No. 24-CV-100
Civil

In the United States Court of Appeals

For the Eighth Circuit

JOHN SMITH,

Appellant,

v.

HOPSCOTCH CORPORATION and RED ROCK INVESTMENT COMPANY,

Appellees.

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

BRIEF OF APPELLEE

Team 10

Attorneys for Appellees

SUMMARY OF THE CASE

This action arises out of John Smith's participation in his employer's, Hopscotch's, retirement plan ("Plan"). Smith brought a civil action in the United States District Court of Minnesota and against Hopscotch Corporation ("Hopscotch") and Red Rock Investment Company ("Red Rock"). Complaint at 1. The claim was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001. C. at 1-2. Smith's claim focused on actions taken by Hopscotch and Red Rock regarding the 401(k) plans of Hopscotch's employees. C. at 9.

The appellees filed a joint motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Opinion at 4. They alleged that Smith failed to plausibly allege fiduciary breaches and failed to plausibly allege any loss caused by the appellees' actions. O. at 4.

The District Court of Minnesota ultimately determined that Smith did plausibly state a claim that Hopscotch and Red Rock breached their fiduciary duties. O. at 5. Regarding the second issue, the court found that Smith failed to allege a loss because of the actions by Hopscotch and Red Rock. O. at 7. Thus, the case was dismissed. O. at 8. Smith now appeals to this court.

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JURISDICTIONAL STATEMENT

This action arises under ERISA. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 1132(e)(1), as well as 28 U.S.C. § 1331, as this action involves a federal question.

STATEMENT OF THE ISSUES

I. Should this Court overrule the holding that one or both of Hopscotch, the sponsor of the ERISA plan, and Red Rock, the manager who used ESG investment strategy, breached the fiduciary duty of prudence under the Employee Retirement Income Security Act?

II. Should this Court affirm the holding that Smith failed to allege any losses caused by the actions of Hopscotch when he only provides general comparisons to the market and brought his claim only four years after the initiative began?

STATEMENT OF THE CASE

I. Factual Background

John Smith ("Smith") resided in Minneapolis, Minnesota. C. at 2. He became an employee of Hopscotch, a media and technology company based out of Minneapolis, in 2016. C. at 2-3. Smith worked for Hopscotch as a software engineer from 2016 until his termination in 2023. C. at 3.

Throughout his tenure with Hopscotch, Smith participated in a 401(k) plan, a pension plan that the company provided to its employees. C. at 2. Red Rock, a leading investment manager for ERISA plans was hired by Hopscotch in 2019 to manage all the ERISA plans which Hopscotch sponsored for its employees. C. at 3.

There were eight different investment options under the 401(k) plan. C. at 3. One of these plans is the ESOP (Employee Stock Ownership Plan) option. O. at 2. Employer contributions are automatically invested in the ESOP option and remain there until the Plan participant has vested a right to it. O. at 2. Plan participants vest a right to the Plan over a five-year period. C. at 3. Once this right is vested, the participant may choose to redesignate funds to one or more of the other seven investment options. O. at 2. If an employee chooses not to redesignate his plan, it remains in the ESOP option. C. at 3. Smith, having worked at Hopscotch for over five years, had vested rights in his plan. O. at 2.

Red Rock managed the investment options using an ESG (Environmental, Social, and Governance) investment strategy. C. at 3. This strategy focuses on the promotion of environmentally friendly companies and energy policies. C. at 1-2. This strategy does not invest in companies which still produce large amounts of greenhouse gases, but supports companies moving toward renewable energy. C. at 4. One of the tools within this strategy is that of proxy voting to install pro-environment board members in companies. C. at 4. Throughout this time, stock in Hopscotch has grown, the value of its sponsored 401(k) plans has increased, and it is now the number one social media company for teens and pre-teens in large part due to its reputation for being pro-ESG. C. at 4.

