No. _____

In The
Supreme Court of the United States

WENDELL F. GILLEY, an individual
and as class representative,
Petitioner(s),

v.

MONSANTO COMPANY, INC.,
a corporation, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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June 2, 2009

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QUESTION PRESENTED

Whether after *Metropolitan Life Insurance Co. v. Glenn,* 554 U.S. __, 128 S.Ct. 2343 (2008) a non-reversionary trust vitiates the need for consideration of an ERISA plan's conflict of interest as a factor?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Defendants-Appellees and Respondents: Monsanto Company, Inc., Monsanto Company Salaried Employees' Pension Plan, Monsanto Company Employee Benefits Plan Committee, Monsanto Company Employee Benefits Executive Committee, and Pharmacia Corp.

Plaintiff-Appellant and Petitioner: Wendell F. Gilley, as an individual and class representative.

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PETITION FOR A WRIT OF CERTIORARI

Wendell F. Gilley ("Gilley") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated February 3, 2009, is unpublished and is reproduced at App. A 1a-2a.

A prior published opinion of the United States Court of Appeals for the Eleventh Circuit dated June 28, 2007, is officially published in the Federal Reporter at 490 F.3d 848 (11th Cir. 2007) and is reproduced at App. E 26a-47a.

The District Court's Orders, Findings of Fact and Conclusions of Law are unreported and reproduced at App. C, D and F to L.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 3, 2009. (App. A 1a). A petition for panel rehearing and *en banc* review was timely filed and subsequently denied on April 6, 2009. (App. B 4a). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of

rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. §§ 1001 *et seq.*

The Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, 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 409;
> >
> > (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the plan;

29 U.S.C. §§ 1132(a)(2) & (3).

STATEMENT OF THE CASE

I. INTRODUCTION

ERISA was enacted in 1974 to regulate employer-sponsored employee benefits to ensure that employees receive promised benefits in accordance with the terms of their plans. 29 U.S.C. §§ 1001 *et seq*. ERISA § 1001(b) declares that 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). While ERISA does not mandate that employers establish employee pension plans, 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. *See* 29 U.S.C. § 1104(D). Pension plans must be maintained and 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.

II. FACTUAL BACKGROUND

In 1941 Monsanto Company, Incorporated "Old Monsanto" established a defined benefit retirement pension plan for its employees.[1] Beginning in 1951 Old Monsanto amended the plan every five years *as to certain groups of employees*[2] identifying each amendment as a separate plan: the 1956 plan, 1961 plan, 1966 plan, 1971 plan, 1976 plan, 1981 plan, the 1986 plan etc. [R 64 at App 1 Exh B p. 42]. Petitioner worked for the chemical division of Old Monsanto from August 30, 1972 until he was laid off on March 31, 1981. (App. H 56a fn 1). Petitioner, like other production level employees, was a participant in the Monsanto Salaried Employe(e)s' Pension Plan as a salaried nonexempt employee subject to overtime provisions under the Fair Labor Standards Act of 1938 "FLSA".[3] 29 U.S.C. §§ 201 et seq. [R 70 ¶ 2]. Old Monsanto closed the North Alabama plant where Gilley worked in February 1981 approximately nine and a half years after production at the plant began.

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[1]A plan refers to a written instrument, a benefit plan, and here an "account" in a collective trust. IRS Publication 575 at http://www.irs.gov.

[2]Old Monsanto amended the plan every five years prior to ERISA to either cover or exclude "working class" hourly employees.

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

The 1976 plan, which was the plan in effect when the plant closed, was the first ERISA plan offered by Old Monsanto to its employees. (App. E at 28a, 29a fn 3). Under the 1976 plan a participant was credited with service for both pre-ERISA years of service as well as years of service under the 1976 plan according to ERISA's 1000 Hour Rule, including a year in the event of a layoff.[4] 29 U.S.C §§ 1053(a)(2)(A) & (C); *see also* 29 C.F.R. § 2530.200b-2. Records maintained by Old Monsanto reflected that Gilley 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. [Hearing of August 2005 Exhibit "HExh" 17]. Old Monsanto's management promised Gilley a pension when the plant closed.[5] [R 35].

After Gilley and others situated similarly to him were laid off, Old Monsanto amended the 1976 plan and continued it as the 1981 plan without prior notice to participants pursuant to 29 U.S.C. § 1054(h). [R 182-14, 168-23]. Old Monsanto made the effective date of the amendment January 1, 1981, but the record reflects it was not adopted until sometime after the plant was closed, probably in 1982, pursuant to 29 U.S.C. § 1082(c)(8). *Id.*

Critical to these proceedings is the reorganization of Old Monsanto between 1997 and

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[4]The 1981 amendment excluded credit for overtime.

