
DOCKET NUMBER
CV-06-CLS-01564-M

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

ROBERT H. HEPTINSTALL, et al.
as individual representative participants on behalf of a
putative class and the plan

Plaintiffs,

v.

MONSANTO COMPANY, INC. et. al.

Defendants

DOCKET # 97

MOTION FOR SANCTIONS

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

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

PLAINTIFFS’ MOTION FOR SANCTIONS

COME NOW, Plaintiffs, Robert H. Heptinstall (“Robert Heptinstall”), Wendell E. Sims (“Wendell Sims”), James L. Collins (“Larry Collins”), Fred Dewayne Works (“Fred Works”), Thomas Ferrell Campbell (“Thomas Campbell”), James Russell Newman (“Russell Newman”), and Jacky T. Blackwell (“Jacky Blackwell”)¹ as individuals and as representatives on behalf of a putative class and the plan and file their motion for sanctions for the destruction of evidence.

This action pursuant to the Employee Retirement Insurance Security Act “ERISA” 1974, as amended, 29 U.S.C. §§ 1001 *et. seq.* against Pharmacia, f/k/a Monsanto Company, Inc., the new Monsanto Company,

¹Plaintiffs, Robert Heptinstall, Wendell Sims, Larry Collins, and Russell Newman presently reside in Marshall County, Alabama. Plaintiff, Fred Works, presently resides in DeKalb County, Alabama. Plaintiff, Thomas Campbell, presently resides in Colbert County, Alabama. Plaintiff, Jacky Blackwell, presently resides in East Palestine, Ohio.

Inc., f/k/a Monsanto “Ag” Company, a successor corporation of “Old” Monsanto Company, Inc.,² the Monsanto Company Salaried Employees’ Pension Plan, the “Monsanto Pension Plan”, the Monsanto Company Employee Benefits Committee, “Committee”, the Monsanto Company Employee Benefits Executive Committee, the “Executive Committee”, Solutia, Inc. “Solutia”, a successor corporation of “Old” Monsanto Company, Inc., and the Solutia Inc. Salaried Employees’ Pension Plan, the “Solutia Plan”, a successor pension plan of the Monsanto Pension Plan (collectively Defendants) is for equitable and remedial relief for a class of participants and the plan. Plaintiffs’ individually also seek clarification of their benefits under the Monsanto Pension Plan specifically the 1976 Pension Plan.

Plaintiffs are former employees of Monsanto Company, Inc., “Old Monsanto” a/k/a Pharmacia, employed at the Sand Mountain plant near

² On December 19, 1999 Monsanto Company, Inc. entered into a merger agreement with Pharmacia & UpJohn, Inc., pursuant to which a wholly owned subsidiary of Monsanto Company, Inc. merged with and into Pharmacia & UpJohn, Inc. with Pharmacia & UpJohn, Inc. remaining as a wholly owned subsidiary of Monsanto Company, Inc. In connection with the merger Monsanto Company, Inc. changed its name from Monsanto Company, Inc. to Pharmacia Corporation. On February 9, 2000, Monsanto “Ag” Company, Inc. was incorporated as a wholly owned subsidiary of Pharmacia and assets and liabilities related to Monsanto Company, Inc.’s agricultural business were transferred to the Monsanto Ag Company. Monsanto Ag Company changed its name to Monsanto Company, Inc., “New Monsanto” agreeing to indemnify Pharmacia, “Old Monsanto” for certain liabilities assumed by Solutia at their spin-off to the extent that Solutia fails to pay, perform or discharge those liabilities. Pharmacia merged with Pfizer Corporation in 2003.

Guntersville, Alabama. (SAC ¶¶ 2, 18-29, 44). Plaintiffs on their first day of employment with “Old Monsanto”³ at the Sand Mountain plant in August 1972 were all considered participants in the Monsanto Pension Plan, an “employee pension benefit plan” maintained by Monsanto for its salaried employees⁴. (SAC ¶ 29). The effective date of the Monsanto Pension Plan is December 30, 1940. Exhs. A, B. “Old Monsanto” maintained an “employee benefit plan” or “plan”⁵ that incorporated along with other welfare benefit plans the Monsanto Pension Plan. Throughout the years “Old Monsanto” amended its Pension Plan from time to time as to certain covered groups of employe(e)s and set forth each amendment in separate documents as separate plans, the 1951 Pension Plan, the 1956 Pension Plan, the 1961 Pension Plan, the 1971 Pension Plan, the 1976 Pension Plan, the 1981 Pension Plan, etc. (SAC ¶¶ 34, 67-9). Each time “Old Monsanto”

³ Herein plaintiffs refer to the original Monsanto Company, Inc. [EIN # 43-0420020] as “Old Monsanto” and to the new Monsanto Company, Inc. incorporated in 2000 [EIN # 43-1878297] as “New Monsanto”.

