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

ROBERT H. HEPTINSTALL, et al.	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO.
MONSANTO COMPANY, INC., et. al.	)	CV-06- P-1564-M
Defendants.	)	

OPPONENTS' RESPONSIVE SUBMISSION IN RESPONSE TO

EXHIBIT B OF THE COURT'S ORDER[1]

(MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS)

INTRODUCTION

Plaintiffs, Robert H. Heptinstall ("Bob Heptinstall"), Wendell E. Sims ("Wendell Sims"), and James L. Collins ("Larry Collins") collectively ("Plaintiffs"), bring this action pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et. seq*. ("ERISA"). Plaintiffs' claims arose as a result of Defendants alleged violation of several provisions of ERISA, including § 204(g), § 510, and § 404. Plaintiffs, individually and as representatives for other similarly situated participants and the Monsanto Company Salaried Employees' Pension Plan (the Plan), seek appropriate equitable and remedial relief pursuant to ERISA § 502(a)(3) and/or 502(a)(1)(B) in their representative capacity pursuant to § 502(a)(2) and § 409 for the Defendants' breach of

[1] Plaintiffs did not receive the Court's Order regarding Exhibit B until 10-24-2006.

fiduciary duty under § 404. The Plan is sponsored, maintained and administered by the Defendants, Monsanto Company, Inc., ("Monsanto"), Pharmacia Corp. ("Pharmacia"), the Monsanto Company Employee Benefits Executive Committee ("Executive Committee"), and the Employee Benefits Plan Committee ("Committee"), collectively ("Defendants"). Plaintiffs, other similarly situated plan participants, and the Plan have been injured by the Defendants' violations of several provisions of ERISA.

Plaintiffs assert Defendants, "who had a 'full and fair' opportunity to litigate their claims" in *Gilley v. Monsanto Company, et. al.* CV-04-PT-00562-M are collaterally estopped from relitigating the same issues resolved by that action such as: Whether Defendants' use of the 95-Hour Rule to calculate 1972 Hours of Service is a violation of ERISA § 204(g); whether the Committee is the only proper Defendant when the *Gilley* court determined that a "heightened arbitrary and capricious" standard of review applied because of a conflict of interest, and ; whether all Plaintiffs' claims are barred by a statute of limitation? *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). While use of offensive collateral estoppel is not favored, when, as here, none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present, the Court may in its discretion permit Plaintiffs to foreclose Defendants from litigating issues that Defendants previously litigated unsuccessfully. *Id.*

STATEMENT OF FACTS

A. Background

The facts surrounding Plaintiffs claims are essentially the same as the facts outlined in *Gilley v. Monsanto Co. Inc.*. In early 1972, Monsanto Company, Inc. (herein "Monsanto") opened a plant in North Alabama located on the Tennessee River near

Guntersville, Alabama, the Sand Mountain plant, for the purpose of manufacturing nylon and polyester yarn for market. (Comp. ¶¶ 12, 13).[2] Plaintiffs here as was Gilley in the related case are all former non-exempt employees[3] of the Sand Mountain plant hired in August 1972 and working continuously until Monsanto closed the plant in early 1981 and thereafter. (Comp. ¶¶ 1, 2, 14-18).).

B. Parties

Plaintiffs Bob Heptinstall, Wendell Sims, and Larry Collins, presently reside in Marshall County, Alabama. As salaried non-exempt employees of Monsanto, Plaintiffs here as did Gilley, participated in Monsanto's pension plan for salaried employees, the Monsanto Salaried Employes' Pension Plan ("the 1971 Plan") when their employment began in 1972. (Comp. ¶ 21).

C. The Plan

Under the 1971 Plan a participant was entitled to a deferred pension if his "Continuous Service" from the first day of employment until his last equaled ten years. (Comp. ¶ 23). In 1976, pursuant to the newly enacted Employment Retirement Insurance Security Act ("ERISA") the 1971 Plan was amended, restated and continued as the Monsanto Salaried Employes' Pension Plan in 1976 ("the 1976 Plan") incorporating for the first time the concept of a Plan year. (Comp. ¶ 24). Under the 1976 Plan a "'Plan Year' is defined as a calendar year." (Comp. ¶ 28). According to the Summary Plan Document (SPD), "YOUR BENEFITS - Monsanto," distributed to participants starting January 1, 1976, one year of Vesting Service would be credited for each calendar year in which the participant completed 1000 or more Hours of Service. (Comp. ¶ 29). The SPD

[2] When the Sand Mountain facility was shut down in February 1981 it was no longer producing nylon.
[3] In 1972, Plaintiffs were all non-exempt production level salaried employees subject to the Fair Labor Standards Act's ("FLSA") overtime provisions. (Comp. ¶ 19).

defines an Hour of Service as each hour for which you are paid – either directly or indirectly-or are entitled to payment for time not actually worked – i.e. holidays, vacations, temporary disability, etc. (Comp. ¶ 30). Plaintiffs received overtime in addition to their base salary as non-exempt employees subject to FLSA and because overtime hours are hours for which a participant is directly compensated, overtime hours were to be credited under the 1976 Plan as Hours of Service according to the 1976 SPD. (Comp. ¶¶ 21, 31). Furthermore, according to the 1976 SPD, Vesting Service for calendar years before 1976 is credited as described in the 1976 SPD or on the basis of Credited Service as determined under prior Company pension plans **depending on which method was more favorable to the plan participant.** (Comp. ¶ 32).[4]

