UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ELECTRONICALLY FILED

KENA MOORE, TIMOTHY K. SWEENEY, RUSSEL A. HOHMAN, SUSAN M. SMITH and VERONICA CARGILL, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

HUMANA INC., THE BOARD OF DIRECTORS OF HUMANA INC., THE HUMANA RETIREMENT PLANS COMMITTEE and JOHN DOES 1-30,

Defendants.

Civil Action No. 3:21-cv-00232-RGJ

Oral Argument Requested

DEFENDANTS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Defendants Humana Inc., the Board of Directors of Humana Inc., and the Humana Retirement Plans Committee (collectively, "Defendants") hereby respectfully move for reconsideration of the Court's March 31, 2022 Order denying Defendants' Motion to Dismiss ("Dismissal Order") [DE 39]. Defendants bring this motion pursuant to Federal Rules of Civil Procedure 54(b), 59(e), 60(b), and the Court's inherent power to reconsider its prior interlocutory orders before entry of final judgment.

I. INTRODUCTION

This case concerns allegations that Defendants breached ERISA's duty of prudence by causing the Humana Retirement Savings Plan (the "Plan") to pay purportedly "excessive" fees for recordkeeping services. After this Court entered its order denying Defendants' motion to dismiss, the Sixth Circuit decided *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022). The claims at issue in *CommonSpirit* included an excessive recordkeeping fee claim similar to that asserted by Plaintiffs in this case. The Sixth Circuit affirmed the dismissal of that claim, directly holding for the first time that a plaintiff asserting a claim of imprudence based on recordkeeping fees must plausibly "allege that the fees were excessive relative to the services rendered." *Id.* at 1169 (quoting *Young v. Gen. Motors Inv. Mgmt. Corp.*, 325 F. App'x 31, 33 (2d Cir. 2009) (per curiam)). To do so, a plaintiff must plead facts establishing that other plans cited to show what a "reasonable" fee would have been provide an apples-to-apples comparison—*i.e.*, that the services covered by the challenged recordkeeping fee "are equivalent to those provided by the plans" that allegedly paid their recordkeepers less. *Id.* The Sixth Circuit has since applied the same standard in affirming the dismissal of claims alleging excessive investment expenses. *Forman v. TriHealth, Inc.*, --- F.4th ---, 2022 WL 2708993, at *4 (6th Cir. July 13, 2022).

CommonSpirit constitutes precisely the type of intervening change in controlling law that courts recognize as an appropriate basis for reconsidering an earlier interlocutory order. And Plaintiffs' allegations do not state a plausible claim for breach of fiduciary duty under the standard described in *CommonSpirit*. Like the plaintiffs in *CommonSpirit*, Plaintiffs here have not alleged facts establishing that any of the plans they cite as comparators paid less for the *same* recordkeeping services secured by the Plan. Nor do Plaintiffs supply any other factual allegations showing that the Plan's recordkeeping fees were unreasonable relative to the specific services the Plan received in exchange. Plaintiffs simply assert that a few plans of roughly similar size paid lower recordkeeping fees than the Plan at one point in the relevant period. Those allegations are lacking "the kind of context that could move [Plaintiffs'] claim from possibility to plausibility." *CommonSpirit*, 37 F.4th at 1169.

In light of the Sixth Circuit's decision in *CommonSpirit*, Defendants respectfully request that the Court reconsider its Dismissal Order and dismiss the First Amended Complaint ("FAC") [DE 17] in its entirety.

II. BACKGROUND

Plaintiffs filed the operative FAC in this action on August 26, 2021. The FAC alleges that the Plan's fiduciaries breached ERISA's duty of prudence by causing the Plan to pay "excessive" fees for recordkeeping services. FAC ¶ 57. In their original complaint, Plaintiffs alleged that $40 per participant per year ("PPPY") would have been a reasonable recordkeeping fee for the Plan. Compl. ¶¶ 79, 83 [DE 1]. After Humana provided Plaintiffs with information showing that the Plan in fact had paid between $23 and $37 PPPY for recordkeeping services in the relevant period, Plaintiffs filed an amended complaint that abandoned their previous $40 benchmark for reasonableness. *See* FAC ¶¶ 65–67, 72. In the FAC, Plaintiffs alleged instead that the Plan's fiduciaries "should have been able to negotiate a recordkeeping cost in the low

$20 range from the beginning of the Class Period to the present." *Id.* ¶ 72. In connection with that assertion, Plaintiffs identified four other plans with "over 34,000 participants and over $2.5 billion in assets under management" that purportedly paid recordkeeping fees between $25 and $28 PPPY in 2018. *Id.* Plaintiffs also cited anecdotal information drawn from other litigation about the recordkeeping fees paid by unrelated plans. *Id.* ¶¶ 70–71. The FAC does not provide any context about how the services provided to any of these other plans compare to the specific package of services the Plan received.

