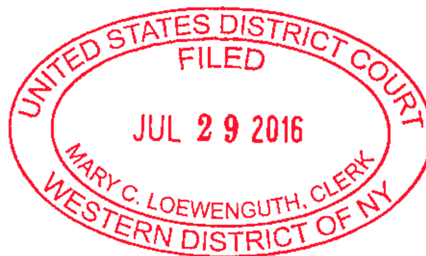
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



PAUL J. FROMMERT, et al.,

Plaintiffs,

DECISION and ORDER

-vs-

00-CV-6311

LAWRENCE BECKER
Xerox Corporation Plan Administrators, et al.,

Defendants.

INTRODUCTION

In this case that has now entered its seventeenth year, a number of plaintiffs have been seeking to recover pension benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1101 *et seq.* Defendants include Xerox Corporation ("Xerox"), the Xerox Retirement Income Guarantee Plan ("the Xerox Plan" or "the Plan"), and the Plan Administrator.

For purposes of the present Decision and Order, the relevant factual background and procedural history–which have been set forth at length in prior decisions of this Court, the Court of Appeals for the Second Circuit, and the United States Supreme Court–is assumed. Relevant portions of that history will be recited here only to the extent necessary.

On April 22, 2016, defendant filed a motion for certain relief pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. The details will be explained below, but in short, defendants

allege that in 2009, the Plan paid certain plaintiffs roughly $4.6 million in benefits, and that based on subsequent court rulings in this case, defendants have concluded that plaintiffs were overpaid to the tune of some $2.6 million. Defendants seek an order directing the 22 plaintiffs in question to pay back to the Plan those "excess" benefits, plus interest. *See* Defendants' Notice of Motion (Dkt. #297) at 2.

BACKGROUND

In general, this case involves Xerox employees who were participants in the Xerox Plan, and who left Xerox's employ at some point, at which time they each elected to receive a lump-sum distribution of accrued pension benefits. Plaintiffs later returned to work for Xerox, for a second period of employment. The basic dispute arises out of Xerox's treatment of the prior distributions when calculating plaintiffs' subsequent pension benefits, following their second period of employment.

It has long been established in this and other cases that defendants violated plaintiffs' ERISA rights, primarily by applying a so-called "phantom account," which involves reducing Plan participants' benefits based on a hypothetical appreciation of their prior lump-sum distributions. *See Frommert*, __ F.Supp.3d __, 2016 WL 64678, at *1; *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003).

The details of the phantom account have been set forth in several reported decisions, including *Frommert v. Conkright*, 433 F.3d 254, 257-61 (2d Cir. 2006). In short, under the phantom-account formula, the Plan Administrator would calculate the hypothetical growth that the

employees' past distributions would have experienced if the previously-distributed money had remained in Xerox's investment funds, and the Administrator would then reduce the employee's present benefits accordingly.

In 2006, the Court of Appeals for the Second Circuit held that the phantom account was not part of the Plan until 1998, when it was fully disclosed and explained to participants in the summary plan description. 433 F.3d at 263. Therefore, the court stated, "the phantom account may not be applied to employees rehired prior to the issuance of the 1998 SPD ... ." Although a good deal of further litigation has transpired in this case, that central holding remains intact.

In the context of this action, the primary problem with the application of the phantom account is the lack of notice given to plan participants of the phantom account's existence and the details of its application, prior to their making important decisions concerning their employment and pension benefits. That lack of adequate notice violated participants' rights under ERISA. The focus of many of the decisions that have been issued in this case over the years has been on how best to remedy that violation, consistent with ERISA, with the plaintiffs' reasonable expectations, and with the terms of the Plan.

On January 24, 2007, this Court issued a Decision and Order ("2007 Decision") that directed defendants to recalculate plaintiffs' retirement benefits, without taking the phantom account into consideration, and to pay each plaintiff a lump sum in the amount of the difference between the amount of benefits that each plaintiff had received, and the amount of the recalculated benefit. 472 F.Supp.2d 452, 467-68. The parties have sometimes referred to that remedy as the "nominal" or "*Layaou*" offset, the latter being a reference to a related, single-plaintiff case (which was eventually

settled), *see Layaou v. Xerox Corp.*, 238 F.3d 205, 209-12 (2d Cir. 2001); *Layaou v. Xerox Corp.*, 330 F.Supp.2d 297 (W.D.N.Y. 2004).

