No. 24-CV-100

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John Smith,
Plaintiff- Appellant,

-v.-

Hopscotch Corporation & Red Rock Investment Co.,
Defendants- Appellees.

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

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BRIEF OF APPELLANT

Date: January 24, 2025

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QUESTIONS PRESENTED

I. Did the District Court prematurely dismiss Mr. Smith's breach of fiduciary duties claim for failure to prove loss to the Plan based on a degree of specificity that was not applicable to the context of his claim, specifically in the pleading stage, while ignoring the circumstantial evidence provided to infer loss?

II. Did Appellant adequately allege Hopscotch and Red Rock's fiduciary duties to Plan participants and the plausibility that each Appellee subsequently breached those duties in hiring for ideological motives, imposing illusory limitations on the Plan's financial growth capability, and neglecting to remove imprudent investments?

STATEMENT OF THE CASE

This Court is asked to reverse the United States District Court for the District of Minnesota's decision to grant Appellee's motion to dismiss for failure to state a claim. The questions presented are first, whether the District Court prematurely dismiss Mr. Smith's breach of fiduciary duties claim for failure to prove loss to the Plan based on a degree of specificity that was not applicable to the context of his claim, specifically in the pleading stage, while ignoring the circumstantial evidence provided to infer loss? And second, whether Appellant adequately alleged Appellees' fiduciary duties to Plan participants and the plausibility that each Appellee subsequently breached those duties in hiring for ideological motives, imposing illusory limitations on the Plan's financial growth capability, and neglecting to remove imprudent investments?

Appellee Hopscotch Corporation ("Hopscotch") is a social media platform and technology company. (R. at 2). Hopscotch offers employees an employee defined contribution pension plan, known as the Hopscotch Corporation 401(k) Plan (the "Plan"), and governed by ERISA. (R. at 1). Under the Plan, employees may invest up to 10% of their salary, Hopscotch automatically invests 5% of employee salaries as employer contributions and matches employee investments up to 7%. (R. at 2). For employees with less than 5 years of employment, all employer contributions are vested in an employee stock ownership plan ("ESOP") and must remain there until they have vested. (R.at 3). Prior to his termination in November 2023, Mr. Smith worked for the Appellee for seven years and as such, all of his Plan contributions are vested. (R. at 3).

In 2018, Hopscotch Directors shifted their operational and Plan investment focus to Environmental, Social and Governance ("ESG") goals. (R. at 3). In 2019, following the pivot to ESG, Hopscotch pursued Appellee Red Rock Investment Co. ("Red Rock") as its new investment manager due to their shared commitment to ESG as well as diversity, equity, and inclusion ("DEI"). (R. at 3). The Hopscotch CEO stated that the decision to prioritize ESG and DEI was intended to attract and retain teenagers and pre-teens, whom they identified as their target audience. (R. at 3). The corporate decision solidified Hopscotch as the number one social media platform in that demographic. (R. at 3, 4). That same year, Red Rock announced climate sustainability would be its key tenant after joining Climate Action 100+, an investor group committed to challenging greenhouse gas emitters and using their proxy voting powers accordingly. (R. at 4).

The consequences of Red Rock's commitment to climate sustainability included exercising the Plan's proxy voting rights against management and Board directors of companies whose principles did not align with their pursuit of green goals, as well as foregoing energy sector investments in favor of underperforming ESG-focused funds. (R. at 4). Despite a paper from the Journal of Finance at the University of Chicago declaring that ESG funds underachieved over a five-year period by 2.5% compared to the broader market, Red Rock did not waver from ESG. (R. at 5).

Mr. Smith alongside all participants and beneficiaries of the Plan filed this class action complaint against the Appellees under 29 U.S.C. §§ 1104 and 1105, alleging fiduciary and co-fiduciary breaches of the duty of loyalty and prudence. (R. at 5). Mr. Smith contends that the Appellees failed to consider financial merits and the interest of Plan participants when selecting and incorporating investment options. (R. at 8). Individually, Mr. Smith asserts that Appellee Hopscotch's fixation on ESG objectives in hiring Appellee Red Rock as Plan investment manager was disloyal and imprudent. (R. at 8). Mr. Smith similarly asserts Appellee Hopscotch retention of deficiently performing ESOP investments and its illusory restriction to ESG funds in lieu of higher performing options was similarly disloyal and imprudent. (R. at 8). Ultimately, Mr.

Smith's primary allegation is that both Appellees failed to fulfill the fiduciary duties imposed by ERISA: acting with the care, skill, prudence, and diligence of a prudent person in similar circumstances and for the purpose of benefitting Plan participants and beneficiaries. (R. at 9).

At the pleading stage, Appellees moved to dismiss Mr. Smith's complaint for failure to state a claim. (R. at 11). Appellees assert that considering ESG factors in various stages of plan administration does not breach the fiduciary duties of loyalty and prudence and that Mr. Smith's allegations did not prove that Appellees' actions caused loss to the Plan. (R. at 14, 15). Despite determining that Mr. Smith stated a plausible claim for breach in Appellees' prioritization of ESG in the investment process, the District Court for the District of Minnesota nonetheless dismissed the complaint. (R. at 17). The court erroneously stated that although Mr. Smith successfully stated a claim, he was still responsible for providing a "meaningful benchmark" or comparator fund in support of the assertion that the ESG funds selected by the Appellees each had a non-ESG fund with greater return on investment, thus leading to unrealized profits. (R. at 17, 18). Thereafter, Mr. Smith appealed to the United States Court of Appeals for the Eighth Circuit.

