IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

JOSEPH B. GLICK, individually and as a representative of a class of participants and beneficiaries of the Thedacare Retirement and 403(b) Savings Plan,	)	
Plaintiff,	)	
	)	Case No. 1:20-cv-1236-WCG
v.	)	
THEDACARE, Inc., *et al.*,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS IN LIGHT OF THE SEVENTH CIRCUIT'S NEW CONTROLLING DECISION IN *ALBERT V. OSHKOSH CORPORATION*

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I. INTRODUCTION

The Seventh Circuit's recent opinion in *Albert v. Oshkosh Corp*., 47 F.4th ___, 2022 WL 3714638 (7th Cir. Aug. 29, 2022), *aff'g*, 2021 WL 3932029 (E.D. Wis. Sept. 2, 2021) (Griesbach, J.), affirmed dismissal of materially indistinguishable claims to those that Joseph Glick asserts here, and provides grounds for the Court to reconsider its order granting in part defendants' motion to dismiss and to instead dismiss Mr. Glick's Complaint in its entirety.[1]

To briefly summarize, as relevant here, Mr. Glick alleges that ThedaCare, Inc. and its Board of Directors (together, "Defendants" or "ThedaCare") violated the duty of prudence under the Employee Retirement Income Security Act ("ERISA") with respect to the ThedaCare Retirement and 403(b) Savings Plan's (the "Plan") because Plaintiff believes: (1) the Plan's recordkeeping fees were "excessive"; (2) the Plan includes investment share classes that did not result in the lowest "Net Investment Expense" to participants; (3) the Plan's actively managed investment and stable value investment options charged excessive fees compared to available alternatives; and (4) the Plan's "Managed Account Services"—Managed Advice and PortfolioXpress—were too expensive. ThedaCare moved to dismiss each of these claims, among others, under Rule 12(b)(6).[2] On August 25, 2022, the Court issued a Decision and Order ("Order") denying in part ThedaCare's motion to dismiss, largely based on the U.S. Supreme Court's decision in *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022). *See* ECF No. 33.

Just four days later, the Seventh Circuit issued its decision in *Oshkosh*, a precedential opinion that affirmed this Court's 12(b)(6) dismissal with prejudice of virtually identical ERISA

[1] The plaintiff in *Oshkosh* filed a Petition for Panel Rehearing, which the Seventh Circuit denied. *Albert v. Oshkosh Corp.*, Case No. 21-2789, ECF No. 56 (7th Cir. Sept. 21, 2022).

[2] The Court dismissed Mr. Glick's duty of loyalty claims and a duty of prudence claim based on ThedaCare's alleged failure to disclose revenue sharing information. ECF No. 33 at 15-16. These claims are not subject to this Motion.

fiduciary-breach claims in a lawsuit filed in this Court by the same counsel representing Mr. Glick. In doing so, the Seventh Circuit clarified *Hughes*' limited reach. While *Hughes* rejected a narrow portion of the Seventh Circuit's prior analysis—*i.e.*, the "assumption that the availability of a mix of high-cost and low-cost investment options in a plan insulated fiduciaries from liability"—it did not create "a radically different approach" to evaluating the plausibility of fiduciary-breach claims under ERISA. *Oshkosh Corp*., 2022 WL 3714638, at *6, 8. Instead, the bulk of the Seventh Circuit's reasoning from *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020), remains intact following *Hughes*, as do the Seventh Circuit's prior decisions in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), and *Loomis v. Exelon Corp.*, 658 F.3d 667 (7th Cir. 2011). *Oshkosh*, 2022 WL 3714638, at *6 (rejecting suggestion "that the reasoning in *Hecker* and *Loomis* no longer stands"); *id*. at *1 (clarifying that this Court's dismissal ruling in *Oshkosh* did not rely on the single and limited "proposition that the Supreme Court rejected in *Hughes.*").[3]

Oshkosh controls here, and ThedaCare respectfully moves this Court to reconsider its Order due to this newly established precedent. *See e.g.,* Fed. R. Civ. P. 54(b). Indeed, this is precisely the type of intervening change in authority that a motion for reconsideration is designed to address. *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571-72 (7th Cir. 2006) (explaining that reconsideration is justified when there is a "compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous").