II. Procedural History

Smith filed this claim under the ERISA, 29 U.S.C. § 1001, *et seq*. C. at 2. He sought to require Hopscotch to remove from the Plan all investment options that use ESG investment strategies and exercise all voting proxies without regard to ESG policy goals. C. at 9. Additionally, he sought equitable or remedial relief restoring all Plan losses, payment of all costs and attorney's fees, and prejudgment and post-judgment interest. C. at 9. Hopscotch and Red Rock filed a motion to dismiss for failure to state a claim. O. at 1. The district court granted the defendants' motion and dismissed the case with prejudice. O. at 8. Smith appealed to this Court.

SUMMARY OF THE ARGUMENT

The case before this Court is about ensuring that the parties either gave what was rightfully owed to the other, or received what was rightfully owed to them under ERISA. It is about interpreting whether the defendants Hopscotch and Red Rock were fiduciaries of the ERISA Plan in question, and if they were, whether they can be held liable for a claimed breach of fiduciary duty. Furthermore, it is about determining that if either Hopscotch or Red Rock were held to be a fiduciary, and reasonably inferred to have violated a breach of fiduciary duty, whether there is sufficient evidence to show a loss on the part of the plaintiff, Smith.

Based on the definition of the courts, Hopscotch cannot be considered a fiduciary. Hopscotch, while the sponsor of the ERISA Plan, was not the active manager or administrator of the Plan, and played no active role in its management or administration. Red Rock was the active manager and administrator of the Plan, and thus can be considered a fiduciary. However, while the fiduciary, the courts cannot consider Red Rock to have breached its fiduciary duty. When the actions and decision of Red Rock are viewed objectively, that is, when the process of those actions and decisions are taken into account, and not the result, no breach of duty shows itself. Red Rock's process was in the specific context of an ESG investment strategy, which has inherently long-term, not short-term, goals. This, combined with Red Rock's experience and expertise in ESG investing, the courts cannot consider Red Rock's decisions to have fallen outside of a range of reasonableness.

Under the courts' standard to bring a claim of loss, Smith failed to provide anything more than speculation for how his retirement plan experienced harm as a result of decisions made by Red Rock. The court reasoned that with nothing more than basic information, it is unreasonable to compare plans which may have different objectives over time. Because Smith failed to allege anything more than simple comparisons to other plans without providing details of how the plans functioned, his claim does not meet the standard of the courts. Furthermore, it is too early to bring a claim of loss to the court. Retirement plans are long-term investments, yet Smith is arguing the returns were insufficient after only a four-year period. Thus, Smith failed to state a loss partly because it is unreasonable to compare his Plan to others with different objectives, and partly because not enough time had passed to see the full fruits of the investment.

For all of the foregoing reasons, this Court should affirm the district court's grant of motion to dismiss for failure to state a claim for Hopscotch and Red Rock.

STANDARD OF REVIEW

This Court reviews de novo the grant by the district court of a motion for failure to state a claim under Fed. R. Civ. P. 12 (b)(6). *Monday Rests. v. Intrepid Ins. Co.*, 32 F.4th 656, 658 (8th Cir. 2022). In this review, the Court must draw all reasonable inferences in favor of the non-moving party. *Id.* To survive a motion to dismiss for failure to state a claim, the complaint must contain sufficient factual evidence as to infer its plausibility at face value. *Id.*

ARGUMENT

I. This Court should uphold the dismissal for failure to state a claim, as it cannot reasonably infer that in the process of managing the Plan, either Hopscotch or Red Rock breached a fiduciary duty under ERISA.