SUMMARY OF THE ARGUMENT

Employee retirement benefit plans are critical to the millions of American employees, retirees, and beneficiaries connected to them and as such, Congress chose to cloak these plans in protection, called the Employee Retirement Income Security Act ("ERISA"). With this, employees had a layer of protection against underfunded plans, reckless investment, and self-serving plan management. Rather than possess the freedom to gamble with employees' precious retirement funds, employers and those acting with control over the plan are held to a fiduciary duty, in which they must act for the employees' financial interests and with the care, skill, prudence, and diligence that a prudent man in a like capacity and circumstance would adopt. Yet in practice, employers do not always act with this requisite care, put other interests above their trustees,' or fail to course-correct in response to investment concerns.

The issue presented is rather similar: whether Mr. John Smith, representing a class of all participants and beneficiaries of his employer Hopscotch Corporation's ('Hopscotch") 401(k) Plan, sufficiently alleged harm caused by Hopscotch and its investment manager Red Rock Investment Company ("Red Rock") without naming specific alternate investments but rather challenging the investment framework as a whole. Should this Court hold that Mr. Smith sufficiently alleged harm through his elucidation of countless missed opportunities for financial benefit, this Court must determine whether Mr. Smith plausibly alleged breaches of fiduciary duty through selecting an investment manager for Environmental, Social and Governance {"ESG") goals, unnecessarily restricting investment options in pursuit of ESG goals, and neglecting to remove imprudent ESG investments. Rather than presenting comparator stock funds, Mr. Smith detailed the entire system of impermissibly motivated fiduciary decisions and an overarching neglect in correcting these decisions as they proved treacherous along the way. Thus, this Court should reverse the grant of Motion to Dismiss for Failure to State a Claim provided by the District Court.

Both the Supreme Court and this Court have emphasized the importance of a context-specific analysis when weighing a breach of fiduciary duty claim, due to the highly circumstantial nature of the fiduciary decisions. Moreover, to survive a Motion to Dismiss for Failure to State a Claim, a plaintiff must satisfy only the low bar of plausibility, meaning that the complaint must merely state a story that holds together whilst alleging a breach of fiduciary duty. At the pleadings stage, a complaint may lack specificity yet nonetheless state a claim as the plaintiff is not required to provide a meaningful benchmark of more prudent investment options. Here, Mr. Smith alleged that Hopscotch and Red Rock breached their fiduciary duties on multiple occasions, by pursuing ESG objectives specifically over the financial benefit of Plan participants. Taking Mr. Smith's alleged facts as true, he sufficiently alleged plausibility and additionally cited to public interviews, press releases, proxy voting, other public declarations, and academic papers to shade the contours of his breach of fiduciary duty claim. While Mr. Smith does not indicate one specific meaningful benchmark investment that was foregone, that standard is not applicable to this form of breach, in which both Appellees categorically disregarded their fiduciary duty to participants in the form of a much greater years-long atmosphere of acts breaching fiduciary duties to Plan participants.

Should this Court agree that Mr. Smith adequately alleged harm to Plan participants, this court should additionally hold Mr. Smith plausibly alleged each Appellee's breach of fiduciary duty due to each's self-serving acts. ERISA imposes the highest fiduciary duty known to law, in which the fiduciary must act with a singular eye to the monetary interests of its participants. While the law has been unsettled in the past, the Department of Labor determined that ESG initiatives may only be considered to the extent that two investment options provide equal financial prospects, therefore allowing ESG to "break the tie." Here, there was no "tie" to be found. Hopscotch chose Red Rock specifically for their commitment to ESG initiatives and subsequently failed to monitor Red Rock's performance, as it drove company stocks it invested in into a steep decline without ever divesting and without Hopscotch addressing the issue. Red Rock first neglected to divest from under-performing Hopscotch stock. Yet its most significant breaches are found in its other investments, in which Red Rock refused to consider investment options on financial ability, manufacturing a ceiling on participants' financial successes, and Red Rock additionally flexed its proxy voting power over a dozen times to promote ESG and "green" directors, every single time sending the company into a steep stock decline. Rather than prioritize participants, Red Rock actively worked against them for their own ideological gain, thoroughly and brazenly breaching its fiduciary duties.

For the foregoing reasons, this Court should reverse the District Court's holding and find that it was premature and factually baseless to characterize Mr. Smith's complaint as failing to state a claim due to insufficient evidence of harm. Should this Court determine that overarching systemic failures and missed opportunities for financial growth were sufficiently pled harm in Mr. Smith's complaint, this Court should hold Mr. Smith plausibly alleged breaches of fiduciary duty by both Appellees over the multiple years they concerted their efforts toward ESG activism rather than Plan participants' retirement funds.

ARGUMENT

I. A fiduciary's commitment to environmental, social, and governance goals that take precedence over plan participants' investment security violates the duties of loyalty and prudence and must survive dismissal for failure to state a claim and prove loss to the plan.

