS, § 2, at 9 (1959); *id.* § 74, at 192 (beneficiary has equitable interest in the trust). The property held in Old Monsanto's trust is the property of the cestui que trust, the HCEs and the nonHCEs, not the property of Old Monsanto or its successor entities. There is a good faith requirement that forbids action on the part of a fiduciary without the knowledge and consent of his cestui que trust especially when the fiduciary has an interest or when the fiduciary's interest is in conflict with that of the person for whom he acts.[16]

2. ERISA

ERISA does not mandate that employers establish employee pension plans. However, if an employer does establish a pension plan that it alleges qualifies under ERISA and Internal Revenue Service "IRS" regulations, the employer receives significant benefits including, but not limited to, enhanced worker retention, beneficial tax treatment of assets held in trust, and super-preemption of state laws that would permit the recovery of damages for intentional or even negligent misconduct in the administration of the plan. In exchange, employers are to adhere to ERISA's mandates and assent to the federal court's equitable jurisdiction. *See* 29 U.S.C. § 1104(D). Pension plans must be maintained and

[16]In the Gilley action Defendants redefined the nature of the claims and limited the issues to be reviewed to the administrative record and plan documents.

administered solely and exclusively for the benefit of a wide range of employees, highly compensated employees "HCEs" and working class employees "nonHCEs". 29 U.S.C. § 1104(a)(1). Top-hat plans, unfunded plans for officers, shareholders, and executives of the company, are not to be considered qualified plans under ERISA. *See* 26 U.S.C. § 401(a)(4); 26 C.F.R. §§ 1.401(a)(4)-1. ERISA mandates that all qualified pension plans covered under ERISA must, by statute, hold funds in a non-reversionary trust. *See* 26 U.S.C. §§ 401(a)(2) & (4); 26 C.F.R. §§ 1.401-2. Under ERISA, participants in defined benefit pension plans have a vested beneficial interest in the funds held in trusts once all the service requirements under the plan have been fulfilled. 29 U.S.C. § 1001(1); 29 U.S.C. §§ 1051-54.

Transactions between an ERISA trustee and his cestui que trust are subject to the same scrutiny, intendments and imputations as between an ordinary trustee and his cestui que trust. The employer-administrator breaches his fiduciary duty to participants and violates ERISA when the administrator's actions cause forfeiture of "working class" participants' property in the self-interest of the corporate citizen and its HCEs who act as trustees of the plan. 29 U.S.C. §§ 1051-2; 29 U.S.C. §§ 1053(a)(2)(A) & (C); 29 U.S.C. §§ 1053(b)(1) & (b)(2); 29 U.S.C. §§ 1053(c)(1)(A) & (c)(1)(B); 29 U.S.C. § 1054(g)(1); 29 U.S.C. § 1140. A forfeiture of "property" without the right to redress and petition the government offends the

Fifth Amendment's due process and "taking" clauses and the First Amendment's redress clause. U.S. CONSTI. amend. V & I.

a. ERISA's Vesting Provisions

Section 29 U.S.C. § 1053(c)(1)(A) states:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment. 29 U.S.C. § 1053(c)(1)(A).

Under Section 29 U.S.C. § 1053(c)(1)(A) Plaintiffs' percentage of their nonforfeitable accrued benefit computed *without regard for the 1981 Plan amendment* is 100 percent, a year of service for each year under ERISA's 1000 rule from August 1972 to December 31, 1980 with a year of service for 1981 as a result of being laid off under the 1976 plan. A nonforfeitable right is a "vested right" under ERISA's statutory provisions and under the common law as a matter of contract because Plaintiffs fulfilled all the service requirements under plan entitling them to future enjoyment. In other words, the terms of the 1981 plan adopted after Plaintiffs fulfilled the service requirements of the 1976 plan caused a forfeiture of an otherwise nonforfeitable accrued benefit.

Section 29 U.S.C. § 1053(c)(1)(B) states:

> A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, *to have his nonforfeitable percentage computed under the plan without regard to such amendment*.[17]

29 U.S.C. § 1053(c)(1)(B)(emphasis added).

Thus, ERISA, codifying the common law of vested rights under contracts, provides for statutory protection of accrued benefits protecting participants' "vested right" by prohibiting amendments that change the vesting schedule under the plan without giving participants with significant service the right to elect to have their nonforfeitable percentage computed under the plan without regard to the amendment. ERISA allows amendments after the close of a plan year, but they shall not reduce the accrued benefit i.e. "vested right" of ANY participant. 29 U.S.C. § 1082(c)(8). Section 29 U.S.C. § 1053(a)(3)(C) states:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(c)(8).

