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VIA FACSIMILE & ELECTRONIC FILING (585-613-4045)

The Honorable David G. Larimer
United States District Court for the Western District of New York
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614

Re: *Frommert v. Conkright*, No. 6:00-CV-6311

Dear Judge Larimer:

We are in receipt of plaintiffs' letter brief dated May 24, 2011, regarding the Supreme Court's decision in *CIGNA v. Amara* ("*Amara*"), a copy of which is attached for the Court's convenience. Contrary to plaintiffs' assertions, *Amara* is of no help to them and, in fact, provides additional reasons why they are not entitled to the relief they seek.

First, the Supreme Court's decision in *Amara* concerns a situation in which the relief for a notice violation based on the facts in that case had to be awarded under Section 502(a)(3) of ERISA. In contrast here, the Second Circuit has held that plaintiffs have a remedy under *Section 502(a)(1)(B)*, and the question presented on remand is how to interpret the remaining terms of the Xerox Plan, applying a deferential standard of review. With respect to Section 502(a)(1)(B), *Amara* makes clear that courts have no authority to change the terms of the plan, or to enforce terms of a summary plan description as terms of the plan itself. *See Amara*, slip op. at 13-14.

Second, for the reasons explained in defendants' prior submissions to this Court, the Plan Administrator's interpretation of the Plan does not violate ERISA's notice requirements. But even if there *were* such a violation, *Amara* makes clear that each plaintiff would, at a minimum, need to have proved by a preponderance of the evidence that he or she suffered "actual harm" as a result of the notice violation in order to recover. *Amara*, slip op. at 22. Here, plaintiffs have not even attempted to make any such showing.

Third, any recovery under Section 502(a)(3) is limited to "appropriate equitable relief." The Supreme Court has already recognized that any offset for prior distributions that failed to take the time value of money into account would be "heresy" and represent a "windfall" to plaintiffs. Thus, even if this Court were to find a notice violation, Amara lends no support to

plaintiffs' position that this Court should adopt the inappropriate and inequitable nominal offset approach on remand.[1]

Defendants respectfully request permission to file a sur-reply to respond to the issues raised by plaintiffs' letter brief and to address more fully the implications of *Amara* for this case.

Respectfully submitted,

/s/Margaret A. Clemens

Margaret A. Clemens

Attachment

cc: John Strain, Esq. (via CM/ECF)
Peter Stris, Esq. (via CM/ECF)

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[1] *See Miller v. Xerox Corp. Ret. Income Guarantee Plan*, No. 98-10389 (C.D. Cal. Sept. 22, 2010), slip op. at 7, 13 ("Even were we to agree that Plaintiffs did not receive adequate notice of the phantom account mechanism until the 1998 SPD was disseminated, this would have no effect on the outcome of this case" because the Plan Administrator's approach "makes a number of reasonable and fair assumptions that broadly seek to achieve equity in this re-calculation of the appropriate offset").