

# COHENMILSTEIN

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April 14, 2025

**VIA ECF**

The Honorable Laura M. Provinzino  
United States District Court, District of Minnesota  
316 North Robert Street  
St. Paul, MN 55101

Re: *Navarro, et al. v. Wells Fargo & Company, et al.*, No. 0:24-cv-03043-LMP-DTS

Dear Judge Provinzino,

Pursuant to Local Rule 7.1(j), Plaintiffs seek leave to request reconsideration of this Court's Order Granting Defendant's Motion to Dismiss (Doc. 57) and judgment (Doc. 58) in two respects.

*First*, the Order dismissed the Complaint "without prejudice," Doc. 57 at 29, but did not allow Plaintiffs an opportunity to amend their Complaint before judgment was entered to address the issues identified by the Court in the Order. In opposition to the motion to dismiss, Plaintiffs specifically requested leave to replead in the event the motion to dismiss was granted, *see* Doc. 38 at 41 n.26, but the Court's order does not address this request. Plaintiffs respectfully submit that reconsideration is appropriate to address this oversight. *See Plymouth Cnty. Iowa ex rel. Raymond v. MERSCORP*, 287 F.R.D. 449, 457 (N.D. Iowa 2012) ("[T]o the extent that I overlooked the County's conditional request for leave to amend, the County is now entitled to reconsideration of that request."); *accord Wisdom v. First Midwest Bank of Poplar Bluff*, 167 F.3d 402, 409 (8th Cir. 1999) ("Because the district court's order is silent as to whether the request [to amend] was even considered, ... we remand this issue to the district court for a ruling on the request to amend").

While leave to amend rests in the discretion of the court, "[l]eave to amend a complaint should be freely given to promote justice" and "parties should usually be given at least one chance to amend their complaint." *Wisdom*, 167 F.3d at 409. Courts routinely follow this approach where conditional leave to amend is requested, *see Trs. of the Welfare & Pension Funds of Loc. 464A – Pension Fund v. Medtronic PLC*, 2024 WL 4528860, at \*1 (D. Minn. Oct. 18, 2024); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 978 (N.D. Iowa 2011) (granting leave to proffer amended complaint where conditional request to amend was made in footnote in motion to dismiss opposition), and following this approach here makes sense where the complaint was dismissed without prejudice. Indeed, in the recent *Lewandowski* case involving similar claims – which Defendants cited as supplemental authority – the court granted the plaintiff leave to amend to address the standing deficiencies identified in its opinion. *See* Doc. 55-1 at 15; *Lewandowski v. Johnson & Johnson*, No. 3:24-cv-671, 2025 WL 288230, at \*7 (D.N.J. Jan. 24, 2025).<sup>1</sup>

Similar to *Lewandowski*, Plaintiffs seek to amend the Complaint to buttress their allegations of injury by (among other things): (1) identifying the empirical link between increased healthcare spending and increased premiums for individual plan participants found in numerous scientific studies and government reports; (2) emphasizing the self-funded nature of the Wells Fargo Health Plan ("Plan"), where every dollar paid out by the Plan must be replaced by a dollar coming in (and

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<sup>1</sup> Like here, the plaintiff in *Lewandowski* made a conditional request to amend in a footnote at the conclusion of her motion to dismiss opposition. *See Lewandowski*, Dkt. 55 at 40 n.17.

explaining how such expenditures are factored into the premium equation); and (3) more precisely explaining how Plaintiffs were harmed by increased *out-of-pocket* costs for prescription drugs (i.e., inflated drug copays or inflated amounts paid for the full cost of their prescriptions prior to meeting their Plan deductible), separately and independently from increased premium costs.<sup>2</sup> Similar to *Lewandowski*, Plaintiffs also intend to include at least one additional named plaintiff in their amended complaint, who is a *current* participant in the plan, to address the Court's concerns regarding redressability and standing to seek prospective relief.

Because the Complaint was dismissed without prejudice, there is no question that Plaintiffs may re-plead their claims. Plaintiffs respectfully submit that it makes more sense, and is more efficient, for them to do so in an amended complaint rather than filing a separate action. Any new action would inevitably need to be tagged as a related action, and the net effect of requiring Plaintiffs to file a separate action would be duplicative suits, increased filing fees and potentially service costs, and parallel-track litigation in the court of appeals to preserve Plaintiffs' appellate rights in the first suit while the second suit is pending. By contrast, if Plaintiffs are permitted to file an amended complaint, and the judgment is vacated during the period in which Plaintiffs are allowed to amend (Plaintiffs propose 30 days from the date of any order allowing amendment), there will be no duplicative litigation, no additional filing or service fees, and no need for Plaintiffs to file an appeal. Nevertheless, Defendants have indicated they are unwilling to agree to allow Plaintiffs to amend, and have indicated that Plaintiffs should direct their request to the Court.

*Second*, in the event that amendment is not allowed, Plaintiffs seek reconsideration of this Court's ruling that Plaintiffs do not have standing to seek retrospective relief under 29 U.S.C. § 1132(a)(3). *See* Order at 27-28. In reaching this result, the Court erroneously held that monetary relief for Wells Fargo's fiduciary breaches is not available under § 1132(a)(3). The law is to the contrary. Both the Supreme Court and Eighth Circuit have made clear that in a breach of fiduciary duty suit against plan fiduciaries such as this, the equitable remedy of surcharge is available under § 1132(a)(3), and provides for "make-whole" monetary relief. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011); *Silva v. Met. Life Ins. Co.*, 762 F.3d 711, 724 (8th Cir. 2014). "[T]he Supreme Court's decision in *Amara* changed the legal landscape." *Silva*, 762 F.3d at 722. "Since *Amara*, every circuit court to address the issue has recognized that Section 1132(a)(3) creates a cause of action for monetary relief for breaches of fiduciary duty." *Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914-15 (11th Cir. 2022). The cases cited by the Court are not to the contrary because they predated *Amara* or did not involve claims against plan fiduciaries (or both). *See* Order at 27-28 (citing pre-*Amara* decisions in *Mertens*, *Kerr*, and *Paulsen*, and suit brought *by* plan fiduciaries instead of *against* plan fiduciaries in *Cox*); *see also Gimeno*, 38 F.4th at 915 (distinguishing *Mertens*). The Court's oversight is understandable because Wells Fargo did not contest redressability under § 1132(a)(3), *see* Doc. 30 at 14, and as a result, the issue was not fully briefed. Nevertheless, Plaintiffs cited *Peters v. Aetna*, 2 F.4th 199 (4th Cir. 2021), a health plan case alleging overcharges, where the court held that (1) Article III standing existed; and (2) restitution and surcharge were available as remedies. And Plaintiffs explicitly pled surcharge as a remedy in their Prayer for Relief (Doc. 1, ¶ 251) and their § 1132(a)(3) causes of action (*id.*, ¶¶ 232, 246).

Plaintiffs respectfully request that leave be given on or before the deadline to move under Rule 59(e) (April 21, 2025), so Plaintiffs may proceed accordingly and avoid a protective appeal.

<sup>2</sup> The amendments in *Lewandowski* can be seen in redline on the docket. *See Lewandowski*, No. 3:24-cv-00671, ECF 74-1 (D.N.J. March 10, 2025). Plaintiffs will submit their own redline here if leave to amend is granted, or in connection with any motion for leave to amend that is permitted.

Respectfully,

/s/ Kai Richter

Kai Richter

cc: Defendants' counsel of record (via ECF)