Applying the Seventh Circuit's decision in *Oshkosh*, each of Mr. Glick's remaining claims fails as a matter of law and should be dismissed. As to his recordkeeping fee claim, *Oshkosh* clarified three primary points. *First*, the Seventh Circuit reaffirmed its "reject[ion]" of "the notion that a failure to regularly solicit quotes or competitive bids from service providers breaches the

[3] The Seventh Circuit has yet to issue a ruling in *Hughes* following remand.

duty of prudence." *Id.* at *6 (citing *Divane*, 953 F.3d at 990-91). *Second*, the Seventh Circuit confirmed that a proffered comparison of a plan's recordkeeping fees with those allegedly paid by a "potentially random assortment" of other plans "from around the country" is not sufficient to demonstrate a plausible claim. *Id.* at *5-6. *Third*, *Oshkosh* made clear that to state a plausible imprudence claim based on allegedly excessive fees, a plaintiff must allege that the "fees were excessive relative to the services rendered." *Id.* at *6 (quoting *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1169 (6th Cir. 2022)). Applying these principles, the Seventh Circuit affirmed this Court's well-reasoned analysis holding that the plaintiff in *Oshkosh* failed to assert a plausible fiduciary breach based on allegedly excessive recordkeeping fees. The same result should follow here, as the Complaint's recordkeeping-fee allegations are virtually identical to those from the *Oshkosh* complaint. *Compare Albert v. Oshkosh Corp.*, No. 20-cv-901, Am. Compl., ECF No. 20 ("*Oshkosh* Am. Compl.") (¶¶ 88-114) *with* Am. Compl., ECF No. 14 (¶¶ 88-114).

Mr. Glick's share class claim fares no better—*Oshkosh* rejected the precise "net-expense theory" that Mr. Glick relies on. 2022 WL 3714683, at *7. *Compare Oshkosh* Am. Compl. ¶¶ 128-168 with Am. Compl. ¶¶ 126-164. The Seventh Circuit also affirmed dismissal of the same investment management fee claim that Mr. Glick asserts because bare allegations regarding differences in cost alone are not enough to state an imprudence claim. Rather, as the Seventh Circuit held, "more detailed allegations providing 'a sound basis for comparison'" must be pleaded. *Oshkosh*, 2022 WL 3714638, at *8 (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018)). The complaint in *Oshkosh* failed to state a claim based on the same allegations, charts, and comparisons that Mr. Glick relies on here with respect to the Plan's actively managed investments. *Compare Oshkosh* Am. Compl. ¶¶ 128-168 *with* Am. Compl. ¶¶ 126-164; *compare generally Oshkosh* Am. Compl. ¶¶ 115-127, 169-196, 257-270 *with* Am. Compl. ¶¶ 115-

125, 165-195, 295-309. The Court also should dismiss Mr. Glick's claim relating to the Plan's actively managed stable value product, which is just another iteration of the contention that ThedaCare could have selected a less-expensive alternative. The same reasoning applies to Mr. Glick's claim premised on the Plan's managed account services. Absent any basis for comparison regarding the investment fees and managed account service fees, the claims relying on those allegations should be dismissed under *Oshkosh*. Finally, Mr. Glick's failure to monitor claims, which are wholly derivative of his breach of prudence claims, cannot survive *Oshkosh*.

For these reasons, and those described below, ThedaCare respectfully asks this Court to reconsider its Order based on *Oshkosh* and dismiss the Amended Complaint with prejudice.

II. PROCEDURAL HISTORY

Mr. Glick filed his original complaint in this matter in August 2020. In response to ThedaCare's motion to dismiss, Mr. Glick filed the operative complaint, the Amended Complaint, on October 29, 2020. Mr. Glick's Amended Complaint alleges ThedaCare violated its fiduciary duties in three primary ways: permitting Plan participants to pay allegedly excessive recordkeeping fees (Count I); offering excessively expensive managed account services (Count II); and selecting excessively expensive investments (Count III). He also asserts derivative failure to monitor claims relating to these same purported breaches (Count IV-VI). *See generally* Am. Compl.