29 U.S.C. § 1053(a)(3)(C) citing § 1081(c)(8).

ERISA permits later adopted amendments, such as the 1981 amendment adopted in 1982, but it does not permit such amendments to impair "vested rights".

[17]The length of service requiring notice was lowered when ERISA's vesting provisions were amended in the 1980's.

Once a participant fulfills the service requirements under the plan he has a vested "accrued benefit". [GDoc. 182-14 at JBH 0069]. Under no circumstance can an *ex post facto* amendment be applied to cause forfeiture of a "vested right" to a pension.

C. Equitable Jurisdiction

1. Federal Rules

Federal Rules of Civil Procedure "Fed. R. Civ. P." 18 permits joinder of claims for equitable and legal relief in civil suits. Fed. R. Civ. P. 18 comment 2; *see also Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962)(discussing concurrent jurisdiction of federal court's); *see also* Federal Rules of Civil Procedure 8 requiring only a short and plain statement of the grounds for the court's jurisdiction. Fed. R. Civ. P. 8. Plaintiffs', individual, representative, and derivative, claims under 29 U.S.C. §§ 1132(a)(2) & (3) are proper claims for "make-whole" relief under the Court's equitable jurisdiction. Plaintiffs, the putative class, and the plan cannot be denied the right to redress and due process based on *Gilley v. Monsanto Company, Inc*., 490 F.3d 848 (11th Cir. 2007).

2. Abuse of Discretion

The District Court abused its discretion by declining to take equitable jurisdiction over the action thus closing the courthouse door to Plaintiffs who were denied their rightful property and offending the Constitution's right to redress the

"taking" of their property through forfeiture under the First and Fifth Amendments. Congress expressed a clear intent to provide participants with a right to "equitable relief" when a fiduciary breaches the duty owed to all participants, when the plan or ERISA has been violated, and to obtain equitable relief to redress such violation or to enforce ERISA or the plan. 29 U.S.C. §§ 1132(a)(2) & (3). Congress' paramount goal in enacting ERISA was declared to be the protection of promised benefits to "working class" participants. Each of Plaintiffs' claims under Count I through VI of the Second Amended Complaint are for "make-whole" or "equitable" relief or for a declaration of rights. 29 U.S.C. §§ 1132(a)(2) & (3).

3. **Statutory Equitable Relief**

Plaintiffs' common law "vested right" to property held in trust are protected under ERISA statutory provisions. Section 29 U.S.C. § 1132(a) provides in pertinent part: (a) A civil action may be brought— (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section [29 U.S.C. § 1109]. Section 29 U.S.C. § 1132(a)(3) provides in pertinent part:

> A civil action may be brought by a participant . . . (A) to enjoin any act or practice which violates any provision of this title . . . or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title.

29 U.S.C. §§ 1132(a)(3).

Section 29 U.S.C. § 1054(g)(1) states "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g)(1).

Employer-administrators by establishing employee-benefit plans as ERISA qualified plans voluntarily assent to the court's equitable jurisdiction and its broad equitable powers and plenary review to redress violations of ERISA, enforce ERISA, and enjoin any act or practice which violates ERISA. *Scott v. Neely*, 140 U.S. 106, 109-113 (1891). Self-reserved discretion in the ERISA context is limited to plan interpretation when the plan is in complete compliance with ERISA's mandates. *Blackshear,* 509 F.3d at 644. ERISA defendants assent to the court's equitable jurisdiction by voluntarily establishing benefit plans covered by ERISA, and they cannot raise a defense based on an objection to the court's jurisdiction in equity. *Perego v. Dodge*, 163 U.S. 160 (1896)("Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defence at large, is precluded from raising such an objection on appeal for the first time"). Moreover, a higher court sitting in review cannot redefine a proceeding in equity as an action deemed as one initiated at law. *Twist et al. v. Prairie Oil & Gas Company,* 274 U.S. 684 (1927)("It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give, shall be deemed an action at law"). Defendants never raised the issue of lack jurisdiction in any of their motions to dismiss admitting the defined benefit plan in question was an ERISA covered plan. [R 9, 13, 18, 82, 83, 93, 94, 104]. The District Court had jurisdiction over the action and Plaintiffs' were

