UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL J. FROMMERT, et al., Plaintiffs, v. SALLY L. CONKRIGHT, et al., Defendants.	**Civil Action No.** **00-CV-6311-DGL-JWL**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR EXTRAODINARY RELIEF UNDER RULE 60(b)(6)

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Xerox asks this Court for exceptional relief under Rule 60(b)(6). Xerox's motion is procedurally and substantively meritless for a plethora of different reasons.

Statement of Facts

This Court entered the judgment from which Xerox now seeks relief nearly a decade ago, in 2007. During the Bush administration, the Second Circuit affirmed that judgment, and Xerox promptly asked both the Second Circuit and the Supreme Court (twice) to stay it, telling these courts that unless a stay was granted, Xerox would never be able to recoup the funds it would pay to plaintiffs. These higher tribunals understood this consequence, but nonetheless rejected Xerox's request each and every time.

On February 11, 2009, Xerox filed a letter in this Court in which Xerox stated its intent to pay various plaintiffs on a given schedule. Dkt. No. 165-3, Exh. A. Shortly thereafter, in early 2009 – a few weeks after a relatively unknown newcomer, Barack Obama, assumed the office of President -- a minority of plaintiffs received the *Layaou* benefits to which they were entitled.

In June 2009, the Supreme Court granted certiorari, and in 2010, it reversed the 2007 judgment. But despite this reversal, at no time did Xerox ever ask either the Supreme Court or the Second Circuit for relief from the consequences of their denial of its repeated requests for a stay.

Thereafter, in 2011, this Court entered a judgment that ordered payment of "plan administrator" benefits but denied any further relief. *Frommert v. Conkright*, 825 F. Supp. 2d 433 (W.D.N.Y. 2011). Yet again, at no time prior to entry of this judgment did Xerox ask this Court to order recoupment of the alleged overpayments in 2009. Nor did Xerox file a cross-appeal or request any such relief from the Second Circuit.

Only now, in 2016, does Xerox deign to request relief from the 2007 judgment, which seeks to recoup alleged overpayments made in 2009 that Xerox has had full knowledge of for nearly a decade.

When Xerox stated its intent to request the relief it now seeks, Your Honor stated the following:

> MS. CLEMENS: Just so Your Honor knows, based on the entry of that judgment, we're going to come in and ask for money back, okay? . . . .
> THE COURT: Consistent, I guess, with Xerox's continuing plan not to treat their employees very favorably.
> MS. CLEMENS: Your Honor, that's completely an unfair statement.
> THE COURT: I don't think so. But anyway, let's move on.

RT 10/23/2014 at 10:9-22 (Dkt. No. 281-2).

Xerox has treated its former employees shabbily during the entire seventeen-year history of this litigation. It has given this same treatment to every other rehired Xerox employee as well, and continues to apply to those individuals a phantom account that both this Court and the Second Circuit have conclusively held violates ERISA. This Court should not countenance the continuing poor treatment of workers who have given their heart and soul to Xerox during the most productive years of their lives.

The Supreme Court and the Second Circuit knew what they were doing when they denied Xerox's requests in 2009. In any event, Xerox's attempt to circumvent the orders of these higher tribunals is both procedurally and substantively meritless. Xerox's motion for relief under Rule 60(b)(6) must accordingly be denied.

Argument

A. Xerox's Rule 60(b)(6) Motion Is Procedurally Improper.

This Court need not evaluate the substantive merits of Xerox's request for relief, as its present motion under Rule 60(b)(6) is clearly procedurally improper. This is true for multiple independent reasons, any one of which would compel the denial of Xerox's motion.

First, the Supreme Court and the Second Circuit were the proper tribunals in which Xerox should have sought and obtained relief, not this Court. Xerox knew this fact full well in 2008 and 2009, which were years in which it repeatedly sought in these tribunals (but was denied) a stay of the 2007 judgment. Xerox sought then to avoid the overpayments at issue now, but the Second Circuit and the Supreme Court were unpersuaded. Thereafter, after certiorari was granted, Xerox was again free to ask the

Supreme Court for relief and a return of the *Layaou* funds Xerox had paid. *See* Supreme Court Rule 21 ("Motions to the Court"). But Xerox deliberately did not do so.

