CIVIL ACTION NO. 24-CV-100

In The United States Court of Appeals for the Eighth Circuit

JOHN SMITH,

APPELLANT,

V.

HOPSCOTCH CORPORATION AND RED ROCK INVESTMENT CO.

APPELLEE.

Appeal from the United States District Court for the District of Minnesota

BRIEF OF APPELLANT

Team 2
Counsel for Appellant

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JURISDICTIONAL STATEMENT

The District Court of Minnesota had exclusive subject-matter jurisdiction over Appellant's Employee Retirement Income and Security Act of 1974 ("ERISA") claims. 29 U.S.C. § 1132(e)(1). The lower court also had federal question jurisdiction. 28 U.S.C. § 1331.

The Eighth Circuit Court of Appeals has appellate jurisdiction; "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291.

Appellant timely filed the appeal, having commenced an interlocutory appeal before the district court's judgment. *See* Decision 1. This Court has jurisdiction over the appeal. 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUES

1. Under applicable ERISA law, did the district court err in dismissing John Smith's complaint for failing to demonstrate loss or harm from Hopscotch's and Red Rock's conduct?
2. Under applicable ERISA law, did the district court correctly hold that Hopscotch and Red Rock breached their fiduciary duties when managing the Plan?

STATEMENT OF THE CASE

a. Factual Background

John Smith, Plaintiff-Appellant, is a beneficiary of a 401(k) defined contribution pension plan ("Plan") governed by the Employment Retirement Income and Security Act of 1974 ("ERISA"). 29 U.S.C.A. § 1001 (West) *et seq*. Hopscotch Corporation ("Hopscotch") is a social media company and the Plan administrator. Red Rock Investment Company ("Red Rock") is an investment manager appointed by Hopscotch in 2019 to manage most of the Plan's options. Pl.'s Compl. 1, 3. Smith alleged that both Defendants-Appellees breached fiduciary duties of prudence and loyalty in managing Smith's retirement funds. *Id*. at 1.

Hopscotch's Plan offers employees eight investment options. *Id*. at 2. Hopscotch manages only one option—the employee stock ownership plan option ("ESOP option")—while Red Rock manages the remaining seven, non-ESOP options. *Id*. at 3. The ESOP option is the default option for employees not expressing an option preference. *Id*. And Hopscotch's employer contributions are automatically invested in the ESOP option. *Id*. After five years, plan participants, such as John Smith, merit a vested, non-forfeitable right to the ESOP option investments. *Id*. Henceforth, they are permitted to invest the funds in the other seven options managed by Red Rock. *Id*. Mr. Smith worked at Hopscotch from 2016 to 2023. *Id*.

Around 2018, Hopscotch's Board of Directors decided to pursue environmental, social, and governance goals ("ESG") in their investment strategies, Pl.'s Compl. 3. Additionally, Hopscotch changed its internal operations to reflect ESG values in hopes appealing younger consumers. *Id.*

In 2019, Hopscotch appointed Red Rock as investment manager for seven of its eight options due to a shared commitment to ESG values. Pl.'s Compl. 3. Consistent with ESG goals, Red Rock refused to invest Hopscotch's retirement securities in any energy industry, greenhouse-gas emitting companies as a matter of principle, citing "climate sustainability" as the company's guiding principle. *See id.* at 4. Having invested Smith's funds into other companies, Red Rock used the proxy voting merited from its investments to pressure Board members to conform to its ESG agenda. *See id.* 4—5.

Howevever, Hopscotch's and Red Rock's ESG pursuits resulted in economic loss and lower returns for beneficiaries. Pl.'s Compl. 5. While boosting its popularity, Hopscotch's ESG changes lowered company stock value (currently comprising "40% of Plan's investments") and decreased returns. *Id.* at 4. Red Rock's proxy voting efforts caused other companies fueled by the Plan's assets to suffer a "steep stock price decline" that resulted in lower returns for beneficiaries once more. *Id.* at 5. By refusing to invest in the energy sector, Red Rock screened out energy sector investments that returned "over 55%" more than its non-energy investments. *See id.* And for every ESG investment option offered by Plan options, similar non-ESG options in the marked resulted higher returns *See id.* at 4. Overall, recent scholarship estimates that ESG funds underperformed during last five years by 2.5% relative to the broader market, which correlates to compounding losses to the Plan. *See id.* at 5.

b. Proceedings Below

On February 14th, 2024, John Smith filed a civil complaint in the United States District Court for the District of Minnesota against Hopscotch and Red Rock. Pl.'s Compl. 1, 10. Smith alleged that ERISA covered Hopscotch's Plan, and that Hopscotch and Red Rock were fiduciaries who breached their statutory duties in managing his retirement investments, causing the Plan economic loss. *See id.* at 7––9. John Smith became the named Plaintiff for a class-action suit with other Plan members. *See id.* at 5—7.

Hopscotch and Red Rock filed a motion to dismiss, claiming that John Smith did not adequately state a claim entitling him to relief. *See* District Ct. Mem. Op. & Order 1, n.1. Adjudicating the matter, the district court granted Defendants' motion and dismissed John Smith's complaint with prejudice. *Id.* at 1, 4—8. Though John Smith adequately claimed that Defendants were fiduciaries breaching their ERISA duties, *see id.* at 5—7, he inadequately "plead a prima facie case" showing loss to the plan. *Id.* at 7—9 (emphasis added). Since John Smith immediately appealed to this Court, the district court dismissed the claim without leave for amendment. *Id.* at 1.

