No. __________

In The

Supreme Court of the United States

WENDELL F. GILLEY, an individual
and as a class representative, *et al.*

Petitioners,

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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QUESTION PRESENTED

Whether fiduciary and co-fiduciaries' fraud against c*estuis que trust* is sufficient "bad faith" to constitute an abuse of discretion so as to warrant "equitable relief" by federal courts where failure to do so will cause "irreparable harm", the balance of the hardships favor a remedy in equity, there is no remedy at law, and the public's interests will be served by permanent injunctions and other orders to do equity?

Whether the district court retains jurisdiction to render granted relief effective and to ensure continuing performance where ERISA defendants answer in equity, enter into an agreement to do equity, the decree called for continuing performance of the agreement, and an appeal to declare the action to be one at law was improvident?

Whether the Employee Retirement Income Security Act, as applied, is unconstitutional because there exist a lack of "intelligible guidelines" to ensure due process of law, access to the courts to redress grievances, and equal protection?

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:

Petitioner(s): Wendell F. Gilley Individually and on Behalf of All Others Similarly Situated and pursuant to Rule 12.4 Robert H. Heptinstall, Wendell E. Sims, James L. Collins, Jacky T. Blackwell, Thomas F. Campbell, J. Russell Newman, Fred D. Works, and Billy J. Wright,

Respondents: "New" Monsanto Company, Inc., a successor corporation of "Old" Monsanto Company, Inc. ("Old" Monsanto), Pharmacia Corporation, a corporation a. k. a. "Old" Monsanto, "Old" Monsanto Company Salaried Employees' Pension Plan, a defined benefit pension plan of "Old" Monsanto, "Old" Monsanto Company Employee Benefits Executive Committee, fiduciaries of the "Old" Monsanto plan, and "New" Monsanto Company Employee Benefits Plan Committee, a plan administrator and co-fiduciary of the "Old" Monsanto plan (collectively Monsanto) and pursuant to Rule 12.4 Solutia Inc., a successor corporation of "Old" Monsanto and co-fiduciary of the "Old" Monsanto plan, Solutia Inc. Employees' Pension Plan, a successor "cash balance" plan of "Old" Monsanto's defined benefit plan (collectively Solutia).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Wendell F. Gilley Individually and on Behalf of All Others Similarly Situated and pursuant to Rule 12.4 Petitioners Robert H. Heptinstall, Wendell E. Sims, James L. Collins, Jacky T. Blackwell, Thomas F. Campbell, J. Russell Newman, Fred D. Works, and Billy J. Wright, petition for a writ of certiorari to review the opinions and judgments of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

A prior published decision by the United States Court of Appeals for the Eleventh Circuit issued on June 28, 2007, which is officially published in the Federal Reporter at 490 F.3d 848 (11th Cir. 2007) is reproduced in Appendix H.

Unpublished opinions of the United States Court of Appeals for the Eleventh Circuit and the Northern District of Alabama Middle Division are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

On July 21, 2011, the Eleventh Circuit Court of Appeals denied a timely filed petition for rehearing and rehearing *en banc* of its unpublished decision affirming the denial of equitable relief pursuant to Federal Rules Civil Procedure Rule 60 in *Gilley v. Monsanto Co. et. al.,* 2011 U.S. App. LEXIS 11105 (U.S. May 31, 2011). Pursuant to Supreme Court

Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. (App. A) Pursuant to Rule 11, Rule 29.4(b), and Rule 14.1(e)(v) the Solicitor General has been served with notice and to Petitioners' knowledge the court below did not notify the Attorney General of the fact that the constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL AMENDMENTS

AMENDMENT ONE

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble; and to petition the Government for a redress of grievance." AMEND. U.S. CONST. I.

AMENDMENT FIVE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

> case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor private property be taken for public use, without just compensation.

AMEND. U.S. CONST. V.

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

Old Monsanto[1] maintained a defined benefit plan for its salaried employees. [*Gilley* R 35]. The 1976 Monsanto Salaried Employee(s) Pension Plan "the 1976 plan" was the first qualified plan under the newly enacted Employee Retirement Income Security Act "ERISA". *Id.* In early 1981 when Petitioners were involuntarily separated from Old Monsanto they had completed the service requirements for a vested pension under the 1976 plan. *See* (App. J at 63a). In 2001 when Petitioner Wendell F. Gilley ("Gilley") became eligible to receive his pension, "New" Monsanto representing it was the successor entity responsible for pensions under Old Monsanto's 1976 defined benefit plan denied his vested pension. *Id.*

[1]Between 1997 and 2003 Old Monsanto split into three separate companies according to its business lines: the chemical business became Solutia Inc. ("Solutia"), the agricultural business became "New" Monsanto Company, Inc. ("'New' Monsanto"), and the pharmaceutical business became Pharmacia Corporation n. k. a. Pfizer Corporation ("Pharmacia or "Old" Monsanto"). Solutia, Old Monsanto, and New Monsanto entered into indemnification agreements wherein Solutia agreed to indemnify Old Monsanto and New Monsanto agreed to act as a guarantor for Solutia's performance. [*Gilley* R 209-211]. On December 17, 2003 prior to the initiation of the *Gilley* action Solutia filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York seeking relief from liability for promised benefits assumed from "Old" Monsanto. *In re: Solutia Inc. et al.* Case No. 03-17949 (PCB)(the bankruptcy court denied Solutia's request for a discharge of liability). [*Gilley* R 209-211].

On March 17, 2004, a class action suit was filed in the United States District Court for the Northern District of Alabama against Monsanto Respondents seeking equitable relief under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1132(a)(3). [*Gilley* R 35]. Monsanto Respondents answered the amended complaint in equity seeking "other appropriate equitable relief" for breach of fiduciary duty and violation of ERISA. [*Gilley* R 41]. Class discovery and certification were denied, and a jury demand was struck on the ground the action was one in equity. [*Gilley* R 51, 77]. Based on Respondents' stipulation the district court limited the hearing to a single factual issue, whether Petitioner had the requisite hours of service for 1972, the first year of the 1976 plan.[2] (App. J at 63a) [*Gilley* R 33, 66, 78-81, R 101 at pp. 1-14].

The district court awarded Petitioner his pension. [*Gilley* R 116, 117, 29 C.F.R. §§ 2530.200b-3(a), (b) & (c))]. Monsanto Respondents, despite their stipulation, appealed declaring an award of benefits was monetary relief under *Great-West Life & Annuity Insurance Company v. Knudson*, 534

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[2]In 1976 ERISA required participants to vest after ten years of service to the employer. 29 U.S.C. §§ 1051-1054. Respondents stipulated petitioner was vested "by virtue of his having fulfilled age and length of service requirements" under the 1976 plan if he had 1000 hours of service for 1972, the first year of the plan. *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004)(App. J at 63a). 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).

U.S. 204 (2001). The Eleventh Circuit Court of Appeals reversed holding the district court clearly erred.[3] *Gilley et al. v. Monsanto Company, Inc. et al.,* 490 F.3d 848, 857 (11th Cir. 2007); *but see Cavender v. Cavender,* 114 U.S. 464, 471 (1885) ("But it is clear that a defendant to a bill in equity, who states in his answer under oath the provisions of a writing, which is presumed to be in his possession, cannot complain that the court acted upon his admission"). A timely petition for rehearing and rehearing *en banc* was filed on July 17, 2007, and denied August 20, 2007. (App. G).

All subsequent timely requests for equitable relief were denied *pro forma*. *Gilley v. Monsanto Company, Inc.,* 490 F.3d 848 (11th Cir. 2007) *cert. denied*, 2008 U.S. LEXIS 1054,*; 128 S. Ct. 1086; 169 L. Ed. 2d 810; 76 U.S.L.W. 3372 (January 14, 2008) (No. 07-643); *Gilley et al. v. Monsanto Company et al.*, 309 Fed. Appx. 362; 2009 U.S. App. LEXIS 2073 (February 3, 2009) *cert. denied* 130 S. Ct. 137 (U.S. October 9, 2009) *reh'g denied Gilley v. Monsanto Co.,* 2009 U.S. LEXIS 8435 (U.S. Nov. 30, 2009). (App. D through F).

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[3]The complaint did not contain a claim under 29 U.S.C. 1132(a)(1)(B), nevertheless, the Eleventh Circuit Court of Appeals found it was a claim for benefits affording Monsanto Respondents absolute deference. *Gilley*, 490 F.3d at 857(Court stating "the district court erred in applying a heightened arbitrary and capricious" standard and "the district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted"). *But see* (App. J at 63a). Copies of the complaint and amended complaint in this action pursuant to 29 U.S.C. § 1132(h) were served on the Secretaries of Labor and Treasury. [*Gilley* R 123, 128].

On August 11, 2006, prior to the Eleventh Circuit Court of Appeal's published decision in the *Gilley* action, a second class action seeking equitable relief under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1132(a)(3) for breach of fiduciary duty and violation of ERISA was filed against the Monsanto Respondents in the Northern District of Alabama Middle Division CV 06-01564 (the "*Heptinstall* action"). The Solutia Respondents, Solutia Inc. and the Solutia Inc. Employees' Pension Plan, a successor "cash balance" plan to the 1976 plan, were joined after Solutia exited bankruptcy. [*Heptinstall* R 50].

On May 15, 2009, the district court relying on the Eleventh Circuit Court of Appeal's decision denying equity on subsequent appeal in the *Gilley* action dismissed the *Heptinstall* action holding plaintiffs lacked standing. (App. M) [*Heptinstall* R 119]. An appeal followed. On appeal Monsanto and Solutia Respondents cited the *Gilley* decision as grounds for dismissal. (App. L).

When Monsanto and Solutia Respondents relied upon the *Gilley* decision prospectively in the *Heptinstall* appeal as grounds for denying persons never before the court the right to petition the Government for redress, a Rule 60 motion for equitable relief was filed in the district court. [*Gilley* R 209 to 211]. The district court denied the motion and Gilley appealed. (App. C); *but see Princess Lida Of Thurn and Taxis et al. v. Thompson et al., Trustees*, 305 U.S. 456 (1939)("As

the agreement called for a continuing performance, and the decree was for enforcement of that performance, the court retained jurisdiction to render the granted relief effective.”).

The Eleventh Circuit Court of Appeals affirmed the dismissal of the *Heptinstall* action with prejudice holding plaintiffs had failed to state a claim for relief. *Heptinstall v. Monsanto Co. et al.* 2010 U.S. App. LEXIS 4890,*; 367 Fed. Appx. 998 (March 5, 2010) (App. L); *but see Metropolitan Life Insur. Co. v. Glenn,* 554 U.S. 105, 111 (2008)("If a benefit plan gives discretion to an administrator or fiduciary who *is operating under a conflict of interest*, that conflict must be *weighed as a "factor* in determining whether there is an abuse of discretion.")(emphasis in original); *see also Gore v. El Paso Energy Corp. Long Term Disability Plan*, 477 F.3d 833 (6th Cir. 2007)(reversing a district court’s Rule 12(b)(6) dismissal of breach of fiduciary claims finding they were not just repackaged claims for benefits). A timely petition for rehearing and rehearing *en banc* was filed.

On May 31, 2011, the Eleventh Circuit Court of Appeals affirmed the denial of equitable relief pursuant to Rule 60 in the *Gilley* action. *Gilley et al. v. Monsanto Company, Inc. et al.*. (No. 10-12303) 2011 U.S. App. LEXIS 11105 (May 31, 2011). (App. B). A timely petition for rehearing and rehearing *en banc* was filed.

On July 21, 2011 and September 13, 2011, respectively, the petitions for rehearing and

rehearing *en banc* filed in the *Gilley* and *Heptinstall* action were denied. (App. A & App. K).

REASONS FOR GRANTING THE PETITION

I. LACK OF INTELLIGIBLE GUIDELINES

A. No Remand, No Remedy, No Recourse.

"To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare which, is the proper province of the judiciary" *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 572 (1819). Unless this Court grants the pending petition for writ of certiorari to consider whether it is an abuse of discretion for federal courts to deny equitable relief under 29 U.S.C. 1132(a)(3) and 29 U.S.C. 1132(a)(2) to prevent "irreparable harm", Respondents will have perfected a forfeiture of property held in trust.

