UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SETH STERN, et al.,

Plaintiffs,

v.

JPMORGAN CHASE & CO., et al.,

Defendants.

Case No. 1:25-cv-02097-JLR

ORAL ARGUMENT REQUESTED

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION[1]

This Court dismissed Plaintiffs' fiduciary-breach claims alleging excessive drug prices and ordered Plaintiffs to file a Rule 7(a)(7) reply as to any remaining prohibited-transaction claims for plan services. Under *Cunningham v. Cornell University*, that reply needed to "put[] forward specific, nonconclusory factual allegations showing the [29 U.S.C. §1108(b)(2)] exemption does not apply." 604 U.S. 693, 708 (2025) (quotation marks omitted). Plaintiffs devote just four paragraphs of their brief to that task—pointing almost entirely to allegations this Court rejected as insufficient to plausibly allege excessive drug costs. They spend most of their brief relitigating their drug-pricing claims, asking this Court to disregard the Supreme Court's unequivocal articulation of the Rule 7(a)(7) mechanism, and advancing misguided interpretations of §1108(b)(2).

None of those moves works. First, Plaintiffs focus *entirely* on allegations about prescription-drug pricing, which this Court has already held does not involve fiduciary conduct. That conduct therefore cannot form a *fiduciary* prohibited-transaction claim. Plaintiffs' arguments to the contrary ignore this Court's careful and nuanced analysis regarding fiduciary and settlor functions. Because Caremark helped with *both* plan design (*e.g.*, setting the formulary and drug pricing) *and* plan administration (*e.g.*, claims administration and processing prior authorizations), the Court's order gave Plaintiffs the benefit of the doubt that there may be a viable nugget left of this case focused on Caremark's role in providing administrative services to the Plan and not plan-design services to the Plan's settlor. The opposition makes plain that Plaintiffs have no interest in pursuing that case—they point to no allegations whatsoever about Caremark's compensation for

[1] This brief uses the same abbreviations as Defendants' motion ("Mot.," ECF No. 56). Plaintiffs' opposition (ECF No. 60) is abbreviated "Opp."

administrative services—and instead wish to relitigate formulary management and prescription-drug pricing. That should be the end of their case.

Second, Plaintiffs are wrong about how Rule 7(a)(7) works. *Cunningham* "empowers district courts" to order plaintiffs to "file a reply putting forward specific, nonconclusory factual allegations" rebutting a prohibited-transaction exemption invoked by a defendant, and "then dismiss the suits of those plaintiffs who cannot plausibly do so." 604 U.S. at 708 (quotation marks omitted). Full stop. Nothing in *Cunningham* or in Rule 7 requires Defendants to "prove" *their* case in their Answer. Opp. 1, 8, 10-11. Quite the opposite. As Plaintiffs correctly point out elsewhere—this Court is required to disregard the substance of Defendants' pleading and focus entirely on the sufficiency of *Plaintiffs'* allegations in resolving Defendants' motion. Opp. 15 (citing *Lively v. WAFRA Inv. Advisory Grp., Inc.*, 6 F.4th 293, 304 (2d Cir. 2021)). Plaintiffs cannot discharge their pleading obligations by arguing that they have none.

For these reasons and those described below and in Defendants' motion (including Plaintiffs' lack of Article III standing and the untimeliness of their claims), the Court should enter judgment for Defendants.

ARGUMENT

I. Plaintiffs misunderstand the motion-to-dismiss order and *Cunningham*.

The parties fundamentally disagree on two key issues: (1) whether the very conduct this Court squarely held was *nonfiduciary* for purposes of Plaintiffs' §1104(a) claims can be the basis of a *fiduciary* prohibited-transaction claim under §1106(a), and (2) how the Rule 7(a)(7) mechanism works. Plaintiffs appear to agree that resolving either dispute in Defendants' favor would require granting Defendants' motion. Opp. 8-13. And Plaintiffs' arguments on *both* issues are specious and unsupported. Under this Court's motion-to-dismiss decision, Plaintiffs' fiduciary prohibited-transaction claims cannot rest on Defendants' retention of Caremark to assist with drug-pricing-related plan design, which this Court held involved nonfiduciary settlor conduct. Mot. 17. And under *Cunningham*, Plaintiffs' Reply needed to plead specific, nonconclusory facts showing §1108(b)(2) does not apply.

A. Plaintiffs' fiduciary prohibited-transaction claims cannot rest on transacting with Caremark for plan-design services.

