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January 28, 2025

**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 *Lewandowski v. Johnson & Johnson*, 3:24-cv-00671, ECF 70 (D.N.J. Jan. 24, 2025). See ECF 55. The cited decision does not support dismissal of Plaintiffs’ claims here for several reasons.

***Nonbinding and Nonprecedential.*** As an initial matter, *Lewandowski* is neither binding nor precedential. It is an out-of-circuit opinion issued by another district court. And the district court that issued the opinion expressly labeled it “**NOT FOR PUBLICATION**.” Slip op. at 1. Such unpublished opinions are “not precedent” in this circuit. See 8th Cir. R. 32.1A (“Unpublished opinions are decisions a court designates for unpublished status. They are not precedent.”).

***Recognized Injury from Drug Costs.*** To the extent *Lewandowski* has any relevance to the Court’s legal analysis here, Wells Fargo buries the headline. **In *Lewandowski*, the court expressly recognized that the plaintiff suffered an injury-in-fact from higher prescription drug costs.** See slip op. at 10 (“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.”) (citations omitted).

Wells Fargo clings to the portion of the *Lewandowski* opinion which found that the injuries from those drug costs were “not redressable” because the plaintiff had “reached her prescription drug cap” every year. Slip op. at 11.<sup>1</sup> But this holding has no application here for two reasons. ***First***, Wells Fargo has made no argument and presented no evidence that any of the Plaintiffs in this case hit their out-of-pocket maximum, let alone that all four Plaintiffs did so each and every year during the class period. ***Second***, **Wells Fargo has conceded that “Plaintiffs’ claims under Section 502(a)(3) ... do not suffer from the redressability issues”** that concerned the court in *Lewandowski*. ECF 30 at 14 (emphasis added). Wells Fargo only raised redressability issues with respect to Plaintiffs’ claims under Section 502(a)(2).<sup>2</sup> As to Section 502(a)(3), Wells Fargo raised

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<sup>1</sup> “The Court expresse[d] no opinion as to the standing of a hypothetical plaintiff in the same situation who has not reached its annual out-of-pocket cap for expenditures.” Slip op. at 11 n.7.

<sup>2</sup> Wells Fargo’s arguments specific to Section 502(a)(2) are misguided and inconsistent with the Eighth Circuit’s opinion in *Braden*. See ECF 38 at 20-23.

a separate issue regarding whether Plaintiffs' injuries were attributable to "settlor" acts (which they again raise in their notice of supplemental authority, ECF 55 at 2), but *Lewandowski* did not address this issue much less endorse Wells Fargo's position.

***Did Not Address Administrative Fees.*** *Lewandowski* also did not address the issue of excessive administrative fees, which are pled here. See ECF 1 at ¶¶ 139-142. Such administrative fees are not subject to an out-of-pocket cap that presents any purported redressability issue.

***Ignores Law and FTC Findings on Premiums.*** Although the *Lewandowski* court found it "speculative" that the plaintiff suffered an injury in the form of higher premiums, slip op. at 8, its ruling is inconsistent with numerous cases cited in Plaintiffs' brief. See ECF 38 at 10 (citing *Slack v. Int'l Union of Operating Eng'rs*, 83 F. Supp. 3d 890 (N.D. Cal. 2015); *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 275 (3d Cir. 2009)); *id.* at 18-19 (additionally citing *City of Columbus v. Trump*, 453 F. Supp. 3d 770, 787 (D. Md. 2020); *Aetna Inc. v. Insys Therapeutics, Inc.*, 330 F.R.D. 427, 430 (E.D. Pa. 2019); *AARP v. EEOC*, 226 F. Supp. 3d 7, 18 (D.D.C. 2016)). It is also inconsistent with a recently-published FTC Report which found that "inflated drug costs over time also result in higher premiums." FTC Interim Staff Report, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*, at 47 (July 2024).<sup>3</sup> The *Lewandowski* opinion does not address any of this case law or regulatory guidance.

Instead, the opinion as it relates to premiums appears to be based entirely on a misreading of the Third Circuit's decision in *Knudsen v. MetLife Grp., Inc.*, 117 F.4th 570 (3d Cir. 2024). See slip op. at 9 (stating that "*Knudsen* is both controlling and dispositive."). As Plaintiffs have explained, *Knudsen* actually supports Plaintiffs' position and expressly recognized that allegations of increased premiums could support standing. See ECF 38 at 12-13, 19-20. Plaintiffs' allegations of increased premiums here are not speculative because Plaintiffs present data showing that Wells Fargo consistently targeted a stable 75%/25% ratio in premium costs between itself and covered employees. See ECF 1 at ¶¶ 206-07. Wells Fargo notably does not dispute this in the declaration of its Benefits Director. See ECF 38 at 11 ("WFC submitted a declaration in support of its motion to dismiss from its Benefits Director (ECF 31), but that declaration does not dispute *any* of these allegations about how WFC passes on overcharges to employees through increased premiums.").

***Dismissal Without Prejudice and Limited to Facts.*** Wells Fargo omits to point out that the *Lewandowski* court's dismissal order was "without prejudice. Slip op. at 15. Plaintiffs were expressly given leave to replead, *id.*, because the court's opinion was fact-specific. For the reasons already explained, the facts of this case support standing under relevant Eighth Circuit law.

***Did Not Address Merits.*** Finally, the *Lewandowski* court's opinion was limited to standing, and did "not reach" the merits question of whether the operative complaint stated a claim in Counts 1 and 2 relating to excessive costs. See slip op. at 11. Moreover, the claims in this case are broader insofar as Plaintiffs assert prohibited transaction claims that were not at issue in *Lewandowski*.

Respectfully,

/s/ Kai Richter  
Kai Richter

cc: Defendants' counsel of record (via ECF)

<sup>3</sup> [https://www.ftc.gov/system/files/ftc\\_gov/pdf/pharmacy-benefit-managers-staff-report.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf).