

No. _____

In the
Supreme Court of the United States

ANDY ALTAHAWI,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

Whether the Second Circuit erred when it upheld the district court's denial of Altahawi's motion pursuant to Fed. R. Civ. P. 60(b)(5) and (6) to make a minor and non-substantive modification to the language of his consent judgment in light of the subsequent distribution fund that was set up by the SEC to award restitution to investors. The new language Altahawi sought to be added to the judgment would accurately reflect that his settlement payment qualified as restitution, which would avoid the imposition of millions of dollars of unanticipated capital gains taxes on Altahawi for gains he never received.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

STATEMENT OF RELATED PROCEEDINGS

SEC v. Andy Altahawi, No. 20-2751 (2d Cir., June 8, 2021)(reported at 849 Fed. Appx. 323 (Summary Order))

SEC v. Longfin Inc., et al., 18-cv2977- (S.D.N.Y. July 21, 2020)(2020 WL 4194484)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Andy Altahawi respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1) is reported at 849 Fed. Appx. 323 (2d Cir. 2021). The district court's opinion (Pet. App. 5) denying the motion to modify the judgment is unreported and available at 2020 WL 4194484 (S.D.N.Y. July 21, 2020).

JURISDICTION

The Second Circuit Court of Appeals entered judgment on June 8, 2021 (Pet. App. 1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES

Federal Rule of Civil Procedure 60 provides, in relevant part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(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;

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

1. This case presents an important question of civil procedure. As set forth herein, a district court has broad discretion to modify a judgment pursuant to Fed. R. Civ. P. 60(b). Rule 60(b) provides relief from a judgment in cases where (5) applying a judgment prospectively is no longer equitable; or (6) any other reason that justifies relief. In this matter, on June 17, 2019 Altahawi entered into a consent judgment with the SEC (Pet. App. 12) pursuant to which he agreed to pay the SEC \$21,090,081 in disgorgement and \$2,980,425 in civil penalties to settle a civil enforcement action (the “Judgment”). The disgorgement amount represented the sales proceeds resulting from the sale of Altahawi’s stock in a publicly traded company called Longfin Corp. These two payments came exclusively from two brokerage accounts belonging to Altahawi that the SEC froze pursuant to a temporary restraining order at the start of this litigation. Altahawi never withdrew or received any of the sales proceeds at issue in this case – the proceeds never left Altahawi’s brokerage accounts.

In 2019 the sales proceeds of \$21,090,081 from the sale of Longfin shares were taxable as capital gains to Altahawi. However, pursuant to Section 162(f) of the Internal Revenue Code (26 U.S.C. § 162), Altahawi was prohibited from taking a tax deduction for the \$21,090,081 disgorgement payment to the SEC. This left Altahawi owing millions of dollars in taxes on money he never received or withdrew from his brokerage accounts.

In April 2020 there was a significant change of facts when the SEC used Altahawi's settlement payment to establish a court approved distribution fund (known as a Fair Fund under Section 308(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7246)), to distribute to public investors the money collected from Altahawi and other defendants in settlements. As a result of the establishment of the Fair Fund, Altahawi's disgorgement payment then became eligible for a tax deduction – so long as certain minor modifications were made to the Judgement to state that Altahawi's settlement payment was being used for restitution to harmed investors. The district court abused its discretion in denying Altahawi's motion to modify the Judgement in light of the Fair Fund being established to distribute Altahawi's settlement payment to public investors. The district court erroneously reasoned that the Judgment should not be modified because the possibility of a Fair Fund being established in the future was contemplated at the time Altahawi consented to the Judgment. The district court's reasoning was an abuse of discretion because Altahawi's disgorgement payment to the SEC did not become eligible for a tax deduction until the Fair Fund was actually set up with the approval of the district court, regardless of what was contemplated when the original Judgment was entered.

This Court has held it is an abuse of discretion for a district court to refuse to modify an injunction or consent decree when a change in the facts or the law warrants the relief. *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997 (1997)(reversing district court's denial of motion to modify judgment pursuant to 60(b)(5)).

This Court has also held that a district court abuses its discretion in denying relief under Rule 60(b) when extraordinary circumstances justify the relief being sought. *Buck v. Davis*, 137 S.Ct. 759 (2017)(District court abused its discretion in denying motion to reopen judgment under 60(b)(6)).

