UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Paul J. Frommert, et al., Plaintiffs, -against- Sally L. Conkright, et al., Defendants.	Civil Action No. 00-cv-6311

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION, PURSUANT TO RULE 60(b)(6), FOR RELIEF FROM THIS COURT'S PRIOR DECISION AND ORDER ENTERED JANUARY 24, 2007

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PRELIMINARY STATEMENT

Xerox Corporation Retirement Income Guarantee Plan (the "Plan" or the "RIGP") and its present and former Plan Administrators, Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker (collectively referred to as "Defendants"), submit this Reply Memorandum of Law in support of their motion, filed pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for relief from this Court's prior Decision and Order, entered on January 24, 2007 ("*Frommert 2007*")*.*[1] This motion also seeks the enforcement of this Court's January 5, 2016 Decision and Order ("*Frommert 2016*")[2] as to all of Plaintiffs in this action, including those who previously received extra benefit distributions under *Frommert 2007*.

ARGUMENT

POINT I

DEFENDANTS' MOTION FOR RELIEF IS TIMELY AND PROCEDURALLY PROPER

Plaintiffs do not dispute that the payments at issue were made using an offset methodology ("*Layaou* Offset Approach") that was subsequently rejected by the Supreme Court[3] and this Court in *Frommert 2016.* Plaintiffs also do not dispute that they are not entitled to these excess payments as a remedy awarded them under *Frommert 2016*. Instead, Plaintiffs contend that Defendants' motion should be denied because it is untimely made and/or procedurally improper. Such arguments lack any legal or factual bases and should be rejected outright by this Court.

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1 Reported at *Frommert v. Conkright*, 472 F. Supp. 2d 452 (W.D.N.Y. 2007) (Dkt. No. 137).

2 Reported at *Frommert v. Becker*, 00-CV-6311L, 2016 U.S. Dist. LEXIS 439 (W.D.N.Y. Jan. 5, 2016) (Dkt. No. 283).

3 Reported at 559 U.S. 506 (2010).

A. Defendants' Motion Is Timely

Although a number of years have passed since these excess payments were received by this group of Plaintiffs in 2009, it was not possible to determine whether such prior payments were actually in excess of what the ultimate remedy would be in this case until this Court issued *Frommert 2016*. Plaintiffs continued to advocate for a remedy based on the *Layaou* Offset Approach up to the time of the issuance of this Court's decision on remedies in *Frommert 2016*. These efforts included filing the following motions and appeals:

- Filing a Motion To Reenter Judgment, on or about October 7, 2010, to "reinstate its prior notice holding and reenter the same judgment that it entered in 2007; *i.e.*, that Xerox recalculate plaintiffs' pensions without an appreciated offset." (Dkt. No. 204).

- Filing a Brief on Appeal to the Second Circuit, on April 20, 2012, stating that the *Layaou* method was one of "only two reasonable interpretations of the Plan." (Second Circuit Case No. 12-67, Dkt. No. 39).

- Filing a Motion for Order Compelling Payment of Amounts Indisputably Due, on August 20, 2014, that "Xerox Should Be Ordered To Calculate And Pay Benefits Pursuant To This Court's *Layaou* Remedy." (Dkt. No. 254-1, at 4).

- Filing a Motion for Entry of Judgment on Notice Issue, on October 20, 2014, for three types of equitable relief – surcharge, reformation, and estoppel – and for all three forms to be paid benefits "at least . . . equal to the *Layaou* Offset." (Dkt. No. 267, at 13-24).

- Filing a Motion for Entry of Judgment on Bad Faith, on October 5, 2015, and claiming that Plaintiffs were entitled to entry of judgment entitling them to the *Layaou* Offset Approach as a remedy. (Dkt. No. 278-1, at 7).

