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

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 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]

Defendants seek to have this Court address and resolve the conflict that now exists between the pension payments that were recalculated and paid in the manner directed by this Court in *Frommert 2007,* and the recalculation of pension benefits now required by this Court's January 5, 2016 Decision and Order ("*Frommert 2016*")[2] ("New Hire Approach"). Specifically, in 2009, additional pension payments totaling over four million dollars were made to a group of twenty-three Plaintiffs who had already received lump sum pension distributions from the Defendant Retirement Income Guarantee Plan (the "RIGP" or "Plan") in this case. These additional payments were made following the Second Circuit's 2008 affirmance of *Frommert 2007* on the issue of the appropriate remedy to be applied for the notice violation of the Employee Retirement Income Security Act. ("ERISA"), 29 U.S.C. § 1001 *et seq*., but before the Supreme Court granted Defendants' Petition for Certiorari to review the Second Circuit's determination, (Dkt. No. 137), and before this Court subsequently issued a stay of the enforcement of *Frommert 2007*.

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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).

The payments made to these Plaintiffs in 2009 utilized an offset methodology for their prior distributions of pension benefits ("*Layaou* Offset Approach") that was, thereafter, specifically rejected by the Supreme Court[3] and this Court in *Frommert 2016*. Because the prior offset method urged by Plaintiffs and initially adopted by this Court in *Frommert 2007* failed to account for the time value of money, we now know that this group of Plaintiffs received excess payments of pension benefits, or overpayments, totaling $2,638,012.46, excluding interest, which was inappropriate and unwarranted.[4]

Although a number of years have passed since these additional payments were made 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*. In other words, Defendants had no basis upon which to seek recoupment of any payments made in 2009 until this Court issued its Decision and Order in *Frommert 2016*.[5]

Upon issuance of *Frommert 2016*, the Plan's actuaries made the necessary actuarial calculations to determine whether the amounts that were previously paid to each of the twenty-three Plaintiffs in 2009 were in excess of the benefits that they were owed under the remedy now ordered by this Court. With regard to twenty-two Plaintiffs, the payments they each received in 2009 exceeded the benefits that they are entitled to receive under the New Hire Approach, as

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

[4] The calculations performed by the actuaries as to the pension benefits owed to all Plaintiffs are attached as Exhibits A and B to the Declaration of Arlyn Kaster, dated February 16, 2016, and previously filed with the Court under seal. (Dkt. Nos. 290-1 and 290-2). This Declaration and its Exhibits is incorporated by reference on this motion.

[5] The Supreme Court reversed the Second Circuit's affirmance of *Frommert 2007*, in an Opinion which also soundly rejected the *Layaou* Offset Approach utilized for recalculating the pension benefits for this group of Plaintiffs, noting that, because it failed to take into account the time value of money, such offset methodology would be considered "heresy" by actuaries and would be "highly unforeseeable" as a plan interpretation by a plan administrator. *Conkright v. Frommert*, 559 U.S. at 519, 522.

ordered by this Court.[6] The excess payments for this group of twenty-two individuals total $2,638,012.46, excluding interest. The individual excess payments ranged from approximately $1,200 to more than $490,000. (*See* Kaster Feb. 16, 2016 Decl., Ex. A; Dkt. No. 290-2). There is no question that these Plaintiffs have no right or entitlement to these excess payments. They should not be allowed to keep what are actually assets of the Plan, which are protected by law and must be applied for the exclusive benefit of the remaining participants and beneficiaries in the Plan.

Extraordinary circumstances exist which justify the issuance of an Order, pursuant to Rule 60(b)(6), on such terms as may be just, to relieve Defendants from the effect of this Court's prior Order. For the reasons set forth below, this Court should issue an order requiring that the excess benefit payments received by the twenty-two Plaintiffs in 2009 be returned or repaid directly to the Plan for the benefit of the Plan's participants and beneficiaries.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

As this Court is aware, Plaintiff Paul Frommert and a group of 12 other rehired Xerox employees commenced the *Frommert* lawsuit in 1999, seeking to be paid additional pension benefits under ERISA. The crux of their claim is that, when they initially left Xerox's employment in the 1980's, they each received a lump-sum distribution from the Plan and, upon being rehired by Xerox, the written materials they received did not adequately disclose, until 1998, that their RIGP benefit would "be reduced if you've had a prior distribution." (Initial

