UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SUSAN R. MCNEILLY and RON MEKKES, individually and on behalf of all others similarly situated, Plaintiffs, v. SPECTRUM HEALTH SYSTEM, THE DEFINED CONTRIBUTION RETIREMENT PLAN INVESTMENT COMMITTEE OF SPECTRUM HEALTH SYSTEM and JOHN DOES 1-30. Defendants.	Civil Action No. 1:20-cv-00870 Hon. Jane M. Beckering

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL

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I. INTRODUCTION

In this putative class action under the Employee Retirement Income Security Act ("ERISA"), Plaintiffs challenge certain investments offered by the Spectrum Health System 403(b) Plan ("Plan"). Plaintiffs claim the investments underperformed and had higher management fees compared to Plaintiffs' preferred investments. Plaintiffs also claim the Plan paid too much in recordkeeping fees.

In an order dated July 16, 2021 (the "Order"), Judge Maloney, who was originally assigned to this case, denied Defendants' motion to dismiss Plaintiffs' Amended Class Action Complaint. Dkt. 21. Noting the absence of a governing standard in the Sixth Circuit for pleading breach-of-fiduciary-duty claims under ERISA, Judge Maloney ruled that the Amended Complaint sufficiently pleaded claims for breach of ERISA's duties of prudence and loyalty. *Id.* at p. 10; PageID.582.

In a pair of recent decisions, *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022), and *Forman v. TriHealth, Inc*., -- F.4th --, 2022 WL 2708993 (6th Cir. July 13, 2022), the Sixth Circuit addressed the pleading standards for the same type of ERISA fiduciary-breach claims alleged in this case and affirmed the dismissal of claims under Rule 12(b)(6) based on allegations similar to those in the Amended Complaint.

The *CommonSpirit* and *Forman* decisions represent a change in the controlling authority applicable to Plaintiffs' claims. As a result, this Court should reconsider the Order and dismiss all of Plaintiffs' claims, with the exception of their claims regarding the share class of the seven funds listed in Paragraphs 100 and 102 of the Amended Complaint. *See Forman*, 2022 WL 2708993, at *4-8 (allowing similar share-class claim to proceed). Alternatively, if the Court is not inclined to reconsider the Order, the Court should certify it for interlocutory appeal under 28 U.S.C. § 1292(b).

II. PROCEDURAL HISTORY

The Amended Complaint alleges that Defendants breached their fiduciary duties of prudence: (1) by offering the Voya Solution Portfolio suite of target-date funds ("TDFs")[1] instead of other Voya passively-managed and actively-managed TDFs that allegedly performed better (*id.* at ¶¶ 98, 112-147, PageID.71-72, 76-86); (2) by offering ten funds in a share class that allegedly cost more than available alternatives (*id.* at ¶¶ 93-111, PageID.70-75); (3) by offering fourteen actively-managed funds that allegedly had higher management fees compared to medians or averages of investment categories that include passively-managed funds (*id.* at ¶¶ 86-92, PageID.68-70);[2] (4) by allegedly being in the "highest cost" category of retirement plans with respect to "total plan costs" (*id.* at ¶¶ 82-85, PageID.67-68); and (5) by allowing the Plan to pay "excessive" recordkeeping fees (*id.* at ¶¶ 148-167, PageID.87-91). Plaintiffs also framed these allegations as a breach of ERISA's duty of loyalty. *Id*. at ¶¶ 168-174, PageID.91-92. In addition, Plaintiffs allege that Spectrum breached its fiduciary duty to monitor the performance of the Committee. *Id.* at ¶¶ 175-181, PageID.93-94.

Defendants moved to dismiss the Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6). Dkts. 10, 11. Judge Maloney denied Defendants' motion (except for the claims of

[1] A target-date fund is "an investment vehicle that offers an all-in-one retirement solution through a portfolio of underlying funds that gradually shifts to become more conservative as the assumed target retirement year approaches." *Wehner v. Genentech, Inc.*, No. 20-6894, 2021 WL 2417098, at *8 (N.D. Cal. June 14, 2021).