SUMMARY OF THE ARGUMENT

This Court should reverse the lower court's dismissal and hold that Smith's complaint plausibly states a claim for relief. At the pleading stage, exactitude and perfect specificity are not required to adequately state a claim. This is partly due to ERISA-plaintiffs' inability to access all investment information that fiduciaries. Thus, to state a claim, Plaintiffs need supply enough circumstantial allegations and data to make *plausible* their claim.

Two issues require adjudication by this Court: whether Smith's complaint plausibly shows a loss due to Appellees' investment strategy *and* whether Smith plausibly showed a breach of ERISA's fiduciary duties.

First, Hopscotch's and Red Rock's investment strategy resulted in loss to the Plan. The district court erred in applying the wrong standard to the case at hand. Rather than applying the inapplicable *Matousek* standard, the district court should have applied the *Braden* standard. In light of this new standard, Smith sufficiently alleges harm by pointing out three key pieces of evidence in the complaint.

Second, Hopscotch and Red Rock also breached their fiduciary duties of prudence and loyalty as mandated by ERISA. In short, fiduciaries are to be prudent in strategy and loyal to beneficiaries when investing Plan assets. Hopscotch and Red Rock managed the Plan *imprudently*, as evidenced by their refusal to remove poor investments that perpetually resulted in lower returns. Smith's complaint supplied circumstantial allegations and facts to make plausible Appellees' preference for poor investments over demonstrably better ones—something that prudent investors do not do.

Hopscotch and Red Rock were also *disloyal* to their beneficiaries. Appellees preferred ESG agendas over beneficiaries' retirement interests. Once again, circumstances and data elucidate a scheme of preemptive rejection of high performing investment choices for comparably lower options *that are* consistent with ESG. And Red Rock goes so far as to bully (via proxy voting) other companies it invests beneficiaries' funds in to follow its agenda—circumstantially demonstrating a preference for ESG over fidelity to Plan's retirement beneficiaries.

Having supplied data and circumstantial allegations; Smith plausible state a claim that loss to the Plan resulted from Appellees mismanagement and a breach of fiduciary duty occurred.

ARGUMENT

This Court should hold that (1) the court below erred by dismissing John Smith's complaint for failing to demonstrate loss or harm from Hopscotch's and Red Rock's conduct, and (2) the district court correctly held that Hopscotch and Red Rock breached their fiduciary duties when managing the Plan, for two reasons. First, the Appellants sufficiently demonstrated loss or harm under *Braden v. Walmart*, 588

F.3d 585 (8th Cir. 2009). Second, the Appellees breached their twin duties of loyalty and prudence by failing to properly manage Plan investments.

The Court reviews the district court's order dismissing a complaint for failure to state a claim *de novo*, "granting no deference to its interpretation of either federal or state law." *Davenport v. Farmers Ins. Group*, 378 F.3d 839, 841-42 (8th Cir. 2004). "When considering a motion to dismiss, we take the complaint's material allegations as true and liberally construe the complaint in the plaintiff's favor." *Rucci v. City of Pacific*, 327 F.3d 651, 652 (8th Cir. 2003).

I. Appellants Adequately Alleged Harm by Appellees

While the district court correctly found that the Appellees "breached their fiduciary duties with respect to their ESG investing," the court below nevertheless erred in finding that the Appellants failed to plausibly state a claim that the Appellees caused harm to the Plan. Memorandum Opinion and Order, 7, *Smith v. Hopscotch Corp.*, No. 24-CV-100 (D. Minn. 2024). In *Usenko v. MEMC LLC*, this Court held that "to prevail on a claim of breach of fiduciary duty under ERISA, the plaintiff 'must make a prima facie showing that [a] defendant acted as a fiduciary, breached [his] fiduciary duties, and thereby caused a loss to the Plan.'' 926 F.3d 468, 472 (8th Cir. 2019) (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009)). In showing loss to the Plan, this Court acknowledged in *Davis v. Washington Univ. in St. Louis* that "there is no one-size-fits-all approach" in determining the plausibility of a prima facie pleading of loss to the Plan. 960 F.3d 478, 484 (8th Cir. 2020). Rather, this Court held that "[p]lausibility depends on the 'totality of the specific allegations in [each] case.'" *Id.* (quoting *Braden*, 588 F.3d at 595-96).

Here, the Appellants have successfully alleged harm because (1) the court below wrongly relied on *Matousek v. Mid-American Energy Co.* and its foundational cases to apply a strict benchmark standard; and (2) applying the proper *Braden* standard, the Appellants sufficiently allege harm by offering three key pieces of evidence that meet that standard. 51 F.4th 274 (8th Cir. 2022); Memorandum Opinion and Order at 7; 588 F.3d 585; Class Action Complaint, *Smith v. Hopscotch Corp.*, 5, 8, No. 24-CV-100 (D. Minn. 2024).