[6] The initial group of Plaintiffs who received benefits in 2009 totaled twenty-three. One of these Plaintiffs was paid pension benefits that did not exceed the amount of benefits he would have received had he been treated as a new hire under *Frommert 2016*. (*See* Kaster Feb. 16, 2016 Decl., Ex. A; Dkt. No. 290-2). This was because the individual had died without a spouse, and he was thus entitled to receive the amount in his Cash Balance Retirement Account ("CBRA"). Defendants' motion is not addressed to that Plaintiff and, consequently, he is not further mentioned in this Memorandum or on this motion.

Compl., ¶ 56).[7] At the time the Complaint was filed, only two of the thirteen rehired Plaintiffs had applied for and taken a distribution of their retirement benefits from the Plan for their subsequent period of employment. After conducting discovery, the parties filed cross-motions for summary judgment.

A. This Court's July 30, 2004 Order and the First Appeal

On July 30, 2004, this Court granted an order for summary judgment in favor of the Defendants, from which Plaintiffs appealed. *See Frommert v. Conkright*, 328 F. Supp. 2d 420, 433 (W.D.N.Y. 2004). A judgment was entered in favor of Defendants against Plaintiffs on August 4, 2004. (Dkt. No. 109). Plaintiffs filed a Notice of Appeal on August 19, 2004. (Dkt. No. 110).

A central issue on that appeal was whether the manner in which Defendants had offset the Plaintiffs' prior lump sum distributions from the Plan violated ERISA. The Second Circuit reversed the grant of summary judgment in favor of Defendants and held that the RIGP did not always contain a provision allowing for the offset of prior distributions in the manner utilized by the Defendants and that its adoption of the offset provision in 1998 was without proper notice to Plan participants. Thus, the Second Circuit reversed the lower court's decision and remanded the matter back to the District Court to "craft a remedy" for the alleged ERISA violations. *Frommert v. Conkright*, 433 F.3d 254, 269 (2d Cir. 2006) ("*Frommert I*").

B. This Court's January 24, 2007 Decision and Order

Following a two-day hearing on remedies, this Court issued *Frommert 2007*. 472 F. Supp. 2d 452; (Dkt. No. 137). That Decision and Order required the Plan Administrator to recalculate and pay benefits to the Plaintiffs in accordance with the Court's interpretation of the

[7] References to Plaintiffs' initial complaint, filed in the United States District Court for the District of Connecticut on November 24, 1999, are designated as "Initial Compl." (*See* Dkt. No. 33).

Plan, taking into account its non-duplication of benefits provision, but without reference to the offset provision challenged by Plaintiffs. 472 F. Supp. 2d 452; (Dkt. No. 137). This methodology was also referred to as the "Nominal Offset" or the "*Layaou* Offset" Approach.

C. Defendants Appeal and Plaintiffs File Post Judgment Motions

Defendants filed a Notice of Appeal, dated February 5, 2007, appealing from portions of *Frommert 2007* on remedies and on the enforceability of the releases which some of the Plaintiffs had executed. (Dkt. No. 138). On February 7, 2007, Defendants filed a motion to: (i) stay the enforcement of the Order pending the appeal; and (ii) waive the posting of a supersedeas bond and/or an order fixing the amount of the bond. (Dkt. No. 140).

Plaintiffs filed opposition papers to Defendants' motion and cross-moved for contempt, alleging that Defendants had failed to recalculate and pay benefits to those Plaintiffs who had retired even though they acknowledged that Defendants had a right to an automatic 10-day stay of the enforcement of the Order. In the alternative, Plaintiffs requested an order requiring the posting of a full supersedeas bond to stay enforcement of the order. (Dkt. No. 144).

On March 6, 2007, the District Court granted Defendants' request for a stay without a need to post a supersedeas bond, pending the outcome of the Second Circuit appeal, and it denied the cross-motion for contempt. (Dkt. No. 148). Notably, in its March 6, 2007 Order, this Court recognized the necessity of the stay, stating, "If defendants are successful on appeal, it will be difficult, if not impossible, to recover sums paid out to plaintiffs and others similarly situated." (*Id.* at 2).

