Civil Action No. 24-CV-100

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN SMITH,

Plaintiff/Appellant

vs.

HOPSCOTCH CORPORATION

and RED ROCK INVESTMENT CO.,

Defendants/Appellees

On Appeal from the United States District Court

For the District of Columbia

BRIEF FOR PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331 because the claims arise under the Employee Retirement Income Security Act of 1974 ("ERISA"). This Court has jurisdiction under 28 U.S.C. § 1291 to review the District Court's Order. Appellant filed a timely notice of appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether the district court erred in holding that Appellees' alleged fiduciary breaches caused loss to the Plan.
2) Alternatively, whether this court should hold that the complaint failed to adequately allege that one or both Appellees breached their fiduciary duty.

STATEMENT OF THE CASE

A. Procedural History

On February 4, 2024, plaintiff-appellant John Smith ("Mr. Smith") filed a civil action in the United States District Court for the District of Minnesota against Hopscotch Corporation ("Hopscotch") and Red Rock Investment Co. ("Red Rock"). (R. at 1). The complaint alleges that Appellees were, at all relevant times, a fiduciary under ERISA. Further, the complaint alleges that Appellees failed to select and include investment options for the Plan based on the financial merits of each investment and the best interests of Plan participants, and instead Appellees' imprudently and disloyally pursued ESG strategies (R. at 5).

Appellees filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) based on failure to state a claim. The District Court entered an Order granting the motion. Mr. Smith

subsequently appealed the Opinion and Judgment to the United States Court of Appeals for the Eighth Circuit.

B. Statement of the Facts

Mr. Smith worked as a software engineer for social media platform and technology company Hopscotch from 2016 until November 2023, when he was terminated. Through this employment, Mr. Smith became a participant under the Hopscotch Corporation 401(k) Plan (the "Plan") and was covered by the Plan at all relevant times (R. at 2). Hopscotch, together with Red Rock, manage the 401(k) Plan; in doing so they are fiduciaries under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001, *et seq*.

Employees participating in the Plan can opt to invest up to 10% of their salary. Hopscotch automatically contributes 5% of each employee's salary. Hopscotch also matches employee's contributions up to a maximum of 7% (R. at 2-3). The Plan offers eight investment options. One option is a Hopscotch stock employee ownership option ("ESOP"). Red Rock manages all investment options other than the ESOP. Contributions made by Hopscotch are automatically invested in the ESOP option and must remain there until the options vest after five years (R. at 3). Mr. Smith worked for Hopscotch and participated in the Plan for over five years and, therefore, all of his and Hopscotch's contributions are vested (R. at 3).

In 2018, Hopscotch's Board of Directors believed that Hopscotch ought to pursue ESG goals for its company and the investment options offered in the Plan. In 2019, Hopscotch selected Red Rock as the Plan's investment manager because Red Rock had a commitment to ESG and diversity, equity, and inclusion ("DEI") goals (R. at 3). In 2019, Red Rock stated that climate sustainability would be its guiding principle (R. at 4). Hopscotch's CEO stated in an

interview that the Board believed ESG and DEI goals would attract a young demographic of teenagers and pre-teens (R. at 3).

However, since February 2018, Hopscotch's commitment to ESG and DEI goals has reduced the value of Hopscotch's stock and has experienced slower growth in share price when compared to competitors such as Tok and Boom (R. at 4). In turn, the lower stock value has led to lower returns for ESOP option of the Plan which constitutes over 40% of the Plan's investments (R. at 4).

Likewise, Red Rock's ESG investing has led to lower investment returns for the seven option investment options offered by the Plan. Red Rock pursues this climate agenda by exercising proxy voting rights on all assets it managed for employee benefit plans against board of directors of companies which were not making sufficient progress towards this goal. Red Rock exercised proxy voting rights several times throughout 2020-2023 (R. at 4). Red Rock also boycotts investments in traditional energy companies. Each of the ESG investment options selected by Red Rock for the PLan has a non-ESG counterpart with better returns and lower costs during the period of Smith's coverage (R. at 4). Each company which Red Rock has invested in has suffered a stock price decline. For comparison, the Energy Sector of the S&P 500 for mid-cap stocks returned over 55% more than non-Energy sectors (R. at 5). The University of Chicago Journal of Finance shows that ESG funds underperformed during the last 5 years by an average of 2.5% compared to the broader market return of 8.9% (R. at 5).

STANDARD OF REVIEW

This court reviews a district court's grant of a Rule 12(b)(6) dismissal order de novo. *e.g., Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020). When reviewing, this court should accept all well-pleaded factual allegations as true and draw inferences in favor of the plaintiff. *See e.g., Schriener v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014).

"To survive a motion to dismiss, a 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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when the plaintiff pleads facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Ashcroft*, 556 U.S. at 678. The plausibility requirement is not a probability requirement. "Thus, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

SUMMARY OF ARGUMENT

The District Court erred in dismissing Appellant's complaint because Appellants that Appellees were I) fiduciaries of the Plan, II) breached their fiduciary duties of prudence and loyalty, and III) caused a loss to the plan.

First, while a fiduciary can act in a non-fiduciary role, neither Appellees alleged breach involves a non-fiduciary role. The investment manager exercises fiduciary responsibility over plan assets when it selects investment options and invests funds. The plan sponsor, as a co-fiduciary, exercises a fiduciary responsibility when selecting the investment manager. A co-fiduciary can be liable for enabling or failing to stop another fiduciary's breach.