D. The Sand Mountain Plant and The Rotating Shift Schedule

The Sand Mountain plant was a continuous operation plant producing nylon and polyester 24 hours a day seven days a week. (Comp. ¶ 34). During its first few years of operation the Sand Mountain plant operated on a continuous rotating shift schedule. (Comp. ¶ 35). Non-exempt employees working the rotating shift worked seven continuous days on first shift (eight a.m. to four p.m.), seven continuous days on second shift (four p.m. to midnight), seven continuous days on third shift (midnight until eight a.m.) followed by seven days on first shift etc. with two off days between each shift. *Id.* Non-exempt employees working the rotating shift schedule were required to work mandatory overtime every Sunday on first shift, thirteen Sundays per calendar year. (Comp. ¶ 36). On the rotating shift schedule non-exempt production level employees were required to work every holiday that fell within their regular shift schedule, six

[4] Plaintiffs were all participants of the 1976 Plan.

holidays per calendar year; notwithstanding the fact that non-exempt employees were entitled to nine paid holidays per calendar year. (Comp. ¶ 37). On the rotating shift schedule non-exempt production level employees worked 254 regular eight hour days per calendar year in addition to mandatory Sundays on overtime and mandatory holidays, or 273 days per calendar year. (Comp. ¶¶ 38, 39). Non-exempt employees were entitled to ten days of paid vacation per calendar year and comparable time off for working required overtime on holidays. (Comp. ¶¶ 40, 41). Non-exempt employees were entitled to five sick days per year and three personal leave days. (Comp. ¶ 42).[5] In addition to their grueling regular work schedule non-exempt production level employees were encouraged to work as much voluntary overtime as possible. (Comp. ¶ 43). It is undisputed that Plaintiffs and other non-exempts worked substantial amounts of overtime in 1972. (Comp. ¶ 44).

E. Plaintiffs' Accrued Credited Service

Pursuant to the 1976 SPD a participant of the Plan accrued credited service for 1972 according to the 1000 Hours of Service Rule because this method of accrual was *more favorable* to participant than "the continuous service" method under the 1971 Plan.[6] (Comp. ¶¶ 45, 46). Because Plaintiffs worked substantial amounts of both mandatory and voluntary overtime in addition to a regular rotating schedule that required them to work more than twenty plus days per month they had over 1000 Hours of Service for 1972 entitling them to be credited with one full year of Vesting Service for 1972 under

[5] Plaintiffs and other non-exempts were paid – either directly or indirectly- or entitled to payment for time not actually worked – i.e. holidays, vacations, temporary disability, comp time etc.

[6] The SPD states "Vesting Service for calendar years before 1976 **is credited** as described above – or on the basis of your Credited Service as determined under prior Company pension plans – **whichever is more favorable to you.**" SPD at 41. Under the "continuous service" method of accrual a participant had to work a full year from his employment date to his anniversary date to be entitled to a year of "Vesting Service," but if partial years of service were to be credited it would be at the rate of 1/12 of a year for each completed month.

the 1976 Plan.[7] Plaintiffs are entitled to eight years of Vesting Service from January 1, 1973 through December 31, 1980. (Comp. ¶ 48). In 1981, Monsanto stopped production at the Sand Mountain plant in Marshall County, Alabama.[8] (Comp. ¶ 49). Under the 1976 Plan a plan participant was to receive credit for Hours of Service for absence from active work during the first 12 months due to a layoff. (Comp. ¶ 50). Plaintiffs and other similarly situated participants were placed on layoff status upon completion of their last day of active work at the Sand Mountain plant. (Comp. ¶ 51). Pursuant to the 1976 Plan Plaintiffs received one year of credited service for the period January 1, 1981 through December 31, 1981. (Comp. ¶ 52). According to the terms of the 1976 Plan Plaintiffs have ten years of Vesting Service and participants with ten years of Vesting Service are entitled to a pension benefit. (Comp. ¶¶ 53, 54). The 1976 Plan was finalized in July 1979. (Comp. ¶ 55).

F. Lack of Notice of Amendment

Around September 1979, the Monsanto Company Employee Benefits Plan Committee ("Committee") approved a recommendation by the plan sponsor for the exclusion of overtime for purposes of determining Hours of Service.[9] (Comp. ¶ 56). The "95 Hour Rule" as it has been so termed credited a flat rate of 95 Hours of Service for each semi-monthly payroll period for technical and clerical participants excluding overtime for purposes of determining Hours of Service (Comp. ¶ 58). Pursuant to

[7] Based on Plaintiffs' total compensation in relation to their regular salary times the number of hours in a year on the rotating shift schedule. The 1976 Plan does not use the Standard Work Year (2080) in determining whether or not a participant has 1000 Hours of Service. Under Section 18.1(ii) of the 1976 Plan if a participant completes less than 1,000 Hours of Service **then and only then** is his/her fractional years of service determined by dividing by the Standard Work Year (Def. Exh. C2 at p. 54). *See* Court's Finding of Fact and Conclusions of Law (herein "FOF") in *Gilley v. Monsanto* et al.

[8] Monsanto's board decided to amend the Plan at the same meeting that it voted to closed the Sand Mountain plant.