[2] In an actively-managed investment, "the portfolio manager actively makes investment decisions and initiates buying and selling of securities in an effort to maximize return." *CommonSpirit*, 37 F.4th at 1163 (citation omitted). In a passively-managed "index" fund, "a fixed portfolio [is] structured to match the overall market or a preselected part of it," which require little to no judgment . . ." *Id.* (citation omitted). Actively-managed funds "need to charge higher fees, because they must hire management teams to actively select investments to buy and sell, whereas index funds require less management and less upkeep." *Id.* at 1169.

Plaintiff Phyllis Walker, which he dismissed for lack of standing). Dkt. 21. Judge Maloney acknowledged that "[t]he Sixth Circuit has not yet weighed in" on "what is necessary to plead a violation of ERISA's duty of prudence." *Id.* at 10, PageID.582. "Absent guidance from the Supreme Court or the Sixth Circuit," Judge Maloney followed the more lenient approach applied by the Third, Eighth and Ninth Circuits to "allegations regarding imprudent investment selections and excessive fees, such as the ones presented by Plaintiffs here." *Id.* Based on those rulings and several rulings from district courts within the Sixth Circuit, he found that Plaintiffs stated viable claims for breach of fiduciary duty. *Id.* at 10-20, PageID.582-592.

On January 5, 2022, the case was reassigned to this Court. Dkt. 38.

III. ARGUMENT

A. Legal Standards.

The Court should reconsider a prior ruling where a party shows "a palpable defect by which the court and the parties have been misled" and "that a different disposition of the case must result from a correction thereof." W.D. Mich. Local Civ. R. 7.4(a). "Reconsideration is usually justified when there is an intervening change in controlling law, newly available evidence, or a need to correct a clear error or prevent manifest injustice." *McCormack v. City of Westland*, No. 18-2135, 2019 WL 4757905, at *2 (6th Cir. Apr. 15, 2019). An intervening change in controlling law occurs when the court of appeals issues a ruling stating a "new rule of law" as to what is required to state a claim in a particular context. *See U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 507 (6th Cir. 2008).

CommonSpirit and *Forman* established new law on the pleading standard for Plaintiffs' ERISA claims, representing the type of intervening change in controlling authority that warrant reconsideration. *See Kowalski v. Mich. State Univ.*, No. 18-390, 2021 WL 5568044, at *1 (W.D.

Mich. Feb. 24, 2021) (granting motion for reconsideration of decision denying motion to dismiss based on new Sixth Circuit guidance regarding applicable pleading standards).

Based on *CommonSpirit* and *Forman*, the Amended Complaint fails to state a claim for breach of ERISA's duty of prudence or loyalty. Allowing the parties to proceed with costly discovery on now-defunct claims would lead to a "palpable defect" in the disposition of the case. *See* Local Rule 7.4(a). Accordingly, the Court should reconsider the Order and dismiss all of Plaintiffs' claims, other than their share-class claim for the seven funds identified in Paragraphs 100 and 102 of the Amended Complaint.

If the Court denies Defendants' motion for reconsideration, it should certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Order involves controlling questions of law as to which there is substantial ground for difference of opinion, and an immediate appeal of the Order may materially advance the ultimate termination of the litigation.

B. *CommonSpirit* and *Forman* Require the Dismissal of Almost All of Plaintiffs' Claims.

1. The Court Should Dismiss Plaintiffs' Claims Based on the Management Fees and Performance of the Voya Solution Portfolio TDFs.

Plaintiffs allege that the Voya Solution Portfolio target-date funds were imprudent investments for the Plan because Voya offered other passively-managed target-date funds (the Voya Index Solution Funds) and actively-managed target-date funds (the Voya Target Retirement Funds) that allegedly cost less and performed better. Dkt. 8, Am. Compl. ¶¶ 98, 131, PageID.71-72, 81-82. In *CommonSpirit* and *Forman*, the Sixth Circuit rejected similar claims as a matter of law.