Prior to January 5, 2016, because this Court had not decided whether or not to award the remedy urged by Plaintiffs; it was not possible for Defendants to perform the actuarial calculations necessary to determine whether or not overpayments had been made.[4] Stated

[4] Plaintiffs also do not address what kind of relief they believe Defendants could have sought prior to *Frommert 2016*. In the absence of a definitive ruling on remedies, all that Defendants could have requested was that the entire amount of payments made to these 22

otherwise, the issue of recoupment was not ripe for a determination by this Court until after the issuance of the Court's final Decision and Order on remedies in *Frommert 2016*. Regardless, there is no specific time limitation contained in Rule 60(b)(6), which motion must be made within a "reasonable" time. Fed. R. Civ. P. 60(c)(1). Defendants' request is within a reasonable time in that this motion was made within a few months of the Court's January 2016 Order and shortly after Plaintiffs were provided with the New Hire recalculations at issue.[5]

Even if the "reasonable" limits contained in Rule 60 somehow did not apply, this Court has the authority to, and should, ensure that the remedy ultimately that it awarded to *all* Plaintiffs in this case, is enforced to be consistent with *Frommert 2016*. Plaintiffs who received excess pension benefits in 2009 as a result of the recalculation of the benefits pursuant to the *Layaou* Offset Approach should not be allowed to simply retain those excess benefits. Plaintiffs are only entitled to the benefits due them under the terms of the Plan, as equitably reformed to correct the inadequacy of disclosure with respect to the precise calculation of the offset; any amounts paid them in excess of these amounts are not theirs to keep, as such monies are Plan assets that should be returned to provide for the payment of benefits due to other participants and beneficiaries. The Plan fiduciaries are obligated by law to recover these excess amounts to apply them for the exclusive benefit of participants and beneficiaries who are still due benefit payments under the terms of the Plan. (Dkt. No. 297-2, at 15-20).

Plaintiffs be returned until the Court issued its final decision on remedies. One can only imagine Plaintiffs' outrage if Defendants had made such a request.

[5] The present case differs from the *Scola* case relied upon by Plaintiffs, *Scola v. Boat Frances R. Inc.*, 618 F.2d 147 (1st Cir. 1980), in a number of ways, including: (1) the Rule 60(b) motion was untimely filed in *Scola* after an error in granting prejudgment interest was made, *which error was apparent at the time it was awarded*, unlike the present case where the overpayments to the 22 Plaintiff were not finally determined until this Court's decision in *Frommert 2016*; and (2) unlike *Scola*, the present case involves an ERISA-governed Plan, which is required by law to maintain, and if necessary recoup, Plan assets for the benefit of all Plan participants.

There is nothing untimely about Defendants' request for such relief as this motion was filed shortly after the Decision and Order was issued and the calculation of the New Hire benefits were completed by the Plan's actuaries and provided to Plaintiffs, pursuant to this Court's Order. *See* Kaster Feb. 16, 2016 Decl. ¶ 2, Ex. A) (Dkt. No. 290).

B. Plaintiffs' Allegations of Procedural Deficiencies Lack Merit

Plaintiffs claim that Defendants are barred from obtaining the relief sought in the instant motion by the "law of the case" because Defendants previously "asked for relief" from the Supreme Court and the Second Circuit by way of a stay on three occasions and were rejected, and thereafter "deliberately refused to ask for further relief from these tribunals." (Pl. Opp. at 3). Plaintiffs' reliance on *United States v. Jacobs*, 955 F.2d 7, 9 (2d Cir. 1992) and *Soto-Lopez v. New York City Civil Svc. Comm'n*, 840 F.2d 262, 277 (2d Cir. 1988) to support such claims is misplaced.

The law of the case doctrine does not apply because neither the Supreme Court nor the Second Circuit ever ruled on the issue before this Court – that is, whether the excess monies that were paid to the Plaintiffs *before* a stay was issued need to be returned to the Plan. Rather, the issue before the Second Circuit and the Supreme Court – and the one on which those courts ruled – was whether the Defendants had demonstrated the grounds necessary for the grant of a stay, including: (i) a likelihood of success on the merits – that the Supreme Court would grant their petition for certiorari and then decide in their favor; and (ii) a likelihood of irreparable harm if a stay was not granted. Thus, the law of the case does not bar the relief sought here.