This controversy is about the dividing line between suits at law and suits in equity, the distribution of power between the President and Congress and the delegation of that power to corporate citizens without the federal courts establishment of "intelligible guidelines" to ensure conformity with due process of law and to ensure the right of access to the courts, and the affect this has had on the structure of the national Government as established by the provisions of the "national constitution." *A. L. A. Schechter Poultry Corp. et al. v. United States,* 295 U.S. 495 (1935).

Petitioners maintain the right to bring claims under 29 U.S.C. §§ 1132(a)(2) and (a)(3) before the federal courts sitting in equity free and clear of an ERISA defendant's discretion is in accordance with ERISA's statutory design, and unless ERISA's statutory design is followed ERISA lacks "intelligible guidelines" to ensure conformity with due process of law and/or the right of access to the courts and equal protection.[4] *Id.*

B. Split In The Circuits On Availability Of Cause Of Action Under 29 U.S.C. 1132(a)(2) And 29 U.S.C. 1132(a)(3) When Beneficiaries Of A Trust Are Denied Full Benefits.

The United States Court of Appeals for the Eleventh Circuit has taken a position in conflict with this Court and the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits by refusing to

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[4]Solutia, not "New" Monsanto", was the successor entity that assumed responsibility for vested pensions belonging to former chemical workers of Old Monsanto. [*Gilley* R 210-211]. Respondents recognizing no boundaries to their discretion under *Firestone Tire & Rubber Co. v. Bruch* acting as the *de facto* if not *de jure* decision-makers substituted one successor entity for another**.** *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)*Caperton et al. v. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252, 2259; 173 L. Ed. 2d 1208 (2009) citing the Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison)("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.") *see* Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 611–612 (1947 (same).

recognize proper claims for breach of fiduciary duty and violation of ERISA when beneficiaries of a trust are denied full benefits: *Cigna v. Amara* 563 U.S. ______, 131 S. Ct. 2900 (2011); *In re: Unisys Corp. Retiree Med. Benefits ERISA Litig. v. Unisys Corp.,,* 579 F.3d 220 (3rd Cir September 2, 2009) *cert denied* 2010 U.S. LEXIS 1208 (Feb. 22, 2010); *Battoni v. IBEW Local Union No 102 Emple. Pension Plan*, 594 F.3d 230 (3rd Cir. February 5, 2010); *In re: Schering Plough Corp ERISA Litigation,* 589 F.3d 585 (3rd Cir. December 21, 2009); *Schreiber v. Philips Display Comp. Co.*, 580 F.3d 355 (6th Cir. September 2, 2009); *Harzewski v. Guidant Corp.,* 489 F.3d 799 (7th Cir. 2007*); Solis v. Current Dev. Corp.,* 557 F.3d 772 (7th Cir. March 5, 2009); *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585 (8th Cir. November 25, 2009); *Harris v. Amgen, Inc. et al.,* 573 F.3d 728 (9th Cir. July 14, 2009); *Vaughn v. Bay Envir. Mgt., Inc*., 567 F.3d 1021 (9th Cir. June 4, 2009); *Poore v. Simpson Paper, Co.,* 536 F.3d 922 (9th Cir. May 2009).

C. Split In The Circuits On Proper Standard Of Review For Claims Of Breach Of Fiduciary Duty And Violation Of ERISA.

The First, Third, Seventh, and Eighth Circuits, reasoning that suits for breach of fiduciary duty and violation of ERISA involve questions of law and statutory interpretation, have all applied a *de nov*o standard of review. *See e. g. Larocca v. Borden, Inc.* 276 F.3d 22, 26 (1st Cir. 2002); *Pell v. E. I. DuPont De Nemours & Co.,* 539 F.3d 292 (3rd 2008);

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); *Prudential Insur. Co. of America v. National Park Medical Center, Inc.*, 154 F.3d 812 (8th Cir. 1998). Separate panels of the Sixth Circuit have applied both a *de novo* standard of review and a deferential arbitrary and capricious standard of review 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.), cert. 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).

D. Federal Courts Have Authority, But Do They Have A Duty To Prevent "Irreparable Harm" In Equity?

This Court in *Cigna v. Amara* held although 29 U.S.C. 1132(a)(1)(B) did not give a court authority to reform a plan, relief is authorized by 29 U.S.C. 1132(a)(3), which allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of ERISA "or the [plan's] terms" when participants will be "likely harmed" by a defendants' violation of ERISA.[5]

[5]While it may be mere error to grant equitable relief when claims have been improperly made under 29 U.S.C. 1132(a)(1)(B) when federal courts erroneously treat claims for

Cigna v. Amara 563 U.S. ____, 131 S.Ct. 2900 (2011). Although this Court held in *Amara* federal courts are authorized under 29 U.S.C. 1132(a)(3) to reform plans to do equity, this Court did not say whether federal courts have a duty to do equity to prevent "irreparable harm" when there is no remedy at law? AMEND. U.S. CONST. V and I.

E. Complaint In Equity, Answer In Equity, Striking Of Jury Demand Based On Equity, Stipulation To Entitlement To Equity, Denial Of Equitable Relief On Appeal.

Where a complainant brings a suit in equity or a defendant answers in equity this Court has held the party cannot appeal to declare it to be an action at law. *Twist et al. v. Prairie Oil & Gas Company,* 274 U.S. 684, 692 (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"); *Brown v. Flecther*, 235 U.S. 589 (1915)(equity jurisdiction over an assignee

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equitable relief as claims for benefits there are constitutional concerns. *Eastern Enterprises v. Apfel Commissioner of Social Security, et al.*, 524 U.S. 498; 118 S. Ct. 2131; 141 L. Ed. 2d 451 (1998)(holding a regulatory act by Congress that permits the "taking" of property belonging to A for the benefit of B is unconstitutional under the Fifth Amendment "taking" clause as applied); *see also Caperton*,129 S. Ct. at 2259; *Bruch*, 489 U.S. at 108; *see* 29 U.S.C. § 1053; 29 U.S.C. § 1053(a)(3)(C) and § 1053(c)(1)(A) and (B). Certainly there are due process concerns where one successor entity is substituted for another as a fictitious plan administrator.

of a *cestuis que trust* against a trustee for the enforcement of rights in and to the property held in trust); *Perego v. Dodge*, 163 U.S. 160, 164 (1896)("Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defence (sic) at large, is precluded in most cases from raising such an objection [that it is properly an action at law] on appeal."); *Cavender*, 114 U.S. at 473-4 ("a trustee, into whose hands trust assets are shown to have come, who . . . fails to discharge any duty of trust . . . cannot successfully resist an application made to a court of equity for his removal"); *Trustees v. Greenough*, 105 U.S. 527 (1882)(suit in equity against former members of the board, corporation, and others in complicity with them to preserve fund following mismanagement by trustees); *The Society For The Propagation Of The Gospel In Foreign Parts v. The Town of New-Haven*, 21 U.S. 464 (1823)(dissolution of empire did not prohibit enforcement of trust for the benefit of American *cestuis que trust*); *Princess Lida Of Thurn and Taxis et al. v. Thompson et al., Trustees*, 305 U.S. 456 (1939)(Court of Common Pleas had jurisdiction and substantial measure of control over the trust funds to do an accounting for the benefit of the *cestuis que trust*).

This Court has long recognized a trustee's discretion must be sufficiently defined so that a court is not left powerless to review a trustee's administration of the trust. *Wheeler v. Smith*, 50 U.S. 55 (1850)(invalidating a bequest to a trust on the grounds it was too vague because it left a court powerless to review the trustees' administration of

the trust). Congress limited an ERISA trustee's discretion by passing "an enormously complex and detailed statute". *Mertens v. Hewitt Associates,* 508 U.S. 248, 262, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). Notwithstanding statutory limits on an ERISA trustee's discretion and a long history of federal courts dealing with the administration of trusts, no federal court has seen fit to afford equitable relief to Petitioners even to prevent "irreparable harm" when there is no remedy at law.

CONCLUSION

Unless this Court grants the pending petition for writ of certiorari to consider whether it is an abuse of discretion for federal courts to deny equitable relief under 29 U.S.C. 1132(a)(3) and 29 U.S.C. 1132(a)(2), Respondents will have perfected an unconstitutional "taking" of property held in trust in their own profit interest through an egregious abuse of discretion.

Respectfully Submitted,

/s/ Elisa Smith Rives
Elisa Smith Rives
Counsel of Record
for Petitioners
Elisa Smith Rives LLC
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Date: October ___, 2011

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 10-12303

[Filed July 21, 2011]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff-Appellant

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, CARNES, BLACK Circuit Judges. PER CURIAM:

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing *En Banc* are DENIED.

ENTERED FOR THE COURT:

SUSAN H. BLACK

UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 10-12303

[Filed May 31, 2011]

WENDELL F. GILLEY, an
individual and as class representative,

Plaintiff-Appellant

v.

MONSANTO COMPANY, INC., a
corporation, MONSANTO COMPANY
SALARIED EMPLOYEES' PENSION
PLAN, EMPLOYEE BENEFITS PLAN
COMMITTEE, MONSANTO COMPANY
EMPLOYEE BENEFITS EXECUTIVE
COMMITTEE, PHARMACIA
CORPORATION, a corporation

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, CARNES AND BLACK, Circuit Judges. PER CURIAM:

ORDER

Following two previous appeals to this Court,[1] Wendell F. Gilley appeals the district court's denial of his motions for relief from judgment under Fed. R. Civ. P. 60(b) and (d) and for attorney's fees. In his third appeal, Gilley argues the district court abused its discretion by denying his motion for relief from judgment under Rule 60(b)(3)(4)(5), and (6) and under Rule 60(d)(3). Gilley also claims the district court abused its discretion by denying his request for attorney's fees and costs. After review, we affirm.[2]

I.

Gilley contends the district court should have granted relief because the defendants schemed to usurp the court's jurisdiction to deprive Gilley and other of their vested rights to a pension governed by the Employee Retirement and Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*

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[1]*See Gilley v. Monsanto Co.,* 490 F.3d 848 (11th Cir. 2007); *Gilley v. Monsanto Co.,* 309 F. App'x 362(11th Cir. 2009).

[2]We review for abuse of discretion the district court's denial of a Rule 60(b) motion. *Big Top Koolers, Inc. v. Circus-Man Snacks, Inc.*, 528 F.3d 839, 842 (11th Cir. 2008). However, we review *de novo* a district court's ruling on a Rule 60(b)(4) motion because the question of the validity of a judgment is a legal one. *Burke v. Smith,* 252 F.3d 1260, 1263 (11th Cir. 2001).

Rule 60(b) allows a party to request relief from a final judgment. The appellant must "demonstrate a justification so compelling that the court was required to vacate its order." *Cavalier v. Allstate Ins. Co.,* 996 F.2d 1111, 1115 (11th Cir. 1993). In relevant part, Rule 60(b) provides the following grounds for relief:

(3) fraud. . ., misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Rule 60(d), a savings clause, provides that Rule 60 does not limit the court's power to set aside a judgment for fraud on the court. Fed. R. Civ. P. 60(d)(3).

Rule 60(c) requires that a Rule 60(b) motion "be made within a reasonable time— and for reasons (1), (2), and (3) no more than a year after the entry of the judgment . . . " Fed. R. Civ. P. 60(c)(1). Nevertheless, and independent action for "fraud on the court" under Rule 60(d) may be brought at any time. *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1337-8 (5th Cir. 1978).

