DOCKET NUMBER
06-12117-EE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WENDELL F. GILLEY

APPELLEE

v.

MONSANTO COMPANY, INC. et. al.

APPELLANT

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

MIDDLE DIVISION

04-00562-CV-PT-M

BRIEF FOR APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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Davis, Harwell, Magistrate Judge

Dillard, Joel E., Attorney for Appellants

Elisa S. Rives, LLC, Law Firm for Appellee

Employee Benefits Plan Committee, Appellant

Former Employees and Employees of Monsanto Company, Incorporated

Former Employees and Employees of Pharmacia Corporation

Former Employees and Employees of Solutia Incorporated

Gilley, Wendell F., Appellee

James, Donald R. Jr., Attorney for Appellants

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Monsanto Company Employee Benefits Executive Committee, Appellant

Monsanto Company, Inc., Appellant

Monsanto Salaried Employees' Pension Plan, Appellant

Pharmacia Corporation, Appellant

Propst, Robert B., District Judge

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Solutia Incorporated

STATEMENT REGARDING ORAL ARGUMENT

Appellee is amenable to oral argument should this Court find that the order below was final and appealable under Rule 54(b). This interlocutory appeal deals with issues surrounding the trial of August 1, 2005, regarding the determination of vesting service under the relevant terms of a deferred compensation plan that was amended and restated after appellee's tenure with the company. The issues that remain in the action below concern a series of bad acts by defendants' in violation of several provisions of ERISA that resulted in discrimination and intentional interference with the obtainment of rights under the plan and an overall breach of fiduciary duty to low-level plan participants.

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STATEMENT OF JURISDICTION

The court below had original subject matter 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. Venue was also proper in the middle division pursuant to 28 U.S.C. § 1391(b)(2) and 29 U.S.C. §1132(e)(2) in that a substantial part of the events or omissions giving rise to plaintiffs' claims arose or occurred in that division.

This Court lacks appellate jurisdiction over this appeal because the district court's order and judgment of January 26, 2006, lacked finality under 28 U.S.C. § 1291 despite the lower court's certification under Federal Rules of Civil Procedure Rule 54(b) because the district court awarded prejudgment interest but failed to specify the rate or the date upon which interest began to accrue and because the remaining claims are inextricably intertwined with the issue tried. Therefore, this appeal is due to be dismissed and the case remanded for further proceedings. Appellee incorporates herein his response to the Court's Jurisdictional Question.

STATEMENT OF THE ISSUES ON APPEAL

Did the district court correctly apply the law under ERISA when it found that generally later amendments to a plan are not applicable to the determination of vesting service accrued under prior versions of the plan, and in awarding restitution of pension benefits and prejudgment interest under ERISA § 502(a)(3) as "appropriate equitable relief"?

Did the district court commit clear error in finding that a conflict of interest existed, that the underlying decision to exclude the counting of overtime hours as hours of service was arbitrary and capricious based on the facts adduced through trial, and in its finding that Mr. Gilley had 1000 hours of service relying on permissible equivalencies based on total compensation instead of an equivalency based on periods of employment chosen by a conflicted administrator?

STATEMENT OF THE CASE

I. PROCEEDINGS

Plaintiff below and appellee here, Wendell F. Gilley ("Mr. Gilley"), brought individual and class claims against the Monsanto Company Salaried Employees' Pension Plan ("the Plan"), Monsanto Company, Inc. ("Monsanto Company"), Pharmacia Corporation ("Pharmacia"), and the Employee Benefits Plan Committee ("Plan Committee"), pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et. seq*. ("ERISA"). [R. 1]. Collectively defendants in the court below and appellants here are referred to herein as "the Corporation."[1]

The action was filed in the Middle Division of the Northern District of Alabama for "appropriate equitable relief" under ERISA § 502(a)(3). 29 U.S.C. §

[1] The Corporation disputes here for the first time the validity of the Monsanto Company, Pharmacia Corporation, and the Monsanto Salaried Employees' Pension Plan as being proper defendants. Mr. Gilley's position is that these entities are fiduciaries and proper defendants based on their actions in regards to the administration of the plan and their role in benefit determinations. 29 U.S.C. § 1002(21)(A); *Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992); *see also Gelles v. Skrotsky*, 983 F.Supp. 1398, 1402 (M.D. Fla. 1997) ("ERISA clearly recognizes such a situation where an officer of a corporation wears two hats.") *citing Amato v. Western Union Int'l Inc*., 773 F.2d 1402, 1416-17 (2nd Cir.1985). The Corporation contends that the Monsanto Company Employee Benefits Executive Committee ("Executive Committee") is a non-entity. Monsanto's Board of Directors delegated authority to an "Executive Committee" to amend and restate the Plan without further approval of the Board. Whether the "Executive Committee" is a separate entity or an alter ego of Monsanto has not been litigated.

1132(a)(3).[2] [R1]. The complaint contained two counts for "recovery of benefits" under 502 without delineation and additional counts against the Corporation for violations of ERISA's mandates under § 204(g), § 510, and § 404.[3] 29 U.S.C. § 1054(g); 29 U.S.C. § 1140; 29 U.S.C. § 1104, respectively[4]. *Id.*

The Corporation filed a motion to dismiss arguing, as they do here, that Mr. Gilley's claim for recovery of benefits was properly a claim for benefits under ERISA § 502(a)(1)(B), that he had no claim under ERISA § 502(a)(3) for "equitable relief" because ERISA's catchall provision could not be invoked if a participant had a claim under § 502(a)(1)(B), that he was not entitled to benefits under the 1981 Plan, and that even if the 1976 Plan was invoked he was not entitled to benefits because the "95 Hour Rule"[5] was more generous than the

[2] 29 U.S.C. §§ 1132(a)(3) & 1132(a)(1)(B) cited herein as ERISA §§ 502(a)(3) & 502(a)(1)(B).

[3] The alleged bad acts included: amending the plan in a discriminatory manner to intentionally deny certain production level employees accrued actual hours of service; retroactively applying the amendment to reduce *accrued* credited service under prior plans in a discriminatory manner; closing the Sand Mountain plant in an effort to intentionally interfere with participants' attainment of rights under the Plan; failing to act in the interest of Plan participants over corporate profits thereby breaching their fiduciary duty to the plan participants, and; breaching their fiduciary duty by promising employees at the Sand Mountain plant that they would be entitled to a pension if their hire date was prior to September 1, 1972, only to deny benefits twenty plus years later.

[4] ERISA section numbers are used herein instead of code sections.

[5] Pursuant to the amendment termed the "95 Hour Rule" a flat rate of 95 hours of service is credited for each semi-monthly pay period eliminating the counting of overtime for all technical and clerical employees for the purpose of determining

"elapsed time"[6] method. [R 8, 20, 23, 24]. Along with their motion to dismiss the Corporation filed excerpts of the 1971 Plan, an alleged 1976 Plan,[7] and the 1981 Plan. [R 8].