In the history of litigation surrounding ERISA, the federal courts have consistently interpreted that to be held liable as a fiduciary, a party must play an active role in the management of the ERISA plan. *Varity Corp v. Howe*, 516 U.S. 489, 498 (1996); *Pegram v. Herdrich*, 530 U.S. 211, 223 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Beck v. Pace*, 551 U.S. 96, 101 (2007). The courts have also held that to breach their fiduciary duty, a party must be in violation of the fiduciary duty of prudence. In order to be held as having violated the duty of prudence, a court must view the actions of the fiduciary in an objective, process-driven standard according to the common law of trusts, and determine whether or not the fiduciary fell outside of a reasonable range of decision-making. *Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 107 (2d Cir. 2021), *cert. denied*, 142 S.Ct. 1112 (2022); *Pizarro v. Home Depot, Inc.*, 111 F.4th 1165, 1173 (11th Cir. 2024), *petition for cert. filed*, (U.S. Dec. 06, 2024) (No. 24-620); *Tibble v. Edison* Int'l, 575 U.S. 523, 530 (2015); *Johnson v. Parker-Hannifin Corp.*, 122 F.4th 205, 213 (6th Cir. 2024). To determine if the fiduciary indeed fell outside of a reasonable range of decision-making, the court must take into account the specific context in which the decisions were made, along with the experience and expertise of the fiduciary who made them. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014); *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). When the court applies all of these aspects of the law of to Hopscotch and Red Rock, there are two conclusions it must come to. First, that as an employer and sponsor of the plan under ERISA, Hopscotch cannot be held liable as a fiduciary. Second, that though manager of the ERISA plan, the actions of Red Rock, when viewed objectively under the law, cannot be considered a breach of fiduciary duty.

A. To be a fiduciary under ERISA, a party cannot be a mere sponsor but must play an active role in management and administration.

In the case *Varity Corp v. Howe*, and later in *Pegram v. Herdrich*, the Supreme Court defined a fiduciary under ERISA as any party which “exercises any discretionary authority or discretionary control respecting management" of an ERISA plan, or has any "discretionary responsibility in the administration" of an ERISA plan. *Varity* Corp, at 498; *Pegram*, at 223. Furthermore, the Court also calls on the common law of trusts to contribute to this definition. In the common law, the fiduciary to a trust is the trustee, that is, the party who loyally manages the trust in the sole interest of the beneficiary. *Pegram*, at 224. Therefore, under ERISA, a party is a fiduciary only to the extent that they are acting as a fiduciary through the active management or administration of the plan and considered analogous to a trustee under the common law.

1. Employers are not liable as fiduciaries under ERISA unless they were acting in the capacity of a fiduciary.

Following the definition set out above, the Court has generally not placed employers in the category of a fiduciary under ERISA. *Lockheed*, at 890. In *Lockheed*, the Court held that "employers or other plan sponsors are generally free under ERISA" from being considered fiduciaries, as their actions are typically of a business nature, and not of a fiduciary nature. *Id*. The actions the Court held to be of a business nature include adopting, modifying, or terminating plans under ERISA. *Id*. When this is the case, an employer is "analogous to the settlors [also known as sponsor] of a trust", who are not considered fiduciaries of the plan. *Id*. Therefore, employers in general, but particularly employers who act in a business, and not a fiduciary nature, cannot be considered a fiduciary under ERISA.

While the Court has generally not placed employers into the category of fiduciary under ERISA, it must be acknowledged that it is still possible for an employer to be held liable as a fiduciary. In *Beck v. Pace*, the Court held that an employer with an operative role in the plan can be considered a fiduciary under ERISA. *Beck*, at 101. However, the "fiduciary duties under ERISA are implicated only when it acts in the latter [fiduciary] capacity," and the determination of this capacity "depends on the nature of the function performed...an inquiry that is aided by the common law of trusts." *Id*. That is, if at the time of the claimed breach, the employer is acting in a way analogous to a settlor, it cannot be held liable as a fiduciary; if it is acting in a way analogous to a trustee, it can be held liable as a fiduciary. This principle of the Court aligns itself with the principle discussed in the section above, which states that to be held liable as a fiduciary, a party must be acting in the capacity of a fiduciary.