ThedaCare moved to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6), arguing that Mr. Glick's claims failed under then-controlling Seventh Circuit decisions in *Divane v. Northwestern University*, 953 F.3d 980 (7th Cir. 2020), *Hecker*, 556 F.3d 575 and *Loomis*, 658 F.3d 667. (Dkt. 17-18.) While that motion was pending, this Court dismissed ERISA fiduciary-breach claims that virtually identical to those alleged here. *Albert v. Oshkosh Corp.*, 2021 WL 3932029, at *1 (E.D. Wis. Sept. 2, 2021) (Griesbach, J.). A few weeks later, on

September 30, 2021, this Court stayed this action because the Supreme Court granted certiorari in *Divane*. *See* ECF No. 26. On January 24, 2022, the Supreme Court vacated *Divane* and remanded to the Seventh Circuit for reconsideration. This Court then lifted the stay imposed in this case and invited the parties to submit supplemental briefings addressing the import of the Supreme Court's decision in *Hughes*. ECF No. 27.

On August 25, 2022, this Court issued its Order.[4] "With the[] considerations [in *Hughes*] in mind," this Court declined to dismiss the duty-of-prudence and duty-to-monitor claims based on ThedaCare's alleged payment of excessive recordkeeping fees, offering of higher-cost actively managed and stable value investments, and the use of excessively expensive managed account services. Order at 11-15. Less than a week later, the Seventh Circuit issued its controlling decision in *Oshkosh*, which affirmed dismissal of materially identical claims. This motion followed.

III. DISCUSSION

A. Legal Standard.

Federal Rule of Civil Procedure 59(e) permits this Court to alter or amend a prior judgment, and Rule 54(b) allows a court to revise any order or decision adjudicating "fewer than all the claims." Federal district courts, moreover, have "inherent authority to reconsider interlocutory orders any time before final judgment is entered." *Eivaz v. Edwards*, 2015 WL 59347, at *1 (E.D. Wis. Jan. 5, 2015) (Griesbach, J.) (collecting cases). Against this backdrop, reconsideration of the Order is justified when there is a "compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Santamarina*, 466 F.3d at 571-72; *Birch Hill Real Estate, LLC v. Breslin*, 2019 WL 4278505, at *2 (E.D. Wis. Sept. 10, 2019) (Griesbach,

[4] The Court dismissed Mr. Glick's disloyalty claims in Counts I through III and prudence claim based on ThedaCare's alleged failure to disclose revenue sharing information. Order at 15-16.

J.); *see also Bishop v. Bosquez*, 2018 WL 10550314, at *1 (E.D. Wis. Sept. 7, 2018), *aff'd*, 782 F. App'x 482 (7th Cir. 2019) (recognizing that "new controlling law" is a proper basis to reconsider a decision) (Griesbach, J.).

Issued just a few days after the Order, *Oshkosh* established new precedent regarding Plaintiff's ERISA claims here. This type of intervening change in controlling authority warrants reconsideration of the Order. *Santamarina*, 466 F.3d at 571–72; *see Highway J Citizens Grp., U.A. v. U.S. Dep't of Transp.*, 656 F. Supp. 2d 868, 881–82 (E.D. Wis. 2009) (reconsidering prior ruling following clarification provided by intervening authority); *Doster Lighting, Inc. v. E-Conolight, LLC*, 2015 WL 3776491, at *1 (E.D. Wis. June 17, 2015) (granting reconsideration when "new caselaw issued after the court's decision was announced"). "Not to reconsider in such circumstances would condemn the parties to the unedifying prospect of continued litigation when they knew that a possibly critical ruling was in error and . . . would compel a reversal of the final judgment at the end of the case." *Santamarina*, 466 F.3d at 572; *see also Texas Ujoints, LLC v. Dana Holding Corp.*, 2015 WL 9295394, at *3 (E.D. Wis. Dec. 21, 2015), *aff'd*, 844 F.3d 617 (7th Cir. 2016) (recognizing reconsideration as a "useful mechanism" when "immediate correction will save time and expense in the long run" (quoting *Eivaz*, 2015 WL 59347, at *1)).

B. Mr. Glick's Recordkeeping Fee Claim Fails As A Matter of Law Under The Seventh Circuit's Controlling Decision In *Oshkosh* And Related Precedent.

