No. 16-2025

In the Unites States Court of Appeals For the Eighth Circuit

JOHN SMITH,

APPELLANT,

V.

HOPSCOTCH CORPORATION; RED ROCK INVESTMENT CO.,

APPELLEES.

On Appeal from the
United States District Court for the
District of Minnesota
(No. 24-CV-100)

BRIEF FOR APPELLEES

TEAM 11

Counsel for Appellees.

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JURISDICTIONAL STATEMENT

This action arises under ERISA. The District Court had 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. This Court has appellate jurisdiction over this case because it is an appeal from a final judgment of the United States District Court for the District of Minnesota. 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiff failed to plausibly allege that Defendants breached their fiduciary duties of loyalty and prudence where Defendants acted in the best interests of the Plan Participants and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent fiduciary acting in a like capacity would use?

Suggested Answer: Yes.

II. Whether Plaintiff failed to plausibly allege that the alleged breaches caused a loss to the Plan where simply alleging that costs are too high or that returns are too low is not sufficient to state a claim and Plaintiff neglected to include in the Complaint any means of comparison to support his broad allegations?

Suggested Answer: Yes.

STATEMENT OF THE CASE

Hopscotch Corporation ("Hopscotch") is a major technology and social media Company incorporated in the state of Minnesota and headquartered in metropolitan-city Minneapolis. *Smith v. Hopscotch Corporation & Red Rock Investment Co.*, No. 24-CV-100, U.S. District Court for the District of Minnesota, Class Action Complaint, ¶ 6 (hereinafter "Complaint, ¶ __"). Hopscotch is the second largest social media company in the world and is especially popular among the youngest demographic of social media users. Complaint, ¶ 14.

Hopscotch is the sponsor and administrator of the 401(k) defined contribution pension plan (the "Plan"). *Smith v. Hopscotch Corporation & Red Rock Investment Co.*, No. 24-CV-100, U.S. District Court for the District of Minnesota, Memorandum Opinion and Order, p. 2 (hereinafter "Opinion, p. __"). The Plan is governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 et seq. Complaint, ¶ 1. Under the Plan, participating employees ("Plan Participants") may choose to invest up to 10% of their salary, while Hopscotch automatically contributes 5% of each employee's salary in employer contributions plus an additional match of employee contributions up to a maximum of 7% of the employee's salary. Complaint, ¶ 8.

The Plan offers eight investment options, one of which consists of Hopscotch stock as an employee ownership plan option ("ESOP option"). Complaint, ¶ 9.

Employer contributions are automatically invested in the ESOP option and will remain there until a Plan Participant has a vested right to it after five years of employment with Hopscotch. *Id*. After vesting, Plan Participants have the freedom to redesignate any such amounts from the ESOP into one or more of the other seven investment options. *Id*. After working at Hopscotch until 2023, Mr. John Smith (hereinafter "Plaintiff") was a covered Participant under the Plan. Complaint, ¶ 10. As such, all his own contributions and the contributions made by Hopscotch for his account were vested. *Id*.

Out of concern for the company's overall sustainability and ethical impact on the digital world, Hopscotch saw the importance of considering environment, social, and governance ("ESG") factors in its corporate decisions. Opinion, p. 3. Thus, around 2018, Hopscotch began pursuing ESG goals regarding internal company operations and investment strategies. Complaint, ¶ 12. After Hopscotch embarked on its campaign of ESG and diversity, equity, and inclusion ("DEI") activism to combat moral disengagement and unethical practices within social media conglomerates, Hopscotch chose to team with Red Rock, a leading investment manager for ERISA plans and other institutional and retail investors worldwide. *Id*. In 2019, Hopscotch retained Red Rock to be the Plan's investment manager, a role responsible for choosing investment options and pursuing strategies that seek to maximize investment returns. *Id*.

Red Rock investors are passionate and active about promoting positive, ethical investment decisions that will not harm the globe's environmental and social climate for generations to come. *Id*. Therefore, Red Rock joined Climate Action 100+, a group of investors committed to pressing greenhouse gas emitters to change their negative and detrimental ways. Complaint, ¶ 17. Red Rock also issued formal press releases stating that climate sustainability would be the company's new guiding principle. *Id*. In keeping with this new focus, Red Rock exercised proxy voting rights of all assets that it managed for employee benefit plans against the management of companies not making sufficient progress on environmental sustainability. Complaint, ¶ 18.