[5]New Monsanto's plan administrator testified that eligibility is determined when former employees apply for benefits. [R 101 at 343:16-18].

2003 into its three separate business lines: the chemical business, the agricultural business, and the pharmaceutical business. [R35]. In 1997, Old Monsanto spun off its chemical business to its shareholders, officers and executives in the form of a stock dividend, while renaming the spinoff as Solutia, Inc. "Solutia". *Id.* at ¶ 4. Between 1999 and 2002, Old Monsanto, through spinoffs and mergers, became "Pharmacia Corporation" which encompassed the pharmaceutical business. New "Monsanto Company" retained the agricultural and life science business. After the split, Solutia, Pharmacia, and New Monsanto Company each established "cash balance" pension plans from assets formerly held in trust by Old Monsanto.[6] As a result of the spinoff, in 1997, Solutia acquired 70% of all the unfunded pension liability of the Old Monsanto chemical business including liability for Gilley's pension. [R 168-26, 170-5].

In 2001 Gilley called a Solutia benefit center at a plant in Decatur, Alabama to inquire about his pension benefit. [R 101 at 146]. Petitioner was initially told he would receive his pension, but he was later told he needed to contact Pharmacia. [R 101 at 146]. When he did so, Pharmacia advised Gilley that he was not entitled to a pension "*at this time*". [HEx. 29]. In early 2003 Gilley was notified by New Monsanto that he was ineligible for a pension altogether under the 1981 amendment that was adopted after his layoff. [HExh. 30].

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[6]Under a cash balance plan the company establishes a hypothetical balance in a virtual account for each participant. *Drutis v. Rand McNally & Co.*, 499 F.3d 608 (3rd Cir. 2007).

Petitioner filed an administrative appeal with New Monsanto the spinoff entity that denied his pension under the 1981 amendment. [HExh. 32]. On December 17, 2003, Solutia filed for bankruptcy protection in the United States Bankruptcy Court Southern District of New York seeking relief from liability for promised benefits assumed from Old Monsanto as well as other assumed liabilities.[7] *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB).

On March 17, 2004, Petitioner filed a class action suit in the United States District Court for the Northern District of Alabama. *Gilley v. Monsanto Company, Inc.* Case No. 04-0562. [R 1]. In support of a 12(b)(6) motion to dismiss Respondents filed a document that was mislabeled as the 1976 plan[8]. [R 14; 19]. When Respondents admitted filing a mislabeled document that was not the 1976 plan, the complaint was amended to specifically bring individual and representative claims under 29 U.S.C. §§ 1132(a)(2) & (a)(3) for breach of fiduciary duty and violation of 29 U.S.C. § 1054(g)(1), 29 U.S.C. § 1140, and 29 U.S.C. § 1132(c) for: filing a misidentified plan document; closing the plant and amending the plan in a discriminatory manner; amending the plan to divest "working class" employees who were on

[7]Solutia assumed liability for unfunded pension benefits but not the company name adding to the confusion over liability for promised pension benefits.

[8]New Monsanto's plan administrator produced the same mis-identified document during the administrative appeal concealing the existence of the actual 1976 plan that credited service for overtime hours. [HExh. 24; R 68].

layoff status of their accrued vested benefit; failing to notify participants of changes to the plan; promising employees a pension only to intentionally deny benefits twenty plus years later, and; failing to act in the interests of plan participants over the interests of shareholders, officers and other HCEs.

Respondents opposed class certification and recast the entire litigation as a single claim for benefits reviewed under a deferential review standard; and, over Petitioner's objection, demanded a limited hearing based on a stipulation that Gilley was vested if he had 1000 hours of credited service in 1972. [R78-81, 120, 132; App. J 64a-75a]. Finding the benefit decision was unreasonable and the result of a clear conflict of interest, the District Court permitted Petitioner to introduce social security records and substitute a non-discriminatory equivalency based on work time that credited hours of service for overtime.[9] (App J; *see also* App. F at 49a and App. H 56a-60a citing 29 C.F.R. §§ 2530.200b-3(a), (b) & (c).

III. DECISION OF THE ELEVENTH CIRCUIT

Despite their stipulation, Respondents appealed the award of Petitioner's accrued benefit, claiming the District Court's award of benefits constituted legal and not equitable relief allowable under 29 U.S.C. § 1132(a)(3) based on this Court's holding in

[9]Abstention, remanding to an administrator, is not an option when the decision is the result of an actual conflict of interest, the reviewing court must assume equitable jurisdiction.

Great-West Life & Annuity Insurance Company v. Knudson, 534 U.S. 204 (2001). [R 135]. While the first appeal was in briefing, this Court issued its ruling in *Sereboff* clarifying that an equitable claim for benefits was not a claim for monetary relief *per se*. *Sereboff v. Mid Atlantic Medical Serv., Inc.*, 547 U. S. 356 (2006).