The district court did not abuse its discretion by denying Gilley's motion for relief from judgment. To

the extent Gilley sought relief under Rule 60(b)(3), his motion was untimely because it was filed more than a year after the district court's order dismissing the action. Fed. R. Civ. P. 60(c)(1). Furthermore, Gilley's allegations of fraud were merely a rehash of arguments previously considered and rejected by both this Court and the district court. Relief under Rule 60(b)(4) was not appropriate because Gilley identified no jurisdictional or other defect that would render the judgment void. Relief under Rule 60(b)(5) was likewise inappropriate because the district court's judgment dismissing the action for lack of standing has not been satisfied, released, discharged, reversed, or vacated. Moreover, the district court's order was final, permanent, and had no prospective effect within the meaning of Rule 60(b)(5). *See Gibbs v. Maxwell House. Div. of Gen. Foods Corp.,* 738 F.2d 1153, 1156 (11th Cir. 1984)("That [the] plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if plaintiff were continuing to feel the effects of a money judgment against him."). Finally, Gilley failed to identify an "exceptional circumstance" warranting relief under Rule 60(b)(6). *See Cavaliere*, 996 F.2d at 1115 (noting relief under Rule 60(b)(6) is an "extraordinary remedy which may be invoked only upon a showing of exceptional circumstances").

Additionally, the record fails to reveal any evidence of fraud on the court. Gilley's evidence of "fraud" stems entirely from a purported scheme among the defendants to deny pensions benefits to

former employees. Gilley offers only a rehash of previously rejected arguments. Furthermore, in relying on a conflict of interest and "bias" among the defendants, Gilley fails to identify any improper misconduct designed to influence the decision of a court. *See Traverlers Indem. Co. v. Gore,* 761 F.2d 1549, 1551(11th Cir. 1985) (stating fraud between the parties is not fraud on the court). Accordingly, the district court did not abuse its discretion by denying relief under Rule 60(d)(3).

II.

Gilley also argues the district court erred by denying his request for attorney's (sic) and costs.[3] Although Gilley asserted in the district court that he was entitled to fees and costs under 28 U.S.C. § 1927 and Rule 11, Gilley argues on appeal only that he was entitled to fees and costs under ERISA and the court's inherent authority to sanction a party. Because Gilley failed to seek fees or costs under ERISA or under the district court's inherent authority before the district court, we decline to address these issues. *See Access Now, Inc. v. Southwest Airlines Co.,* 385 F.3d 1324, 1331 (11th Cir. 2004)(stating this Court will not consider an issue not raised before the district court).

AFFIRMED.

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[3]Throughout Gilley's brief, his counsel refers to herself as "Plaintiff's Representative" and seeks relief on her own account by including herself as a party to the appeal. Counsel cites no authority for granting relief to her personally, and we decline to do so.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. CV 04-0562

[Filed April 15, 2010]

WENDELL F. GILLEY, an	)
individual and as class representative,	)
	)
Plaintiff(s),	)
	)
v.	)
	)
MONSANTO COMPANY, INC., a	)
corporation, MONSANTO COMPANY	)
SALARIED EMPLOYEES' PENSION	)
PLAN, EMPLOYEE BENEFITS PLAN	)
COMMITTEE, MONSANTO COMPANY	)
EMPLOYEE BENEFITS EXECUTIVE	)
COMMITTEE, PHARMACIA	)
CORPORATION, a corporation	)
	)
Defendants.	)
	)

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

ORDER

This matter is before the court on the "Motion for Relief from Final Judgment Pursuant to Federal Rules of Civil Litigation Rule 60" and the "Amended Motion for Relief from Final Judgment Pursuant to Federal Rules of Civil Litigation Rule 60(b)(3)(4)(5)(6) and Rule 60(d)(3)" filed by plaintiff Wendell F. Gilley,[1] crossmotions for attorney's fees and costs,[2] and plaintiff's motion to strike defendant's motion for attorney's fees and costs.[3] Because both this court and the Eleventh Circuit Court of Appeals have determined that this court lacks subject matter jurisdiction,[4] plaintiff's motion and amended motion for relief from the final judgment are DENIED.

Upon consideration, the cross motions for attorney's fees and costs and plaintiff's motion to strike defendant's motion for attorney's fees and costs also are DENIED. Even so, plaintiff is warned that future attempts to rehash arguments which have already been resolved, such as those

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[1] *See* doc. nos. 209 and 211. The amended motion is apparently a restatement intended to supercede (sic) and replace the original motion, but plaintiff failed to delineate the amendment as a restatement.

[2] *See* doc. nos. 213 and 214.

[3] *See* doc. no. 214.

[4] *See* doc. nos. 194 (memorandum opinion of this court) and 207 (Eleventh Circuit order).

presented by plaintiff in her current motions, will be met with sanctions.

DONE and ORDERED this 15th day of April, 2010. supersede

/s/ LYNWOOD SMITH

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646

[Filed April 6, 2009]

WENDELL F. GILLEY, an
individual and as class representative,

Plaintiff(s)-Appellant(s),

v.

MONSANTO COMPANY, INC., a
corporation, MONSANTO COMPANY
SALARIED EMPLOYEES' PENSION
PLAN, EMPLOYEE BENEFITS PLAN
COMMITTEE, MONSANTO COMPANY
EMPLOYEE BENEFITS EXECUTIVE
COMMITTEE, PHARMACIA
CORPORATION, a corporation

Defendants-Appellees,

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BAN

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges. PER CURIAM:

ORDER

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are **DENIED**.

ENTERED FOR THE COURT:

R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08-13646

[Filed February 3, 2009]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)-Appellant(s),

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees,

Before MARCUS, KRAVITCH and ANDERSON, Circuit Judges. PER CURIAM:

ORDER

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We conclude that plaintiff cannot circumvent the law of the case established in *Gilley v. Monsanto Co., Inc.,* 490 F.3d 848 (11thCir. 2007). Therefore, plaintiff's claims in Count I and V are foreclosed. With respect to his claim based upon new evidence, we conclude that the evidence is not new, and that plaintiff had ample opportunity to present that evidence in the hearing before the district court prior to the first appeal. Nor is there any other meritorious exception to the law of the case. With respect to plaintiff's claims in Counts II, III and IV, plaintiff's initial brief on appeal failed to preserve the claims, and in any event the claims are without merit.

AFFIRMED.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. CV 04-0562

[Filed June 12, 2008]

WENDELL F. GILLEY, an individual and as class representative,)
)
)
Plaintiff(s),)
)
v.)
)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation)
)
Defendants.)
)

BEFORE: C. Lynwood Smith, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

Plaintiff was ordered to show cause why this action should not be dismissed for lack of jurisdiction based on the opinions of the Eleventh Circuit in *Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007), holding that plaintiff did not vest under the terms of his employer's pension plan *prior* to the termination of his employment, and the former Fifth Circuit in *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980),[1] holding that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]."[2] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. 1981) (agreeing with *Nugent*).

Plaintiff responded to the show cause order with a number of arguments that can be distilled into two distinct themes: (1) *Nugent* is no longer an accurate statement of Eleventh Circuit law in light of the Supreme Court's holding in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and Eleventh Circuit decisions handed down subsequent to *Firestone*; and (2) the *Gilley* decision

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[1]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[2] *See* doc. no. 189 (May 21, 2008 show cause order).

should not be followed by this court under exceptions to the law of the case doctrine. Neither of these positions has merit, and this action is due to be dismissed because of plaintiff's lack of standing to pursue ERISA claims.

As noted by this court in its May 21, 2008 show cause order,

> "[t]he only parties that have standing to sue under ERISA are those listed in the civil enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs* [*v. Blue Cross Blue Shield of Alabama*], 276 F.3d [1236,] at 1240 [(11th Cir. 2001)] (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA can only be brought by a participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor. *See* 29 U.S.C. § 1132(a).[3]

Plaintiff insists that, by virtue of the Supreme Court's holding of *Firestone*, he is a "participant" under the relevant ERISA plan based on his allegations in this lawsuit, and that, as such, he has standing to sue under ERISA. ERISA defines a "participant" as:

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[3] Doc. no. 189 (show cause order) at 5-6.

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis supplied).

Plaintiff argues that the Supreme Court's holding in *Firestone* is inconsistent with and, thus, overturns the former Fifth Circuit's prior holding in *Nugent* — a case indicating that plaintiff is not a "participant." This court finds that there is no inconsistency between *Firestone* and *Nugent*. *Firestone* provides the definitive analysis of the "may become eligible to receive a benefit" language in 29 U.S.C. § 1002(7), and held that a former employee is a "participant" only if he or she has a reasonable expectation of returning to covered employment, or has a colorable claim that he or she will fulfill eligibility requirements in the future. *See* 489 U.S. at 117-18 ("In order to establish that he or she 'may become eligible' for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future."). Here, plaintiff does not meet either criterion.

Specifically, plaintiff argues that he has a colorable claim for benefits by virtue of his allegations that he is a "participant" of the Monsanto Company Salaried Employees' Pension Plan.[4] Stated differently, plaintiff asserts that he is a "participant" because he claims it to be so. His argument, however, runs contrary to key components of the *Firestone* decision. In *Firestone*, the Supreme Court specifically rejected the notion that 29 U.S.C. § 1132 "should be read to mean that a civil action may be brought by someone who *claims to be a participant*," and found that such an "interpretation of the term 'participant' . . . strays far from the statutory language." *Firestone*, 489 U.S. at 117 (emphasis supplied). "To say that a 'participant' is any person who claims to be one begs the question of who is a 'participant' and renders the definition set forth in § 1002(7) superfluous." *Id.*

> In our view, the term 'participant' is naturally read to mean either 'employees in, or reasonably expected to be in, currently covered employment,' *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2nd Cir. 1985), or former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits. *Kuntz v.*

[4] *Nota bene*: Plaintiff does not, and indeed cannot under the facts of this case, argue that he has a reasonable expectation of returning to covered employment.

> *Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) [(*abrogated by Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir. 1995)].

Id. (emphasis supplied).

Further, *Firestone* makes it clear that a former employee who does not have "a colorable claim to *vested* benefits . . . simply does not fit within the [phrase] 'may become eligible.'" *Firestone*, 489 U.S. at 118 (quoting *Saladino*, 754 F.2d at 476) (brackets in original) (emphasis supplied).[5] The holding in *Firestone*, therefore, does not appear to be inconsistent with *Nugent*, which provides that a plaintiff who did not vest under the terms of an ERISA benefits plan prior to the termination of his or her employment is not a "participant" under ERISA. *See Nugent*, 625 F.2d at 1287.

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[5] Justice Scalia, in his concurring opinion in *Firestone*, noted that

> the phrase "may become eligible" has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of "participant" embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

489 U.S. at 119 (Scalia, J. concurring).

Further, contrary to plaintiff's position, *Nugent* has not been overruled by either the United States Supreme Court or the Eleventh Circuit, and it remains authority binding upon this court. Plaintiff directs this court to *Smith v. Wynfield Development Co., Inc.*, 238 Fed. Appx. 451 (11th Cir. 2007),[6] and *Lyons v. GeorgiaPacific Corp. Salaried Employees Retirement Plan*, 221 F.3d 1235, 1240 n.8 (11th Cir. 2000), as the basis for his argument that "standing in the Eleventh Circuit is no longer dictated" by *Nugent*.[7] Plaintiff's reliance on *Smith* and *Lyons* is wholly misplaced, however, because neither *Smith* nor *Lyons* addresses the issue that was before the former Fifth Circuit in *Nugent*, nor provides any discussion or mention of *Nugent*.

In *Smith*, the Eleventh Circuit addressed the question of whether a district court had subject matter jurisdiction because of ERISA preemption over a lawsuit in which only state law claims were asserted. *See* 283 Fed. Appx. at 454-58. In reaching its conclusion on the jurisdictional question, the Court determined, on the basis of the following rationale, that the appellant was a "participant" under the terms of an ERISA health insurance plan:

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[6]"Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." 11th Cir. R. 36-2. *Smith v. Wynfield Development Co., Inc.* was designated by the Eleventh Circuit as an unpublished opinion. *See* 238 Fed. Appx. at 451.

[7]Doc. no. 91 (plaintiff's response to May 21, 2008 show cause order) at 7-8.

> Smith has standing to sue as a "participant" of the health insurance plan. . . . Here, Smith alleged that she was eligible to receive group health insurance benefits based on her employment, but that she was denied those benefits because of Defendants' failure to enroll her properly. If Smith's allegations are true, she may become eligible to receive the benefits of the group health plan to which she was otherwise entitled. Thus, based on her allegations, we conclude that Smith is a "participant" in the relevant ERISA plan, even though she was never properly enrolled in the plan. Smith cannot avoid ERISA preemption simply by stating that she was never properly enrolled in the plan, when the failure to enroll her properly is the very fact that gives rise to her cause of action.