D. The Second Circuit's Decision and Order

On July 24, 2008, the Second Circuit issued a decision in *Frommert v. Conkright*, 535 F.3d 111, 115 (2d Cir. 2008) ("*Frommert II*"). Specifically, the Second Circuit held that the District Court did not need to defer to the Plan Administrator's interpretation of the Plan, and it

affirmed this Court's ruling that the appropriate method for offsetting Plaintiffs' prior distributions was to use the Nominal or "*Layaou* Offset" Approach proposed by Plaintiffs. Defendants filed a motion to the Second Circuit for a stay of the mandate because they intended to file a petition for certiorari to the Supreme Court. That motion was denied by the Second Circuit, and the mandate issued, returning jurisdiction to this Court. (Clemens July 8, 2009 Aff., Ex. E; Dkt. No. 191-2).

E. Defendants' Applications for a Stay to the Supreme Court

Defendants subsequently made an application to Supreme Court Justice Ginsburg for a stay to enable them to file a Petition for Certiorari to the Supreme Court. The application was denied without opinion. (Clemens July 8, 2009 Aff., Ex. F; Dkt. No. 191-2). After the Supreme Court requested the opinion of the Solicitor General as to whether or not to grant the Petition, Defendants reapplied for a stay contending that, in light of the Supreme Court's request, the likelihood that four Justices of the Supreme Court would grant the Petition had increased sufficiently to warrant a stay. Justice Ginsburg denied the reapplication (Clemens July 8, 2009 Aff., Ex. G; Dkt. No. 191-2).

F. Defendants' Compliance with *Frommert 2007/Frommert II*

Following the Second Circuit's issuance of the mandate, which was filed with this Court on December 15, 2008, this Court held a status conference with the parties on January 27, 2009 to discuss Defendants' compliance with *Frommert 2007/Frommert II*. By that date, Defendants had provided Plaintiffs with spreadsheets showing the recalculated pension benefits using the methodology ordered by the Court. (Clemens July 8, 2009 Aff., ¶ 8; Dkt. No. 191-2).

On February 17, 2009, this Court held another status conference, at which time the Court addressed Plaintiffs' request that the Court enter a new order requiring Defendants to make payments to Plaintiffs within ten days of the entry of that order. In opposition to that request,

Defendants submitted the Declaration of Jeff Clymer, sworn to on February 13, 2009, a consulting actuary and Principal with Hewitt Associates, setting forth in detail the process and time frame needed to prepare and present benefits forms to Plaintiffs to be in compliance with ERISA and the Internal Revenue Code and to protect the rights of the plan participants and their spouses. (Clymer Feb. 13, 2009 Decl.; Dkt. No. 165-2); (Clemens July 8, 2009 Aff., ¶¶ 10-11; Dkt. No. 191-2).

Defendants set out a proposed schedule in a February 11, 2009 letter, which was attached as Exhibit A to the Clymer February 13, 2009 Declaration. (Dkt. No. 165-3). The schedule set forth a number of dates for providing the required forms and distributions to three different groups of Plaintiffs: (i) those Plaintiffs who had terminated their employment from Xerox and who had already taken a RIGP distribution; (ii) those Plaintiffs who had terminated their employment from Xerox but who had not yet taken a RIGP distribution; and (iii) those Plaintiffs who, at that time, were still actively working at Xerox. (*Id.*).

Following that February 17, 2009 status conference, Defendants took numerous steps to comply with this Court's January 24, 2007 Decision and Order and to meet the deadlines set out in the February 11, 2009 letter. For the group of twenty-two Plaintiffs who had terminated their employment with Xerox and previously taken their distribution from the RIGP, Xerox sent them the forms to be completed in order to receive the extra benefit awarded as a result of *Frommert 2007*. Each of these twenty-two Plaintiffs completed their forms and sent them into the Plan. The forms were processed by the actuaries. The Plan then distributed approximately four million, six hundred thousand dollars to this group of Plaintiffs. For the most part, these Plaintiffs chose to rollover their extra benefit into their IRAs. (Clymer July 8, 2009 Decl. ¶¶ 3-4; Dkt. No. 191-4). It is from this group of Plaintiffs that Defendants now seek recoupment.