In a thirty page opinion the district court denied the Corporation's motion to dismiss for failure to state a claim citing the relevant provisions of the 1976 Plan and *Jones v. American General Life and Accident Insurance Company,* 370 F.3d 1065 (11th Cir. 2004). [R 23 at p. 29]. After the parties came to an agreement on scheduling, the Corporation refused to produce discovery relating to Mr. Gilley's class claims. [R 29, 33, 34]. Mr. Gilley filed a motion to compel, which the court referred to a magistrate judge. [R 33].

On December 13, 2004, Mr. Gilley filed an amended complaint raising essentially the same individual and class claims, clarifying that his claims were for "equitable relief" under § 502(a)(3), and adding claims under § 502(c) and § 510 for the Corporation's alleged attempt to misrepresent a *conformed* copy as the true 1976 Plan, and adding the Executive Committee as a defendant. [R 35].

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hours of service as it had been "in the past." [Pltff's Exh. 24 at MON-01-003796 to MON-01003798, MON-01-001907].

[6] See footnote 11 *infra*.

[7] During briefing on the Corporation's motion to dismiss it was discovered that a *conformed* copy of the 1976 Plan containing the "95 Hour Rule" had been filed with the court instead of the actual 1976 Plan, which does not contain the equivalency. [R 13]. See discussion regarding the *conformed* plan in Section C-Administrative Appeal *infra*.

Mr. Gilley's motion for class certification was denied without discovery on the class issue. [R 34, 51, 54]. The lower court denied the Corporation's motion for summary judgment on all claims. [R 61]. At the Corporation's request the court tried on August 1, 2005, the limited issue of whether Mr. Gilley had 1000 hours of service in calendar year 1972 under the relevant terms of the Plan. [R 73, 77-80]. On January 26, 2006, the court below denied a motion to reconsider class certification and entered judgment for Mr. Gilley on the overtime issue certifying its judgment as final. [R 106, 114-117]. The Corporation filed a motion to alter or amend the judgment disputing nearly every aspect of the court's findings of facts and conclusions of law, which the court subsequently denied. [R 124, 134]. The Corporation appealed. [R 135]. Although characterizing the instant appeal as a legal question, the Corporation seeks to litigate once again the lower court's findings of fact regarding its judgment of January 26, 2006, the denial of their motion to dismiss, and their motion for summary judgment. [App. Brief].

II. THE PLAN

Mr. Gilley is a former employee of the Monsanto Company, Inc.[8] [R 1, 35 ¶ 2; R 41]. The Monsanto Company has sponsored, maintained and administered a pension plan for its employees for the past 65 years. [Defendants' Trial Exhibits

[8] The original Monsanto Company, Inc. became Pharmacia & Upjohn, Inc., Monsanto Ag Company, Inc. and then the "new" Monsanto Company through a series of mergers and business agreements from 1999 to 2002. [R 35 ¶¶ 4-10; R 41; App. Brief at fn 1].

"Defs. Exhs." 1, 2, & 4]. The 1941 Retirement Pension Plan of Monsanto Chemical Company, which covered both hourly and salaried employees of the corporation and certain subsidiaries, was superseded by the 1951 Monsanto Chemical Company Salaried Employees' Pension Plan ("the 1951 Plan"). [Defs. Exh. 4, at p. 1]. The 1951 Plan was amended from time to time as to certain groups of employees and documents and identified as separate plans, the 1956 Plan, the 1961 Plan, the 1966 Plan, the 1971 Plan. *Id.* In 1972, when Monsanto Company began production at the Sand Mountain plant near Guntersville, Alabama the Plan in place was the Monsanto Company Salaried Employes' Pension Plan ("1971 Plan"). [Defs. Exh. 4 at p. 1; R 101 at pp. 53:5 to 54:14]. All production and management level employees at the Sand Mountain plant were participants of the 1971 Plan.[9] [R 35; R 101 at pp. 63:18, 132:14-17, 187:9-24; Pltff's Exh. 1 § 4, SM- 8, 9]. The 1971 Plan was a "deferred compensation plan" or a "defined benefit plan" that credited service for a fixed retirement income on a "continuous service" basis.[10] [Pltff's Exh. 1 § 4, R-2]. During Mr. Gilley's tenure with the Monsanto Company the 1971 Plan was amended and restated to conform

[9] There were two types of participants in the Plan, salaried non-exempt production level employees and salaried exempt management level employees. Non-exempt employees, although salaried, received overtime and holiday pay pursuant to the Fair Labor Standards Act ("FLSA") and were subject to termination for three consecutive absences. [Pltff's Exh. 1 at pp. SM-8-9; Pltff's Exh. 46].

[10] A participant of the 1971 Plan was vested if he/she had ten years of "continuous service" from the first day of employment to the last day of employment.

to the newly enacted Employee Retirement Insurance Security Act "ERISA" as the 1976 Monsanto Salaried Employes' Pension Plan ("1976 Plan"). [Pltff's Exh. 5 at p. 1]. Pursuant to ERISA's mandates there were several changes made to the Plan. [Pltff's Exh. 5].

Under the 1976 Plan an employee accrued credited service for vesting purposes, "Vesting Service," based on the number of "Hours of Service" he/she completed in a "Plan Year." [R 1 ¶¶ 19-21, 23; Pltff's Exh. 5 §§ 18.1, 18.5]. The "Plan Year" was redefined as the calendar year. [Pltff's Exh. 5 § 1.6]. Under the 1976 Plan a participant was credited with one year of Vesting Service for each calendar year during which he/she completed at least 1,000 Hours of Service ("the 1000 Rule") with Monsanto Company.[11] [Pltff's Exh. 5 § 18.1].

[11] The Corporation disputes that service was ever determined by the 1000 Hour Rule under the 1976 Plan. [App. Brief at p. 11 fn 4]. The Corporation insists instead that "Hours of Service" under the 1976 Plan were determined under the 'elapsed time' regulations. Notwithstanding, there is no mention of the "elapsed time method" in the 1976 SPD, only a single one line reference in the plan document maintained by the Corporation, and there has been no evidence or testimony introduced to support this contention. *See* ERISA § 102. [Pltff's Exh. 2; Pltff's Exh. 5 at p. 67; Pltff's Exh. 6 & 7; Def. Exh. 4; R 101 at pp. 293-327; R 101 at p. 361:13-22]. The representative appearing for defendants during the trial of August 1, 2005, testified that the general practice was to award a participant a year of Vesting Service if they were hired on any day in July. [R 101 at 361: 22-23]. The Court in its memorandum opinion and order of July 19, 2004, stated that it could not agree that the "elapsed time" regulation "gives the employer the unbridled right to use this alternative simply to deny a benefit to a retired employee." [R 23 at p. 29].