The FAC acknowledges that Defendants conducted competitive Requests for Proposals for Plan recordkeeping services in 2014 and 2019, and that RFPs are a "Best Practice" for evaluating retirement plan recordkeeping fees and services. FAC ¶¶ 64–66, 73. However, Plaintiffs allege that the RFP process must have been "deficient" because the Plan did not change recordkeepers in 2019 (instead securing lower fees from the incumbent provider, who Plaintiffs do not dispute was the lowest bidder), and because the 2014 RFP did not result in recordkeeping fees as low as those paid in 2018 by Plaintiffs' proffered comparator plans. *Id.* ¶¶ 65, 72–73.

Defendants moved to dismiss the FAC, arguing among other things that "[e]ven without an acknowledgment of regular competitive bidding, 'courts regularly dismiss imprudence claims such as these for failing to allege an adequate market comparison.'" Defs.' Mot. to Dismiss [DE 23] at 3 (quoting *Smith v. CommonSpirit Health*, 2021 WL 4097052, at *12 (E.D. Ky. Sept. 8, 2021)). Defendants argued that Plaintiffs had failed to state a claim because the FAC did not allege "any facts suggesting that the fee charged by the recordkeeper is excessive in relation to the services the recordkeeper provides." Defs.' Mot. to Dismiss at 15 (brackets and internal quotation marks omitted) (citing cases including *Smith*, 2021 WL 4097052, at *12 and *Young*, 325 F. App'x at 33).

In their Opposition [DE 32], Plaintiffs argued that they were not required to allege facts showing "why the fees were not justified by the services provided," Opp'n at 15–16 (quoting *Davis v. Magna Int'l of Am., Inc.*, 2021 WL 1212579, at *10 (E.D. Mich. Mar. 31, 2021)), because "the scope of services" provided to a particular plan is a "factually intensive" issue, Opp'n at 15. Plaintiffs contended that decisions dismissing excessive-recordkeeping-fee claims based on the plaintiffs' failure to allege "facts suggesting that the fee charged by [the plan's recordkeeper was] excessive in relation to the services" provided were "wholly out of line with the pleading requirements of this District." Opp'n at 16 n.15.

On March 31, 2022, the Court denied Defendants' motion to dismiss. The Court indicated that it was satisfied that Plaintiffs' allegations sufficed to state a claim. Dismissal Order at 7–8 (citing cases including *Magna Int'l*, 2021 WL 1212579, at *11). Because Plaintiffs' failure-to-monitor claim in the second claim for relief is derivative of their claim of imprudence in the first claim for relief, the Court held that the second claim for relief also could proceed. *Id.* at 8.

Nearly three months after the Court denied Defendants' motion to dismiss, the Sixth Circuit issued its decision in *CommonSpirit*. In that case, the Sixth Circuit endorsed for the first time a requirement adopted by other courts: that plaintiffs claiming imprudence based on allegedly excessive recordkeeping fees must show that the "fees were excessive relative to the services rendered." *CommonSpirit*, 37 F.4th at 1169 (quoting *Young*, 325 F. App'x at 33).

In light of the change in controlling law under *CommonSpirit*, Defendants now move for reconsideration of the Court's order denying their motion to dismiss.