In *CommonSpirit*, the plaintiffs challenged the offering of the actively-managed Fidelity Freedom Funds as the plan's target-date funds rather than the passively-managed Fidelity

Freedom Index Funds, claiming the latter had lower fees, lower risk, and higher returns. The Sixth Circuit ruled that plaintiffs could not state a claim of imprudence by comparing the fees and performance of passively-managed funds to actively-managed funds because "each fund has distinct goals and distinct strategies, making them inapt comparators." *CommonSpirit*, 37 F.4th at 1167. *See also Forman*, 2022 WL 2708993, at *1 ("Our recent decision in *CommonSpirit* … resolves [] plaintiffs' claim[] that their employer TriHealth should not have offered its employees the option of investing their retirement money in actively managed funds"). *CommonSpirit* also disposes of Plaintiffs' critique that a handful of Committee meeting minutes don't reference an "investigation" into replacing the Voya Solution Portfolio funds with the Voya Index Solution Portfolio funds. Dkt. 8, Am. Compl. ¶¶ 74, 77, 112, PageID.65-66, 76; Dkt. 15, PageID.393. "ERISA . . . does not give the federal courts a broad license to second-guess the investment decisions of retirement plans." *CommonSpirit*, 37 F.4th at 1162. Thus, Plaintiffs cannot state an imprudence claim regarding the Voya Solution Portfolio funds by comparing their fees or performance to the Voya Index Solution Funds. Dkt. 11, PageID.129-130; Dkt. 15, PageID.392, 398.

The same is true for Plaintiffs' claim that the Plan should have offered the actively-managed Voya Target Retirement Funds instead of the Voya Solution Portfolio Funds, because each set of funds has a "different investment strategy." *CommonSpirit*, 37 F.4th at 1167 (citation omitted). *See also Forman*, 2022 WL 2708993, at *4; Dkt. 11, PageID.130-134, Dkt. 15, PageID.395-397. The Voya Target Retirement Funds and Voya Solution Portfolio Funds have different investments comprising the top ten holdings of each suite. Dkt. 11, PageID.130-131, Exs. 10-11, PageID.267-300 (comparing prospectuses that Plaintiffs incorporated by reference into their complaint). As such, they are inapt comparators. *Cf. CommonSpirit*, 37 F.4th at 1167

(rejecting plaintiffs' argument that "the Fidelity Index Funds are appropriate comparators to the Freedom Funds because they are sponsored by the same company, managed by the same team, and use a similar allocation of investment types").

Even assuming the Voya Solution Index Funds or Voya Target Retirement Funds were appropriate comparators to the Voya Solution Portfolio Funds, "a showing of imprudence [does not] come down to simply pointing to a fund with better performance." *CommonSpirit*, 37 F.4th at 1166. But that is the premise of Plaintiffs' performance claim. Plaintiffs' allegations are based on hindsight comparisons of one, three, five and ten-year performance as of 3Q 2020, which were not even available to Defendants during most of the putative class period. Dkt. 8, Am. Compl. ¶ 98, PageID.72; Dkt. 11, PageID.132-133; Dkt 15, PageID.395-397. The Sixth Circuit confirmed that "merely pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years does not suffice to plausibly plead an imprudent decision." *CommonSpirit*, 37 F.4th at 1166. And, as in *CommonSpirit*, Plaintiffs allege no fact suggesting that the Voya Solution Portfolio Funds were "imprudent from the moment [Defendants] selected [them], that [they] became imprudent over time, or that [they were] otherwise clearly unsuitable for the goals of the fund based on ongoing performance." *CommonSpirit*, 37 F.4th at 1166.

To the contrary, the Amended Complaint confirms that compared to its prospectus benchmarks (and consistent with the Plan's Investment Policy Statement), the 2025 Voya Solution Portfolio Fund outperformed its stated one, three and five-year benchmarks and was extremely close to its ten-year benchmark (varying only by 0.06%); and the 2035, 2045 and 2055 Funds slightly underperformed (between 0.09% and 0.60%) their benchmarks in some time periods and outperformed in others. Dkt. 8, Am. Compl. ¶¶ 98, 131, PageID.71-72, 81-82; Dkt.