A. The *Braden* Standard is Applicable in Determining Harm

The totality of the allegations "allows the court to draw the reasonable inference" that the Appellants are entitled to relief, thereby satisfying the pleadings requirement set forth in Federal Rule of Civil Procedure 8. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court need not rely on *Matousek* and its foundational cases to apply a "sound" and "meaningful" benchmark standard where the court examines different plans in detail. 51 F.4th at 281. The case at hand is unlike *Matousek*, where the appellant alleged higher fees among otherwise comparable investment funds, nor *Davis*, where the appellants alleged poor performance. 51

F.4th at 279; 960 F.3d at 484. Instead, the case at hand alleges fiduciary and co-fiduciary breaches of the duties of loyalty and prudence. Class Action Complaint at 7-8. Accordingly, this Court should rely on *Braden*, where the appellant also alleged breach of fiduciary duties, and examine the totality of the allegations to determine plausibility. 588 F.3d at 596.

In *Braden*, this Court reviewed a lower court's grant of defendants' motion for dismissal in a putative class action suit against Wal-Mart for breach of fiduciary duties imposed by ERISA. *Id.* at 589. There, the appellant alleged that appellees "failed adequately to evaluate the investment options" included in Wal-Mart's Profit Sharing and 401(k) Plan, thereby resulting in "the Plan charg[ing] excessive fees." *Id.* at 590. The Court inferred from these alleged facts that Wal-Mart's plan included "a relatively limited menu of funds which were selected by Wal-Mart executives despite the ready availability of better options." *Id.* at 596. Ultimately, this Court held in *Braden* that the complaint – taken as true and in its totality – pled "sufficient facts to proceed with [its] claim for breach of fiduciary duty." *Id.* at 598.

In stark contrast, *Matousek* involves a simpler allegation of high investment fees. 51 F.4th at 279. There, this Court affirmed the district court's motion to dismiss because the appellant failed to provide sound and meaningful benchmarks. *Id.* at 279-80. In reaching this conclusion, the Court examined its precedence in

Davis and *Meiners v. Wells Fargo & Co.*, where appellants for both cases alleged high investment fees and poor investment option performance. 960 F.3d at 484; 898 F.3d 820, 822 (8th Cir. 2018). In all of these cases, this Court elected to adopt a test where the Court held a complaint to be plausible only if the appellant provided a "meaningful benchmark." *See Matousek* at 280 ("without a *meaningful* benchmark, the plaintiffs have not created a plausible inference." (emphasis original)); *see also Davis* at 486 ("the complaint fails to provide a meaningful benchmark."); *Meiners* at 822 ("a plaintiff must provide a sound basis for comparison – a meaningful benchmark.").

This Court further delineated the *Braden* application by distinguishing it with that used by the appellant in *Meiner*: "[w]e found that different shares of the *same* fund were a meaningful benchmark [in *Braden*], but Meiners does not match that benchmark by alleging that cheaper alternative investments with *some* similarities exist in the marketplace." 898 F.3d at 823 (emphasis added). In other words, comparisons between plans satisfy the "meaningful benchmark" rule set forth in *Meiner* when there are substantial similarities. *Id.* Furthermore, the Court further expounded on these similarities in *Davis* when it held that the plans proffered by the appellant as benchmarks did not pass muster of the *Braden* application. 960 F.3d at 486. According to this Court's holding in *Davis*, individual plans that have different management approaches, management strategies, and markets are not comparable benchmarks. 960 F.3d at 484-85. To do so would be akin to "comparing apples and oranges." *Id.* at 485.

However, the court below was comparing apples and oranges when it lumped the case at hand in the same bucket as *Matousek, Davis,* and *Meiners.* 588 F.3d 585; 51 F.4th 274; 960 F.3d 478; 898 F.3d 820. Critically, the opinion by the court below is fatally flawed because it wrongly found that dismissal is warranted "without such comparators" that serve as "meaningful benchmarks for an allegedly underperforming retirement plan investment options." Memorandum Opinion and Order at 7-8. This was a clear error by the district court because the Appellants are alleging breach of fiduciary duties of loyalty and prudence by the Appellees when they "disloyally and imprudently pursued ESG objectives." Class Action Complaint at 8. Rather than applying the meaningful benchmark test, then, this Court should apply *Braden* to the case at hand, where this Court held that the appellant stated a claim for breach of fiduciary duty because the complaint's allegations were "understood to assert that the Plan include[d] a relatively limited menu of funds which were selected by [the appellees] despite the ready availability of better options." 588 F.3d at 596. Similarly, here, despite the ready availability of better options such as the "Energy sector of the S&P 500," the Appellees opted not to invest in these options because they did not meet the Appellees' focus on ESG. Class Action Complaint at 4-5.

Accordingly, because the case at hand is cut from the same cloth as *Braden*, rather than from *Matousek*, *Davis*, or *Meiners*, this Court should hold that the district court erred by applying the inapplicable benchmark test from *Matousek*, and that *Braden* is applicable.

