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VIA ECF
The Honorable Laura M. Provinzino
District Court Judge
United States District Court
316 N. 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,

Plaintiffs submit this letter in response to Wells Fargo's notice of supplemental authority regarding the recent district court opinion in *Lewandowski v. Johnson & Johnson*, 3:24-cv-00671, ECF 84 (D.N.J. Nov. 26, 2025) ("*Lewandowski II*"). *See* ECF 97.

Nonbinding and Nonprecedential. As an initial matter, *Lewandowski II* is neither binding nor precedential. It is an out-of-circuit opinion from another district court. And the court that issued the opinion expressly labeled it "**NOT FOR PUBLICATION**." *Lewandowski II*, slip op. at 1. Such unpublished opinions are "not precedent" in this circuit. *See* Eighth Circuit Rule 32.1A ("Unpublished opinions are decisions a court designates for unpublished status. They are not precedent.").

Lacking in Analysis and Distinguishable on Facts. *Lewandowski II* also is non-persuasive, as it lacks any meaningful analysis and largely defers to this Court's prior decision on the initial (and no longer operative) complaint in *Navarro v. Wells Fargo & Co.*, 2025 WL 897717 (D. Minn. Mar. 24, 2025) ("*Navarro I*"). *See Lewandowski II*, slip op. at 8-12 (citing *Navarro I* on every page of the court's analysis, and multiple times on each page). After this Court's decision in *Navarro I*, Plaintiffs here filed an Amended Complaint, ECF 64, and "[t]he Amended Complaint addresses the standing issues identified by the Court" in *Navarro I*. Pls' Mem. in Opp'n. to Motion to Dismiss ("MTD Opp."), ECF 85, at 1. Because *Lewandowski II* relies almost entirely on this Court's assessment of the original complaint, it adds nothing new to this Court's consideration of the Amended Complaint.

Lewandowski II's analysis is also non-persuasive and/or distinguishable in several particular respects. Among other things:

- The Amended Complaint here makes clear that Plaintiffs paid higher out-of-pocket costs for their prescriptions than they should have paid. *See* Amended Complaint

("AC"), ECF 64 ¶¶ 219-28; MTD Opp. at 1, 8-9.[1] *Lewandowski II* does not independently analyze this type of injury, which is separate from injuries due to increased premium contributions. Instead, *Lewandowski II* improperly lumps both forms of injury together, finding "too many variables in how Plan participants' contribution rates are determined" to infer that higher drug costs result in higher payments. Slip op. at 11. Suffice it to say, plan participants' "contribution rates" for premiums have nothing to do with the out-of-pocket drug costs that they pay directly. Where they are overcharged at the pharmacy counter, as Plaintiffs plausibly allege here, they are injured when they pay those excessive charges.

- *Lewandowski II* wrongly implies that overcharges for prescription drugs are somehow excused by the mere fact that participants receive benefits in connection with other covered services. *See Lewandowski II*, slip op. at 11 ("Lewandowski alleges that she overpaid $210 for two prescriptions in 2023. However—in that same year—she received Plan benefits totaling over $200,000."). That is a non-sequitur. Article III requires only that a plaintiff suffer a concrete injury—not that the injury exceed other, collateral benefits. A plan participant who is overcharged $210 for prescriptions suffers that economic harm regardless of whether she properly received coverage for other medical services—just as a television customer who is overcharged for one service (e.g., ESPN+) is harmed even if she received the benefit of other services (e.g., Paramount+ and Disney+) as part of her television package. Moreover, *Lewandowski II* recognizes that Plaintiffs' cost allegations here are pleaded in far more detail than in *Lewandowski*. *See* slip. op. at 10 ("These 57 comparisons pale in comparison to the 260 comparisons made in *Navarro*.").

- Plaintiffs' allegations of increased premium costs here are supported by an expert report that was not before the Court in *Navarro I* or *Lewandowski II*. *See* AC ¶¶ 261-70 & Ex. A (ECF 64-1). Moreover, the focus in *Lewandowski II* on "Defendants' discretion to set participant contribution rates," slip op. at 12, is misguided for the reasons stated in Plaintiffs' brief, *see* MTD Opp. at 19-22, and also has no application to Plaintiff Erica McKinley here, as she indisputably paid 100% of the total premiums under COBRA, *see* AC ¶¶ 18, 256-60; MTD Opp. at 22-23.

- With respect to redressability, Plaintiffs expressly plead the equitable remedy of surcharge, *see* AC ¶¶ 217, 229, 314, which the Eighth Circuit has held is available in this Circuit, *see Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 722 (8th Cir. 2014). Wells Fargo does not deny that surcharge is a recognized form of relief and would redress the alleged harms here. MTD Opp. at 23; *see also* ECF 30 at 14 (admitting that "Plaintiffs' claims under section 502(a)(3) [29 U.S.C. § 1132(a)(3)] seek individual relief and, as such, do not suffer from the redressability issues identified …"). *Lewandowski II* does not address this form of relief or the law allowing it.

[1] Wells Fargo does not dispute Plaintiffs' allegations regarding out-of-pocket costs. MTD Opp. at 1.

Inconsistent with Prior Decision. *Lewandowski II* is also inconsistent with that court's own earlier decision in *Lewandowski v. Johnson & Johnson*, 2025 WL 288230 (D.N.J. Jan. 24, 2025) ("*Lewandowski I*"). In *Lewandowski I*, the court expressly recognized that the plaintiff suffered an injury-in-fact from higher prescription drug costs. *See id.* at *5 ("It is clear to the Court based on these allegations that Plaintiff has suffered an injury-in fact that is traceable to Defendants' alleged ERISA violations. … In plain terms, when Plaintiff spent more money on drugs at the pharmacy, which was allegedly the result of Defendants' breach of fiduciary duties, Plaintiff suffered a cognizable injury."). *Lewandowski I* ruled only that the plaintiff's injuries were not "redressable" because she had hit her out-of-pocket maximum that year. *Id.* Yet when the Second Amended Complaint added a new plaintiff who undisputedly did not hit his out-of-pocket maximum in any year, *see* Exh. B to Def.'s Letter at ¶ 239, the *Lewandowski* court did not address this fact or attempt to reconcile its dismissal with its prior recognition that overpaying for prescription drugs constitutes injury-in-fact. Wells Fargo makes no argument that Plaintiffs hit their out-of-pocket maximums here. *See* MTD Opp. at 9 n.1.

Dismissal Without Prejudice and Leave to Replead Granted. Wells Fargo also omits to point out that the dismissal in *Lewandowski II* was "without prejudice." Slip op. at 13. Plaintiffs were expressly given leave to replead. *Id*. For the reasons above and further discussed in Plaintiffs' briefing, the facts of this case support standing under relevant Eighth Circuit law.

Did Not Address Merits. Finally, *Lewandowski II* was limited to standing and did not reach the merits question of whether the complaint stated a breach of fiduciary duty claim under 29 U.S.C. § 1104. Moreover, the claims in this case are broader insofar as Plaintiffs assert prohibited transaction claims under 29 U.S.C. § 1106 that were not at issue in *Lewandowski II*. For purposes of those prohibited transaction claims, Plaintiffs need only plead a covered transaction with a service provider (such as the Plan's PBM here), and are not required to plead that the charges were unreasonable. *See Cunningham v. Cornell Univ.*, 145 S.Ct. 1020, 1031-32 (2025); MTD Opp. at 2, 27-28.

We appreciate the Court's consideration of this submission.

Respectfully,

/s/ *Kai Richter*
Kai Richter

cc: Defendants' counsel of record (via ECF)