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Case 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

BRIEF FOR THE APPELLANT

January 24, 2025

Team # 14
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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because an Employee Retirement Income Security Act of 1974, as amended (“ERISA’), 29 U.S.C. § 1001 et seq. claim raises a federal question.

This appeal is from a final opinion and order of the District Court of Minnesota that granted the Defendants’ Motion to Dismiss for Failure to State a Claim. The Notice of Appeal in this matter was filed timely.

STATEMENT OF THE ISSUES

The following issues are raised in this appeal:

I. Whether Hopscotch Corporation ("Hopscotch") and Red Rock Investment Company ("Red Rock") plausibly breached their fiduciary duties by focusing on environmental, social, and governance ("ESG") goals when selecting an investment manager and all investments within the 401(k) defined contribution pension plan (the "Plan") over the financial benefit of the plan participants.

II. Whether Hopscotch and Red Rock's commitment to ESG, whose funds are known for underperforming, plausibly caused a loss to the Plan.

STATEMENT OF THE CASE

I. Background

John Smith, the plaintiff, worked as a software engineer for Hopscotch from 2016 to 2023. Compl. ¶ 10. Smith participated in Hopscotch's 401(k) defined contribution plan (the "Plan") by continuously making contributions during his time of employment and due to his tenure, he was fully vested in the plan. Compl. ¶ 10. The Plan offered eight investment options, including a default option for the Hopscotch stock employee ownership option ("ESOP option). Compl. ¶ 9. For employees who do not select other investment options concerning their contributions to the Plan, the ESOP option is their only holding in the Plan. Compl. ¶ 9.

At or around 2018, Hopscotch Board of Directors determined that Hopscotch should pursue ESG goals in both how Hopscotch operated and with respect to the selection of investments offered in the Plan. Compl. ¶ 12. About a year later, the CEO of Hopscotch, Bobby Whistler, reported in a Forbes interview that Hopscotch Board of Directors discussed how Hopscotch could use its commitment to ESG and diversity, equity, and inclusion ("DEI") to further attract and retain its primary consumers, teenagers and pre-teens. Compl. ¶ 13. Further, the CEO of Hopscotch noted that its commitment to ESG benefitted Hopscotch substantially as Hopscotch had managed to become the top social media platform for the specific demographic of teenagers and pre-teens. Compl. ¶ 13. Hopscotch's ESG and DEI activities had a significantly negative impact on returns and on the value of Hopscotch's own stock from February 4, 2018 to the present ("the relevant time period") when compared to similar competitors. Compl. ¶ 14. Compared to the largest social media company, Tok, Hopscotch's stock suffered a slower growth in share price during the relevant time period. Compl. ¶ 14. Similarly, compared to Hopscotch's competitor of a smaller size, Boom, Hopscotch's stock suffered a slower growth in share price during the relevant time period. Compl. ¶ 14. With over forty percent of the Plan's investments in the ESOP option, Hopscotch's ESG and DEI activities led to lower stock value, and thus hindered the Plan's growth. Compl. ¶ 14-15.

All other options are managed by the Plan's investment manager, Red Rock. Compl. ¶ 11. In 2019, Red Rock joined Climate Action 100+, a group of investors committed to urging greenhouse emitters to change their ways. Compl. ¶ 17. Red Rock then publicly stated that climate sustainability would be the company's guiding principle. Compl. ¶ 17. For this reason, Hopscotch chose Red Rock as the Plan's investment manager in 2019 as it aligns with Hopscotch's corporate ESG goals with respect to how it operated and selected investments within the Plan. Compl. ¶ 12.

To further Red Rock's guiding principles, Red Rock began exercising proxy voting rights of all assets for employee benefit plans to vote against management and the Board of Directors of companies Red Rock deemed did not make sufficient progress on environmental sustainability. Compl. ¶ 18. For instance, from 2020 through 2023, while Mr. Smith was a participant in the Plan, Red Rock, through the use of proxy voting, supported investor activism and voted against the appointment of its own Board members who Red Rock deemed not sufficient in pursuing green goals. Compl. ¶ 19. Red Rock in those short three years utilized this system of proxy voting on dozens of occasions. Compl. ¶ 19. As a result of Red Rock's proxy voting activism, the companies that Red Rock chose to invest in suffered steep stock price declines following reports of Red Rock voting for a more pro-energy Board of Directors. Compl. ¶ 24.

Furthermore, in accordance with Red Rock's guiding principle of climate sustainability, Red Rock included only ESG-focused investments in the Plan despite having similar non-ESG investment options available on the marketplace that had better investment returns and lower costs during the relevant time period. Compl. ¶ 21. For instance, despite the Energy sector of the S&P 500 for large and mid-cap stocks returning over fifty-five percent more than non-Energy sectors in 2021 and 2022, Red Rock continued to boycott investments in traditional energy companies. Compl. ¶¶ 20, 23. In the last five years, during the relevant time period, ESG funds underperformed 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) per the recent papers such as the Journal of Finance at the University of Chicago. Compl. ¶ 25. Red Rock's climate activism and ESG investing has led to underperformance and lower retirement savings for Plan participants during the relevant time period. Compl. ¶ 16.

II. Procedural History

Smith filed this case in the District Court of Minnesota, alleging breach of ERISA fiduciary duty. Hopscotch and Red Rock, defendants, filed a Motion to Dismiss for Failure to State a Clam. The District Court granted the Defendants' motion. Smith now appeals to the Eighth Circuit of Appeals.

SUMMARY OF THE ARGUMENTS

This Court should affirm the District Court's finding that Smith sufficiently pleaded Hopscotch and Red Rock plausibly breached their fiduciary duties. Smith sufficiently alleged a plausible breach of duty of loyalty by pleading Hopscotch and Red Rock prioritized its own ESG goals over the financial benefit of the Plan participants. In addition, Smith sufficiently alleged a plausible breach of duty of prudence by pleading Hopscotch and Red Rock's commitment to ESG motivated their investment decisions and thereby making a reasonable inference that the process of selecting the investment was flawed.

Furthermore, this Court should reverse the District Court's dismissal because Smith made significant allegations of wrongdoing by alleging Hopscotch and Red Rock made investment decisions for the Plan that were motivated by its own corporate-wide ESG goals. While the District Court applied the meaningful benchmark standard in *Matousek*, *Matousek* does not apply to the facts of our case. *Matousek*'s meaningful benchmark standard is only applicable when there has been a lack of significant allegations of wrongdoing. Given that Smith alleged Hopscotch and Red Rock made investment decisions incluenced by each of their own corporate ESG goals, Smith has made more than simple allegations of wrongdoing in *Matousek*. By providing significant allegations of wrongdoing, the court should not apply the heightened meaningful benchmark standard to our case.

Even if Smith did not make signification allegations of wrongdoing, Smith has provided sufficient evidence of a plausible loss of underperformance by supplying a prominent academic journal of finance supporting that ESG funds consistently have a record of underperformance. Because Smith has met his prima facie case for establishing a breach of fiduciary duty by alleging Hopscotch and Red Rock acted as fiduciaries when making investment selections not in the best interest of plan participants caused a plausible loss in the Plan. Thereby, Smith has shifted the burden of persuasion to the Defendants.

ARGUMENTS

Under the Eighth Circuit, the Court reviews dismissals *de novo*. *Davis v. Wash. Univ. of St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020). To survive a Rule 12(b)(6) motion to dismiss, the complaint must provide "sufficient factual matter" to state a facially plausible claim for relief. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (must be more than a "sheer possibility that a defendant has acted unlawfully"); Fed. R. Civ. P. 12(b)(6). The Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Davis*, 960 F.3d at 483.

An ERISA fiduciary must make prudent decisions in the best interest of the plan participants. 29 U.S.C. § 1104(a). To state a claim for breach of fiduciary duty under ERISA, a plaintiff must make a prima facie showing that the defendants acted as a fiduciary "when taking the action subject to the complaint," breached its fiduciary duties, and the breach caused a plausible loss to the Plan. *Pegram v. Herdrich*, 530 U.S. 211, 225–26 (2000); *Roth v. Sawyer–Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994).

I. This Court should affirm the district court's decision that Hopscotch and Red Rock plausibly breached their fiduciary duties by using ESG goals to make investment decisions.

A. *Hopscotch and Red Rock breached their duty of loyalty.*

ERISA fiduciaries have a duty of loyalty to "discharge his duties with respect to the plan *solely* in the interest of participants . . . for the exclusive purpose of providing benefits to participants." 29 U.S.C. § 1104(a) (emphasis added); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) (Benefits are "financial benefits."). A fiduciary is required to not subordinate the plan participants' interests to other objectives and may not sacrifice those interests to take additional risks to promote benefits unrelated to such interests. 29 C.F.R. § 2550.404a-1(c)(1).

i. Hopscotch plausibly breached its duty of loyalty because Hopscotch used ESG goals and not solely the financial benefit of the plan participants in selecting Red Rock as its investment manager.

Under ERISA, a plan sponsor is a fiduciary when exercising control over the management of the plan. 29 U.S.C. § 1002(21); *Spence v. Am. Airlines, Inc.*, 2025 WL 225127 at 19 (N.D. Tex. Jan. 10, 2025). Furthermore, a plan sponsor is liable for a breach of fiduciary duty by knowingly participating with an investment manager when breaching its fiduciary duty. 29 U.S.C. § 1105(a)(1). A plan sponsor breaches its duty of loyalty by allowing corporate commitment to ESG motivate its fiduciary obligations. *Spence*, 2025 WL 225127 at 31 ("ERISA does not permit a fiduciary to pursue a non-pecuniary interest no matter how noble it might view the aim.").

To survive a motion to dismiss for a breach of duty of loyalty claim, the plaintiff must sufficiently articulate a plausible story that a plan sponsor's corporate commitment to ESG motivated its selection of an investment manager. *Spence v. Am. Airlines, Inc.*, 718 F.Supp.3d 612, 621 (N.D. Tex. 2024). In *Spence*, the plan participants alleged that in pursuit of its corporate ESG goals, the plan sponsor violated its duty of loyalty by knowingly selecting an investment manager who pursued non-economic ESG goals over exclusively financial benefits. *Id.* at 620. While the plan sponsor argued that it was not acting as a fiduciary when pursuing its corporate ESG goals, the plan sponsor was not relieved of their ERISA fiduciary duties. *Id.* at 621. Though the plan sponsor further argued that the plan participants did not sufficiently allege how its ESG goals motivated investment decisions, the court held plan participants are not required to plead details to which they do not have access when the alleged facts "tell a plausible story." *Id.* at 621 (citing *Allen v. Greatbanc Tr. Co.*, 835 F.3d 670, 678 (7th Cir. 2016)). By alleging that the plan sponsor's public commitment to ESG goals influenced its investment selection by knowingly choosing an ESG-focused investment manager who invests in and votes for ESG policies, the plan participants sufficiently plead a plausible story that its corporate commitment, the financial benefits of the plan participants, motivated its investment selection. *Id.* The plan participants sufficiently plead a breach of duty of loyalty claim given that Hopscotch prioritized its corporate-wide ESG goals and allowed its goals to seep into the plan sponsor's investment decision in selecting an ESG-focused investment manager. *Id.*