entitled to equitable or "make-whole" relief in their individual, representative and derivative capacity because they had a "vested right" to property held in Old Monsanto's trust and internal review was exhausted. *Lanfear v. Home Depot, Inc.*, 536 F.3d. 1217 (11th Cir. 2008). Even more importantly, Defendants are not entitled to any discretion in this litigation because they abused their discretion *ab initio* by destroying evidence necessary to Plaintiffs' claims.

4. <u>The District Court Erred</u>

Because defense counsel Bryan Cave represented the interests of all Defendants, the District Court erred by denying Plaintiffs' motion to enjoin or restrain Defendants from shredding documents stored at a Solutia plant.[18] [R 28, 33, 36]. The District Court also erred by failing to consider Plaintiffs' motions to compel, by denying Plaintiffs' motion for a protective order when Defendants' discovery requests were issued for an improper and abusive purpose, by granting Defendants' motion to compel, and awarding sanctions against Plaintiffs' counsel for untimely discovery responses when Defendants were in possession of the information, by failing to recognize Monsanto Defendants' failed to timely respond to discovery requests without eliciting sanctions, by granting Defendants' motion

[18]Monsanto Defendants stated "Solutia is not a party to this action. Solutia and the Defendants (Monsanto, its pension Plan, several supposed Monsanto committees, and Pharmacia) are distinct and separate entities (See Monsanto Company, 10-K Form for 2006, the relevant portion of which is attached hereto as Exhibit 1). As a result, the documents and actions described in the Motion are not in Defendants' possession, custody or control." [R 33].

to strike the second amended complaint, and by failing to address Plaintiffs' motion for sanctions for the destruction of evidence. [R 25, 26, 37, 51, 59, 60, 63, 69, 71, 76, 85, 88, 91, 97, 101, 106, 107].

II. DOES THIS COURT'S DECISION IN *GILLEY V. MONSANTO COMPANY, INCORPORATED* OFFEND THE CONSTITUTION BY HOLDING AS A MATTER OF LAW THAT A NON-REVERSIONARY TRUST VITIATES A CONFLICT OF INTEREST SO THAT THE HIGHLY DEFERENTIAL STANDARD OF REVIEW APPLIES IN ALL PENSION CASES BY PERMITTING FORFEITURE OF "PROPERTY" HELD IN TRUST AS A MATTER OF DEFENDANTS' DISCRETION?

A. Constitutional Rights

ERISA was enacted without a standard of review for its remedial provisions, but if Congress intended, as this Court found, for the arbitrary or capricious standard to be applied wholesale into ERISA then this renders ERISA unconstitutional as applied because it permits a biased conflicted decisionmaker to make a decision to cause forfeiture of "working class" participants' property in its own self-interest. The Constitution guarantees a right to due process by a fair and impartial decisionmaker and the right to redress the "taking" of property. The Supreme Court of the United States recognized shortly after this country's inception that a revolution and the Vermont legislature could not cause forfeiture of property held in trust. *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven et al.*, 21 U.S. 464 (1823). Notwithstanding that ruling, if this Court's decision in *Gilley* applies to Plaintiffs' claims here it bestows

discretion on employer-administrators so broad that it surpasses constitutional limits allowing forfeiture of property at will as a matter of a conflicted trustees' discretion. This level of discretion is superior to the discretion enjoyed by administrative agencies of the government. *See e.g*. *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988)(courts do not afford deference to administrative agency when constitutional issues exist). The Constitution will not permit the forfeiture of property held in trust belonging to "working class" participants for the benefit of conflicted trustees, officers, executives and other HCEs without offending the Due Process Clause of the Fifth Amendment and the First Amendments Right to Redress Clause. U.S. CONSTI. amend. V & I.