III. LEGAL STANDARD

"District courts have the authority and discretion to reconsider and modify interlocutory orders at any point before final judgment." *Bliss Collection, LLC v. Latham Companies, LLC*,

2021 WL 2651811, at *4 (E.D. Ky. June 28, 2021); *see Rodriguez v. Tennessee Laborers Health & Welfare Fund*, 89 F. App'x 949, 952 (6th Cir. 2004); *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991). Decisions denying a motion to dismiss are among the types of interlocutory orders a court may properly revisit where the circumstances merit reconsideration. *See, e.g.*, *Bliss Collection*, 2021 WL 2651811, at *4 (reconsidering prior order denying motion to dismiss). "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, MI*, 2019 WL 4757905, at *2 (6th Cir. Apr. 15, 2019); *see also*, *e.g.*, *Rodriguez*, 89 F. App'x at 959. An intervening change in controlling law occurs when, for example, the court of appeals issues an opinion stating a "new rule of law" concerning what is required to state a claim in a particular context. *E.g.*, *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 507 (6th Cir. 2008).

IV. ARGUMENT

The Sixth Circuit's decision in *CommonSpirit* reflects the type of intervening change in controlling authority that justifies reconsideration, and it demonstrates that Plaintiffs' allegations of imprudence do not state a plausible claim. The Court should reconsider its prior order denying Defendants' motion to dismiss and dismiss the FAC in full.

A. The Sixth Circuit's decision in *CommonSpirit* reflects a change in controlling law warranting reconsideration of the Court's order denying Defendants' motion to dismiss.

CommonSpirit constitutes an intervening change in controlling law because the Sixth Circuit announced in *CommonSpirit* a new legal rule about what an ERISA plaintiff must plead to state a claim for breach of fiduciary duty based on allegedly excessive recordkeeping fees.

The plaintiff in *CommonSpirit* alleged that CommonSpirit's 401(k) plan "paid a flat annual fee of between $30 and $34 per person" for recordkeeping services, which the plaintiff

asserted "was too high, citing industry average costs of $35 per person for recordkeeping *and* administration for smaller plans." *CommonSpirit*, 37 F.4th at 1169. The Sixth Circuit affirmed the dismissal of the recordkeeping-fee claim, explaining that the complaint "fail[ed] to give the kind of context that could move this claim from possibility to plausibility." *Id.* Specifically, the plaintiff "ha[d] 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.* Those missing allegations were important, the Court of Appeals explained, 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*, 325 F. App'x at 33). Simply identifying other plans that paid lower recordkeeping fees and asserting that the CommonSpirit plan should have been able to negotiate a similar rate did "not suffice to create an inference that CommonSpirit was imprudent to choose recordkeeping fees of [the challenged] amount." *Id.*

CommonSpirit broke new ground in the Sixth Circuit by holding that plaintiffs alleging imprudence based on purportedly excessive recordkeeping fees must plead facts indicating "that the fees were excessive relative to the services rendered" to the plan in question. *Id.* (quoting *Young*, 325 F. App'x at 33). The Sixth Circuit had never previously endorsed this standard, and some district courts within the Sixth Circuit had specifically refused to apply it. Prior to *CommonSpirit*, the district court in *Magna International*, for example, held that "Plaintiffs need not allege why the fees were not justified by the services provided." 2021 WL 1212579, at *10. In opposing Defendants' motion to dismiss, Plaintiffs urged this Court to follow *Magna*

International rather than the district court decision in *CommonSpirit*, *see* Defs.' Motion to Dismiss at 15–16, and the Court cited *Magna International* in denying Defendants' motion, *see* Dismissal Order at 8. But the Sixth Circuit's subsequent, controlling decision in *CommonSpirit* rejects the reasoning of *Magna International* and confirms that plaintiffs *are* required to allege facts plausibly showing that a plan's recordkeeping fees were excessive relative to the specific services provided to the plan.

CommonSpirit also demonstrates that *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022), does not call for any general relaxation of the pleading standard for excessive-recordkeeping-fee claims. Rather, the Supreme Court vacated the dismissal of the plaintiffs' recordkeeping claim in *Hughes* based on a specific error in the decision below: the Seventh Circuit's mistaken view that plaintiffs necessarily could not state a recordkeeping fee claim if "plan participants had options to keep the expense ratios (and, therefore, recordkeeping expenses) low." *Id.* at 942 (quoting *Divane v. Northwestern Univ.*, 953 F.3d 980, 991 n.10 (7th Cir. 2020)). In the Sixth Circuit, an ERISA plaintiff's failure to allege facts supporting the conclusion "that the fees were excessive relative to the services rendered" *is* now a recognized basis for dismissal. *CommonSpirit*, 37 F.4th at 1169 (quoting *Young*, 325 F. App'x at 33).