2. **Hopscotch, as an employer who was not acting in any active capacity as a fiduciary, cannot be held liable as a fiduciary under ERISA.**

When all the holdings of the Court as set out above come together, three points stand out in regard to Hopscotch. First, Hopscotch never exercised anything authority, control, or responsibility over the management and administration of the Plan. Second, as the employer, Hopscotch is a part of the category of parties not generally held as liable under ERISA, given the business nature of its actions. Third, even if Hopscotch was considered in a "dual role" of sponsor and fiduciary, it still could not be held liable under ERISA. The actions of Hopscotch to retain Red Rock and its desire to pursue an ESG investment plan for the sake of business growth were actions of a business nature that had nothing to do with the active management of the Plan; they were actions analogous to a settlor, not a trustee. C.

at 3. Therefore, Hopscotch, as the employer of Smith and sponsor of the Plan, and which took no active part in its management, cannot be considered a fiduciary under ERISA and is thus not bound by any fiduciary duty.

B. Prudence under ERISA is an objective, process driven standard based on the common law of trusts, and thus cannot be judged with the benefit of hindsight.

Under ERISA, a fiduciary is said to have breached their fiduciary duty to act "solely in the interest of the...beneficiaries" when they fail to act "with the care, skill, prudence, and diligence under the circumstances...that a prudent man acting in like capacity" would act. 29 U.S.C. § 1104 (a)(1), (a)(1)(B). In interpreting this statute, the courts have held this prudent standard of care to be measured in accordance with the objective standard of the common law of trusts. *Sacerdote*, at 107; *Pizarro*, at 1173. In the objective standard of the common law, the Court the duty of prudence is the "responsibility [of the fiduciary] to examine periodically the prudence of existing investments" or "a continuing duty to monitor investments and remove imprudent ones." *Tibble*, at 530. Therefore, when measuring the the duty of prudence under ERISA, the courts must view it from the perspective of the fiduciaries' ongoing management of the ERISA plan.

Having held that prudence under ERISA will be viewed as prudence under the common law of trusts, the courts have consistently held that prudence is a process driven standard. In *Johnson v. Parker-Hannifin Corp.*, the court described the duty of prudence "as a process-driven obligation" in which the focus is whether or not the fiduciary "engaged in a reasoned decision-making process" while investing. *Johnson*, at 213. In *Sacerdote*, the court emphasized that determining a breach of prudence turned on whether or not "the process [of investing] was flawed." *Sacerdote*, at 108. Lastly, in *Pizarro*, the court held determining a breach of prudence to be an inquiry centered on a "fiduciary's process for choosing that investment." *Pizarro*, at 1173. Therefore, when addressing if there was a breach of prudence under ERISA, the courts have consistently held that a breach is to be inferred from the information during the time of the decision-making and the process the fiduciary used to make those decisions. *Johnson*, at 213; *Sacerdote*, at 108; *Pizarro*, at 1173.

Since the courts have held that prudence under ERISA is an objective standard, and a process-driven obligation, they have forbid the use of hindsight to determine whether the actions of the fiduciary were prudent or not. *Johnson*, at 213; *Sacerdote*, at 108; *Pizarro*, at 1173. Put most plainly in *Pizarro*, "the duty of prudence is objective, judged by the information available at the time of each investment decision—not by the glow of hindsight." *Pizarro*, at 1173. This position of the courts ensures that the decisions made on the prudence of the fiduciary are based on the "real-time decision-making process, not on whether any one investment performed well in hindsight." *Johnson*, at 213. The reasoning behind this is simple: it is possible to make an investment decision that would be considered prudent, and it fail; it is also possible to make in investment decision that would be considered imprudent, and it succeed. Therefore, hindsight is forbidden by the courts because, if allowed, it would create a subjective standard of prudence, which not only would go against the objective standard of common law but cause inherent unfairness toward fiduciaries.

1. For the decisions of fiduciaries to be flawed, they must be considered unreasonable within the context of the investments as well as the experience and expertise of the fiduciary.