Having asked for relief from the Supreme Court and the Second Circuit on three different occasions, having been rejected, and thereafter having deliberately refused to ask for further relief from these higher tribunals, Xerox is barred from relief in this Court. A lower court cannot reconsider the rulings of a higher court. *United States v. Jacobs*, 955 F.2d 7, 9 (2nd Cir. 1992); *Soto-Lopez v. New York City Civil Svc. Comm'n*, 840 F.2d 262, 167 (2nd Cir. 1988). The Supreme Court knew that overpayments might be made, was asked -- but refused -- to prevent them, and Xerox sought no further relief in that tribunal, even after the Court ruled in Xerox's favor. Having made those decisions, Xerox cannot seek in this Court relief that it failed to obtain in the Supreme Court. *Id*.

Second, even if Xerox's request for Rule 60(b)(6) relief was not jurisdictionally barred, it is surely untimely under Rule 60(c). Rule 60(c)(1) provides: "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."

Xerox admits that it seeks relief from a judgment entered on January 24, 2007; *i.e.*, over nine years ago. Xerox also admits that it knew in April of 2010 – when the Supreme Court held in its favor and vacated this Court's 2007 judgment – that Xerox had paid funds in 2009 to which plaintiffs were no longer legally entitled.

Xerox thus could have filed a Rule 60(b)(6) motion in 2009, 2010, 2011, 2012, 2013, 2014, and/or 2015. But Xerox chose not to do so, and instead waited *six years* after it knew that it had paid some plaintiffs a *Layaou* remedy to which they were no longer entitled to file its current, belated, Rule 60(b)(6) motion.

It is crystal clear that six years is not a "reasonable time" to wait to file such a motion. *See, e.g.*, *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2nd Cir. 1983) (one year delay much too long for a Rule 60(b)(6) motion); *see also Rhodes v. Houston*, 258 F. Supp. 546, 555-61 (D. Neb. 1966) (discussing the "reasonable time" requirement of Rule 60(b)(6) motions at length, and finding delays of "three years, seven months, twenty-eight days in case No. 01322; one year, nine months, twenty-four days in case No. 01682; and one year, nine months, eleven days in case No. 01784" were unreasonable

under Rule 12(c) notwithstanding the presence of an appeal in the Eighth Circuit and a petition for certiorari in the Supreme Court during these same years).

Xerox knew when the Supreme Court decided its appeal in 2010 that the plaintiffs at issue here had been paid *Layaou* benefits even though the judgment that required such relief had now been vacated. Yet Xerox did not file a Rule 60(b)(6) motion then.

Xerox similarly knew when this Court entered its "plan administrator" judgment in 2011 that the plaintiffs at issue here had been paid *Layaou* benefits in 2009 that were in excess of this Court's 2011 judgment. Yet Xerox did not file a Rule 60(b)(6) motion then either.

After this Court's most recent "new hire" ruling, Xerox now yet again knows that the plaintiffs at issue here were paid different *Layaou* benefits in 2009 that were in excess of that decision. But that knowledge is materially indistinguishable from Xerox's identical knowledge of those alleged overpayments in 2010, 2011, and every single year since then. There was no excuse for failing to file the current (and long-threatened) motion previously. Xerox's nine-year delay in filing the present Rule 60(b)(6) motion violates the requirement of Rule 60(c) that such motions be made within a reasonable time of the 2007 judgment at issue. Xerox's motion must accordingly be denied.

Third, even if Xerox's Rule 60(b)(6) motion was somehow not jurisdictionally improper as well as time-barred, it must nonetheless be denied because it seeks affirmative relief that is categorically unavailable under that rule. This is true for two distinct reasons.

For one thing, the 2007 judgment at issue has already been vacated, and hence no Rule 60(b)(6) request to modify it is proper. Rule 60 only applies to *existing* judgments and orders, as only extant orders necessitate relief therefrom. *Hospital Ass'n v. Toya*, 577 F.2d 790, 795-97 (2nd Cir. 1978). But this Court's 2007 judgment was already vacated by the Supreme Court's 2010 opinion. *Conkright v. Frommert*, 559 U.S. 506, 522 (2010); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 20-29 (1984) (reversal by Supreme Court vacates lower court judgment). Rule 60(b)(6) simply cannot be used to grant relief from a judgment that no longer exists.

Relatedly, Rule 60(b)(6) also cannot be used to grant affirmative relief that has not been requested in the litigation. This Court's 2007 judgment ordered Xerox to pay

Layaou benefits. But that judgment has already been vacated. Xerox does not need, nor is it entitled to, relief from a judgment that no longer exists.