Here, Smith sufficiently articulated a plausible story that Hopscotch's corporate commitment to ESG goals motivated its selection of an investment manager, Red Rock. Like in *Spence*, where the plan participants alleged that in pursuit of its corporate ESG goals, the plan sponsor violated its duty of loyalty by knowingly selecting an investment manager who pursued non-economic ESG goals over exclusively financial benefits, Smith alleged that in pursuit of Hopscotch's ESG goals, it violated its duty of loyalty by knowingly selecting Red Rock who pursues non-economic ESG goals over solely financial benefits. In the complaint, Smith alleged that Hopscotch pursued an ESG agenda to attract Hopscotch's desired demographic of pre-teens and teens and further supported his allegations by pleading that the CEO of Hopscotch reported in a 2019 interview with Forbes how Hopscotch would use the company's commitment to ESG to further attract more of its target demographic. In addition, Smith alleged Red Rock joined a group of investors committed to pressing greenhouse gas emitters to change their ways in the same year as Hopscotch's public commitment to ESG interview with Forbes. Furthermore, Smith alleged Red Rock publicly issued a notice stating that climate sustainability would be Red Rock's guiding principle and in doing so, stated that it would exercise proxy voting rights of all assets that it managed for employee benefits plans against investments Red Rock deemed were not making sufficient progress on environmental sustainability. Smith articulated a plausible story by alleging that Hopscotch specifically chose Red Rock, an ESG-focused investment manager, to align with its corporate-wide ESG goals rather than solely in the best interest of the Plan's participants.

Thus, this Court should affirm that Smith sufficiently pleaded a breach of duty of loyalty claim given that taking the above facts as true and in Smith's favor, Hopscotch plausibly breached its duty of loyalty by placing greater weight towards its corporate ESG goals than the financial benefit of the plan participants.

ii. Red Rock plausibly breached its duty of loyalty by engaging in proxy voting activities that are not for the financial benefit of the plan participants.

Proxy voting for ESG-focused funds to make a positive contribution to society is "not on their face financial benefits absent some showing to the contrary." *Spence v. Am. Airlines, Inc.*, 2025 WL 225127 at 10, 17 (N.D. Tex. Jan. 10, 2025) (citing Proxy Voting by Investment Advisers, 68 Fed. Reg. 6,585, 6,593 (Feb. 7, 2003) (Voting proxies must maintain "policies and procedures . . . reasonably designed to ensure that the advisor votes its proxies in the best interests of clients."). In *Spence*, the investment manager joined Climate Action 100+ pursuant to its climate sustainability goals and engaged in proxy voting activities in which the investment manager expected companies to disclose a plan for how their business models would be compatible with a low-carbon economy. *Id.* at 14–15. The investment manager, using its proxy voting activities, opposed several energy companies because they failed to meet the investment manager's climate goals or secure diverse corporate boards. *Id.* Once the investment manager faced backlash for its ESG goals, the investment manager left the Climate Action 100+ and admitted that its ESG goals conflicted with ERISA law requiring investment managers to act solely in the plan participants' benefit. *Id.* at 16. The investment manager was not a party to the suit, but the court acknowledged the investment manager breached its duty of loyalty given that proxy voting for ESG goals was not acting solely in the financial benefit of the plan participants. *See id.* at 17.

Here, Smith plausibly alleged that Red Rock breached its duty of loyalty given that Red Rock engaged in a proxy-voting system that were contrary to the plan participant's interests. Like in *Spence*, in which the investment manager joined Climate Action 100+ and started a proxy voting system for its own climate sustainability goals, Red Rock joined Climate Action 100+ and began exercising a proxy voting system in favor of its own climate sustainability goals. Again, similar to *Spence*, in which the investment manager used its climate sustainability proxy voting activities and opposed energy sector companies that did not align with the investment manager's climate sustainability goals, Red Rock used its climate sustainability proxy voting activities on dozens of occasions to oppose companies that Red Rock deemed were not meeting its green goals. While Red Rock has not admitted to breaching its duty of loyalty like in *Spence*, Red Rock's climate sustainability proxy voting system is "not on their face financial benefits absent some showing to the contrary." *Id.* at 10. Given that Smith sufficiently alleged Red Rock committed to ESG-focused funds and denied companies that did not align with its own climate sustainability goals, it is the responsibility of Red Rock to show that its climate sustainability proxy voting system is for the financial benefit of the plan participants.