Second, Appellants plausibly claim a breach of the duty of prudence by highlighting a *process* of ESG investing which was imprudent and contrary to the best interest of Plan participants. Appellees breach their duty of prudence through by selecting and retaining an imprudent investment manager, and imprudently selecting investment options based on non-financial factors. Not only do the investment options selected by Red Rock underperform, but selection of options based on climate sustainability rather than financial opportunities is an imprudent process. Selection of an investment manager based on their climate priority and not financial prowess may not be imprudent at the outset, but is imprudent once the investment manager has shown that it makes imprudent investments and acts disloyally. Continued retention of that investment manager is imprudent and enables the investment manager's breach. Appellees breach their duty of loyalty by subordinating participants' interests for the sake of non-pecuniary, ESG goals. Fiduciaries are expected to act for the exclusive benefit of Plan participants', which vocal prioritization of ESG goals within the Plan contradicts.

Third, Appellant's complaint adequately stated a claim that Appellees' breaches caused losses by foregoing Plan investment returns in favor of ESG activism. The level of detail required by the meaningful benchmark standard is inapplicable to this case and should not be used to assess whether Appellant sufficiently plead losses as a result of Appellees' actions. Applying such a benchmark standard in this case would demand that Appellant determine issues of fact that are only appropriate after discovery has commenced, not at the pleading stage of the case. Indeed, applying such a benchmark would create an extraordinarily high standard for plaintiffs in ERISA cases and only allow courts to grant relief to plaintiffs in cases involving the most egregious violations of fiduciary duties.

However, if this Court finds that the meaningful benchmark standard applies to this case,

Appellants' complaint provides several specific and meaningful benchmarks that are sufficient to deny Appellees' motion to dismiss. To establish losses as a result of Hopscotch's breach, Appellant provides a comparison of Hopscotch's performance to that of its closest peer companies. This comparison provides a clear demonstration of losses to the ESOP as a result of Hopscotch's ESG activism. To establish losses as a result of Red Rock's breach, Appellant provides two meaningful benchmarks. First, the performance of the Energy sector of the S&P 500 for large and mid-cap stocks demonstrates clearly plausible losses as a result of Red Rock's boycott of investments in the energy sector broadly. Second, The University of Chicago Study provided by Appellant clearly demonstrates the plausibility of losses when fund managers institute ESG and DEI practices in their investment strategy. These losses, as in many ERISA cases, are naturally less certain. However, that does not make it appropriate for this Court to deny Appellant the opportunity to argue for equitable relief.

ARGUMENT

1. APPELLANTS ADEQUATELY ALLEGED THAT APPELLEES, ACTING AS FIDUCIARIES, PURSUED ESG INVESTING STRATEGIES VIOLATING THEIR FIDUCIARY DUTIES.

To state a claim for a breach of ERISA's fiduciary duties, a plaintiff must make a prima facie showing that I) the defendant acted as a fiduciary, II) the defendant breached its fiduciary duties, and III) thereby caused a loss to the plan. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). The District Court correctly recognized that Hopscotch and Red Rock were both acting in their role as fiduciaries and that both parties plausibly breached their fiduciary duties of

prudence and loyalty through their pursuit of ESG goals under the Plan. Here, Appellee Red Rock is a named fiduciary under the Plan, and acts as a fiduciary when it invests Plan assets. Appellee Hopscotch is also a named fiduciary and acts in its fiduciary role when selecting and retaining Red Rock as an investment manager–these responsibilities do not fall under corporate decision-making by Hopscotch nor its role as a settlor. After concluding that both Appellees are fiduciaries to the Plan at issue, Appellants must also show that Appellees plausibly breached their fiduciary duties. Appellants allege that Hopscotch and Red Rock breached their fiduciary duties under ERISA by imprudently prioritizing ESG goals as a flawed process over the best interests of Plan participants.

a. Appellees Were Acting In Their Capacities As Fiduciaries When Engaging In The Alleged Breach.

A person is a fiduciary with respect to a plan to the extent he exercises any discretionary authority or control over the management of the plan, its assets, or administration of the plan. 29 U.S.C. § 1002(21)(A). *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 251 (5th Cir. 2008). Fiduciary status is complex because fiduciaries can act in multiple roles which have conflicting interests. Fiduciaries often act with "two hats." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000) (finding that a fiduciary can wear "two hats" but must wear only one "hat" at a time, and wear the fiduciary hat when making fiduciary decisions). For example, a fiduciary may act as an employer by firing a plan beneficiary for reasons unrelated to the ERISA plan; a fiduciary may act as a plan sponsor when electing to create, amend, or terminate an employee benefit plan; a fiduciary may act in a corporate role when making executive decisions which implicate its stock; a fiduciary may act as a fiduciary when hiring an investment manager or selling Plan assets. A

threshold question to ERISA litigation is whether the defendant was acting as a fiduciary when performing the subject of the complaint. *Pegram*, 530 U.S. at 225; *Lockheed Corp. v. Spink*, 517 U.S. 882, 884 (1996) (finding that the lower court erred in not finding a fiduciary status before finding an ERISA violation when implementing the amended Plan).

"Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries… When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust." *Lockheed*, 517 U.S. at 890 (quoting *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995)). *See also Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) ("An employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."); *Wright v. Or. Metallurgical Corp.*, 360 F.3d 1090, 1102 (9th Cir. 2004). Individuals who would otherwise be fiduciaries are free to adopt, amend, or terminate employee benefit plans without implicating their fiduciary duty. Therefore, a plaintiff cannot succeed on a claim for breach of a fiduciary duty by alleging that a defendant amended or terminated a plan imprudently or disloyally.