Finding a lack of finality pursuant to Rule 54(b), the Eleventh Circuit Court of Appeals nonetheless found appellate jurisdiction under 28 U.S.C. § 1292(a)(1) based on the injunctive nature of the order.[10] (App. E 35a-36a). Relying on *Buckley v. Metropolitan Life,* 115 F.3d 936, 939-40 (11th Cir.1997) ("*Buckley*"), a welfare benefit case, the Court held as a matter of law that there is never a conflict of interest when "benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense". (App. E 38a). The Court, after finding no conflict of interest as a matter of a law, declared the District Court's findings clearly erroneous and vacated the judgment. (App. E 38a-39a). The Eleventh Circuit found the *ex post facto* 1981 amendment adopting a discriminatory equivalency that caused forfeiture when applied retroactively did not implicate ERISA's "anticutback" rule and later amendments could be applied to an employee who had not completed ten years of service without violating 29

[10]Recognizing jurisdiction based on the equitable nature of the lower court's order the Eleventh Circuit applied a legal standard of review holding there is never a conflict of interest when benefits are paid out of trust despite the lower court's finding of a clear abuse of discretion *ab initio*. (App. E).

U.S.C. § 1053.[11] (App. E at 43a-46a). The Eleventh Circuit remanded to the District Court in the second instance for consideration of Petitioner's other claims for equitable relief. (App. E 46a-47a).

Petitioner filed a petition for certiorari. Respondents responded the appeal was interlocutory, Petitioner's claims for breach of fiduciary duty were never reached, there was no split in the circuits regarding the proper standard of review for claims brought under 29 U.S.C § 1132(a)(3), and the decision was not contrary to this Court's opinion in *Central Laborer's Pension Fund v. Heinz*, 541 U.S. 739 (2004)("*Heinz*") or *Varity Corp. v. Howe*, 516 U.S. 489 (1996)("*Varity*")(employer scheme to deny welfare benefits). This Court denied the petition on January 14, 2008. *Gilley v. Monsanto Co., Inc.,* 490 F.3d 848, (11th Cir 2007), *cert denied*, 128 S. Ct. 1086 (U.S. January 14, 2008)(No. 07-643).

On remand, the District Court found Petitioner lacked standing based on the law of the case doctrine and the Eleventh Circuit's finding Petitioner was not vested in the retirement plan when he was terminated; and therefore, he was not a "participant" in the Monsanto Company Salaried

[11]New Monsanto's plan administrator claimed there were no time records for this time frame, but during the pendency of the first appeal personnel at the Solutia plant in Decatur, Alabama shredded records from the Sand Mountain plant stored there since the plant closed in 1981. [R 170].

Employees' Pension Plan.[12] (App. D 20a and 24a & App. C at 9a and 10a at fn 5); *but see LaRue v. DeWolff, Boberg & Assoc., Inc.* 552 U.S._____, 128 S.Ct. 1020, 1026 fn 6 (February 2008)("*LaRue*")(Rejecting motion to dismiss after the petition for certiorari was granted recognizing a former participants' right to bring claims for breach of fiduciary duty under 29 U.S.C. § 1132(a)(2) if there is a colorable claim).

The Eleventh Circuit affirmed the District Court despite a change in the law in the circuit effected by this Court's decision in *Metropolitan Life Insurance Company v. Glenn,* _____554 U.S. _____, 128 S.Ct. 2343 (2008) cautioning reviewing courts not to disregard structural conflicts of interest, Petitioner's submission of additional undisputed evidence of Respondents' abuse of discretion and scheme to convert assets of the trust into nonqualified benefits for top-hats, and proof of the manifestly unjust result.[13] (App. A 2a). *Metropolitan Life Insur. Co. v. Glenn,* 554 U.S. ___,

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[12]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). Respondents never disputed Petitioner was a participant or that he was vested under the 1976 plan if he had 1000 hours of service for 1972. (App. J); [R 70 ¶ 2].

[13]POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 218 at 368 (1994) ("The exclusive equitable jurisdiction, or the power of courts to adjudicate upon the subject-matters coming within that jurisdiction, exists independently of the adequacy or inadequacy of the legal remedies obtainable under the circumstances of any particular case.").

128 S.Ct. 2343 (June 19, 2008)("*MetLife*"); *Lanfear v. Home Depot, Inc.,* 536 F.3d. 1217 (11th Cir. 2008) overruling *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980); *LaRue*, 128 S. Ct. 1026 fn 6. A petition for rehearing and *en banc* review was denied April 6, 2009. A timely filed motion to stay the mandate and a motion to recall the mandate were denied on April 28, 2009.