According to the summary plan description ("SPD") "in general, an Hour of Service means each hour for which you are paid – either directly or indirectly – or are entitled to payment for time not actually worked—i.e., holidays, vacations, temporary disability, etc." [Plttf's Exh. 2 at p. 41, ¶ 5]. The SPD states that "starting January 1, 1976, [participants] will be credited with one year of Vesting Service for each calendar year in which you complete 1,000 or more Hours of Service." [Pltff's Exh. 2 at p. 41, ¶ 3]. Vesting service for calendar years before 1976 was to be determined by the "1000 Hour Rule" or on the basis of prior Company pension plans, "*whichever [was] more favorable to [the participant]*." [Pltff's Exh. 2 at p. 41, ¶ 7 (emphasis added)]. A participant's credited service, accrued by a participant under the portable service provisions of predecessor plans, was considered as vesting service under the 1976 Plan. [Pltff's Exh. 5 § 18.1(h)]. The 1976 Plan was conformed to final regulations under ERISA in July 1979. [Pltff's Exhs. 10 at MON-01-002716, Exh. 11 at MON-01002383].

In late September 1979, the Manager of Employee Benefits for Monsanto Company, apparently as a cost savings measure, made a proposal to the Plan Committee to exclude the counting of overtime hours towards "hours of service" for all technical and clerical employees as it had done "in the past" under the Plan. [Pltff's Exh. 24 MON-01-001906, 38, 47; Def. Exh. 4 § 17.1(f)]. The "95 Hour Rule" as it is so termed states that employees that are compensated on a basis *not*

dependent on the number of hours worked are credited with a flat rate of 95 hours of service each semi-monthly pay period regardless of the hours worked. [Pltff's Exh. 38; Defs. Exh. 4 § 17.1(f)]. The "95 Hour Rule" was summarily adopted by the Committee. [Pltff's Exh. 24 at MON 01-001906]. When the Sand Mountain plant closed in early 1981 the maximum years of service for any employee at this plant was just over nine years. [R 101 at p. 41]. At some point the Plan was amended, restated and continued as "the 1981 Monsanto Salaried Employees' Pension Plan ("1981 Plan")."[12] [R 1 ¶ 14; Defs. Exh. 4 § 17.1(f)]. The 1981 Plan was the first version of the Plan to contain the "95 Hour Rule." [Pltff's Exhs. 2 & 5; Def. Exh. 4].

STATEMENT OF FACTS[13]

I. BACKGROUND

A. Closure of the Plant and Plan Amendment

The Corporation held open meetings with employees at the Sand Mountain plant regarding the plant's closure wherein employees were told by management

[12] The Corporation made the decision to amend, restate, and continue the 1976 Plan as the 1981 Plan at the same board meeting that the decision was made to close the Sand Mountain plant and other plants. [Pltff's Exh. 26 ¶ 6]. Plan participants at the Sand Mountain plant were on layoff status and were not notified as of April 27, 1981, of the 1981 Plan. [Pltff's Exh. 2, 3; Pltff's Exh. 10 at MON-01-002690; Pltff's Exh. 11 at MON-01002362; Pltff's Exh. 12 at MON-01002618].

[13] Nearly every aspect of the instant action is in dispute. Accordingly, the statement of facts contained herein should be considered by the Court as appellee's view of the facts. The Court should also note that the Corporation's statement of fact should be considered in the same light.

that if they were hired prior to a certain cutoff date they were fully vested in the Plan.[14] [R 101 at p. 88:19-20]. Mr. Gilley was told that the cutoff date was September 1, 1972, and that he was vested.[15] [R 101 at p. 203:20; R 1 ¶¶ 49-52]. Mr. Gilley maintains that he received a memorandum that he can no longer locate that verified the cutoff date.[16] [R 1 ¶ 50; R 101 at p. 203:21-3]. As of February 26, 1981, most of the employees at the Sand Mountain plant were on layoff status with a call back period of up to three years.[17] [R 101 at p. 105:13-14; Pltff's Exh. 15 (MON-01-002063)].

B. Mr. Gilley's Request for Benefits.

Believing he was fully vested and entitled to a pension Mr. Gilley contacted the Solutia plant (formerly Monsanto) in Decatur, Alabama to inquire about receiving his retirement benefit. [R 101 at pp. 145: 8 to 146:24]. Mr. Gilley was initially told that there would be no problem and that he was entitled to a retirement benefit.[18] [R 101 at pp. 146:24 to 148:19; Pltff's Exh. 31]. On April 6,

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[14] This issue has not been heard.

[15] Under the Plan if a participant has ten years of "Vesting Service" he is vested and entitled to an early retirement benefit upon reaching age 55. The early retirement benefit is a percentage of the full retirement benefit collectable at age 65 years. [Pltff's Exh. 2 at p. 31].

[16] *See* footnote 17 & 19 *infra*.

[17] A few employees remained at the plant as part of a closure team. Mr. Gilley was one of these employees; his last day of active work was March 31, 1981. [R 101 at p. 105:13-14; Pltff's Exh. 15 (MON-01-002063)].

[18] The only representative for the defendants to attend the trial of August 1and 2, 2005, was an employee of Monsanto Company and a former employee of the

2001, Mr. Gilley received a letter from Pharmacia indicating that there were no benefits due him from the Monsanto Company Pension Plan **"at this time." [**R 101 at p. 150:22-25; Pltff's Exhs. 29, 31]. Over the next two years Mr. Gilley continued to communicate with the Benefit Service Center in regards to his pension. [Pltff's Exh. 31]. The Corporation never advised Mr. Gilley of his right to an appeal or right to bring a civil action. In June of 2003, Mr. Gilley received a letter from Monsanto indicating that he was not fully vested and entitled to a pension benefit because he had only nine and a half years of vesting service, four months of employment in 1972, nine years of employment from 1973 to 1981, and two months of employment in 1982. [Plttf's Exh. 30].[19] [Pltff's Exhs. 32, 36].

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original Monsanto Company and Pharmacia. [R 101 at pp. 245:13-14; 248:19 to 249:20; 251:8 -14]. At trial the Corporation's representative testified that as head of the Retirement Group he had discretion to interpret and administer the Plan reporting directly to the Secretary of the Committee. [R 101 at pp. 248:1-19 to 249:13-15; 251:21-23; 375:2-3]. According to the Corporation's representative an initial determination regarding benefits is made at the time of termination so that there is a pool of money to pull from, but the eligibility determination is made at the time benefits are requested. [R 101 at p. 343:8 -18, 344:23 to 345:12, 352:20 to 353:2].

[19] Mr. Gilley's termination date was heavily disputed at trial. The Corporation contended that Mr. Gilley was employed from August 31, 1972 until he chose termination on February 16, 1982 giving him 9.594 years of vesting service using the "95 Hour Rule." [Pltff's Exh. 33]. Mr. Gilley testified that he never chose termination. Two records maintained by the Corporation list Mr. Gilley's termination date as September 27, 1982. [Pltff's. Exh. 16 compare MON-01-002069 and MON-01-001187; R 101 at pp. 327:22 to 334:23; Pltff's Exh. 17; R 101 at pp. 336:8 to 338:22; R 101 at pp. 360:23 to 361:12].