Here, Hopscotch wears its "settlor" or "corporate" hat when deciding that the company ought to pursue ESG goals with respect to its operations and to the Plan at issue (R. at 3). Hopscotch's decision to amend the Plan resembles *Lockheed* and *Hughes* as all cases involve plaintiffs attempting to sue plan sponsors for the amendments to the Plan. Hopscotch is not potentially liable merely for deciding to pursue ESG goals in the Plan, nor would stating as such be a sufficient pleading to overcome a motion to dismiss. The decision to make Hopscotch-matched contributions invested in Hopscotch stock by default falls under settlor duties, rather than fiduciary duties. *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 367 (2d Cir. 2014)

(“Settlor functions… include conduct such as establishing, funding, amending, or terminating a plan.”); *Akers v. Palmer*, 71 F.3d 226, 230 (6th Cir. 1995) (“Not every decision affecting a benefits plan is subject to ERISA's fiduciary rules.”). *See also Hughes*, 525 U.S. at 444; *Lockheed*, 517 U.S. at 891. Additionally, Hopscotch was not acting as a fiduciary in its decision to terminate Smith in 2023 (R. at 3). *e.g., Coulter*, 573 F.3d at 367.

Yet, while Hopscotch acts in its role as settlor when selecting the ESOP option, it is fundamentally unworkable that a corporate decision can be separate from a fiduciary decision when dealing with employer stock options. *See Akers*, 71 F.3d at 230 (“Competing concerns will always arise between the creators of a plan and the interests of potential beneficiaries.”). Corporate decisions that implicate employer stock, such as the amendment of an ERISA plan, could almost always conflict with a fiduciary’s duty of loyalty and prudence; a corporate decision to pursue certain goals that may dramatically decrease or increase the value of its stock will always affect an employer stock option asset. Selecting an ESOP option is a settlor's responsibility, but electing to pursue ESG goals as a company is a corporate decision that is very likely to affect company stock. Hopscotch acknowledges this potential impact, noting that the decision to pursue ESG goals was to bring in and retain a younger consumer base (R. at 3, 16). Yet, the motivation driving the decision is irrelevant so long as the decision implicates Plan assets. Given that Smith was covered by the Hopscotch’s Plan starting in 2016 and the decision to pursue ESG was not made until 2018 (R. at 2, 3, 8, 12), all matched ESOP investments by Hopscotch would be affected by the decision because the ESG decision affects existing Plan assets (e.g., matched contributions placed into ESOP).

Strictly reading the roles of a fiduciary as one who exercises control over plan management or its assets, it would seem impossible to differentiate the roles of a fiduciary and

corporate decision making. As a practical matter, distinguishing between a corporate decision and a fiduciary decision seems unworkable when considering plans offering ESOP options. Any decision that affected employer stock under an ERISA plan would be subject to fiduciary responsibilities–so long as the plan sponsor and administrator was making the corporate decisions, as is the case here–as that decision would exercise control over assets (employer stock) in the plan. By the same measure, a company could skirt fiduciary obligations by labelling its decisions affecting the plan as "corporate" rather than fiduciary. *But see Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988) ("ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants.") (citations omitted). Still here, a company-wide decision to shift towards ESG goals is not "day-to-day." Hopscotch should not be able to avoid liability by labelling its decision to pursue ESG goals a "corporate" decision, when the decision inherently implicates Plan participants' interest in employer stock.

Here, it is not necessary to go this far. Hopscotch is uncontested as a fiduciary because it is the plan administrator. Hopscotch acts as a fiduciary exercising control, discretion, and management over the Plan and its assets when it selects and retains Red Rock as the investment manager. While this does not affect the ESOP option within the Plan, Hopscotch can still be liable for a breach of fiduciary duty in its management of the seven other options via its retention of Red Rock.

While Hopscotch does discharge some of its fiduciary duties to Red Rock by appointing them as an investment manager (*See Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1219 (2nd Cir. 1987)), that appointment does not absolve Hopscotch from liability if the appointment enabled the breach under co-fiduciary duties. A trustee is not liable for the acts or omissions of

appointed investment managers involving assets under the investment manager's control, unless "[the] trustee has enabled such other fiduciary to commit a breach or …if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. §§ 1105(a);(d). Hopscotch not only enables Red Rock's fiduciary breach, but also knowingly participates in it. Hopscotch initially appointed Red Rock "because of Red Rock's commitment to ESG, particularly with respect to the environment but also with respect to diversity, equity and inclusion ("DEI") goals" (R. at 3) and retained Red Rock thereafter when Red Rock exercised proxy voting rights to progress ESG goals (R. at 4). As such, Hopscotch enables Red Rock, a named fiduciary, to commit an alleged breach of fiduciary duties and is therefore subject to liability under its co-fiduciary duties of § 1105.

b. Appellants Plausibly Allege That Hopscotch And Red Rock Breach Their Fiduciary Duties By Pursuing ESG Goals That Are Imprudent And Disloyal To The Interest Of Plan Participants.