This Court should reverse the United States District Court for the District of Minnesota's grant of the Appellees' motion to dismiss for failure to state a claim. This Court should find that Appellees breached their fiduciary duties of loyalty and prudence by prioritizing ESG goals above the interest of Plan participants retirement security. The Employee Retirement Income Security Act of 1974 (ERISA) is a federal statute that provides minimum standards for employer-sponsored plans to protect workers' retirement security. 29 U.S.C. § 1001 et seq. ERISA imposes the primary fiduciary duties of loyalty and prudence, requiring a fiduciary's actions related to the plan to be solely in the interest of plan participants and beneficiaries, and that such actions be carried out with comparable care, skill, prudence, and diligence to a prudent man acting as a fiduciary for an "enterprise" of "like character and with like aims." *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 595 (8th Cir. 2009); 29 U.S.C.A. § 1104(a)(1)(A)-(B).

The duty of prudence is an objective standard that focuses on a fiduciary's behavior and the processes they have engaged in to make investment decisions, rather than the results of those decisions. *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994). The Supreme Court has interpreted behaviors consistent with the duty of prudence to include regularly monitoring, reviewing, and removing imprudent investments. *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015). Moreover, the "nature and timing of the [investment] review is contingent on the circumstances" and the continuous duty to review is distinct from a fiduciary's duty to exercise prudence in the initial investment selection process. *Id.* at 529.

Here, the Appellees, Hopscotch Corporation and Red Rock Investment Company, did not do their due diligence in prudently selecting, reviewing, and removing underachieving investments. Consequently, Mr. Smith and other Plan participants faced lower returns on their Plan investments because the Appellees excluded energy investments that did not align with their green goals – despite higher returns and lower costs – and ignored scholarly articles detailing the difference in performance and returns between ESG and non-ESG funds. (R. at 4, 5). Ultimately, this contradicts the District Court's conclusion that Mr. Smith failed to state a claim for fiduciary breach under ERISA because he failed to prove loss to the Plan.

A. Boycotting higher performing energy investments for underperforming ESG funds, implementing proxy voting, and existing scholarly articles detailing the difference in investment returns between ESG and non-ESG funds are adequate facts to prove loss to the Plan.

A fiduciary is not relieved of their responsibility to prioritize Plan participants' investment security and properly execute their duties under ERISA solely because they wear multiple hats – a "corporate hat" and a "fiduciary hat." *Spence v. American Airlines, Inc.*, 718 F.Supp.3d 612 (N.D.Tex. 2024). Instead, ERISA requires "the fiduciary with two hats wear only one at a time and wear the fiduciary hat when making fiduciary decisions." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000); *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-444 (1999). Therefore, failure to clearly delineate between actions constituting corporate decision-making from those constituting fiduciary decision-making calls into question whether the adverse decision was made while performing in a fiduciary capacity. *Pegram*, 530 U.S. at 226 (2000).

A claim for breach under ERISA is a three-step process: the plaintiff must show that the defendant is a plan fiduciary, that the fiduciary breached its duties under ERISA, and the breach resulted in loss to the plan's participants. *Allen v. GreatBanc Trust Co.*, 835 F.3d 670, 685 (7th Cir. 2016). Here, the first two elements are easily established – he defined contribution 401(k) plan offered by Hopscotch Corporation is governed by ERISA, and both Appellees are Plan fiduciaries, in which Hopscotch serves as the Plan administrator and Red Rock as the investment manager. (R. at 2-3). However, while agreeing that Mr. Smith adequately stated a claim for breach, the District Court erroneously decided that he "failed to plausibly allege that the Defendants' actions caused loss or other harm to the Plan." (R. at 17).

At the pleading stage, a plaintiff is not required to provide the court with an exact connection between the actions of the fiduciary and the financial loss sustained. *Spence*, 718 F.Supp at 619 (N.D. Tex. 2024) (citing *Pension Benefits Guar. Corp v. Morgan Stanley Inv. Mgmt. Inc.,* 712 F.3d 705, 718 (2d Cir. 2013). The *Spence* Court evaluated claims by an American Airlines pilot alleging imprudent plan management and loss because the defendants invested participants' retirement funds in pursuit of ESG initiatives. *Spence*, 718 F.Supp at 615 (N.D. Tex. 2024). The complaint included claims for breach of prudence and loyalty, with the court finding that a fiduciary's conduct must "give appropriate consideration to those facts and circumstances that . . . the fiduciary knows or should know are relevant to the particular investment." *Id.* at 617 (citing 29.C.F.R. § 2550.404a-1(b)(1)(i)).

Fiduciaries must not abandon investment returns or accept unnecessary risk to promote corporate goals unrelated to the financial interest of plan participants. 29 C.F.R. § 2550.404a-1(c)(1). Thus, a fiduciary's decision-making process must "take into consideration the risk of loss and the opportunity for gain . . . associated with the . . . investment course of action compared to the opportunity for gain . . . associated with reasonably available alternatives." *Id.* (citing 29 C.F.R. § 2550.404a-1(b)(2)(i)). But, even if a complaint does not directly address the plan's management process, the court may decline a motion to dismiss if it can be inferred, based on circumstantial evidence, that the process is flawed, and harm could occur. *Pension Benefits*

Guar. Corp. 712 F.3d at 718 (2d Cir. 2013) (quoting *Braden v. Wal-Mart Stores Inc.,* 588 F.3d at 596 (8th Cir. 2009)).