11, PageID.133. *See also Forman*, 2022 WL 2708993, at *1 (affirming dismissal of claims "that the performance of several funds was deficient at certain points").

Thus, the Court should dismiss Plaintiffs' claim that the Plan should have offered the Voya Index Solution Funds or the Voya Target Retirement Funds instead of the Voya Solution Portfolio Funds. *See* Dkt. 11, PageID.129-134, Ex. 10-11, PageID.267-300; Dkt. 15, PageID.392-397, Ex. 14-15, PageID.406-422.

2. The Court Should Dismiss Plaintiffs' Share-Class Claim regarding the Voya Solution Portfolio Funds because It Is Predicated on an Inappropriate Comparison to the Voya Target Retirement Funds.

As stated in the Amended Complaint, "[m]any mutual funds offer multiple classes of shares in a single mutual fund that are targeted at different investors." Dkt. 8, Am. Compl. ¶ 93, PageID.70. "Generally, more expensive share classes are targeted at smaller investors with less bargaining power, while lower cost shares are targeted at institutional investors with more assets, generally 1 million or more, and therefore greater bargaining power." *Id.* "There is no difference between share classes other than cost—the funds hold identical investments and have the same manager." *Id. See also Forman*, 2022 WL 2708993, at *2.

Plaintiffs claim that Defendants breached their fiduciary duties by not offering the lowest-cost share class for ten funds in the plan, including three of the Voya Solution Portfolio Funds. Dkt. 8, Am. Compl. ¶¶ 98, 100, 102, PageID.71-73. However, the Voya Target Retirement Funds that Plaintiffs claim the Plan should have offered *were not* share classes of the Voya Solution Portfolio Funds; rather, they are totally different funds with different strategies, as discussed *supra*.

Because the two families of target-date funds are different investments, they cannot form the basis of a share-class claim, which is premised on the notion that the share class offered and the lower-cost share class Plaintiffs claim the fiduciaries should have offered "were the *exact*

same except for costs." *Forman*, 2022 WL 2708993, at *6 (emphasis added). The Voya Solution Portfolio Funds have their own set of share classes (ADV, I, S, S2 and T), which are different from the I and R6 share classes of the Voya Target Retirement Funds. *Compare* Dkt. 11, Ex. 10, PageID.268 (listing Voya Solution Portfolio share classes in bold) *with* Ex. 11, PageID.285 (listing Voya Target Retirement share classes in bold). Thus, the Court should dismiss Plaintiffs' share-class claim to the extent it is premised on challenges to the 2035, 2045, and 2055 Voya Solution Portfolio Funds. *See* Dkt. 11, PageID.130-131, 137, Exs. 10-11, PageID.267-300; Dkt. 15, PageID.394-395.

3. The Court Should Dismiss Plaintiffs' Claims Challenging the Investment-Management Fees of Actively-Managed Funds Compared to "Medians" or "Averages" of Investment Categories.

Plaintiffs allege that fourteen of the Plan's actively-managed funds had excessive investment-management fees compared to the "median" or "average" price of generic investment categories identified in an Investment Company Institute study ("ICI Study"), which included both active and passively-managed funds. Dkt. 8, Am. Compl. ¶¶ 89-90, 113-25, 130-31, PageID.68-70, 76-81; Dkt. 11, PageID.134-135; Dkt. 15, PageID.398. This claim fails as well.

In *Forman*, the Sixth Circuit held that the plaintiffs could not state a viable claim of imprudence by comparing the fees of funds "in the same investment style" with alternatives that are not "otherwise equivalent to the [plan's] funds." 2022 WL 2708993, at *4. This reasoning applies with even greater force to Plaintiffs' allegations, which compare the expense ratios of the Plan's individual funds not to other funds, but rather to broad categories of funds, such as "Target Date," "Domestic Equity" and "Other Mutual Funds." Dkt. 8, Am. Compl. ¶ 90, PageID.69-70. Thus, the Court should also dismiss Plaintiffs' claims based on comparisons to the ICI Study. *CommonSpirit*, 37 F.4th at 1167 (rejecting claims based on inapt comparators). *See also* Dkt. 11, PageID.134-135; Dkt. 15, PageID.398.