Smith, 283 Fed. Appx. at 457. Plaintiff does not develop his argument that *Smith* overturns *Nugent*, and this court will not give consideration to arguments that are not fully developed or bolstered with legal authority. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) (refusing to address a party's "perfunctory and underdeveloped argument"). Nevertheless, this court finds that the issue before the Eleventh Circuit in *Smith* has nothing whatsoever to do with

the holding in *Nugent*, and that *Smith* cannot be read to abrogate *Nugent*.[8]

Further, unlike plaintiff in the present case, the plaintiff in *Lyons* was vested under the terms of the relevant ERISA plan prior to the termination of his employment. *See Lyons*, 221 F.3d at 1239 ("On January 5, 1991, Lyons left employment at Georgia-Pacific. In accordance with Article 4 of the Plan, Lyons was entitled to a vested benefit, because he had worked for Georgia-Pacific and Great Northern for at least five years."). For that reason, *Lyons* is distinguishable from *Nugent*, and cannot be construed as overruling *Nugent*.

Insofar as plaintiff invites this court to depart from the Eleventh Circuit's holding in *Gilley*, this court declines to do so. Plaintiff argues that there are certain scenarios that might appropriately give a district court cause to deviate from the law of the case doctrine;[9] however, the cases cited by plaintiff in support of this proposition involve situations where the *Eleventh Circuit*, *not* a district court, set aside the law of the case doctrine and revisited a

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[8]This is especially true in view of the well-settled rule quoted in note 6 *supra*.

[9]The doctrine of the law of the case mandates that "an appellate court decision on an issue . . . be followed in all subsequent trial court proceedings in the same case." *United States v. White*, 846 F.2d 678, 684 (11th Cir. 1988). "The purpose of the law of the case doctrine is to bring an end to litigation. In addition, it ensures that district courts obey appellate courts and that the parties are not required to relitigate settled issues." *Id.* at 684-85 (citing *Leggett v. Badger*, 798 F.2d 1387, 1389 (11th Cir. 1984)).

prior Eleventh Circuit holding on an issue of law or fact in a particular case. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) (conceding that there are certain circumstances whereby an appellate court may stray from the law of the case doctrine); *Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (same); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1139-40 (11th Cir. 1984) (same, and noting that the law of the case doctrine is an "amorphous concept"). Contrary to plaintiff's argument, it is well-settled that, "[o]n remand a district court is not free to deviate from the appellate court's mandate." *Wheeler*, 746 F.2d at 1140 n.2. Such is the case here, and this court will not revisit those matters that were decided by the Eleventh Circuit in *Gilley*. With regard to the present case, the Eleventh Circuit held in *Gilley* that plaintiff did not vest under his employer's applicable benefits plan prior to the termination of his employment. *See* 490 F.3d at 858-60. Accordingly, plaintiff is not a "participant," and he lacks standing to sue under ERISA.

Consistent with the May 21, 2008 show cause order and for the reasons discussed herein this case is due to be, and hereby is **DISMISSED** without prejudice due to this court's lack of subject matter jurisdiction.[10] In addition, because this court does

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[10]Defendants assert that, although they agree that plaintiff lacks standing to pursue ERISA claims, this court should table the issue of standing, and should reach a determination as to the merits of plaintiff's remaining claims. Because standing is a jurisdictional issue, and plaintiff does not have

not have subject matter jurisdiction over this action, it lacks the power to rule on the parties' pending motions. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (noting that when a court lacks subject matter jurisdiction it "cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit."). As such, the clerk is directed to administratively terminate all pending motions, and to close this file. Costs are taxed as paid.

DONE this 12th day of June, 2008.

/s/ LYNWOOD SMITH

UNITED STATES DISTRICT JUDGE

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standing to sue under ERISA, this court lacks the power to make the sort of substantive ruling sought by defendants. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 84 (1998) (mentioning that when a federal court lacks jurisdiction over a controversy, the court cannot take any action other than dismissing the case); *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877-878 (11th Cir. 2000) (noting that a plaintiff's standing to bring an action is a jurisdictional issue).

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-012117

[Filed August 20, 2007]

WENDELL F. GILLEY, an
individual and as class representative,

Plaintiff(s)

v.

MONSANTO COMPANY, INC., a
corporation, MONSANTO COMPANY
SALARIED EMPLOYEES' PENSION
PLAN, EMPLOYEE BENEFITS PLAN
COMMITTEE, MONSANTO COMPANY
EMPLOYEE BENEFITS EXECUTIVE
COMMITTEE, PHARMACIA
CORPORATION, a corporation

Defendants.

<u>ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BAN</u>

BEFORE: CARNES, PRYOR, and FARRIS[*], Circuit Judges.

ORDER

The Petition(s) for Rehearing are DENIED and No Judge in regu1ar active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure), the Petition(s) for Rehearing En Bane are DENIED.

ENTERED FOR THE COURT:

ED CARNES

UNITED STATES CIRCUIT JUDGE

[*] Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation

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APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-12117

[Filed June 28, 2007]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff-Appellant

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Alabama

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BEFORE: CARNES, PRYOR, and FARRIS, [*]
Circuit Judges.

CARNES, Circuit Judge:

ORDER

Throughout his judicial career Holmes relished challenging cases. While on Massachusetts' highest court he confessed to a friend that although none of the cases he had handled that year had been of universal interest, "there is always the pleasure of unraveling a difficulty."[1]A decade and a half later, while on the Supreme Court, he told the same friend that he had few cases of general interest that term, but "[t]here is always the fun of untying a knot and trying to do it in good compact form."[2] It is a pity that Holmes did not live to see ERISA cases.

I.

Wendell Gilley was employed by Monsanto Company, Inc. from August 31, 1972 through

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[*]Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1]Oliver Wendell Holmes, Jr., *Feb. 23, 1890 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874 – 1932 32, 33 (Mark DeWolfe, ed., Harvard Univ. Press 2d prtg. 1941).

[2]Oliver Wendell Holmes, Jr., *May 25, 1906 Letter to Frederick Pollack, in* THE HOLMES-POLLACK LETTERS, *supra* note 1, at 123, 124.

February 16, 1982 at its Sand Mountain textile plant in Northeast Alabama. Monsanto closed the plant in March of 1981, but Gilley remained on the payroll in layoff status until February 1982 when he was finally let go. Although the period of his employment was under nine-and-a-half years, Gilley claims that with the overtime that he worked in 1972, he acquired the necessary ten years of "Vested Service" to merit pension benefits.

Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.

When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.,* which went into effect,

for our purposes, in 1976.[3] According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year—if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week period they are employed, regardless of the actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service

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[3]The majority of ERISA became effective January 1, 1975, but for all pension plans in existence as of January 1, 1974, of which the Plan here was one, the participation and vesting standards of ERISA became applicable on the first day of the plan year beginning after December 31, 1975, effectively 1976. *See* 29 U.S.C. § 1061(b)(2).

credited on a biweekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Believing that he had acquired ten years of Vested Service, even though he had only worked for Monsanto for nine full years and part of two other years (1972 and 1982), Gilley applied for pension benefits in 2001. Monsanto denied his request, because it concluded that Gilley's Vested Service fell short of the requisite ten years. Gilley filed an administrative appeal, and the Monsanto Plan Committee denied his petition. It applied the 1981 Plan and the 95-Hour Rule to determine that Gilley was only entitled to 9.594 years of Vested Service.

Gilley filed suit claiming that Monsanto had: (1) arbitrarily and capriciously denied his claim for benefits, in violation of ERISA § 502, 29 U.S.C. § 1132; (2) made oral and written assurances that all employees hired at the Sand Mountain plant after September 1972 were vested and, therefore, is equitably estopped from denying Gilley benefits now under ERISA § 502; (3) intentionally closed the Sand Mountain Plant right before the employees would reach the ten year mark, in violation of ERISA § 510, 29 U.S.C. § 1140; (4) amended the Plan to retroactively reduce or eliminate the amount of accrued Hours of Service in violation of

ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); and (5) breached its fiduciary duty by failing to act in the best interest of plan participants, in violation of ERISA § 404, 29 U.S.C. § 1104. Monsanto filed a motion to dismiss, arguing that the 1981 Plan governed the determination of Gilley's credit, and that under the plan Gilley lacked the requisite ten years of Vested Service. The district court denied the motion to dismiss.

Gilley then filed an amended complaint, specifically restating all of his claims under the "equitable relief" section of ERISA, § 502(a)(3), 29 U.S.C. § 1132(a)(3), and adding a claim under § 502(c), 29 U.S.C. § 1132(c), and § 510, 29 U.S.C. § 1140, asserting that Monsanto had interfered with his attempts to attain benefits by refusing to provide him with requested documents. The amended complaint alleged that the 95-Hour Rule should not be applied because, according to Gilley, it is less favorable to him than the 1976 Plan's method of calculating Hours of Service.

Monsanto filed a motion for summary judgment, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), only permits equitable relief and does not apply when a party is seeking purely legal relief, as Monsanto claimed Gilley was doing.[4]

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[4]Monsanto contends that Gilley cannot properly make out an equitable claim under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), because he is actually seeking legal relief which can only be granted under § 502(a)(1)(b), 29 U.S.C. § 1132(a)(1)(b). Our disposition of this appeal does not require us to decide the nature of the relief Gilley is seeking, and it is

Additionally, Monsanto restated its argument that Gilley cannot prove the ten years of Vesting Service necessary to merit benefits. It put before the court Social Security records indicating that Gilley had earned a total of $2,149.68 in 1972, and other records showing that in 1972 his base salary had been $420 monthly, or $5,040 annually. Gilley argued that the $420 figure actually included overtime pay and that his monthly base salary was really only $390, which would have been $4,680 annually.

Based on all of those records, Monsanto argued that even if the district court calculated Hours of Service based on the actual hours Gilley worked, Gilley still was not entitled to a pension. Using the $2,149.68 figure, a $420 monthly base salary, and the 2,080 hour "Standard Work Year" set out in the 1981 Plan, Monsanto asserted that Gilley could have actually worked only 887.2 hours in 1972 (if all hours were compensated equally), well short of the 1,000 hours needed. Monsanto also pointed out that because the $2,149.68 salary Gilley earned in 1972 included compensation for some overtime and holiday hours, which would have been paid at a

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not a question that goes to the existence of subject matter jurisdiction. *See Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (noting that subject matter jurisdiction exists even if the remedy sought under § 502(a)(3) is legal in nature, because a finding that the relief sought is legal in nature "'does not negate the existence of federal subject matter jurisdiction, but rather indicates that [the plaintiff] may have failed to state' a claim upon which relief can be granted" (quoting *Health Cost Controls v. Skinner*, 44 F.3d 535, 537–38 (7th Cir. 1995)).

premium rate, Gilley's actual hours worked would be much less. What's more, even if Gilley's claimed $390 monthly salary figure and the resulting $4,680 annual salary figure are accepted, the maximum it appears Gilley could have worked in 1973 based on the Social Security records is 955.41 hours (assuming all hours were compensated at the same hourly wage). Still, the district court denied Monsanto's motion, finding that a trial was warranted based on the "closeness of the vesting issue."

A two-day bench trial was conducted solely to decide the number of Hours of Service credit Gilley was entitled to receive for his employment in 1972. After trial, the district court ordered Gilley to submit an "itemized, succinct list showing exactly how [he] . . . would arrive at a minimum of 1,000 [H]ours of [S]ervice in 1972." In response, Gilley offered three "equivalencies," claiming that each showed he was entitled to benefits. ERISA gives a plan the option of using equivalencies in order to simplify the record keeping and calculation burdens associated with determining Hours of Service, 29 C.F.R. § 2530.200b-3(a). A list of equivalencies from which a plan may choose is contained in the regulation, id. § 2530.200b-3(d), (e).