Specifically, Defendants seek recoupment of the amount they were paid that is in excess of the amount to which they are entitled under the Court's most recent Decision and Order.[8]

G. The Supreme Court's Grant of the Petition for Certiorari and Defendants' Motion for Expedited Hearing or Stay

On June 29, 2009, the Supreme Court granted Defendants' Petition for Certiorari regarding the remedy awarded by the Court, and denied Plaintiffs' Cross-Petition for Certiorari regarding the enforceability of the releases. (Clemens July 8, 2009 Aff., ¶¶ 14-15; Dkt. No. 191-2). In light of the Supreme Court's grant of the Petition for Certiorari, Defendants filed a motion to this Court for an order modifying the proposed payment schedule or granting a stay of any requirement that additional extra payments be made until the Supreme Court decided the issues on which it granted Certiorari (Defendants' "2009 motion for stay"). (Dkt. No. 191). Plaintiffs filed an opposition to Defendants' 2009 motion for stay on July 17, 2009. (Dkt. No. 194).

On August 5, 2009, the Court granted Defendants' request for a stay, stating "I see no reason to reach a different decision on the present application for a stay than I did in my prior order granting a stay pending appeal to the Court of Appeals." (Dkt. No. 197 (referencing the Court's March 6, 2007 Order)). The Court ordered that "[a]ny obligation on the part of defendants to make payments pursuant to this Court's January 24, 2007 Decision and Order (Dkt. #137) is hereby stayed, pending a decision on the merits of Defendants' appeal to the Supreme Court of the United States, or further order of this Court." (Dkt. No. 197).

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[8] Additionally, back in 2009, the Plan's actuaries prepared and sent required benefit forms to the second group of Plaintiffs who elected to take their RIGP benefits at that time: the group of 28 Plaintiffs who, at that time, had terminated their employment with Xerox but had not yet applied for and taken their regular RIGP distribution. These individuals were also sent the forms they needed to complete in order to apply for their regular RIGP benefit so that RIGP distributions could be made. (Clymer July 8, 2009 Decl. ¶ 5; Dkt. No. 191-4).

H. The Supreme Court's Decision and the Second Circuit's Remand

In April 2010, the Supreme Court reversed the Second Circuit, holding that the Plan Administrator's interpretation should have been reviewed under a deferential standard. *Conkright v. Frommert*, 559 U.S. at 520. In particular, the Supreme Court held that a "single honest mistake in plan interpretation" did not strip a court of its obligation to defer to a plan administrator's interpretation of plan terms. *Id.* at 509.

After multiple decisions by this Court and subsequent appeals to the Second Circuit, on January 5, 2016, this Court issued its Decision and Order on remedies. *Frommert 2016*. In that Decision and Order, this Court recognized that some issues had already been decided, including that the offset provision contained in the RIGP violated the notice requirements contained in ERISA in that it failed to notify Plan participants of the Plan's offset provisions for prior distributions and, therefore, it "cannot be applied to Plaintiffs' benefits." *Frommert 2016,* 2016 U.S. LEXIS 439, at *8 (citing *Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013)).

Following the Second Circuit's direction, this Court first addressed whether an equitable remedy was appropriate. Reasoning that the appropriateness of the equitable remedy is "inextricably tied" to the notice violation, this Court then determined that an equitable remedy was justified and that "the appropriate equitable remedy [was] to recalculate plaintiffs' benefits, treating plaintiffs upon their re-employment with Xerox as if they had been newly hired, with no offset whatsoever." *Frommert 2016*, 2016 U.S. Dist. LEXIS 439 at **13-14.

Since that time, and pursuant to *Frommert 2016*, the Plan Administrator has recalculated and/or paid benefits to Plaintiffs based on the New Hire Approach for those Plaintiffs who have already terminated their employment with Xerox and applied for their RIGP benefits. ((Clemens

Decl., ¶ 4).[9] With regard to the group of twenty-two Plaintiffs who were paid benefits in 2009 based upon the recalculations performed under the *Layaou* Offset Approach, Defendants have also provided the recalculations of their benefits to Plaintiffs under the New Hire Approach, and provided the amount of the difference between what they were paid in 2009 under *Frommert 2007* and what they were to be paid as a remedy under the Court's latest Decision and Order in *Frommert 2016*. (*Id.*, ¶ 5).