REASONS FOR GRANTING THE PETITION

The questions presented in this petition for writ of certiorari raise important issues concerning ERISA's promised protection against forfeiture of vested pension benefits and conflicts of interest when employers administer pension plans. The current state of ERISA jurisprudence in the Eleventh Circuit has reduced Congress' promise of protection of promised benefits to a nullity. Instead of protecting promised benefits, ERISA is being used here as a means of causing a forfeiture of vested benefits belonging to "working class" participants at the company's discretion. (App. A-L).

In *Bruch,* this Court recognized that parties were free to incorporate narrower standards of review into their agreements, but refused to incorporate an arbitrary or capricious standard wholesale into ERISA. *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 109, 115 (1989) ("*Bruch*"). Although never addressing the standard of review for claims brought under 29 U.S.C. § 1132(a)(2) & 29 U.S.C § 1132(a)(3), this Court has made it clear

that plan sponsors are not entitled to absolute discretion. Still, there remains confusion over the availability of a participant's right to equitable relief among the circuits. This Court should grant the petition to clarify that participants who have been denied their beneficial interest in property held in trust are entitled to bring claims against the employer-administrator for "appropriate equitable relief" for breach of fiduciary duty and violation of ERISA when "but for" the trustees' self-interested abuse of discretion participants would be entitled to their accrued benefit.

I. REVIEW IS WARRANTED TO RESOLVE A SPLIT IN THE CIRCUITS AS TO WHETHER THE EXISTENCE OF A NON-REVERSIONARY TRUST VITIATES THE NEED FOR CONSIDERATION OF AN ERISA PLAN'S CONFLICT OF INTEREST AS A FACTOR.

Prior to *MetLife* the Eleventh, Third, and Fourth Circuits had held the structural conflict of interest was not a factor to be considered when benefits were paid out of a non-reversionary trust. *Buckley,* 115 F.3d at 939-40 (holding where the company neither incurs a direct expense in paying benefits nor directly profits from denying or discontinuing benefits, there is no conflict of interest); *Post v. Hartford Insur. Co.*, 501 F.3d 154, 164 n.6 (3d Cir. 2007)("when the employer both funds and administers the plan, but pays benefits out of a fully funded and segregated ERISA trust fund rather than its operating budget, no structural conflict of interest is created"); *Vitale v. Latrobe Area Hosp.*, 420 F.3d 278, 282-83 (3rd Cir.

2005)(heightened version of abuse of discretion standard was not applicable because plan benefits were paid out of a separate trust fund); *de Nobel v. Vitro Corp*. 885 F.2d 1180, 1191-92 (4th Cir. 1989)(no conflict of interest from an employer-funded plan where plan funds were held in a trust because there is no direct and immediate expense to the employer from the payout of benefits).

The Ninth, First, and Eighth Circuits, in light of this Court's decision in *MetLife,* have now declared this line of cases no longer applicable because the structural conflict of interest must be considered as a factor that cannot be ignored. *See Burke v. Pitney Bowes Inc. Long-Term Disability*, 544 F.3d 1016, 1026 (9th Cir. 2008)(remanding for consideration of conflict of interest); *Chronister v. Unum Life Ins. Co. of America*, No. 07-3552, 2009 U.S. App. LEXIS 9033 (8th Cir. April 30, 2009)(judgment for insured based on abuse of discretion); *Denmark v. Liberty Life Assur. Co.*, 2009 U.S. App. LEXIS 9825 (1st Cir. May 6, 2009)(remanding for consideration of conflict of interest).

The Eleventh Circuit remains steadfast in its position that when benefits are paid out of a non-reversionary trust there is never a conflict of interest. *See e.g., Gilley v. Monsanto Co., Inc.*, 490 F.3d 848, 856 (11th Cir. 2007)(reversing an award of equitable relief based on the lower court's finding of an actual conflict of interest because benefits were paid from a non-reversionary trust and affirming dismissal on remand); *White v. Coca-Cola*, 542 F.3d 848 (11th 2008)(relying on *Gilley*);

Townsend v. Delta Family-Care Disability and Survivorship Plan, No. 08-11340, 2008 U.S. App. LEXIS 21547 (11th Cir. Oct. 8, 2008).

If, as the Eleventh has held, the arbitrary and capricious standard applies without consideration of conflict to all claims because benefits are paid from a trust then *a fortiori* the highly deferential standard of review is the only standard of review in pension cases. *Contra Bruch*, 489 U.S. at 109 (rejecting administrative law analogy and refusing wholesale incorporation of the highly deferential standard of review).

Not all benefits, not all claims, not all funds held in trust, and not all trusts are created equal. All qualified pension plans covered under ERISA must by statute hold funds in a non-reversionary trust for the benefit of HCEs and nonHCEs alike. *See* 26 U.S.C. §§ 401(a)(2) & (4); 26 C.F.R. §§ 1.401-2. . "A trust forming part of a defined benefit plan shall not constitute a *qualified* trust under [26 U.S.C. § 401] 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). "In a trust there is a separation of interests in the subject matter of the trust, the beneficiary 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). 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.