B. Due Process Clause

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication [by a fair and impartial adjudicator] be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullan,* 339 U.S. at 313. In determining what is due process of law it is not just form or procedure but substance. *Gilley v. Monsanto Company, Inc.* is not *res judicata* here because there has been process without substance and because there has been no adjudication. Defendants, operating under a proven conflict of interest, decided the issue of forfeiture in *Gilley* to foreclose other

parties' rights. The proper course of action if Defendants wanted to litigate a class claim was to allow discovery on the class issue and to not oppose class certification. Defendants abused their discretion by withholding knowledge of the parties' true representation and by stipulating as to the issue of vesting in the *Gilley* action and then rescinding that stipulation and appealing to establish precedent for forfeiture. The law has long recognized that due process demands that a party have notice and the opportunity to be heard by an unbiased adjudicator. In *Hovey v. Elliott*, 167 U.S. 414 (1897) the Supreme Court explained:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

Hovey v. Elliott, 167 U.S. 414, 446 (1897).

The Supreme Court recently emphasized due process entails the right to be heard by an unbiased and fair adjudicator. *Caperton et al. v. Massey Coal Co., Inc.*, 556 U.S. ___, 2009 U.S. LEXIS 4157 at * 6 (2009). *Caperton* reiterated a long recognized fact—"it is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process". *Id.* at *6 *citing In re Murchison*, 349 U. S. 133, 136 (1955). When a decisonmaker has "a direct, personnel, substantial, pecuniary interest" in a case there exists bias that creates constitutional concerns for due

process. *Id. citing Tumey v. Ohio,* 273 U.S. 510 (1927). As *Caperton* explained, this follows from the common law rule that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Caperton*, 556 U.S. at * 6 citing The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); *see* Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 611–612 (1947) (same).

ERISA actions are unique falling outside the normal civil litigation paradigm. Under ERISA's remedial provisions Plaintiffs are only entitled to "make-whole" or equitable relief to redress violations of the law and/or breach of duty that in this case resulted in the "taking" of property. Courts by declining equitable jurisdiction over claims for the recovery of property and to redress violation of the law and breach of fiduciary duty deny basic due process protections guaranteed by ERISA and the Constitution. By deferring to self-interested conflicted employer-administrators, insurance companies, or other ERISA entities courts also violate the directives of the Federal Rules of Civil Procedure. Defendants by selectively and successfully "defending" forfeiture of a single claim under a deferential standard of review sought to establish precedent to deny Plaintiffs and others their right to a pension. This constitutes an abuse the discretion afforded under *Bruch*.

Defined benefit plans may easily become ponzi schemes with tax-free status for providing nonqualified benefits to executives, officers, and HCEs of the company defeating ERISA's goal of protecting against forfeiture if ERISA's equitable remedial provisions are not respected. This Court unaware of Defendants' plan cannot rely on *Gilley* as precedent to deny claims of all "working class" participants permitting a complete end-run around ERISA

Judge Propst recognized that judges inquire into reasons that seem to be leading to a particular result including "[p]recedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work." *Id.* at *12. Judge Propst also recognized that Monsanto's plan administrator did not make these types of inquiries, but instead looked to a means of accomplishing an end in the interest of his master, forfeiture of property held in trust for the benefit of HCEs and the company. [GDoc. 116, 117; R 119]. *Gilley v. Monsanto Company, Inc.* is not *res judicata* here because it is founded upon a biased plan administrator's decision, which was wrongly afforded deference. *Gilley*, 490 F.3d at 857.

The question presented here is whether the District Court in the instant action abused its discretion by denying equitable relief to Plaintiffs in their individual, representative, and derivative capacity to redress Defendants' breach of

fiduciary duty and violation of ERISA by operating a defined benefit pension plan as a ponzi scheme for HCEs by relying on *Gilley v. Monsanto Company, Inc.* Due process demands the adjudication of forfeiture of property of persons never before the court by an unbiased decisionmaker, not a conflicted trustee who has acted in its own self-interest. *Metropolitan Life Insur. Co. v. Glenn,* 554 U.S. ___, 128 S.Ct. 2343 (June 19, 2008). The arbitrary or capricious standard of review can easily offend concepts of due process of law and the right to redress by affording deference to a private citizen acting as a trustee if the proper inquiries are not made.