The district court accepted two of the three equivalencies that Gilley suggested. One of those two calculates Hours of Service based on "Hours Worked" under 29 C.F.R. § 2530.200b–3(d)(1), granting 1,000 Hours of Service if 870 hours are

worked. The other calculates Hours of Service based on "Regular Time Hours" under 29 C.F.R. § 2530.200b–3(d)(2), granting 1,000 Hours of Service if 750 "Regular Time Hours" are worked. The parties dispute whether Gilley would be entitled to a pension under either or both of the two equivalencies the district court adopted. The math involved with both equivalencies is dense, enough so that during oral argument counsel had difficulty answering some of our questions about the numbers and formulas used during the trial.

The more fundamental point that Monsanto stressed, however, is that the Plan never included either of the two equivalencies that the district court used at Gilley's urging. Instead, the 1981 Plan included the 95-Hour Rule, another equivalency permitted by ERISA. *See* 29 C.F.R. § 2530.200b-3(e)(1)(iii). We will spare the reader the details of how the 95-Hour Rule plays out in Gilley's circumstances, except to say that everyone agrees that under it Gilley would not be entitled to a pension.

In its findings of fact and conclusions of law, the district court refused to apply the 95-Hour Rule set out in the 1981 Plan. Its reasoning was that "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement." Even though the two equivalencies that were more favorable to Gilley had never been part of the Plan, the district court justified their use on the grounds that Monsanto had not kept adequate records of the hours Gilley

worked in 1972. It said that Gilley was entitled to the "benefit of the doubt" because Monsanto had failed to keep adequate records from that year. Applying the two equivalencies that Gilley preferred, the court determined that he did have the requisite Hours of Service to receive a full year of credit for 1972, giving him ten years of Vested Service which entitled him to a pension. Throughout its reasoning, the court applied a "heightened arbitrary and capricious" standard of deference, because it concluded that the Plan Committee had a conflict of interest in making benefit decisions.

The court's judgment ordered Monsanto to pay Gilley his past due pension benefits, "plus appropriate interest," and to pay additional retirement benefits as they accrue in the future. Monsanto filed a motion to alter or amend the district court's judgment, asserting multiple mathematical and legal errors in the application of the two equivalencies the district court used. After the court denied that motion, Monsanto filed this appeal.

II.

We initially had some doubt about our jurisdiction to decide this appeal because, while the district court ordered Monsanto to pay "appropriate interest" on the award of past benefits, it did not specify the rate of interest or the date from which the interest would be calculated. We were concerned that the judgment might not be final

under 28 U.S.C. § 1291 for purposes of appellate review.

The district court's failure to set an interest rate for calculating prejudgment interest might have been a problem for the purpose of our jurisdiction if the judgment had no injunctive aspects. *See SEC v. Carrillo*, 325 F.3d 1268, 1272–73 (11th Cir. 2003) (per curiam) (noting that "if the judgment amount, the prejudgment interest rate, or the date from which prejudgment interest accrues is unclear, the calculation of prejudgment interest is no longer a ministerial act and the court's order is not final"); *but see Moon v. Am. Home Assurance Co.*, 888 F.2d 86, 89–90 (11th Cir. 1989) (addressing the merits but remanding the case back to the district court for clarification on the questions of whether prejudgment interest was intended and the rate at which any such interest should be calculated). However, the judgment here does include injunctive relief, because it requires Monsanto to continue to pay pension benefits as they accrue in the future. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over orders granting injunctive relief. The district court's judgment here is injunctive enough in nature to give us jurisdiction over the appeal.

III.

On the merits, both sides agree that Gilley must have ten years of credit to be entitled to a pension, and they agree that he earned at least nine years of credit for his work at the plant from 1973 to 1982.

Their disagreement is about whether Gilley gets a full year of credit for 1972, his first year on the job, when he actually worked only four months for Monsanto. If Gilley is credited with a full year for working those four months, he gets a pension.

The district court's conclusion that Gilley should be treated as having worked a full year in 1972 was based on its belief that instead of the 95-Hour Rule in the 1981 Plan, the Hours Worked or Regular Time Hours equivalencies, which Gilley proposed, should be used. The parties disagree about whether Gilley is entitled to a pension even if those two equivalencies are used, but they do agree that he is not entitled to a pension under the 1981 Plan's 95-Hour Rule. The question that determines the issues we address in this appeal is whether the 95-Hour Rule is the equivalency that should be applied.

A.

The parties think that the answer to that question might depend on the standard of deference applicable to the Plan Committee's decision to deny Gilley pension benefits. Monsanto argues that the arbitrary and capricious standard applies, while Gilley thinks the district court was correct to apply a heightened arbitrary and capricious standard. Given the nature of the issue on which this case turns, we doubt that the standard of deference makes any difference. To the extent that it does, however, the proper standard is arbitrary and capricious.

ERISA does not explicitly establish the standard of review to be applied to a plan administrator's decision. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 109 S. Ct. 948, 953 (1989). Following the Supreme Court's direction, however, we have adopted three different standards to guide us: (1) *de novo* review applies where the plan administrator has been given no discretion in deciding claims; (2) arbitrary and capricious review applies where the plan administrator has discretion in deciding claims and does not suffer from a conflict of interest; and (3) heightened arbitrary and capricious review applies where the plan administrator has discretion but suffers from a conflict of interest. *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 993 (11th Cir. 2001). For purposes of that third standard, a conflict of interest exists when a provider has to pay benefit claims out of its own assets, making it directly advantageous to the provider for the claims to be denied. These three standards have been broadly applied to both the administrator's interpretation of plan provisions as well as the administrator's decision to grant or deny benefits. *Williams v. Bellsouth Telecomms., Inc.*, 373 F.3d 1132, 1135 n.3 (11th Cir. 2004); *Paramore v. Delta Air Lines, Inc.*, 129 F.3d 1446, 1451 (11th Cir. 1997).

Our circuit law is clear that no conflict of interest exists where benefits are paid from a trust that is funded through periodic contributions so that the provider incurs no immediate expense as a result of paying benefits. *See Buckley v. Metro.*

Life, 115 F.3d 936, 939–40 (11th Cir. 1997). Only when benefits are paid from a provider's assets, so that benefit decisions have a direct and immediate impact on the provider's profit margin, does the heightened standard come into play. *See Williams*, 373 F.3d at 1135.

In this case, the Plan gave the Plan Committee discretion to make benefits decisions. The record clearly establishes that benefits were paid out of a nonreversionary trust instead of from Monsanto's own assets. In *Buckley*, we specifically considered the standard of deference to be applied when benefits are paid out of a trust funded by periodic, non-reversionary contributions. 115 F.3d at 939. We held that 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. *Id.* at 939–40. That holding has been reiterated in subsequent cases. *See, e.g., Turner v. Delta Family-Care Disability & Survivorship Plan,* 291 F.3d 1270, 1273 (11th Cir. 2002) (per curiam) (a non-reversionary, periodic trust "eradicates any alleged conflict of interest so that the arbitrary or capricious standard of review applies"). The fact that the company is responsible for replenishing the funds of the trust is not enough to create a conflict of interest. *Id.*

For these reasons, the district court erred in applying the heightened arbitrary and capricious standard. To the extent that a deference standard applies, the ordinary arbitrary and capricious standard is the one.

B.

The district court also erred in forcing on the Plan two equivalencies that the Plan had never adopted. The court based its substitution of the equivalencies, Gilley favored for the one in the Plan on its view that Monsanto had failed to keep adequate records of the hours Gilley worked in 1972. We have some doubts about whether a court generally can impose on a plan equivalencies that the plan did not choose simply because of the absence of adequate records.

We have no doubt, however, that a plan cannot be forced to use an equivalency that is different from the one the plan chose simply because it or the company did not keep adequate records for ERISA purposes before there was any ERISA. The year we are talking about is 1972, and ERISA was not enacted until September of 1974 (with an effective date, for our purposes, of January 1, 1976, *see* 29 U.S.C. § 1061(b)(2)). Only after the time for doing so had passed did the Plan and the company learn that it would be necessary to make and keep the records. Companies and pension plan managers are not required to be clairvoyant.

Instead, when it comes to pre-enactment years, ERISA requires only that plans do the best they can with the records they have, and it permits plans to choose an equivalency from those set out in the regulations. 29 C.F.R. § 2530.200b-3(b), (d), (e). This is how the relevant regulation reads:

> If accessible records are insufficient to make an approximation of the number of pre-effective date hours of service for a particular employee . . . the plan may make a reasonable estimate of the hours of service completed by such employee . . . . A plan may use any of the equivalencies permitted under this section, or the elapsed time method of crediting service . . . to determine hours of service completed . . . .

Id. § 2530.200b–3(b). That is exactly what the Plan did in this case. It chose the 95-Hour Rule and applied the rule to the vagaries of Gilley's 1972 work history. As the regulation we have quoted shows, ERISA permitted it to do so. The statute and regulations leave the choice of equivalencies to plans, not to courts. The district court should not have overridden the Plan's choice and applied an equivalency that was not in the Plan. *See id.* § 2530.200b–3(c)(1) ("Any equivalency used by a plan must be set forth *in the document* under which the plan is maintained." (emphasis added)).

C.

In addition to substituting its own preferred equivalencies because of the lack of adequate records of Gilley's work hours in 1972, the district court also rejected the 95-Hour Rule because it was adopted after 1972. The record is unclear exactly when the 95-Hour Rule was adopted, but it was sometime between 1979 and January 1, 1981. The

district court thought the fact that the rule was not adopted until sometime during that period foreclosed its use because, in the court's words, "later amendments to the Plan should not have an effect on the 1972 calculations if they impact adversely on plaintiff's entitlement."

First, it is important to recognize that there is no way Gilley could have accumulated the requisite ten years of Vested Service, under any calculation method; by the time Monsanto adopted the 95-Hour rule. On January 1, 1981, Gilley could have accumulated, at most, nine years of Vested Service credit. Even if he is given a full year of credit for 1972, he would still only have acquired nine years by the beginning of 1981. All of Gilley's arguments that he earned ten years of Vested Service count hours he worked in 1981 after the Plan was amended to put the 95-Hour Rule in place. This fact is critical to our analysis of whether the adoption of the 95-Hour Rule and its application to Gilley violated ERISA.

Gilley takes the district court's determination that later amendments cannot adversely impact a plaintiff's entitlement and runs with it, casting it in terms of ERISA's "anti-cutback" rule. ERISA § 204(g), 29 U.S.C. § 1054(g)(1). One of the purposes of ERISA is to protect pension rights by ensuring "that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.,* 446

U.S. 359, 375, 100 S. Ct. 1723, 1733 (1980). To further that purpose, the "anti-cutback" rule provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g), 29 U.S.C. § 1054(g)(1). By its own terms, what the rule forbids is cutbacks on "accrued benefits." There is a difference between "accrued benefits" and "vested benefits."

The Supreme Court has explained that benefit accrual is "the rate at which an employee earns benefits to put in his pension account," while benefit vesting refers to the point at which a participant's pension rights become nonforfeitable "by virtue of his having fulfilled age and length of service requirements." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749, 124 S. Ct. 2230, 2238 (2004). A participant is fully vested when he has a nonforfeitable right to his total accrued benefit. In other words, benefit accrual affects the size of the pension, while benefit vesting determines whether a pension will be paid at all. *See Stewart v. Nat'l Shopmen Pension Fund,* 730 F.2d 1552, 1561–62 (D.C. Cir. 1984)(noting that "'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is entitled"); *Silvernail v. Ameritech Pension Plan,* 439 F.3d 355, 359 (7th Cir. 2006) ("Benefit accrual and vesting are related but different concepts. 'Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable.'"

(quoting *Hoover v. Cumberland, Md., Area Teamsters Pension Fund*, 756 F.2d 977, 983–84 (3d Cir. 1985))).

The Plan amendment adopting the 95-Hour Rule affected Gilley's ability to vest before he had vested, but it did not reduce the amount of his accrued benefit or the rate at which he was accruing benefits. Throughout Gilley's employment the Plan provided that an employee had to reach the retirement age and have accumulated the requisite ten years of Vested Service before he was entitled to a pension. The amendment adopting the 95-Hour Rule, which occurred during Gilley's employment, did not affect the rate at which he accrued benefits, although it did alter the method for calculating Vested Service, which in turn determined whether he received a pension. The ERISA § 204(g) anti-cutback provision does not apply to changes in vesting requirements.