Appellants plausibly allege that Hopscotch and Red Rock breach their fiduciary duties by pursuing ESG goals that are imprudent and disloyal to the interest of Plan participants. ERISA requires that fiduciaries act with a duty of prudence and of loyalty to participants and beneficiaries. Each of these duties come with derivative responsibilities–such as acting in participants' best interest, conducting investigations into investments and asset managers, diversifying investments, and monitoring existing investments. *See e.g.,* 29 U.S.C. § 1104(a)(1)(B); *Dormani v. Target Corp.*, 970 F.3d 910 (8th Cir. 2020). Appellants sufficiently plead a breach of the duty of prudence by plausibly alleging a flawed process of ESG investing by Red Rock and imprudently selecting an investment manager based on its ESG reputation by

Hopscotch. Appellants sufficiently plead a breach of the duty of loyalty by plausibly alleging that both Hopscotch and Red Rock's prioritization of ESG goals was in conflict with the best interest of Plan participant's interests.

i. A duty of prudence pleading requires showing that the process used in Plan decision-making was flawed.

Under ERISA, fiduciaries' duty of prudence requires fiduciaries to act with the "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. 29 U.S.C. § 1104(a)(1)(B). *Dormani*, 970 F.3d at 913 (8th Cir. 2020). A fiduciary can be liable for assembling an imprudent menu of investment options, failing to diversify investments, or failing to monitor and remove imprudent investments after a reasonable time. For example, in *Tibble v. Edison Int'l*, the Supreme Court noted that a fiduciary's duty included selecting, frequently and independently monitoring investments, and removing those determined to be imprudent. 575 U.S. 5233 (2015) (finding that plaintiff had successfully alleged a breach of the duty of prudence for a fiduciary neglecting to remove higher priced funds when materially identical, cheaper alternatives existed). ERISA fiduciaries are not required to select the cheapest fund or the best performing fund, but they are required to assess whether a fund or investment course of action is prudent– taking into consideration other investment options and comparable funds. *See e.g., Davis*, 960 F.3d at 486; *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018). *See also Allen v. GreatBanc Tr. Co.*, 835 F.3d 670 (7th Cir. 2016) (concluding that a fiduciary breached its duty of prudence for failing to initially investigate and select wise investments).

The requisite pleading standard for a breach of the duty of prudence is context specific.

Hughes v. Nw. Univ., 595 U.S. 170, 177 (2022). For ESOP fiduciaries, to state a claim for a breach of the duty of prudence, a plaintiff must allege an alternative action that would have been consistent with 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." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 428 (2014). *See also Amgen Inc. v. Harris,* 577 U.S. 308 (2016); *Ret. Plans Comm. of IBM v. Jander,* 589 U.S. 49 (2020). The heightened standard of *Dudenhoeffer* does not necessarily apply to non-ESOP fiduciaries. *Hughes*, 595 U.S. at 177. Instead, it is sufficient for the plaintiff to plead enough facts to "infer from what is alleged that the [fiduciary's decision-making] process was flawed." *Braden*, 588 F.3d at 596; *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) ("The process is what ultimately matters, not the results."). In evaluating a claim of imprudent decision making, courts consider whether a prudent fiduciary in similar circumstances would have made the same decision. *Meiners*, 898 F.3d at 823. ERISA does not enable a plaintiff to plead a breach of the duty of prudence merely by showing that a fund is not the top performer or is underperforming. *Meiners,* 898 F.3d at 823. *See Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022) ("A showing of imprudence does not come down to simply pointing to a fund with better performance."). Thus, if a plaintiff pleads sufficient facts that a process was plausibly flawed and that a prudent fiduciary like circumstances would have acted otherwise, plaintiff should successfully overcome a motion to dismiss.

Appellants sufficiently plead that Appellees breached their fiduciary duty of prudence by showing that the ESG investing strategy utilized by Hopscotch and Red Rock was plausibly flawed. Appellants plausibly allege that Defendants, Hopscotch and Red Rock, breach their duty of prudence by alleging that Defendants ESG investing goals were potentially harmful to the

Plan and therefore imprudent. Appellants are not claiming a breach of prudence based on the fact that the investments of Red Rock are underperforming nor the existence of better performing funds. Rather Appellants plausibly claim a breach of the duty of prudence noting that the decision to prioritize ESG goals as a *process* for selecting investments is flawed and an imprudent decision, particularly given its underperformance. The investment options offered by the Plan had a non-ESG counterpart, which Red Rock neglected to select because Red Rock boycotts investments in traditional energy companies, which would include non-ESG counterparts (R. at 4). And these ESG options underperformed the non-ESG counterparts which had better returns and lower costs (R. at 4). ESG investing itself may not be imprudent, but selection of investment options solely based on ESG goals without considering their financial implications is imprudent. A complaint showing that Defendants pursued ESG goals as an investing strategy and that ESG investing as a strategy is contrary to a fiduciary's duty of prudence should clear the plausibility bar.

Red Rock is unable to escape liability for its alleged breach by arguing it is bound by the express language of the Plan. A fiduciary's duty of prudence takes precedence over the express language of the Plan and the goals of the Plan. *Dudenhoeffer*, 573 U.S. at 422 ("trust documents cannot excuse trustees from their duties under ERISA.") (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 568 (1985)). Under ERISA fiduciary duties, a fiduciary is expected to follow plan documents, unless those documents are inconsistent with the duty of prudence. 29 U.S.C. § 1104(a)(1)(D). Here, so long as appellants plausibly alleged that the process of ESG factors as a goal in investing by Hopscotch and Red Rock was flawed, Red Rock should not be able to avoid liability by claiming it was obligated to follow the express language of the Plan.