1. <u>Res judicata</u>

Courts have recognized the propriety of class certification in ERISA actions due to the representative nature of participants' claims and the equitable character of ERISA's remedial sections. *Coan v. Kaufman,* 457 F.3d 250, 257-8 (2nd Cir. 2006). In *Gilley,* the Monsanto Defendants resisted class certification citing due process concerns based on inadequacy of representation and arguing there was a lack of commonality, typicality, and numerosity. After convincing the District Court to deny class certification, over Plaintiffs' strenuous objection, Defendants demanded a limited hearing stipulating to the vesting issue arguing Gilley's individual claim for equitable relief was nothing more than a discretionary claim

under 29 U.S.C. § 1132(a)(1)(B) warranting a deferential standard of review. [GDoc. 101 at pp. 1 to 11]; *Gilley*, 490 F.3d 857. The record states:

> THE COURT: Well, my understanding is, at least part of what we're here to establish is how much time that he either worked or was on vacation, or however you say it added up. Do you agree that if he somehow or another got 1,000 hours in 1972, calculated however it's due to be calculated, that he would be eligible?
>
> MR. RUSSELL: That's correct, Your Honor.
>
> THE COURT: You agree to that?
>
> MR. RUSSELL: Yes, we do, Your Honor.

[GDoc. 101 at p. 11].

After stipulating as to the issue of vesting Defendants rescinded the stipulation and appealed. *Gilley*, 490 F.3d at 855. Black's Law Dictionary defines a stipulation "as a voluntary agreement between opposing counsel concerning the disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues." BLACK'S LAW DICTIONARY 984 (6th ed. 1991). On appeal Defendants were able to convincingly recast Gilley's individual claim for equitable relief as a discretionary claim for benefits because this Court could not envision how Defendants could profit from the denial of a single pension benefit when ERISA requires funds to be held in a non-reversionary trust. *Gilley,* 490 F.3d at 857. This Court, however, never considered the infallible and inherently human characteristic of greed as an incentive.

By recasting the *Gilley* action as nothing more than a discretionary claim for benefits, Defendants secured a favorable ruling under a deferential review standard, thus establishing precedent for forfeiture of all "working class" property formerly held in Old Monsanto's trust. [R 119]. Once this Court issued a published decision as precedent Defendants did an about face and now insist the *Gilley* action is dispositive. [R 83, 94].

Gilley v. Monsanto Company, Inc. is inapposite and is not *res judicata* not because of a lack of privity between the parties, but because *Gilley* was wrongly recast as a discretionary claim for benefits and the product of an abuse of discretion. Neither the District Court nor this Court in *Gilley* reached the question presented here— whether Plaintiffs individually and as representatives of a putative class and the plan are entitled to equitable relief for breach of fiduciary duty and violation of ERISA due to the confiscation or forfeiture of their property by a conflicted trustee in the interest of HCEs—executives, officers, and shareholders of the company. Defendants' success, through the application of an abuse of discretion standard that excluded all consideration of similar claims brought in the *Gilley* matter, estops them from now asserting that the questions are *res judicata.* "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an

opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." *Hovey,* 167 U.S. at 443. Additionally, the *Gilley* decision cannot be *res judicata* because this Court never addressed Gilley's individual, representative, and derivative claims for breach of fiduciary duty and violation of ERISA. *Gilley v. Monsanto Company, Inc.*, 490 F.3d 848 (11th Cir. 2007), No. 08-13646, 309 Fed. Appx. 362; 2009 U.S. App. LEXIS 2073 (February 3, 2009) *petition for certiorari filed and docketed* (June 9, 2009) No. 08-1511. The issues in substance, not in form, must be the same or the question is not *res judicata*. A judgment by this Court based on facts presented by a conflicted trustee in its own self-interest under a deferential standard of review that is contrary to the record found by the trial court is not due process of law.

C. Conflicted Decisionmaker, Litigation and Due Process

1. Executives, Officers, and Other HCEs and IRS Regulations.

The IRS places restrictions on the amount of funds that can be held in qualified "tax favored" plans. IRS Publication 575 at http://www.irs.gov. Old Monsanto, like many other companies, established nonqualified "unwritten" pension plans for its top executives, officers, and employees. [R 96-3 at p. 2]. Funds for both nonqualified and qualified plans were held in a collective trust

under a Master Trust Agreement. *Id.* The non-reversionary trust is nothing more than a minimum balance bank account with tax advantages. [R 117, 118]. If liability for promised pension benefits to "working class" participants who were never reported can be eliminated, the funds held in trust are available for executives, officers, and highly compensated employees i.e. "trustees" of the plan, as nonqualified benefits. *Id.* Almost none of ERISA's substantive provisions apply to Top Hat Plans or unqualified plans, and not only are Top Hats Plans not required to be funded, but Congress requires that they be *unfunded*, because:

> Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore would not need the substantive rights and protections of Title I.