B. Applying the proper *Braden* Standard, the Appellants Provided Sufficiently Comparable Benchmarks

In light of the applicable standard pursuant to *Braden*, the Appellants successfully pled a prima facie case of loss to the Plan by alleging sufficient facts in its complaint. 588 F.3d 585. Specifically, the Appellants provide three key evidence: (1) the Plan passed over on higher investment returns by pursuing options "that are known to underperform relative to their benchmark indices" such as energy sector investments; (2) Appellees' proxy voting activism "had a measurable impact" on Appellees' invested companies, each of which "suffered a steep stock price decline following reports of Red Rock voting for a more pro-green energy Board of Directors;" and (3) recent studies establishing that "ESG funds underperformed during the last five years by an average of 2.5%." Class Action Complaint at 5, 8.

In *Braden*, this Court held that the appellant's comparison to investment in index funds was sufficient to serve as a sound basis for comparison. 588 F.3d at 595-96. Here, the Appellants do the same by pointing out that the "Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors." Class Action Complaint at 5. This comparison is meaningful and serves as a comparable benchmark because the sole reason for the Appellees not investing in the energy sector was because of the Appellees' commitment to ESG. *Id.* at 3. In other words, when every other factor is identical with the only distinguishing factor being that the Appellees' commitment to ESG, and Plan suffered a loss, then the only logical conclusion is that the Appellee's commitment to ESG caused the harm.

To further substantiate this causal link between the Appellees' misguided engagement with ESG, the Appellants point to the fact that each of the companies that the Appellees invested in "suffered a steep stock price decline following reports of red Rock voting for a more pro-green energy Board of Directors." *Id.* at 5. Further bolstering this fact that the Appellees' ESG focus caused harm to the Plan, the Appellants additionally allege that "recent papers, including one from the Journal of Finance at the University of Chicago, establish that ESG funds underperformed during the last five years by an average of 2.5% . . . as compared to the broader market." *Id.* This figure was reached by comparing the returning average of 6.3% for ESG funds to an average return of 8.9% for the broader market. *Id.* These allegations all lead to the logical inference that *some* harm was done due to the Appellees' decision to focus on ESG. And if these allegations are substantiated, just as in *Braden*, "the process by which appellees selected and managed the funds in the Plan would have been tainted by failure of effort, competence, or loyalty." 588 F.3d at 596.

Accordingly, because the Appellant provides three key evidence that, when considered in their totality, create a logical and plausible inference that the Appellees' commitment to ESG investment options resulted in lower investment returns, this Court should hold that the Appellees' actions caused a loss or other harm to the Plan.

II. Hopscotch and Red Rock plausibly breached their duty of loyalty and prudence in management of the Plan funds.

ERISA imposes on fiduciaries "twin duties of loyalty and prudence." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982)). These duties are among "the highest known to law," requiring fiduciaries to act prudently and for the sole benefit of plan participants. 29 U.S.C.A. § 1104(a)(1),(B) (West).

To survive a motion to dismiss, an ERISA complaint need only *plausibly* allege a breach of these duties through "'[c]ircumstantial allegations['] . . . based on the 'investment choices a plan fiduciary made.'" *Davis v. Washington Univ. St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020) (quoting *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018)); *see also Fifth Third Bancorp v. Dudenhoeffer*, 573

U.S. 409, 425 (2014) ("[T]he content of the duty . . . turns on 'the circumstances . . . prevailing' at the time the fiduciary acts . . . .").

Appellant's complaint followed this formula, pleading facts and data about Hopscotch's and Red Rock's investment choices while also explaining the circumstances, and by doing so make a plausible claim for breach of fiduciary duty. To require more of Appellee would be unfair, as Appellant John Smith is not privy to *all* private investment information affecting Hopscotch's and Red Rock's decisions, so that is impossible to plead with actual precision. Therefore, at the pleading stage Smith's complaint must show that (1) Appellees are fiduciaries as defined by ERISA (subjecting them to fiduciaries duties); and (2) Appellees *plausibly* breached these fiduciary duties of *prudence* and *loyalty*.

A. Hopscotch and Red Rock are fiduciaries under ERISA subject to its heightened duties and ensuing liability for breach.

Hopscotch and Red Rock are both fiduciaries under ERISA. Appellees did not dispute their fiduciary status in lower court proceedings. *See* Mem. Order & Op. 4. Nevertheless, exploring the nature of Hopscotch's and Red Rock's fiduciary status helps define the contours within which their fiduciary breaches occur. *See Braden*, 588 F.3d at 590–-95 (8th Cir. 2009).

A person or entity "is a fiduciary with respect to a [retirement] plan to the extent [] he exercises any discretionary *authority* or discretionary *control* respecting management of such plan or . . . disposition of its assets . . . ." 29 USCS § 1002(A)(i).

As an investment manager, Red Rock controls most of the Plan's fund options. Thus, as a matter of course, its duty of loyalty and prudence spreads to most of the Plan's investment portfolio.

Hopscotch, however, is the Plan Administrator and "named fiduciary" in the written instrument. *See* 29 U.S.C.A. § 1002(16)(A) (West); § 1102(a)(2) (West). Plan administrators, by virtue of their situation, exert considerable discretionary authority over the disposition of assets, saddling it with fiduciary duties. Hopscotch has the authority to redefine investment goals, appoint or relinquish investment managers, and amend terms of the written instrument. *See* Pl.'s Compl. 3—5. This level of control is permitted by ERISA, *so long as fiduciary status attaches to the administrator*. *See* 29 U.S.C.A. § 1105(a)(1),(B) (West).