These calculations are also set forth in Exhibit A to the Affidavit of Arlyn Kaster, sworn to on February 16, 2016, with its attached exhibits, filed under seal on February 16 and 26, 2016. (Dkt. No. 290-1 and 290-2). The difference between the amount owed under this Court's New Hire Approach and the amount that was previously paid out to these same twenty-two Plaintiffs totals $2,638,012.46 in overpayments to these Plaintiffs. (*Id.*); (Clemens Decl., ¶ 4).

Now that this Court has determined that the appropriate remedy in this case should be an equitable one based upon a New Hire Approach, as set forth in detail in *Frommert 2016*, the recalculations of the pension benefits that were paid in 2009 *to* twenty-two Plaintiffs based on a *Layaou* Offset Approach show that they received more pension benefits that than this Court has held they were equitably entitled to receive. Consequently, Defendants are requesting that the Court issue an Order, pursuant to its equitable powers and in accordance with Rule 60(b)(6) of the Fed. R. Civ. Proc., requiring them to return to the Plan any excess payments, with interest, by a date certain.

[9] References to the Declaration of Margaret A. Clemens, Esq., sworn to on April 22, 2016, and filed with the instant motion, are cited as "(Clemens Decl., [paragraph number].)."

ARGUMENT

THIS COURT SHOULD ISSUE AN ORDER REQUIRING PLAINTIFFS TO REPAY THE EXCESS PAYMENTS THEY RECEIVED TO THE PLAN AS THOSE EXCESS PAYMENTS ARE PLAN ASSETS

Rule 60(b)(6) of the Federal Rules of Civil Procedure permits a court, "on motion and just terms," to relieve a party from a final judgment, order or proceeding "for any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). "The decision to grant relief under Rule 60(b) is left to the 'sound discretion' of the district court." *Buczek v. Cotter*, 14-CV-1024, 2016 U.S. Dist. LEXIS 46205, **5-6 (W.D.N.Y. Apr. 5, 2016) (quoting *In re Lawrence*, 293 F.3d 615, 623 (2d Cir. 2002)). *See also Coleman v. E. St. Louis Sch. Dist. No.* 189, 08-cv-0145, 2009 U.S. Dist. LEXIS 68025, *3 (S.D. Ill. July 30, 2009) (citing *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 303 (7th Cir. 1994)) ("Whether to grant the relief sought in a Rule 60(b) motion lies within the sound discretion of a district court."). Properly applied, Rule 60(b) "strikes a balance between serving the ends of justice and preserving the finality of judgments." *Romeo v. Aid to the Developmentally Disabled, Inc.*, 11-CV-6340, 2015 U.S. Dist. LEXIS 2193, *6 (E.D.N.Y. Jan. 7, 2015) (internal citation omitted). *See In re Terrorist Attacks of September 11, 2001 v. Kingdom of Saudi Arabi*, 741 F.3d 353, 357 (2d Cir. 2013*). Accord Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009) (affirming the grant of a Rule 60(b)(6) motion, reasoning that the Supreme Court has noted that this "catch-all provision of Rule 60(b) allows courts to vacate judgments whenever necessary to accomplish justice, although such relief should be granted only in extraordinary circumstances") (citation omitted); *Byrd v. Corporation Forestal Y Industrial De Olancho, S.A*, 974 F. Supp. 2d 264, (S.D.N.Y. 2013), *decision reached on appeal*, No. 13-3794-cv, 2015 U.S. App. LEXIS 9017 (2d Cir. June 1, 2015); *Amoroso v. Certified Safety Prods. of N.Y., Inc*., 13-CV-959, 2014 U.S. Dist. LEXIS 125097 (W.D.N.Y. Sept. 8, 2014).