Claims of proxy voting are a sufficient fact for a court to infer that the defendants' process was flawed, caused harm to plan participants, and therefore breached the duties of prudence and loyalty. In *Spence*, the Texas District Court held that this inference was met when the plaintiff alleged that proxy voting rights plummeted Exxon and Chevron stock, diminished the participant's return, and that numerous reporting sources revealed that ESG funds, including those managed by the defendants, were underperforming. *Spence*, 718 F.Supp. at 619 (N.D. Tex. 2024). The court asserted that proof of the defendants' breach occurred in the selection, inclusion, and retaining of an investment manager who openly and exclusively pursued ESG objectives. *Id.* at 620. Accordingly, the court held that public commitment to ESG that influences an employer's "failure to faithfully investigate the availability of other investment managers whose exclusive focus would maximize financial benefits for Plan participants" would demonstrate a breach of defendants' duty of loyalty. *Id.* at 621. Thus, disregarding a primary fiduciary responsibility to "[keep] an eye single to the interest of the participants and beneficiaries" will suffice to substantiate a breach claim and prove loss to the plan because it emphasizes the influence that corporate goals had on the fiduciary decision-making. *Main v. Am. Airlines Inc.,* 248 F.Supp.3d 786, 793 (N.D. Tex. 2017).

Here, like *Spence,* Mr. Smith was not required at, in the pleading stage, to provide the District Court with any alternative, non-ESG comparators to satisfy the third element of a breach claim under ERISA and prove a loss. Instead, Mr. Smith was responsible for providing evidence that would support an inference by the court that the Appellees acted imprudently and disloyally and that their behavior created an obvious risk of loss that they should have been aware of. First, Appellee Red Rock's management of the Plan included exercising proxy voting rights across all

Plan investments, similarly to *Spence*. (R. at 4). This right, which they exercised over a dozen times between 2020 and 2023, allowed them to vote against management and company Board members who were not aligned or making progress, as defined by the Appellee, towards environmental sustainability. (R. at 4). To reinforce their position on sustainability, Appellee Red Rock also boycotted outperforming energy investments during the relevant years for lesser performing ESG funds. (R. at 4). This exclusion was an obvious risk and heavily impacted the returns for investment options managed by the Appellee since energy investments in 2021 and 2022 were reported as returning over 55% more than non-energy investments. (R. at 5).

If these reports were not adequate enough to inform the Appellee that their management process and considerations were causing significant loss to Plan participants, the University of Chicago's Journal of Finance published an article recognizing that over a five-year span (2018-2023) the average return on investment for ESG funds was 6.3%, nearly 2.5% lower than the 8.9% returns averaged by the broader market during the same five-year span. (R. at 5). Lastly, the *Spence* and *Main* courts acknowledgement that failing to keep the interest of plan participants at the forefront when hiring an investment manager supports Mr. Smith's claim for breach of the duties of loyalty and prudence and serves as circumstantial evidence for the court to infer that the choices of the Appellees would lead to loss or other harm to the Plan. Thus, the District Court erred in holding that Mr. Smith failed to plausibly allege loss to the Plan.

B. The context which has required plaintiffs to provide a meaningful benchmark is dissimilar to the context of Mr. Smith's claim and is therefore not applicable to the Eighth Circuit's review.

A meaningful benchmark refers to a "sound basis for comparison" that aids a plaintiff in providing sufficient facts to "infer… that the [fiduciary] process is flawed. *Matousek v. MidAmerican Energy Company*, 51 F.4th 274, 278 (8th Cir. 2022). The Matousek court emphasized that a "meaningful benchmark" provides more than allegations of high costs or low returns by requiring a plaintiff to identify comparable sized plans, not chosen for investment by fiduciaries, that were better suited to meet their financial interests. *Id.* at 278-9. This level of detail has since been required by many circuit courts when evaluating a breach of fiduciary duty of prudence claim. *See e.g. Smith v. CommonSpirit Health,* 37 F.4th 1160 (6th Cir. 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022); *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136 (10th Cir. 2023). However, the circuit courts' adoption of the meaningful benchmark standard supports but does not negate the Supreme Court's requirement for a "context-specific" inquiry in breach of fiduciary duty claims. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2015); *Hughes v. Northwestern Univ.*, 595 U.S. 170 (2022). In *Fifth Third*, the Supreme Court held that the assessment of a duty of prudence claim in the pleading stage requires courts to participate in "careful, context-sensitive scrutiny of the complaints allegations." *Fifth Third,* 573 U.S. at 425.

The context by which the meaningful benchmark standard was applied in *Matousek, Smith, Albert, and Matney* is identical—the fiduciaries' acted imprudently and disloyally by offering pricy investments and costly recordkeeping fees compared to more economical options. In response to claims of imprudence based on price disparity, the *Matney* court expressly stated that these allegations must be supported by an "apples-to-apples" comparison; thus, the alternative investment option must have similar investment strategies, investment objectives, or risk profiles to those included in the Matney plan. *Matney*, 80 F.4th, at 1148-49; *Smith* 37 F4th. at

1167 (explaining that funds with "distinct goals and strategies" are "inapt comparators"); *Matousek*, 51 F.4th at 279 ("we cannot infer imprudence unless similarly sized plans spend less on the same services"); Albert, 47 F.4th at 582 (finding that plaintiff who cannot explain why fees are considered excessive or reasonable in comparison to other funds fails to substantiate a breach of duty of prudence claim).