Defendants appealed from the 2007 Decision, and the Second Circuit affirmed. 535 F.3d 111 (2d Cir. 2008). After granting defendants' petition for certiorari, the United States Supreme Court reversed and remanded for further proceedings. *Conkright v. Frommert*, 559 U.S. 506 (2010). The Court of Appeals in turn remanded to this Court. (Dkt. #203.)

Additional proceedings followed, both here and in the Court of Appeals, and on January 5, 2016, this Court issued a Decision and Order ("2016 Decision") directing defendants "to recalculate and pay plaintiffs' retirement benefits, treating plaintiffs' second periods of employment with Xerox as if plaintiffs had been newly hired and without regard for their prior periods of employment ... ." __ F.Supp.3d __, 2016 WL 64678, at *15. That remedy is sometimes referred to by the parties as the "New Hire" approach.

Defendants state that following the Court's issuance of that decision, they have recalculated the benefits due to plaintiffs, in accordance with the New Hire approach, and have determined that the 22 plaintiffs who were paid the $4.6 million in benefits mentioned above would only be entitled to about $2 million under the New Hire formula. Defendants contend that those plaintiffs should therefore be required to return those "excess" payments, or overpayments, to the Plan. The vehicle defendants have chosen to effect such relief is Rule 60(b)(6), as explained below.

DISCUSSION

Rule 60(b)(6) states that "the court may relieve a party ... from a final judgment, order, or proceeding for ... any ... reason that justifies relief." Defendants' motion is ostensibly premised on their request for relief from this Court's 2007 Decision.

Rule 60(b)(6) is a "mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances." *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (internal quotation omitted). "A motion for relief from judgment is generally not favored ...," *Rossi v. Stevens*, __ Fed.Appx. __, 2016 WL 3212267, at *1 (2d Cir. 2016) (quoting *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004)), and is rarely granted absent a showing of "extraordinary circumstances or extreme hardship." *ISC Holding AG v. Nobel Biocare Finance AG*, 688 F.3d 98, 109 (2d Cir. 2012). "This is so because 'giv[ing] Rule 60(b)(6) broad application would undermine numerous other rules that favor the finality of judgments.'" *United Marketing Solutions, Inc. v. Fowler*, 512 Fed.Appx. 271, 275 (4th Cir. 2013) (quoting *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc)).

Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice [and] it constitutes a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. v. Guangdong Bldg., Inc.*, 571 Fed.Appx. 62, 65 (2d Cir. 2014) (quoting *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004)). Nevertheless, the rule does not constitute an unlimited grant of power. Relief under the rule must be "appropriate," meaning that the rule's procedural requirements have been satisfied, and that the relief is in fact equitable. On both counts, defendants' motion is deficient in several respects.

Regarding procedure, Rule 60(b) provides several grounds for relief from a final judgment, order, or proceeding:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), 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.

As stated, defendants' motion is ostensibly brought under Rule 60(b)(6) only. There is no allegation here of any mistake, newly discovered evidence, or any of the other factors listed in subsections (1) through (5).[1]

It is not at all apparent, however, how the relief sought here falls within the scope of Rule 60(b)(6). That rule "vests power in courts adequate to enable them to *vacate* judgments whenever such action is appropriate to accomplish justice.'" *Foley v. Biter*, 793 F.3d 998, 1002 (9th Cir. 2015) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)) (emphasis added). The rule has also been described as permitting a court to "set aside" a judgment, *US Bank Nat'l Ass'n v. Budnick*, 626 Fed.Appx. 438, 441 (5th Cir. 2015), "reopen" a judgment, *Blue v. International Broth. of Elec. Workers Local Union 159*, 676 F.3d 579, 585 (7th Cir. 2012), "reverse its [prior] order," *Searles v.*

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[1]As explained below, the 2007 Decision was itself effectively vacated by subsequent court decisions in this litigation, but it was not "based on an earlier judgment that has been reversed or vacated ...," as provided in subsection (b)(5). *See Gillispie v. Warden, London Correctional Inst.*, 771 F.3d 323, 327 (6th Cir. 2014) ("Typically, the 'based on' language from Rule 60(b)(5) applies when 'the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel'") (quoting *Klein v. United States*, 880 F.2d 250, 258 n.10 (10th Cir. 1989). In any event, defendants do not rely on subsection (b)(5).

Dechant, 393 F.3d 1126, 1131 (10th Cir. 2004), and to "modify a previous decision ... ." *Reid v. Angelone*, 369 F.3d 363, 374 (4th Cir. 2004).