Oshkosh forecloses Mr. Glick's recordkeeping fee claim. He alleges the Court should infer a flawed fiduciary process with respect to recordkeeping because ThedaCare purportedly (1) did not engage in a competitive bidding process for recordkeeping services and (2) the Plan's recordkeeping fees exceeded the average fees of nineteen "comparable" plans. Am. Compl. ¶¶

88-114. Virtually identical recordkeeping claims were raised by Mr. Glick's counsel—and rejected—in *Oshkosh*.[5] *Compare Oshkosh* Am. Compl. (¶¶ 88-114) *with* Am. Compl. (¶¶ 88-114).

Oshkosh squarely affirmed this Court's conclusion that a plaintiff cannot plausibly allege imprudence based on these theories. The Seventh Circuit in *Oshkosh* explained that in *Divane*—relying on *Hecker* and *Loomis*—it "rejected the notion that a failure to regularly solicit quotes or competitive bids from service providers breaches the duty of prudence." 2022 WL 3714638, at *6. It went on to note that *Hughes* neither disposed of the *Hecker* and *Loomis* precedents, nor did it "hold that fiduciaries are required to regularly solicit bids from service providers." *Id*. Accordingly, a plaintiff cannot state a plausible claim by alleging the fiduciaries failed to solicit recordkeeping bids. *Id.*

The Seventh Circuit also held that the *Oshkosh* plaintiff's comparison of the plan's fees to a "random assortment" of comparator plans, the same type of comparison Mr. Glick relies on, lacked "the kind of context that could move this claim from possibility to plausibility." *Id.* at *5-6 (quoting *Smith*, 37 F.4th at 1169). That is because the complaint lacked any allegations suggesting "that the [recordkeeping] fees were excessive relative to the services rendered." *Id*. at *6 (quoting *Smith*, 37 F.4th at 1169). The Amended Complaint suffers the same fatal flaws: although it alleges in conclusory fashion that all recordkeepers provide the same services (like the

[5] *Compare generally* Am. Compl. ¶¶ 71-114, 271-282, *with Oshkosh* Am. Compl. ¶¶ 71-114, 245-256; *compare, e.g.*, Am. Compl. ¶ 92 ("Defendants failed to regularly solicit quotes and/or competitive bids from covered service providers . . . in order to avoid paying unreasonable fees for RK&A services"), *with Oshkosh* Am. Compl. ¶ 92 (same); *compare also*, *e.g.*, Am. Compl. ¶ 108 ("From the years 2014 to 2019, and because Defendants did not act in the best interests of the Plan's participants, and as compared to other Plans of similar sizes with similar amounts of money under management, the Plan actually cost its Participants a total minimum amount of approximately $2,343,246 in unreasonable and excessive RK&A fees"), *with Oshkosh* Am. Compl. ¶ 108 (same but alleging years "2015 to 2018" and "approximately $2,722,365 in unreasonable and excessive RK&A fees").

Oshkosh complaint did), it is devoid of any facts describing the specific services that Transamerica provided to the Plan and its participants, the services purchased by the alleged comparator plans, or how a hypothetical lower-cost provider would provide the same level of services. *See generally* Am. Compl. ¶¶ 71-114, 271-282. Furthermore, although the Amended Complaint here (like the *Oshkosh* complaint) alleges that the Plan paid more for recordkeeping than a "random assortment" of other plans, it does not even allege that the Plan's fees were above average, let alone outside "the range of reasonable judgments" that other fiduciaries make. *Oshkosh Corp*., 2022 WL 3714638, at *4-5. The recordkeeping fee claim fails as a matter of law under *Oshkosh*, *Hecker*, and *Loomis*.

C. *Oshkosh* And Related Precedent Requires The Dismissal Of Mr. Glick's Share Class Claim.

Mr. Glick asserts that ThedaCare breached its fiduciary duties by selecting inappropriate "share classes" for some of the Plan's investments and bases his claim on a "net investment expense to retirement plans" theory of liability. Am. Compl. ¶¶ 126-164. In its Order, this Court noted that "the Seventh Circuit has not addressed imprudence based on a net investment expense to retirement plans theory (primarily because it appears to be a concept created by Plaintiff)." Order at 14. The Seventh Circuit in *Oshkosh* now has addressed and rejected the "net-expense theory" as a matter of law. 2022 WL 3714683, at *7. Specifically, the Seventh Circuit found no support for this "novel" theory and concluded that "while a prudent fiduciary might consider such a metric, no court has said that ERISA *requires* a fiduciary to choose investment options on this basis . . . [w]e see no reason to impose such a requirement here." *Id*. The same reasoning applies to Mr. Glick's nearly identical share class allegations. *Compare Oshkosh* Am. Compl. ¶¶ 128-168 with Am. Compl. ¶¶ 126-164. As such, the Court should dismiss the share class claim.