There is another provision, however, that does. Section 203 of ERISA provides that a plan amendment changing the vesting schedule shall be treated as not satisfying the requirements of ERISA:

> if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less

> than such nonforfeitable percentage computed under the plan without regard to such amendment, unless the employee is given the option of electing the pre-amendment plan.

ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). Although Monsanto argues that the amendment introducing the 95-Hour Rule did not change the vesting schedule, some courts have concluded that changes in the way vesting is determined can amount to an alteration of the vesting schedule. *See, e.g., Fentron Indus., Inc. v. Nat'l Shopmen Pension Fund,* 674 F.2d 1300, 1306 (9th Cir. 1982) (noting that the cancellation of past service credits, which diminished the pension credits of otherwise vested participants, was a vesting schedule amendment). We will assume for present purposes that those courts are correct and that the Plan amendment we are discussing did change the Plan's vesting schedule.

Even making that assumption, there still was no violation of ERISA § 203, because the plain language of the provision limits its scope to benefits that are nonforfeitable ("if the nonforfeitable percentage . . . such nonforfeitable percentage") at the time the amendment is adopted or becomes effective ("determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective"). ERISA § 203(4)(c)(1)(A); 29 U.S.C. § 1053(4)(c)(1)(A). When the 95-Hour Rule amendment became effective on or before January 1, 1981, and when it was adopted

sometime on or before that date, Gilley was not entitled to any benefits, because he could not have earned ten years of Vested Service until after that date. Because Gilley was not vested at the time the amendment was adopted or became effective, ERISA § 203 does not help him. It follows that the district court erred in concluding that the Plan amendment adopting the 95-Hour Rule could not be applied to Gilley because it came after he had started earning credit toward his pension.

D.

To the district court's reasons for not allowing the 95-Hour Rule, Gilley adds some more of his own. Among them is his assertion that he was never properly notified of the amendment. We decline to consider that contention because it was raised for the first time in this appeal. *FDIC v. Verex Assurance, Inc.,* 3 F.3d 391, 395 (11th Cir. 1993) ("By well settled convention, appellate courts generally will not consider an issue or theory that was not raised in the district court."). Gilley also appears to argue that the amendment discriminates against him, an argument which is difficult to follow and unpersuasive in any event.

Finally, Gilley raises a host of arguments, both before us now and in earlier proceedings, about why he is equitably entitled to a pension notwithstanding his inability to satisfy the vesting requirements under the 95-Hour Rule. The district court did not reach any of these arguments and we decline to take the first swing at them. Some may

require factual development, while all of them may benefit from two-tier consideration. All of them the district court should deal with as it deems appropriate on remand.

IV.

The judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. CV 04-0562

[Filed January 26, 2006]

WENDELL F. GILLEY, an individual and as class representative,	)
Plaintiff,	)
v.	)
MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS PLAN COMMITTEE, PHARMACIA CORPORATION, a corporation MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE,	)
Defendants.	)

BEFORE: Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

ORDER

In accordance with Findings of Fact and Conclusions of Law filed contemporaneously herewith, judgment is entered in favor of the plaintiff. The court adjudges and declares that the plaintiff is entitled to retirement benefits as provided in the defendants' ERISA Plan. The defendants will pay accrued benefits on past due payments plus appropriate interest and continue to pay retirement benefits as they accrue. The court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment as stated above. Costs are assessed against the defendants. The parties may file suggested amendments to this judgment within ten (10) days.

DONE and **ORDERED** this the **26th** day of January, 2006.

/s/ ROBERT B. PROPST

ROBERT B. PROPST
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. CV 04-0562
[Filed October 13, 2005]
[Hearing Held August 1, 2005]

WENDELL F. GILLEY, an individual and as class representative,

Plaintiff(s)

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, EMPLOYEE BENEFITS PLAN COMMITTEE, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation

Defendants.

BEFORE:
Robert B. Propst, SENIOR UNITED STATES DISTRICT JUDGE

EXCERPTS

* * *

APPEARANCES:

FOR THE PLAINTIFF:

ELISA S. RIVES
Attorney at Law
103 Ringold Plaza
Guntersville, AL 35976

FOR THE DEFENDANT:

JEFFREY SCOTT RUSSELL
Bryan Cave LLP
St Louis, MO 63102

DONALD R. JAMES
Baxley Dillard Dauphin
McKnight
Birmingham, AL 35205

THE COURT: Now, let me start and try to see if I can pierce through this veil as much as I possibly can. All right. Plaintiff, one of your positions is that in the year, 1972, is that the first year?

MS. RIVES: Yes, sir.

THE COURT: And, please, all of you answer my questions as directly as you can. One of your positions is that in 1972 that Mr. Gilley worked 1,000 hours and that thereby that made him eligible for 10 year vesting; is that correct or not?

MS. RIVES: No. It's not correct. My client doesn't have to work 1,000 hours –

THE COURT: No. Do you mean to tell me that you have never taken the position –

MS. RIVES: No, Your Honor.

THE COURT: -- that he worked enough overtime in 1972 to get in 1,000 hours which made him eligible?

MS. RIVES: No. He doesn't have to work 1,000 hours. He has to have 1,000 hours of Credited Service. Credited Service includes overtime, hours worked, vacation time, and compensation time...

THE COURT: Okay. Well –

MS. RIVES: Not 1,000 hours work time. That's their position.

THE COURT: Okay. Let me back up then. One of your positions is that he got 1,000 hours credit in 1972, and that that made him eligible for vesting; is that correct?

MS. RIVES: Yes, Your Honor. That's one of my positions.

THE COURT: That's the only one we're here to try today.

MS. RIVES: Yes, Your Honor. But not because it made him eligible under the current plan, but because they violated the ERISA mandates for discrimination and by adding the 95-Hour Rule while Mr. Gilley and other individuals were out on layoff, and they amended the plan and they applied the amendment backwards. Otherwise, there's no claim. The defendants' position has been consistently that this is just a claim for benefits, a claim for benefits, a claim for benefits. This is not an action about a claim for benefits. This is an action about the violation of ERISA Section 204 –

THE COURT: Well, wait a minute. A violation of ERISA, that's a claim for benefits, also, isn't it? If you're claiming benefits, you're claiming a violation of ERISA, aren't you?

MS. RIVES: Yes and no. You can have a claim for benefits strictly under the terms of the Plan or you can have a claim --

THE COURT: And that's not an ERISA claim?

MS. RIVES: Your Honor, there's a Section 502(a)(B)(1), or there's a Section 502 (a)(3). This is a claim under 502(a)(3). This is a claim for equitable relief because they violated ERISA by

applying an amendment backwards. I believe also that there are --

THE COURT: Are you not making a claim that he vested, by virtue of having 10 years of vesting time, and therefore he thus becomes entitled to benefits?

MS. RIVES: I'm making a claim that he's entitled to equitable relief, not that he's entitled to just benefits, but equitable relief, that inevitably they will get him his benefits. But until you get to that position, you have to find that the 95-Hour Rule could not be applied backwards. That's a separate claim. Plaintiffs get pigeonholed with this constant you're applying for just benefits, just benefits. It's not about just benefits. It's a claim for discrimination under Section 510 --

THE COURT: Discrimination as related to whom?

MS. RIVES: As related to Mr. Gilley as a technical clerical employee who is the only type of individual they applied this 95-Hour Rule to.

THE COURT: Refresh my memory as to what the 95-Hour Rule is.

MS. RIVES: The 95-Hour Rule was an amendment they added to the Plan. The first time I can identify defendants taking the opposite position, the first time that I can find it in a document in regards to the Summary Plan document –

THE COURT: Slow down a little bit, if you will.

MS. RIVES: Yes, sir. Was in 1981. What the amendment says is that the employer can elect to award 95 hours of Credited Service every semi-monthly pay period regardless of how many hours you worked. That rule in and of itself, if applied forward or backwards is somewhat –

THE COURT: Let me ask you this: Regardless of the application of the 95-Hour Rule, unless it's applied to the year 1972, does it have any effect on your client?

MS. RIVES: I'm sorry? I don't understand the question. You're saying regardless of –

THE COURT: It's my understanding, and I feel like I'm working in a foreign language in talking to both of you, but be that as it may, it's my understanding that there is no real dispute that if, except for the year 1972, and the argument that you all are respectively making with regard to the year 1972, that there is no dispute that he had a full year of '73, '74, '75, '76, '77, '78, '79, '80, '81, and I think '82, whatever gets us up to '90; right?

MS. RIVES: Actually, in 1982, the defendants take the position that Mr. Gilley chose termination in February of 1982, from layoff. The plaintiff's position is that he did not choose termination, that he was simply terminated --whatever paperwork they chose to do, not giving him a full year of credit up until March 31st, 1982.

THE COURT: Let me see if I can get some semblance of understanding of even what the positions are. Do I not understand that if he became eligible for a full year's credit in 1972, that there is no other issue? If he got credit for a full year's service in 1972, then everything else is insignificant as far as his individual claim is concerned; isn't that correct?

MS. RIVES: As far as his individual -- no, Your Honor. They breached their duty to keep the records that they were under an obligation, under the law, to keep. They discriminated against my client as an individual.

THE COURT: And that gets him what?

MS. RIVES: The same thing. At the same time, I'm not going to stand here and say, well, it's just a claim for benefits. That's their position. My position is that –

THE COURT: Well, I want to know -- I assume that that gentleman can't spend principle, spelled P-L-E. He can spend principal spelled P-A-L; but he can't spend principle spelled P-L-E. If he gets his pension and gets his backpay and everything under his pension, what else can he get?

MS. RIVES: That's all he can get as far as monetary relief or equitable relief in regards to his individual claims. But he sits here as a Plan participant suing on behalf of the Plan; and the

Plan can get something in regards to him. Also, I filed this as a class action and –

THE COURT: Well, wait a minute. Now, let's get down to the class action. I was looking back through the file awhile ago. You at some point filed an opposition to the defendants' motion for an extension of time for the plaintiff's motion for class certification. Then you filed a motion for class certification. We held a hearing and talked about it on the phone. I specifically asked you, do you want me to give you additional time for discovery on this class action or do you want me to go ahead and decide it? You told me you wanted me to go ahead and decide it. At that time, you had not named one person that would fall into the category of determining numerosity; is that correct or not?

MS. RIVES: That's not correct, Your Honor.

THE COURT: What's incorrect about anything I just said?

MS. RIVES: What's incorrect about it is, what you said on the telephone was -- I said, Your Honor, there is a motion to compel outstanding. And you said, well, I passed that off to Judge Davis and can't I do that? And I said, yes, sir, you can. And you said, well, I'll look into that; and if we need to look at a motion to compel -- and after I look at the motion to compel, if that's needed, then we will reopen discovery in regards to whatever we need to do. Based on that language from you, I assumed

that you were going to at least allow a look into the motion to compel which had many, many, many –

THE COURT: You did not tell me that you wanted me to go ahead and determine the class certification? The record will speak for whatever it said.

MS. RIVES: Yes, Your Honor, it will speak for whatever it says. You said you were going to look into the motion to compel and you would come back -- look at the motion to compel --

THE COURT: Well, you filed a motion for class certification. You did not think at the time that you had whatever it took to obtain a class certification?

MS. RIVES: Your Honor, I filed a motion to compel in November. The deadline –

THE COURT: No. I mean you filed a motion for class certification, did you not?

MS. RIVES: Yes, sir, I did.

THE COURT: And it came under submission, did it not?

MS. RIVES: Yes, sir, it did. And you ruled on it without allowing the motion to compel to be ruled on beforehand. In fact, the motion to compel was not heard until a week after discovery closed. Discovery closed on April 1st. I believe April 1st.

THE COURT: Did he ever rule on the motion to compel?

MS. RIVES: A week after discovery was closed.

THE COURT: What did he rule?

MS. RIVES: In regards to the class action, because you had already ruled that there was no class action, he said that he was not going to rule on that because the defendants presented to the Court that that was a dead issue.