When deciding whether or not the actions of a fiduciary violated the duty of prudence, the courts have consistently held that it is a context specific decision which will turn on the circumstances prevailing at the time of the fiduciary's decisions. *Dudenhoeffer*, at 425; *Hughes*, at 177. This builds off of the notion that prudence is itself a "process-driven obligation." *Johnson*, at 213. Since the duty of prudence is objective and process-driven and focuses on whether or not the fiduciary in question "engaged in a reasoned decision-making process," the "appropriate inquiry will inherently be context specific." *Johnson*, at 213; *Dudenhoeffer*, at 425. Therefore, the prudence of a fiduciary must be judged in the context in which that fiduciary was acting, and based on the process of decision-making within the fiduciary's specific context.

Once the court is viewing the actions of the fiduciary within their specific context, in order to consider the process flawed, the actions of the fiduciary must fall outside of a "range of reasonable judgments." *Hughes*, at 177. This range of reasonable judgments is, of course, context specific, and in each context the notion of what is reasonable will change. To determine if the actions of a fiduciary fell outside this "range of reasonable judgments," the court "must give due regard" to the "experience and expertise" of the fiduciary when considering if the actions fell outside of this reasonable range. *Id*. Therefore, when determining a violation of the duty of prudence by a fiduciary, the court must reasonably infer that the fiduciary strayed from the process of decision-making in which a party within the same context and with the same level of experience and expertise would have used.

2. Viewed objectively in the process-driven standard of the courts, Red Rock cannot be reasonably inferred as having breached the fiduciary duty of prudence.

As established in the sections above, the actions of Red Rock as manager of the ERISA plan must be viewed in light of three considerations to determine if it falls within the range of reasonableness. First, within the specific context in which those decisions were being made. Second, the objective standard of the process of decision making. Third, its experience and expertise with ERISA plans as financial investors. All of this must be done, of course, without taking into account the results of its investments.

First, the context in which Red Rock was managing its investments must be viewed through two lenses. The first lens being the long-term, future oriented vision of ESG (Environmental, Social, and Governance) investment strategies. The second lens being the long-term nature of 401(k) accounts. Given the current widespread views on climate change in the world today, it is not unreasonable that over 600 investing firms promote renewable energy in the world of investing. This fact is emphasized by groups such as Climate Action 100+. Climate Action, https://www.climateaction100.org (last visited Jan. 20, 2025). This is combined with the trend of companies throughout the world shifting towards more renewable energy, and setting climate friendly goals for themselves and others in the coming decades. Marlena Batchelor, *Top Companies in the US Leading the Transition to*

Green Energy, The CEO Magazine (Apr. 12, 2022, 11:54 AM), https://www.theceomagazine.com/business/utilities-energy-2/green-companies-in-the-us/. Thus, even though ESG investments may not be the most lucrative short-term investments, there is nothing to suggest that they will not be successful long-term investments, especially given the climate of today's world. Along with this is the nature of 401(k) accounts. 401(k)s are retirement accounts, accounts meant to accrue in value over multiple decades during the beneficiary's career. They are not meant to, nor do they have the capability to make one wealthy over the course of a few years. Thus, the context of the actions of Red Rock is a context of long-term goals with a future oriented vision, sought for the benefit of the beneficiaries not only from a purely financial perspective, but for the sustainability in the world to enjoy that financial success.

Second, the process of Red Rock's decision making must be viewed objectively within context in which it was operating. As Red Rock was operating within the context of an ESG investment strategy and the 401(k) accounts, its decisions could not be made with short term goals in mind. The process which was driving Red Rock forward was one committed to long-term goals. If Red Rock was committed to financial success multiple decades in the future, it's process could not be committed to gaining success in under a decade. Under this long-term vision, it would have been equally imprudent for Red Rock to have abandoned its process as Smith claims it was for it to have it in the first place. But the only reason Smith claims it to be imprudent was the damaged outcome he claims to have suffered, which judges the prudence of the decision not by its process, but by "the glow of hindsight." *Pizarro*, at 1173. Thus, to judge the long-term process of Red Rock by any short-term investment process and their returns would violate the objective standard of prudence and rely too heavily on the return of the investments, which is forbidden.