C. The Administrative Appeal.

On December 5, 2003, Mr. Gilley filed a formal administrative appeal. During the appeal the Corporation for the first time informed Mr. Gilley that his credited service was determined under the "95 Hour Rule" without regard to other Plan materials that were in place during the course of his tenure with the Monsanto Company. [R 101 at pp. 258:19-25, 259:1-25; Pltff's Exh. 38; Pltff's Exh. 24]. Realizing the Plan had been amended in 1976 to conform to ERISA, Mr. Gilley requested a copy of the 1976 Plan from the Committee, the Committee instead provided him with a *conformed* copy of the Plan dated August 1980 that contained the "95 Hour Rule." [R 35 ¶¶ 57-58]. Unaware that the "95 Hour Rule" was not actually included in the 1976 Plan, Mr. Gilley maintained that he was entitled to ten years of vesting service because he was an employee compensated on a basis *dependent* on the number of hours worked as an employee subject to FLSA's overtime regulations, and he worked substantial amounts of overtime in 1972.[20] [Pltff's Exh. 24 MON-01-003783-85].

[20] The Corporation has argued that Mr. Gilley's civil action is improper because it raises claims based on arguments that were not presented to the Committee during the administrative appeal. [Appellant's Brief ("App. Brief") at pp. 6-9]. This argument has no merit because the Corporation intentionally tried to mislead Mr. Gilley into believing that "the 95 Hour Rule" was incorporated into the 1976 Plan. Because the Corporation did not provide Mr. Gilley with a copy of the true 1976 Plan he was unaware at the time of the administrative appeal that the 95 Hour Rule was a later amendment to the Plan.

The head of the Retirement Group for Monsanto Company made a recommendation[21] to the Committee to deny Mr. Gilley's appeal based on his determination that the "95 Hour Rule" was the proper method of determining hours of service under the 1981 Plan, and that the crediting of overtime as hours of service was not necessary in any case because Mr. Gilley was a salaried employee.[22] [Pltff's Exh. 24 at MON-01-003779]. The Committee, accepting the recommendation of Monsanto's Retirement Group, denied Mr. Gilley's appeal stating that its decision was "[b]ased upon a review of the relevant provisions of Plan documents [submitted] and the administrative decisions made by the

[21] During the trial the Court asked "Did you have any role in making the decision with regard to his (Mr. Gilley's) eligibility?" and the head of Monsanto's Retirement Group answered "I provided the information and the support material, yes, Your Honor." The Court then asked "And did you make any recommendations or did you enter into any decision-making process with regard to his eligibility?" to which the head of Monsanto Company's Retirement Group responded "No, Your Honor. I provided the information." [R 101 at p. 254:9-17].

[22] The administrative appeal folder contains Relevant Portions of the 1971 and 1981 Plan and an explanation of how service accrued under these plans; there is no mention of the 1976 Plan. [Pltff's Exh. 24]. The appeal folder also contains a memorandum regarding the "95 Hour Rule" and a memorandum dated January 29, 1991 regarding the 1000- Hour Rule stating that the 95-Hour Rule should not be used to reduce accrued credited service for participants in the salaried plan who are paid by the hour. [Pltff's Exh. 24 at MON-01-003800 ¶¶ 7, 8]. According to the 1000 Hour Rule memo all actual hours worked should be counted in the situation in which an individual is paid "on a basis dependent on the number of hours worked." [Pltff's Exh. 24].

Employee Benefits Plans Committee (administration of the Plan) in 1979."[23] [Pltff's Exh. 24 at MON-01-003774].

The Corporation aware of ERISA's mandates regarding amendments that reduce accrued credited service failed to address the existence of and finalization of the 1976 Plan in the interval between the 1971 Plan and the 1981 Plan and the applicability of the terms of the 1976 Plan to pre-ERISA service. [Pltff's Exh. 24, MON-01-003799-801; 38].

D. Trial of August 1, 2005.

The trial of August 1, 2005, was limited to the single issue of whether Mr. Gilley had 1000 hours of service based on overtime he worked in calendar year 1972 entitling him to a pension benefit under the relevant terms of the Plan. [R 77-81; R 101]. The Corporation attempted to frame the issue in terms of the number of hours *worked* rather than *hours of service*. Hours of service include, in addition to hours worked, hours based on indirect and direct compensation such as vacation, holiday, sick leave and "comp" time.[24] [App. Brief at p. 11 ¶ 2; Pltff's Exh. 5 § 18.5]. The Corporation relied on Social Security Earnings produced during

[23] The decision made by the Committee in 1979 refers to the adoption of the "95 Hour-Rule," which was suggested by an employee of the Monsanto Company's Retirement Group. Pltff's Exh. 11 at MON-01-002361; Pltff's Exh. 25 (MON-01-001906 to MON-01-001908 and MON-01-003796 to MON-01-003798).

[24] 29 C.F.R. § 2530.200b-2 and § 2530.200b-3(a)(2) (A plan may in any case credit hours of service under any method which results in the *crediting of no less* than the actual number of *hours of service* required to be credited under 29 C.F.R. § 2530.200b-2(a))].

discovery by Mr. Gilley to argue that he did not *work* 1000 hours in 1972.[25] *See* Argument Section II(C)(1). [R 76; App. Brief at 13-14]. The head of Monsanto's Retirement Group utilizing a standard work year of 2080 hours and Mr. Gilley's reported Social Security Earnings of $2,149.68 testified that the maximum number of hours that Mr. Gilley could have *worked* in 1972 was 887 hours.[26] [R 101 at p. 374:1-25; R 61-64; App. Brief at p. 11]. The Corporation's representative based on several assumptions drawn in the sponsor's favor testified during trial that Mr. Gilley's salary was $420.00 per month based on 160 hours per month, that a standard work year under the Plan was 2080 hours without reference to the Plan, and that Mr. Gilley could not have worked more than 887 hours in 1972 based on his calculations.[27] [R 101 at pp. 404:14 to 409:22]. Mr. Gilley testified that he worked the rotating shift schedule[28] at the Sand Mountain plant and that his base

[25] The Corporation has consistently maintained throughout that the Monsanto did not have records of the number of hours worked or compensation earned by employees in 1972. In their brief the Corporation states that there are no company records reflecting how much Gilley earned in 1972 or the number of hours he worked that year. This is a distortion of the testimony given at trial. The Corporation's representative testified, when asked if they had records of Mr. Gilley's overtime hours or compensation for 1972, answered "we do not," but when asked if anyone at Monsanto had the records he replied "the payroll group." [R 101 at pp. 399:24 to 400: 2; 402:19].

[26]The Corporation makes the same argument here.

[27] The Corporation's representative refused to acknowledge the fact that non-exempt employees at the Sand Mountain plant did not work a standard work year. [R 101 at pp. 361:22 to 363:12; 365:12-22; 374:1 to 375:3].

