ORAL ARGUMENTS SCHEDULED FOR MARCH 7, 2025

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 PLAINTIFF-APPELLANT

Team 15

Counsel for Plaintiff-Appellant.

January 24, 2025

TABLE OF CONTENTS

TABLE OF CONTENTS 1
TABLE OF AUTHORITIES 3
JURISDICTIONAL STATEMENT 5
STATEMENT OF THE ISSUES 5
STATEMENT OF THE CASE 5
SUMMARY OF THE ARGUMENT 8
ARGUMENT 10
I. STANDARD OF REVIEW 10
II. THE LOWER COURT CORRECTLY HELD THAT THE PLAINTIFF ADEQUATELY PLEADED A BREACH OF FIDUCIARY DUTY WHEN HOPSCOTCH AND RED ROCK PRIORITIZED ENVIRONMENTAL SOCIAL GOVERNANCE STANDARDS OVER PLAN PARTICIPANTS. 10
A. Hopscotch And Red Rock Are Fiduciaries And Their Actions Triggered Fiduciary Duties Because They Were Related to Management And Administration of Plan Assets. 10
B. Hopscotch and Red Rock Violated their Fiduciary Duties of Loyalty and Prudence Under ERISA. 13
i. The Duty of Loyalty is Violated When the Defendants Intended To Benefit Someone Other Than Participants By Pursuing ESG Strategies. 14
a) Hopscotch Breached Their Duty of Loyalty By Hiring and Retaining Red Rock and Publicly Announcing Their Focus on ESG to Retain a Younger Demographic. 16
b) Red Rock Breached Their Duty of Loyalty By Announcing and Pursuing ESG. 17
ii. Both Hopscotch and Red Rock Violated Their Duty of Prudence. 18
a) Hopscotch Breach Their Duty of Prudence By Hiring Red Rock Without Adequate Investigation and Failing To Continue Monitoring the Plan. 20

b) Red Rock Breached Its Duty of Prudence by Pursuing ESG, Failing to Monitor, and Remove Imprudent Investments. 22

III. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS BECAUSE PLAINTIFF ADEQUATELY STATED A CLAIM THAT THE ALLEGED FIDUCIARY BREACHES CAUSED A LOSS TO THE PLAN. 23

A. Plaintiff Sufficiently Pleaded the Losses to the Plan in the Form of Underperforming Returns Related to the ESG Options and Declining Stock Prices Related to the ESOP Option. 23

i. Plaintiff Must Only Plead Sufficient Facts To Draw a Reasonable Inference of Defendants' Liability at This Stage. 23

ii. Plaintiff Sufficiently Pleaded the Losses To The Plan Regarding the Seven ESG-Limited Options Of The 401(K) Managed By Red Rock and Provided a "Meaningful Benchmark." 25

iii. Plaintiff Sufficiently Pleaded a Loss To the Plan Regarding the ESOP Option of the 401(K). 29

B. Plaintiff Must Not Prove Causation, as This Circuit Recognizes the Burden Shifting Framework in an ERISA Breach of Fiduciary Duty Claim. 31

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 10, 23, 24, 28

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 10, 24

Braden v. Wal-Mart Stores, Inc. 588 F.3d 585 (8th Cir. 2009) ....passim

Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018) 31

Cent. States, SE and SW Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559 (1985) 13

Davis v. Washington Univ. in St. Louis, 960 F.3d 478 (8th Cir. 2020)............25, 28

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) 14, 24

Dormani v. Target Corp., 970 F.3d 910 (8th Cir. 2020)...15

Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) 15

Harley v. Minn. Mining & Mfg. Co., 42 F.Supp.2d 898 (D. Minn. 1999) 32

Hughes v. Northwestern University, 595 U.S. 170 (2022).........................19, 21, 22

In re Beck Indus., Inc., 605 F.2d 624 (2d Cir. 1979)..32

Krueger v. Ameriprise Financial, Inc., 2012 WL 5873825 (D. Minn. Nov. 20, 2012)..11, 20, 21

Larson v. Allina Health System, 350 F.Supp.3d 780 (D. Minn. 2018) 20

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984)...14, 15, 17

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 12

Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992)...31, 33

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 11

Matousek v. Mid-American Energy Co., 51 F.4th 274 (8th Cir. 2022).......25, 26, 27

McDonald v. Provident Indem. Life Ins., 60 F.3d 234 (5th Cir. 1995) 31

Meiners v. Wells Fargo & Co., 898 F.3d 820 (8th Cir. 2018) 25

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) 11

Nelsen v. Principal Glob. Inv. Trust Co., 362 F.Supp.3d 627 (S.D. Iowa 2019)...16, 19