[9] The memo to the Committee from the Plan sponsor requesting the approval of the "95 Hour Rule" and the exclusion of overtime hours has been termed the "95 Hour Rule memo." The "95 Hour Rule"states that the plan sponsor previously counted overtime hours as Hours of Service.

regulations a Plan cannot be amended until participants are given proper notice, thus the "95 Hour Rule" was not **formally** incorporated into the Plan until the 1976 Plan was amended, restated, and continued as the 1981 Plan or thereafter when participants were given formal notice. (Comp. ¶ 57). The 1976 Plan was amended, restated and continued as the "1981 Monsanto Company Salaried Employees' Pension Plan," the "1981 Plan," after Plaintiffs and other non-exempt employees working at the Sand Mountain plant were placed on layoff status. (Comp. ¶ 59). Plaintiffs and other similarly situated participants at the Sand Mountain plant were never given notice of the amendment, restatement, and continuation of the 1976 Plan. (Comp. ¶ 60).

G. Separated Participants

Plaintiffs at the time of their discharge were rightfully entitled to their separated deferred vested pension benefit under the Plan. (Comp. ¶ 61). Defendants are required to report annually all separated participants with a deferred vested benefit on SSA Form 5500. (Comp. ¶ 62). Plaintiffs and other non-exempt participants were not listed on Schedule SSA Form 5500 for 1979, 1980, 1981, and/or 1982 as being separated participants with a deferred vested benefit. (Comp. ¶ 63). Even non-exempt participants hired prior to August 1972 that Defendants now admit are entitled to their deferred vested benefit were **not** listed on Schedule SSA Form 5500 for 1979, 1980, 1981, and/or 1982, while exempt management level employees were listed. (Comp. ¶¶ 64, 65).

H. Exhaustion

Plaintiff, Bob Heptinstall, inquired about his vested benefit over the telephone with a representative of Defendant Pharmacia/Monsanto. (Comp. ¶ 66). By letter dated February 12, 2004, Defendants notified Bob Heptinstall that he did not meet the

necessary service requirements to accrue a vested benefit because he accrued only 9.685 years of vesting service. (Comp. ¶ 67). The letter of February 12, 2004, did not properly notify Bob Heptinstall of the reason for the decision and failed to advise him of his right to review as required by ERISA § 503(1) & (2). (Comp. ¶ 68). On or about January 23, 2006, Bob Heptinstall filed a request for review of the denial of his rightful pension benefit with Defendant Monsanto Employees Benefits Plans Committee. (Comp. ¶ 69). The Secretary of the Employee Benefits Plans Committee, the ("Committee"), by letter dated March 10, 2006, finally explained that the Monsanto administrator calculated Bob Heptinstall's vesting service according to the "95 Hour Rule." (Comp. ¶ 71). The Secretary set out his understanding of how the Monsanto administrator calculated Bob Heptinstall's service under the "95 Hour Rule" as follows:

Hire date	August 30, 1972
Termination from layoff	March 31, 1982
Vesting Service 1972	0.411 years (9 x 95 = 855/2080)
Vesting Service 1973-1981	9.000 years
Vesting Service 1982	0.274 years
Total Vesting Service	9.685 years

(Comp. ¶ 73). The Secretary of the Committee recalculated Bob Heptinstall's accrued service allegedly based on a review of employment records using a termination from layoff date of January 1, 1982, and the "95 Hour Rule" as follows:

Hire date	August 30, 1972
Layoff date	February 27, 1981
Termination from layoff	January 1, 1982
Vesting Service 1972	0.411 years (9 X 95 = 855/2080)
Vesting Service 1973-1981	9.0 years

Vesting Service 1982	0.046 years (Based on January 1, 1982 termination date)
Total Vesting Service	9.457 years

(Comp. ¶ 74).

1. Lack of Full and Fair Review and the Committee's Lack of Autonomy

In support of his review by the Committee Bob Heptinstall submitted an outline of how his service accrued under the 1976 Plan and under the "1000 Hour Rule," a certified copy of his Social Security earnings for calendar year 1972, a sworn affidavit stating his base pay, and a record of all hours worked on the B Shift for calendar year 1972. (Comp. ¶ 75). The Committee, realizing the Secretary had misread the record, found that Bob Heptinstall's termination date was actually November 1, 1982, rather than January 1, 1982, but nevertheless the Committee acting without autonomy agreed with the sponsor's determination that Bob Heptinstall was not entitled to a pension benefit even though he had ten years of service based on the beginning and termination dates. (Comp. ¶ 76). The Committee failed to acknowledge Heptinstall's termination date of November 1, 1982, and revisited eligibility by recalculating his accrued Hours of Service for 1972 according to the "95 Hour Rule" under Section 17.5(f) of the 1981 Plan Document instead of Section 18.5 of the 1976 Plan.[10] (Comp. ¶ 78).

