IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JOHN SMITH,	)	
Plaintiff,	)	
	)	**CIVIL ACTION NO. 24-CV-100**
v.	)	
	)	
HOPSCOTCH CORPORATION;	)	
RED ROCK INVESTMENT CO.,	)	
Defendants.	)	
______________________________	)	

MEMORADUM OPINION AND ORDER

Before the Court is "Defendants' Motion to Dismiss for Failure to State a Claim" (Doc. 25). As set forth below, Defendants' motion is **GRANTED**. Furthermore, because Plaintiff has indicated that he wishes to immediately appeal, and because this Court finds that amendment would be futile, this matter is **DISMISSED with prejudice.**

I. BACKGROUND AND PROCEDURAL HISTORY[1]

[1] In reviewing a motion to dismiss under Rule 12(b)(6), the Court accepts all well pleaded facts alleged in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (citation omitted). In light of this standard, the Court has taken the facts as alleged in the Complaint (Doc. 1) unless otherwise indicated.

Plaintiff John Smith is a participant in a defined contribution 401(k) pension plan governed by the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1001 *et seq*. The plan is sponsored by his former employer, Hopscotch Corporation, a technology and social media company that is especially popular with teenagers and pre-teen children. Hopscotch is named as the Plan administrator for the Plan and, as such, is a Plan fiduciary.

Under the Plan, employees may choose to contribute up to 10% of their salary to the Plan to save for retirement. The company automatically contributes another 5% of salary and matches employee contributions up to 7%. The employees’ own contributions vest immediately and contributions from Hopscotch vest after an employee has worked for the company and participated in the Plan for five years. Because Mr. Smith worked for the company for seven years from 2016 until 2023, all of his own contributions to the Plan as well as the contributions Hopscotch made on his behalf were vested, meaning they cannot be taken away and he will receive them and any investment earnings on these contributions, less any applicable administrative expenses, when he retires.

The Plan has eight investment options, one of which is made up of Hopscotch stock and is referred to in the complaint as the employee stock ownership plan (“ESOP”) option. The contributions from Hopscotch all automatically go into this investment option and must stay there until the employee

has worked for the company for at least five years and these contributions have vested, at which point the employee may direct some or all of those funds to one or more of the other investment options if he or she so chooses. All of the Plan's investment options are managed by the Plan's investment manager, Defendant Red Rock, which is also a Plan fiduciary. This included the right to exercise proxy voting as to all of the Plan's investments.

According to the complaint, both Red Rock and Hopscotch have embarked in recent years on a campaign of environmental, social and governance ("ESG") activism. Indeed, Hopscotch's commitment to these kinds of goals, particularly with respect to the environment, is what led Hopscotch to pick Red Rock as the Plan's investment manager. And Red Rock has consistently used its proxy voting power associated with the stock investments it manages to vote in pro-environment individuals to boards of directors and to vote out those it considers less environmentally friendly. Moreover, Red Rock simply refuses to invest in many greenhouse-gas emitting energy companies.

Mr. Smith contends that focus on ESG goals with respect to the Plan's investments is inconsistent with ERISA's fiduciary requirements which, according to Mr. Smith, require Plan fiduciaries to focus exclusively on investment returns in considering appropriate Plan investments. Mr. Smith contends that ESG investments consistently underperform their non-ESG counterparts and that ESG

proxy voting and activism by Red Rock has caused share prices at the targeted companies to go down. Mr. Smith further contends that this has caused financial injury to the Plan and its participants such as himself and endangers the retirement security of participants.

The one-count complaint asserts a claim for fiduciary and co-fiduciary breaches of prudence and loyalty in violation of ERISA Sections 404 and 405, 29 U.S.C. §§ 1104, 1105. Plaintiff seeks declaratory, injunctive, equitable and remedial relief under ERISA Sections 409(a), 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2), 1132(a)(3).