Defendants seek no such relief here. They have not asked the Court to vacate, modify or reverse its 2007 Decision, or anything of the kind. For that matter, such relief would seem superfluous at best, since that decision and the ensuing judgment were effectively reversed by the Supreme Court. While the focus of the Supreme Court's opinion was on the decision from which the appeal had been taken, *i.e.*, the Second Circuit's decision, the Supreme Court also made clear its conclusion that this Court's 2007 Decision was reached in error. Specifically, the Court found that this Court had applied an erroneous standard in deciding whether to give deference to the Plan Administrator's interpretation of the Plan. *See*, *e.g.*, 559 U.S. at 515, 519 (stating that the district court had erred in not following certain trust law principles, and in its interpretation of the Plan).

The 2007 Decision was also supplanted by a later decision of this Court, issued in November 2011 ("2011 Decision"). In that decision, this Court adopted the Plan Administrator's interpretation of the Plan, at that time, and, in accordance with that interpretation, directed defendants "to calculate and pay plaintiffs retirement benefits, without utilizing a so-called 'phantom account ... .'" *Frommert v. Conkright*, 825 F.Supp.2d 433, 451 (W.D.N.Y. 2011). While that decision was itself later vacated by the Court of Appeals, *see* 738 F.3d 522, 530 (2d Cir. 2013), the point is that the 2011 Decision effectively rendered the 2007 Decision a nullity. At this juncture, then, there is no existing 2007 judgment or order currently in force, for this Court to vacate or reverse.

As to the specific relief sought, defendants' motion asks the Court to issue an order "requiring those Plaintiffs who received recalculated benefits payments, pursuant to this Court's [2007 Decision] to pay back to [the Plan] the amount of excess pension benefits they received as a

result of Defendants' compliance in 2009 with [the 2007 Decision], as compared to their recalculated benefits under the New Hire method" set forth in the 2016 Decision. That does not amount to relief from the 2007 Decision, within the meaning of Rule 60(b), but rather affirmative relief against the 22 plaintiffs in question. Defendants do not seek merely to be relieved of any further obligation to comply with the 2007 Decision (which, as explained above, was long ago effectively vacated), but to recover monies from those 22 plaintiffs.

That goes well beyond the relief provided for by Rule 60(b). To summarize, Rule 60(b) essentially allows a court to vacate its own judgment. But the 2007 Decision is no longer in effect, nor has it been for years. In short, Rule 60(b) does not empower this Court to order the relief sought by defendants.

Even if this were an otherwise proper motion under Rule 60(b), it would also be subject to denial as untimely. Rule 60(c) provides that "[a] motion under Rule 60(b) must be made within a reasonable time–and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Thus, the rule provides that motions for relief under subsection (b)(6) must be brought "within a reasonable time." What constitutes a "reasonable time" is left to the discretion of the court. *See McKay v. Novartis Pharm. Corp.*, 751 F.3d 694, 701 n.5 (5th Cir. 2016) ("A district court is provided wide discretion in determining whether a Rule 60(b) motion is filed within a reasonable time, and what constitutes a reasonable time under Rule 60(b) depends on the particular facts of the case in question") (internal quotes and alterations omitted).

In the case at bar, defendants filed their Rule 60(b)(6) motion, which ostensibly seeks relief from the 2007 Decision, over nine years after the issuance of that decision. That delay was not reasonable. *See, e.g.*, *Walsh v. United States*, __ Fed.Appx. __, 2016 WL 379302, at *2 (3d Cir.

2016) ("Walsh filed his motion more than six years after the District Court granted summary judgment in favor of [defendant], which is not within a reasonable time"); *Fowlkes v. Adamec*, 622 Fed.Appx. 76, 77 (2d Cir. 2015) (plaintiff was not entitled to relief under Rule 60(b)(6), in part because "he did not file his motion 'within a reasonable time,' waiting nearly four years after the denial of his December 2010 motion before filing the motion presently at issue in August 2014"); *Buffalo Teachers Federation v. Tobe*, 514 Fed.Appx. 57, 58 (2d Cir. 2013) ("As the Rule 60(b) motion was brought many years after the entry of judgment ... and well beyond any period that would be reasonable under Rule 60(b)(6)[,] we conclude that the district court did not abuse its discretion by denying relief"); *Lee v. Marvel Enterprises, Inc.*, 471 Fed.Appx. 14, 15 (2d Cir. 2012) ("[appellant] did not seek to vacate this judgment until more than five years after final judgment. Much shorter periods of time have been held unreasonable") (citing cases).