The commitment to ESG and DEI goals ultimately helped attract and retain Hopscotch's main demographic of teenagers and pre-teens. Complaint, ¶ 13. After just one year of employing ESG goals, factors, and measurements in the company, Hopscotch became the number one social media platform among its targeted and profitable demographic. *Id*. Growing their business in this manner significantly increased the value of the Hopscotch stock that constitutes over 40% of the value of the Plan. Opinion, p. 6. Nonetheless, Plaintiff disagrees with Hopscotch and Red Rock's choice to pursue ethical activism by means of strategic ESG investments. Complaint, ¶ 2. Therefore, Plaintiff filed a class action complaint in the United States District Court for the District of Minnesota. Opinion, p. 4. In the Complaint, Plaintiff alleges that Hopscotch and Red Rock breached their fiduciary duties of loyalty and prudence under 29 U.S.C §§ 1104, 1105. *Id*. Specifically, Plaintiff alleges that Hopscotch disloyally and imprudently pursued ESG objectives for Hopscotch and then selected it as the matching and default investment option for the Plan. Complaint, ¶ 40. In support of this argument, Plaintiff claims "Hopscotch's own ESG and DEI activities have had a significant negative impact on returns and ultimately on the value of Hopscotch's own stock during the period of February 4, 2018 to the present." Complaint, ¶ 14.

Plaintiff also alleges that Hopscotch breached fiduciary duties by selecting and retaining Red Rock as the Plan investment manager. Complaint, ¶ 41. In the Complaint, Plaintiff states that the selection of Red Rock as the Plan investment manager was disloyal and imprudent because Red Rock openly pursues ESG investment options which are "known to underperform relative to their benchmark indices and other similar investment options available in the marketplace." *Id*. To support this allegation, Plaintiff claims that, "in 2021 and 2022, the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors." Complaint, ¶ 23. Lastly, Plaintiff alleges that Red Rock breached its fiduciary duties by selecting ESG funds for the Plan despite the availability of better performing and lower cost investment options readily available in the marketplace. Complaint, ¶ 42.

In response, Defendants filed a "Motion to Dismiss for Failure to State a Claim" which the District Court granted. Opinion, p. 1. Plaintiff has filed an appeal in this matter. This brief follows in support of Defendants' position.

STANDARD OF REVIEW

A district court's dismissal of a pleading under Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. *Dormani v. Target Corp.*, 970 F.3d 910, 914 (8th Cir. 2020). In conducting the review, the Court must assume the truth of all factual allegations in the complaint and makes all reasonable inferences in favor of the nonmoving party but is not bound to accept the truth of legal conclusions couched as factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To overcome a defendant's motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). While specific facts are not necessary and a plaintiff need only allege sufficient facts to provide "fair notice" of the claim and its basis, stating an adequate claim for relief requires more than "a formulaic recitation of the elements of a cause of action." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555). Rather, the complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. This standard "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim or element]." *Id.* at 556. The key issue is threshold plausibility and not whether it is likely that he will ultimately prevail. *Id.*

SUMMARY OF THE ARGUMENT

This Honorable Court should affirm the lower court's decision granting Defendant's Motion to Dismiss because Plaintiff failed to state a claim in his Complaint. First, Plaintiff has not plausibly alleged that either Defendant breached their fiduciary duties under ERISA. Given that Hopscotch's pursuit of ESG objectives and selection of the ESOP option were business decisions not subject to ERISA, Hopscotch could not possibly have breached its fiduciary duties by making such decisions. Even if these decisions were subject to ERISA, Plaintiff has not shown how Hopscotch acted imprudently or disloyal in those decisions. Plaintiff also has not shown how Red Rock's open pursuit of ESG investment options would make them an imprudent and disloyal choice for the Plan's investment manager. Further, Plaintiff has not shown how Red Rock's selection of ESG funds constitutes a breach of fiduciary duties. There is no requirement that fiduciaries pick the best performing or lowest-cost funds. Additionally, Plaintiff failed to identify *any* alternative non-ESG fund options that could or should have been selected for the Plan.

Second, Plaintiff failed to plausibly allege that the Plan suffered a loss. Given that Plaintiff failed to provide any means of comparison to support his broad allegations, Plaintiff failed to plausibly allege that the Plan had suffered any loss. As such, the District Court's dismissal of Plaintiff's Complaint was warranted.