What Xerox *actually* wants is instead affirmative relief from the plaintiffs; namely, the repayment of previously-paid benefits. There is indeed a rule through which a defendant can request repayment of moneys paid to a plaintiff. Such relief is obtained through a counterclaim, not a Rule 60(b)(6) motion. *See Fed. R. Civ. P.* 13. But Xerox has consistently refused to file any such claim.

Rule 60(b) may be used by a defendant to avoid paying money to a plaintiff. But it may not be used to request affirmative relief, much less can it be employed to avoid the express pleading requirements of a counterclaim. Xerox's present motion is accordingly procedurally improper on these additional grounds as well.

Fourth, Xerox's Rule 60(b)(6) motion is independently barred by its failure to cross-appeal this Court's judgment in 2011. In 2011, this Court ordered Xerox to pay "plan administrator" benefits, and awarded neither plaintiffs nor defendants any other relief. *Frommert v. Conkright*, 825 F. Supp. 2d 433, 451 (W.D.N.Y. 2011). At that time, Xerox had already paid *Layaou* benefits to various plaintiffs two years earlier, in 2009. But this Court's judgment in 2011 merely ordered Xerox to pay additional benefits to various plaintiffs, and did not order repayment of any allegedly "overpaid" amounts by any plaintiff. *Id.* (This is not surprising, as Xerox had not even requested such relief.)

Plaintiffs filed an appeal of this Court's 2011 judgment, but Xerox elected not to cross-appeal. The absence of such a cross-appeal jurisdictionally bars Xerox from seeking additional relief to that ordered by this Court in its 2011 judgment. As the Supreme Court has repeatedly explained:

> Without a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence on matter overlooked or ignored by it. What he may not do in the absence of a cross-appeal is to attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. The rule is inveterate and certain.

Morley Const. Co. v. Maryland Cas. Co., 300 U.S. 185, 191 (1937) (citations omitted).

This Court settled the respective rights of the parties in 2011. Because Xerox did not cross-appeal, it may not thereafter seek to "enlarge[e] his own rights thereunder or lessen[] the rights of his adversary," even "with respect to a matter not dealt with below;" e.g., the previous "overpaid" *Layaou* benefits to various plaintiffs. *Id*. That "inveterate and certain" rule, *id*., conclusively bars Xerox's present motion for relief. If it wanted to obtain any relief from the plaintiffs, Xerox was required to file a cross-appeal in 2011. Having failed to do so, Xerox's current request to obtain relief that was not granted to it by this Court's judgment in 2011 – a judgment four years after the judgment in 2007 of which Xerox now complains -- is jurisdictionally barred.

This Court need go no further. Xerox cannot obtain through a Rule 60(b)(6) motion the relief it currently seeks. Its motion should, and must, be denied on such procedural grounds alone.

B. Xerox's Rule 60(b)(6) Motion Lacks Substantive Merit.

Xerox's belated motion also fails on the merits. This is true for multiple reasons as well.

Initially, relief under Rule 60(b)(6) is not available here given the clear absence of the type of truly "extraordinary circumstances" that are a prerequisite to the granting of such a remedy. Because finality of civil judgments is such a critical interest, a party that requests relief under Rule 60(b)(6) must demonstrate that "extraordinary circumstances" exist. *PRC Harris, Inc. v. Boeing, Inc.*, 700 F.2d 894, 897 (2nd Cir. 1983) (citing cases). But Xerox cannot show such extraordinary events. Both the Supreme Court and the Second Circuit knew that a failure to grant a stay would result in overpayments that could not thereafter be recouped. Indeed, Xerox expressly told these courts so. Repeatedly. *See, e.g.*, Dkt. No. 191-2, Exhs. E-G. These tribunals nonetheless held that even if such overpayments transpired, this would be an acceptable consequence of the 2007 judgment, and on that basis, repeatedly denied a stay.

No case in the history of the American republic has ever found that a situation that was *expressly contemplated* by the Court of Appeals or the Supreme Court – much less both of them -- nonetheless constitutes an "extraordinary circumstance" that would

justify the grant of a Rule 60(b)(6) motion by a district court. Nor should this Court be the first to so hold. A result intended -- or (as a minimum) accepted -- by a higher court does not constitute an "extraordinary circumstance" that justifies departure from the core concept of finality. For this reason alone, Xerox's Rule 60(b)(6) motion must be denied.