Defendants contend that as a practical matter, they could not file their motion until after this Court issued its 2016 Decision directing defendants to utilize the New Hire approach. But the fact remains that defendants knew as early as 2010, when the Supreme Court issued its decision, that this Court's 2007 Decision, upon which defendants' 2009 payments were based, was no longer good law. The Supreme Court expressly held that the standard applied by this Court (and by the Court of Appeals, in its decision affirming this Court's 2007 Decision) was incorrect.

At that point, defendants could have raised essentially the same argument they do now: that the plaintiffs who had been paid in 2009 no longer had a claim to entitlement to the funds at issue, at least in the amounts paid. If defendants believed, in the wake of the Supreme Court's decision, that they were entitled to relief from the 2007 Decision, they could have moved for such relief immediately.

Defendants' contention that they had no choice but to wait for this Court's 2016 Decision, to determine the exact amount of the alleged overpayments, is further belied by this Court's issuance of its 2011 Decision in November of that year. As stated, that decision was quite favorable to defendants, inasmuch as it adopted what was then the Plan Administrator's most recent interpretation of the Plan. *See* 825 F.Supp.2d at 451. Under that approach, the plaintiffs were to receive less in benefits than was provided for by the 2007 Decision.

Though that decision was later vacated by the Court of Appeals, *see* 738 F.3d 522, 530 (2d Cir. 2013), defendants had no way of knowing, when the 2011 Decision was issued, that such a result was forthcoming. Upon the issuance of the 2011 Decision, defendants could have recalculated the benefits that had been paid up to that point, and sought the same type of relief they seek now. The methodology for doing so was set forth in the Plan Administrator's own affidavit. *See* Dkt. #211-2. At the very least, such a motion would have put plaintiffs on notice that defendants would seek to recover the monies that had been paid.[2]

There is still another problem with defendants' motion. While, in certain circumstances, § 502(a)(3) of ERISA does permit plan fiduciaries to seek equitable relief, in the form of restitution for past overpayments, *see* 29 U.S.C. § 1132(a)(3), defendants have not sought such relief. Yet even if they had done so, the amounts attributable to the alleged overpayments would not be subject to recovery under § 502(a)(3) if the property sought to be recovered or its proceeds have been spent or

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[2]Plaintiffs assert that when they appealed from the 2011 Decision, defendants could have cross-appealed to seek relief from recoupment of the moneys it had paid out in 2009. Defendants counter that they had no reason to cross-appeal from the 2011 Decision, since that decision was favorable to them. While I am not persuaded by plaintiffs' argument that defendants' failure to cross-appeal from the 2011 Decision, in itself, bars their present motion, I believe that it evidences defendants' recognition that the 2007 Decision had, by that point, become a nullity, and that the 2011 Decision provided plaintiff with considerably lower benefits than the 2007 Decision.

otherwise dissipated. *See Montanile v. Board of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, __ U.S. __, 136 S.Ct. 651, 657 (2016); *Metzgar v. U.A. Plumbers and Steamfitters Local No. 22 Pension Fund*, No. 13-CV-85, 2016 WL 1554295, at *4 (W.D.N.Y. Mar. 1, 2016). *See Montanile*, 136 S.Ct. at 658, 661 (stating that a defendant's expenditure of an identifiable fund on nontraceable items destroys an equitable lien, that while "[t]he plaintiff then may have a personal claim against the defendant's general assets[,] recovering out of those assets is a *legal* remedy, not an equitable one," and that "legal remedies–even legal remedies that a court of equity could sometimes award–are not 'equitable relief' under § 502(a)(3)"); *accord Connecticut General Life Ins. Co. v. Humble Surgical Hospital, LLC*, No. 13-CV-3291, 2016 WL 3077405, at *11 (S.D.Tex. June 1, 2016); *Metzgar*, 2016 WL 1554295, at *4.[3]

Some seven years after the payments were made, it seems unlikely that all the funds remain intact and identifiable. Defendants have offered only unsupported assertions that some of the monies in question might remain in plaintiffs' 401(k) accounts.

Beyond that, § 502(a)(3) on its face permits a plan fiduciary "to obtain ... appropriate equitable relief ... to enforce any provisions of this subchapter or the terms of the plan ... ." Defendants have not shown that the relief they seek here–recoupment of monies paid out to plaintiffs–is provided for by the terms of the Plan itself.