As to Hopscotch's status as an ESOP fiduciary, the heightened standard of *Dudenhoeffer* should not apply under the specific context of Hopscotch acting as a co-fiduciary. Although Hopscotch is an ESOP fiduciary, unlike *Dudenhoeffer* Appellants allege Hopscotch breached its duty of prudence by selecting and retaining Red Rock, a non-ESOP fiduciary responsibility. Here, the selection of Red Rock based on ESG factors is an imprudent process for selecting an investment manager. And retention of Red Rock after their continued imprudent and disloyal, *infra 22*, investments is imprudent. A prudent fiduciary in the same circumstances would not retain an investment manager who continually makes investments based on non-pecuniary factors, which are known to underperform other similarly priced investments, and without an eye to the Plan. And continued retention of that investment manager enables the investment manager's breach, therefore constituting a co-fiduciary breach under § 1105, *supra 16*.

ii. The duty of loyalty requires that Plan participant interests' are placed above all else.

The duty of loyalty requires a fiduciary to discharge his duties with respect to a plan solely in the interest of participants and beneficiaries. 29 U.S.C. § 1104(a)(1)(A). ERISA demands that a fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . .for the exclusive purpose of" providing benefits to the participants and beneficiaries and defraying administrative costs. 29 C.F.R. § 2550.404a-1. *See also Pegram*, 530 U.S. at 224 (2000); *Dormani*, 970 F.3d at 916. In the ERISA context, "benefits" refers to monetary or financial benefits, and does not cover non-pecuniary benefits. *Dudenhoeffer*, 573 U.S. at 421 (noting the term "benefits" does not non-pecuniary benefits like employer stock). This duty requires a fiduciary to prioritize participant's interest above almost all

other factors. *See State St. Bank & Trust Co. v. Salovaara,* 326 F.3d 130, 136 (2d Cir. 2003); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (noting the duty of loyalty requires "eye single to the interests of the participants and beneficiaries"). Fiduciaries are barred from subordinating participants' interests to secondary goals. "A fiduciary may not subordinate the interests of the participants…to other objectives, and may not sacrifice investment return…to promote benefits or goals unrelated to interests of the participants…" 29 C.F.R. § 2550.404a-1(c)(1). While the duty of loyalty requires managing funds with the best interest of participants, it does not preclude fiduciaries from incurring indirect benefits, as long as Plan participants' interests were the first priority. *See e.g. Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705 (2d Cir. 2013); *Metzler v. Graham*, 112 F.3d 207, 213 (5th Cir. 1997) (finding fiduciary who incurred incidental benefit did not violate duty when all evidence showed he acted reasonably in the best interest of participants); *Mertens v. Hewitt Assocs*., 508 U.S. 248, 252 (1993) (A fiduciary's duty includes avoiding a conflict of interest).

Rather than a strict application of the *Dudenhoffer* prudence pleading standard, pleadings for a breach of the duty of loyalty are guided by rigorous application of *Twombly* and *Iqbal*. *In re Wells Fargo ERISA 401(k) Litig*., 331 F. Supp. 3d 868, 873 (D. Minn. 2018), *aff'd sub nom*., *Allen v. Wells Fargo & Co.*, 967 F.3d 767 (8th Cir. 2020). "What matters is why the defendant acted as he did." *Id.* at 875. Therefore, if a plaintiff plausibly alleges that a fiduciary acted with self-interest or subordinated the interests of plan participants, *supra*, a plaintiff clears the pleading requirement.

In its decision, the District Court correctly recognized the plausible possibility that Defendants' focus on ESG and DEI goals superseded Plan participant and beneficiaries' interests (R. at 15). For defendant Hopscotch, the complaint demonstrates that around 2018 the company

opted to pursue ESG goals with respect to how the company runs itself and for investment options within the Plan. And in 2019, selected Defendant Red Rock because of their commitment to ESG goals (R. at 3), who imprudently pursued these strategies when investing. A fiduciary is expected to act with the exclusive benefit of participants in mind. Selection of the Plan's investment manager based on environmental, social, and governance factors inherently does not have an "eye single to the interests of participants" nor would such selection without further investigation into Red Rock be deemed prudent. Rather, Hopscotch is focused on its public image and commitment to secondary, non-pecuniary factors. The same is true for the investment options selected by Red Rock. Here, Red Rock's "eye" looks to climate sustainability as a crucial factor (R. at 4). Only companies that meet this climate criteria are considered as investment options by Red Rock (R. at 4). And Appellants highlight several factors for why these goals are not in their best interest, i.e. the lowered investment returns and Red Rock's use of proxy voting to entrench its ESG agenda (R. at 4-5). When Defendants select the investment manager and investment options based on non-pecuniary factors such as environmental, social, and governance factors rather than an assessment grounded in financial interests, Appellants *at least* posit a plausible breach of the duty of loyalty. That is, Hopscotch and Red Rock's vocal attention to these factors in selecting the Plan's manager and investment options, respectively, creates a plausible inference that non-pecuniary factors were elevated above Plan participants' interests.

2. APPELLANT'S COMPLAINT ADEQUATELY STATED A CLAIM THAT APPELLEES' BREACHES CAUSED LOSSES BY FOREGOING PLAN INVESTMENT RETURNS IN FAVOR OF ESG ACTIVISM

Appellant's complaint plausibly stated a claim that the Appellees' breaches caused a loss to the plan. In order to state a claim for breach of fiduciary duty under ERISA, a plaintiff must not only make a prima facie showing that the defendant acted as a fiduciary and breached its fiduciary duties but also plausibly allege that the breach caused a loss to the plan. *Braden*, 588 F.3d at 594. Three Circuits, including the Eighth Circuit, have adopted a "meaningful benchmark" standard to assess whether a complaint plausibly alleges that the breach of a fiduciary duty caused a loss to the plan. *Matousek*, 51 F.4th at 278; *Singh v. Deloitte LLP*, 123 F.4th 88, 96 (2d Cir. 2024); *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136, 1144 (10th Cir. 2023). Specifically, these courts have held that simply alleging that recordkeeping costs or fees are too high or that returns are too low is not sufficient to "state a claim to relief that is plausible on its face.'" *Twombly*, 550 U.S. at 570. The Eighth Circuit has applied this standard in cases where the plaintiff is arguing "that 'a prudent fiduciary in like circumstances' would have selected a different fund based on the cost or performance of the selected fund." *Meiners*, 898 F.3d at 822.

a. The Level Of Detail Required By The Meaningful Benchmark Standard Is Inapplicable To This Case.