The Committee as did the sponsor's administrator found that Bob Heptinstall had 855 hours of Vesting Service (0.411 years= 855/2080) for his partial year of service in 1972. (Comp. ¶ 79). The Committee rejected the assertion that Bob Heptinstall accrued credited service for 1972 under the "1000 Hour Rule" of the 1976 Plan maintaining that

[10] In the August 1 & 2, 2005, trial in *Gilley v. Monsanto* et. al. Mr. Brian Buettner (herein "Mr. Buettner") the company's administrator testified that when a participant requests a pension benefit or appeals a benefit determination that the administrator looks at the hire date and termination date to determine eligibility. [Transcript at L4:258-L25:259].

the Department of Labor allowed the use of any equivalency chosen by the administrator at any time regardless of whether it reduced accrued service. (Comp. ¶ 80). The Committee also rejected Heptinstall's sworn statement that he had over 1000 hours of service in 1972 based on earnings reported to the Social Security Administration by Defendant Monsanto. (Comp. ¶ 81). Defendants arbitrarily and capriciously denied Bob Heptinstall credit for his accrued Vesting Service for 1972 based on a later amendment to the Plan and denied him credit for a full year of Vesting Service from his last day of active employment at Monsanto until his termination in November 1982. (Comp. ¶¶ 82, 83). Plaintiffs aver that Defendants are revisiting eligibility determinations for non-exempt production level employees of the Sand Mountain plant based on their use of the "95 Hour Rule," a later amendment to the Plan, which Bob Heptinstall and others had no notice of to recalculate vesting service thereby reducing accrued benefits and intentionally denying them their rightful pensions in the possession and control of Defendants. (Comp. ¶¶ 84, 85).[11]

2. Exhaustion for Plaintiffs Wendell Sims and Larry Collins

Plaintiff, Larry Collins, will be eligible for early retirement at fifty- five years of age on June 23, 2008 (Comp. ¶ 91). Plaintiff, Wendell Sims, will be eligible for early retirement at fifty-five years of age on August 16, 2009 (Comp. ¶ 98). Larry Collins inquired about his deferred vested benefit over the telephone with a representative of Defendant Pharmacia/Monsanto, and he was notified shortly thereafter by a letter from

[11] On or about January 26, 2006, the Honorable Robert B. Propst ruled in the related case, CV 04-PT-0562-M *Gilley v. Monsanto*, that the "95 Hour Rule" could not be utilized to recalculate vested service accrued in 1972 under the 1976 Plan (Comp. ¶ 70). Thus, Defendants being aware of this judgment ignored the Court's finding and applied the "95 Hour Rule," a later amendment to the Plan, in direct contravention of a valid Court judgment to the contrary. Defendants appealed the Court's ruling in *Gilley v. Monsanto* et. al. and the appeal is set for oral argument the week of January 29, 2007.

Defendant Monsanto that he did not meet the necessary service requirements to receive a deferred vested benefit because he accrued only 9.685 years of vesting service. (Comp. ¶¶ 92, 93). The letter that Larry Collins received did not give an explanation for Monsanto's decision to deny eligibility and failed to give notice of the opportunity for a full and fair review as required by ERISA § 503(1) & (2). (Comp. ¶ 94). Plaintiff, Wendell Sims, realized that Defendants did not consider him eligible for a pension benefit when he inquired about his eligibility via a website maintained by Fidelity, Incorporated, Defendants' pension service center, which provides a vehicle for participants to inquire about benefits. (Comp. ¶ 95). Plaintiffs, Larry Collins and Wendell Sims, allege that it would be futile to submit their claims for administrative review in light of Defendants' consistent position that they can employ the "95 Hour Rule," or any other equivalency under ERISA, to recalculate accrued benefits and Hours of Service for 1972. (Comp. ¶ 99).

I. Restitution

Defendants are in possession of and maintain control over compensation earned while Plaintiffs were employed by Monsanto that Defendants, as fiduciaries, were to hold until Plaintiffs reached retirement age. (Comp. ¶ 88). Plaintiffs aver that Defendants are intentionally interfering with non-exempt participants' right to obtain their deferred pension benefit in the Plan sponsor's profit interest. (Comp. ¶ 88). Plaintiffs seek restitution of their compensation held in trust.

J. Statement of Claims

The complaint filed in the present action consists of six counts for appropriate equitable relief for the Defendants' violation of several ERISA provisions. (Comp. ¶¶

100-121). Plaintiffs here raise essentially the same claims as Gilley did against Defendants in *Gilley v. Monsanto* et. al. with little substantive variation. The only notable exception is that Plaintiffs here have more clearly set out the lack of notice issue in regards to the amendment of the Plan.[12] Defendants raise essentially the same defenses and argument that were presented in *Gilley v. Monsanto* et. al. with a few notable exceptions. The most significant additions are Defendants' argument based on *Great West* and *Mertens* and ignoring *Sereboff* that a claim for benefits under § 502(a)(3) is not "appropriate equitable relief" because it is a claim for money or legal damages, and that the Committee is the only proper Defendant.[13] *Compare Great-West Life & Annuity Insur. Co. v. Knudson*, 534 U.S. 204 (2001) *and Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993) *with Sereboff v. Mid Atlantic Medical Serv., Inc.*, No. 05-260, ____ U. S. _____ (May 15, 2006). Defendants also argue here, which they could not do in *Gilley*, that Plaintiffs failed to have their benefit determinations reviewed by Defendants.

ARGUMENT

I. Legal Standard for Motions to Dismiss

A motion pursuant to Rule 12(b)(6) should only be granted in very limited situations. In *Brooks v. Blue Cross/Blue Shield of Fla.* the Eleventh Circuit reiterated the stringent standard set by the Supreme Court in *Conley* stating: "[T]he 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Brooks v. Blue*

[12] Plaintiffs here have not yet reached retirement age while Gilley was sixty at the time he first requested his pension, and he is sixty-six years old now.
[13] Defendants raised both of these issues for the first time on appeal in *Gilley*, accordingly these issues are not properly before the Circuit Court.

