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VIA TELEFAX AND ELECTRONIC FILING
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Chambers of Hon. David G. Larimer
Kenneth Keating Federal Building
100 State Street
Rochester, NY 14614

Re: Frommert et al v. Conkright et al (Case No. 00-cv-06311)

Dear Judge Larimer:

This Court will hear cross-motions on June 2, 2011. Xerox urged this Court to delay ruling on these pending motions until the Supreme Court issued its opinion in CIGNA v. Amara ("CIGNA"). Xerox Opposition at 19-20. Last week, the Supreme Court issued that opinion. See http://www.supremecourt.gov/opinions/10pdf/09-804.pdf. The CIGNA opinion makes clear that Plaintiffs' Motion to Re-Enter Judgment must be granted and Xerox's Cross-Motion summarily denied based precisely on the notice grounds raised by plaintiffs in their papers.

The CIGNA and Frommert cases are quite similar. In each, a large pension plan was overhauled and SPDs were sent to employees aggressively proclaiming the generosity of the modified plan. In neither were any explanations or examples given to employees to illustrate how complex interest rate calculations would reduce their pensions. Justice Breyer, writing for a near-unanimous CIGNA Court, held that such a notice failure violates ERISA, whatever the terms of the plan itself. That is precisely plaintiffs' argument in their Motion to Re-Enter Judgment.

Specifically: plaintiffs have long contended that Xerox's amendments imposing an appreciated offset are without force because plaintiffs were never informed, in SPDs or otherwise, that *any* interest rate would be used to gut their pensions. CIGNA confirms that plaintiffs are right:

- As the Supreme Court noted in CIGNA when describing *this case*, "plan amendments not preceded by a proper notice" are invalid. CIGNA Slip Opinion at 11 (citing to Frommert).

- Even the two concurring justices (Justices Scalia and Thomas) expressly noted: "[P]lan members misled by an SPD will be compensated. That they will normally be compensated is not in doubt." CIGNA Slip Opinion Concurrence at 4.

For this reason alone—that any amendment imposing an appreciated offset was never noticed—judgment should be reentered.

But CIGNA goes even further. The Supreme Court expressly held in CIGNA that equity requires courts to make whole employees who are victims of notice violations, and that courts can do so in several ways, including "reforming" a plan to make it consistent with employees' expectations in light of the employer's deficient representations. CIGNA Slip Opinion at 18-20. This is exactly what plaintiffs have requested, and CIGNA expressly held that it appropriate. This is yet another reason why the Motion to Re-Enter Judgment should be granted.

At a bare minimum, CIGNA authoritatively compels denial of Xerox's Cross-Motion. The Plan Administrator Approach does not, in any sense of the word, make plaintiffs whole. It yields nearly an identical devastation to plaintiffs' pensions as the illegal phantom account and makes plaintiffs worse off than new hires. Equity does not countenance such a result. In the words of CIGNA, this Court must "mold the relief to protect the rights of the beneficiary according to the situation involved." CIGNA Slip Opinion at 21. The Plan Administrator Approach indisputably does not do so.

As the Supreme Court made clear:

> In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief. . . . We believe that, to obtain relief by surcharge for violations of §§102(a) and 104(b), a plan participant or beneficiary must show that the violation injured him or her. But to do so, he or she need only show harm and causation.

CIGNA Slip Opinion at 22. This language is controlling and dispositive here. Plaintiffs' Motion to Reenter Judgment should be granted. Xerox's Cross Motion should be denied.

Sincerely

/s/

Shaun P. Martin
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cc: Chris Pistilli, Esq.
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