Thus, this Court should affirm that Smith sufficiently pleaded a breach of duty of loyalty claim. Given the above facts, taken as true and in Smith's favor, Red Rock plausibly breached its duty of loyalty because proxy voting activism for ESG-focused funds is not on its face a financial benefit for plan participants.

B. Hopscotch and Red Rock plausibly breached their duty of prudence.

An ERISA fiduciary must discharge its duties "with the care, skill, *prudence*, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity." 29 U.S.C. § 1104(a)(1)(B) (emphasis added). Prudence is based on an objective "prudent person" standard, focusing on the fiduciary's conduct in making investment decisions, not the results. *Katsaros v. Cody*, 744 F.2d 270, 279 (2d. Cir. 1984); *Spence v. Am. Airlines Inc.*, 718 F.Supp.3d 612, 617 (N.D. Tex. 2024); *Roth v. Sawyer–Cleator Lumber Co.*, 16 F.3d 915, 917–18 (8th Cir. 1994). Fiduciaries of ESOP options are also subject to the same duty of prudence as other fiduciaries. *Fifth Third Bancorp v.*

Dudenhoeffer, 573 U.S. 409, 425 (2014). A complaint survives a motion to dismiss when there are sufficient facts for the court to make a reasonable inference that the process of selecting an investment was flawed. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594, 598 (8th Cir. 2009) (acknowledging that plan participants have limited access to crucial detailed plan information).

i. Hopscotch plausibly breached its duty of prudence because Hopscotch's process of selecting and retaining Red Rock as an investment manager is flawed.

Allowing corporate-wide ESG goals to influence a plan sponsor's selection of an investment manager is a reasonable inference that the investment process is flawed. *Spence*, 718 F.Supp.3d at 620. In *Spence*, the plan participants alleged that in pursuing its own corporate-wide ESG goals, the plan sponsor knowingly included funds managed by investment managers that pursue ESG policy goals through proxy voting activism. *Id.* at 615. The plan participants alleged that the plan contained certain investment managers that pursued ESG agendas, which resulted in harm to the plan participants' financial benefits because the investment managers were more focused on socio-political outcomes than solely financial benefit. *Id.* at 615–16. Thus, the plan participants alleged a reasonable inference that the plan sponsor's investment process of selecting, including, and retaining an ESG-focused investment manager was flawed, and thereby the plan sponsor plausibly violated its duty of prudence. *Id.* at 619–20.

Here, Smith has sufficiently alleged a reasonable inference that Hopscotch's corporate-wide ESG goals in motivating its investment selection and retainment of Red Rock as an investment manager is flawed. Like in *Spence*, in which the plan participants alleged that in pursuing its own corporate-wide ESG goals, the plan sponsor knowingly included funds managed by investment managers that pursue ESG goals through proxy voting activism, Smith alleged that in pursuit of its corporate-wide ESG goals, Hopscotch knowingly selected Red Rock as its investment manager because of Red Rock's ESG goals through proxy voting activism. Furthermore, like in *Spence*, in which the plan participants alleged that the investment manager engaged in ESG-focused proxy voting activism to the detriment of the plan's financial benefit, Smith alleged Red Rock engaged in ESG-focused proxy voting activism to the detriment of the Plan's financial benefit. By alleging that Hopscotch specifically chose Red Rock due to Hopscotch's commitment to ESG, Smith sufficiently pleaded enough factual allegations for a reasonable inference that Hopscotch's investment process was flawed.