II. DISCUSSION

A. Defendants' Motion to Dismiss

In order to state a claim for breach of fiduciary duty under ERISA, "a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan." *Braden v. Wal-Mart Stores. Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Defendants have filed a joint motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Although neither Defendant disputes that they were acting as a fiduciary with respect to the challenged acts and omissions, they assert that Mr. Smith has failed to state a claim for two reasons. First, Defendants contend that Plaintiff has failed to plausibly allege fiduciary breaches because considering ESG factors when selecting an

investment manager or investment options to make available to participants under the Plan does not constitute a breach of the duties of prudence or loyalty under ERISA. Second, Defendants argue that Plaintiff has failed to plausibly allege any loss caused by their ESG-related actions by plausibly alleging that there were other available investment options that a reasonably prudent fiduciary would have chosen. The court addresses each of these arguments in turn.

i. Consideration of ESG factors in selecting an investment manager and investment options may constitute a breach of the duty of prudence.

Defendants argue that the complaint must be dismissed because consideration of ESG factors is well within "the range of reasonable judgments a fiduciary may make based on her experience and expertise." Doc 25 (quoting *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). Plaintiff, on the other hand, argues that consideration of such factors is always inconsistent with an ERISA fiduciary's duty to act prudently and solely in the interests of plan participants in managing a pension plan and its assets. The court disagrees with both sides and concludes that while ESG considerations may not always be at odds with a fiduciary's duties of prudence and loyalty, elevation of these considerations above the interests of plan participants in their retirement security would violate a fiduciary's duty to act with utmost prudence and loyalty in managing plan assets.

Here, the complaint alleges that the Board of Directors of Hopscotch determined that pursuing ESG and related diversity, equity, and inclusion ("DEI") goals, and publicizing the same, could attract more of the young consumers who tend to utilize Hopscotch and that it hired Red Rock as an investment manager in order to promote these goals. Given this, one plausible explanation of the use of ESG investing by Red Rock with respect to the Plan is that it was done in order to promote Hopscotch's own corporate interests in attracting young users and not specifically with the retirement interests of the Plan participants in mind. And Plaintiff refers in his complaint to at least some evidence that such a strategy is hazardous with respect to expected investment returns and therefore may be imprudent. At the pleading stage, this is enough to plausibly state a claim for breach of fiduciary duties, particularly because fiduciary breach claims are heavily fact-dependent and do not, as a general matter, lend themselves to disposition prior to discovery.

Defendants argue that by engaging in ESG and DEI strategies, they were able to significantly grow their business among the young people who tend to be their users. And growing their business in this manner, which was the motivation behind adopting these strategies in the first place, significantly increased the value of the Hopscotch stock that constitutes over 40% of the value of the Plan. Be that

as it may, the impact and intent of their strategy is a merits issue, not something that the Court can resolve on the pleadings.

For these reasons, the Court concludes that Plaintiff has plausibly stated a claim that Defendants breached their fiduciary duties with respect to their ESG investing. Dismissal of the complaint is nevertheless warranted, as discussed next.

ii. Plaintiff has failed to plausibly allege that Defendants' actions have caused a loss or other harm to the Plan.

Nevertheless, although Plaintiff has plausibly stated a claim that Defendants breached their fiduciary duties through their ESG investment strategies, Defendants are correct that Plaintiff did not plausibly allege that these breaches caused any losses to the Plan.

Defendants fault Plaintiff for failing to identify any alternative, non-ESG fund comparators that could have or should have been selected consistent with Defendants' fiduciary duties that outperformed the funds that were chosen as Plan investment options by Red Rock. In a somewhat different context, the Eighth Circuit affirmed the dismissal of an ERISA complaint at the pleadings stage where the plaintiffs failed to provide meaningful benchmarks for an allegedly underperforming retirement plan investment options. *See Matousek v. Mid-American Energy Co.*, 51 F.4th 274, 281 (8th Cir. 2022). Here, although Plaintiff stated in the complaint that each of the ESG funds selected had a non-ESG corollary that outperformed the selected option, he failed to identify these options

either in the complaint or when his counsel was pressed to do so at the hearing on the motion to dismiss. Without such comparators, dismissal is warranted.

It is true, as Plaintiff points out, that in this circuit, "once the ERISA Plaintiff has proved a breach a fiduciary breach and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the loss was not caused by, or his profit not attributable to, the breach of duty." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). But this principle is of no help to Mr. Smith in this case given that Mr. Smith has failed, as an initial matter, to plead a prima facie case of loss to the Plan.

Therefore, Plaintiff has failed to state a claim for fiduciary breach under ERISA. Accordingly, Defendant's motion (Doc. 27) is **GRANTED**, and this case is **DISMISSED with prejudice.**

IT IS SO ORDERED.

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