Additionally, Hopscotch did not lose its fiduciary status by appointing Red Rock as an investment manager. For one, Hopscotch still has completely managerial control over the ESOP option, meaning fiduciary liability can attach in case of failure to manage those assets prudently and loyally. *See supra* Section IIB.–C. Regarding the non-ESOP options managed by Red Rock, Hopscotch also may be held liable but under a different ERISA theory: Hopscotch would be liable for breaching "co-fiduciary" duties. 29 U.S.C.A. § 1105(a) (West). Co-fiduciary liability attaches in the event Hopscotch's breach of prudence or loyalty "enables" Red Rock to breach as well, or *vice versa*. *See* 29 U.S.C.A. § 1105(a)(2) (West).

Thus, as fiduciaries, Hopscotch and Red Rock's duties extend beyond what is immediately in their control. As will be seen below, Hopscotch may enable Red Rock to breach, which invites greater fiduciary liability and supports there being a plausible breach that should survive a motion to dismiss.

B. Hopscotch and Red Rock breached the fiduciary duty of prudence failing to properly manage Plan investments.

The duty of prudence requires companies to make investment decisions that a prudent fiduciary would "acting in a like capacity and familiar with such matters. . . ." 29 U.S.C.A. § 1104(a)(B) (West). This duty is derived "from common law of trusts, and is an objective standard to safeguard against mismanagement of retirement funds." *See* 1 Lee T. Polk *ERISA Practice and Litigation* § 3:3 (2023) (Applicability of Fiduciary Requirements).

Central to a duty of prudence is the proper management and monitoring of investment funds. *see id*. Mismanagement of funds takes many forms in the ERISA context, ranging from a failure to *remove* imprudent investment options, *see Davis*, 960 F.3d at 484, to failure to *remedy* a breach of a co-fiduciary. *See* 29 U.S.C.A. § 1105(a)(2) (West). Hopscotch and Red Rock broach both ranges of mismanagement.

i. Red Rock imprudently managed Hopscotch's non-ESOP investment options by failing to monitor and remove poor, underperforming investments.

Red Rock imprudently managed non-ESOP funds because it "fail[ed] to monitor and remove imprudent investment options." *Davis*, 960 F.3d at 484 (citing

Tibble v. Edison Int'l, 575 U.S. 523, 135 (2015)). Once again, ERISA complaints need only provide "*data about the selected funds* and [] *circumstantial allegations* about methods" to show a plausible breach. *See Meiners*, 898 F.3d at 822 (emphasis added) (quoting 29 U.S.C.A. § 1104(a)(1)(B)).[1]

Appellant's complaint followed this precedent: Appellant provided *circumstantial allegations* regarding Red Rock's pursuit of ESG initiatives and *data* about the performance of its funds in comparison to others. From the circumstances and data, Appellant enabled this Court to plausibly infer Red Rock's imprudence in managing retirement assets. *See* Plf's Compl. 3-5, 8-9; *see also Braden*, 588 F.3d at 596 ("It is reasonable . . . to infer from what is alleged that the process was flawed."). At the pleading stage, this is sufficient. *See Meiners*, 898 F.3d at 822.

Of course, Appellant's claim would not be plausible (and thus should be dismissed) if it *merely* contained "a bare allegation that . . . returns are too low[,]" and thus Appellant's only point was to discuss poorly performing investments. *See Davis*, 960 F.3d at 484. In that case, an ERISA claim is not plausible.

[1] This is because ERISA plaintiffs "typically lack extensive information regarding the fiduciary's '*methods* and actual knowledge' because those details 'tend to be in the sole possession of [that fiduciary].'" *Meiners*, 898 F.3d at 822 (alteration in original) (emphasis added)(quoting *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718–19 (2d Cir. 2013)).

However, Appellant's complaint does not reflect this type of reasoning. Appellant does not merely complain of low returns but supplies circumstantial allegations and market data as evidence of the flawed "*process* by which [investment] decisions are made." *See Davis*, 960 F.3d at 482 (8th Cir. 2020) (citing *Braden*, 588 F.3d at 595. (citations omitted)). In ERISA, a flawed process makes *plausible* a breach of prudence, which does not warrant dismissal. *See Braden*, 588 F.3d at 595 (noting that ERISA breach-of-prudence analysis "focus[es] on the process . . . rather than the results of [investment] decisions.").

Flawed process is at the heart of Appellant's complaint and thus Appellant has *plausibly* alleged that Red Rock behaved imprudently (in contravention to their statutory duty). Appellant contends that a prudent person in Red Rock's position—saddled with the obligation to act for the beneficiaries' retirement interests—would discontinue Red Rock's *process* of chasing ESG initiatives and invest elsewhere. 29 U.S.C.A. § 1104 (West).