The case presented by Mr. Smith differs contextually. Mr. Smith is not merely alleging that the cost and fees associated with the Plan's investments breached the Appellees fiduciary duty of prudence and loyalty, instead his complaint alleges breaches related to the process each defendant undertook in the management of the Plan's ESOP and other investment options. (R. at 8). First, in 2018 Hopscotch Directors began pursuing ESG goals "with respect to how [they] operated and with respect to the investment strategies and options offered in the Plan." (R. at 3). The following year, Appellee Red Rock was chosen as Plan investment manager because their similar focus on ESG. (R. at 3). Appellee Red Rock's emphasis on ESG and sustainability as their core value was solidified when they joined Climate Action 100+, an investor group that challenges greenhouse gas emitters. (R. at 4). It is indisputable that the context of Mr. Smith's claims does not warrant application of the meaningful benchmark as applied in *Matousek*, *Smith*, *Albert*, and *Matney*. Mr. Smith focuses his concerns on the Appellees motivation for selecting the Plan funds which would not require an apples-to-apples comparison when stating a claim for breach and loss to the Plan. Therefore, this Court should reverse the District Court's grant of the Appellee's motion to dismiss for failure to state a claim.

II. Mr. Smith adequately alleged Hopscotch and Red Rock's fiduciary duties to Plan participants and plausibly alleged that each Appellee subsequently breached those duties in hiring for ideological motives, imposing illusory limitations on the Plan's financial growth capability, and neglecting to remove imprudent investments.

Should this Court hold the District Court prematurely dismissed Appellant's claim for breach of fiduciary duty due to the specificity of the alleged loss, this Court should additionally hold Appellant adequately alleged that both Hopscotch and Red Rock breached the fiduciary duties they owed to Plan participants under ERISA.

ERISA was enacted to provide adequate safeguards for employees utilizing employer benefit plans to ensure participants and their beneficiaries are not deprived of anticipated benefits. 29 U.S.C. § 1001 et seq. Congress sought to provide retirement income security to the millions of workers and retirees so that they and their beneficiaries receive full benefits. *Id.* ERISA accomplishes this protection by imposing fiduciary duties on those exercising discretionary control over plan management, rendering investment advice regarding the plan, or possessing discretionary control over plan administration. 29 U.S.C. § 1002(21)(A). ERISA fiduciaries must discharge their duties "(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries" and the Supreme Court recently clarified "benefits" to mean "the sort of *financial* benefits" typically received by trust beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) (emphasis in original).

At Hopscotch, employees were offered a 401(k) Plan in which they could voluntarily invest up to 10% of their salary, Hopscotch would invest 5% of the employee's salary, and Hopscotch would match employee contributions up to 7% of their salary. (R. at 2, 3). Hopscotch's and undesignated employee contributions went into the ESOP plan composed exclusively of Hopscotch stock. (R. at 3). Employees could opt to have their contributions invested in other Plan options, to be managed by investment manager Red Rock, but the contributions from Hopscotch were confined to the ESOP option for the first five years of employment. (R. at 3). In 2018, the Hopscotch Board of Directors determined it should pursue ESG goals for the company and its investments, specifically hiring Red Rock for their commitment to ESG initiatives. (R. at 3). Hopscotch had already been experiencing slower stock growth than comparable companies yet selected Red Rock despite their boycott of traditional (and historically more profitable) energy companies and retained Red Rock for four years, even after they vowed to use proxy voting to remove management and Board directors that they deemed insufficiently committed to environmental goals. (R. at 3, 4). Hopscotch hired and continuously retained an investment manager publicly committing exclusively to ESG goals rather than "the exclusive purpose of providing benefits to beneficiaries," breaching both Appellees' fiduciary duties in the process. 29 U.S.C. §1104(a)(1)(A)(i).

A. The District Court inappropriately dismissed Mr. Smith's plausible claim as Mr. Smith met the standard of proof necessary for surviving the Motion to Dismiss.

Mr. Smith met the pleading standards necessary to survive the Motion to Dismiss for Failure to State a Claim, as he alleged plausible breach of fiduciary duties by both Appellees. A breach of fiduciary duty claim is inappropriate to dismiss at the pleading stage, prior to any discovery, as the Supreme Court emphasizes an evaluation of this type of claim must be context specific. *Fifth Third*, 573 U.S. at 425. This Court repeatedly affirmed the same, stating it is premature to determine specific facts like fiduciary status at the motion to dismiss stage. *Harris v. Koenig*, 602 F.Supp.2d 39, 63 (D.D.C. 2009). This Court elaborated that the party bringing the motion to dismiss could prevail *only if* they could prove as a matter of law that they could *never* qualify as an ERISA fiduciary, a nonexistent and illogical assertion in this instance. *Id.* at 65 (emphasis added). Further weighing against dismissal, in ruling on a motion to dismiss the factual allegations in the Complaint must be taken as true and any ambiguities must be resolved in the plaintiff's favor as the non-moving party. *Id.* at 49.

Mere plausibility is sufficient to survive a motion to dismiss at the pleadings stage. *Hughes v. Northwestern. Univ.*, 63 F.4th 615, 628 (7th Cir. 2023). While the plaintiff is required to provide more than a "short and plain statement," the plaintiff satisfies their burden by providing enough factual basis to be plausible when taken as a whole. *Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan by & through Lyon v. Buth*, 99 F.4th 928, 945, 947 (7th Cir. 2024). Ultimately, the plaintiff's story must be sound. *Id.* at 948. A court reviewing a motion to dismiss must examine whether the plaintiff's allegations are plausible, not which side's explanation is more probable. *Hughes*, 63 F.4th at 630 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

In *Fifth Third*, the Supreme Court exemplified the duty to undertake a context-specific review by examining the circumstances experienced by the fiduciary at the time of the complaint. The Supreme Court went on to highlight the fiduciary's reliance on the stock market as an accurate valuation and the fiduciary's knowledge of nonpublic information, instructing the lower court to consider the specific public and nonpublic information available to the fiduciary. *Fifth Third*, 573 U.S. at 426-30. In *Harris*, this Court examined a claim alleging various fiduciary breaches but was unable to decide the matter, holding defendants' contention that they were not a fiduciary as premature and unpersuasive, as this Court did not have the necessary facts to determine the defendant's fiduciary status. *Harris*, 602 F.Supp.2d 63-66.