Petitioner and other "working class" former employees who have met the service requirements under the plan are the cestui que trust as are HCEs. 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. 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 violating ERISA when it takes actions to cause forfeiture of "working class" participants' property in its self-interest. 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; *see also* (App. J).

This Court recognized as early as 1823 that not even a revolution could cause forfeiture of property held in trust. *The Society of the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven et al.*, 21 U.S. 464 (1823). Notwithstanding that ruling, the Eleventh Circuit has accomplished that which the Vermont legislature and a revolution could not— the forfeiture of property held in trust.

Id. Finding jurisdiction over the appeal based on equitable jurisdiction the Court deemed Petitioner's individual claim under Section 502(a)(3) for equitable relief to be a legal claim vacating the award of Petitioner's accrued benefit. *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"); *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"); *Gilley v. Monsanto Company, Inc.,* 490 F.3d at 861 (reversing lower court's award of equitable relief under Section 1132(a)(3) based on actual conflict of interest and unreasonable decision finding claim was a legal claim because defined benefit pension plan was freely amendable at the company's discretion regardless of ERISA's vesting standards and prohibition against forfeiture). In a subsequent action, the Eleventh Circuit recognized that relief involving a money award based on a fiduciary's equitable lien is not a legal claim. *Administrative Comm. for Wal-Mart Stores, Inc. v. Horton,* 513 F.3d 1223 (11th Cir. 2008)(court recognizing a company's right to "appropriate equitable relief" and restitution under Section 1132(a)(3) under insurance subrogation clause)*; Sereboff,* 547 U. S. at *13 (recognizing equitable lien by agreement of parties on identifiable fund).

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT IN THE CIRCUITS CONCERNING THE PROPER STANDARD OF REVIEW TO BE APPLIED IN SUITS BROUGHT UNDER ERISA SECTION 502(a)(3).

The First, Second, Fifth, Seventh, Eighth, and Ninth Circuits have all applied a *de novo* standard of review in suits for breach of fiduciary duty and violation of ERISA, reasoning suits of this nature involve questions of law and statutory interpretation properly resolved by courts. *See e. g. La Rocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Coan v. Kaufman*, No. 04-5173 (2nd Cir. 2006) citing *Burke v. Kodak Retirement Income 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).

Separate panels of the Sixth Circuit applied a *de novo* standard of review and an arbitrary or capricious standard to claims brought under Section 502(a)(3). *See Simpson v. Ernst & Young,* 100 F.3d 436 (6th Cir. 1996)(applying *de novo* standard of review) citing *Schwartz v. Gregori*, 45 F.3d 1017, 1021 (6th Cir.), certiorari denied, 116 S. Ct. 77 (1995); *but see Hunter v. Caliber System*, 220 F.3d 702 (6th Cir. 2000)(expressly rejecting the *de novo* standard of review).[14]

A. The Employer-Administered Plan And The Conflict of Interest.

Critical to these proceedings is the Respondents' conflict of interest[15] and the reorganization of Old Monsanto into its three separate business lines and the division of assets from Old Monsanto's trust

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[14]The Third Circuit in *Jordan v. Federal Exp. Corp.*, 116 F.3d 1005 (3rd Cir. 1997) recognized that the deferential standard "only applies to actions brought under § 1132(a)(1)(B) and not those brought under § 1132(a)(3)." *Jordan*, 116 F.3d at fn 8; *Smith v. Sydnor*, 184 F.3d 356 (4th Cir. 1999)(discussing circuit split in regards to whether exhaustion is required under ERISA § 502(a)(3))

[15]The District Court in the first instance stated "[a] significant issue with regard to the partial final judgment may be whether the following statement of the defendants, if correct in some instances, has application to a defendant with a conflict of interest. "Although federal regulations recognize a permitted equivalency that uses 870 Hours of Service as the threshold, the regulation is clear that it is for the Plan, and not individual participants, to elect the equivalency of its choice. *See* C.F.R. § 2530 200b-3(a)." (App. F 49a).

into different "cash-balance" plans.[16] Solutia, Pharmacia, and New Monsanto Company's "cash balance" benefit plans were funded from assets formerly held in Old Monsanto's Trust. Because Old Monsanto promised retirees life time medical benefits and because Old Monsanto did not report terminated "working class" participants with an entitlement to a separated deferred vested accrued benefit the assets held in trust were not sufficient to cover all promised benefits.[17] [R 167-170].