THE COURT: Whatever. Okay. The issue we're here to try today is, as I understand it, and correct me if I'm wrong. First of all, you all have filed a motion for me to strike exhibits related to the Plan and things of that type. Now, when somebody is seeking recovery under an ERISA Plan and has exhausted administrative remedies, they don't have to tell you all what the plan is, do they?

MR. RUSSELL: No, Your Honor.

THE COURT: A lot of that you all put in your motion, that's just something you should have known and had with you.

MR. RUSSELL: With regard to the Plan documents, that's exactly right, Your Honor.

THE COURT: But you've asked me to exclude them, didn't you?

MR. RUSSELL: We asked you to exclude anything that was beyond the administrative record, if we referred to –

THE COURT: Including the Plan document?

MR. RUSSELL: That would have been a mistake, Your Honor.

THE COURT: That was what?

MR. RUSSELL: That would have been a mistake for us to ask you to exclude those and you properly denied the motion as to those.

THE COURT: That's what I'm wondering is when is it a mistake and when is it substance?

MR. RUSSELL: Right. And your ruling with regard to bringing in the Plan documents is correct, Your Honor, and –

THE COURT: Thank you.

MR. RUSSELL: You don't need me to tell you that. There are other materials, like Mr. Gilley's live testimony, for example, that is not part of the administrative record. He never appeared in front of the Committee. Those are the things that ought to be excluded and that's what our motion is based on.

THE COURT: Well, my understanding is, at least part of what we're here to establish is how much

time that he either worked or was on vacation, or however you say it added up. Do you agree that if he somehow or another got 1,000 hours in 1972, calculated however it's due to be calculated, that he would be eligible?

MR. RUSSELL: That's correct, Your Honor.

THE COURT: You agree to that?

MR. RUSSELL: Yes, we do, Your Honor.

THE COURT: Okay. So now you go ahead and prove, however you expect to prove, that he should get 1,000 hours for 1972.

* * *

THE COURT: While he's looking, let me ask the defendant. Is there a position being taken by the defendants that, even assuming that somehow or another Mr. Gilley was entitled to be credited for 1,000 hours in 1972, are you taking any position that later on there was an amendment to the Plan which would have reversed that initial determination?

MR. RUSSELL: No, Your Honor, we're not.

* * *

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12665

[Filed September 13th, 2011]

ROBERT H. HEPTINSTALL, WENDELL E. SIMS, JAMES L. COLLINS, JACKY T. BLACKWELL, THOMAS F. CAMPBELL, J. RUSSELL NEWMAN, FRED D. WORKS, as individuals and class representatives,

Plaintiffs/Appellants

And

BILLY J. WRIGHT

Plaintiff,

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation, SOLUTIA INC. EMPLOYEES'

PENSION PLAN, and SOLUTIA INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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Before: TJOFLAT, PRYOR AND MARTIN, Circuit Judges. PER CURIAM:

ORDER

The Petition for Rehearing is DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc* (Rule 35, Federal Rules of Appellate Procedure), the Petition For Rehearing *En Banc* is Denied.

ENTERED FOR THE COURT:

WILLIAM H. PRYOR JR.

UNITED STATES CIRCUIT JUDGE

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-12665

[Filed March 5, 2010]

ROBERT H. HEPTINSTALL, WENDELL E. SIMS, JAMES L. COLLINS, JACKY T. BLACKWELL, THOMAS F. CAMPBELL, J. RUSSELL NEWMAN, FRED D. WORKS, as individuals and class representatives,

Plaintiffs-Appellants

And

BILLY J. WRIGHT

Plaintiff,

v.

MONSANTO COMPANY, INC., a corporation, MONSANTO COMPANY SALARIED EMPLOYEES' PENSION PLAN, MONSANTO COMPANY EMPLOYEE BENEFITS EXECUTIVE COMMITTEE, PHARMACIA CORPORATION, a corporation, SOLUTIA INC. EMPLOYEES'

PENSION PLAN, and SOLUTIA INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

Before TJOFLAT, PRYOR, AND MARTIN, Circuit Judges. PER CURIAM:

ORDER

This case presents facts and issues indistinguishable from those already considered and decided by this court in *Gilley v. Monsanto Co.*, 490 F.3d 848 (11 th Cir. 2007). Robert Heptinstall and his co-plaintiffs, all former employees of Monsanto Company, Inc. (collectively "Heptinstall"), appeal the district court's dismissal of their action against the Monsanto Company, Inc. and several related entities. Heptinstall alleged that he was a vested member of the Monsanto Company Salaried Employees' Pension Plan ("the Plan") and that the Plan wrongfully denied him his vested benefits in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* In *Gilley*, this court addressed a factual1y indistinguishable case involving the same Plan, the same method of calculating years of service, and a plaintiff-employee who started and

stopped working for Monsanto at the same time as did Heptinstall (and brought by the same attorneys who represent Heptinstall), and held that the plaintiff-employee had not accumu1ated enough years of service, so his benefits had not yet vested. Gilley controls the outcome here. Heptinstall puts forth various arguments as to why Gilley should not apply, but they all in essence ask us to reconsider that decision, and one panel of this court may not overrule a prior panel's decision. *Cargill v. Tumin*, 120 F.3d 1366, 1386 (lIth Cir. 1997). Accordingly, the district court's order dismissing Heptinstall's claim with prejudice is AFFIRMED.[1]

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[1]The district court dismissed Heptinstall's suit for lack of standing to sue under ERISA, but it actually should have dismissed for failure to state a claim. Heptinstall's claims are due to be dismissed with prejudice for failure to state a claim.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION

No. CV 06-01564

[Filed May 15, 2009]

ROBERT H. HEPTINSTALL,)
WENDEL E. SIMS, JAMES L.)
COLLINS, JACKY T. BLACKWELL,)
THOMAS F. CAMPBELL, J.)
RUSSELL NEWMAN, FRED D.)
WORKS, BILLEY WRIGHT,)
as individuals and class representatives,)
)
)
)
Plaintiff(s))
)
v.)
)
MONSANTO COMPANY, INC., a)
corporation, MONSANTO COMPANY)
SALARIED EMPLOYEES' PENSION)
PLAN, MONSANTO EMPLOYEE)
BENEFITS PLAN COMMITTEE,)
MONSANTO COMPANY EMPLOYEE)
BENEFITS EXECUTIVE COMMITTEE,)

PHARMACIA CORPORATION,)
a corporation)
)
)
Defendants.)
)

BEFORE: C. Lynwood Smith,
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

This is an ERISA action. Plaintiffs Robert H. Hepinstall, Wendell Sims, Larry Collins, Fred Works, Thomas Campbell, Russell Newman, and Jacky Blackwell are former employees of defendant Monsanto Company, Inc. Plaintiffs worked at a now defunct factory located in Marshall County, Alabama ("the Sand Mountain Plant"). Despite the verbose and convoluted nature of plaintiffs' pleadings, the issue presented in this case is fundamentally straightforward: plaintiffs allege that they are vested members of the Monsanto Company Salaried Employees' Pension Plan ("the Plan"), and that they have wrongfully been denied benefits due to them under the Plan by defendants Monsanto Company, Inc.; the Monsanto Company Salaried Employees' Pension Plan; the Employee Benefits Plan Committee; Pharmacia Corporation; the Monsanto Company Employee Benefits Executive Committee; the Solutia, Inc., Employees Pension Plan; and Solutia, Inc. Plaintiffs seek relief exclusively under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*,

and they assert their ERISA claims in three different capacities: (1) as individuals who were allegedly wrongfully denied pension benefits; (2) as representatives of a putative class of similarly situated individuals; and (3) on behalf of the Plan itself. This action is before the court on a dozen motions, three of which request the dismissal of plaintiffs' claims.[1] Due to the unique history of this dispute, however, those motions only recently became ripe for review. The present case is, according to plaintiffs, a "continuation and follow-up" to *Gilley v. Monsanto Company, Inc.*, *et al.*, Civil Action No. 4:04-CV-00562-CLS, which was filed approximately two years prior to the commencement of this action.[2] Both cases arise

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[1] *See* doc. no. 69 (Plaintiffs' Second M 1 otion to Compel); doc. no. 82 (Motion to Dismiss Plaintiffs' Second Amended Complaint by Monsanto Company, Inc., the Monsanto Company Salaried Employees' Pension Plan, the Employee Benefits Plan Committee, Pharmacia Corporation, and the Monsanto Company Employee Benefits Executive Committee) ("the Monsanto Defendants); doc. no. 93 (Motion to Dismiss Plaintiffs' Second Amended Complaint by the Solutia Inc. Employees Pension Plan, and Solutia, Inc.); doc. no. 97 (Plaintiffs' Motion for Sanctions); doc. no. 99 (Second Motion to Compel and for the Sanction of Dismissal by the Monsanto Defendants); doc. no. 101 (Plaintiffs' Third Motion to Compel); doc. no. 103 (Plaintiffs' Motion to Strike); doc. no. 105 (Plaintiffs' "Motion to Clarify" the Third Motion to Compel); doc. no. 106 Plaintiffs' Motion to "Supplement" the Second and Third Motions to Compel); doc. no. 112 (Plaintiffs' "Motion to Continue"); doc. no. 114 (Plaintiffs' "Supplemental Motion to Continue"); and doc. no. 115 (Plaintiffs' Revised "Supplemental Motion to Continue").

[2]Doc. no. 88 (Plaintiffs' Reply to Defendants' Response to Plaintiffs' Second Motion to Compel) at 2. *Gilley* was never consolidated with the present case.

from substantially identical facts, were brought by the same attorney for plaintiffs, advance ERISA claims, and involve many of the same defendants.[3] Also, both cases have had tortuous histories. *Gilley*, however, has reached a final disposition, whereas the instant case, despite its age, has not moved beyond the initial pleadings stage. Nevertheless, and because of the striking similarities between the two cases, this court will examine the various rulings by this court and the Eleventh Circuit in *Gilley* when adjudicating the present dispute. The Eleventh Circuit's recent holdings in *Gilley* provide clear, *stare decisis* guidance for the disposition of plaintiffs' claims in this action. *See Gilley v. Monsanto Co., Inc.*, 490 F.3d 848 (11th Cir. 2007) (*Gilley I*); *Gilley v. Monsanto Co., Inc.*, 309 Fed. Appx. 362 (11th Cir. 2009) (*Gilley II*).[4] Upon review of the pleadings, the parties' motions, and their respective briefs, defendants' motions to dismiss are due to be granted.

I. STANDARD OF REVIEW

The Federal Rules of Civil Procedure require that a complaint contain a "'short and plain statement of the claim' that will give the defendant

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[3]Solutia, Inc. and the Solutia, Inc., Employees Pension Plan were not parties to *Gilley*; however, Gilley unsuccessfully sought, through his counsel, to add those entities as defendants to his lawsuit.

[4]Prior to the Eleventh Circuit's ruling in *Gilley I*, the Clerk of court reassigned that case from Senior United States District Judge Robert B. Propst (to whom it was originally assigned, and who conducted the partial trial on the merits from which the *Gilley* defendants appealed) to the undersigned judge.

fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (citations omitted). Those factual allegations need not be detailed, but "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 545 (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986), and *Sanjuan v. American Board of Psychiatry and Neruology, Inc.,* 40 F.3d 247, 251 (7th Cir. 1994)) (bracketed alteration in *Twombly*). Thus, even though notice pleading may not require that the pleader allege a "specific fact" to cover every element, or allege "with precision" each element of a claim, the complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Center for Choice, Inc*., 253 F.3d 678, 683 (11th Cir. 2001). When ruling upon a Rule 12(b)(6) motion, the court must accept all well-pleaded facts as true, and construe them in the light most favorable to the non-moving party. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also, e.g., Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1369 (11th Cir. 1997); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983).

Viewed in this manner, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level . . . ." *Twombly,* 550 U.S. at 545 (citations omitted). Stated differently, the plaintiffs must plead facts sufficient to "nudge[] [their] claims across the line from conceivable to plausible . . . ." *Id.* at 547.