The Seventh Circuit recently grappled with this pleading standard, both in *Hughes* and *Appvion*. In *Hughes*, plaintiffs alleged the fiduciary neglected steps to reduce fees and remove imprudent investments, yet defendants allege these avenues were not available. *Hughes*, 63 F.4th at 630. The court concluded the plaintiff's claim must survive a motion to dismiss as the pleadings stage requires plausibility rather than developed evidence of real availability. *Id.* The court later decided *Appvion*, which reversed a district court dismissal, holding that there was no requirement for the claims to be probable but merely plausible. *Appvion*, 99 F.4th at 945. The case presented a story that held together as the fiduciaries may have intentionally inflated the employer's stock price, but if not, they were negligent in not supervising the financial advisor they hired to value the company. *Id.* at 946, 948. Therefore, the court reversed the dismissal for failure to state a claim and remanded the case to the district court for examination under the appropriate standard. *Id.* at 957.

While the District Court concluded that Mr. Smith plausibly alleged a breach of fiduciary duty, the court erred in holding that he failed to state a claim solely for not providing specific alternate investments. (R. at 17, 18). Mr. Smith stated in his complaint that "[e]ach of the ESG investment options offered by the Plan has a similar non-ESG investment option available… which had better investment returns and lower costs[.]" (R. at 4). Mr. Smith illustrated this issue by highlighting the Energy sector of the S&P 500, which significantly out-performed non-Energy sectors. (R. at 5). Red Rock also boycotts investments in traditional energy companies, keeping Plan participants shackled to investments that both generally and in reality, fare worse than those specifically excluded from consideration. (R. at 4, 5). Additionally, Mr. Smith highlighted that every company Red Rock flexed their proxy voting power against "suffered a steep stock price decline[.]" (R. at 5). Taking Mr. Smith's factual assertions as accurate, he represented in two different forms the harm caused to Plan participants by Red Rock's actions and Hopscotch's decision to retain them, in addition to Hopscotch's stock trending poorly itself. Mr. Smith is not claiming that Red Rock should have invested in any one specific stock fund, but rather that Red Rock's ESG commitment created unnecessary and imprudent obstacles, imposing a false ceiling on the benefits Plan participants could realize. Therefore, Mr. Smith sufficiently exemplified the plausibility of harm caused by Hopscotch and Red Rock in addition to their plausible breach of fiduciary duties, each of which should have been examined through the context-specific inquiry decreed by the Supreme Court and this Court. As such, it was procedurally improper for the District Court to dismiss Mr. Smith's complaint for failure to state a claim due to a lack of specified loss, as breach and loss were sufficiently plausibly alleged.

B. Both Hopscotch and Red Rock were fiduciaries of the Plan and were acting in their fiduciary capacity while pursuing the conduct that breached those imposed duties.

While straightforward to identify fiduciaries, Courts have more extensively weighed whether conduct was undertaken within a fiduciary capacity. Pursuant to ERISA, an employee is "any individual employed by an employer," while a participant is any employee or former employee who is eligible to receive a benefit or whose beneficiaries may receive such a benefit. 29 U.S.C. §1002(6)-(7). An ERISA fiduciary is one who exercises discretionary control over plan management, renders investment advice regarding the plan, or possesses discretionary control over plan administration. 29 U.S.C. §1002(21)(A). Any corporate fiduciary may also be an ERISA fiduciary but not in the same instance, as the entity functions as an ERISA fiduciary only while acting with respect to the ERISA-governed plan. *Burke v. Boeing Co.*, 42 F.4th 716, 725 (7th Cir. 2022). Therefore, like the context-specific inquiry above, the court must look to the functional authority over the plan, making the actor a fiduciary when exercising that control. *Id.* (*see also Maniace v. Com. Bank of Kansas City, N.A.*, 40 F.3d 264, 268 (8th Cir. 1994) (holding similarly by focusing on the entities with actual ability to control the asset)).

Additionally, the named fiduciary who had control and managed the plan could appoint an investment manager to manage, acquire, or dispose of any assets of the plan. 29 U.S.C. §1102(c)(3). While the corporate fiduciary passes its additional fiduciary duties to the investment manager, they act in a fiduciary capacity in both selection and retention, meaning they carry a fiduciary responsibility to plan participants for those acts. 29 C.F.R. §2509.75-8(D-4)

In *Burke*, Boeing delegated responsibilities to an Investment Committee, giving the committee the authority to manage assets and select and monitor investments for the Boeing employee investment plan. *Burke*, 42 F.4th at 726-27. Boeing still carried a fiduciary duty to plan participants in choosing to delegate authority to the Investment Committee, with the Seventh Circuit stating Boeing would have violated their fiduciary duty should they have had a reason to doubt the Investment Committee's capabilities. *Id.* at 727.