D. *Oshkosh* And Related Precedent Requires The Dismissal Of Mr. Glick's Excessive Investment Fee Claims.

Mr. Glick posits that ThedaCare breached its duty of prudence because the Plan contained higher-cost actively managed investment options instead of purportedly comparable and lower-cost passively managed investments. *See* Am. Compl. ¶ 190. This Court reasoned that Mr. Glick does not "generally oppose" actively managed funds but, rather, he alleges ThedaCare failed to make "specific and informed" findings regarding "cost" when selecting those investments. Order at 13. The Court concluded that "[t]he difference in cost" alone between the Plan's funds and Plaintiff's preferred funds created the inference that ThedaCare breached its duties. *Id*.

Oshkosh rejected the identical claim and explained that the "fact that actively managed funds charge higher fees than passively managed funds is ordinarily not enough to state a claim because such funds may also provide higher returns," *Oshkosh*, 2022 WL 3714638, at *7 (citing *Smith*, 37 F.4th at 1165). *See also Hecker*, 556 F.3d at 586 ("nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund"); *Loomis*, 658 F.3d at 670 (same).[6] The Seventh Circuit reemphasized that "the cheapest investment option is not necessarily the one a prudent fiduciary would select." *Oshkosh*, 2022 WL 3714638, at *5. *Oshkosh* went on to hold that—regardless of whether investments are active or passive—allegations that a fiduciary "failed to consider materially similar and less expensive alternatives to the Plan's investments options" are not enough to state a claim. *Id.* at *8 (quoting *Oshkosh*

[6] Other Circuits have also endorsed this reasoning after *Hughes*. *See Smith*, 37 F.4th at 1166 (holding that plaintiff's allegations that actively managed funds had high fees were insufficient to state ERISA claim because "there is still room for offering an actively managed fund that costs more but may generate greater returns over the long haul," so "these claims require evidence that an investment was imprudent from the moment the administrator selected it, that the investment became imprudent over time, or that the investment was otherwise clearly unsuitable for the goals of the fund based on ongoing performance"); *Forman v. TriHealth, Inc.*, 40 F.4th 443, 449 (6th Cir. 2022).

Amended Complaint).[7] The plaintiff in *Oshkosh* and Mr. Glick assert virtually identical investment-related imprudence claims, relying on similar "comparative tables" showing the plan's actively managed funds and cheaper alternatives.[8] Mr. Glick's investment fee claim cannot survive *Oshkosh*.

Likewise, Mr. Glick's attack on the Prudential GIC is no different from his other investment or fee challenges and fails as a matter of law for the same reasons. Mr. Glick alleges only that ThedaCare might have selected an unidentified "Benchmark GIC" that allegedly cost less or performed better. Am. Compl. ¶ 196; Order at 12. As this Court explained in its Order, this theory of imprudence is simply that ThedaCare failed to consider "materially similar and less expensive alternative." Order at 13. That does not state a claim under *Oshkosh, Hecker,* and *Loomis*, as described above.[9]

E. Mr. Glick's Imprudence Claim Based On Managed Account Service Fees Fails As A Matter Of Law Under *Oshkosh* And Related Precedent.

Mr. Glick separately challenges the Plan's inclusion of two optional managed account services through Transamerica, Managed Advice and PortfolioXpress. The Court permitted that

[7] *Compare Oshkosh* Am. Compl. ¶ 190 ("Defendants failed to consider materially similar and less expensive alternatives to the Plan's investment options.") *with* Am. Compl. ¶ 190 ("Defendants failed to consider materially similar but cheaper alternatives to the Plan's investment options.").