Moreover, not only do expressly contemplated results not constitute extraordinary circumstances, but Xerox also fails to demonstrate an entitlement to relief under Rule 60(b)(6) in any event. Xerox asserts that some plaintiffs were allegedly overpaid *Layaou* benefits that exceed the "new hire" benefits ordered by this Court. But Xerox's calculations are wrong. Xerox's calculations invariably use an erroneous calculation date that improperly reduces the amount of "new hire" benefits owed. *See* Declaration of Shaun P. Martin dated May 16, 2016 ("Martin Decl., ¶ 2"). These calculations also use the wrong salary, and the wrong years of service, for numerous plaintiffs. Martin Decl., ¶ 3. And these figures also fail to reflect either prejudgment interest or a lump-sum award that would follow from pending relief requested in this action, Dkt. No. 284, either of which would result in new hire benefits for many purportedly "overpaid" plaintiffs that would be equal or greater to their previously-paid *Layaou* amounts. Martin Decl., ¶ 4. Put simply, Xerox has not properly shown which plaintiffs were overpaid, or by how much, particularly since Xerox's calculations are both erroneous and fail to reflect the ultimate final judgment currently under consideration by this Court. Such flawed calculations do not conclusively demonstrate "extraordinary circumstances" that would authorize relief under Rule 60(b)(6).

Independently, the relief requested by Xerox is also prohibited by both ERISA as well as controlling Supreme Court precedent. The ERISA statute does permit Xerox to recover alleged overpayments in some particularized settings. 29 U.S.C. § 1132(a)(3). But there are two categorical prerequisites to recovery of such overpayments, neither of which Xerox has demonstrated here.

First, the "terms of the Plan" must expressly allow recovery of such overpayments in the situation presented. 29 U.S.C. § 1132(a)(3) (ERISA permits plan administrator to recover overpayments if such equitable relief is "to enforce . . . the terms of the plan"); *see also Montanile v. Board of Trustees*, 136 S. Ct. 651, 655 (2016) (discussing and applying the prerequisites of Section 1132(a)(3) of ERISA). Xerox's moving papers are

bereft of any showing whatsoever that the terms of the Plan permit it to recover alleged overpayments paid to beneficiaries pursuant to an order of a federal court. Absent such a showing *in the moving papers*, ERISA clearly precludes the relief Xerox seeks.

Second, the Supreme Court expressly held earlier this year that a plan may only recover alleged overpayments if the plan administrator can conclusively establish that the funds paid to the beneficiary remain segregated and have not yet been dissipated. *Montanile v. Board of Trustees*, 136 S. Ct. 651, 655-62 (2016). Xerox indisputably fails to make this required showing. Xerox argues only that many purportedly "overpaid" plaintiffs initially put these funds into an IRA. But this comes nowhere close to the showing required by *Montanile* that these funds remain to this date in such a segregated and non-dissipated account. *Montanile*, 136 S. Ct. at 662 (ERISA allows recovery of overpayments only upon demonstration that such funds are *currently* "kept separate from [the plan beneficiary's] general assets;" by contrast, if plan beneficiary has "dissipated" such funds on nontraceable assets, ERISA prohibits recovery by the plan).

Nor could Xerox make such a factual showing even if it tried. Many plaintiffs have withdrawn the entirety of the *Layaou* amounts they received in 2009 and have used this money to pay their living expenses in retirement. Martin Decl., ¶ 5. Other plaintiffs have dissipated some or all of these funds in other ways. To take but one example, the biggest recipient (by far) of any alleged "overpaid" *Layaou* amount was plaintiff Larry Gallagher. He received his *Layaou* payment in 2009. And promptly died.

Xerox cannot claw back from the deceased hands of Larry Gallagher – or his heirs (whom Xerox has never sued) – the allegedly overpaid amounts that Xerox distributed in 2009. Nor does ERISA permit Xerox to claw back from any of the other plaintiffs the funds they received in 2009 and subsequently spent. Xerox indisputably has failed to demonstrate that the assets it seeks herein have remained segregated since 2009 as required by *Montanile*.[1] Xerox thus fails to establish the controlling prerequisites to its requested relief, and its current motion may thus be denied on this additional basis as well.