⁴ The term “employee pension benefit plan” and “pension plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program – (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, . . . regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. ERISA § 3(2)(A).

⁵ Under ERISA the term “employee benefit plan” or “plan” means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.” ERISA § 3(3).

amended its Pension Plan it amended the “employee benefit plan” and furnished participants with summary plan descriptions “SPDs”.⁶ The 1971 Pension Plan, was amended, restated and continued as the 1976 Monsanto Salaried Employees’ Pension Plan, the 1976 Pension Plan, in response to the enactment of the Employee Retirement Insurance Security Act “ERISA”.

(SAC ¶¶ 34-5). Pursuant to Section 1.1 of the 1976 Pension Plan:

The rights and benefits of any other person entitled to benefits under the Predecessor Plans shall be determined in accordance with the applicable provisions of the Predecessor Plan in effect at the time of the cessation of such person’s active participation . . . in such Predecessor Plan whether by termination of employment, retirement, cessation or loss of eligible status, or otherwise, except as required by applicable law or regulation, or except as specifically provided or changed by subsequent amendments, including this amendment.

[R 83-6].

Plaintiffs were all participants of the 1976 Pension Plan, which pursuant to the plan document controlled a determination of their rights and benefits under the plan because it was the plan in place when they went on “layoff” and when their employment terminated in early 1982. (SAC ¶¶ 67-

⁶ The 1971 employee benefit plan, which incorporated the 1971 Monsanto Pension Plan was published to participants in the summary plan description “MONSANTO and You”. The 1976 employee benefit plan which incorporated the 1976 Monsanto Pension Plan was published to participants in the summary plan description “YOUR BENEFITS Monsanto”. The 1981 employee benefit plan which incorporated the 1981 Monsanto Pension Plan was published to participants in the summary plan description “BENEFITS ... for Monsanto people”.

72). Assets of the 1976 Pension Plan were collectively invested in The Monsanto Company Master Retirement Trust (“Master Retirement Trust”) with the assets of certain other “Old Monsanto” pension plans under a Master Trust Agreement. [R 96 Exhs. A, B]. The named trustee for the Master Trust is The Northern Trust Company, 50 South LaSalle Street, Chicago Illinois 60675. *Id.* Each participating plan is entitled to an interest in the Master Trust’s net assets and net earnings, although not necessarily an interest in the individual Trust assets, liabilities, income and expenses. *Id.* The 1976 Pension Plan was conformed to final regulations under ERISA in July 1979, and a favorable Internal Revenue Service “IRS” Determination Letter was issued November 7, 1979, and received November 13, 1979. (SAC ¶ 65). The 1981 Plan which incorporated the 95 Hour Rule was adopted in 1982. (SAC ¶¶ 68-72).

On September 1, 1997, pursuant to a Distribution Agreement, “Old Monsanto” a/k/a Pharmacia spun-off its chemical business as Solutia.⁷ (SAC ¶¶ 8-11; R 96 Exh. B at p. 25). In 1998 assets belonging to retirees and future retirees of “Old Monsanto’s” chemicals group assigned to Solutia were held in the Monsanto/Solutia Group Trust with the Northern Trust Company remaining as the named trustee. [R 96 Exh. B at p. 2]. As of