Plaintiffs' contention that both the Second Circuit and the Supreme Court "expressly contemplated" that it would be an "acceptable consequence" for these 22 Plaintiffs to receive *and retain* more money than they are entitled to, now that the final remedy has been determined,

lacks any basis in fact.[6] The Second Circuit denied Defendants' request for a stay without any substantive discussion. (Dkt. No. 191-3, Ex. E). And, contrary to what Plaintiffs would have this Court believe, a review of Justice Ginsberg's decision denying Defendants' request for a stay shows that, among other things, Defendants had not established "irreparable harm," because they "did not establish that recoupment will be impossible."

As Justice Ginsberg explained, the "`possibility that adequate compensatory or other *corrective relief will be available at a later date*, *in the ordinary course of litigation*, *weighs heavily against a claim of irreparable harm*.'" (Dkt. No. 191-3, Ex. G) (emphasis added) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). It is such *"corrective relief" in the ordinary course of this litigation* that Defendants now seek, to address the overpayments that were made because a stay was not promptly issued.

Significantly, *Plaintiffs themselves previously contended that Defendants were not entitled to a stay because, among other reasons, they had not shown a likelihood of irreparable harm inasmuch as the monies that Plaintiffs were being paid were from a pension plan and would be located in each of Plaintiffs' 401(k) plans, presumably to allow for the very possibility presented now —the obligation to repay monies arose.* (Dkt. No. 194, at 6 fn. 2). In making such representations, Plaintiffs were attempting to assure both Defendants and the Court that there would be no irreparable harm because the monies they received in 2009 would be preserved in a tax preferred account and would be available, if necessary, to repay to the Plan.

Also meritless is Plaintiffs' claim that Defendants are procedurally barred from seeking the instant relief because the 2007 Order requiring the payments to the Plaintiffs – which was

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[6] Accordingly, Plaintiffs' admonition to this Court that it should not be the first "in the history of the American republic" to find something that has been "expressly contemplated" by a court to constitute an "extraordinary circumstance" (Pl. Opp. at 6-7), should be dismissed for the hyperbolic rhetoric that it is.

subsequently stayed – was then vacated by the Supreme Court. The consequences of the enforcement of *Frommert 2007* prior to the issuance of a stay by this Court in 2009 are still in effect, and a group of 22 Plaintiffs are still the beneficiaries of that 2007 Order regardless of the fact that it has been vacated. The Court has the equitable power to remedy that situation. Moreover, the Court can enforce the terms of its own recent 2016 Decision and Order on remedies by ensuring that the affected group of Plaintiffs do not get to keep excess benefits in their possession to which they are not entitled by way of a remedy issued by this Court.

Hospital Association of New York State Inc. v. Toia, 577 F.2d 790 (2d Cir. 1978), the sole case on which Plaintiffs rely as support for their position, actually supports Defendants' position on this issue. In that case, a group of hospitals, alleging violations of the Medicaid reimbursement formula, sought to avoid having to refund payments back to the State on various grounds, including that they should be "spared the necessity" of complying with the district court's decision to refund the payments made by the State, "pursuant to the district court's vacated order." *Id*. at 796 n. 4. The Court rejected such argument and granted the State's request for the refund of such payments. Similarly here, this Court should reject the Plaintiffs' attempt to be spared the necessity of repaying the excess payments previously made by the Plan pursuant to the terms of a now vacated order.

Equally specious is Plaintiffs' claim that the instant motion is procedurally barred by Defendants' alleged "failure" to cross-appeal in 2011, and Plaintiffs provide no support for such claim. In 2011, this Court issued a Decision and Order on the recalculation of benefits that applied to all Plaintiffs according to the Plan Administrator Approach. At that time, there was nothing contained in the Order for Defendants to cross-appeal given that the Order granted Defendants motion and simply required the recalculation of benefits for all of the Plaintiffs.