Third, the experience and expertise of Red Rock must be taken into account when judging the process by which it made decisions. As described above, ESG is a widely accepted investment strategy by hundreds of investment firms, one of which was Red Rock. Red Rock has much experience in ESG investing, has great knowledge in, and is a strong advocate of the process. Taking this experience and expertise into account, it is not likely that Red Rock went about this process in a negligent way, or acted outside the range of reasonableness in the process of ESG investing. Thus, when the actions of Red Rock are viewed through the two lenses of context, the process of ESG investing was placed within that context, and the experience and expertise of Red Rock taken into consideration, it cannot be reasonably inferred that Red Rock fell outside of the "range of reasonable judgments." *Hughes*, at 177. Therefore, Red Rock cannot be viewed as having violated its duty of prudence as a fiduciary under ERISA.

II. This Court should uphold the dismissal for failure to state a claim because Smith failed to provide sufficient evidence to show a loss, and even if he did, it is too early to judge the returns fairly.

The primary goal of ERISA is to protect beneficiaries in employment benefit plans by setting out substantive regulatory requirements for its fiduciaries. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). ERISA establishes numerous requirements about what a fiduciary may or may not do and how courts will hold it liable if it breaches its duty. As a result, companies have had to figure out how best to balance their interests and their employees' interests while being careful, skillful, prudent, and diligent. *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020). This structure can be particularly difficult when the company may need to make short-term sacrifices for long-term growth and success. Ultimately, this court settled in *Kalda* that "ERISA does not prohibit an employer from acting in accordance with its interests as employer." *Kalda v. Sioux Valley Physician, Inc.,* 481 F.3d 639, 647 (8th Cir. 2007). Despite not returning as much as some other investment options in the short-term, a company should be able to do what is ultimately best for itself without it being considered a loss, so long as it acts prudently and has a reason for doing so. If a beneficiary believes the fiduciary breached this duty, they must supply adequate evidence to establish a prima facie loss to their claim.

The district court correctly granted Hopscotch and Red Rock's motion to dismiss for failure to state a claim because Smith failed to meet his burden of showing a prima facie loss. There are two reasons why this court should affirm that decision. First, this court has already established a set of standards that beneficiaries must meet to prove a loss, and in this case, Smith has failed to meet that burden. Second, it is too early for Smith to establish a sufficient claim that losses have occurred in the Hopscotch employees' retirement plan after only four years.

A. Smith has failed to provide meaningful benchmarks for the allegedly underperforming retirement investment options.

This court has already held that there needs to be a sound basis for comparison for plaintiffs to display that they suffered a loss because of the fiduciary acting imprudently. *Matousek v. MidAmerican Energy Co.,* 51 F.4th 274, 278 (8th Cir. 2022). If plaintiffs fail to establish an alternative investment option or how the fiduciary should have acted and instead provide generalities of what the fiduciary should have done, a dismissal is warranted.

This court should stick with the trend of requiring plaintiffs to offer meaningful benchmarks in ERISA cases. If there is an ERISA fiduciary claim, the level of scrutiny applied to the alleged facts is higher than in other types of cases. *Ruebel v. Tyson Foods, Inc.*, No. 5:23-CV-5216, 2024 LEXIS 139618 at *9 (W.D. Ark. Aug. 6, 2024). This heightened standard is crucial to weed out meritless claims. *Dudenhoeffer*, at 425. Since there are no specific facts which distinguish Smith's situation from that of Matousek, Smith should be bound to the court's higher standard for bringing an ERISA claim, under which his claim would be dismissed.

1. **This Court has already decided what is needed to show a loss resulting from a fiduciary's actions.**