⁷ Solutia, Inc. EIN # 43-1781797

November 2, 1998, assets in the Group Trust were split into Monsanto Company Master Trust and the Solutia Inc. Master Trust and on this date assets attributable to former employees of Monsanto's chemical group were transferred to Solutia Master Trust. [R 96 Exh. B at p. 18]. The effective date of the Solutia Pension Plan is December 30, 1940. [R 96 Exh. C at p. 1; *see also* ERISA § 4022(b)(2)]. Since the spin-off the Solutia Pension Plan has been severely underfunded failing to meet even the minimum funding requirements under ERISA requiring quarterly employer contributions to the plan in 2005 and 2006.⁸ [R 96 Exh. C & D at p. 3; *see also* ERISA § 302]. The now defunct Sand Mountain plant is a former business operated by "Old Monsanto" as part of its chemicals group. (SAC ¶ 9). "Old Monsanto" also operated a plant in Decatur, Alabama as part of its chemicals group. (SAC ¶ 10). As a result of the spin-off some, but not all, former employees of the now defunct Sand Mountain plant and participants of the Monsanto Pension Plan are now participants of the Solutia Pension Plan.⁹ (SAC ¶ 104). Documents from Sand Mountain were stored in the basement of a plant in

⁸ The new Monsanto Company Pension Plan another successor plan is also severely underfunded requiring the employer to make contributions to meet funding standards. [R 96 Exhs. E and H at p. 4]. The effective date of the new Monsanto Company Pension Plan is the same as the effective date of the plan. *Id.*

⁹ Because "Old Monsanto" did not report non-HCE participants entitled to a deferred vested benefit on Form 5500s it is impossible without truthful discovery from Defendants to determine if Plaintiffs are now considered participants of the Monsanto Pension Plan or the Solutia Pension Plan.

Decatur, Alabama, now a Solutia plant, until the interlocutory appeal in the related case *Gilley v. Monsanto* CV 04-562 was filed and the documents were shredded. (SAC ¶ 103).

“The Pension Benefit Guaranty Corporation (“PBGC”) is a United States government corporation that administers and enforces the pension plan termination insurance program established under Title IV of the Employee Retirement Income Security Act of 1974, *as amended*, 29 U.S.C. §§ 1301-1461 (2000 & Supp. 1 2001) (“ERISA”).” [R 96 Exh. F]. Under ERISA contributing sponsors of the plan must guarantee nonforfeitable benefits under the 1976 Pension Plan sponsored by Pharmacia a/k/a “Old Monsanto” as *an alleged qualified*. ERISA § 4022(a) and (b)(2). Any person who is a contributing sponsor of the plan or a member of such contributing sponsor’s controlled group incurs liability for losses resulting from the operation of the plan on a joint and several bases. [ERISA § 4062 and § 4068; R 96 Exh. F]. Because “Old” Monsanto did not report separated non-HCE participants with a deferred vested who were employed at the Sand Mountain plant the PBGC has not received premiums to cover these participants. (SAC ¶¶ 73-75). Additionally, the successor pension plans are severely underfunded at the present requiring employer contributions to cover pension liabilities. [R 96 Exhs. C, D, E, H].

Regardless of “Old” Monsanto’s failure to report participants with separated vested benefits and regardless of whether assets belonging to participants of the 1976 Pension Plan are now in the new Monsanto Master Trust or the Solutia Master Trust contributing sponsors of the plan remain liable for Plaintiffs and other similarly situated participants’ for nonforfeitable benefits. [R 96 Exhs. A-I; ERISA § 4062; Exhs. J-N].

Destruction of Evidence

When the Sand Mountain plant closed all records and documents including but not limited to punch cards, pay records, overtime records, personnel files, notices, SPDs, plan documents, and operational documents were sent to the plant in Decatur, Alabama for storage. (SAC ¶ 102). In December 2006, Solutia, Inc. was in bankruptcy and accordingly not a party to the above styled action. [R 1]. Pursuant to subpoena, Plaintiffs’ counsel requested inspection of documents stored in the basement of the Solutia plant f/k/a as an “Old Monsanto” plant in Decatur, Alabama. [R 28]. Upon arriving at the Solutia plant counsel learned that a temporary contract person had been hired to shred documents from the now defunct Sand Mountain plant. [R 28; Affidavit “Aff” 1 James R. “J. R.” Rives; Aff. 2 Elisa S. “E. S.” Rives]. According to the contract person she was hired in May 2006 around the time the appeal in *Gilley v. Monsanto* was perfected, and she was

instructed to begin with the documents from Sand Mountain. *Id.* According to the contract person she was directed to scan a few documents¹⁰ from personnel files and shred everything else including the documents that were scanned.¹¹ Affs. 1 &2.