The parties fundamentally disagree about the scope of the case that remains. As this Court's nuanced decision acknowledged, Caremark served a dual role with respect to the Plan. It was retained to help with plan-design functions (like formulary management and drug pricing) and with plan-administration functions (like claims administration and processing prior authorizations). MTD Order 24. Defendants read the Court's decision as holding that there is no fiduciary responsibility concerning the former role (and dismissing Plaintiffs' §1104(a) claims based on that role), but permitting narrow prohibited-transaction claims to proceed based on the latter role. Mot. 7-8.

Plaintiffs' opposition makes clear that they have no interest in pursuing plan-administration claims. Instead, they insist that the Court held that their dismissed, nonfiduciary drug-pricing claims can be litigated as fiduciary prohibited transactions. Opp. 11-13. It is impossible to read the statute and the Court's decision this way. The opinion first explains that the gravamen of "Plaintiffs' allegations" challenges "Plan-design decisions" like "set[ting] the benefits promised by the Plan." MTD Order 24 (quotation marks omitted). By challenging "the structure of the pharmacy benefit itself" ("how the PBM was compensated, how drugs were categorized, [and] what pricing benchmarks were used"), the Court explained that Plaintiffs challenged "settlor functions" and not fiduciary conduct. *Id.* at 24-26. So the Court dismissed Plaintiffs' fiduciary-breach claims, which cannot be based on settlor conduct. *Id.* at 24-29.

But Plaintiffs' §1106 claims also must target fiduciary conduct. *See* 29 U.S.C. §1106(a) ("A fiduciary ... shall not ...."); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 87 (2d Cir. 2001); MTD Order 30. Since the Court already determined that hiring Caremark to help with the "structure of the pharmacy benefit" is nonfiduciary activity, it cannot be the basis of §1106 liability. *See, e.g.*, *Malone v. TIAA*, 2017 WL 913699, at *3 (S.D.N.Y. Mar. 7, 2017) (dismissing §1104 and §1106 claims for lack of fiduciary status). The very same conduct that was *not fiduciary* under §1104 cannot be *fiduciary* under §1106, and Plaintiffs nowhere explain how ERISA could be understood that way. They instead say (at 13) that the Court called Defendants fiduciaries "with respect to the prohibited transaction claims" involving "spread pricing." But the Court squarely held the opposite—that "choosing between pricing models" is a "component[] of benefit design." MTD Order 26, 29-30. What can be challenged is only Defendants' transacting with Caremark for its benefits-administration services. *Id.* at 24, 30.

Finally, Plaintiffs are wrong (at 13-14) that Defendants' position would treat "deciding how much to pay for goods and services" as nonfiduciary and thus render the §1108(b)(2) exemption superfluous. Transacting with Caremark for *plan-design services* is nonfiduciary, and so cannot support a prohibited-transaction claim. Transacting with Caremark for *administration-services* could be challenged, but Plaintiffs do not dispute they have offered *no* factual allegations regarding the quality or cost of those services (Mot. 12-13, 17), or how retaining Caremark to provide them for the Plan caused injury-in-fact to Plaintiffs (Mot. 20-28). That is reason enough to grant Defendants' motion.

B. Plaintiffs' Reply needed to assert specific, nonconclusory facts that, taken as true, plausibly establish that §1108(b)(2) is inapplicable.

The parties also fundamentally disagree about how the Rule 7(a)(7) mechanism works. Plaintiffs argue that courts may not dismiss claims following a Rule 7(a)(7) reply unless the reply "admit[s]" the answer's affirmative-defense allegations, "thereby obviating any need to present evidence on any such issue." Opp. 9 (quoting 5 Wright & Miller, *Fed. Practice & Proc.* §1185). Because Plaintiffs' pleadings are not so "self-defeating," they say, Defendants' motion must be denied. Opp. 15, 19 (citation omitted).

That view is unsupported by the very treatise Plaintiffs cite, and it squarely contradicts *Cunningham* and the qualified-immunity cases that *Cunningham* invoked. Wright & Miller lists admitted allegations as *one of* "a number of … reasons why a defendant may try to secure a court order directing the plaintiff to reply" to an answer. *Fed. Practice & Proc.* §1185. But read on. Two sentences later it explains that "[i]n certain instances an additional pleading by the plaintiff may be helpful to the defendant in laying the groundwork for a motion to test the sufficiency of a claim or defense under" Rule 12(c). *Id.*

This is one of those "instances." As *Cunningham* explained, plaintiffs generally need not initially plead around §1108's exemptions to state a §1106 claim. 604 U.S. at 701. That would require "plaintiffs to plead and dispute myriad exceptions before knowing which of them the defendant will seek to invoke." *Id.* at 705. But that does not prevent courts from "insist[ing] that the plaintiff file a reply putting forward specific, nonconclusory factual allegations showing the exemption [invoked by defendant] does not apply." *Id.* at 708 (quotation marks and brackets omitted). If plaintiffs fail to do so, the court "may then dismiss the suit[]." *Id.* *Cunningham* accordingly *does* place a burden on plaintiffs—*if* a district court orders a Rule 7(a)(7) reply.