[28] The Sand Mountain plant was a continuous operation plant running 24-7 on rotating shifts. Non-exempt employees at the Sand Mountain plant worked a

pay was $390.00 dollars per month plus a small shift differential (the base salary did **not** include the mandatory overtime).[29] [R 101 at pp. 104:9 to 105:10; 177:1-25, 242:23-25, 242:1-25; Pltff's Exh. 1 at SM-9; Pltff's Exh. 44, 46].

The court ordered the parties to submit findings of fact and conclusions of law specifically identifying how each party would determine hours of service for Mr. Gilley in 1972 and other issues developed during the trial. [R 101 at pp. 434-5; R 102-5].

E. The District Court's Judgment.

The court found that Mr. Gilley had at least 870 hours of service based on his total compensation entitling him to 1000 hours of service under two permissible equivalencies under 29 C.F.R. § 2530.200b-3(d).[30] [R 116, Exhs. A-C]. In its order of March 3, 2006, the district court took exception and expressed its doubts whether the following statement made by the Corporation was applicable to defendants with a conflict of interest: "although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the

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rotating shift schedule in 1972 of 254 regular-8 hour days, 13 mandatory overtime days per year, and 6 mandatory overtime holidays of the 9 paid holidays. Non-exempts were supposed to receive 9 paid holidays, 10 vacation days, 5 sick leave days, and 3 personal days for a total of 2524 hours per year. [R 116 Exh. A; Pltff's Exh. 1 at pp. SM-8-9; Pltff's Exh. 46].

[29] Mr. Gilley testified that he received a separate check for overtime. [R 101 at p. 105:5-12].

[30] Utilizing either of these equivalencies Mr. Gilley has 1000 hours of service even using the Corporation's own calculation. [App. Brief at p. 14].

regulation is clear that it is for the Plan, and not the individual participants, to elect the equivalency of its choice. See 29 C.F.R. § 2530.200b-3(a)." [R 134].

STANDARD OF REVIEW

Questions of law under ERISA are reviewed by this Court and the court below *de novo*. *A.I.G. Uruguay Compania de Seguros, S.A. v. AAA Cooper Transp*., 334 F.3d 997, 1003 (11th Cir. 2003). This Court reviews the district court's findings of fact for clear error. *Levinson v. Reliance Stand. Life Insur. Co.,* 245 F.3d 1321, 1322 (11th Cir. 2001). The action below seeks "appropriate equitable relief" under ERISA § 502(a)(3) based on violations of ERISA's provisions that collectively resulted in the denial of benefits. The standard applied to a district court's decision to award benefits as "appropriate equitable relief" under ERISA § 502(a)(3) has not been clearly established, but in general a grant or denial of equitable relief by the district court in other contexts is reviewed for abuse of discretion. *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1220 (11th Cir. 2002).

In actions seeking relief under ERISA § 502(A)(1)(B) for the denial of benefits this Court applies a *de novo* standard of review to a lower court's decision applying the same legal standards that governed the district court's disposition. *Williams v. Bellsouth Telecomm., Inc.*, 373 F.3d 1132, 1133 (11th Cir. 2004) (internal cites omitted). In *Williams v. Bellsouth* this Court established a

framework for judicial review of benefit decisions under ERISA § 502(A)(1)(B) based on the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Burch*, 489 U.S. 101, 109 S.Ct. 948 (1989). *Williams*, 373 F.3d at 1133. There are three distinct standards of review to be applied to an administrator's decision which are: "(1) *de novo* where the plan does not grant the administrator discretion [i.e., does not exercise discretion in deciding claims;] (2) arbitrary and capricious [where] the plan grants the administrator [such] discretion; and (3) heightened arbitrary and capricious where [the plan grants the administrator such discretion but] ... [he has] ... a conflict of interest." *Williams*, 373 F.3d at 1133.

SUMMARY OF ARGUMENT

ERISA forbids plan amendments that result in the loss of accrued benefits to participants. *See* ERISA §§ 204(g) and 502(a)(3); *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004). The only recourse available for a participant of a "defined pension plan" i.e. a "deferred compensation plan" who has been wrongly denied his pension benefit as a result of a fiduciary's amendment of the plan that results in a forfeiture of vested benefits is for appropriate "equitable relief" under ERISA § 502(a)(3). *Jones*, 370 F.3d 1065. In the case of a "defined pension" plan a portion of a participant's compensation earned during the course of his employment is held in trust until the participant reaches the age of retirement or earlier if the plan allows. LANGBEIN, JOHN H. & BRUCE A. WOLK,

PENSION AND EMPLOYEE BENEFIT LAW 17 ¶ 4 (3rd ed. 2000). An action for restitution of a participant's "deferred compensation" under § 502(a)(3) in this instance is a claim for true "equitable" restitution under the rubric of the divided bench because it is an action for a specifically "identifiable fund" that is "within the possession and control" of the Corporation. Similarly, an award of pre-judgment interest is appropriate "equitable relief" under a theory of unjust enrichment when a fiduciary has wrongly benefited by the retention of benefits belonging to a participant. Thus, the Supreme Court's teachings in *Mertens*, *Great-West*, and *Sereboff* in regards to restitution and the admonishment against the use of section 502(a)(3) for "legal" relief are not contrary to the lower court's judgment and do not prevent an award of pre-judgment interest and past and future benefits under this section. *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993); *Great-West Life & Annuity Insur. Co. v. Knudson*, 534 U.S. 204 (2001); *Sereboff v. Mid Atl. Med. Serv., Inc.*, No. 05-260, 547 U. S. _____ (May 15, 2006); *see also* Langbein, John H., *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens and Great-West* (January 16, 2003) (unpublished manuscript, on file with Yale University and the Social Science Research Network Electronic paper Collection at http://papers.ssrn.com).

A conflict of interest exists if a plan fiduciary acts in the interest of the entity sponsoring the plan, regardless of whether the plan is funded by a trust, over the

interest of participants of the plan to whom the fiduciary owes the duty of loyalty and prudence. When a sponsor stands to gain a windfall in retained "compensation," i.e. pension benefits, the discretion normally afforded plan administrators to interpret and apply plan terms is limited. When a fiduciary adopts an equivalency in the sponsor's profit interest and retroactively applies that equivalency to reduce "accrued" benefits causing forfeiture of participants' benefits held in the trust, a conflict of interest exists. Under these circumstances ERISA allows the court to fashion relief by selecting a permissible equivalency under section 502(a)(3) "appropriate equitable relief" provisions to override what would ordinarily be a plan sponsor's choice to choose an equivalency at the plan's conception. ERISA's carrot and stick approach to the regulation of pension plans permits flexibility in plan design to encourage plan sponsorship, but once the plan is in place and the plan sponsor has reaped the benefits of maintaining a plan that covers a wide range of participants ERISA's statutory scheme eschews forfeiture of those benefits. The court's finding that Mr. Gilley had 1000 hours of service in 1972 based on demeanor and other plain evidence entitling him to a pension benefit and pre-judgment interest was not clearly erroneous.