2. This action was commenced on April 4, 2018, when the SEC filed under seal a Complaint and Application for a Temporary Restraining Order (“TRO”) and Asset Freeze against Altahawi and others (Pet. App. 6). The Complaint alleged, in relevant part, that Altahawi had violated the registration provisions of the federal securities laws by selling shares of Longfin Corp. (“Longfin” or the “Company”) that he received in exchange for services he provided to the Company (*Id.*). Altahawi’s services related to preparing and filing documents concerning Longfin’s sales of common stock under SEC Regulation A and the Company’s later listing on the Nasdaq stock market.

On April 6, 2018, the district court granted the SEC’s request for a TRO and Asset Freeze against Altahawi and others and unsealed the action. On May 1, 2018, the Court granted the SEC’s application for a preliminary injunction and the SEC’s request to continue the Asset Freeze against Altahawi and others.

On May 29, 2018, the SEC filed its First Amended Complaint and Altahawi filed his Answer thereto on June 8, 2018. On June 5, 2019, the SEC filed a Second Amended Complaint against Altahawi and others.

On June 7, 2019, the Judgment was entered against Altahawi on consent without Altahawi admitting or

denying the allegations in the SEC's Second Amended Complaint. (Pet. App. 12). The Judgment provided that Altahawi would pay to the SEC the amount of \$21,090,081 in disgorgement and \$2,980,425 in civil penalties pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]. (Pet. App.16-17) The funds to pay the SEC were taken directly from Altahawi's accounts at Bank of America and Interactive Brokers (the "Frozen Accounts"), which accounts were frozen pursuant to the TRO obtained by the SEC. The funds in the Frozen Accounts came from Altahawi's sale of Longfin shares, and Altahawi never withdrew the funds at issue from the Frozen Accounts.

On April 15, 2020, the district court entered an Order establishing a Fair Fund for distribution of Altahawi's settlement payment to Longfin investors under Section 308(a) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7246), and appointing a Distribution Agent and Tax Administrator. (Pet. App. 7) The establishment of the Fair Fund in April 2020 represents a significant change in circumstances, as it caused the economic substance of the settlement payment to the SEC pursuant to the Judgment to constitute restitution to investors, as opposed to disgorgement.

On or about January 27, 2020 Altahawi learned for the first time from his tax advisor that, without a modification of the Judgment, pursuant to Section 162(f)(1) of the Internal Revenue Code (the "Code"), as amended by the Tax Cuts and Jobs Act of 2017 ("TCJA")(131 Stat. 2054): (i) the funds generated in the

Frozen Accounts would be taxable to him even though he never received or withdrew the funds; and (ii) there would not be an offsetting tax deduction for the payments he made to the SEC of disgorgement and civil penalties. This inequitable result is due to the fact that the Judgment does not contain language required by Section 162(f)(2) of the Code that the payments to the SEC were either for restitution or were made to come into compliance with the law. As a result, if the Court does not modify the Judgment to include the language requested by Altahawi, he faces the prospect of being obligated to pay millions of dollars of capital gains taxes on funds he never received. Altahawi's lack of knowledge of the tax consequences of the Judgment, and the way to ameliorate the result by including the language set forth in Section 162(f)(2) of the Code, is not unreasonable given that the tax treatment of gains incurred in frozen accounts that are subsequently paid to the SEC is a highly complex area of tax law.

Moreover, the Judgment itself does not state what the tax treatment is of either the funds in the Frozen Accounts or the deductibility of the disgorgement or civil penalty payments. With regard to taxes, the Judgment only states that "amounts ordered to be paid *as civil penalties* pursuant to this Judgment shall be treated as penalties paid to the government for all purposes, including all tax purposes." (Pet. App. 19)(emphasis added).¹ In addition, the Judgment does not indicate that funds Altahawi never received or withdrew from the Frozen Accounts would be taxable

¹ The Judgment does not contain any references to the tax treatment of the disgorgement payment.

to him as capital gains, nor does the Judgment indicate that Altahawi would not receive a corresponding deduction on his taxes for his payments of disgorgement or civil penalties.

In order to avoid the extreme and undue hardship that would be caused by the IRS imposing millions of dollars of capital gains taxes on monies that Altahawi never received and were paid in restitution, Altahawi moved pursuant to Rule 60(b)(5) and (6) for an order amending the Judgment. Altahawi's motion sought to add language accurately stating that Altahawi's payments to the SEC pursuant to the Judgment were for restitution or were made to come into compliance with the law.