Solutia filed a class action seeking a declaratory judgment to establish retirees' rights to health and pension benefits excluding participants of the 1976 plan. *Solutia, Inc. v. Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV Northern District of Florida Pensacola Division. A settlement was reached with retirees receiving higher pension benefits and lifetime medical benefits resulting in Solutia's "cash-balance" plan being 70% underfunded.

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[16]"[T[he division of an empire works no forfeiture of rights previously acquired." *The Society of the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven et al.* 21 U.S. at 473.

[17]Although ERISA requires it, Old Monsanto did not report "working class" participants who it terminated with a deferred vested accrued pension benefit on the plan's annual returns or provide them with annual benefit statements. [R 68; 167]. Because Respondents stipulated Petitioner was vested if he had 1000 hours of credited service the record reflected only that the 1981 Plan was adopted after Gilley and others were on layoff, after April 1, 1981, and that the plan administrator reported the amendment did not have an effect on *any* participant's accrued benefit, and accordingly, the significance of the conversion to "cash balance" plans was never raised. (App. J); [HEx.12].

Solutia then filed for bankruptcy protection allegedly seeking to reject the separation agreement and to discharge liability for pension benefits. *In re: Solutia Inc et al.* Case No. 03-17949 (PCB) Bankruptcy Court Southern District of New York. After the Eleventh Circuit published its decision Solutia, Pharmacia, New Monsanto, and the *Forsberg* Retiree Committee entered into new agreements wherein New Monsanto and Pharmacia reacquired an ownership interest in exchange for financial assistance to Solutia to exit bankruptcy. [R 177-2]. A motion to join Solutia as a necessary party was denied as moot by the District Court in the second instance when the case was dismissed for lack of subject matter jurisdiction.[18] (App. C fn 10 at 14a & App. D 23a-24a).

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. *Id*. Funds for both nonqualified and qualified plans were held in a collective trust under a Master Trust

[18]New Monsanto's plan administrator claimed there were no pay records for this timeframe, but during the pendency of the first appeal personnel at the Solutia plant in Decatur, Alabama shredded records from the Sand Mountain plant stored there since the plant closed in 1981. [R 170].

Agreement. [R 162-2, 167-22 at p. 10]. The non-reversionary trust is nothing more than a minimum balance bank account with tax advantages. 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. Old Monsanto's trust did not constitute a qualified trust under 26 U.S.C. § 401 because forfeitures were applied to increase the benefits HCEs received under the plan. 26 U.S.C. § 401(a)(8).

2. <u>Legal Pitfalls</u>

The Eleventh Circuit's ERISA jurisprudence effectively closes the federal courthouse door to ERISA participants 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); *Katz v. Comprehensive Plan of Group Insur.,* 197 F.3d 1084 (11th Cir. 1999)(claims for breach of fiduciary duty under Section 1132(a)(3) are barred under either a theory of issue or claim preclusion when a claim under 1132(a)(1)(B) is not arbitrary or capricious) and *Gilley v. Monsanto Company, Inc.,* 490 F.3d 848 (11th Cir. 2007)(overturning District Court's finding of an actual conflict of interest because pension benefits are paid out of

trust mandating application of the arbitrary and capricious standard as a matter of law). In other words, in the Eleventh Circuit all claims under Sections 502(a)(2) & (3) are either nonexistent or a matter of the defendants' discretion.[19] *But see* RESTATEMENT (SECOND) OF TRUSTS, § 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).

The employer-administrator's self-interest is the *sin qua non* of protracted ERISA litigation because participants, entitled to only "make-whole" relief, have no incentive to litigate. Respondents, armed with precedent supporting forfeiture, can deny all "working class" participants' of the 1976 plan their separated deferred vested accrued benefit. (App. E & J). *Compare e. g. Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979) citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois*

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

Foundation, 402 U. S. 313, 326-8 (1971)(holding the doctrine of mutuality no longer valid and condoning the use of defensive collateral estoppel or *res judicata*) and *Heptinstall v. Monsanto Company, Inc.* et al. 4:06-cv-01564 Northern District of Alabama Middle Division (dismissed on ground of defensive collateral estoppel, appeal pending).[20] By ensuring forfeiture under the 1976 plan Respondents are guaranteed forfeiture of all "working class" participants' vested accrued benefits because future claims for "equitable relief" brought by participants terminated under later amendments will be easily cutoff by time limitations. *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); [R 180]; *but see In re: Unisys Corp., Retiree Medial Benefit Litigation*, 242 F.3d 497 fn3 (3rd Cir. 2001)(Mansmann, Circuit Judge concurring in part). By terminating "working class" participants' right to their vested accrued benefit forfeited assets formerly held in Old Monsanto's Trust are available to be paid out as nonqualified benefits to executive and officers of the company, i.e. trustees. *See Miller v. Pharmacia Corp.*, 4:04-cv-00981 RWS, Eastern District of Missouri-Eastern Division; *Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV.