4. The Court Should Dismiss Plaintiffs' "Total Plan Cost" Claim.

Pointing to another industry source, BrightScope, Plaintiffs claim the Plan was in the "highest cost" category of retirement plans over $500 million with respect to "total plan costs." Dkt. 8, Am. Compl. ¶¶ 82-85, PageID.67-68. This also fails to state a claim. In *CommonSpirit*, the Court explained that a higher total plan cost "is merely evidence that [the Plan] offers a number of actively managed funds, and an imprudence claim based on this [] alone fails for the same reason that [a] more general attack on active investments fails." 37 F.4th at 1169. *See also Forman*, 2022 WL 2708993, at *4 (affirming dismissal of similar claim).

5. The Court Should Dismiss Plaintiffs' Recordkeeping-Fee Claim.

Plaintiffs also claim the Plan paid too much in recordkeeping fees. Dkt. 8, Am. Compl. ¶¶ 158-163, Page ID.89-90. Plaintiffs allege that, "[g]iven the size of the Plan's assets during the Class Period and total number of participants," the Plan "could have obtained recordkeeping services that were comparable to or superior to the typical services provided by the Plan's recordkeeper at a lower cost," and that a "more reasonable" recordkeeping fee arrangement would be a per-participant fee structure rather than the use of revenue sharing.[3] *Id*. ¶¶ 165, 166, PageID.90.

CommonSpirit forecloses this claim. Like Plaintiffs in this case, the *CommonSpirit* plaintiffs argued that "the Plan, one of the largest in the country by asset size and participant count, paid significantly more than comparable plans for commoditized record-keeping services as a result of Defendants' failure to engage in benchmarking or competitive exercises to ensure the Plan paid only reasonable fees." Brief of Plaintiff-Appellant, *Smith v. CommonSpirit Health*,

[3] Revenue sharing is "an arrangement allowing mutual funds to share a portion of the fees that they collect from investors with entities that provide services to the mutual funds," like recordkeepers. *See Leimkuehler v. Am. United Life Ins. Co.*, 713 F.3d 905, 907-08 (7th Cir. 2013).

No. 21-5964, 2021 WL 6068742, at *33 (6th Cir. Dec. 31, 2021) (citing Compl., RE 1 ¶¶ 4, 26, 49 n.20). The plaintiffs also claimed that "undisclosed sums paid for recordkeeping services through revenue-sharing support an inference that Defendants caused the Plan to overpay." *Id.*

The Sixth Circuit ruled that these allegations "fail[] to give the kind of context that could move this claim from possibility to plausibility." 37 F.4th at 1169. The Court emphasized that the plaintiff "has not pleaded that the services that CommonSpirit's fee covers are equivalent to those provided by the plans comprising the average in the industry publication that she cites." *Id*. The absence of such allegations was critical, because other plans might well "offer fewer services and tools to plan participants" than the CommonSpirit plan did. *Id.* Without allegations plausibly establishing that other, similarly-situated plans paid less for the same services, the plaintiff had failed "to allege that the fees were excessive relative to the services rendered" or offer "facts concerning other factors relevant to determining whether a fee is excessive under the circumstances." *Id.* (quoting *Young v. Gen. Motors Inv. Mgmt. Corp*., 325 F. App'x 31, 33 (2d Cir. 2009) (per curiam)). *See also Forman*, 2022 WL 2708993, at *4 (affirming dismissal of claim challenging "the imprudence of the plan expense ratios as a whole" because, among other "pleading failures," the plaintiffs "never alleged that these fees were high in relation to the services that the plan provided") (citations omitted).

Plaintiffs' Amended Complaint suffers from these same shortcomings. Plaintiffs fail to allege which services the Plan received for the fees charged, and the Amended Complaint is devoid of any analysis comparing the services provided to the other plans that were included in the surveys or publications referenced therein. Dkt. 8, Am. Compl. ¶¶ 148-167, PageID.87-91; Dkt. 11, PageID.139-140; Dkt. 15, PageID.399. Thus, Plaintiffs fail to state a claim for excessive recordkeeping fees.