ARGUMENT

I. DID THE DISTRICT COURT CORRECTLY APPLY THE LAW UNDER ERISA WHEN IT FOUND THAT GENERALLY LATER AMENDMENTS TO A PLAN ARE NOT APPLICABLE TO THE DETERMINATION OF VESTING SERVICE ACCRUED UNDER PRIOR VERSIONS OF THE PLAN, AND IN AWARDING RESTITUTION OF PENSION

BENEFITS AND PREJUDGMENT INTEREST UNDER ERISA § 502(A)(3) AS "APPROPRIATE EQUITABLE RELIEF"?

A. The Corporation's Position.

The Corporation insists that Mr. Gilley's claims for benefits under § 502(a)(3) is improper because a claim for benefits is "legal" and not "appropriate equitable relief" and because this and other circuits have found that ERISA's "catchall" provision is not available when there is a proper claim for benefits under § 502(a)(1)(B). [App. Brief at pp. 23-30.]. The Corporation then insists that there are no benefits under the 1981 Plan because Mr. Gilley's accrued benefit calculated under the 95 Hour Rule results in less than 1000 hours of service. [App. Brief at pp. 29-30]. The Corporation's argument is akin to a rundown play in baseball where the participant is caught between § 502(a)(3) and § 502(a)(1)(B). To arrive at the desired result, the Corporation ignores ERISA's prohibition against amendments to a plan that result in the loss of "accrued benefits" and this Court's more recent decisions regarding the propriety of actions under § 502(a)(3).

B. ERISA and the Plan Amendment.

1. ERISA § 204(g) and *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004).

In *Central Laborers' Pension Fund v. Heinz*, the Supreme Court addressed the issue of whether an amendment that expanded the categories of post-retirement

employment that triggers suspension of payment of early retirement benefits already accrued violated ERISA's anti-cutback rule under Section 204(g). *Central Laborers*, 124 S.Ct. 2230. The Supreme Court explained that the "'anti-cutback' rule of ERISA prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefits.'" *Id. at* 2234. The issue of whether or not an amendment that places a restriction on a participant's right to an "accrued benefit" is a reduction in "benefits" per se was raised in *Central Laborers* as it was by defendants below. *Id.* The Supreme Court found that "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." *Id.* at 2236 (internal cite omitted). The Supreme Court, viewing the matter from a practical sense, said that "the real question is whether a new condition may be imposed after a benefit has accrued; may the right to receive certain money on a certain date be limited by a new condition narrowing that right?" *Id.* The Court answered this question in the negative. *Id*. at 2237.

The Corporation in the instant case added the 95 Hour Rule to the Plan after employees at the Sand Mountain plant were on layoff status never notifying participants of the change. [Pltff's Exh. 2, 3; Pltff's Exh. 10 at MON-01-002690; Pltff's Exh. 11 at MON-01002362; Pltff's Exh. 12 at MON-01002618]. Thus, the Corporation imposed a new condition that limited the right to receive benefits on a

certain date by imposing a narrower definition of hours of service that did not include credit for overtime service thereby reducing the amount of "accrued benefit" credited under the 1976 plan and ultimately eliminating plaintiff's right to his pension. ERISA's vesting and accrual provisions protect retirement plans from later-adopted plans preventing the reduction of already-earned pension benefits. "Absent such requirements, ERISA would provide minimal protection for employees who would lack any certainty that the benefits they expected to receive upon retirement would actually be available to them and not be eliminated by the later adoption of a less favorable plan." *Frommert v. Conkright*, No. 04-4609 (2nd Cir. 2/10/2006)(finding that a plan is *amended* when the participants are notified of the changes in the material terms of the plan and not when the plan administrator makes such changes). Additionally, implicit in ERISA's protection scheme is the concept that material terms of a plan cannot be given binding effect if they have not been communicated to participants. *Id; see also* ERISA §§ 101, 102.

2. The Propriety of Claims Under ERISA § 502(a)(3).

This Court in *Jones v. American General Life and Accident Insurance Company* distinguished its holding in *Katz v. Comprehensive Plan of Group Insurance* finding a cause of action for a plan participant in an ERISA-governed plan for "appropriate equitable relief" under Section 502(a)(3) if no adequate remedy exists elsewhere in ERISA's statutory framework. *Jones*, 370 F.3d 1065;

see also Harte v. Bethlehem Steel Corp., No. 98-2052 (3rd Cir. 2/29/2000)(finding a cause of action under ERISA § 502(a)(3) and breach of fiduciary duty for failure to notify a participant that might predictably and reasonably be misled by the terms of the plan); *Griggs v. E.I. Dupont De Nemours & Co*., No. 03-1985 (4th Cir. 09/29/2004)(equitable rescission of a participant's election of lump sum distribution allowing the participant to opt instead for annuity payment due to fiduciary's misrepresentations); *Flint v. ABB, Inc.*, No. 02-15029 (11th Cir. 2003)(this Court reserving judgment on whether ERISA § 502(a)(3) allows for the recovery of interest on reinstated benefits); *Harris Trust v. Salomon Brothers Inc.*, 530 U.S. 238 (2000) (reversing Seventh Circuit dismissal of action for rescission, restitution of purchase price, and disgorgement of profits in action under ERISA § 502(a)(3) against a non-fiduciary) *Mathews v. Chevron Corp.*, No. 02-15936 (9th Cir. 03/26/2004)(finding a relief that reinstates a participant's entitlement to benefits equitable and finding that a mere payment of money does not necessarily render an award compensatory "monetary damages").

3. *Mertens, Great-West, and Sereboff*.

In the very recent decision *Sereboff v. Mid Atlantic Medical Services, Incorporated* the Supreme Court realized a claim for restitution based on a reimbursement clause contained in a welfare benefits contract. *Sereboff v. Mid Atlantic Med. Serv., Inc.*, 547 U.S. _____(2006). The Supreme Court in

Sereboff distinguishes its holdings in *Mertens* and *Great-West* finding that even though money was ultimately being requested based on a reimbursement clause in a welfare benefits contract the true essence of the claim was for "appropriate equitable relief" under § 502(a)(3) based on restitution of property (in this case money) in the possession and control of the participant that was recovered from a third-party tortfeasor. *Id; Mertens,* 508 U.S. 248; *Great-West Life,* 534 U.S. 204. The major difference explained the *Sereboff* Court is that equitable restitution poses a constructive trust or equitable lien on "particular funds or property in the defendant's possession." *Sereboff* at * 4. The Court recognized that Mid Atlantic "alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust or equitable lien on a specifically identified fund." *Id.* at * 5. Thus, the Court's holding in *Sereboff* makes it perfectly clear that just because "money" will be recovered that does not transform a claim for equitable relief for benefits into one for compensatory damages prohibited under § 502(a)(3). "ERISA provides for equitable remedies to enforce plan terms, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable; that would make § 502(a)(3)(B)(ii) an empty promise." *Id*. A claim for benefits due under a plan that has been amended by an unscrupulous fiduciary in the sponsor's profit interest causing a forfeiture of benefits is a claim properly brought under § 502(a)(3) based on either a theory that an equitable lien exist on

the participant's "deferred compensation" held in an "identifiable fund" or based on a theory of "constructive trust" if the plan is under funded because the participant's "earned compensation" has always been in "the possession and control of the Corporation." *See Skretvedt v. E.I. Dupont De Nemours*, No. 02-3620 (3rd Cir. 06/16/2004) (holding that a claim for interest on delayed payment of benefits was not a request for money damages but rather a request for restitution under the device of a constructive trust, which is "appropriate equitable relief").