[8] *Compare generally Oshkosh* Am. Compl. ¶¶ 115-127, 169-196, 257-270 *with* Am. Compl. ¶¶ 115-125, 165-195, 295-309; *compare, e.g.*, *Oshkosh* Am. Compl. ¶ 176 ("During the Class Period and based on the charts above, the investment options selected by the Plan Fiduciaries were 986% more expensive than passive options covering the same asset allocation category.") *with* Am. Compl. ¶ 133 ("During the Class Period and based on the charts above, the investment options selected by Plan Fiduciaries were 637.27% more expensive than prudent alternative and less expensive options covering the same asset category.").

[9] One of the funds the plaintiff challenged in *Oshkosh* was a money market fund, which is similar to the stable value fund at issue here. *Oshkosh* Am. Compl. ¶ 172 (Fidelity Government Cash Reserves Fund). The Seventh Circuit considered those allegations no different from any other investment-fund challenge, and that applies with equal force here.

claim to proceed because Mr. Glick identified five "similarly situated plans" that purportedly paid less for "materially identical managed account services" provided by Transamerica. Order at 15. This theory of breach regarding the managed account services rests on the same fundamentally flawed premise as the recordkeeping fee allegations rejected in *Oshkosh*: *i.e.*, ThedaCare's process must have been imprudent because a "random assortment" of other plans paid less for managed account services.[10] Indeed, this claim is even weaker than the recordkeeping fee claim, because Mr. Glick does not even allege that the allegedly "comparable" plans he identified actually were comparable, i.e., that they had a similar number of participants or asset size as the Plan here. As discussed above, the Seventh Circuit in *Oshkosh* has held that such allegations are insufficient to state a claim, and they should be dismissed.

F. The Court Should Dismiss Mr. Glick's Derivative Failure To Monitor Claims.

In Counts IV, V and VI, Mr. Glick alleges that ThedaCare breached a duty to monitor. Am. Compl. ¶¶ 310-330. Because these claims are wholly derivative of his prudence and (already dismissed) loyalty claims, which fail for the reasons outlined above, the Court should follow *Oshkosh* and dismiss these derivative claims. *Oshkosh*, 2022 WL 3714638, at *9 (dismissing failure to monitor claims because "duty to monitor claims rise or fall with . . . duty of prudence and duty of loyalty claims").

G. The Court Should Dismiss The Amended Complaint With Prejudice.

After the Seventh Circuit issued its decision in *Oshkosh*, counsel for ThedaCare and Plaintiff discussed their respective views of the impact here. ThedaCare's counsel explained that a motion for reconsideration based on *Oshkosh* would be forthcoming. Plaintiff indicated he would

[10] Mr. Glick also asserts ThedaCare could have offered a less-expensive managed account service from a different provider. Am. Compl. ¶ 227. That claim is similarly flawed. *Oshkosh*, 2022 WL 3714638, at *8.

move to amend if the Court granted reconsideration. But if Plaintiff intends to seek leave to amend, then now is the proper time to take that step, as Plaintiff's counsel has done in other cases following the *Oshkosh* ruling.[11] That will permit the Court to review Plaintiff's allegations once, through the lens of the *Oshkosh* decision. Given Plaintiff's decision to forego a motion to amend, the Court should decline any future request to amend and should dismiss Plaintiff's claims with prejudice.

IV. CONCLUSION

ThedaCare respectfully requests that the Court reconsider its Order and dismiss the entirety of Mr. Glick's claims—and this action—with prejudice.

Dated: September 21, 2022

/s/ Sean K. McMahan

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[11] *See Shaw v. Quad/Graphics Inc.*, No. 20-cv-1645, ECF No. 34 (moving to file amended complaint following *Oshkosh* ruling); *Guyes v. Nestle USA Inc.*, No. 20-cv-1560, ECF No. 32 (same); *Bangalore v. Froedtert Health Inc.*, No. 20-cv-893, ECF No. 53 (same); *Case v. Generac Power Sys. Inc.*, No. 21-cv-1100, ECF No. 70 (same). Plaintiff's counsel suggested those cases are somehow different because motions to dismiss were still pending (at least in some). But *Oshkosh* applies equally to each.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on September 21, 2022, a true and correct copy of the foregoing document was filed via the Court's ECF System.

s/ Sean K. McMahan
Sean K. McMahan