In denying Defendants' motion to dismiss, Judge Maloney found that "Defendants' decision to change recordkeepers to one with a flat annual administrative and recordkeeping fee of $22 may indicate a breach of fiduciary duty, given that Defendants had an ongoing duty to monitor the Plan's expenses." Dkt. 21 at 17, PageID.589 (citation omitted). However, *CommonSpirit* rejected this logic, holding that the defendants' removal of one of the challenged investments from the plan line-up "does not help [Plaintiff]. It simply shows that CommonSpirit fulfilled its continuing duty to monitor trust investments and remove imprudent ones." 37 F.4th at 1169 (internal quotations and citation omitted). The same reasoning applies to Defendants' change in recordkeepers and shift to a flat-fee structure, and *CommonSpirit* compels dismissal of Plaintiffs' recordkeeping-fee claim for this reason as well. *See* Dkt. 11, PageID.138-141, Dkt. 15, PageID.398-400. *See also White v. Chevron Corp*., No. 16-0793, 2017 WL 2352137, at *20 (N.D. Ca. May 31, 2017) (allegation that fiduciaries removed challenged investment led to an inference that "fiduciaries were attentively monitoring the Fund"), *aff'd*, 752 F. App'x 453 (9th Cir. 2018); Fed. R. Evid. 407 (subsequent remedial measures not admissible to prove culpable conduct).

6. *CommonSpirit* and *Forman* Require Dismissal of Plaintiffs' Disloyalty and Duty-to-Monitor Claims.

Plaintiffs allege Defendants breached ERISA's duty of loyalty based on the same factual allegations underlying their imprudence claims. Dkt. 8, Am. Compl. at ¶¶ 168-174, PageID.91-92. Judge Maloney concluded that Plaintiffs stated a viable claim based on their argument "that Defendants chose a combination of high-cost investments and a revenue-sharing fee structure to use a portion of the fees to pay Voya's inflated fees: when Voya was replaced at the end of 2020, the high-cost options were replaced." Dkt. 21 at 18-19, PageID.590-591. This theory is not pleaded in the Amended Complaint, but even if it were, *CommonSpirit* confirms that a disloyalty

claim requires plaintiffs to plead facts that "the fiduciary's operative motive was to further its *own* interests." 37 F.4th at 1170 (emphasis added) (citation omitted). *See also Forman*, 2022 WL 2708993, at *4 (same). Merely arguing that a third party is benefitting from imprudence is not enough. *See* Reply Brief of Plaintiff-Appellant, *Smith v. CommonSpirit*, No. 21-5964, 2022 WL 743086, at *25 (6th Cir. Mar. 4, 2022) (alleging breach of duty of loyalty because "Fidelity clearly benefitted from Defendants' misconduct"). Thus, the Court should also dismiss Plaintiffs' disloyalty claim. *See* Dkt. 11, PageID.141-142; Dkt. 15, PageID.400-401.

Finally, Plaintiffs allege that Spectrum, as an appointing fiduciary, breached its duty to properly monitor the Committee. Dkt. 8, Am. Compl. ¶¶ 175-181, PageID.93-94. While *CommonSpirit* and *Forman* did not address such claims, the law is clear that where "no predicate fiduciary breach exists," a claim for failure to monitor "cannot stand." *In Saumer v. Cliffs Nat. Res. Inc.*, No. 15-954, 2016 WL 8668509, at *8 (N.D. Ohio Apr. 1, 2016), *aff'd*, 853 F.3d 855, 865 (6th Cir. 2017). Accordingly, the Court should also dismiss Count II other than as it relates to Plaintiffs' share-class challenge to the seven funds identified in Paragraphs 100 and 102 of the Amended Complaint. *See* Dkt. 11, PageID.142; Dkt. 15, PageID.401.