Until those recalculations were performed and compared to the amounts that the Plaintiffs at issue received, the issue of recoupment was not yet ripe for determination (let alone for cross-appeal).

In any event, Defendants' motion is consistent with the Supreme Court's decision in *Morley Constr. Co. v. Maryland Cas. Co*., 300 U.S. 185, 191 (1937), cited by Plaintiffs in their opposition. Defendants are not requesting that this Court enlarge their rights or lessen Plaintiffs' rights; which the Supreme Court indicated would be impermissible if a party fails to cross-appeal. This Court has determined Plaintiffs' remedy in *Frommert 2016,* and as a consequence of that Decision and Order, Plaintiffs have no right to the excess payments they received in 2009.

This Court should reject outright Plaintiffs' suggestion that Defendants should have asked the Supreme Court for recoupment of any excess monies the Plan had paid by way of a motion made pursuant to Rule 21 of the Rules of the Supreme Court. As stated above, the issue of recoupment was not ripe for the Supreme Court's consideration when the case was before that Court; the only issue on which the Supreme Court ruled was the proper standard of review to be applied to the Plan Administrator's determination. A final remedy had yet to be determined.

Nor should Defendants have filed a counterclaim. While Rule 13 of the Fed. R. Civ. P. permits a party to interpose a counterclaim, such counterclaim must "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim." Here, the payment of the excess monies did not *arise out of the transaction or occurrence that is the subject matter of the litigation*. It arose following a Decision and Order by this Court in 2007 as an appropriate *remedy* for the underlying transaction or occurrence. Hence, a more appropriate mechanism is for Defendants to seek relief from the 2007 Decision and Order or enforcement of the 2016 Decision and Order on remedies as to all Plaintiffs to whom the remedy is to apply.

POINT II

EXTRAORDINARY CIRCUMSTANCES EXIST WHICH WARRANT A GRANT OF THE INSTANT MOTION

Plaintiffs do not dispute that the Court is vested with the equitable power to issue an order enabling the Defendant Plan to recoup any excess payment of benefits that these individuals were paid out of the Plan under this Court's now reversed *Frommert 2007* decision. This is particularly true since the distributions apparently were made into Plaintiffs' IRAs and, Plaintiffs do not dispute, that the distributions can be repaid back to the Plan without any tax consequences for the individual Plaintiffs. Such a remedy from a specifically identifiable account of a participant is equitable in nature. *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651, 658 (2016).

Nevertheless, in opposition to Defendants' motion for recoupment, Plaintiffs contend that the "extraordinary circumstances" contemplated by Rule 60(b)(6) *do not* exist in this case. In support of that claim, Plaintiffs allege – for the first and only time and without offering any evidentiary support whatsoever – that Defendants' New Hire calculations with respect to this group of Plaintiffs "are wrong." (Pl. Opp. at 7). Relying solely on the unsupported allegations contained in opposing counsel's Declaration, and without providing a single example, Plaintiffs contend that the New Hire calculations "use the wrong salary, the wrong years of service" for numerous unidentified Plaintiffs. (*Id.*).

While opposing counsel submitted his own Declaration indicating that he has "personally examined the "new hire" benefits ordered by the Court, and believes that "Xerox's calculations are wrong, his Declaration, contains conclusory allegations, is inadmissible and is insufficient to defeat the present motion. *See Nico Mexi Food, Inc. v. Abarrotera Cent. # 2 Wholesale, Corp., et al.*, No. 1:14-cv-296, 2016 U.S. Dist. LEXIS 28796, *10-*12 (S.D.N.Y. Feb. 10, 2016); *FTC*

v. Vantage Point Servs., LLC, No. 15-CV-006S, 2015 U.S. Dist. LEXIS 63940, *7-*8 n. 5 (W.D.N.Y. May 15, 2015.