[R 118-16 at p. 1 *citing* U.S. Dep't of Labor ERISA Op. 90-14A, 1990 ERISA LEXIS 12, at *3-*4 (May 8, 1990)]; *see also* 26 U.S.C. § 401(a)(4), 26 C.F.R. §§ 1.401(a)(4)-1.

2. <u>Reorganization</u>

After Solutia's spinoff in 1997, three significant events occurred. Solutia filed a class action seeking a declaratory judgment against retirees' paying all costs and representation fees that resulted in a settlement wherein retirees received life time health benefits and an increase in pension benefits – Northern District of Florida Pensacola Division *Solutia, Inc. v. Forsberg*, 98-cv-00237-3 RV and 99-

00168-cv-3-RV. *See* [R 117-2; R 117-9 at p. 10-11; R 117-16]. Because Solutia's "cash-balance" plan was 70% underfunded[19] on December 17, 2003, Solutia filed for bankruptcy protection in the United States Bankruptcy Court Southern District of New York allegedly seeking relief from liability for promised benefits assumed from Old Monsanto as well as other assumed liabilities.[20] *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB). [R 117-2]. After Solutia's bankruptcy, Old Monsanto executives, many of them lawyers and shareholders of Old Monsanto, who actively negotiated and drafted the operative spinoff agreements who went to work for Solutia filed an action for nonqualified benefits in the Eastern District of Missouri Eastern Division in a case captioned *Miller v. Pharmacia Corp.*, 4:04-cv-00981 RWS. [R 112-5; R 117; R 118; R 117-9 at p. 10-1; R 118-17 at p. 9]. Many of the *Miller* plaintiffs who orchestrated the spinoff of Old Monsanto's pension liability to Solutia received distributions from their nonqualified pension and deferred compensation plans from Solutia in amounts greater than the balance in their accounts at the time of spinoff and either settled with Pharmacia and new

[19]Only $75 million in assets from Old Monsanto's Master Trust was transferred to Solutia for all benefits including nonqualified Top Hat Plan pension benefits. [R 118-17].

[20]Solutia assumed liability for unfunded pension benefits owed to former employees who were entitled to a separated deferred vested benefit, but not the company name adding to the confusion over liability for promised pension benefits. [R 118-17].

Monsanto or were awarded millions more in benefits as a result of the litigation. [R 118-17 at p. 15; 118-9 to 118-19].

On March 17, 2004, *Gilley v. Monsanto Company, Inc.* 04-cv-0562 was filed in the Northern District of Alabama, Middle Division, after Solutia, Pharmacia and new Monsanto denied Gilley his vested pension benefit. [GDoc. 35]. The *Gilley* action was defended by counsel of the law firm Bryan Cave LLP who represent Defendants' interests here. Old Monsanto as the original obligor remained liable to all its former "workers" for their separated deferred vested benefit including Plaintiffs and Gilley because there was no consent to the unilateral assignment of pension liability to Solutia who was under bankruptcy protection at that time. [R 118-19]. Solutia was liable to Old Monsanto for defense, judgment, and cost as a result of the Defendants' agreements. [R 48]. On November 29, 2004, the law firm of Bryan Cave LLP filed a proof of claim against Solutia in the Chapter 11 bankruptcy proceeding for litigation costs, judgments, and defense in the *Forsberg*, *Miller*, and *Gilley* actions as well as other litigation dealing with retiree claims. [R 117-9 at pp. 10-11]. Accordingly, defense counsels of the firm Bryan Cave were representing Solutia's interest as well as the interest of Old Monsanto "Pharmacia" and new Monsanto in the *Gilley* litigation and by association here as well.