Plaintiff's counsel filed a motion to enjoin Pharmacia a/k/a "Old Monsanto" and new Monsanto Company collectively Pharmacia/Monsanto" and all the original Defendants and any party connected to or in association with them to stop the shredding. [R 28]. Pharmacia/Monsanto's response was "the documents and actions described in the Motion are not in Defendants' possession, custody or control. While in this and prior litigation Defendants have made requests to Solutia that it search for older personnel records (for example, to investigate pension claims and to assist in responding to Plaintiffs' discovery demands), Defendants do not direct or control Solutia's documents." [R 33]. The Court denied Plaintiff's motion to enjoin Pharmacia/Monsanto finding it had no jurisdiction over Solutia. [R 34, 36, 37]. Solutia is now a proper party before the Court.¹²

¹⁰ Attention, *Gilley v. Monsanto*, do not remove or destroy without specific authorization from the Law Department. *Id.* The notice demands specific authorization before the personnel file can be removed or destroyed. *Id.* All the documents with the exception of documents on the retention list¹⁰ were shredded. Aff. 1 J. R. Rives; Aff. 2 E. S. Rives.

¹¹ Primarily the contractor scanned the employment application, the confidentiality agreement, and the checkout sheet. Exh. L.

¹² Solutia was added as a party in the related action *Gilley v. Monsanto* and Defendants, Pharmacia/Monsanto, did not address this issue in their response to the show cause order

Plaintiffs have repeatedly requested the production of documents such as pay records, overtime records, personnel files, documents relating to the closing of the Sand Mountain plant, notices sent to participants regarding plan amendments, information on when SPDs were furnished to participants at the Sand Mountain plant, employment dates and termination dates for participants that worked at the Sand Mountain plant, the number of participants employed at the Sand Mountain plant, the number of participants that were separated with a deferred vested benefit when the Sand Mountain plant closed, personnel and employee status sheets showing dates of termination and employment, which employees were vested with a nonforfeitable accrued benefit under the 1981 Plan and the 1976 Plan, when were participants furnished with the 1981 SPD, etc. [R 25, 69]. Pharmacia/Monsanto have only minimally responded to Plaintiffs' discovery requests and Plaintiffs' Second Motion to Compel is still pending. *Id.* Pharmacia/Monsanto maintain that documents responsive to Plaintiffs'

as directed by the Court. Solutia is a proper and necessary defendant in both actions. During the Solutia bankruptcy a committee to represent the interest of retirees was formed consisting of former HCEs including Larry R. Baird, the former plant manager of the Sand Mountain plant. The Committee which opposed the rejection of the Distribution Agreement spent \$ 2, 214, 943 dollars on legal fees, \$ 306, 318 on expenses and \$ 916, 760 dollars on financial advisors to reach a settlement agreement with Pharmacia and new Monsanto Company, the current shareholders, to protect the interest of former HCEs. Plaintiff's counsel, as a solo without any support of any kind, has spent her own personal funds and worked tirelessly for five years facing relentless abusive litigation tactics to protect the interest of the non-HCEs without any compensation because these participants, working class citizens, could not afford legal representation or in many instances even costs.

requests no longer exist. [R 31, 76]. Documents responsive to Plaintiffs' discovery requests were in Solutia's possession and were in the process of being shredded when Plaintiffs' filed their motion to enjoin. [R 28; Exhs. L-M]. Plaintiffs' pleas for discovery here and the related case *Gilley v. Monsanto* have gone unanswered. [R 36, 37]. Solutia is now a party under the Court's jurisdiction. This Court has the inherent power to order sanctions against parties for misconduct to protect the Court's integrity and to prevent abuses of the judicial process and pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure that authorizes sanctions for violation of a discovery order. *Webb v. District of Columbia*, 146 F.3d 964 (D.C. Cir. 1998).

WHEREFORE, Plaintiffs, all premises considered, request sanctions against all Defendants involved in the destruction of evidence and documentation necessary to the obtainment of participants' rightful property.

Respectfully

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by the court's electronic filing system on the following counsel of record, this 13th day of June, 2008.

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