Plaintiffs erroneously treat the Supreme Court's clear directive as a "passing reference" that can be ignored. Opp. 1-2, 9-10. But this discussion was central to *Cunningham*'s holding. *The* animating practical concern was that "plaintiffs could too easily get past the motion-to-dismiss stage and subject defendants to costly and time-intensive discovery." 604 U.S. at 708. Rule 7(a)(7) was the government's response that the Court engaged with and ultimately adopted.[2]

Defendants' view also comports with the qualified-immunity caselaw discussed in Plaintiffs' favored treatise and in *Cunningham*. Indeed, *Cole v. Carson* said that replies must be "particularized to address the defense of immunity." 935 F.3d 444, 446 (5th Cir. 2019). That "particularized" procedure asks for a "tailored" reply and may require plaintiffs to plead additional facts that, "if true, would overcome the defense of qualified immunity." *Est. of Munoz by Ruelas v. Ford*, 402 F. Supp. 3d 344, 352 (E.D. Tex. 2019) (quotation marks omitted).

Pointing to a few of their own qualified-immunity cases (at 10-11), Plaintiffs claim that their pleading failures are irrelevant because the Court cannot dismiss their claims unless Defendants have "prove[n]" their affirmative defense. But none of those cases involved a Rule 7(a)(7) reply, and only one was even decided on a Rule 12(c) motion. *See Shechter v. Comptroller of City of New York*, 79 F.3d 265, 270 (2d Cir. 1996). And unlike in that case, Defendants here have not made "bald assertion[s]" amounting to "conclusions of law" "not warranted by any asserted facts." *Id.* (quotation marks omitted); *see* Mot. 9; Answer (Third Defense) ¶¶13, 18.

Plaintiffs' argument also conflicts with their (correct) argument that the Court must resolve this motion by reference *only* to Plaintiffs' allegations, and not the content of Defendants' Answer. Opp. 15. The point of an answer in this context is not to have a defendant *prove* the exemption. It is to put plaintiffs on notice which exemptions are being asserted, so they know what specific, nonconclusory facts to assert in any reply. *See Cunningham*, 604 U.S. at 705; *Dalton v. Freeman*,

[2] *See* U.S. Br. 10-11, 30-31, https://tinyurl.com/3d5w25pn; Tr. 59-60, https://tinyurl.com/yvthtsvr (Justice Gorsuch positing that once there is a "pled affirmative defense, a particular one, not just a laundry list," then "you've got to plead facts" in that reply, and "then you might be able to *Twiqbal* it"); Tr. 21, 27 (similar discussions by Justices Alito and Kavanaugh).

2025 WL 3771345, at *2 (E.D. Cal. Dec. 31, 2025) (ordering Rule 7(a)(7) reply). An answer's allegations might inform *whether* to order a Rule 7(a)(7) reply, *Cunningham*, 604 U.S. at 708, but they are irrelevant to the subsequent Rule 12(c) inquiry, which examines whether the plaintiffs' pleadings contain the requisite factual detail plausibly defeating the exemption. *Lively*, 6 F.4th at 304.

Finally, Plaintiffs are wrong (at 11) that the Supreme Court violated the Rules Enabling Act in *Cunningham*. Rules Enabling Act problems do not exist if the rule "really regulates procedure." *Berk v. Choy*, 607 U.S. 187, 198 (2026) (citation omitted). It does not matter if the purportedly "displaced" law is "substantive," as Plaintiffs claim (at 11). *Id.* at 199 (the Court "rejected that approach eight decades ago"). Here, since the Rule 7(a)(7) process determines only "what plaintiffs must present to the court about their claims," then it "really regulates procedure" and does not violate the Rules Enabling Act. *Id.*

Plaintiffs were required to set forth specific, nonconclusory facts defeating the §1108(b)(2) exemption. They spend just four paragraphs of a 28-page brief summarily arguing (in the alternative) that they satisfied that obligation—without identifying any pleaded facts about Caremark's plan-administration services (as opposed to drug pricing)—and devote the rest of their brief to resisting the burden altogether. That, too, is reason alone to grant Defendants' motion.