Pegram v. Hedrich, 530 U.S. 211 (2000)...11

Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705 (2d Cir. 2013)..24

Perez v. Harris, 2015 WL 6872453 (D. Minn. Nov. 9, 2015) 32

Pharm. Care Mgmt. Ass'n v. Gerhart, 852 F.3d 722 (8th Cir. 2017) 10

Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017) 31
Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915 (8th Cir. 1994) ("*Roth I*") .. 19, 32
Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599 (8th Cir. 1995) ("Roth II") 24
Rozo v. Principal Life Ins. Co., 48 F.4th 589 (8th Cir. 2022) 15
Smith v. Hopscotch Corp., No. 24-CV-100 (D. Minn.) 8, 13, 23, 27
Spence v. American Airlines, Inc., 2025 WL 225127 (N.D. Tex. Jan. 10, 2025) ... 13
Spence v. American Airlines, Inc., 718 F.Supp.3d 612 (N.D. Tex. 2024) 16, 20
Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014) 31
Tibble v. Edison Int'l, 575 U.S. 523 (2015) 19, 22
Varity Corp. v. Howe, 516 U.S. 489 (1996) 11, 15
Wildman v. Am. Century Serv., LLC, 362 F.Supp.3d 685 (W.D. Mo. 2019) 14, 19

Statutes

26 U.S.C. § 4975(e)(7) 30
28 U.S.C. § 1132 5
28 U.S.C. § 1291 5
29 U.S.C. § 1001 10
29 U.S.C. § 1002 .... 11, 12
29 U.S.C. § 1102 10
29 U.S.C. § 1104 .... 14, 19
29 U.S.C. § 1105 13
29 U.S.C. § 1109 .... 24, 31
29 U.S.C. § 1331 5

Regulations

29 C.F.R. § 2550.404a-1(c)(1) 14

JURISDICTIONAL STATEMENT

This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"). The District Court for the District of Minnesota had proper subject matter jurisdiction pursuant to 28 U.S.C. § 1132(e)(1) and 29 U.S.C. § 1331. This Court has jurisdiction on the issues on appeal pursuant to 28 U.S.C. § 1291. Plaintiff-Appellant filed a timely notice of appeal.

STATEMENT OF THE ISSUES

1. Whether the District Court, in a motion to dismiss, properly found Plaintiff-Appellant sufficiently pleaded that Defendants breached their fiduciary duties.
2. Whether the District Court erred in granting Defendants' motion to dismiss and holding that Plaintiff-Appellant failed to sufficiently plead Defendants' alleged breaches caused any loss to the Plan.

STATEMENT OF THE CASE

Hopscotch Corporation, a prominent social media platform and technology company, offers eligible employees the opportunity to participate in the employer-sponsored 401(k) plan governed by ERISA. (hereinafter, "the Plan"). Compl. ¶ 6. Hopscotch sponsors the Plan, and is named as the Plan Administrator. Compl. ¶ 1. In 2019, Hopscotch hired Red Rock Investment Co., a leading investment manager, to be the investment manager of the Plan per ERISA §3(38). Compl. ¶ 7,

12. The Plan is a defined contribution plan, where participating employees may choose to invest up to 10% of their salary into the Plan. Compl. ¶ 8. Hopscotch contributes equal to 5% of each employee's salary, plus an additional match of the employee's contributions up to 7% of salary. Compl. ¶ 8.

The Plan offers eight investment options. Compl. ¶ 9. One of these options is an Employer Stock Ownership Plan option ("ESOP option"), meaning the Plan invests in the employer's stock. Compl. ¶ 9. Hopscotch's contributions to the plan are automatically invested in the ESOP option for at least five years. Compl. ¶ 9. After five years, the participant has a vested right to it, and may choose to either continue with the ESOP option or redesignate any amount into the other seven investment options. Compl. ¶ 9. Regarding the participant's contribution, the ESOP option is the default option unless participants choose to invest their contribution in one of the other seven options. Compl. ¶ 9.