C. In the Alternative, the Court Should Certify the Order for Interlocutory Appeal.

Should the Court decline to reconsider the Order, it should certify that Order for interlocutory appeal under 28 U.S.C. § 1292(b). A district court may certify an order for interlocutory appeal when it (1) "involves a controlling question of law" for which (2) there is "substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see also In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002). "[S]ection 1292(b) authorizes

certification of *orders* for interlocutory appeal, not certification of *questions*." *In re Trump*, 874 F.3d 948, 951 n.3 (6th Cir. 2017) (citations omitted).

All three elements are satisfied here. **First,** "whether the complaint states a facially valid claim" is a controlling question of law. *See In re Trump*, 874 F.3d at 951.

Second, to the extent the Court denies Defendants' motion for reconsideration, there are "substantial grounds for difference of opinion" as to whether the allegations in Plaintiffs' Amended Complaint sufficiently state a claim. As Judge Maloney recognized, at the time of his ruling there was a circuit split regarding the applicable pleading standards for ERISA fiduciary-breach claims and no guidance from the Sixth Circuit. Dkt. 21, PageID.582. *CommonSpirit* and *Forman* have clarified what is required to state such claims in the Sixth Circuit. Defendants submit that *CommonSpirit* and *Forman* require dismissal of almost all of Plaintiffs' claims, but if the Court disagrees, that will deepen the circuit split, and it could also create a difference of opinion within the Sixth Circuit. *See In re Trump*, 874 F.3d at 952 (noting that this element is satisfied where "fair-minded jurists might reach contradictory conclusions").

Third, an immediate appeal will materially advance the ultimate termination of the litigation. *CommonSpirit* and *Forman* should dispose of all of Plaintiffs' claims other than those based on the share-class allegations in Paragraphs 100 and 102 of the Amended Complaint. Dismissing the remaining claims (or a subset of those claims) would narrow and focus the scope of fact discovery, expert testimony, and dispositive motions. *See Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 285 F. Supp. 3d 1028, 1033 (W.D. Mich. 2018) (granting interlocutory appeal where pleadings-based question could reduce "the number of issues to be resolved in this litigation"); *Wang v. Gen. Motors, LLC*, No. 18-cv-10347, 2019 WL 1950185, at *2 (E.D. Mich. May 2, 2019) (similar).

IV. CONCLUSION

Based on *CommonSpirit* and *Forman*, this Court should reconsider the Order and dismiss Plaintiffs' Amended Complaint with prejudice, except with respect to their claims regarding the share class of the seven funds referenced in Paragraphs 100 and 102 of the Amended Complaint. Alternatively, if the Court denies Defendants' motion for reconsideration, the Court should certify the MTD Order for interlocutory appeal under 28 U.S.C. § 1292(b). In addition, for the reasons set forth in Defendants' motion to stay (filed concurrently), the Court should stay proceedings in this action pending resolution of this motion and any appeal.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

SUSAN R. MCNEILLY and RON MEKKES, individually and on behalf of all others similarly situated, Plaintiffs, v. SPECTRUM HEALTH SYSTEM, THE DEFINED CONTRIBUTION RETIREMENT PLAN INVESTMENT COMMITTEE OF SPECTRUM HEALTH SYSTEM and JOHN DOES 1-30. Defendants.	Civil Action No. 1:20-cv-00870 Judge Jane M. Beckering

CERTIFICATE OF COMPLIANCE

Defendants Spectrum Health System ("Spectrum") and The Defined Contribution Retirement Plan Investment Committee of Spectrum Health System (the "Committee") (collectively, "Defendants") state as follows:

1. Defendants' Brief in Support of Defendants' Motion for Partial Reconsideration of the Court's Order Denying Defendants' Motion To Dismiss, Or In The Alternative, To Certify The Order For Interlocutory Appeal ("Brief") contains 3,963 words. This word count excludes the portions of the brief that are exempted pursuant to Local Rule 7.3(b)(i).

2. Defendants' Brief has been prepared in proportionally spaced typeface using Microsoft Word in 12-point Times New Roman font.

Respectfully submitted,

/s/ Deborah S. Davidson

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2022, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such to all counsel of record.

/s/*Deborah S. Davidson*

Deborah S. Davidson