As discussed above, enjoying unchecked discretion, defense counsel demanded a limited hearing stipulating that Gilley was vested if he had 1000 hours

of service in 1972. [GDoc. 77 to 81; 101 at pp. 1 to 11]. The District Court found in favor of Gilley, but Defendants reneged on their stipulation regarding vesting and appealed. Because of time constraints if participants retiring under the 1976 plan, the first ERISA plan, were prevented from challenging the spinoff of Old Monsanto's pension liability other "working class" participants scheduled to retire under other amendments in the future would forfeit their separated deferred vested accrued benefit as well. *See* 29 U.S.C. § 1109; 29 U.S.C. § 1113 (establishing statute of limitations for fiduciary's breach of duty); 29 U.S.C. §§ 1362 to 1369; RESTATEMENT (FIRST) OF RESTITUTION §§ 148, 179 (1937); *but see In re: Unisys Corp., Retiree Medical Benefit Litigation*, 242 F.3d 497 fn3 (3rd Cir. 2001)(Mansmann, Circuit Judge, concurring in part). Thus, through established precedent, Defendants, one and all, benefited if liability for promised pension benefits belonging to "working class" participants could be eliminated and property formerly held in Old Monsanto's trust could be used to pay former executives, officers, and shareholders in the form of nonqualified benefits. *Gilley,* 490 F.3d at 857; *see* R 96-2.

"A trust forming part of a defined benefit plan shall not constitute a *qualified* trust unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan." 26 U.S.C. § 401(a)(8). The *Miller* litigation resulted in top executives of Old Monsanto who

went to Solutia receiving millions in nonqualified benefits some even more than what was in their account at the time of the spin. [R 118-19]. The *Forsberg* litigation also resulted in retirees, former top executives of Old Monsanto who had already retired, receiving an increase in pension benefits. [R 117-16]. Old Monsanto's trust did not constitute a qualified trust under 26 U.S.C. § 401 because forfeitures increased the benefits officers, executives, and other HCEs received under the plan. 26 U.S.C. § 401(a)(8).

D. Legal Pitfalls

The ERISA jurisprudence established by this Court has effectively closed the courthouse door to persons wrongfully denied their property by creating a legal minefield to prevent appropriate "equitable" or "make-whole" relief. *Compare Burroughs v. BellSouth Telecomms, Inc.,* ___ F.3d ____, 2009 U.S. App. LEXIS 8145 (11th Cir. April 15, 2009) citing *Ogden v. Blue Bell Creameries U.S.A., Inc.,* 348 F.3d 1284 (11th Cir. 2003) and *Katz v. Comprehensive Plan of Group Insur.,* 197 F.3d 1084 (11th Cir. 1999) and *Gilley,* 490 F.3d at 857. The culminating result of these cases is that a claim for equitable relief is either nonexistent or a matter of defendants' discretion. [21] *But see* RESTATEMENT (SECOND) OF TRUSTS, §

[21]The first proceedings in equity in the "Court of Chancery, based largely upon existing inadequacies of the common law courts, was exercised in cases in which a fiduciary had failed to perform his duties . . . in cases in which a person by fraud, mistake or duress had been deprived of property which he could not regain by the

205, at 458 cmt. a (equitable relief is available to redress breach of fiduciary duty when it restores the beneficiary to "the position he would have been if the trustee had not committed the breach of trust."); 76 Am. Jur. 2d Trusts § 667 (2002); *MetLife*, 128 S. Ct. at 2346; *Varity*, 516 U.S. at 504-6; *Heinz*, 541 U.S. at 744; *Bruch*, 489 U.S. at 109; RESTATEMENT (FIRST) OF RESTITUTION §§ 1, 40, 160, 161, 198 (1937).

1. Equitable Claims Cannot Deter Employee Benefit Plans

Contrary to the often spouted cry that a *de novo* standard of review deters the formation of benefit plans, the employer-administrator receives substantial benefit from establishing employee benefits plans including but not limited enhanced worker retention, beneficial tax treatment of assets held in trust, and super-preemption of state laws that would permit the recovery of damages for intentional or even negligent misconduct in the administration of the plan. Participants entitled to only "make-whole" relief hardly have an incentive to litigate claims for years. Trustees of employee benefit plans, however, have a built in incentive to deny benefits if it improves the bottom line. The real question is whether ERISA is constitutional by affording sponsors unwarranted discretion permitting them to deny due process and the right to judicial redress for the

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ordinary legal remedies then available." RESTATEMENT (FIRST) OF RESTITUTION (1937)(Introductory Note).

"taking" of participants' property. Due process requires adjudication by an unbiased, uninvolved tribunal with plenary review rather than a conflicted trustee.