While the Eighth Circuit has applied the meaningful benchmark standard to claims made based on the fiduciary duties laid out in 29 U.S.C. § 1104(a)(1)(B), this case can be differentiated from those cases. E.g. *Matousek*, 51 F.4th at 278. First, the breaches of the

fiduciary duties in this case are not related to recordkeeping fees or the imprudent selection of a specific fund. Whereas the Eighth Circuit has only applied the meaningful benchmark standard in cases involving claims of breach of prudence and loyalty based on high recordkeeping fees or imprudently selected or maintained funds. *Id*; *Meiners*, 898 F.3d at 821; *Braden*, 588 F.3d at 594; *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135 (8th Cir. 2024). Second, as a result of this action's claims being based on a broader fiduciary breach, the losses are, while still significant, more speculative than they would be in a traditional case of exorbitant fees. Third, applying the meaningful benchmark standard in this case would raise the burden on Appellant beyond stating a claim to relief that is merely plausible on its face. Indeed, a complaint that not only stated a breach of fiduciary duties but could also provide specific benchmarks as to how those breaches affected the performance of a stock would go beyond mere plausibility and be much closer to a likely case of a breach of fiduciary duties.

i. The breaches of the fiduciary duties in this case are not related to recordkeeping fees or the selection of a specific fund.

The breaches of the fiduciary duties in this case are not related to recordkeeping fees or the selection of a specific fund and, therefore, do not reflect the kinds of breaches assessed in *Matousek* and similar cases. The meaningful benchmark standard was developed in the Eighth Circuit through a series of cases in which the plaintiff ventured to demonstrate a loss through the comparison of recordkeeping fees across various fund managers. The cases in the Eighth Circuit make clear that a benchmark becomes meaningful to these kinds of cases when it provides a sound basis for comparison. *Barrett*, 112 F.4th at 1138. That sound basis is established when the benchmark identifies similar plans that offer the same services for less. *Id*. In cases like *Barrett*

and *Matousek* the courts found that the provided benchmarks were not meaningful because the two plans being compared were not sufficiently similar. *Id*; *Matousek*, 51 F.4th at 281. As the court in *Barrett* describes, plaintiffs are attempting to satisfy the pleading standard by "trying to compare the costs of two otherwise identical grocery baskets, except one contains filet mignon and the other does not". *Barrett*, 112 F.4th at 1138. Unlike these cases, Appellant does not claim that Hopscotch or Red Rock breached a fiduciary duty based on high fees.

Similarly, this case is also not a case about a 401k plan fiduciary choosing poorly performing investment options. *Matousek* and similar cases not only apply the meaningful benchmark standard to cases involving allegedly high fees but also to cases involving investment-by-investment duty-of-prudence claims. *Matousek*, 51 F.4th at 280; *Davis*, 960 F.3d at 484; *Meiners*, 898 F.3d at 823. These complaints generally allege that the fiduciaries violated the established continuing "duty of some kind to monitor investments and remove imprudent ones." *Hughes*, 595 U.S. at 170. Appellant does not claim that Hopscotch or Red Rock breached a fiduciary duty based on failing to monitor investments in the fund. Rather, this case rests on three theories of breach causing harm to the Plan. First, the Plan missed investment returns by not investing in most of the energy sector Second, the share prices of companies included in the Plan's investments declined as a result of Red Rock's proxy voting policies. And, third, ESG investments are shown to underperform other investments. In *Matousek* and similar cases, there are no theories of breach that are similar to these.

As a result, there is no reason for the court to apply the meaningful benchmark standard simply because the same statute establishes the fiduciary duty in each case. When assessing what should be required to plausibly demonstrate a loss, the focus must be on the case's specific facts. The Eighth Circuit has acknowledged this in *Matousek* writing that although "In one case, a

combination of a 'market index and other shares of the same fund' did the trick, but there is no one-size-fits-all approach. Nudging the complaint past the plausibility threshold depends on the 'totality of the specific allegations.'" *Matousek*, 51 F.4th at 281. The court must not abandon this sophisticated stance because the meaningful benchmark standard has worked in other cases. The great differences in the facts of this case call for an updated and nuanced approach to determining what can nudge the complaint past the plausibility threshold and applying the meaningful benchmark standard in this case will ignore the "totality of the specific allegations" in contradiction of precedent in this Circuit. *Meiners*, 898 F.3d at 823.

ii. Applying the meaningful benchmark standard in this case demands that Appellant determines issues of fact that are only appropriate after discovery has commenced.

The District Court determined that Appellant has failed to identify apt comparators to the ESG funds selected in order to show that non-ESG corollaries outperformed the selected option. However, as this court has acknowledged, "ERISA plaintiffs generally lack the inside information necessary to make out their claims in detail unless and until discovery commences". *Braden*, 588 F.3d at 598. Applying the meaningful benchmark standard in a case like this which is not simply comparing recordkeeping fees or overall returns between different plans will create a structural disadvantage for plaintiffs that will impede the rights that are secured by ERISA. By definition, determining when and how various ESG-related actions within Hopscotch, Red Rock affected related plans and determining the same thing for non-ESG corollaries is an inquiry of fact that is inappropriate prior to discovery.