ARGUMENT

This Honorable Court should affirm the lower court's decision granting Defendant's Motion to Dismiss because Plaintiff failed to state a claim in his Complaint. 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. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). For pleadings on a motion to dismiss, a plaintiff's factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs must provide "some further factual enhancement" to take a claim of fiduciary duty violation from the realm of "possibility" to "plausibility." *Id*. at 557. In the instant case, Plaintiff failed to plausibly allege that Defendants breached fiduciary duties of loyalty and prudence. Further, Plaintiff failed to plausibly allege that the alleged breaches caused a loss to the Plan.

I. Plaintiff Failed to Plausibly Allege Defendants Breached Fiduciary Duties of Loyalty and Prudence.

The lower court erred in finding that Plaintiff plausibly alleged Defendants breached their fiduciary duties. Plaintiff failed to show how Defendants were disloyal or imprudent with respect to their ESG investing. "ERISA imposes upon fiduciaries twin duties of loyalty and prudence. . .." *Braden*, 588 F.3d at 595. The duty of loyalty requires that fiduciaries act in the sole interest of benefit plan participants and beneficiaries. 29 U.S.C. § 1104(a)(1)(B); *Delker v. Mastercard Int'l, Inc.*, 21 F.4th 1019, 1025 (8th Cir. 2022). The duty of prudence mandates "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id*. This statutory duty of prudence establishes "an objective standard" that focuses on "the process by which" decisions are made, "rather than the results of those decisions." *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020) (internal citations omitted). In other words, a prudently made decision is not actionable, even if it leads to a bad outcome. *Id*. Accordingly, to sufficiently allege a breach, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it. *Ret. Plans Comm. of IBM v. Jander*, 589 U.S. 49, 51 (2020).

The Supreme Court has emphasized that a Rule 12(b)(6) motion is an important mechanism for weeding out meritless claims in the ERISA context. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014). Whether a plaintiff has plausibly alleged that a defendant acted imprudently under ERISA is a context-specific inquiry based on the circumstances prevailing at the time the fiduciary acts. *Id*. Therefore, at the pleading stage, the complaint must provide the Court with enough information to infer from what is alleged that the process was flawed. *Braden*, 588 F.3d at 596. Although the complaint does not have to directly address the actual process by which the plan was managed, a plaintiff should at least provide circumstantial allegations about the fiduciary's methods based on the investment choices. *Id.*; *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). Where a complaint lacks any allegations relating directly to the methods employed by the ERISA fiduciary, the complaint cannot survive a motion to dismiss. *Braden*, 588 F.3d at 596. Here, Plaintiff has not shown *how* the consideration of ESG factors in investment decisions is a flawed strategy that constitutes a breach of fiduciary duties by either Defendant. With respect to their ESG investment strategies, Defendants remained loyal and prudent by making decisions that were in the best interests of the Plan Participants and no different than decisions made by any other fiduciary in their same position. Moreover, given that neither Defendant breached their fiduciary duties under ERISA, neither Defendant was required to "make reasonable efforts under the circumstances to remedy" pursuant to 29 U.S.C. § 1105. *See* 29 U.S.C. § 1105 ("a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan . . . if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.").

A. Hopscotch Did Not Breach Its Fiduciary Duties by Pursuing ESG Objectives and Selecting the Plan's Default ESOP Option.

Plaintiff alleges that Hopscotch disloyally and imprudently pursued ESG objectives for Hopscotch and then selected the ESOP as the matching and default investment option for the Plan. This allegation does not support Plaintiff's claim that Hopscotch breached fiduciary duties under ERISA. ERISA does not prohibit an employer from acting in accordance with its interests as an employer when not administering the plan or investing its assets. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). Here, Hopscotch's decisions to pursue ESG objectives and select the Plan's default ESOP options were business decisions not subject to ERISA.

In *Martin v. Feilen*, this Court concluded that *Hickman* applies with equal force when the ERISA plan is an ESOP. *Martin v. Feilen*, 965 F.2d 660, 666 (8th Cir. 1992). In that case, the district court did not apply the *Hickman* standard to the specific transactions at issue, concluding instead that appellees breached their fiduciary duties under § 1104 when they "engaged in unwise business transactions that were intended primarily to inure to the benefit of the fiduciaries themselves." *Id*. This Court reasoned that virtually all of an employer's significant business decisions affect the value of its stock, and therefore the benefits that ESOP plan participants will ultimately receive. *Id*. However, this Court ultimately found that ERISA's fiduciary duties under § 1104 attach only to transactions that involve investing the ESOP's assets or administering the plan. *Id*. Applying this reasoning to the instant case, since Hopscotch's general commitment to ESG goals for the company was a business decision not related to the administration of the plan, such action was not subject to ERISA's fiduciary duties under § 1104.