As alluded to above, this Court held that a showing of preferred alternative investments that outperform the currently held ones can help show that a plan is flawed. *Braden* lays out this this requirement. To determine whether the currently held funds underperformed, the Court compared those funds to the market indices and value of other funds following the same indices (and having the same invest goal). *See id*. Because the other funds—situated in the same marketplace—

performed markedly better than the currently held funds, the Court held that an investment decision-making plan was flawed because "[fiduciaries] did not change the options included in the Plan despite the fact that most of them underperformed the market indices they were designed to track." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596. And thus, there was a breach of fiduciary duty of prudence. *See id.*

Notably, however, the *Braden* court did not consider their approach doctrine but clarified "that evaluation of a complaint upon a motion to dismiss is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Braden*, 588 F.3d at 594 (quoting Iqbal, 129 S. Ct. at 1950).

Like the analysis *Braden*, Appellant's complaint compared the performance of Red Rock's ESG stock to non-ESG investment options available on the marketplace. 588 F.3d at 594. Importantly, these are "similar" non-ESG options that correlate to the ESG options, thereby satisfying the requisite similarity in *Braden*. *Id.* Upon comparison, ESG funds underperformed *for the last five years*. *See* Pl.'s Compl. 5. This chronic underperformance allows this Court to infer that the Red Rock's decision-making process has gone awry and *plausibly* support a breach of prudence.

But Red Rock's decision-making process has an element unforeseen in the *Braden* reasoning: it actively "boycotts" all investments in traditional energy companies. *Id*. This factor makes it difficult to provide any analogy as was done in *Braden*. But this Court anticipated that possibility when it clarified that "complaint[s] should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible . . . 'draw[ing] on its judicial experience and common sense.'" *Braden*, 588 F.3d at 594 (quoting Iqbal, 129 S. Ct. at 1950).[2]

Energy Sector stocks has returned "over 55% more than non-energy sectors" investments in 2021-2022. *Red Rock's investment plan, by its very nature, excludes investments options that could bring its retirees 55% more profit.* Appealing to common sense and judicial experience: An investment regime that refuses to *even consider* investing in more profitable stock is operating under some flaw investment plan. When read holistically with Appellant's complaint, this is further evidence of Red Rock's lack of "diligence" in decision-making, as they will not even consider investing in certain plans. *See* 29 U.S.C.A. § 1104(a)(1)(B) (West). Additionally, it is not a defense to say that the financial instruments enjoined Red Rock to remain in imprudent investments because this Court has held that the duty to invest prudently *outweighs the written word of the planning instrument. See N.R. v. Raytheon Co.*, 24 F.4th 740, 749 (1st Cir. 2022); *Hunter v. Caliber Sys.*, 220 F.3d 702, 721 (6th Cir.

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[2] Additionally, the Supreme Court enjoins "a context-specific inquiry of the fiduciaries' continuing duty to monitor investment" in the ultimate search for a breach. *Hughes v. Northwestern Univ.*, 595 U.S. 170, 170 (2022).

2000) (holding that one follows plan "unless doing so would be inconsistent with ERISA's purposes.").

ii. Hopscotch breached its duty as a co-fiduciary by imprudently selecting and monitoring Red Rock's Investment Manager decisions.

As Red Rock's co-fiduciary, Hopscotch cannot—by its own imprudence—"enable[] such other fiduciary [Red Rock] to commit a breach . . . ." 29 U.S.C.A. § 1105(a)(2) (West). Co-fiduciary regimes are expressly permitted by ERISA, which allows for "allocate[ion of] fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries" 29 U.S.C.A. § 1105 (West).[3]

Hopscotch breached this co-fiduciary duty when appointed Red Rock to manage the stock. At the outset, Hopscotch failed "to investigate all decisions that

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[3] Importantly, trustee and fiduciary are not synonymous. Failure to recognize this important distinction may lead one to misread Section 1105(d)(1), which says that "no trustee shall be liable for the acts or omissions of such *investment manager* or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager." 29 U.S.C.A. § 1105(d)(1) (West)(emphasis added). If Hopscotch were a trustee, then no co-fiduciary duty would attach.

However, Hopscotch is *not* a trustee, but a mere fiduciary. Trustees are endowed with "exclusive authority" in investing trust funds. However, Hopscotch delegated the investing authority to Red Rock *via* its instrument, so that it does not have "exclusive authority." 29 U.S.C.A. § 1103 (West). Nevertheless, this does not mean that Hopscotch lacks all discretionary authority. On the contrary, ERISA contemplates this precise situation where a Plan's trustee is "subject to the direction of a named fiduciary" *Id*. Therefore, Hopscotch is a fiduciary, but not a trustee, and is not precluded from co-fiduciary liability.

will affect the pension plan, and [] act in the best interests of the beneficiaries." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994) (citing *Schaefer v. Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th Cir.1988)). Hopscotch failed to consider recent scholarship pointing to the poor performance of ESG stock and did not examine non-ESG options.

Additionally, Hopscotch has a "continuing duty" to monitor its investment manager's *use of the assets*. *See Tibble*, 575 U.S. at 530; *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1049 (D. Nev. 2023). As expressed by the Supreme Court, "plan fiduciaries are required to conduct their own *independent* evaluation to determine which investments may be prudently included in the plan's menu of options." *Hughes v. Nw. Univ.*, 595 U.S. 170, 176 (2022) (emphasis added) (citing *Tibble*, 575 U.S. at 529—30). By failing to conduct and independent evaluation of the performance of ESG investments, Hopscotch created an environment where Red Rock could implement its imprudent agenda at the expense of the beneficiaries.