3. By Opinion and Order (the "Order") of Hon. Denise Cote dated July 21, 2020, the district court denied Altahawi's motion. (Pet. App. 5). The district court held that the establishment of the Fair Fund was not a change in fact sufficient to grant Altahawi's motion under Rule 60(b)(5). The district court also held that extraordinary circumstances were not present to support relief under 60(b)(6).

4. On appeal the Second Circuit affirmed the district court's denial of the motion to modify the Judgment for substantially the same reasons as given by the district court. (Pet. App. 1) This petition followed.

REASONS TO GRANT THE PETITION

The petition for writ of certiorari should be granted for two reasons.

First, the ruling below is wrong on the merits of Rule 60(b)(5). This Court's precedents make clear that a district court abuses its discretion if it does not reopen a judgment after there has been a significant change in circumstances from the time the judgment was entered. Here there was a clear and significant change in circumstances that occurred in April 2020 when the district court established a Fair Fund to distribute Altahawi's settlement payment as restitution to Longfin investors. The district court abused its discretion when it denied Altahawi's motion to add language to the Judgment to reflect this significant change.

Second, the ruling below is wrong on the merits of Rule 60(b)(6). This Court's precedents make clear that a district court abuses its discretion if it fails to modify a judgment when extraordinary circumstances exist that warrant the change. Here such extraordinary circumstances are present because failure to make the non-substantive changes to the Judgment will likely lead to the unjust result of Altahawi owing millions of dollars of taxes on money he never received. Moreover, the lack of prejudice to the SEC from the requested modification of the Judgment is an important factor that the district court did not adequately consider.

This Court reviews the decision below for abuse of discretion. *See* 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2857 (3d ed. 2012).

The question is therefore whether a reasonable jurist could conclude that the district court abused its discretion in declining to reopen the judgment to permit Altahawi to make a minor, non-substantive modification to the language of the Judgment in light of the establishments of the Fair Fund. Here, the district court abused its discretion in denying Altahawi's motion pursuant to Rule 60(b)(5) and (6). The district court failed to articulate any legally sufficient reason why the simple, accurate, non-substantive and non-prejudicial modification to the Judgment requested by Altahawi should not be granted.

I. The District Court Abused its Discretion in Declining to Modify the Judgment Pursuant to Fed. R. Civ. P. 60(b)(5).

Fed. R. Civ. P. 60(b)(5) permits a party to obtain relief from a judgment or order if, among other things, “applying [the judgment or order] prospectively is no longer equitable.” *Horne v. Flores*, 557 U.S. 433, 447 (2009). Rule 60(b)(5) provides a means by which a party can ask a court to modify or vacate a judgment or order if “a significant change either in factual conditions or in law” renders continued enforcement “detrimental to the public interest.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). The party seeking relief bears the burden of establishing that changed circumstances warrant relief, *id.*, at 383, but once a party carries this burden, a court abuses its discretion “when it refuses to modify an injunction or consent decree in light of such changes.” *Agostini v. Felton*, 521 U.S. 203, 215 (1997).

The district court erroneously held that Rule 60(b)(5) is not applicable on the ground that Altahawi has not demonstrated “a change in facts or law” that warrants the modification. As noted by the district court, when a party invokes Rule 60(b)(5) to seek alteration of a judgment, the moving party must establish that “a significant change in circumstances warrants the modification.” *Barcia v. Sitkin*, 367 F.3d 87, 99 (2d Cir. 2004). (Pet. App. 9). The district court abused its discretion in failing to acknowledge that there was a significant change in circumstances demonstrated by Altahawi – *i.e.*, that the establishment by the district court of the Fair Fund months after the original Judgment was entered caused the economic substance of the settlement payment to the SEC pursuant to the Judgment to constitute restitution to investors. The establishment of the Fair Fund is clearly a significant change that fundamentally altered the nature of Altahawi’s disgorgement payment to the SEC and made the payment eligible to be treated as restitution. This is because the remedy of disgorgement is focused on depriving alleged wrongdoers of ill-gotten gains whereas the remedy of restitution is defined as making a harmed party whole. According to Black’s Law Dictionary, restitution is the “[r]eturn or restoration of some specific thing to its rightful owner or status.” *Black’s Law Dictionary* (11th ed. 2019) In contrast, disgorgement is defined as “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.” *Black’s Law Dictionary* (11th ed. 2019).