As one example, opposing counsel states, that Xerox's calculations "inexplicably use a calculation date of 2011 to calculate the benefits despite the fact that plaintiffs did not retire in 2011." (Martin Decl. 2). However, as is shown in Ex. C to the Declaration of Arlyn Kaster, sworn to February 16, 2016, previously submitted to the Court, the Settlement Date used by the Plan Actuaries for the calculations of the New Hire benefits for those Plaintiffs who received the excess payments under the "Layaou Offset Approach," differs from Plaintiff to Plaintiff, but in no event, occurred later than in 2006. (Dkt. No. 290-2). That Exhibit also shows that Plaintiff Barbarosa and his widow, to whom Plaintiffs refer in their Memorandum, are not even among the individual Plaintiffs who are the subject of the instant motion. Even more significantly, opposing counsel fails to inform the Court that numerous Plaintiffs have applied for and received their New Hire benefits based on these calculations, all without any prior complaint by Plaintiffs that the calculations are not accurate for the reasons now being asserted.

Even assuming that some Plaintiffs have made some withdrawals from their 401k accounts, as is also alleged (Pl. Opp. at 9), Plaintiffs had a right to access and utilize the monies to which they were otherwise entitled as they saw fit. That use does not give them an excuse not to return any excess benefits that remain in their accounts. The Supreme Court has recognized that, under ERISA, an equitable lien can be imposed upon the specifically-identifiable funds in the possession and control of a beneficiary (as opposed to the beneficiary's general assets). *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. at 658 (reaffirming that ERISA allows for the imposition of equitable relief, including recovery of amounts owed from a beneficiary's specially identifiable funds); *U.S. Airways Inc., v.*

McCutchen, 133 S. Ct. 1537 (2013); *Sereboff v. Mid Atlantic Medical Services, Inc*., 547 U.S. 356, 363 (2006). The issue is whether there are any remaining funds in the account and not whether there were any withdrawals.

This Court should also reject Plaintiffs' argument that these individuals –and not any other Plaintiffs -- should be permitted to keep those excess funds because of the "uncompensated and uncompensable inequities" that have been allegedly "heaped upon plaintiffs by Xerox over the past thirty years." (Pl. Opp. 10). This Court has already determined the remedy for any alleged wrongdoing as applied to all Plaintiffs. Unless this motion is granted, this subset of Plaintiffs will have received, and be permitted to retain, a great remedy (for some amounting to tens and even hundreds of thousands of dollars) than the other Plaintiffs, even though this Court's final remedy applies to *all* Plaintiffs.

Nor must Defendants *conclusively show* when filing this motion that the funds they seek remain segregated and have not been dissipated by Plaintiffs, as is alleged, (Pl. Opp. at 8), and the Supreme Court's decision in *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. at 651, is not to the contrary. Indeed, courts have permitted a plaintiff to seek relief without first "conclusively" making such a showing. *See e.g., Metzgar v. U. A. Plumbers and Steamfitters Local No. 22 Pension Fund*, No. 13-CV-00085V, 2016 U.S. Dist. LEXIS 28168 (W.D.N.Y. Mar. 1, 2016), *adopted*, No. 13-CV-85V, 2016 U.S. Dist. LEXIS 51320 (W.D.N.Y. Apr. 15, 2016).

It is undisputed that the excess payments were distributed into Plaintiffs' own IRA accounts. Plaintiffs' counsel made such a representation to the Court *on the record* in 2009. Such proof, at this stage, is sufficient for the Court to proceed on this motion.

CONCLUSION

For all the reasons discussed above and in Defendants' initial motion papers, Defendants respectfully request that this Court issue an Order, requiring those Plaintiffs who received recalculated benefits payments pursuant to this Court's prior Decision and Order in *Frommert 2007*, to pay back to the Defendant Plan the amount of excess pension benefits they received as compared to their recalculated benefits under the New Hire Approach to which they are currently entitled under this Court's Decision and Order in *Frommert 2016,* adjusted for any interest as determined by the Court, by a date certain.

Dated: May 26, 2016

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