The Sixth Circuit's even more recent decision in *Forman v. TriHealth Inc.*, --- F.4th ---, 2022 WL 2708993 (6th Cir. July 13, 2022), reiterates *CommonSpirit*'s core teaching: "the importance of a sound basis for comparison in imprudence claims." *Id.* at *3. The Sixth Circuit did not consider a recordkeeping-fee claim in *TriHealth*, but the court did address a claim challenging the average plan investment expenses as excessive because they "were almost twice as high as other comparator plans." *Id.* at *4. The Court of Appeals held that this claim was properly dismissed in light of multiple "pleading failures," including that the plaintiffs "never

alleged that these fees were high in relation to the services that the plan provided." *Id.* (citing *CommonSpirit*, 37 F.4th at 1169; *Young*, 325 F. App'x at 33). The court again underscored that "bare allegations" that other plans paid lower fees, "devoid of all context for the services provided," do not state a claim for breach of ERISA's duty of prudence. *Id.*

B. Plaintiffs' allegations do not state a plausible claim for breach of fiduciary duty under the standard articulated in *CommonSpirit*.

Evaluated in light of the pleading rule articulated in *CommonSpirit*, the FAC fails to state a plausible claim for breach of fiduciary duty.[1] Like the plaintiff in *CommonSpirit*, Plaintiffs here do not allege facts showing that the Plan's recordkeeping "fees were excessive relative to the services rendered"—allegations the Sixth Circuit has now made clear are essential to any claim of imprudence in this context. *CommonSpirit*, 37 F.4th at 1169 (quoting *Young*, 325 F. App'x at 33).

Plaintiffs' breach of fiduciary duty claim depends on the allegation that the Plan's fiduciaries could have negotiated recordkeeping fees lower than $37 PPPY in 2014–2019, but failed to do so. *See* FAC ¶ 65. The Dismissal Order characterizes the FAC as alleging, in support of that theory, that some other plans "negotiated lower fees" within the relevant period. Dismissal Order at 7 (citing FAC). Although the FAC provides information about the "number of participants, amount of assets, and recordkeeping fees paid" by those proposed comparators, *id.*, Plaintiffs offer *no* factual allegations establishing that any of those comparator plans obtained the *same services* as the Plan for a lower fee. Nor does the FAC provide any factual allegations otherwise demonstrating that the Plan's recordkeeping fees were excessive in relation to the

[1] Because this motion for reconsideration is based on an intervening change in controlling law, Defendants incorporate by reference their prior dismissal briefing, including the supporting declarations and exhibits, to the extent the Court needs to consider those issues now. Motion to Dismiss; Defs.' Reply in Support of Motion to Dismiss [DN 34].

specific services rendered *to this Plan*. *See* Defs.' Mot. to Dismiss FAC at 13–15; Defs.' Reply in Support of Mot. to Dismiss at 6. To the contrary, the FAC acknowledges that the Plan's recordkeeping services were regularly put out to competitive bidding (a practice Plaintiffs call a fiduciary "Best Practice" for defined contribution plans), and does not allege that Defendants opted for any other provider than the lowest bidder in these periodic RFPs. FAC ¶¶ 64–66. This acknowledgement provides compelling confirmation that—for the specific package of services required by the Plan at issue here—the Plan was paying the market rate, and thus a reasonable rate. Plaintiffs' failure to make these allegations about service comparisons, when they already know what services the recordkeeper offered in exchange for its recordkeeping fee, renders amendment futile and should not allow Plaintiffs to open the gates of discovery. Under the *CommonSpirit* standard, these pleading deficiencies are fatal to Plaintiffs' imprudence claim (their first claim for relief).

The shortcomings of Plaintiffs' recordkeeping-fee allegations require dismissal of the FAC in its entirety. Plaintiffs' claim for the failure to monitor other fiduciaries in the second claim for relief is derivative of their primary breach of fiduciary duty claim in their first claim for relief and cannot survive on its own. *See* Dismissal Order at 8; Defs.' Mot. to Dismiss FAC at 15–16 (citing cases).

V. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for reconsideration and dismiss the FAC in its entirety.

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Dated: July 20, 2022

Respectfully submitted,

/s/ Michael P. Abate

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2022, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Michael P. Abate

Michael P. Abate
Counsel for Defendants