II. DID THE DISTRICT COURT COMMIT CLEAR ERROR IN FINDING THAT A CONFLICT OF INTEREST EXISTED, THAT THE UNDERLYING DECISION TO EXCLUDE THE COUNTING OF OVERTIME HOURS AS HOURS OF SERVICE WAS ARBITRARY AND CAPRICIOUS BASED ON THE FACTS ADDUCED THROUGH TRIAL, AND IN ITS FINDING THAT MR. GILLEY HAD 1000 HOURS OF SERVICE RELYING ON PERMISSIBLE EQUIVALENCIES BASED ON TOTAL COMPENSATION INSTEAD OF AN EQUIVALENCY BASED ON PERIODS OF EMPLOYMENT CHOSEN BY A CONFLICTED ADMINISTRATOR?

A. The Standard of Review.

1. The Corporation's Position.

The Corporation argues that this Court established an absolute rule in *Buckley v. Metropolitan Life*, 115 F.3d 936, 939-40 (11th Cir. 1997) that the heightened arbitrary and capricious standard of review is never applicable to a review of a plan administrator's denial of a pension benefit when the administrator retains discretion under a plan funded through periodic non-reversionary contributions.

2. A Conflict of Interest.

The appropriate standard of review when deciding whether there has been a violation of ERISA's mandates is *de novo*. *Larocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Simpson v. Ernst & Young,* 100 F.3d 436 (6th Cir. 1996); *Chao v. Malknai*, 216 F. Supp.2d 505, 512 (6th Cir. 2002); *Locher v. Unum Life Ins. Co. of America*, No. 03-9229 (2nd Cir. 2004) (when "good cause" is shown it is within the discretionary power of the district court to determine the standard of review in ERISA cases and *de novo* review is proper).

Once the lower court determined that the Corporation improperly amended and retroactively applied the terms of a later plan to reduce accrued benefits the court looked for guidance regarding the standard to be applied to the benefits decision.[31] The lower court relied on this Court's decision in *Williams v. BellSouth Telecommunications, Inc*. 373 F.3d 1132, 1135 (11th Cir. 2004). [R 101 at p. 256]. Based on the administrative record, testimony, and evidence presented at trial, and the fact that the plan sponsor was responsible for funding shortfalls,[32] the court

[31] A clear conflict of interest could be found in the administrative record. The Committee decided to follow the sponsor's recommendation denying Mr. Gilley his pension based on the "95 Hour Rule," a later adopted amendment, even though the Committee was aware that the "95 Hour Rule" "should not be used for participants in the salaried plan who [were] paid by the hour." [Pltff's Exh. 24 at MON-01-003800].

[32] The Corporation's corporate representative testified that an initial determination was made when the participant's service with the employer is terminated because

below found that a heightened arbitrary and capricious standard was appropriate. [R 116 at p. 2; R 134; R 101 at pp. 254:9 to 262:19]. There is simply no legal basis for the Corporation's position that a universal arbitrary and capricious standard applies to a review of all benefit decisions in situations where benefits are paid from a trust that is funded periodically by the plan sponsor through non-reversionary contributions. Furthermore, adopting such a rule would thwart ERISA's stated purpose of "promoting the interest of employees and their beneficiaries." *Firestone*, 489 U.S. at 103. If this position were adopted then plan sponsors through meaningless administrative and judicial review could deny benefits to entire classes of participants reserving funds held in trust for high-end participants creating after-the-fact top-hat plans and windfalls for the plan sponsor relieved of the obligation to fund shortfalls through periodic contributions to the fund. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

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you have to have a system to pay out of, but the eligibility calculation is made when a participant "goes to commence their benefits." [R 101 at p. 343:12-18]. The Corporation did not submit with their annual reports from 1979 to 1982 a list of non-exempt participants who terminated with a vested benefit from the Sand Mountain plant as required by Internal Revenue Service rules. [Pltff's Exhs. 10, 11, 12, 13]. Based on this testimony and evidence the court could have deduced that the Corporation is freely revisiting eligibility determinations and recalculating vesting service for certain low-end participants when they seek to begin receiving their pension. A non-exempt participant entitled to a minimal pension from a predominately poor area with limited access to legal representation is unlikely to challenge a denial of benefits. [Pltff's Exh. 47; R 101 at pp. 254-62].

B. The Arbitrary and Capricious Standard.

1. The 1981 Plan and the 95 Hour Equivalency.

The Corporation's explanation as to why the Committee applied the terms of the 1981 Plan and why benefits are not available is merely a pretext. The Corporation states "the Committee was observing its obligation to *all* Plan participants to abide by the Plan documents and to protect the Plan assets, ensuring that funds are available to pay rightful benefits." [App. Brief at 34]. The Corporation is not reserving funds for *all* rightful participants, but rather denying promised benefits to non-exempt participants to eliminate the need for additional funding by the plan sponsor. Secondly, the 1981 Plan simply does not apply to participants that were never notified of the amendment. ERISA § 102; *Deak v. Masters, Mates and Pilots Pension*, 821 F.2d 572 (11th Cir. 1987)(This Court upholding a lower court's finding that the Trustees' actions were arbitrary and capricious in amending the Plan for the primary purpose of benefiting the union and therefore breached their fiduciary duty under ERISA to act in the sole and exclusive interest of the participants and beneficiaries of the Plan); *Smith v. National Credit Union Admin. Bd.*, 36 F.3d 1077 (11th Cir. 1994)(held employer applied amendments to pension plan retroactively in violation of ERISA); *Frommert*, No. 04-4609; *Depenbrock v. Cigna Corp.*, No. 03-3575 (3rd Cir. 11/10/2004)(reversing summary judgment for corporation finding that an

amendment that had an adverse affect on pension benefits could not be applied retroactively without addressing the notice and disclosure requirements).