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[20]The seven *Heptinstall* plaintiffs just recently became eligible for an early retirement benefit at fifty-five years of age. Pharmacia, Solutia, and New Monsanto Company no longer inform participants of the status of their pensions when benefit inquiries are made. *Heptinstall* at Doc. 112-3.

III. REVIEW IS WARRANTED TO CLARIFY WHETHER THE HIGHLY DEFERENTIAL STANDARD OF REVIEW HAS BEEN INCORPORATED WHOLESALE INTO ERISA FORECLOSING THE PROMISE OF READY ACCESS TO FEDERAL COURTS AND EQUITABLE JURISDICTION.

This Court has presented reviewing courts with mixed signals, resulting in a split in the circuits regarding the availability of "appropriate equitable relief" under Section 1132(a)(2) and Section 1132(a)(3) and the scope of discretion afforded defendants in ERISA actions. Recently, in *MetLife,* this Court urged reviewing courts to consider the structural conflict of interest as a factor when reviewing benefit decisions without setting hard and fast rules.[21] *Metlife*, 128 S. Ct. 2343. However, in *LaRue,* Chief Justice Roberts cautioned reviewing courts to consider claims for breach of fiduciary duty and violation of ERISA as discretionary claims citing the need for judicially created safeguards such as exhaustion. *LaRue,* 128 S. Ct. at 1028 (Roberts, Chief Justice concurring in the opinion).

Equally important, if not more so, is the need for reviewing courts not to recast proper claims for equitable relief under Section 1132(a)(2) & (3) as mere discretionary claims. (App. E & J). Unregulated pension plans may easily become

[21]Justice Scalia dissenting in *MetLife* stated unreasonableness *alone* suffices to establish an abuse of discretion." *MetLife*, 128 S. Ct. at 2350 (Scalia, J. dissent).

Ponzi schemes when, at maturity, payments for promised benefits exceed incoming payments by current participants resulting in the pension plan becoming severely underfunded.[22] When a pension plan reaches maturity in a state of underfunding, trustees of the plan— officers, executives, shareholders, and other HCEs of the company who act as "trustees" of the plan –- have a strong incentive to cast off liability to the least economically advantaged participants. Companies enjoying super preemption and a uniform federal common law can engineer a forfeiture of "working class" participants' accrued benefits, while HCEs are able to recover all of their benefits when the highly compensated plan administrators enjoy near absolute discretion.

Recognizing ERISA's explicit paramount goal of protecting promised benefits, and the fact that a single determination can have defensive collateral estoppel effect in subsequent legal actions, should reviewing courts afford ERISA defendants who have abused their discretion *carte blanche* control over litigation, freely permitting them to recast proper breach of fiduciary duty and violation of ERISA claims as discretionary claims for legal relief? (App. J). *Compare Miller,* 4:04-cv-00981 (court, citing ERISA's prohibition against the retroactive denial of benefits, awarded millions to Old Monsanto's former top executives and

[22]This is especially true in situations where the plan administrator fails to report participants of the plan who are terminated with vested accrued benefits as occurred in the instant case. [R 167-169].

defendants settled for millions of dollars more with no appeal);[23] *Forsberg*, 98-cv-00237-3 RV and 99-00168-cv-3-RV and *In re*: *Solutia Inc et al.* Case No. 03-17949 (PCB) (declaratory action and settlement with current retirees receiving higher pension benefits and lifetime medical benefits with the company paying all representation fees); *Gilley,* 04-cv-0562 (class action for "equitable relief" recast as discretionary claim for benefits establishing precedent for forfeiture), and; *Heptinstall,* 4:06-cv-1562 (dismissed under Rule 12(b)(6) on ground of issue or claim preclusion based on *Gilley* without discovery and without addressing motion for sanctions for destruction of evidence).[24]

The *Miller* and *Forsberg* litigation stand in stark contrast to the results of the instant action where Respondents, after stipulating Petitioner was vested if he proved he had performed 1000 hours of service for 1972, nonetheless, rescinded their stipulation after the District Court found in Gilley's favor; Respondents then appealed the award of Petitioner's accrued benefit. *Id;* (App. J). Old Monsanto's trust, which formed part of the

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[23]In *Miller* plaintiffs were top executives and employees of Old Monsanto who went to work for Solutia who filed an action for nonqualified benefits when Solutia entered bankruptcy protection. Doc. 231.

[24]Counsel for the class of "working class" participants has no arrangement with Respondents. "Working class" participants terminated from the Sand Mountain plant separated with a deferred vested accrued benefit of approximately two hundred dollars per month payable at retirement age. [R 64 Exh B App 1].

defined benefit plan, was not a qualified trust under IRS regulations because forfeitures inured to the benefit of the *Miller* plaintiffs and *Forsberg* retirees increasing their pension benefits. 26 U.S.C. § 401(a)(8); 26 C.F.R. §§ 1.401(a)(4)-1(b)(2),(3),(4),(10),(11).