Cross/Blue Shield of Fla 116 F.3d 1364, 1369 (11th Cir. 1997). *See e.g., Madison v. Purdy*, 410 F.2d 99,100 (5th Cir. 1969); *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465, 471 (5th Cir. 1968) ("Dismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate."). "The pleadings must show, in short, that the Plaintiffs have no claim before the 12(b)(6) motion may be granted." *Brooks*, 116 F.3d at 1369.

II. Appropriate Equitable Relief

Plaintiffs bring claims for benefits individually and on behalf of similarly situated participants of the Plan in Count One under ERISA §§ 502(a)(3) and/or 502(a)(1)(B) for a declaration that Plaintiffs and other similarly situated participants are entitled to their rightful pension benefit upon reaching retirement age or alternatively their early retirement benefit at fifty-five. (Comp. ¶ 100-102). ERISA § 502, 29 U.S.C. § 1132 states:

> (a) A civil action may be brought --
> (1) by a participant or beneficiary –
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 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 appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

29 U.S.C. § 1132.

Plaintiffs seeking to redress violations of ERISA's mandates have only one option, bring a claim under Section 502(a)(3)(A) *to enjoin any act or practice which violates any provision of this title* **or** the terms of the plan, **or** (B) *to obtain appropriate equitable relief* (i) *to redress such violations* **or** (ii) *to enforce any provisions of this title* or the terms of the plan. 29 U.S.C. § 1132 (emphasis added). Defendants amended, restated, and continued the Plan after Plaintiffs were placed on layoff status. (Comp. ¶ 59). Plaintiffs only recourse is to seek under Section 502(a)(3)(A) to enjoin Defendants from violating ERISA Section 204(g) and Section 510 by retroactively reducing non-exempt participants' accrued credited service under the 1976 Plan through their application of a later amendment, and to obtain "appropriate equitable relief" under Section 502(a)(3)(B) (i) to redress such violations by declaring Plaintiffs right to a pension benefit upon reaching early retirement or at retirement age and (ii) to enforce the provisions of ERISA. Plaintiffs seek under Section 502(a)(2) for appropriate relief under Section 409 for Defendants breach of their fiduciary duties listed under Section 404. Defendants did not argue in Gilley until appeal that a claim to a right to a pension was legal and not "appropriate equitable relief" based on *Great West* and *Mertens.* In fact, Defendants when seeking to strike a jury demand in Gilley claimed that Plaintiff was not entitled to a jury:

> …because claims under ERISA are equitable in nature, even where the effect of such claims for benefits might ultimately be the payment of money. Blake, 90 F.2d at 1526; Hunt v. Hawthorne Associates, Inc., 119 F.3d 888, 907-08 (11th Cir. 1997). Here, the equitable nature of the claims is reinforced by the demands for equitable relief in the prayer of the Complaint and the reliance on ERISA §§ 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1132(a)(2) and 1132 (a)(3). See First Amended Complaint at 7, 9, 11, and 12. See also Cox v. Keystone Carbon Co., 861 F.2d 390, 393 (3d Cir. 1988)(holding no right to jury trial on claim under ERISA

> §502(a)(3)). 3. Plaintiff's claims arise under ERISA, are equitable in nature, and are not to be tried to a jury.
>
> (Defendants' Motion to Strike Jury Trial and Memorandum in Support at ¶¶ 2, 3).

Furthermore, Defendants reliance on the recent Supreme Court opinion in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006) is disingenuous. The Court in *Sereboff* made it clear that just because money may ultimately be requested the true essence of a claim can still be for "appropriate equitable relief.," *Id.* at *4. The only appropriate equitable relief for Plaintiffs that have been denied their rightful pension that is being held in trust by Defendants is restitution, and just because the res of the trust is money does not convert a claim into to one for legal damages.[14]

III. <u>Plaintiffs Alternative Pleading under Section 502(a)(1)(B)</u>

Defendants argue that Plaintiffs "[r]ecognizing the problems inherent in a claim for benefits under ERISA § 502(a)(3), … plead in the alternative that they are entitled to benefits under ERISA § 501(a)(1)(B). This strategy, however, gains nothing because the terms of the Plan bar their demand for benefits." (Defendants' Memorandum in Support at 12).

Plaintiffs simply plead alternatively for a declaration of their right to a pension benefit under the terms of the Plan under Section 502(a)(1)(B) because this is the only section that discusses a participants' right to a declaration of their right to future benefits, and it highlights the inherent flaw in Defendants' argument. Participants may bring claims under Section 502(a)(1)(B), 502(a)(2), or 502(a)(3). 29 U.S.C. § 1132. Opinions concerning ERISA causes are replete with statements about Congresses' well drafted

[14] Legal damages are awarded when a Plaintiff cannot be made whole through any other means. For instance a man who has lost an arm as a result of negligence cannot seek restitution because there is no way to restore his severed arm instead he seeks "legal damages" in lieu of his arm.

reticulated statute and how Congress intended what it incorporated into ERISA's statutory framework. *See Nachman Corp. v. Pension Benefit Guar. Corp*, 446 U.S. 359, 361 (1980) ("Given that ERISA 'is a comprehensive and reticulated statute' that Congress drafted with care"); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (`comprehensive and reticulated statute'); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 , 510 (1981)("ERISA is a comprehensive and reticulated statute which Congress has adopted after careful study of private retirement plans."); s*ee also Hughes Salaried Retirees Action Comm. v. Adminis- trator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686, 696 (9th Cir. 1995). If ERISA intended participants to be able to bring a claim for benefits when unscrupulous Defendants violate ERISA's Section 204(g), for instance, by amending the plan to intentionally deny benefits, then under what section did Congress intend participants to bring their claim for restitution of their pension held in trust? Did Congresses' reticulated well drafted statute intentionally provide unscrupulous employers with an avenue to hold participants' compensation for retirement, but provide no recourse for that participant? Plaintiffs aver that Section 502(a)(3) provides the only possible avenue to redress participants' claims, but pleads alternative for a declaration regarding their right to benefits.