When Altahawi first entered into the Judgment his disgorgement payment was made to the SEC and, therefore, could not be considered restitution to investors. However, once the Fair Fund was established months later the nature of Altahawi's disgorgement payment changed in a material way from disgorgement to restitution and thereby became eligible to be tax deductible. The Second Circuit erred when it held that the consent judgment should not be modified because the Judgment anticipated that the SEC might establish such a fund. (Pet. App. 3-4) This holding was in error because, regardless of what was contemplated at the time the consent judgment was entered, Altahawi's settlement payment did not become eligible to be treated as restitution until the Fair Fund was set up.

Denying Altahawi's motion to modify the Judgment will result in undue hardship to Altahawi. The requested modification does not substantively change the terms of the consent agreement or prejudice the SEC. For these reasons, the district court abused its discretion in failing to grant this relief.

The district court also abused its discretion when it ruled that Rule 60(b)(5) is not applicable here because the Judgment is a money judgment rather than an injunction, and "[i]nsofar as the Consent Judgment characterizes the payments owed by Altahawi to the SEC as disgorgement and civil penalties, the Consent Judgment does not have prospective application within the meaning of Rule 60(b)(5)" (Pet. App. 8).

However, contrary to the district court's findings, the Judgment does have prospective application because the tax treatment of Altahawi's payments to

the Commission has not yet been determined. The categorization of Altahawi's payment to the SEC, for tax purposes under Section 162(f) of the Code, still remains to be determined. How the settlement payments are characterized *in the future* will have a dramatic economic effect on Altahawi, his tax obligations and his financial condition.

Moreover, the myopic analysis by the district court ignores that the Judgment is not a straightforward money judgment for which the court no longer has any oversight; rather, the court established a Fair Fund in April 2020 for distribution of the settlement payment, appointed a Distribution Agent and Tax Administrator, and retained jurisdiction over the distribution.

II. The District Court Abused its Discretion in Denying Altahawi's Motion for a Minor, Non-Substantive Modification of the Judgment.

Rule 60(b)(6) permits a district court to reopen a judgment for "any other reason that justifies relief." Rule 60(b) vests wide discretion in courts, but this Court has held that relief under Rule 60(b)(6) is available only in "extraordinary circumstances." *Buck v. Davis*, 137 S.Ct. 759, 777 (2017)(District court abused its discretion in denying motion to reopen judgment under 60(b)(6)) *quoting*, *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health*

Services Acquisition Corp., 486 U.S. 847, 863–864 (1988).

In the circumstances of this case, the district court abused its discretion in denying Altahawi’s Rule 60(b)(6) motion and has caused significant injustice to Altahawi. *Liljeberg*, 486 U.S. at 863–864. The district court’s conclusion that Altahawi had failed to demonstrate that this case presents extraordinary circumstances rested in large measure on the erroneous application of the principle that Rule 60(b)(6) is not intended to relieve a party from an agreement that he voluntarily entered but now regrets. Here, in fact, Altahawi is not attempting to change the agreement he struck with the SEC in any substantive way. Altahawi is also not attempting to relieve himself of the consent judgment because he is not seeking the return of the millions of dollars he paid to the SEC in disgorgement and civil penalties. Rather, Altahawi is merely seeking to have the Judgment accurately reflect the nature of the payments he made to the SEC.

A. The District Abused its Discretion When it Declined to Modify the Judgment Pursuant to Rule 60(b)(6).

Rule 60(b)(6) of the Federal Rules of Civil Procedure “permits a court to relieve a party from a final judgment for any reason ... justifying relief from the operation of the judgment. The rule confers broad discretion on the trial court to grant relief when ‘appropriate to accomplish justice.’” *Gil v. Vogilano*, 131 F.Supp.2d 486, 494 (S.D.N.Y. 2001) (citing *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir.1986), *Int’l Controls*

Corp. v. Vesco, 556 F.2d 665, 668 n.2 (2d Cir. 1977)).
Rule 60(b)(6)

confers broad discretion on the trial court to grant relief [from a judgment] when appropriate to accomplish justice [and] it constitutes a grand reservoir of equitable power to do justice in a particular case. Furthermore, it is properly invoked where there are extraordinary circumstances, or where the judgment may work an extreme and undue hardship[.]