The dual statutory design of pension regulation provides ample rewards for companies that choose to provide benefit plans and no threat of meritless suits if procedural safeguards are followed. In addition to the judicially created doctrine of exhaustion there is also statutory protection under ERISA § 502(h) and procedural safeguards incorporated into the Federal Rules of Civil Procedure "FRCP" to terminate meritless suits. Contrary to the often spouted cry from companies that they need protection, the real question here is whether there is adequate judicial oversight to prevent sponsors of pension plans from effectively "taking" the property of "working class" participants, creating Constitutional concerns. Opening the courthouse door to participants seeking a review of an improper denial under the court's equitable jurisdiction will promote compliance with ERISA's mandates and reduce the number of improperly motivated suits filed by self-interested benefit providers in their profit interest.

Petitioner, as an individual and class representative, properly brought claims for violation of ERISA and breach of fiduciary duty

under the court's equitable jurisdiction.[25] [R 35]. In equity, a lien upon or interest in property created by contract or by contribution to its value by labor or material is distinguishable from a legal claim, and a right in equity can be established by statute if the parties assent to abrogation of their Seventh Amendment right to a jury trial.[26] *Scott v. Neely*, 140 U.S. 106, 109-10 (1891). Federal Rules of Civil Procedure 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.

Congress expressed a clear intent to provide participants with a right to "equitable relief" when there has been a breach of fiduciary duty, when the plan or ERISA has been violated, and to obtain equitable relief to redress such violation or enforce ERISA or the plan. 29 U.S.C. §§ 1132(a)(2) & (3). By voluntarily providing benefit plans ERISA defendants assent to plenary suits in equity for

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[25]Petitioner stressed that his claims were proper under Section 1132(a)(2) and (3) because he was not entitled to his accrued benefit without a finding that ERISA had been violated and/or there had been a breach of fiduciary duty. (App. J 67a).

[26]Respondents moved to strike Petitioner's jury demand based on the equitable character of Petitioner's claims, but then argued the court's review was limited to a discretionary claim for benefits on the administrative record. (App. J) & [R69, 77-81].

make-whole relief. *Scott,* 140 U.S. at 1013. Contractual discretion is reserved for qualified plans that are in complete compliance with ERISA's mandates at inception and in operation. Nothing in the ERISA statute permits defendants *carte blanche* discretion to recast equitable claims under Section 502(a)(2) & (3) as discretionary claims. 29 U.S.C. §§ 1132(a)(2) & (3)*; see also* (App. J). Although reviewing courts in ERISA cases initially applied the arbitrary or capricious standard of review taken from the administrative law realm, this Court made it clear in *Bruch* this standard is not to be incorporated wholesale into ERISA. *Bruch*, 489 U.S. at 109. Reviewing courts should not afford deference to employer-administrators who have reserved discretion in their own self-interest when there has been an abuse of discretion. *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). Permitting broad deference to ERISA defendants once procedural safeguards have been met strays from trust law concepts of strict scrutiny of conflict-tainted transactions. The economic realities of litigation are stacked against "working class" participants. Fortune 500 companies such as Respondents with near unlimited resources can litigate indefinitely, eliminating *de facto* the right to redress ensuring the 'taking' of property. Respondents, by abusing the discretion afforded under *Bruch* and ignoring ERISA, converted an alleged qualified defined benefit pension plan into a tax-free Ponzi scheme for the benefit of executives,

officers, and shareholders of the company. [R 167-170]. When the "existing distribution of economic benefits is not just, then the results of the private contracting may reflect not the voluntary arrangement that maximizes the joint interests of both parties, but the imposition of exploitative terms by the more powerful party on the more vulnerable party." Donald Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law: With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MARYLAND L. REV. 563 (1982).

The Eleventh Circuit strayed far from general trust principles of scrutinizing a conflict-tainted decision based on a legal fiction. The highly deferential standard of review without judicial scrutiny invites abuse of discretion allowing unscrupulous trustees to manipulate benefit plans in their own self-interest. Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony Of ERISA*, HASTINGS LAW JOURNAL, Vol 61 No. 2 2009. The culminating effect of the Eleventh Circuit's decision is the wholesale incorporation of the highly deferential standard of review into all of ERISA, inviting the unregulated conversion of pension plans on a wide scale basis. This Court should grant the petition and clearly define the scope of discretion afforded conflicted trustees when there has been a clear abuse of discretion.

CONCLUSION

Petitioner, Wendell F. Gilley, as an individual and class representative, for all the reasons set forth above respectfully submits that the writ of certiorari should be granted.

Respectfully Submitted,

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