In order to fully assess complex losses related to ESG policy within companies like

Hopscotch and Red Rock, Appellant will need to reach the discovery stage to gain access to inside information that will form the basis for determining individual accurate non-ESG corollaries. Specifically, the appropriate time to assess specific comparators in a case like this is at the summary judgment when the record is more developed. *Cassell v. Vanderbilt Univ.*, 285 F. Supp. 3d 1056, 1067 (M.D. Tenn. 2018). If this Court requires individual non-ESG comparators to Hopscotch and Red Rock to plausibly allege that Appellees' actions have caused a loss or other harm to the Plan and further requires those comparators to withstand scrutiny from Appellants in the face of great information asymmetry, plaintiffs will face significant barriers. As a result, they will be effectively prohibited from bringing claims like this under ERISA except in cases of the most blatant violations.

b. Alternatively, If This Court Finds That The Meaningful Benchmark Standard Applies To This Case, Appellants' Complaint Provides Several Specific And Meaningful Benchmarks.

If this Court finds that the meaningful benchmark standard applies to this case, Appellants' maintain that the complaint provides sufficient specific and meaningful benchmarks to survive a motion to dismiss. Specifically, the complaint provides a comparison of returns between the Energy sector of the S&P 500 for large and mid-cap stocks versus the non-Energy sectors. In addition, the complaint provides a comparison between the performance of Hopscotch and its two closest competitors in the social media industry, Tok and Book. Finally, the study published in the Journal of Finance at the University of Chicago establishes a meaningful benchmark to assess the underperformance of ESG funds during the last five years when compared to the broader market (R. at 5). All of these benchmarks assessed through the totality

of the complaint plausibly allege that Appellants' actions have caused a loss to the Plan.

i. Comparing Hopscotch's performance to that of its peer companies is a sufficient benchmark to establish plausible losses incurred as a result of Hopscotch's breach.

The key to a meaningful benchmark is that it must provide "a sound basis for comparison" and the complaint must go beyond alleging that "costs are too high, or returns are too low." *Davis*, 960 F.3d at 484. While the Eighth Circuit has provided many examples of comparators that were not meaningful benchmarks and a limited number of examples of comparators that served as meaningful benchmarks, it has not produced a singular definition. For example, in *Braden* analysis of a market index and other shares of the same fund provided a meaningful benchmark but the court emphasized that there is no simple formula to determining what is and what is not a meaningful benchmark. Rather, the assessment rests on the "totality of the specific allegations." *Braden*, 588 F.3d at 595-96. In *Matousek*, the court took issue with each of the plaintiff's proposed benchmarks because they were "just different" from the funds that were central to the case. *Matousek*, 51 F.4th at 282. For example, the individualized benchmarks provided in the case had differing investment styles from the fund at issue which create different aims, risks, and potential rewards that cater to different kinds of investors. *Id*. Similarly, when assessing peer-group expenses ratio data, the court noted, "There is no way to compare the large universe of funds—about which we know little—to the risk profiles, return objectives, and management approaches of the funds in MidAmerican's lineup." *Id*. Finally, the court took issue with peer-group performance comparisons because the composition of the peer groups was not explained and therefore, the court determined, there was "no way of knowing

whether the peer-group funds provide a 'sound basis for comparison.'" *Id.* at 281 (quoting *Braden*, 588 F3d at 595-96).

The peer-company benchmark provided in the complaint assessing Hopscotch's performance in the market compared to its two closest competitors does not have the issues that the proposed benchmarks in *Matousek* did and does provide a sound basis for comparison. The complaint states, "Hopscotch is the second largest social media company and the most popular among the youngest demographic of social media users but has experienced slower growth in share price when compared to the number one company, Tok, and the number three company, Boom." (R. at 4). Unlike the proposed benchmarks in Matousek, Tok and Boom are not "just different" from Hopscotch. Indeed, as the first and third largest social media companies it seems clear that Tok and Boom provide the closest source of comparison in the market for how Hopscotch is likely to perform. This benchmark certainly is less specific than benchmarks that were rejected by the court in *Matousek*. However, the court in *Braden* accepted an overall market index and other shares of the same fund as a sound basis for comparison. *Braden*, 588 F3d at 595-96. This court emphasized that its "ultimate conclusions rest on the totality of the specific allegations in this case" and noted, "we do not suggest that a claim is stated by a bare allegation that cheaper alternative investments exist in the marketplace." *Id*. at 596. Similarly, Appellant does not suggest a loss can be shown simply because a company performed worse than its competitors. However, along with that comparison, the complaint provides detailed descriptions of how Hopscotch's ESG-related practices led directly to that decline and, therefore, in examining the totality of the complaint a sufficiently meaningful benchmark is found to plausibly state a loss as a result of Hopscotch's breach.