The loss ensuing would not have happened but-for Hopscotch's creation of the environment, even permitting Red Rock to use proxy voting as a cudgel for its initiatives. *This imprudence enabled greater imprudence, which means Hopscotch breached its co-fiduciary duty*. *See* 29 U.S.C.A. § 1105(a)(2) (West).

iii. Hopscotch also imprudently managed its Employee Stock Ownership Plan option, thereby breaching its fiduciary duty of prudence.

On separate grounds Hopscotch breached its duty of prudence by failing to prudently manage the Plan's ESOP option. ESOP plans are a unique form of investment because, by definition, they violate ERISA's diversification requirement. *See* 1 ERISA Practice and Litigation § 3:43 (Continued Investments in Employer Stock**)**. This led to the idea that ESOP fiduciaries have a lesser duty of prudence than non-ESOP fiduciaries. Nevertheless, the Supreme Court held that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets." *Dudenhoeffer*, 573 U.S. at 412. Hopscotch has sole control over the ESOP plan, *see* Compl. 3, so that it is subject to a duty-of-prudence when managing the ESOP option. 29 U.S.C.A. § 1104(a) (West).

Generally, ERISA requires ESOP plans to "invest primarily[4] in qualifying employer securities." 29 U.S.C.A. § 1107 (West). The rest of the investments can be distributed to other non-employer securities. Hopscotch's ESOP Plan invested 40% into their company stock, which means that the remaining 60% was scattered across other investments subject to Hopscotch's ESG prerogatives. *See* Pl.'s Compl. 4.

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[4] There is an issue as to what "primarily" means, which according to a Department Labor advisory opinion is said to refer to greater than 50%. *See* Advisory Opinion 83-6A. Following the overturning of *Chevron*, however, it is unclear to what extent this advisory opinion holds true, and thus this brief does not address the issue in defining what "primarily" means. It is also not at issue.

Nevertheless, *100% of the investments are affected by ESG goals*. This is because the company reworked its corporate structure to support ESG goals, puporting "operate" differently in pursuit of ESG agendas. *See id.* at 3 ("Board of Directors of Hopscotch determined that the company should pursue ESG goals both with respect to how Hopscotch itself operated and with respect to the investment strategies").

Thus, Hopscotch's *employer* securities are subject to its ESG initiatives because its corporate structure operates according to ESG goals, which directly trickles down to its of company value. This valuation affects the Hopscotch's stock investment—which directly correlates to the ESOP plan's returns.

Having subjected the entirety of its ESOP plan to an ESG agenda, Hopscotch acts imprudently. Once again, it fails its "obligat[ion] to investigate all decisions that will affect the pension plan, and [] act in the best interests of the beneficiaries." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994) (citing *Schaefer v. Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th Cir.1988)). Based on the nature of ESOP plans, a prudent person would investigate its trickle-down effect on employee's retirement securities. Once again, an ESOP by design is affected heavily by company risks due to the trick down effect. A reasonably prudent fiduciary in Hopscotch's like circumstances would investigate the potential adverse effect an internal corporate change would have on the interest of its beneficiaries.

The circumstances show Hopscotch's failure to investigate this internal corporate change in the interests of their beneficiaries. Instead, Hopscotch continued this internal corporate change for the relevant time period, despite the negative impact on its ESOP plan returns. *See* Pl.'s Compl. 4. Notably, Hopscotch does not lack the capacity or resources to investigate future projections, as its CEO openly discussed ESG projections for Hopscotch's popularity relative to other apps, a closely related goal to its *economic* performance among other apps. *See id.* at 3-4. And yet, despite its ability to investigate, it violated its duty of prudence by failing to act prudently for the beneficiaries. A prudent fiduciary with its beneficiaries' benefit in mind, would not pursue ESG prerogatives solely for the corporate good. Therefore, having failed to manage its ESOP plan with prudence, Hopscotch breached its duty.

C. Hopscotch and Red Rock breached a fiduciary duty of loyalty by pursuing social investment initiatives such as ESG over safeguarding beneficiaries' retirement assets.

"The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . ." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000) (quoting 2A A. Scott & W. Fratcher, *Trusts* § 170 (4th ed. 1987)). This common law rule was memorialized in ERISA, which requires fiduciaries to "discharge his duties . . . solely in the interest of the . . . beneficiaries and for the exclusive purpose of[] providing benefits . . . ." 29 U.S.C.A. § 1104(1)(a)-(A)(i) (West). Hopscotch and

Red Rock violated these duties by preferring ESG and ETI (economically targeted initiatives) to their statutory duty of loyalty to Appellants.

i. Hopscotch pursued ESG Initiatives, which is a kind of social investment

Hopscotch and Red Rock engaged in pure social investing. Broadly speaking, social investing "refers to transactions [of] plan assets . . . influenced by objectives other than those relating directly to . . . plan benefits . . . ." 1 ERISA Practice and Litigation § 3:40 (Miscellaneous fiduciary issues—Social investing). In this case, Appellees' "other" objectives are a type of non-pecuniary goal: environmental, social, and governance interests (ESG).