In addition, because ESOP fiduciaries are subject to the duty of prudence as other ERISA fiduciaries, Hopscotch as an ESOP fiduciary to Smith's ESOP option may be analyzed here. Like in *Spence*, in which the plan participants alleged that in pursuing its own corporate-wide ESG goals, the plan sponsor knowingly included funds managed by investment managers that pursued ESG goals, Smith alleged that Hopscotch knowingly included its own stocks and made its own stock the qualified default investment option to further promote its own ESG goals and benefit the corporation. Smith alleged that Hopscotch's investment decision of including their own stock option in the Plan is evidenced of a flawed investment process given that it promotes its own ESG goals rather than the financial benefits of the plan participants.

Thus, this Court should affirm that Smith sufficiently pleaded a breach of duty of prudence claim given that taking the above facts as true and in Smith's favor, Smith provided a reasonable inference that Hopscotch's investment process was flawed by considering its own ESG goals when selecting Red Rock as its investment manager and making its own stock as the qualified default investment option.

ii. Red Rock plausibly breached its duty of prudence because Red Rock's process of purely choosing ESG-focused funds for the plan was flawed.

Plan participants are not required to directly address the fiduciary's investment process if the allegations create a reasonable inference that the process was flawed. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (finding plan participants are not responsible for rebutting all possibilities of the fiduciary's intent and process in the pleading stage). In *Braden*, the plan participant alleged that fiduciaries failed to change the funds in the plan even though most of them underperformed in the market and charged significantly higher fees than other funds. *Id.* at 595–96. The participants alleged each of the ten funds included in the plan only offered a type of class share, which plan participants alleged charged significantly higher fees. *Id.* at 595. Additionally, the plan participants alleged that these funds were specifically chosen to benefit the fiduciary at the expense of the participants. *Id.* at 596. While none of the allegations addressed the process by which the plan was managed, when taken as true, the allegations provided were sufficient for a reasonable inference that the investment process was flawed. *Id.*

Here, Smith sufficiently alleged a reasonable inference that Red Rock's process in its ESG-focused fund investment selection is flawed. Like *Braden*, in which the plan participant alleged that the fiduciaries failed to change the funds in the plan, Smith alleged that Red Rock only offered ESG-focused funds within the Plan and then failed to change those funds when they were underperforming. Further, like in *Braden*, in which the plan participants alleged the funds were chosen to benefit the fiduciaries at the expense of the plan participants, Smith alleged that Red Rock purely selected ESG-focused funds for its own benefit at the expense of the plan participants. While Red Rock may have other motivations for the ESG-focused funds, Smith is not required to directly address Red Rock's investment process given that Smith has sufficiently pleaded allegations for a reasonable inference that Red Rock's process is flawed. Taking the facts as true, Smith sufficiently pleaded allegations for a reasonable inference that Red Rock's process of only selecting ESG-focused funds was flawed.

Thus, this Court should hold that Smith sufficiently pleaded a breach of duty of prudence claim given that taking the above facts as true and in Smith's favor, there is a reasonable inference that Red Rock's process in purely choosing ESG-focused funds for the Plan is flawed.

II. This Court should reverse the District Court's decision that Smith failed to allege Defendants' actions caused a loss given that Smith alleged a plausible loss to the Plan.

A. The district court erred in requiring Smith to provide a meaningful benchmark to determine that a plausible loss occurred in the plan given that Smith made significant allegations of wrongdoing.

A meaningful benchmark is unnecessary when there are "significant allegations of wrongdoing." *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 279 (8th Cir. 2022) (citing *Tussey v. ABB, Inc.*, 746 F.3d 327, 336 (8th Cir. 2014)). In *Matousek*, the plan participants pleaded simple allegations complaining that the fiduciary failed to act in reducing excessive fees. *Id.* Because there were no significant allegations of wrongdoing as the plan participant's allegations only focused on the fees, a meaningful benchmark is required to plead a claim for claims focused on improving costs and returns. *Id.* at 278–79.