2. The Duty of Loyalty and Prudence.

The Corporation complains that the district court erred in its finding that the 95 Hour Rule and the terms of the 1981 Plan were not applicable and by improperly shifting the burden to them to disprove that Mr. Gilley had a 1000 hours of service based on overtime he worked in 1972. [App. Brief at 34]. The Corporation's disputations are misplaced. A fiduciary fails to abide by his/her obligations under ERISA unless decisions are made in regards to the plan "with an eye single to the interests of the participants and beneficiaries." *Reich v. Compton*, 57 F.3d 270, 291 (3d Cir. 1995) ("[T]rustees violate their duty of loyalty when they act in the interests of the plan sponsor rather than 'with an eye single to the interests of the participants and beneficiaries of the plan'" (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir.), cert. denied, 459 U.S. 1069 (1982))); *see, e.g., Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997); *Pilkington PLC v. Perelman*, 72 F.3d 1396 (9th Cir. 1995); *Deak*, 821 F.2d at 580; *Leigh v. Engle*, 727 F.2d 113, 125 (7th Cir. 1984). Based on the evidence and testimony presented the district court did not commit clear error by expecting the Corporation to

disprove competent evidence when the Committee was acting in the sponsor's interest rather than in the interest of plan participants.[33] [R 116, 117, 134].

C. Permissible Equivalencies.

1. The 1000 Hour Rule and the 1976 Plan.

The Corporation further challenges the district court's findings insisting that actual hours of service were never used to determine vesting and accrual under the 1976 Plan, but even if the 1000 Hour Rule is applicable then Mr. Gilley did not *work* 1000 hours.[34] [App. Brief at pp. 36-7]. The Corporation's persistent use of the term "worked" is off point because whether Mr. Gilley "worked" 1000 hours in 1972 was never an issue. *See* Background I(D). The 1976 Plan awarded "one year

[33] The 95 Hour Rule was adopted to lower the administrative cost to the plan sponsor of interfacing the bi-monthly payroll and overtime systems, systems that were already in place and being used to determine vesting and benefit accrual under the 1976 Plan. [App. Brief at p. 35 fn 8; Pltff's Exh. 24 at MON-01-001907 at II].

[34] Although the Corporation disputes that the 1000 Hour Rule was ever used it is the only method described in the 1976 SPD, and all the evidence points to it being the only method used during this timeframe. 29 U.S.C. § 1022(b); 29 C.F.R. § 2520.102-3(l); see also 29 C.F.R. § 2520.102-3(j)(1) (providing that the SPD for an employee pension plan shall include "a statement describing any other conditions which must be met before a participant will be eligible to receive benefits"). [Pltff's Exh. 24 at MON 01-001907 at II A ¶ 1; Pltff's Exh. 24 at MON 01- 003799 to 003801; Pltff's Exh. 10 at MON 01-002716 at 3(c)(i); Pltff's Exh. 8 at p. 41 ¶ 8; Pltff's Exh. 2 at p. 41; R 101 at pp. 313:18 to 317:19]. Furthermore, the benefits group's failure to keep records was a breach of fiduciary duty when the 1000 Hour Rule was the only method of determining hours of service stated in SPD. 29 U.S.C. § 1104(a)(1)(B). [R 101 at pp. 292:2 to 299:9; Pltff's Exh. 10 at MON 01-002716; Pltff's Exh. 24 at MON 01-003797-3801 & MON 01-001906-1908].

of Vesting Service for each calendar year in which [a participant] complete[d] 1,000 or more Hours of Service." [Pltff's Exh. 2 at p. 41]. *See* footnote 11 *supra* & 34 *infra*.

2. Permissible Equivalencies

The Corporation failed to produce payroll and/or overtime records for 1972 claiming that these records were never kept by the *benefits group* despite the fact that the Monsanto Company maintained both a payroll and overtime system. *See* footnote 25 & 34, *supra*. [R 101 at pp. 399:24 to 400: 10; 401:14-19; Pltff's Exh. 24 at MON-01-001908]. Accordingly, the only records available to Mr. Gilley to prove his entitlement to the pension he was promised was a copy of his Social Security Earnings Statement. [Def. Exh. 6; Section I(D).]. ERISA permits the use of an equivalency based on total compensation to determine hours of service. 29 C.F.R. § 2530.200b-3. A permissible equivalency is one that is **not** "reasonabl[y] designed with an intent to preclude an employee or employees from attaining statutory entitlement with respect to eligibility to participate, vesting or benefit accrual." 29 C.F.R. § 2530.200b-3(c)(1)(2). Furthermore, "the use of a permissible equivalency for some, but not all, purposes or the use of a permissible equivalency for some, but not all, employees may, under certain circumstances, result in discrimination prohibited under section 401a of the Code, even though it is permitted under this section." 29 C.F.R. § 2530.200b-3(c)(3).

Because of the excessive amounts of work time incorporated into the rotating shift schedule and the fact that production level employees worked considerable amounts of additional overtime an equivalency adopted after-the-fact by a conflicted fiduciary at the sponsor's suggestion that is not based on the number of hours worked would be unreasonable.[35] [R 116]. Making use of equivalencies based on "working time," which take into account overtime worked as setout under the 1976 Plan, the district court determined that Mr. Gilley's *hours of service* could be determined based on total compensation. *Id.* 29 C.F.R. § 2530.200b-3(d)(1)& (2); *see also* 29 C.F.R. § 2530.200b-3(f). The district court found that Mr. Gilley had 1000 hours of service because he worked at least 870 hours. *Id.* Accordingly, the lower court did not err in its finding that Mr. Gilley had 1000 hours of service in 1972 based on his total compensation. [R 116].

CONCLUSION

The district court correctly applied the law under ERISA and its findings were not clearly erroneous. A clear conflict of interest exists when a fiduciary adopts an equivalency in the sponsor's profit interest causing forfeiture of benefits. The Committee, acting under a clear conflict of interest, arbitrarily and

[35] The standard work year includes all hours for which non-exempt production level employees were compensated for based on their yearly salary. Non-exempt production level employees were required to work additional overtime above their standard work schedule. The standard work year for non-exempt production level employees at the Sand Mountain plant was 2524 hours or 2460 hours if sick leave and personal leave days are excluded.

capriciously decided to apply the terms of a later amendment of the Plan instead of counting overtime hours as hours of service as stated in the 1976 SPD. While ERISA's regulatory scheme permits flexibility in plan design at the conception stage once the plan is in place that same statutory scheme prohibits forfeiture of accrued benefits through later amendments under § 204(g). Under these circumstances ERISA allows the court to fashion "appropriate equitable relief" under § 502(a)(3) including selecting a permissible and non-discriminatory equivalency based on total compensation instead of an equivalency based on periods of employment selected by a conflicted fiduciary. Thus, the court's finding that Mr. Gilley had 1000 hours of service in 1972 based on demeanor and other plain evidence entitling him to restitution of his pension benefit plus interest was not clearly erroneous.

Respectfully Submitted,

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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 by placing seven originals in the United States Mail on this the 13th day of June, 2006. The following counsels of record were also served by United States mail with a true and correct copy on this the 13th day of June, 2006.

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CERTIFICATE OF COMPLIANCE

1. Appellee'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 2002.

2. Appellee's brief complies with F.R.A.P. 32(a)(7)(B) & (C) in that it contains no more than 9,315 words, excluding the sections listed under subsection (B)(iii), and it contains a certificate of compliance signed by counsel.

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