Marrero Pichardo v. Ashcroft, 374 F.3d 46, 55-56 (2d Cir. 2004)(cleaned up). *See also Matarese*, 801 F.2d at 106 (same)(internal quotation marks and citations omitted); *Transaero Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 461 (2d Cir. 1994). This broad power to do equity and justice “should be liberally applied” when a judgment causes unnecessary hardship. *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir.1977); *Matarese*, 801 F.2d at 106.

As set forth herein, Altahawi has demonstrated extraordinary circumstances that warrant relief pursuant to Rule 60(b)(6), and he will suffer extreme and undue hardship without the requested modification. The district court abused its discretion in denying his motion.

1. Section 162(f) of the Internal Revenue Code.

Section 162(f)(1) of the Code, as amended by the TCJA, provides that a taxpayer may not deduct any amount paid to the government or governmental entity “in relation to the violation of any law or the

investigation or inquiry by such government or entity into the potential violation of any law.” Section 162(f)(2) provides an exemption from this general rule for cases where the taxpayer establishes the payment:

(i) constitutes restitution (including remediation of property) for damage or harm which was or may be caused by the violation of any law or the potential violation of any law, or

(ii) is paid to come into compliance with any law which was violated or otherwise involved in the investigation or inquiry... and

is identified as restitution or as an amount paid to come into compliance with such law, as the case may be, in the court order or settlement agreement.²

The Code does not define “restitution” nor what constitutes “amounts paid to come into compliance with

² Section 6050X of the Internal Revenue Code [26 U.S.C. § 6050X] adds a reporting requirement for payments deductible under Code Section 162(f). Code Section 6050X provides that the Governmental Entity must file an information statement with the IRS specifying (1) the name of the Governmental Entity involved in resolving the dispute, (2) the amount of the entire payment to the Governmental Entity, and (3) the portion of such payment qualifying for the Restitution Exception or the Compliance Exception (the Reporting Requirement). The reporting requirement binds both the taxpayer and the Governmental Entity to a single position with respect to the nature and purpose of the payments made pursuant to a settlement agreement or order. This language was included in the proposed modified judgment that was submitted to the district court by Altahawi along with his motion to modify the Judgment.

such law.” However, it is clear in this case that the economic reality is that Longfin shareholders are being compensated through the SEC’s Fair Fund process and, therefore, Altahawi’s settlement payments to the SEC – which make up the majority of the assets of the Fair Fund – qualify as restitution under Section 162(f)(1). This conclusion is consistent with the Second Circuit’s decision in *Stephens v. C.I.R.*, 905 F.2d 667 (2d Cir. 1990). In *Stephens*, the Second Circuit held that even in criminal cases, court-ordered payments that are compensatory in nature do not constitute a “fine or similar penalty” under 26 U.S.C. § 162(f), and thus are deductible.

The defendant in *Stephens* was convicted in a criminal proceeding of various crimes in connection with his embezzlement of funds from Raytheon Company. *See Stephens*, 905 F.2d at 668. In addition to a five-year prison term and a fine, the criminal trial court in which the defendant’s case was prosecuted had ordered the defendant to make a restitution payment to Raytheon. *See id.* In a related proceeding, the United States Tax Court held that this restitution payment was not deductible.

On appeal, the Second Circuit analyzed the question of deductibility with reference to 26 U.S.C. § 162(f), and held that the restitution payment in *Stephens* was deductible because the “restitution payment is primarily a remedial measure to compensate another party, not a ‘fine or similar penalty,’ even though Stephens repaid the embezzled funds as a condition of his probation.” *Id.* at 672-673.

The takeaway from *Stephens* is that payments that are compensatory in nature are deductible. The United States Tax Court has also said as much, in a case in which the Tax Court commented on the Second Circuit's opinion in *Stephens*. In *Cavaretta v. Comm'r.*, T.C. Memo 20104, 99 T.C.M. (CCH) 1028 (Tax Ct. 2010), the Tax Court explained that the Second Circuit's finding of deductibility in *Stephens* was the correct result because the Court had "carefully distinguished punitive from compensatory restitution, even in criminal cases, and reasoned that Stephens' restitution payment had both law-enforcement [punitive] and compensatory purposes, but that it was primarily a remedial measure to compensate another party." *Id.*

The First Circuit has reached the same conclusion, holding in *Fresenius Med. Care Holdings v. United States*, 763 F.3d 64 (1st Cir 2014), that "[u]nder generally accepted principles of tax law," a court should determine deductibility by inquiring as "to the economic realities of the transaction." *Id.* at 70. As the First Circuit explained in *Fresenius*, only an inquiry into the economics of the transaction is consistent with "the case law's sensible emphasis on economic reality." *Id.* at 71.