IV. <u>Defendants' Interferrence With Pension Rights ERISA Section 510</u>

Plaintiffs bring individual and class claims against the Defendants pursuant to ERISA § 510 based on Defendants' interference with Plaintiffs' and other similarly situated low level participants' obtainment of benefits by amending the plan in such a way as to change the vesting requirements and discriminate against certain low level plan participants while simultaneously closing the Sand Mountain plant, and for Defendants'

failure to keep low level non-exempt participants advised of their pension rights. (Comp. ¶¶ 103-104). "To sustain a valid claim under ERISA section prohibiting adverse action by employer for the purpose of interfering with attainment of any right to which an ERISA plan participant may become entitled under the plan, a [plan participant] must show: 1) prohibited adverse employer action; 2) taken for the purpose of interfering with the attainment; of 3) any right to which the employee is entitled. *Bodine v. Employers Cas. Co*., 352 F.3d 245, 250 (5th Cir. 2003) citing *Van Zant v. Todd Shipyards Corp*., 847 F.Supp. 69, 72 (S.D. Tex. 1994).

Defendants here relying on *Musick v. Goodyear Tire & Rubber Co.*, as they did in *Gilley v. Monsanto*, argue that under applicable Eleventh Circuit precedent Plaintiffs' claims under ERISA § 510 are subject to the two-year limitations period, and that the statute of limitation began to run twenty plus years ago. *Musick v. Goodyear Tire & Rubber Co.*, 81 F.3d 136, 137 (11th Cir. 1996).

"An ERISA cause of action accrues when a request for benefits is denied." *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992). *Musick* is distinguishable. Plaintiffs seek a determination by the Court that Defendants took certain actions to intentionally deny non-exempt participants their rightful pensions in the sponsor's profit interest. Defendants are fiduciaries of a trust holding Plaintiffs' deferred compensation earned as a result of employment with the company. Defendants received the benefit of having a defined pension plan for *all* of their employees including, but not limited to, worker retention and a tax qualified plan.

Defendants have previously argued nearly every issue raised here. The arguments Defendants raised in *Gilley* are: that they have total discretion under the Plan and as such

a finding of a conflict of interest is wrong; that based on discretion the Plan could be amended without notice to participants at any time because ERISA permits equivalencies; that ERISA does not require them to keep records; that the burden is on non-exempt participants to prove they are entitled to their meager pensions; that class certification is inappropriate; that the decision to close the Sand Mountain plant was not a decision actionable for breach of fiduciary duty; that the applicable statute of limitations bars all claims by non-exempt participants; and that the amendment of the plan was not relevant because the "95 Hour Rule" is more generous than the "elapsed time method" although there has never been any credible evidence presented that the "elapsed time method" was ever employed to determine accrued credited service under the Plan. Plaintiff prevailed in *Gilley v. Monsanto*.

Defendants diligently and vigorously defended against Gilley's small inconsequential claim for his rightful pension benefit because, if successful, Defendants would be able to estop all other non-exempt participants from filing individual actions to obtain their rightful pension. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). Unsuccessful, however, Defendants now resist the application of the same principle and wish to relitigate every issue in the hopes of gaining a more favorable outcome from this Court. *Id.*

As mentioned previously courts favor the view that ERISA is a well drafted reticulated statute, and if Congress had intended a certain thing when drafting ERISA Congress certainly knew how to accomplish it. ERISA contains no statute of limitations governing claims for plan benefits. *Cavegn v. Twin City Pipe Trades Pension Plan*, 223 F.3d 827 (8th Cir. 2000). "ERISA contains an express statute of limitations that bars

breach of fiduciary duty claims after the earlier of six years from the breach or three years from the date that Plaintiff acquires actual knowledge of the breach." *Brown v. American Life Holdings,* 190 F.3d 856 (8th Cir. 1999); *See* 29 U.S.C. § 1113. But "ERISA permits tolling of the statute of limitations in cases of fraud or concealment. Under section 410, "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under [ERISA] shall be void as against public policy." 29 U.S.C. Section(s) 1110(a) (1982). In *Musick* as in many other cases, courts have fashioned statutes of limitations when the facts of the case in their view did not warrant recovery. To fashion any statute of limitation under the facts of this case would render ERISA illusory providing nothing more than the appearance of redress.

"It is known to have been the long-settled doctrine of Courts of equity, that if fraud has been concealed by a party, against whom there is a cause of action, the statute of limitations does not commence to run, until the fraud has been discovered, or until the party aggrieved shall have had reasonable opportunity afforded him for discovering it. . . . The reason [being] that the conscience of the party being so affected, he ought not to be allowed to avail himself of the lapse of time." *Horn v. Citizens Hosp.* 425 So.2d 1065, 1067-68 (Ala. 1982)(internal cites omitted).