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[3]Such a legal remedy might be enforceable in state court, under state law, but that issue is not before me. What is clear is that defendants could not bring such a claim in this Court under ERISA. *See Sheet Metal Workers Pension Trust of Northern California v. Trayer Engineering Corp.*, No. 15-cv-4234, 2016 WL 1745676, at *6 (N.D.Cal. May 3, 2016) (stating that because plan sponsor's claim for relief from trust funds' general assets was "an essentially legal remedy [that was] not cognizable under § 502(a)(11)'s 'equitable relief' term, that it is a request over which this court lacks subject-matter jurisdiction").

This case thus stands in contrast to *Montanile*, in which the trustees of a health benefits plan sought reimbursement from a plan participant who had received plan benefits to cover his medical expenses after he was severely injured in an automobile accident. The participant later recovered a substantial judgment against the driver of the other vehicle involved in the accident. The plan expressly provided, however, that "any amounts" that a participant "recover[s] from another party by award, judgment, settlement or otherwise ... will promptly be applied first to reimburse the Plan in full for benefits advanced by the Plan ... ." 136 S.Ct. at 655. In addition, when the participant accepted his plan benefits, he signed a reimbursement agreement reaffirming his obligation to reimburse the plan for any benefits received, from any recovery he might later obtain "as a result of any legal action or settlement or otherwise." *Id.* at 656.

Other cases confirm that § 502(a)(3) means just what it says: that a fiduciary may seek equitable relief, not based just on some general notion that the plan "overpaid" benefits, but to *enforce the terms of the plan*. *See, e.g.*, *U.S. Airways, Inc. v. McCutchen*, __ U.S. __, 133 S.Ct. 1537, 1548 (2013) (stating that § 502(a)(3) "does not ... authorize appropriate equitable relief at large; rather, it countenances only such relief as will enforce the terms of the plan or the statute"); *Sereboff v. Mid Atlantic Med. Services, Inc.*, 547 U.S. 356 (2006) (plan expressly required a beneficiary who received benefits under the plan for covered injuries to reimburse plan fiduciary for those benefits from "[a]ll recoveries from a third party (whether by lawsuit, settlement, or otherwise)"); *Continental Ins. Co. v. Dawson*, __ Fed.Appx. __, 2016 WL 1055371 (5th Cir. 2016) (noting that plan provided insurance carrier with subrogation and reimbursement rights pertaining to third-party liability for participants' injuries, and stating that carrier's assignee therefore had derivative standing to enforce claims under 29 U.S.C. § 1132); *Bencivenga v. Unum Life Ins. Co.*

of America, No. 14-10118, 2015 WL 1439697, at *17 (E.D.Mich. Mar. 27, 2015) ("It is well-established in this Circuit that plan fiduciaries may recover overpaid benefits when the terms of an ERISA plan so permit") (citing *Gilcrest v. UNUM Life Ins. Co. of Am.*, 255 F. Appx. 38, 46 (6th Cir. 2007)).

Admittedly, this case arises out of facts dissimilar from most of the "overpayment" cases, which typically involve participants who received both plan benefits and monies from third parties. But that is precisely the point. The situations in those cases were expressly covered by the plan terms. Defendants have pointed to no language in the Plan here that provides for recoupment of alleged overpayments, based on subsequent court decisions in litigation over plan benefits. It may well be that it simply never occurred to the drafters of the Plan to provide for such a contingency. But the fact remains, they did not do so. The payments that defendants now request are therefore not "appropriate equitable relief ... to enforce ... the terms of the plan."

In addition, even if defendants had made out an otherwise facially valid claim under § 502(a)(3), such a claim would be untimely. "As there is no statute of limitations for claims under ERISA § 502(a)(3), [courts] look to state law for the most analogous cause of action." *North Cypress Medical Center Operating Co., Ltd. v. Cigna Healthcare*, 781 F.3d 182, 204 (5th Cir. 2015). In cases in which fiduciaries seek to recover monies that have been paid to beneficiaries, courts have typically applied the limitations periods for unjust-enrichment claims, *see id.*, or for contract claims, *see, e.g.*, *Vanderbilt University Health Ben. Plan v. Pesak*, No. 08-cv-1132, 2011 WL 4001115, at *6 (M.D.Tenn. Sept, 8, 2011).