This court has already dealt with a very similar case in 2022. In *Matousek*, the plaintiff alleged that his fiduciary was acting imprudently for not removing underperforming funds. *Matousek*, at 280. This court held that while "nudging the complaint past the plausibility threshold depends on the totality of the specific allegations," there must be a "sound basis for comparison" beyond bare allegations. *Id*. In *Matousek*, the plaintiff introduced different avenues to try and clear the pleading bar, none of them were successful. *Id*. at 280, 283. First, the plaintiffs compared the performance of the funds to their peer groups. *Id*. at 281. Lastly, it compared the funds against alternative investments. *Id*. The complaint failed in the first area because of the difficulty of comparing a large universe of funds. *Id*. at 282. Specifically, it was hard to compare plans offered as evidence against the Plan that suffered the alleged loss because Matousek failed to provide the court with any information about the "risk profiles, return objectives, and management approaches." *Id*. Without details of what MidAmerican was explicitly seeking to accomplish with its investments, there was no way of knowing if its investments missed the mark completely or if it even acted imprudently. See *id*. Finally, the alternative investments that it did offer were different in nature. *Id*. For these reasons, the court concluded that these benchmarks were not sound and Matousek had failed to meet his burden. *Id*.

Smith, like Matousek, has failed to show a sound basis for comparison. When looking at the complaint, it becomes apparent that Smith's allegations are similar to those in *Matousek*. First, the complaint alleged that the Energy sector for large and mid-cap stocks returned over 55% more than the non-energy sectors. C. at 5. However, the issue is that Smith has failed to provide evidence of the specific return objectives or management approaches for these more extensive stocks.

Hopscotch had a set objective to gain more of the younger demographic and was successful in doing so by becoming the number one social media platform for this demographic. C. at 3-4. The other data offered is from recent studies comparing

ESG funds to the broader market. C. at 5. This relation ultimately fails because, like in *Matousek*, it is too broad. Smith needs to point to specific funds that would have been a more prudent investment rather than just market averages. If mere averages were enough, anyone whose investments were below market average could bring a claim to the court. The court needs to control this because "even an objectively prudent investment can sometimes turn out to be a losing one." *Pizarro*, at 1176. Therefore, Smith's claim needs to be held to the *Matousek* standard, otherwise Hopscotch would be liable for any of its plans that did not return at or below market average, regardless of what it chose to invest in.

2. Smith failed to provide concrete examples comparing investment funds to other non-ESOP investment options.

Even if this Court wants to set the burden lower than the one in *Matousek*, this Court has consistently held that there needs to be at least some sound basis for comparison. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). It specifically pointed out that a claim is not necessarily stated by a bare allegation that better alternatives exist in the marketplace. See *id*. The reasoning behind this is simple. Not every investment can return above the market average. "ERISA recognizes that managing an employee-benefit plan will implicate difficult tradeoffs yielding a range of reasonable options." *Pizarro*, at 1177. Even the most diligent fiduciary will not have a 100% success rate regarding their investments. See *id*. Therefore, a plaintiff should have to plead something more than just higher returns in any stock it finds to show a loss. Displaying a meaningful benchmark is especially true when the investment is in something unique. *Davis*, at 486. Without a similar plan to compare, courts will have difficulty deciphering whether, based on all the previously discussed factors, a loss resulted due to imprudence by a fiduciary.

Smith has failed to plead anything specific enough to provide a meaningful comparison. Smith had the opportunity to compare Hopscotch's ESOP investment options to its non-ESOP investment options to provide a clear benchmark. C. at 5. However, he did not. The non-ESOP options could have suffered similar losses, meaning this would have nothing to do with the DEI initiatives the company began following. Furthermore, Smith did not allege a specific number for the percentage of lower returns because of Hopscotch's ESG policies. R. at 4. Lastly, the complaint alerted the court that the ESG Plan had "similar" non-ESG investment options on the open marketplace that could have been invested in and would have led to higher returns but did not point to what those numbers were. Thus, it was ultimately too vague. If this were the standard, fiduciaries would be required to scour the market far too frequently and spend countless hours attempting to find the cheapest fund possible with no fundamental criteria. Ultimately, the generalized grievances Smith has alleged do not even meet the bare necessity for establishing a claim to show a prima facie loss.

B. It is too early to determine if these short-term deficiencies can genuinely be considered losses to the beneficiaries.