V. <u>Breach of Fiduciary Duty As Defined Under Section 404</u>

Defendants' argument that Count Three should be dismissed for failure to state a claim for breach of fiduciary duty because Section 404 does not provide a private cause of action is nonsensical. Private rights of action for breach of fiduciary duties listed under Section 404 are brought under Section 502(a)(2) pursuant to Section 409. Under

29 U.S.C. § 1132 (a)(2) by the Secretary, or *by a participant*, beneficiary or fiduciary for *appropriate relief under section 409*. Section 409(a):

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of Section 411 of the Act.

Plaintiffs' Complaint satisfies the notice pleading requirements of Federal Rules of Civil Procedure Rule 8. Plaintiffs did not label their claims for violations of Section 204(g) and Section 510 as an action under Section 502(a)(3), but Defendants did not suggest that this was improper. Defendants are well aware of Plaintiffs' claims as the instant action is a continuation of ongoing litigation with Defendants conducted over the last two and half years including an appeal scheduled for oral argument the week of January 29, 2007.

VI. Reduction of Accrued Benefits Under Section 204(g)

Defendants here just as they did in *Gilley v. Monsanto* proffered again the argument that Section 204(g), which mandates that the accrued benefit of a participant under a plan shall not be decreased by an amendment of the plan, has no application to the instant action because here Plaintiffs' claims as they did in *Gilley* involve vesting service and not benefit accrual.

The simple fact is that Defendants are well aware that Plaintiffs' contention that the "95 Hour Rule," a later amendment to the Plan of which they had no notice, in fact changed accrued benefits by changing how hours of service for calendar year 1972 under the 1976 Plan were awarded and that this in turn had an affect on vesting service

ultimately causing forfeiture. "[T]he anti-reduction rule of ERISA § 204(g) is a measure essential to prevent evasion of the *vesting rules*. Without § 204(g), retroactive plan amendments could do the former work of forfeiture rules." John H. Langbein &Bruce A. Wolk, Pension and Employee Benefit Law, ch. 3 § E (3d ed. 2000) (emphasis supplied); *see also Rybarczyk v. TRW*, 235 F.3d 975, 983 (6th Cir. 2001)(internal cite omitted); *Kay v Boyertown Casket Co. Thrift & Profit Sharing Plan*, 780 F. Supp. 1447 (E.D. Pa. 1991).

The Court in *Gilley v. Monsanto* requested that the parties brief the Supreme Court's opinion in *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004) regarding this issue, and Plaintiffs here rely on the position taken in *Gilley v. Monsanto*. In *Heinz* the Supreme Court addressed the issue of whether an amendment that expanded the categories of postretirement employment that triggers suspension of payment of early retirement benefits already accrued violated ERISA's anti-cutback rule under Section 204(g). Defendants in *Heinz* argued essentially the same issue as raised by Defendants here. *Id.* In *Heinz* the issue was whether or not an amendment that places a restriction on a participant's right to an "accrued benefit" is a reduction in benefits in violation of Section 204(g). The Court explained that the "'anti-cutback' rule of ERISA prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefits.'" *Id. at* 2234. The Court found that despite the lack of clarity in the language of the statute that "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." *Id.* at 2236 (internal cite omitted). The Court stated that in a practical sense a "change of terms could [only] be viewed as shrinking the value of [a participant's] pension rights and reducing his promised benefits." *Id.* Refusing to buy into the

argument raised by Defendants in the instant action "that Section 204(g) applies only to amendments directly altering the nominal dollar amount of a retiree's monthly pension payment," the Court said that "the real question is whether a new condition may be imposed after a benefit has accrued; may the right to receive certain money on a certain date be limited by a new condition narrowing that right?" *Id.* The Supreme Court answered this question in the negative, and the court in *Gilley* agreed. *Id*. at 2237.

VII. Equitable Estoppel

The Eleventh Circuit has narrowly defined a common law equitable estoppel claim in ERISA action when "(1) the provisions of the plan at issue are ambiguous, and (2) representations are made which constitute an oral interpretation of the ambiguity." *Katz v. Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1090 (11th Cir. 1999); accord *Alday v. Container Corp. of America*, 906 F.3d 660, 666 (11th Cir. 1990). Defendants insist that Plaintiffs cannot make out a claim for equitable estoppel because while "mouthing the word 'ambiguity,'" the Complaint identifies none in the Plan. (Defs' Brief at 20). Defendants insist the Plan is consistent and that no representations were made to participants regarding the Plan's consistency or lack thereof. *Id*. This could not be further from the truth. The Plan in question here and Gilley is anything but consistent. The 1976 Plan document in the company sponsor's possession defines Hours of Service pursuant to ERISA regulation 29 C.F.R. § 2530.200b-2 as does the SPD. *See* 29 C.F.R. § 2530.200b-2; Comp. ¶ 26). The 1976 Plan also states "Hours of Service may be computed and recorded under the "elapsed time" regulations if the Employer so elects." (Comp. ¶ 26). The SPD contains no such language. The 1981 Plan in the company sponsor's possession includes in addition to the Hours of Service definition under

Section 17.5, the statement regarding the Employer's option of electing the "elapsed time" regulation and the 95-Hour equivalency. Defs' Apdx A § 17(f)). The SPD, an official written interpretation, contains no such language. The elements of equitable estoppel have been met or alternatively the SPD controls and Hours of Service are defined according to the SPD including overtime hours.