In addition, this Court must take into account not just the totality of the complaint but the

totality of the circumstances and limitations surrounding the case at the point of the motion to dismiss. The information related to Tok and Boom's growth is limited in the complaint because it is limited in the marketplace. Corporations are not in the habit of publishing every detail of their business to the public eye and therefore a more detailed comparison is not available at this stage. However, this benchmark is sufficient to move past the plausibility standard. There are some circumstances where "a plaintiff may need to rule out alternative explanations in some circumstances in order to survive a motion to dismiss." *Id*. Specifically, "where there is a concrete, "obvious alternative explanation" for the defendant's conduct—that a plaintiff may be required to plead additional facts tending to rule out the alternative." *Id*. (quoting *Twombly*, 550 U.S. at 567). However, here there is no obvious alternative explanation for why a company, while its two closest peer companies grew rapidly, would grow at a significantly slower rate. When construing the complaint most favorably to Appellant as the nonmoving party here, it is clear that the complaint plausibly alleges that Hopscotch's actions have caused a loss to the Plan. The growth of the company directly impacts the share price and that share price directly impacts the value of the ESOP which makes up 40% of the Plan's investments.

ii. The performance of the Energy sector of the S&P 500 for large and mid-cap stocks is a meaningful benchmark to assess losses related to Red Rock's deliberate boycott of most energy-sector investments.

The performance of the Energy sector of the S&P 500 for large and mid-cap stocks provides a meaningful benchmark to assess the claims of loss to the Plan made against Red Rock on the basis of its boycott of most energy-sector investments. In *Matousek* the court rejected the use of peer-group performance comparisons containing hundreds of funds each with little

information provided about "whether [the peer-group funds] hold similar securities, have similar investment strategies, and reflect a similar risk profile." *Matousek*, 51 F.4th at 281. However, the benchmark of a subset of the S&P 500 can be clearly differentiated from the use of peer-group performance in *Matousek*. First and foremost, these benchmarks are being used in different contexts. The plaintiff in *Matousek* is attempting to show that there were comparable funds that performed better than the fund at issue as a result of investment-by-investment mismanagement on the part of the fiduciary. *Id*. at 278. However, here Appellant states that through Red Rock's boycott of investments in traditional energy companies, Red Rock has "missed out on achieving these high returns for Plan participants." (R. at 4-5). Appellant's complaint rests on the fact that Red Rock failed to diversify investments within the Plan which therefore led to lower returns than the Plan would have had if it had been diversified across the Energy sector. The breadth of comparison that the Energy sector of the S&P 500 provides is exactly the kind of benchmark that is most helpful in assessing losses related to a lack of diversification as a result of an intentional boycott of a specific sector for political reasons.

This benchmark is particularly meaningful because of Red Rock's explicitly political decision to boycott Energy sector investments. Red Rock boycotts investments in traditional energy companies (R. at 4). Appellee may argue that there were sound reasons behind the decision to boycott an entire well-performing section of the market. However, "Not every potential lawful explanation for the defendant's conduct renders the plaintiff's theory implausible." *Braden*, 588 F.3d at 597. When seen alongside the performance of the Energy sector of the S&P 500 for large and mid-cap stocks, it is clear that Red Rock's intentional boycott of the sector allows Appellant to plausibly plead losses up to the 55% returns missed as a result of Red Rock's politicized decision-making.

iii. The University of Chicago Study provides a sufficient benchmark to establish plausible losses incurred as a result of Red Rock's breach.

Finally, the University of Chicago study provides a meaningful benchmark to establish plausible losses incurred as a result of Red Rock's breach. The complaint states "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% (returning an average of 6.3%) as compared to the broader market (which had an average return of 8.9% during the same five-year period)." (R. at 5). While broad studies of the market have not been used as a meaningful benchmark in any of the precedent discussed, "there is no one-size-fits-all approach" and such a benchmark is appropriate in this case. *Matousek*, 51 F.4th at 281. While the court in *Matousek* took issue with the figures provided by the plaintiff because they did not capture the relevant section of the market, this study captures the performance of the market as a whole when compared to funds like the Plan that Red Rock manages. *Id*. at 280 ("they analyze smaller plans: those with less than half the number of participants and under a quarter of the total assets"). In addition, this benchmark must be assessed based on the totality of the complaint. The complaint clearly states that Red Rock has engaged in ESG activism and has also provided specific examples of how that ESG activism has hurt the Plan specifically. That is why the Energy sector of the S&P 500 for large and mid-cap stocks is a meaningful benchmark. This study simply goes even further to allow the court to view Red Rock's actions with reference to a benchmark that describes trends in the market as a whole. Indeed, a broad study like the University of Chicago study makes it less plausible that Appellant did not suffer a loss as a result of Red Rock's breach. A one-off difference between Red Rock and a non-ESG fund can be explained to be a result of various lawful actions by the fiduciary, Red Rock. However, this study makes clear that the low

returns of the Plan are the direct result of Red Rock's ESG activism which has hurt Appellant, other participants in the Plan, and ESG funds across the market overall.

iv. Appellant plausibly states a prima facie case of loss to the Plan despite losses in ERISA cases being naturally less certain.

It is acknowledged that the losses in this case as well as the losses in many ERISA cases are "of such a nature as to preclude the ascertainment of the amount of damages with certainty". *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Appellant is not attempting to proceed past a motion to dismiss through speculation or guess as the losses which is why Appellant's complaint does not state a specific monetary figure. Rather, at this stage of the case, Appellant has provided in the complaint reasonable forms of assessment to show the extent of the damages "as a matter of just and reasonable inference." *Id*. Without discovery Appellant cannot assess exact damages that occurred as a result of Appelles' breaches. However, to deny Appellant relief because the amount of damages is relatively uncertain would be counter to the precedent provided by the Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court Order and Judgment and find that Mr. Smith's complaint made a prima facie showing that the defendants acted as fiduciaries, breached their fiduciary duties, and thereby caused a loss to the Plan.