II. FACTS[5]

Each of the seven named plaintiffs began working at the Sand Mountain Plant in August of 1972.[6] Allegedly, they were continuously employed at that facility until Monsanto "laid off" all employees in February of 1981, due to the permanent closure of the Sand Mountain Plant.[7] Plaintiffs' "continuous" employment was collectively terminated in February of 1982 — one year after plaintiffs were placed on "layoff" status.[8]

When each plaintiff began his employment in 1972, defendant Monsanto maintained a defined pension plan for its employees, the "1971 Monsanto

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[5]All allegations of fact have been construed in a light most favorable to the plaintiffs, and have been gleaned exclusively from plaintiffs' second amended complaint and plaintiffs' consolidated response to defendants motions to dismiss. The parties' evidentiary submissions related to the motions to dismiss have not been considered.

[6]*See* doc. no. 64 (Second Amended Complaint), at ¶¶ 20, 21, 23-28.

7 *Id.* at ¶ 9.

[8] Doc. no. 96 (Plaintiffs' Consolidated Response to Defendants' Motions to Dismiss), at 16-17 ("Monsanto automatically terminated Sand Mountain employees at the expiration of the one-year 'layoff' period . . . .").

Company Salaried Employees' Pension Plan" ("1971 Plan"), to which each plaintiff was a "participant." In *Gilley I*, the Eleventh Circuit summarized the relevant vesting requirements of, and the amendments to, the 1971 Plan as follows:

> Under Monsanto's Salaried Employees' Pension Plan, certain employees are entitled to benefits if they are able to meet the vesting requirements of the plan. Although Monsanto has amended its pension plan several times over the years, all relevant versions of the plan set out the same basic vesting requirements: (1) an eligible employee must reach retirement age, and (2) the employee must acquire at least ten years of "Vested Service." An employee earns a year of Vested Service when he completes 1,000 "Hours of Service," defined as all hours of employment for which an employee is directly or indirectly compensated, during that year. The manner in which Hours of Service are calculated has varied as Monsanto has amended its pension plan.
>
> When Gilley began work at Monsanto, the 1971 Plan was in effect. The pension plan was amended in 1976 to comply with the requirements of the Employee Retirement Income

Security Act of 1974, 29 U.S.C. §§ 1001 et seq., which went into effect, for our purposes, in 1976. According to Monsanto, both the 1971 Plan and the 1976 post-amendment Plan utilized the "Elapsed Time Method" to calculate Vested Service for pension purposes. Under this method, an employee is credited with the hours that result from dividing the total number of calendar days of employment, including weekends and holidays, by 365 and then multiplying that number by 2,080 (the total hours in a "Standard Work Year" based on a forty-hour work week). In other words, an employee's Hours of Service are determined based on the fraction of the year he is employed, multiplied by the Standard Work Year — if an individual is employed for 176 days out of the year, he would be entitled to 1,002 Hours of Service or one year of Vested Service.

Sometime between 1979 and 1981, the Plan Committee decided to change the way Hours of Service are determined, adopting the "95-Hour Rule" and incorporating it into the amendments to the 1981 Plan. Under this calculation method, the provider credits all employees with ninety-five Hours of Service for each two-week

> period they are employed, regardless of the actual hours worked. The 95-Hour Rule expressly excludes additional credit for overtime hours, embodying the assumption that the fifteen extra Hours of Service credited on a bi-weekly basis (assuming a 40-hour week or 80 hours every two weeks) is a fair way to cover any overtime hours worked. In addition to adopting the 95-Hour Rule, the 1981 Plan stated that an employee's benefit rights are to be determined according to the pension plan in effect at the time that the employee separates from Monsanto.

Gilley I, 490 F.3d at 852-53 (footnote omitted).[9]

III. DISCUSSION

The claims of plaintiffs in the present action rely upon an incorrect and incurable assumption: that each plaintiff vested under the terms of the 1976 Plan before the date of their collective termination. In making that argument, however, plaintiffs paradoxically concede that the 1976 Plan was amended in 1981, and that none of the plaintiffs meet the vesting requirements under the 1981 Plan. That said, plaintiffs argue that, as a matter of

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[9]The court takes note that the portion of *Gilley I* quoted above is not inconsistent with the allegations of plaintiffs' second amended complaint insofar as the Plan's various amendments and vesting requirements are concerned.

law, the 1981 Plan cannot be applied to them, and that this court should look instead to the 1976 Plan to determine whether plaintiffs vested prior to the termination of their employment. It would be folly for this court to analyze plaintiffs' claims for benefits under anything other than the 1981 Plan. That row was plowed by this court in *Gilley I*, and the Eleventh Circuit made it crystal clear that such a course was erroneous. *See Gilley I*, 490 F.3d at 858-60. Identical to each of the plaintiffs in this case, Wendell Gilley was "continuously" employed at the Sand Mountain Plant from August 1972 until February 1982. *Id.* at 850. Also, he advanced the same legal arguments that are presented by the plaintiffs in the present lawsuit — *i.e.*, that the 1981 Plan was not applicable to him, and that he was entitled to pension benefits under the calculation methods for vested service found in the 1976 Plan. Persuaded by Gilley's arguments against the applicability of the 1981 Plan to his claim for benefits, Senior Judge Robert B. Propst refused to follow the provisions of the 1981 Plan, held a bench trial on the merits of Gilley's claim for benefits, and entered a judgment in his favor. *Id.* at 853-55.[10] On appeal, however, the Eleventh Circuit disagreed, and held that the so-called "95-Hour Rule" contained within the 1981 Plan provided the proper method of calculating whether Gilley had earned his pension. *Id.* at 858-60. Applying the 95-Hour Rule, that Court determined that Gilley did not vest under the 1981 Plan, reversed the entry of judgment in his favor, and remanded the case to

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[10]*See supra* note 4.

this court for further proceedings. *Id.*[11] On remand from the Eleventh Circuit, this court found that, because Gilley had not vested under the Plan, he was no longer a "participant," as that term is defined in ERISA. *See Gilley v. Monsanto Co., Inc.*, No. 4:04-cv-00562-CLS-HGD, doc. no. 194 (N.D. Ala. Mar. 17, 2004). Based upon that finding, this court concluded that Gilley lacked standing to pursue *any* claims under ERISA and, consequently, that Gilley's claims were due to be dismissed for lack of jurisdiction. *Id*. That holding was recently affirmed by the Eleventh Circuit. *See Gilley II*, 309 Fed. Appx. at 362. In the present case, plaintiffs have failed to assert any facts that distinguish the claims in this case from those asserted in *Gilley*, or, alternatively, that could plausibly entitle them to relief under ERISA. In their respective motions to dismiss, defendants correctly argue that, pursuant to the Eleventh Circuit's mandate in *Gilley I*, the 1981 Plan also governs these plaintiffs' claims for benefits. It is undisputed that, in order to vest under the Plan at issue, an employee must have completed ten years of continuous service. Under the 95-Hour Rule, plaintiffs fall short of that mark, and they concede that it would be "futile" to submit their claims for benefits for review if the 1981 Plan

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[11]Like all published opinions by the Eleventh Circuit, that Court's holding in *Gilley* is binding authority on this court. Moreover, the doctrine of *stare decisis* plays an important role here. The issues before this court in the present case are *identical* to those previously ruled upon by both this court and the Eleventh Circuit in the *Gilley* decisions. Plaintiffs' counsel will not be allowed to circumvent the adverse rulings in *Gilley* by filing and prosecuting a mirror image of that case with different named plaintiffs.

governs.[12] Moreover, this court notes that none of the named plaintiffs could have achieved ten years of continuous service under the terms of the 1976 Plan at the time the amended 1981 Plan took effect. As such, this court finds that plaintiffs have failed to allege any facts that could plausibly lead to the conclusion that they vested under the terms of the 1981 Plan before the date of their collective termination.

Because plaintiffs did not vest prior to the termination of their employment, they lack standing to pursue claims under ERISA. "The only parties that have standing to sue under ERISA are those listed in the civil enforcement provision of ERISA, codified at 29 U.S.C. § 1132(a)." *Hobbs v. Blue Cross Blue Shield of Alabama*, 276 F.3d 1236, at 1240 (11th Cir. 2001) (citing *Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir. 1997) (same)). An action seeking relief under ERISA can only be brought by a "participant," a "beneficiary," or a "fiduciary" of an ERISA plan; or, in certain instances, by the Secretary of the United States Department of Labor. 29 U.S.C. § 1132(a). Plaintiffs do not allege that they are either beneficiaries or fiduciaries under the Plan, and the court takes judicial notice that none of the named plaintiffs is the Secretary of Labor. Rather, plaintiffs attempt to bring their claims under ERISA's umbrella by alleging that they are

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[12]*See* doc. no. 64 (Second Amended Complaint), at ¶¶ 84-85, 96, 121. *See also* doc. no. 96 (Plaintiffs' Consolidated Response to Defendants' Motions to Dismiss), at 16-17.

"participants" under the Plan. That position is untenable. ERISA defines a "participant" as:

> any employee or former employee of an employer, or any member or former member of an employee organization, *who is or may become eligible to receive a benefit* of any type *from an employee benefit plan* which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis supplied). As former employees who are not entitled to vested benefits, plaintiffs can fall within that definition only if they "may become eligible to receive a benefit" from the Plan. *Id.* The Supreme Court examined the "may become eligible" requirement as it relates to former employees in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Specifically, the Court held that the requirement is satisfied if the former employee has a reasonable expectation of returning to covered employment, or has a colorable claim that he will prevail in a suit for vested benefits. *Id.* at 117-18. Here, plaintiffs do not fall within the "may become eligible" requirement. Plaintiffs have not alleged that they expect to return to covered employment.[13] Moreover, plaintiffs do not have a colorable claim for vested benefits, in that none of

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[13]In fact, such an allegation would be baseless. It is undisputed that the Sand Mountain Facility has been shuttered for 28 years.

them vested prior to their collective termination from continuous employment. Also, it is the long-standing law in the Eleventh Circuit that "a former employee whose pension benefits were not vested at the time of [his] termination . . . is not a 'participant' [under ERISA]." *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980).[14] *See also Jackson v. Sears, Roebuck and Co.*, 648 F.2d 225, 228-29 (5th Cir. June 15, 1981)[15] (agreeing with the holding in *Nugent* and concluding "that the 'may become eligible' language was intended [by Congress] to apply only to current employees."). Accordingly, when considering plaintiffs' allegations of fact in light of the authority of *Firestone*, *Nugent*, and *Jackson*, none of the named plaintiffs is a "participant" under 29 U.S.C. § 1132(a). As such, plaintiffs lack standing to pursue ERISA claims. *See Hobbs*, 276 F.3d at 1240. A plaintiff's standing to bring an action is a threshold jurisdictional issue. *See Alabama v. United States Environmental Protection Agency*, 871 F.2d 1548, 1554 (11th Cir. 1989) (noting that "[s]tanding is a jurisdictional prerequisite to suit in federal court") (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). "As the Supreme Court made clear in *United States v. Hays*, 515 U.S. 737, [742], 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995), '[t]he

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[14]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[15] *See* Footnote 14, *supra*.

question of standing is not subject to waiver . . . and standing is perhaps the most important of [the jurisdictional] doctrines.'" *Bischoff v. Osceola County, Florida*, 222 F.3d 874, 877 (11th Cir. 2000) (bracketed text supplied).

IV. CONCLUSION AND ORDER

For the reasons stated herein, defendants' motions to dismiss are due to be, and they hereby are, GRANTED.[16] Accordingly, plaintiffs' claims are DISMISSED with prejudice. All remaining motions are DENIED.[17] The Clerk is directed to close this file. Costs are taxed as paid.

DONE and ORDERED this 15th day of May, 2009.

Lynwood C. Smith

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United States District Judge

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[16]*See* doc. no. 82; doc. no. 93. *Nota bene*: Defendants advanced several alternative grounds for dismissal of this action; however, those arguments have not been analyzed by this court.

[17]*See* doc. no. 69; doc. no. 97; doc. no. 99; doc. no. 101; doc. no. 103; doc. no. 105; doc. no. 106; doc. no. 112; doc. no. 114; doc. no. 115.