Mr. Smith was undoubtedly a Hopscotch employee and Plan participant, Hopscotch was the named Plan administrator, and Red Rock was named investment manager for the Plan. (R. at 2). First addressing the fiduciary conduct of Plan administrator and employer Hopscotch, the Seventh Circuit in *Burke* addressed Boeing's relationship to its Investment Committee, which is quite analogous to the relationship between Hopscotch's and Red Rock. While Red Rock relieved Hopscotch of continued fiduciary responsibility over its Plan, Hopscotch retained its fiduciary obligation to select and retain an investment manager prudently and loyally. Therefore, in choosing Red Rock as investment manager in 2019 and retaining Red Rock through the relevant period, Hopscotch was acting in a fiduciary capacity in relation to the Plan.

Turning to Red Rock, the investment manager entered the realm of fiduciary duty upon appointment in 2019 and continued in this fiduciary capacity through the relevant period. From that time, any action they took in relation to the Plan was an exercise of their discretionary control over plan management and administration under §1002(21)(A). Red Rock first announced they would exercise their proxy voting rights from the employee benefit plans they manage to promote ESG initiatives, acting with discretionary control over plan management by controlling these Plan assets. (R. at 4). Mr. Smith highlighted the dozens of occasions Red Rock made good on this promise by using their discretionary control managing Plan assets to support investor activism and vote against the appointment of Board members they deemed not "green" enough. (R. at 4). Red Rock additionally boycotts investments in traditional energy companies, there again using discretionary authority over plan management and directly affecting the investments considered for the Plan. (R. at 4). Therefore, in flexing their proxy voting rights and choosing to not consider traditional energy company investments, Red Rock was acting in a fiduciary capacity in relation to the Plan.

C. Mr. Smith plausibly alleged that Hopscotch and Red Rock breached their fiduciary duties to Plan participants in pursuit of economically imprudent ESG initiatives.

Employer Hopscotch and investment manager Red Rock neglected the best interests of Plan participants in pursuing environmental initiatives rather than seeking the greatest financial benefit for Plan participants and their retirement funds. The Supreme Court clarified the standard of review for fiduciary decisions in *Fifth Third*, holding that while fiduciaries of ESOP plans are relieved of the duty to diversify their investments, they are not granted a favorable presumption regarding other aspects of fiduciary prudence and loyalty. *Fifth Third*, 573 U.S. at 418-19.

ERISA imposes the highest fiduciary duty known to law, requiring complete and unyielding loyalty to plan participants and that decisions be made with "an eye single to the interests of the participants and beneficiaries." *Singh v. RadioShack Corp.*, 882 F.3d 137, 149 (5th Cir. 2018); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418-19 (4th Cir. 2007) (citation omitted). ERISA fiduciaries must discharge their duties "(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries[.]" 29 U.S.C. §1104(a)(1)(A)(i). While 'benefits' is undefined in this section, the Supreme Court declared the term "must be understood to refer to the sort of financial benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries." *Fifth Third*, 573 U.S. at 421. After President Trump required ERISA fiduciaries to solely consider economic factors in making investment decisions, President Biden directed the Department of Labor to re-examine Trump's rule. *Utah v. Su*, 109 F.4th 313, 318 (5th Cir. 2024). The Department of Labor concluded ERISA fiduciaries may consider ESG goals if competing investment options "equally serve the financial interests of the plan." *Id.* Therefore, after fully prioritizing the economic interests of plan participants, fiduciaries may consider factors like ESG initiatives as a form of "tiebreaker" between investment options.

Here, Hopscotch and Red Rock specifically took fiduciary action in pursuit of ESG initiatives rather than the financial interests of Plan participants. Hopscotch breached its fiduciary duties of loyalty and prudence in choosing and retaining Red Rock as investment manager, even as their investments fared poorly. Red Rock breached its fiduciary duties of loyalty and prudence in using their proxy voting power for activism rather than in the interest of advancing the investments' success and further breached in barring Plan participants from investing in funds that historically and in reality, performed better than the funds they selected.

i. Hopscotch

Hopscotch breached its fiduciary duty to Plan participants in selecting and retaining Red Rock as investment manager, even as it became apparent that Red Rock was pursuing non-financial motives and actively contributing to the financial decline of the companies they chose to invest in. As stated above, the corporate fiduciary with an investment manager acts in a fiduciary capacity in the selection and retention of that entity. 29 C.F.R. §2509.75-8(D-4). Further, the fiduciary may not sacrifice participants' retirement income to alternate objectives or accept reduced returns in pursuit of non-financial collateral benefits. 29 C.F.R. §2550.404a-1(c)(1)-(2); *Spence v. Am. Airlines, Inc.*, 718 F.Supp.3d 612, 626 (N.D. Tex. June 20, 2024). Corporate officers must avoid placing themselves in a position where their corporate interests will inhibit their complete loyalty to plan participants. *See Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (elaborating on the significant duty owed by trustees of employee pension plans). Moreover, the complaint may allege facts of progressive and continued stock decline, which may demonstrate that not only in hindsight but as the investments progressed it should have been clear to fiduciaries that the acts were imprudent. *Gedek v. Perez*, 66 F.Supp.3d 368, 376 (W.D.N.Y. 2014).