[1] Much less has Xerox demonstrated its alleged entitlement to an unspecified amount of "interest" on these funds, recovery of which would be flatly barred by the holding in *Montanile* that only ERISA permits relief only classically available in equity. *Id.*

Finally, and perhaps most importantly, this Court should deny Xerox's belated request to recover funds that it paid seven years ago on the simple ground that such relief would not be equitable -- much less constitute "extraordinary circumstances." Most, if not all, of the plaintiffs needed to use these funds to buy food, pay their mortgages, and live their lives in retirement. It would be unfair, seven years later, to deprive these individuals of their continuing ability to support themselves and their families by ordering them to repay these long-ago disbursed amounts.

Moreover, when plaintiffs took these amounts out of their IRAs, they were forced to pay taxes on these amounts. Similarly, if plaintiffs are forced to move these funds from their IRA back to Xerox, federal tax law facially compels them to pay further taxes – as well as penalties – upon any such withdrawal. *See* 26 U.S.C. § 408.

Xerox contends that plaintiffs might be able to avoid such taxes and penalties were they to send funds directly from their IRA to the plan. Xerox Motion at 13. Xerox tellingly offers no legal authority, nor even a declaration, to support this mere assertion, nor does Xerox offer to pay the taxes and penalties imposed on plaintiffs if its advice is erroneous. Moreover, even were Xerox's self-interested tax claim correct, it comes far too late. Plaintiffs have *already* withdrawn funds from their IRAs and paid federal and state taxes on these amounts. Indeed, many plaintiffs were *forced* to do so due to required minimum distributions ("RMDs") on retirement accounts once they became age seventy and one-half. *See, e.g.*, 26 C.F.R. 1.401(a)(9)-5 (2016).

It would obviously be unfair, as well as inequitable, to force plaintiffs to pay money to Xerox and yet leave plaintiffs with the taxes and penalties due on the payment or withdrawal of such funds. Moreover, such a remedy would treat these plaintiffs far worse than new hires -- who were left with no such taxation burden -- and hence impermissibly conflict with the mandate of the Second Circuit. *Frommert v. Conkright*, 738 F.3d 522, 529-34 (2nd Cir. 2013).

There are several other substantive reasons why the relief requested by Xerox is inequitable as well as legally impermissible. *See, e.g.*, 18 *New York Surrogate Court Procedure* § 1802 *et seq.* (claims against decedent or estate barred unless presented within seven months). That is, in part, why applicable procedure requires a counterclaim, discovery, and a full evidentiary hearing on the merits, all of which Xerox attempts to

circumvent with its Rule 60(b)(6) motion. That motion is procedurally improper, as well as fails to make the required evidentiary showings, and hence must be denied.

Regardless, on the merits, there are no clearly "extraordinary circumstances" in the present case that would authorize relief from the 2007 judgment at issue. This is not a case where rapacious individuals have stolen funds that rightfully belong to a more deserving entity. Instead, plaintiffs here were given annual benefits statements by Xerox for *decades* that promised them a certain amount of retirement benefits. Then, in 2009, after yet another decade of hard-fought litigation, some plaintiffs finally received precisely the *Layaou* retirement benefits they had long been promised. Plaintiffs further came within one vote in the Supreme Court of retaining their entitlement to these sums, and in any event, both the Supreme Court and the Second Circuit were unwilling to grant a stay that would divest these individuals of these amounts. Simply put, at long last, in 2009, plaintiffs received from a federal court benefits that were long overdue.

That said, it remains possible, perhaps, that one or more of these plaintiffs received in 2009 some (often very small) amount of benefits that, when they retired in the 1980s, were in excess of the "new hire" benefits that this Court has now held were then due. If so, so be it. These plaintiffs entirely innocently received these funds. By contrast, Xerox has indisputably repeatedly violated ERISA, has refused *for decades* to pay plaintiffs the benefits they are owed, and has run plaintiffs through the grist mill of implacable litigation for seventeen years. *See Frommert v. Becker*, 2016 WL 64678, *9 (W.D.N.Y., Jan. 5, 2016) ("Those initial denials would prove to be the harbingers of Xerox's dogged defense against plaintiffs' claims for additional benefits. . . . [I]t is fair to say that while Xerox has yielded some ground over the years – generally only when compelled to do so by court decisions – it has done so grudgingly, block by metaphorical block.") (Larimer, J.).