In the case at bar, on the facts before me, unjust enrichment would seem to be a more analogous theory than breach of contract, but that is a moot point, since New York applies a six-year

limitations period to both. *See Northern Elec. Power Co., L.P. v. Hudson River-Black River Regulating Dist.*, 122 A.D.3d 1185, 1187 (3d Dep't 2014); *Tand v. Solomon Schechter Day Sch. of Nassau County*, 324 F. Supp. 2d 379, 384 (E.D.N.Y. 2004). As stated, the payments at issue here were made in 2009. The motion *sub judice* was filed in 2016, more than six years later. Thus, even had defendants sought relief under ERISA § 502(a)(3), their claim would be subject to denial as untimely brought.

But as stated, defendants have not expressly sought relief under § 502(a)(3), perhaps because they recognize that such relief is not available here. The point is that to the extent that ERISA permits a plan fiduciary to seek to recover alleged overpayments of plan benefits, the fiduciary can only do so under § 502(a)(3). That statute sets forth the nature of the relief that can be sought, and the requirements that must be met for the fiduciary to do so. If those requirements have not been met, then so be it. That does not mean that the Court should countenance defendants' attempt to shoehorn their request into an equally inapt provision, Rule 60(b).

Beyond all the flaws mentioned thus far, "a party seeking to avail himself of Rule 60(b)(6) must demonstrate that 'extraordinary circumstances warrant relief' ... ." *Fowlkes*, 622 Fed.Appx. 76, 77 (2d Cir. 2015) (quoting *Stevens v. Miller*, 676 F.3d 62, 67 (2d Cir. 2012). *See also Harris v. United States*, 367 F.3d 74, 81 (2d Cir. 2004) ("[A] proper case for Rule 60(b)(6) relief is only one of extraordinary circumstances, or extreme hardship") (internal quotation marks omitted). For the reasons stated, I find that such circumstances have not been shown here. Defendants paid out certain monies in 2009, in accordance with the remedy set forth in the Court's 2007 Decision. That this Court, after further years of litigation here and in the appellate courts, has now ordered a different remedy does not, in my view, constitute an extraordinary circumstance, for purposes of Rule 60(b).

That is particularly so in light of "the factors that counsel against Rule 60(b)(6) relief, most notably the public policy favoring finality of judgments and termination of litigation." *Wright v. Warden, Riverbend Maximum Sec. Inst.*, 793 F.3d 670, 672 (6th Cir. 2015) (internal quote omitted).

Defendants have not shown that the Plan, or other Plan participants, will suffer *any* harm, much less "extreme hardship" if defendants' motion is denied. In that regard, it is worth noting that when this Court granted defendants' motions for a stay in 2007 and again in 2009, the Court declined to require the posting of a bond by defendants, in part because "defendants have shown that the Plan 'has ample assets and is fully capable of paying any judgment entered in this case.'" *Frommert*, 639 F.Supp.2d 305, 313 (W.D.N.Y. 2009) (quoting *Frommert*, 472 F.Supp.2d at 468-69). The Court also noted that "[d]efendants have submitted evidence that the Plan's trust fund contains over three billion in assets, far exceeding the amounts at issue in this case, which appear to run into the tens of millions at most." 639 F.Supp.2d at 313.

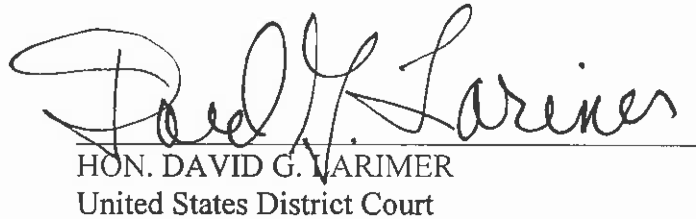
That is not to suggest that the allegedly excess payment of $2.6 million is *de minimis*, but it certainly indicates that there is no danger of "hardship" here, at least on defendants' side of the equation. If anyone is at risk of suffering a hardship, it is the plaintiffs who accepted payments in good faith, seven years ago, in satisfaction of their longstanding, well-founded claims, and from whom defendants now seek to strip away a substantial portion of those benefits.

CONCLUSION

Defendants' motion pursuant to Fed. R. Civ. P. 60(b)(6) to set aside this Court's prior Decision & Order entered January 24, 2007 (Dkt. #297) is denied in all respects.

IT IS SO ORDERED.

Dated: July 28, 2016
Rochester, New York



HON. DAVID G. LARIMER
United States District Court