Fiduciaries placing their own corporate interests or other objectives above their fiduciary obligation to act solely in the best interests of plan participants is a significant allegation of wrongdoing. *See Tussey v. ABB, Inc.*, 746 F.3d 327, 335–37 (8th Cir. 2014) ("The facts of this case . . . involve significant allegations of wrongdoing, including allegations that [the plan sponsor] used revenue sharing to benefit [the plan sponsor] . . . at the [p]lan's expense."). In *Tussey*, plan sponsors steered investments to benefit the plan sponsor, undermining the duty to act solely in the best interest of plan participants. *Id.* at 336–37. There was "significant allegations of wrongdoing" because plan sponsors prioritized corporate benefits to "benefit themselves at the [p]lan's expense" over the plan participants' financial benefits. *Id.* at 336.

Here, the district court erred in relying on *Matousek v. MidAmerican Energy Company* to dismiss Smith's complaint because *Matousek* itself recognized that a meaningful benchmark is only required when there are no significant allegations of wrongdoing. Unlike *Matousek*, which only had simple allegations of failing to reduce excessive fees rather than significant allegations of wrongdoing, Smith's complaint alleged that Hopscotch and Red Rock's prioritization of non-financial ESG goals over the financial benefit of the plan participants is a significant allegation of wrongdoing that caused a plausible loss to the Plan. More so like *Tussey*, in which the plan participants alleged the fiduciary made investment decisions based on its own interest over the financial benefit of plan participants, Smith alleged Hopscotch and Red Rock made investment decisions prioritizing their own ESG goals over the financial benefit of the plan participants. Smith further alleged Hopscotch selected and retained Red Rock as the investment manager because of Red Rock's commitment to ESG. Moreover, Smith pleaded Hopscotch and Red Rock made public statements regarding their strong commitment to ESG goals. Red Rock even joined Climate Action 100+, an investors group committed to pressing greenhouse gas emitters to change their ways. Adding insult to injury, Red Rock engaged in proxy voting activism to promote the board of directors prioritizing environmental sustainability as per its ESG goals. Because Smith alleged Hopscotch and Red Rock placed their own corporate interests above their fiduciary obligation to act solely in the best interests of plan participants, Smith made significant allegations of wrongdoing.

Thus, this Court should reverse the district court's dismissal of Smith's claims given that Smith made significant allegations of wrongdoing. As such, a meaningful benchmark is not applicable to determine a plausible loss to the Plan.

B. Smith is not required to prove actual loss, but only that a plausible loss occurred when Hopscotch and Red Rock breached its fiduciary duty.

An event study report can suffice as evidence to show a plausible loss. *See Spence v Am. Airlines, Inc.*, 2024 WL 3092453 at 17 (N.D. Tex. June 20, 2024). When establishing a plausible loss to the plan, the certainty of damages need not be absolute. *Id.* (recognizing the nature of fiduciary breaches may preclude precise ascertainment of the amount of damages at the pleading stage) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)). The amount of plausible loss is a material fact issue for trail. *Perez v. Bruister*, 54 F. Supp. 3d 629, 674 (S.D. Miss. 2014). In *Spence*, the plan participants alleged a report that provided sufficient evidence that ESG funds consistently underperform. *Id.* The report was an event study that was widely accepted evidence to show the impact of a particular event on investment performance. *Id.* Given that the plan participants provided a renowned event study that found incorporating ESG funds consistently had a record of underperforming, the plan participants sufficiently alleged a plausible loss. *See id.*

Here, Smith alleged a plausible loss when Hopscotch and Red Rock's commitment to ESG plausibly caused lower returns for plan participants due to the consistent underperformance of ESG funds. Like in *Spence*, where the plan participants alleged a renowned event study found ESG funds consistently had a record of underperforming, Smith alleged that the prominent Journal of Finance at the University of Chicago found during the last five years ESG funds underperformed in comparison to the broader market. Relying on the Journal, Smith pleaded that ESG funds, on average, underperform by 2.5% in the last five years. Further, Smith alleged that the energy sector of the S&P 500 outperformed all other sectors by over 55% in 2021 and 2022 indicating further there is a plausible loss. Smith is not required to prove specific financial loss at this stage. Given that Smith provided an event study report showing historical return on ESG funds is sufficient evidence of a plausible loss.