The other seven investment options are managed by Red Rock. Compl. ¶ 11. In 2018, Hopscotch announced its shift to pursue ESG goals in its own operations as well as investment strategies offered in the Plan. Compl. ¶ 12. In 2019, Hopscotch hired Red Rock due to, in part, Red Rock's commitment to ESG. Compl. ¶ 12. ESG refers to Environmental, Social and Governance. In 2019, the CEO of Hopscotch announced that the Board took on this ESG focus in hopes of attracting and retaining younger demographics as primary consumers, and that it

was “paying off.” Compl. ¶ 13. In 2019, soon after taking control and becoming an investment manager for Hopscotch, Red Rock joined Climate Action 100+, a group of investors committed to pressing greenhouse gas emitters to reduce emissions. Compl. ¶ 17. Red Rock issued a formal press release stating climate sustainability would be their new guiding principle. Compl. ¶ 17. Further, Red Rock exercised proxy voting rights for the investments it managed, voting against directors that were not making “sufficient” progress on environmental sustainability. Compl. ¶ 18. Over a dozen times from 2020 to 2023, Red Rock submitted proxy votes against appointment of Directors who were not pursuing green goals as sufficiently as Red Rock hoped. Compl. ¶ 19. From the companies which Red Rock engaged in proxy voting, all suffered a steep stock price decline following Red Rock’s actions. Compl. ¶ 24. Additionally, Red Rock boycotts investments in traditional energy companies. Compl. ¶ 20. The non-ESOP options, all managed by Red Rock, therefore, were all ESG focused. For every ESG investment option, the non-ESG options available in the marketplace had better returns and lower costs during that time period. Compl. ¶ 21. Further, the S&P 500 showed 55% higher returns than non-energy sectors, showing a foregone opportunity of growth Red Rock consciously disregarded. Compl. ¶ 22.

John Smith is a former employee of Hopscotch, having worked for the company over seven years from 2016 until November 2023. Compl. ¶ 10. Similar

to other employees of Hopscotch, John Smith participated in the 401(k) plan, detrimentally relying on the Plan fiduciaries to act in the Plan's interest and grow an ample retirement fund. Compl. ¶ 5, 10, 26.

On February 4, 2024, Plaintiff John Smith, on behalf of a class, filed a complaint against Hopscotch Corporation and Red Rock Investment Co. alleging a breach of their fiduciary duties. Compl. ¶ 45-46. Defendants filed a motion to dismiss. Doc. 27. The District Court of Minnesota granted Defendants' motion to dismiss, finding that although Plaintiff sufficiently alleged breaches of fiduciary duties, Plaintiff failed to adequately allege the Plan suffered a loss. *Smith v. Hopscotch Corp.*, No. 24-CV-100, 7-8 (D. Minn.). Plaintiff appealed to this Court.

SUMMARY OF THE ARGUMENT

Plaintiff has met their burden adequately alleging that Defendants, Hopscotch and Red Rock, violated their fiduciary duties under ERISA. The trust principles could not be any clearer, fiduciaries are to act in the interest of the participants when making decisions about assets and plan administration. Here Hopscotch violated their fiduciary duty of loyalty by hiring and retaining a company to benefit their company and attract a young demographic through announcing a commitment to ESG instead of considering participants' best interests. Additionally, they breached fiduciary duty of prudent monitoring by not adequately reviewing the plan options. Separately, Red Rock breached their

fiduciary duty of loyalty by publicly announcing their commitment to ESG and using their proxy voting powers, actively harming plan participants. Additionally, they breached their duty of prudence by offering only ESG options and failing to remove the options when it was clear they were underperforming.

Plaintiff has met their burden in adequately alleging Defendant's actions caused a loss to the Plan. Plaintiff has provided the court with supporting facts, demonstrating the higher returns of other sectors compared to the sector which Defendants limited the plan to. While Plaintiff provided a meaningful benchmark in this context, it is an improper comparison to look at meaningful benchmarks in past cases and expect the same. The novelty and unprecedented strategy of an entirely ESG-focused plan which Defendants pursued does not align with precedent and therefore must be considered in a new understanding of a meaningful benchmark. Plaintiff has sufficiently pleaded the breach and prima facie case of a loss, thereby shifting the burden of persuasion for the causation issue to Defendants. Taking the facts presented as true and in favor of the nonmoving party, and given Plaintiff has met their burdens, the lower court's granting of the motion to dismiss was improper.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a Rule 12(b)(6) motion to dismiss. *Pharm. Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722, 726 (8th Cir. 2017). To survive a motion to dismiss, plaintiffs must plausibly state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Braden v. Wal-Mart Stores*, Inc. 588 F.3d 585, 994 (8th Cir. 2009) (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.")); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

II. THE LOWER COURT CORRECTLY HELD THAT THE PLAINTIFF ADEQUATELY PLEADED A BREACH OF FIDUCIARY DUTY WHEN HOPSCOTCH AND RED ROCK PRIORITIZED ENVIRONMENTAL SOCIAL GOVERNANCE STANDARDS OVER PLAN PARTICIPANTS.

A. Hopscotch And Red Rock Are Fiduciaries And Their Actions Triggered Fiduciary Duties Because They Were Related to Management And Administration of Plan Assets.