Further, an employer's decisions about the content of a plan are also not fiduciary acts subject to ERISA. *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Hopscotch's decision to include a default ESOP option in the Plan is a decision about the content of the Plan and therefore is not a fiduciary act subject to ERISA. Accordingly, this Honorable Court should find that Plaintiff failed to plausibly allege that Hopscotch breached any fiduciary duties by pursuing ESG objectives and selecting the Plan's default ESOP option.

In the alternative, should this Court find that Hopscotch's decisions to pursue ESG objectives and select the default ESOP option were fiduciary acts subject to ERISA, it should nonetheless find that such acts were loyal and prudent investment decisions, and that Plaintiff has failed to plausibly allege otherwise. The primary reasoning Plaintiff offers in support of his argument that Hopscotch's pursuit of ESG initiatives and selection of the ESOP option were imprudent and disloyal decisions is that "Hopscotch's own ESG and DEI activities have had a significant negative impact on returns and ultimately on the value of Hopscotch's own stock during the period February 4, 2018 to the present." Here, Plaintiff is improperly basing his claim on outcomes and has not made any assertions as to how the process of selecting the default ESOP option was flawed. To sufficiently allege that such an investment decision was flawed, Plaintiff would need to show that in selecting the ESOP option, Hopscotch superseded the interests of the Plan Participants or acted contrary to how a similarly situated fiduciary would act. *See generally* 29 U.S.C. § 1104(a).

First, Hopscotch did not breach it's duty of loyalty under ERISA when it selected the default ESOP option for the Plan. While it may be true that Hopscotch commitment to ESG objectives was in effort to increase business, Hopscotch always prioritized the best interests of the Plan Participants. Hopscotch's own corporate interests to grow business and the interests of the Plan Participants are not mutually exclusive. By adopting ESG strategies, Hopscotch, in just one year, had managed to become the number one social media platform for teenagers and pre-teens. The business growth greatly increased the value of Hopscotch stock, which ultimately benefited Plan Participants. As such, Hopscotch's selection of the default ESOP option was a loyal investment decision and Plaintiff has failed to present evidence suggesting otherwise.

Second, Hopscotch did not breach its duty of prudence under ERISA when it selected the default ESOP option. Selection of the default ESOP option was a prudent investment decision and Plaintiff has again, failed to present evidence suggesting otherwise. In *Vigeant v. Meek*, the court held that the plaintiffs had failed to state an imprudent investment claim because the employer stock was not excessively risky. *Vigeant v. Meek*, 352 F. Supp. 3d 890, 899 (D. Minn. 2018), aff'd, 953 F.3d 1022 (8th Cir. 2020). In that case, the company's stock declined during a period of financial hardship. *Id*. The plaintiffs argued that fiduciaries have a continuing duty to monitor investments and remove imprudent ones; and fiduciaries breach this duty when they fail to investigate whether an investment is imprudent after changed financial circumstances increase the risk of holding stock. *Id*. at 898. In response, the defendants argued that it is only imprudent for ESOP fiduciaries to continue to invest in employer stock if an investment is excessively risky. *Id*. First, the court found that according to the plaintiffs' own allegations, the defendants did regularly monitor the plan's investment. *Id*. The complaint had stated that the trustee annually determined the fair market value of company stock with the opinion of an independent appraiser. *Id*. Second, the court found that the company stock was not so risky as to make it an imprudent investment. *Id*. at 899. The court reasoned that, "[e]mployer stock is excessively risky when the company is on the verge of collapse." *Id*. While the plaintiffs alleged that the stock value dropped a little over 50% from 2014 to 2017, the court ultimately concluded that the financial hardship described in the Complaint did not amount to the financial collapse. *Id*.

In the instant case, Plaintiff neglected to make any allegations about whether the ESOP option was being regularly monitored. Plaintiff only makes a vague allegation that the value of Hopscotch stock declined by an unknown amount during the period February 4, 2018 to the present. Even if Plaintiff's weak allegations are taken as true, applying the reasoning from *Vigeant v. Meek*, Plaintiff has failed to show how the ESOP option is excessively risky. Hopscotch is not on the verge of collapse. Rather, Plaintiff's Complaint supports the opposite stating that, "Hopscotch is the second largest social media company and the most popular among the youngest demographic of social media users." Accordingly, this Honorable Court should find that Plaintiff failed to plausibly allege that Hopscotch was imprudent in its selection of the default ESOP option.