While ERISA's goal may be protect the beneficiaries' interests, the plan may be unable to achieve its purpose if said beneficiaries' can bring suit the moment their investments are not delivering significant returns in comparison to the market. The idea behind investing for the long term is that there will be highs and lows, but eventually, the funds will bring in more than they lose over time, and the employee will be able to use his funds effectively. This reasoning is why, when enforcing the duty of prudence, it is essential to focus on the fiduciary's real-time decision-making rather than from the vantage point of hindsight. *Johnson*, at 213; *Pizzaro*, at 1173. Furthermore, enough time must pass to see what an investment will look like down the line. Given the increasing popularity of ESGs, allowing Smith to plead a loss this early would be unfair to the prudence Hopscotch and Red Rock have taken to stay ahead of the curve and invest early. Thus, this Court should uphold the lower court's decision that Smith failed to show a prima facie loss.

1. Retirement plans are based on long-term performance, not short-term gains.

This Court should adopt the approach taken by the Sixth Circuit in the case *Smith v. Common Spirit Health*. There, the Sixth Circuit held that a plaintiff had not met her burden by pointing to only three-year and five-year periods when comparing Common Spirit Health's investment funds. The court specifically noted that "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." *Smith v. Common Spirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022). In addition to that, the court feared that "selling a well-constructed portfolio in response to disappointing short-term losses…is one of the surest ways to frustrate the long-term growth of a retirement plan." *Id*. The goal of retirement plans is to let them sit during the bear and bull markets. Perhaps beneficiaries will not see immediate success, but it would be better to wait a reasonable amount of time than panic because of a short-term loss and let them bring suit against a fiduciary.

The plaintiff will likely point out the statute of limitations for ERISA claims. This statute states that no action may be commenced regarding a fiduciary's breach after the earlier of six years after the date of the last action, which constituted a breach or violation three years after the earliest date on which the plaintiff had actual knowledge of the breach. 29 U.S.C. § 1113. However, how would plaintiffs be able to fairly point to a breach or violation after just a few years of comparison between their stock and another data point? It would only be after enough information is available that they can show why there was a breach and how much recovery they are entitled to as a result.

In this case, Smith has brought his claim merely four years after the new initiatives set forth by Hopscotch began to take hold. C. at 3. As the *Smith* court has emphasized, this period should not be enough to judge whether or not this decision led to a loss. See *Smith*, at 1166. ESGs have just recently burst onto the scene. According to Professor Rock at NYU School of Law, "In the past five years, ESG has moved from the fringes to the mainstream of corporate governance." 1 Corporate Compliance Practice Guidance § 23.13 (2024). Furthermore, Morningstar Direct reported that Global ESG Fund Assets more than doubled in two years. *Id*. Because of the rise of ESGs in recent years and Smith having only brought this claim five years from when Hopscotch began ESG initiatives, this Court should rule that he has failed to assert a loss. The Plan could make significant improvements over the course of its life.

2. This case has not even gone through an entire market cycle; thus, it is too early to determine its performance.

A typical market cycle consists of several quarters of down markets and several quarters of up markets. *Ramos v. Banner Health*, 461 F. Supp. 3d 1067, 1096 (D. Colo. May 20, 2020). Thus, it takes place over the course of 10 to 15 years. *Id*. It is reasonable to measure the "progress of each investment option against its return objectives…over a full market cycle." *Id*. If a fiduciary were only to look at a plan's returns over the course of half that time, it might not be able to get all the data it needs to make an adequate determination about whether to remove an imprudent investment.

Once again, Hopscotch began its DEI initiative, which involved investing in ESGs, in 2018 and Smith's Plan ended in 2023. R. at 3. The investments Red Rock made were only judged and compared for about one-half to one-third of a typical market cycle at the time Smith filed this suit. Thus, it would be imprudent to say he has a claim for losses. If the popularity of ESGs continues to rise, as the report from Morningstar Direct suggests, his returns could be well above the market share. Therefore, this Court should affirm the district court's ruling that Smith has failed to show loss related to Red Rock's ESG-related actions.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the district court's grant of motion for summary judgment for Hopscotch Corporation and Red Rock Investment Company.