Spence examines a highly analogous claim alleging the defendant corporation utilized ESG-oriented plan managers and allowed ESG corporate goals to influence the administration of the investment plan. *Spence*, 718 F.Supp. at 619. After hiring an investment manager, the corporate fiduciary was made aware of that manager using its proxy voting power to pursue ESG goals, which they neglected to address with the manager. *Id.* at 9. The court held that the corporate fiduciary's ESG goals in addition to the investment manager's endorsement of them could lead a reasonable factfinder to find the fiduciaries acted disloyally, therefore precluding summary judgment. *Id.* at 15. In *Gedek*, the plaintiff's complaint highlighted Kodak's stock price declining step by step over time. *Gedek*, 66 F.Supp.3d at 378. The court held that the plaintiff did not need to specify when exactly the ESOP investments in Kodak went from prudent to imprudent, but the facts alleged could lead a reasonable fact finder to determine that the fiduciary should have stepped in at some point. *Id.* at 378, 381.

As in *Spence* and *Gedek*, Mr. Smith adequately pled that Hopscotch breached its fiduciary duty in hiring and continuing to retain Red Rock, allowing a reasonable fact finder to draw that same conclusion. In hiring Red Rock based on their ESG initiatives, Hopscotch impermissibly prioritized their corporate interests above the goal of increasing retirement plan value for its employee participants. (R. at 3). A reasonable finder of fact could conclude that Hopscotch solely pursued ESG initiatives, rather than focusing on financial benefits to Plan participants. Additionally, Hopscotch retained Red Rock even after they announced they would be using Plan proxy voting power to pursue ESG initiatives, after they voted this way for multiple years leading to categorically steep stock declines in those companies, and boycotted investments in traditional energy companies. (R. at 4, 5). Therefore, Hopscotch was informed repeatedly over the years that Red Rock would not be prioritizing participant retirement funds, but rather ESG initiatives. A reasonable finder of fact could conclude that Hopscotch was not acting prudently or loyally to Plan participants when selecting or retaining Red Rock year after year, making dismissal of Mr. Smith's claim improper.

ii. Red Rock

Red Rock breached its fiduciary duty to Plan participants by unduly restricting the Plan's investments to ESG funds and keeping ESOP contributions invested in Hopscotch stock, pursuing solely ideological objectives at the risk of employee retirement funds. ERISA fiduciaries must discharge their duties "(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries," after which the Supreme Court clarified "benefits" refers "to the sort of *financial* benefits" typically received by trust beneficiaries. 29 U.S.C. §1104(a)(1)(A)(i); *Fifth Third*, 573 U.S. at 421 (emphasis in original). The Department of Labor concluded ERISA fiduciaries may consider ESG goals if competing investment options "equally serve the financial interests of the plan." *Su*, 109 F.4th at 318. Discussing ESOP funds, the Supreme Court explicitly held the ERISA duty of prudence trumps the instructions of the plan document as a plan document cannot excuse trustees from their duties to invest on behalf of participants loyally and prudently. *Fifth Third*, 573 U.S. at 421-22. In addition to the fiduciary duty in selecting funds for investment, the fiduciary also has a continuing duty to review the investments to ensure each remains prudent. *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015).

Fifth Third presents a case with a similar ESOP. *Fifth Third*, 573 U.S. at 413. The claim alleged that the fiduciary failed to act prudently by leaving Fifth Third employees' retirement funds invested in Fifth Third stock, even as the fiduciary knew through both private and public means that the stock was overvalued. *Id.* While the planning document stated that ESOP funds were to be primarily invested in Fifth Third, the Supreme Court held this falls secondary to the ERISA fiduciary's duties. *Id.* at 412, 422. *Tibble* examined the basis of ERISA fiduciary duty in trust law, holding that if a breach of duty continued within the six-year statute of limitations, the claim would not be barred. *Tibble*, 575 U.S. at 530.

As Red Rock carried discretionary control over the Plan once appointed investment manager, they are held to the fiduciary standard of acting for the exclusive purpose of providing financial benefits to participants from that point on. Red Rock had the ability to minimize funds dedicated to the ESOP fund, even though the plan document intended otherwise, to fulfill their fiduciary duty to the Plan participants and protect their retirement savings. (R. at 3). Hopscotch's stock had begun losing value as the company implemented its extreme ESG viewpoints, while comparable companies like Tok and Boom experienced more rapid stock growth. (R. at 4). Red Rock had a duty to monitor this investment and make decisions solely in the best financial interests of the participants, unable to hide behind the shield of the plan document. Red Rock also failed Plan participants by unduly restricting their investments to only ESG funds and failing to divest from those funds once they suffered steep stock price declines. (R. at 4, 5). Red Rock neglected to prioritize those funds that have historically performed most successfully, disregarding the financial interests of Plan participants, jeopardizing their retirement savings, and egregiously breaching their fiduciary duties in the process. (R. at 4, 5). After investing in imprudent funds, Red Rock breached their duties further, using their proxy voting power to puppeteer investor activism and "green" directors, sending every single affected company into a steep stock decline. (R. at 4, 5). Rather than monitoring these investments and promptly divesting, Red Rock categorically sent others into the same downward spiral without once fulfilling their duty to divest. (R. at 5). Red Rock's actions as investment manager seemed to solely work to the detriment of Plan participants, throwing duty to the wind and retirement funds down the drain for their own ideology.

CONCLUSION

For the foregoing reasons, this Court should reverse the Judgement of the United States District Court for the District of Minnesota and hold that (1) Mr. Smith plausibly stated a claim that the Appellees breached their fiduciary duties of loyalty and prudence and caused loss to the Plan and (2) Mr. Smith plausibly alleged that each Appellee breached its fiduciary duties of loyalty and prudence by pursuing ESG initiatives over the financial standing of Plan participants.

Respectfully Submitted,

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