Given that Hopscotch's pursuit of ESG objectives and selection of the ESOP option were business decisions not subject to ERISA, Hopscotch could not possibly have breached its fiduciary duties by making such decisions. Even if these decisions were subject to ERISA, Plaintiff failed to meet his burden of plausibly alleging that the decisions constituted a breach of fiduciary duties. Plaintiff has not shown how Hopscotch acted imprudently or disloyal with respect to the company's commitment to ESG goals and decision to include an ESOP default option in the Plan.

B. Hopscotch Did Not Breach Its Fiduciary Duties by Selecting and Retaining the Plan's Investment Manager, Red Rock.

Plaintiff alleges that Hopscotch breached fiduciary duties by selecting and retaining Red Rock as the Plan investment manager. In the Complaint, Plaintiff argues that the selection of Red Rock as the Plan investment manager was disloyal and imprudent because Red Rock openly pursues ESG investment options which are "known to underperform relative to their benchmark indices and other similar investment options available in the marketplace." However, Plaintiff fails to support this broad assertion with sufficient evidence necessary for establishing a prima facie case. For pleadings on a motion to dismiss, a plaintiff's factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true. *Twombly*, 550 U.S. at 555. Plaintiffs must provide "some further factual enhancement" to take a claim of fiduciary duty violation from the realm of "possibility" to "plausibility." *Id*. at 557. Specifically, in the Eighth Circuit, the key to nudging an inference of imprudence from possible to plausible is providing "a sound basis for comparison—a meaningful benchmark." *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022). Unless a plaintiff has plausibly alleged that an investment decision was imprudent or disloyal, courts must give "due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Northwestern Univ.*, 595 U.S. 170, 177 (2022). Here, because Plaintiff fails to provide a meaningful benchmark to support the idea that ESG investment options are known to underperform, Plaintiff also fails to plausibly allege how Red Rock's open pursuit of ESG investment options would make them an imprudent and disloyal choice for the Plan's investment manager.

The facts of the instant case are analogous to those in *Spence v. Am. Airlines, Inc.*. *See Spence v. Am. Airlines, Inc.*, 718 F. Supp. 3d 612 (N.D. Tex. 2024). In that case, the Fifth Circuit addressed the issue of whether the defendants had breached their fiduciary duties by choosing to invest Plan assets with investment managers who pursue ESG objectives. *Id*. at 618. The plaintiff argued that funds managed by ESG-focused investment managers have continually underperformed compared to other similarly situated funds and that defendants knew or should have known of this underperformance yet selected and retained these investment managers despite knowledge that those managers pursued nonpecuniary ends. *Id*. The defendants argued that these allegations are insufficient to state a claim because the plaintiff did not provide a benchmark by which to compare performance. *Id*. The court in *Spence* ultimately found that the plaintiff had sufficiently stated a claim. *Id*. However, the court makes clear that this decision was based upon the fact that the Fifth Circuit has not imposed a performance-benchmark requirement. *Id*. at 619. The court goes a step further to specifically recognize that while the Fifth Circuit imposes no such requirement, the Eighth Circuit does impose a "meaningful benchmark" standard in

ERISA fiduciary duty cases. *Id*. As such, Plaintiff in the instant case was required to provide a meaningful benchmark to support his allegations.

The only information Plaintiff offers to support his claim that ESG investments are known to underperform is that "in 2021 and 2022, the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors." This is not a meaningful benchmark; the data is insufficient to support Plaintiff's argument because it is only representative of stock performance amongst 500 of the largest publicly traded companies in the United States during an extremely specific and limited period of time. At any point in time, one sector may outperform another. In the instant case, the relevant time period spans over 7 years from February 2018 to the present. While a consistent underperformance of stock during the relevant time period could indicate flawed investment strategies, Plaintiff has failed to support his argument with such data. Therefore, Plaintiff has not plausibly alleged that Red Rock was a disloyal or imprudent choice in Hopscotch's selection of an investment manager for the Plan.

Hopscotch selected an investment manager for the Plan that aligned with its company values. This decision was also in line with the best interests of the Plan Participants and the prudent fiduciary standard. Therefore, this Honorable Court should find that Plaintiff failed to plausibly allege that Hopscotch breached any fiduciary duties by selecting and retaining the Plan's investment manager, Red Rock.