II. Plaintiffs' prohibited-transaction claims fail.

A. Plaintiffs misstate the "services necessary" requirement.

Plaintiffs challenge §1108(b)(2)'s necessary-services requirement by misinterpreting the statute. They start by ignoring §1108(b)(2)'s plain language, claiming (at 16-17) that *Cunningham* and trust-law principles support reading the "necessary" inquiry to explore whether *outsourcing* a service was necessary, instead of whether the *services secured* were necessary for the Plan's operation. But statutory interpretation always starts with the text. *United States v. Maynard*, 743 F.3d 374, 378 (2d Cir. 2014).

Here, that text tells us the exemption applies if any secured "office space, or legal, accounting, or other services" are "necessary for the establishment or operation of the plan"—"necessary" modifying "other services" and the list preceding it. Plaintiffs say "necessary" modifies "contracting," appearing 19 words earlier. But that view runs headlong into the "last-antecedent rule," which "provides that a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Bank of Am. Corp. v. United States*, 148 F.4th 171, 176 (4th Cir. 2025) (quotation marks omitted). The "necessary" phrase "immediately follows" "other services," and so is most naturally read as modifying that term, rather than a verb clause at the beginning of the sentence. Although Plaintiffs claim this reading would absurdly result in securing "office space" being exempt, even if "office space" were not "necessary," Opp. 18, another canon of construction resolves that concern: When modifiers follow enumerated lists and could sensibly apply to the whole list rather than just the final item, they usually do. *United States v. Bass*, 404 U.S. 336, 339-40 (1971). Here, "necessary" reads naturally as qualifying every item in the list preceding it, including "office space."

Plaintiffs have no answer to the statutory text, or to the DOL regulation interpreting §1108(b) precisely as Defendants do: "A service is necessary for the establishment or operation of a plan within the meaning of section 408(b)(2) … if the service is appropriate and helpful to the plan obtaining the service in carrying out the purposes for which the plan is established or maintained." 29 C.F.R. 2550.408b-2(b). DOL promulgated this regulation shortly after ERISA's enactment, *see* 42 Fed. Reg. 32389, 32390 (June 24, 1977), and courts "give an agency's interpretations ... considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use," *Davis v. United States*, 495 U.S. 472, 484 (1990).

Plaintiffs claim (at 18) that such a reading causes superfluity, because §1104 already prevents paying for unnecessary services. But there is nothing strange about two provisions preventing the same conduct for different reasons, which is why ERISA plaintiffs virtually always challenge excessive recordkeeping fees under *both* §1104 and §1106—including in *Cunningham*. *See Cunningham v. Cornell Univ.*, 86 F.4th 961, 970-71 (2d Cir. 2023), *rev'd and remanded*, 604 U.S. 693 (2025). Moreover, violations of §1106 (but not §1104) carry independent tax consequences under 26 U.S.C. §4975.

Finally, neither *Cunningham* nor the common law of trusts supports departing from the statutory text. *Cunningham* did not address §1108(b)(2)'s scope, and it expressly declined to rely on trust law. 604 U.S. at 702 n.4. Courts, moreover, have rejected importing trust-law principles into the prohibited-transaction context since the entire prohibited-transaction scheme departs from the common law. *See Reich v. Compton*, 57 F.3d 270, 278 n.12 (3d Cir. 1995) (Alito, J.).

Section 1108(b)(2) applies if the services secured are necessary for the operation of the Plan. Plaintiffs do not even attempt to plead facts showing that benefits-administration services were unnecessary for the Plan here.

B. Plaintiffs have not pleaded facts showing that Caremark received more than "reasonable compensation."

Plaintiffs spend most of this section of their brief resisting the obligation to plead *any* facts and attacking the Answer as insufficient to prove Defendants' case. Opp. 19-22. Those arguments are wrong for the reasons explained above. *See supra* pp. 4-7.

Plaintiffs' brief remaining argument attempting to discharge their *actual* pleading burden using NADAC comparisons is meritless. Opp. 22-24. This Court already rejected NADAC prices as inapt comparators even as to the already dismissed claims for the Plan's *drug pricing*, MTD Order 19 n.5, and Plaintiffs give no reason to revisit that decision. Instead, they insist (at 5, 13 n.4, 23) that Defendants have supposedly now admitted that NADAC comparisons are useful by neither admitting nor denying their NADAC allegations. But that wrongly assumes that Defendants were required to respond to allegations concerning the dismissed drug-pricing theories, *see Mechigian v. Art Cap. Corp.*, 639 F. Supp. 702, 704 (S.D.N.Y. 1986), or that selectively quote from uncited publications (*e.g.*, Answer ¶¶ 47, 60, 69, 88, 101, 138-144, 142-149). Since they were not, the failure to deny does not operate as an admission. 5 Wright & Miller, *Fed. Practice & Proc.* §1279 ("an admission by failure to deny only applies to allegations in those pleadings to which a responsive pleading is required"). Moreover, Plaintiffs mischaracterize Defendants' Answer as offering only "non-responses" (Opp. 5, 13 n.4, 23), while ignoring the specific denials contained in the very allegations Plaintiffs cite. *See, e.g.*, Answer ¶¶ 111-125. In any event, Plaintiffs' drug-pricing allegations are irrelevant because they do not speak to Caremark's compensation *for administrative services*, which is what the §1108(b)(2) exemption is all about.