In this case, not only do the ends of justice warrant the relief sought, but the circumstances in this case are extraordinary in nature. *See Klapprott v. United States*, 335 U.S. 601 (1949); *Amoroso*, 2014 U.S. Dist. LEXIS at 125097; *McConnell v. Colvin*, 5:12-cv-01829, 2014 U.S. Dist. LEXIS 184374 (N.D.N.Y. Sept. 5, 2014). The Order under which the excess benefit payments were made to this group of Plaintiffs was subsequently reversed by the Supreme Court. *Conkright*, 559 U.S. 506. In a decision emphasizing the importance of *Firestone* deference to plan administrators, the Supreme Court held that "a single honest mistake" does not provide a basis for "stripping the administrator" of "deference for subsequent related interpretations of the plan." *Id*. at 509 *(*citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)). The Supreme Court's opinion also emphasized the importance of the time value of money in the administration of pension plans. *Id.* at 519-20. Citing an amicus brief filed by a prominent group of senior actuaries, the Court observed that it would be "heresy" and "highly unforeseeable" to interpret the Plan in a way that failed to take into account the time value of money, as had the *Layaou* Offset Approach. *Id*. at 519. Ultimately, the Supreme Court reversed *Frommert II*, thus reversing *Frommert 2007*. *Id.* at 522.

Subsequently, after a number of additional motions and appeals, on January 5, 2016, this Court issued its Decision and Order on remedies in *Frommert 2016*. The Court specifically cited the Supreme Court's decision in its own rejection of the *Layaou* Offset Approach, and ordered that the Plan Administrator recalculate Plaintiffs' benefits, treating Plaintiffs upon their re-employment with Xerox as if they had been newly hired. *Frommert 2016*, 2016 U.S. LEXIS 439, at *37.

The Second Circuit has recognized that 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." *Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004) (quoting *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987)); *McConnell*, 2014 U.S. Dist. LEXIS 184374 at * 5 (citations omitted). This catchall provision is "'liberally construed when substantial justice will . . . be served.'" *Church & Dwight Co. v. Kaloti Enters. of Mich., LLC*, No. 07-CV-0612, 2011 U.S. Dist. LEXIS 110955, *10 (E.D.N.Y. Sept. 28, 2011) (quoting *LeBlanc v. Clevelan*d, 248 F.3d 95, 100 (2d Cir. 2001)). *See also Johnson Chemical Co. v. Condado Center, Inc.*, 453 F.2d 1044, 1047 (1st Cir. 1972) ("[Fed. R. Civ. P. 60(b), 6(b), and 1], read singularly or together evidence a strong federal policy of liberal treatment of parties in correcting unjust orders. The court is given wide discretion in the granting of such relief.").

Thus, this 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 the distributions can be repaid back to the Plan without any tax consequences for the individual Plaintiffs. Accordingly, such a remedy would be equitable in nature. *See Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 136 S. Ct. 651 (2016). And, as this Court recognized in *Frommert 2016*, "the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.'" *Frommert 2016,* 2016 U.S. LEXIS 439, at *27 (quoting *Brown v. Plata*, 563 U.S. 493, 538 (2011)).

It should be noted that Plaintiffs themselves previously argued that Defendants were not entitled to a stay because 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

their 401(k) plans, presumably to allow for the very possibility presented now —the obligation to repay monies to the Plan if that need arose. Plaintiffs stated at the time:

> Indeed, the assertion that [plaintiffs] are likely to become judgment-proof by dissipating or secreting paid funds is belied by the fact that **the monies at issue are pension funds (which, as such, must be preserved in specific accounts in order to maintain their tax-preferred status). The position taken by the Plan Administrators is predicated on the assumption that Participants will forfeit the tax preferred status of their funds (in some cases) and/or recognize immediate ordinary income in a single calendar year (in all cases) in an effort to bring such funds outside the reach of the Xerox Plan. . . . These presumptions are wildly speculative**.

(Dkt. No. 194, at 6, fn. 2) (emphasis added). In making such representations, Plaintiffs were attempting to reassure both Defendants and the Court that the monies they received in 2009 would be preserved in a tax preferred account, and could be used if necessary, to repay to the Plan. It is time now for such repayment to be made, with interest.

This Court should now ensure that the remedy ultimately awarded to *all* Plaintiffs in this case is consistent with *Frommert 2016*. Those 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 permitted to retain those excess benefits, which would be a "windfall" to them. There is no legal or equitable basis to create two classes of Plaintiffs here — those who receive tens and even hundreds of thousands of dollars more in pension benefits than the benefits to which they are entitled. To avoid this windfall, the Court should issue an order allowing the Plan to recoup the amount of the excess payments or overpayments made to those Plaintiffs who received additional payments based on the *Layaou* Offset Approach in 2009.