Opening the courthouse door to persons entitled to equitable relief to redress the "taking" of their vested property will not increase ERISA litigation. Instead, opening the courthouse door to participants seeking "make-whole" relief is constitutionally required and will lower the number of ERISA cases brought to the courthouse door because it will diminish the incentive for ERISA sponsors to deny claims solely in their own pecuniary interest. Because there are no punitive sanctions for the unreasonable denial of benefits unscrupulous sponsors, with the odds always in their favor due to economic realities, will always attempt to circumvent the law and take the property held in trust belonging to the least advantaged cestui que trust i.e. "working class" participants of the plan. Congress declared the purpose of passing ERISA was to prevent forfeiture of promised "working class" pensions, not to facilitate forfeiture. 29 U.S.C. §§ 1001 *et seq.* Affording unlimited discretion to conflicted employer-administrators ensures the "taking" of "working class" participants' property held in trust.

E. *Varity* and *Heinz*

The Supreme Court has never addressed the issue of whether an amendment which changes the method of computing credited service under a plan adopted after participants' rights vests is a violation of 29 U.S.C. § 1054(g). However, a

reasonable reading of the Supreme Court's decisions in *Central Laborers' Pension Fund v. Heinz*, 541 U.S 739 (2004) and *Varity Corporation v. Howe*, 516 U.S. 489 (1996) as well as a plethora of cases on contract and property law dating back centuries suggests that it does. *Steamship Company v. Joliffe*, 2 Wall. 450 ("When a right has arisen upon a contract . . . and has been so far perfected that nothing remains to be done by the party asserting it . . . It has become a vested right which stands independent of the statute").

An amendment which causes a complete forfeiture of an otherwise non-forfeitable accrued benefit violates ERISA's "anticutback" rule because it violates ERISA's statutory vesting and accrual provisions and because it violates centuries of common law relating to contract, property and trust by causing forfeiture of a "vested right" or "property right." The employer-administrator breaches his fiduciary duty to participants violating ERISA when it takes actions to cause forfeiture of "working class" participants' property in the self-interest of the trustee i. e. the HCEs. 29 U.S.C. §§ 1051-2; 29 U.S.C. §§ 1053(a)(2)(A) & (C); 29 U.S.C. §§ 1053(b)(1) & (b)(2); 29 U.S.C. §§ 1053(c)(1)(A) & (c)(1)(B); 29 U.S.C. § 1054(g)(1); 29 U.S.C. § 1140.

CONCLUSION

A conflicted trustee's decision "taking" property held in trust belonging to a former employee and "working class" participant of a defined benefit plan

reviewed under the arbitrary or capricious standard cannot be *res judicata* to the instant action. Plaintiffs, in their individual, representative, and derivative capacity are entitled to equitable or "make-whole" relief. Plaintiffs, a putative class, and the plan are entitled to an opportunity to redress the "forfeiture" of property formerly held in Old Monsanto's trust by conflicted trustees. Defendants, fiduciaries and trustees of a defined benefit plan, have engaged in a scheme to cause forfeiture of "working class" participants' "vested" rights to property held in Old Monsanto's trust in the interest of executives, officers, shareholders, and other highly compensated employees. The District Court abused its discretion by affording Defendants *carte blanche* discretion and by failing to assume equitable jurisdiction over Plaintiffs' claims permitting the "taking" of property as a matter of discretion while denying the right to redress and due process of law offending the First and Fifth Amendment to the Constitution. U.S. CONSTI. amend. I & V.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. Appellant's brief complies with F.R.A.P. 32(a)(5) & (6) in that the typeface is proportional and the typestyle is Times New Roman 14 point prepared in Microsoft Word 2003.

2. Appellant's brief complies with F.R.A.P. 32(a)(7)(B) & (C) in that it contains 11705 words, less than the 14,000 word maximum, excluding the sections listed under subsection (B)(iii), and it contains a certificate of compliance signed by counsel.

/s/ Elisa Smith Rives

Elisa Smith Rives

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed with the United States Court of Appeals for the Eleventh Circuit by electronic means and one original and six copies of Appellants' Brief along with two copies of the Expanded Record Excerpt were sent by United Parcel Services on 25th day of June 2009.

Counsels of record were served by United States mail with a true and correct copy of Appellant's brief and a digital copy of the Expanded Record Excerpt on this the 25th day of June 2009.

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