A precise definition of ESG is difficult to pin down. Some refer to ESG investing as the "practice of *avoiding* investment in firms that make antisocial product[s]," Bernard S. Sharfman, *ESG Investing Under ERISA*, 38 YALE J. ON REG. BULL. 112, 116 (2020) (emphasis added), while others affirmatively define ESGs as, "*promot[ion]* [of] socially positive goals, making investors feel they are contributing . . . [to] society and promoting moral values." Annette DeSipio, *ERISA Fiduciary Duties and Esg Funds: Creating A Worthy Retirement Future*, 15 DREXEL L. REV. 121, 132 (2023) (emphasis added).

However, amidst this uncertainty, one thing is clear: Neither Congress nor the ERISA-statute enjoin fiduciaries to entertain ESG objectives in their prescribed duties. ERISA's statutory language is silent on the concept. *See generally* 29

U.S.C.A. § 1104. But on the fiduciary duty of loyalty, the statute is bold and sweeping—enjoining fiduciaries to act for the "exclusive purpose" of providing benefits and to behave "solely in the interest" of beneficiaries. *See* 29 U.S.C.A. § 1104(a)(1)-(A)(i) (West).

The legislative history does not support any Congressional intent regarding a fiduciary consideration for ESG (or any other social investing). In fact, legislative history attests to the opposite. At the time of its enactment, Congress considered including a social investment provision. Yet, of the "several proposals designed to *encourage social investing* [in ERISA] placed before Congress, *none were enacted into law*." Charles G. Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals*, 128 U. PA. L. REV. 1340, 1365-67 (1980) (emphasis added) (detailing examples of congressional social investment proposals rejected by Congress). Furthermore, ERISA's original declaration of policy " makes no reference to the objective of providing nonfinancial benefits . . . through a socially responsible investment policy . . . ." *See id.* at 1364. Instead, Congress intended a "relatively narrow objective of assuring adequate financial security for retired workers." *See id.* at 1367.

Based on the legislative history and statutory silence, any adjudication recognizing ESG initiatives would be a judicial addition, as there is no ESG word or ambiguity to interpret. The statute's exclusive language and legislative history does not square with ESG pursuits, much less with ESG pursuits that are demonstrably averse to beneficiaries.

ii. An independent judicial determination shows that Hopscotch prefers its own interest over its beneficiaries

Overall, Hopscotch's and Red Rock's investment position insists on worse investments (and thus worse returns) for more enlightened social goals. *See* Pl.'s Compl. 4. The fiduciaries' decision to employ ESG investment strategies was already problematic enough (amidst the statutory silence about the matter). But Appellees further push the bounds by preemptively disposing of more profitable investments in pursuit of environmental considerations, suggesting a greater loyalty to the environment than its own investors. Remarkably, even a court that erroneously recognize social investing draw the line when it begins to interfere with the duty of loyalty. These courts may permit minimal coexistence until any conflict with broader loyalties. *See generally Spence v. Am. Airlines, Inc.*, 718 F. Supp. 3d 612 (N.D. Tex. 2021).

Lastly, Red Rock stated that "climate sustainability" is Hopscotch's "guiding principle." *See* Compl. 4. This runs contrary to this Court's precedent, which considers "act[ing] in the best interests of the beneficiaries" to be a perennial call to fiduciaries, *see Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 918 (8th Cir. 1994) (citing *Schaefer v. Arkansas Medical Soc'y*, 853 F.2d 1487, 1491 (8th

Cir.1988)), and a fiduciary duty of prudence is among "the highest known to law." *Braden*, 588 F.3d 585, 595 (8th Cir. 2009) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982)).

However, for Red Rock, their guide is political aspirations—not the high duty of loyalty designed to protect peoples' retirement livelihood. And by privileging ESG in its investment decisions, it acts imprudently in managing Appellant's investments by dodging prudent alternatives for aspirational ESG

For Appellees, ESG initiatives are not peacefully coexisting, but ruling. For example, Red Rock preemptively boycotted an entire *class* of investments—industrial energy sector investments—that would have potentially provided "over 55%" more returns than the non-energy sector investments they voluntarily limited their options to. *See* Pl.'s Compl. 4. Additionally, Hopscotch's ESG initiatives lowered its share price, thereby directly lowering returns for 40% of its ESOP plan. *See id.*

As said above, even if this Court were to hold that ESG agendas are permitted by ERISA, the extent Appellees pursued this agenda abrogated any remaining duty of loyalty, completely frustrating ERISA's high call—"the highest known to law." *Braden*, 588 F.3d at 595 (8th Cir. 2009) (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d Cir.1982)).

CONCLUSION

Hopscotch and Red Rock caused harm to the Plan and breached their fiduciary duty to loyally and prudently manage the Plan. Appellees caused economic loss to Appellant, having identified highly profitable alternatives that satisfy the strict requirements of case law. ERISA is designed for precisely this situation, where fiduciaries take advantage of the economic "might" of their Plan to fulfill whatever social or governance initiatives in sight. ERISA restrains companies, so that they never forget that the assets they deal with are not for pure economic gain, but peoples' livelihood—the livelihood of retirees trusting in their employer to honor the fruit of their labor.