Defendants' request on this motion is also consistent with their fiduciary obligations. ERISA provides, in pertinent part, that a plan fiduciary must discharge his duties with respect to a plan solely in the interests of the plan's participants and beneficiaries. 29 U.S.C. §

1104(a)(1)(A). As recognized by the Supreme Court, under ERISA, a plan's fiduciaries have a duty to act to ensure that the plan receives all funds to which it is entitled, so that those funds can be used on behalf of all participants and beneficiaries. *Central States, Se. & Sw. Areas Pension Fund v. Central Transp*., 472 U.S. 559, 571-72 (1985).

Plan fiduciaries are obligated to take reasonable steps to recoup overpayments (with appropriate interest) from plan participants or recipients. *See e.g*., *Sewell v. 1199 Nat'l Ben. Fund for HHS*, 187 Fed. App'x 36, 41 (2d Cir. 2006). Indeed, as explained by the Second Circuit in *Sewell*,

> [an ERISA plan] has a fiduciary duty to 'ensure that [the] plan receives all funds to which it is entitled.' The [ERISA plan], like any trustee, cannot pay a beneficiary more than the trust instrument authorizes and *is entitled to recover any excess payment*.

187 Fed. App'x at 41 (quoting *Cent. States, Se. & Sw. Areas Pension Fund*, 472 U.S. at 571 and *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1354 (D.C. Cir. 1982)) (emphasis added). *Accord Metzgar v. U.A. Plumbers and Steamfitters Local No. 22 Pension Fund*, 13-CV-00085V(F), 2016 U.S. Dist., LEXIS 28168 *12 (W.D.N.Y. Mar. 1, 2016) (quoting, among others, *Greenes v. Adornato*, 2004 U.S. Dist. LEXIS 1418 (S.D.N.Y. Feb. 4, 2004)) ("Fiduciaries, such as trustees of ERISA-based funds, have a duty to locate and reclaim trust fund assets that have been improperly taken or disbursed.").

The circumstances of this case are extraordinary. Indeed, this Court recognized the difficulty, if not impossibility, of any efforts to recover any excess payments by ordinary means in its March 6, 2007 Order granting Defendants' first request for a stay: "**If defendants are successful on appeal, it will be difficult, if not impossible, to recover sums paid out to plaintiffs and others similarly situated**." (*See supra*; Dkt. No. 148, at 2) (emphasis added). That same reasoning applies now. Absent a grant of the instant motion, Defendants will be faced

with the extraordinarily difficult, if not impossible, task of attempting to recover plan assets from the individual Plaintiffs by means of individual lawsuits from Plaintiffs located in various states and from some individuals who are deceased.

As stated above, a failure to grant Defendants' motion would create two classes of Plaintiffs, receiving two materially different remedies, in contravention of this Court's final ruling that all Plaintiffs in this case are entitled to a remedy under the New Hire Approach. Since the New Hire Approach is materially different than the *Layaou* Offset Approach, it is undisputed that the Plaintiffs who received their payments prior to the issuance of the August 2009 stay have received more than they are entitled to under *Frommert 2016*. This outcome would be manifestly unjust and should not be allowed to occur. *DiLaura v. Power Auth. of the State of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992).

Accordingly, this Court, in equity, should grant the relief sought on this motion.

CONCLUSION

For all the reasons discussed above, Defendants respectfully request that this Court issue an Order, pursuant to Rule 60(b)(6), requiring those Plaintiffs who received recalculated benefits payments pursuant to this Court's prior Decision and Order in *Frommert 2007*, which was subsequently affirmed by *Frommert II*, prior to the Supreme Court's reversal (*Conkright v. Frommert*, 559 U.S. at 506), 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,* plus interest, by a date certain.

Such amounts should be made from their respective IRAs into which the excess benefit payments were made, provided such accounts still exist, or, if such accounts do not exist, from such other account or accounts into which such funds were transferred. If such accounts do not

exist, Plaintiffs shall advise the Court and shall make arrangements for payments by such other manner or means as is reasonable.

Dated: April 22, 2016

LITTLER MENDELSON, P.C.

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