Thus, this Court should reverse the district court's dismissal of Smith's claim.

C. The burden of persuasion shifts to Hopscotch and Red Rock given that Smith has proved his prima facie that they were acting as a fiduciary when breaching its fiduciary duty, thereby causing a loss.

When a plan participant establishes a prima facie for a breach of fiduciary duty cause of action, the burden of persuasion shifts to the defendant fiduciaries to prove that their breach did not cause the loss. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992); *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982) (holding that fiduciaries must establish that a loss was not caused by imprudent decisions when evidence suggests a breach). In *Martin*, the burden of persuasion shifted to fiduciaries to disprove causation where plan sponsors prioritized corporate motives over plan participants' interests by selecting imprudent investments that resulted in plan losses. 965 F.2d at 671. Fiduciaries with superior access to investment performance data and decision-making processes are responsible for disproving causation. *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). In *Braden*, allegations of imprudent investment decisions, combined with assertions that fiduciaries acted disloyally by selecting investment options that benefited themselves or third parties rather than plan participants, were sufficient to state a prima facie claim under ERISA and shift the burden to the fiduciaries to demonstrate that their decisions were prudent and in the best interest of the plan. *Id.* at 595–96.

Here, Smith established a prima facie case sufficient to shift the burden of persuasion to Hopscotch and Red Rock. Like *Martin*, where plan participants alleged the fiduciary prioritized its corporate motives over plan participants' interest by selecting imprudent investments that resulted in plan losses, Smith alleged Hopscotch and Red Rock prioritized its ESG goals over plan participant's financial benefit by making ESG-focused investment selections that resulted in loss to the Plan. Hopscotch acted as a fiduciary in selecting an investment manager. When selecting an investment manager, Hopscotch allowed its own corporate ESG goals as a motivation to select Red Rock, an ESG-focused investment manager, as its investment manager. In addition, Hopscotch's decision to set the ESOP option as the default investment for Plan participants, resulting in over forty-percent of the Plan being invested in Hopscotch stock, demonstrates a plausible prioritization of corporate ESG and DEI objectives over participants' financial returns. Smith sufficiently alleged that Hopscotch's ESG activities were intended to attract its target demographic of teenagers and pre-teens, despite these activities resulting in slower stock growth compared to competitors like Tok and Boom. As a result, Hopscotch breached its fiduciary duty that plausibly resulted in a loss to the Plan. In addition, Red Rock is an investment manager and acted as a fiduciary in selecting investments. Red Rock's proxy voting practices, such as voting against board members deemed insufficiently "green," and its decision to exclude high-performing energy investments like the energy sector of the S&P 500 (which outperformed other sectors by over fifty-five percent in 2021 and 2022), further demonstrate a focus on ESG principles over participant returns. Further, Red Rock's commitment to Climate Action 100+ and exclusion of high performing energy investment from the Plan to satisfy its ESG goals despite being investment manager for the Plan is a breach of fiduciary duty that plausibly resulted in a loss to the Plan. Thus, the burden or persuasion shifts to Hopscotch and Red Rock to prove whether their actions caused a loss to the plan. Like in *Braden*, where imprudent investment choices and potential conflicts of interest sufficed to establish a prima facie case, the facts here justify shifting the burden to Hopscotch and Red Rock to prove their actions did not cause losses to the Plan and were consistent with their fiduciary duties under ERISA.

Thus, Smith has met its prima facie case to shift the burden of persuasion to Hopscotch and Red Rock. The Defendants must now demonstrate that their breaches of fiduciary duties were not the cause of the Plan’s underperformance and financial losses.

CONCLUSION

For all the foregoing reasons, this Court should reverse the District Court's grant of the appellee's Motion to Dismiss for Failure to State a Claim.

DATED: January 24, 2025

Respectfully Submitted,
/s/ Team #14
Attorneys for Appellant