2. Altahawi Has Made the Necessary Showing to Warrant Relief Pursuant to Rule 60(b)(6).

Altahawi has established that extraordinary circumstances exist here to justify modifying the Judgment under Rule 60(b)(6). Specifically, Altahawi demonstrates that if the Judgment is not modified to

add language stating that his payments to the SEC were in the form of restitution or to come into compliance with the law, which are accurate statements, he may unjustly owe millions of dollars in capital gains taxes based on the proceeds from the sale of the Longfin shares, which proceeds he never received or withdrew from the Frozen Accounts. The proceeds from the sale of Longfin shares were taken by the SEC directly from the Frozen Accounts and are the subject of the district court's April 15, 2020 Order establishing a Fair Fund for distribution to Longfin investors. The economic reality of Altahawi's settlement payments to the SEC is that they will be used to compensate victims and are, therefore, restitution. The extreme and undue economic hardship that Altahawi will suffer without the modification to the Judgment unquestionably qualifies as the extraordinary circumstances needed to modify a judgment under Rule 60(b).

In a hyper-technical decision in which the district court refers to its misguided notion that Altahawi was having "regrets" about the consent judgment (Pet. App. 10), the district court failed to conduct a proper analysis of Altahawi's motion and failed to tap into the court's "grand reservoir of equitable power to do justice,"³ which is provided by Rule 60(b), to grant the minor modification sought by Altahawi. Altahawi is not trying to change the deal he struck with the SEC to settle this matter and is not having "regrets" about the consent judgment. Rather, he simply seeks the minor modification to add language to the Judgment that would correctly categorize his payments to the SEC as

³ See, e.g., *Matarese v. LeFevre*, 801 F.2d at 106.

either restitution or made to come into compliance with the law. Without this language Altahawi faces the prospect of being saddled with a tax liability of millions of dollars based on capital gains when such liability is not appropriate in this situation.

Moreover, Altahawi has demonstrated that if the Judgment is not modified to add language stating that his payments to the SEC were in the form of restitution or to come into compliance with the law he may unjustly owe millions of dollars in capital gains taxes based on the proceeds from the sale of the Longfin shares, which proceeds he never received or withdrew from the Frozen Accounts. The modification would not substantively alter Altahawi's consent agreement with the SEC, nor would it cause any prejudice to the SEC. Altahawi established that extraordinary circumstances exist here to justify adding the requested language to the Judgment under Rule 60(b)(6), and that he will suffer an extreme and undue hardship without the modification.

3. The Modification to the Judgment that is Sought Would Not Result in Any Prejudice to the SEC.

The modification to the Judgment sought by Altahawi's motion would not result in any prejudice to the SEC.

It is proper for the court to consider whether any prejudice will result to plaintiff if the judgment is set aside, and it was an abuse of discretion for the trial court to refuse to set aside a . . . judgment when there were no intervening

equities and no special harm would result to plaintiff except some delay in finally realizing satisfaction of its claim should plaintiff be successful on trial.

Tozer v. Charles A. Krause Mill. Co., 189 F.2d 242, 246 (3d Cir. 1951). *See also* 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2857 (3d ed. 2012).

Altahawi is not seeking the return of any funds paid to the SEC nor is he seeking to change or restrict in any way what the SEC can do with the funds he paid as part of the settlement. Adding the requested language to the Judgment would not deprive the SEC of any part of its bargain when it settled this action – but the requested language would alleviate the unforeseen and draconian tax consequences that Altahawi will suffer if the modification in the language of the Judgment is not made.

The district court further incorrectly held that the applicable provision of Rule 60(b) is 60(b)(1), for which there is a one-year statute of limitations period, and therefore Altahawi may not avail himself of Rule 60(b)(6) (or 60(b)(5)). However, the district court failed to articulate the basis for its holding that the request for relief falls under Rule 60(b)(1), which requires “mistake, inadvertence, surprise, or excusable neglect” – none of which is applicable here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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