Plaintiffs' pleadings, taken as true, do not plausibly establish Caremark's benefits-administration compensation was unreasonable.

III. Plaintiffs' claims are untimely.

Plaintiffs' claims are also untimely. Mot. 17-20. Plaintiffs point (at 25) to the "renewal" of the Caremark contract and "ongoing payments" under that contract to evade the limitations bar. But Defendants have already explained why that theory fails: the initial transaction starts the clock. Mot. 18-20. While Plaintiffs point (at 25-26) to some contrary district court cases, those decisions do not grapple with the problem inherent in accepting "renewal" or "ongoing payments" theories. Resetting the repose period upon each "renewal" or "payment" hardly comports with "[t]he purpose of a statute of repose ... to create an absolute bar on a defendant's temporal liability."

California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc., 582 U.S. 497, 507 (2017) (quotation marks omitted).

That problem is acute here, given Plaintiffs' theory that *any* outsourcing constitutes a prohibited transaction. Plaintiffs do not deny that Defendants outsourced plan-administration services well beyond six years ago. Renewing that arrangement has nothing to do with Plaintiffs' theory of liability, and so should not be treated as "the last action which constituted a part of the breach or violation." 29 U.S.C §1113(1).

IV. Plaintiffs lack standing.

Defendants explained in detail how Plaintiffs lack standing for their remaining prohibited-transaction claims because they failed to plead facts showing that their purported harms (payments to pharmacies) either (1) are fairly traceable to retaining Caremark for benefits-administration services, or (2) plausibly reflect an *over*charge. Mot. 20-28.

Plaintiffs offer essentially no substantive response. They insist instead (at 27) that the Court "already ruled that Plaintiffs have Article III standing to pursue their prohibited-transaction claims" and should not revisit that ruling. But Plaintiffs are mostly wrong.[3] When the Court previously addressed standing, it focused on injuries traceable to the gravamen of Plaintiffs' Complaint—the drug-pricing-related fiduciary-breach claims—not their prohibited-transaction claims. But Plaintiffs must establish standing for *each* claim they assert, and their supposed standing to assert claims and theories that have since been dismissed does not supply standing for the more limited prohibited-transaction claims that remain. *See Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 64 (2d Cir. 2012).

[3] Defendants' motion made clear that it was asking the Court to reconsider its "overcharge" injury-in-fact ruling and explained the legal basis for that request under Second Circuit precedent. Mot. 3, 25-28 & n.15. But the remaining standing issues are specific to traceability and Plaintiffs' prohibited-transaction claims, which the Court did not previously address.

Plaintiffs also say (at 27) there is a "false dichotomy" at play—that separating out "compensation" "for 'retail-drug costs'" does not make sense, since §1108(b)(2) requires "consider[ing] all compensation" paid for the services provided. But Article III standing asks whether Plaintiffs' pocketbooks were in fact injured, and in a way traceable to the alleged prohibited-transactions—not the merits question of what comprises Caremark's total compensation.

What little else Plaintiffs say about standing is meritless. They attack (at 27) the premise that this Court already limited their claims, but that premise is inescapable. *See supra*, pp. 3-4. The Court, moreover, did not already "reject[]" Defendants' traceability arguments. Indeed, it understood "Defendants here [to] raise no arguments with respect to the causal element of Article III standing." MTD Order 13. This motion confirms that they do, and Plaintiffs cannot meet their Article III burden by asking the Court to skirt a jurisdictional issue.

CONCLUSION

The Court should grant Defendants' motion and enter judgment in Defendants' favor.

Dated: July 24, 2026

Respectfully submitted,

/s/ James O. Fleckner

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CERTIFICATE OF COMPLIANCE

I, James O. Fleckner, hereby certify that the foregoing Reply Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings contains 3,499 words, as reported by Microsoft Word, not including those portions of the document that do not count against the word limit.

/s/ James O. Fleckner
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