Whatever possible inequity might perhaps result from permitting some plaintiffs to retain whatever excess benefits may or may not have been paid to them in 2009 simply pales in comparison to the uncompensated -- and uncompensable -- inequities that have been heaped upon plaintiffs by Xerox during the past thirty years. *None* of the plaintiffs in this action were paid the benefits they were legally owed when they retired. *None* of the plaintiffs were allowed to live their lives in retirement in the manner that Xerox had

promised. *All* of the plaintiffs had to scrimp, struggle, and save their pennies, and alongside this burden, simultaneously watch their former employer compel them to hire attorneys and ruthlessly litigate for *seventeen years* their entitlement to an honorable and reasonable pension. That is inequity. That is extraordinary. The tiny additional benefits that a few plaintiffs may perhaps have received in 2009 pursuant to the deliberate decisions of this Court, the Second Circuit, and the Supreme Court is, at best, the equitable tail to the profoundly inequitable dog of the past decades of litigation and non-payment by Xerox.

Plaintiff Napoleon Barbosa – like several other plaintiffs -- died without ever receiving even a single penny of the additional retirement benefits to which he was entitled. During his life, he received only the daily stress of litigation, and confronted even upon his deathbed total uncertainty about how his now 78-year old widow, Dorothy, could possibly afford to survive on the pittance that Xerox chose to pay him for his decades of service. Similarly, Plaintiff William Plummer split his retirement benefits with his now ex-wife based upon what Xerox told him for decades those benefits would be, only to find out years later that he would never, in fact, actually receive these amounts. *See* Dkt. No. 284 (describing these, and other, circumstances).

Those are the types of extraordinary, irreparable harms that Rule 60(b)(6) is designed to prevent, not the deliberate court-ordered payment of retirement benefits seven years previously – payments that constitute both a literal and metaphorical drop in the bucket compared to the over $250 *billion* in revenue that Xerox has made during the seventeen years of this litigation. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2nd Cir. 1983) (relief under Rule 60(b)(6) permissible only when defendant will suffer "extreme hardship" from failure to grant such a remedy).

A comparison of the present case to *Scola v. Boat Frances R. Inc.*, 618 F.2d 147 (1st Cir. 1980), may perhaps be instructive. In *Scola*, it was undisputed that a judgment erroneously granted the plaintiff nearly $60,000 in interest to which he was not entitled. The defendant had not treated plaintiff badly, or violated any statute; instead, plaintiff had simply been injured while working on a ship owned by defendant, and pursuant to the Jones Act, was accordingly entitled to compensation. *Id*. at 150-52. Plaintiff was able to promptly obtain a judgment – he was not forced to wait seventeen years – but that

judgment incorrectly included an additional $60,000. When defendant noticed this error, a little over one year after the entry of the judgment, it filed a Rule 60(b)(6) motion for relief. *Id*. at 150-54. Defendant's motion did not even ask for money back from the plaintiff; rather, it simply asked that it not be compelled to *further* pay an additional $60,000 to the plaintiff that everyone admitted was not, in fact, properly owed to him. *Id*.

The Court of Appeals held in *Scola* that the trial court was entirely correct to deny defendant's Rule 60(b)(6) motion. *Id*. at 150-56. There is a manifest interest in finality. *Id*. at 156. Defendant could have made a Rule 60(b)(6) motion shortly after the judgment was entered, on appeal, or at any other time. But it elected not to, and instead waited a little over a year after entry of the judgment at issue. *Id.* It is true, the Court of Appeals held, that as a result of this erroneous order, plaintiff would be paid $60,000 that he was not, in fact, owed. But big deal. Mistakes happen. "Windfalls" of this type are simply not the type of extraordinary circumstance that would justify either a year-long delay or a motion for relief from a final judgment pursuant to Rule 60(b)(6). *Id.*

If a Rule 60(b)(6) motion was not proper in *Scola*, it is certainly not proper here, in which the delay is substantially larger, the defendant indisputably more blameworthy, and the equities manifestly more on the side of the plaintiffs.

Conclusion

Xerox has asked for relief from the wrong court. Xerox's motion is time-barred under Rule 60(c). Xerox improperly seeks affirmative relief from an already-vacated judgment absent a counterclaim. Xerox has waived any entitlement by failing to cross-appeal. Any alleged overpayments do not constitute extraordinary circumstances sufficient to authorize relief under Rule 60(b)(6). And Xerox has not only failed to satisfy its evidentiary burdens, but the relief it seeks would also flatly violate ERISA as well as controlling Supreme Court precedent.

Rule 60(b)(6) is an extraordinary remedy. It is definitively inapplicable to the circumstances and equities that exist in the present case.

Dated: May 16, 2016

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