VIII. Exhaustion

While courts have interpreted ERISA's provision directing plans to provide avenues for review of benefit decisions as an exhaustion requirement, ERISA does not *per se* contain an exhaustion requirement. Courts have however adopted the requirement that participants should exhaust plan review procedures before filing suit as a matter of policy based on Section 503(2). Nevertheless, the Eleventh Circuit has also recognized that the court made exhaustion requirement is not appropriate in certain circumstances. *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990). The Eleventh Circuit in *Curry* recognized that *Mason*, upon which Defendants rely, "should not be read as overruling well-established exceptions to the exhaustion requirement. In *Curry* the Eleventh Circuit citing a plethora of opinions on point recognized that "there are well established exceptions to the exhaustion requirement, and that there are occasions when a court is obliged to exercise its jurisdiction and is guilty of an abuse of discretion if it does not, the most familiar examples perhaps being when resorting to the administrative route would be futile or the remedy inadequate. *Id.*

The parties here have proven over the course of the last two and a half years that they are tenacious if nothing else. While there are policy considerations favoring exhaustion of review this requirement was never intended to be a bar to recovery or a

means of circumventing judicial review. Plaintiff, Bob Heptinstall, submitted the decision to deny his pension benefit for review, but after engaging in several months of gamesmanship the decision by the sponsor was upheld without hesitation. *See Hill v. Blue Cross & Blue Shield*, No. 03-2607 (6th Cir. May 13, 2005)(finding it unnecessary to answer the question whether exhaustion is required when a participant has a statutory right to file suit such as for breach of fiduciary duty based on futility); *Constantino v. TRW, Inc*., 13 F.3d 969 (6th Cir. 1994)(finding that exhaustion would be futile when the suit had merit, the matter stood little chance of becoming less adversarial, requiring Plaintiffs to pursue costly administrative process was not likely to change results, and the Defendant was unlikely to change its position, and there was already a well developed factual record before the court). Plaintiffs here have shown that exhaustion would be futile.

IX. <u>All Defendants are Proper Parties</u>

Plaintiffs agree with Defendants' that "[t]he proper party Defendant in an action concerning ERISA benefits is the party that controls administration of the plan." Defs' Brief at 24 citing *Garren v. John Hancock Mut. Life Ins. Co.*, 114 F.3d 186, 187 (11th Cir. 1997). In the instant case, all Defendants are acting in concert and are proper Defendants because while the Committee may be the named administrator in the Plan document, the company sponsor is actually making benefit determinations in the company's profit interest and is administering the Plan accordingly. The Committee provides nothing more than rubber stamp approval of the company sponsor's decision. Thus, Monsanto, Pharmacia, the Committee, and the Board of Directors that make up the Employee Benefits Executive Committee are responsible for amending the Plan in the

company's profit interest and are proper Defendants. After a two day trial in *Gilley v. Monsanto* wherein the court was able to consider demeanor evidence as well as other evidence, Judge Propst found and concluded "that the Defendants' denial of Plaintiff's (Gilley) retirement benefits [was] to be reviewed under a "heightened arbitrary and capricious" standard because of a conflict of interest." [Doc. # 166, 117]. Thus, the court in *Gilley* impliedly found that all Defendants were proper parties because they were acting in concert and administrating the plan in the corporate sponsor's interest instead of participants' interest.

CONCLUSION

The standard for dismissal of a complaint pursuant to Rule 12(b)(6) for failure to state a claim is high and Defendants cannot prevail unless it appears *beyond doubt* that Plaintiff(s) can prove no set of facts in support of their claims that would entitle them to relief. Plaintiffs here, as did Gilley, stand in the shoes of all similarly situated non-exempt participants of the Plan and as representatives of the Plan. Plaintiff prevailed on nearly identical issues and facts in *Gilley v. Monsanto*, and *a fortiori* Plaintiffs here have pleaded facts sufficient to survive a motion to dismiss. Plaintiffs, Bob Heptinstall, Wendell Sims and Larry Collins, on behalf of themselves and other similarly situated plan participants and the Plan, request that the Court deny Defendants' Motion to Dismiss and certify the present action as a class action.

Respectfully submitted,

/s/ Elisa Smith Rives
Elisa Smith Rives
Attorney for Plaintiffs
ASB # -9351-E61R

OF COUNSEL:
Elisa S. Rives, LLC
2208 Ringold Street, Ste 103
Guntersville, AL 35976
Tel: (256) 582-3559
Fax: (256) 582-3559
Cell: (256) 558-4626

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on counsel for Defendants by the court's electronic filing system and a courtesy copy pursuant to the court's initial standing order was served by first class mail, postage prepaid, on this 30th day of October, 2006.

Donald R. James, Jr.
Joel E. Dillard
BAXLEY, DILLARD, DAUPHIN,
McKNIGHT & BARCLIFT
2008 Third Avenue South
Birmingham, AL 35233
Attorney for Defendants

Jeffery S. Russell
Darci Madden
BRYAN CAVE, LLP
One Metropolitan Square
211 N. Broadway Suite 3600
St. Louis, MO 63102

/s/ Elisa Smith Rives
Elisa Smith Rives
ASB # 9351-E61R