C. Red Rock Did Not Breach Its Fiduciary Duties by Selecting ESG Funds for the Plan.

Plaintiff alleges that Red Rock breached its fiduciary duties by selecting ESG funds for the Plan despite the availability of better performing and lower cost investment options readily available in the marketplace. This allegation is unsubstantiated. First, fiduciaries are not required to pick the best performing or lowest-cost funds. *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 486 (8th Cir. 2020). It is only required that fiduciaries monitor and remove imprudent investment options. *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015). And again, to sufficiently allege than an investment option is imprudent, a plaintiff "must provide a sound basis for comparison—a meaningful benchmark." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018)

In *Meiners*, this Court found that the plaintiff did not plead facts showing that the selected funds were underperforming. *Id*. at 823. In that case, the plaintiff only pled that one alternative fund, which he alleged was comparable, performed better than the selected fund. *Id*. This Court reasoned that the fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the selected funds were an imprudent choice at the outset. *Id*. Because the plaintiff had failed to provide a sound basis for comparison, this Court concluded that the plaintiff's complaint failed to state a plausible claim because it lacked "sufficient factual matter, accepted as true," to demonstrate that the defendant's selected funds for the Plan were an imprudent choice. *Id*. (quoting *Iqbal*, 556 U.S. at 678).

This Court further highlights why a meaningful benchmark is so important in *Davis*. *Davis*, 960 F.3d at 486. Although the plaintiff in that case made several attempts to make comparisons and point to potential benchmarks, this Court concluded that there was "simply not enough in the complaint to infer" that the defendant had breached its fiduciary duties under ERISA. *Id*. at 484–486. This Court reasoned that the plaintiff was "comparing apples to oranges" and ultimately found that the plaintiff's complaint failed to "connect the dots in a way that created an inference of imprudence." *Id*. at 485–486.

Whereas the plaintiff in *Davis* at the very least attempted to offer several comparative options to support his claim, Plaintiff in the instant case failed to provide *any* meaningful comparators, even when specifically requested by the District Court.[1] Moreover, Plaintiff failed to identify *any* alternative non-ESG fund options that could have or should have been selected for the Plan, a necessary step for plausibly stating an imprudence claim. Therefore, this Honorable Court should

[1] *See* Opinion, p. 7–8 ("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.").

apply the same reasoning it did in *Davis* and find that Plaintiff's Complaint failed to "connect the dots in a way that created an inference of imprudence."

II. Plaintiff Failed to Plausibly Allege that the Alleged Breaches of Fiduciary Duties Caused Loss to the Plan.

Should this Honorable Court find that Plaintiff has plausibly stated a claim that Defendants breached their fiduciary duties under ERISA, it should nevertheless find that Plaintiff did not plausibly allege that such breaches caused any losses to the Plan. One cannot determine whether the assets of a plan were diminished in the abstract. *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599 (8th Cir. 1995). In *Roth*, this Court held that a comparison must be made between the value of a plan's assets before and after the breach. *Id.* More specifically, loss must be determined by examining a plan's assets as a whole and comparing the respective performances over an extended period of time. *Id*. (*Citing Donavan v. Bierwirth*, 754, F.2d 1049, 1058 (2d Cir. 1985)).

Here, Plaintiff only makes vague allegations that the pursuit of ESG initiatives by both Defendants has negatively impacted returns for the Plan. Plaintiff fails to provide any evidence that speaks to the value of the Plan's assets before and after the alleged breaches. Plaintiff also fails to compare the respective performances of the different fund options offered by the Plan. Relying on *Matousek*, the lower court correctly found that dismissal of Plaintiff's Complaint was warranted. *See Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (holding that, "[t]he key to nudging an inference of imprudence from possible to plausible is providing "a sound basis for comparison—a meaningful benchmark—not just alleging that costs are too high, or returns are too low.") Given that Plaintiff failed to provide any means of comparison to support his broad allegations, Plaintiff failed to plausibly allege that the Plan had suffered any loss.

CONCLUSION

For the foregoing reasons, this Honorable Court should AFFIRM the lower court's decision granting Defendant's Motion to Dismiss. Plaintiff's Complaint fails to plausibly allege facts supporting the necessary elements to succeed on a breach of fiduciary duties claim. Most notably, Plaintiff failed to plausibly allege that either Defendant acted imprudently or disloyally with respect to their ESG investment decisions. Further, Plaintiff failed to plausibly allege that the alleged breaches of fiduciary duties caused loss to the Plan. Therefore, Plaintiff failed to state a claim and thus, Plaintiff's Complaint was properly dismissed.