The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended 29 U.S.C. § 1001 *et seq.*, requires fiduciaries to be named in the plan documents. 29 U.S.C. § 1102(a). Under ERISA, "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

"Fiduciaries are assigned a number of detailed duties and responsibilities, which include the proper management, administration, and investment of [plan] assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 251-52 (1993) (citing *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-143 (1985). When named fiduciaries act as fiduciaries, they trigger the highest duties of prudence and loyalty based in trust law. *See Varity Corp. v. Howe*, 516 U.S. 489, 506-07 (1996).

"Under ERISA, a corporate officer serving as a fiduciary must 'wear only one hat at a time, and wear the fiduciary hat when making fiduciary decisions.'" *Krueger v. Ameriprise Financial, Inc.*, 2012 WL 5873825, *8 (D. Minn. Nov. 20, 2012) (*citing Pegram v. Hedrich*, 530 U.S. 211, 224 (2000)). Since plan sponsors and administrators are also employers, there can sometimes be competing interests between business decisions and decisions in favor of the plan. To balance the interests of protecting participants but give flexibility to plan administrators, an

exception to fiduciary duties has been made for changes or amendments to the plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.") (internal citations omitted). Employers are free under ERISA for any reason at any time, to adopt, modify or terminate welfare and pension plans. This is commonly known as the settlor function. *Lockheed Corp.*, 517 U.S. at 889-91.

Hopscotch is the plan sponsor and administrator, qualifying as a named fiduciary under the definition of ERISA. Hopscotch hired and retained Red Rock, a plain act of plan administration. Hopscotch was acting as a fiduciary and not as a settlor when making comments about their investment decisions, hiring Red Rock and pursuing ESG. This is not an issue about plan amendments or changes, this is a case about investment strategy. *Lochkeed*, 517 U.S. at 891.

Red Rock was hired by Hopscotch and is an investment manager under 29 U.S.C. § 1002(38). Red Rock directly oversaw investments made to the Plan, triggering fiduciary duties with respect to the seven investment options. When Red Rock managed the funds with EGS in mind and used their power over proxy votes to favor ESG companies, they were acting as a fiduciary. There is no question that both Hopscotch and Red Rock were fiduciaries and acted within in their capacity triggering stringent duties of prudence and loyalty under ERISA. *See Smith v.*

Hopscotch Corp., No. 24-CV-100, 4 (D. Minn.) ("[N]either Defendant disputes that they were acting as a fiduciary with respect to the challenged acts and omissions").

Even if this court found that one of the Defendants was not acting as a fiduciary, they would still be liable for the alleged breaches under co-fiduciary liability. ERISA "imposes explicit co-fiduciary duties on plan fiduciaries who knowingly participate in a breach by another fiduciary, enable the breach by another fiduciary, or know of a breach and fail to make reasonable efforts to remedy the breach." 29 U.S.C. § 1105(a); *See Spence v. American Airlines, Inc.*, 2025 WL 225127, *20 (N.D. Tex. Jan. 10, 2025) (slip op.). Even if Hopscotch is found to be acting as a settlor when administering the plan, they are still responsible for the breach of loyalty and prudence of Red Rock under co-fiduciary liability.

B. Hopscotch and Red Rock Violated their Fiduciary Duties of Loyalty and Prudence Under ERISA.

ERISA imposes a duty of loyalty and prudence for fiduciaries when making decisions for a retirement plan. ERISA fiduciary's duty of care and prudence is derived from the common law of trusts. *See Cent. States, SE and SW Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985). Under the duty of loyalty a fiduciary is required to act "for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable

expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). To be prudent, a fiduciary must 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 in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

i. The Duty of Loyalty is Violated When the Defendants Intended To Benefit Someone Other Than Participants By Pursuing ESG Strategies.

Under ERISA the key question for a duty of loyalty is whether the fiduciaries acted 'solely in the interest' of plan beneficiaries and for 'the exclusive purpose' of providing benefits." *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). This fiduciary duty requires undivided loyalty, sometimes referred to as an "eye single towards the plan." *Id*. (*citing Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). A fiduciary should "not subordinate the interests of the participants and beneficiaries … to promote benefits or goals unrelated to interests of the participants." 29 C.F.R. § 2550.404a-1(c)(1). Duty of loyalty will be analyzed under a subjective standard. *Wildman v. Am. Century Serv., LLC*, 362 F.Supp.3d 685, 700-01 (W.D. Mo. 2019) ("Plaintiffs' burden is to point to Defendants' subjective motivation behind specific disloyal conduct.").

The Eighth Circuit has not adopted specific factors for a duty of loyalty inquiry but looks to sister circuits for additional guidance and the circumstances of

fact as a whole. *See Rozo v. Principal Life Ins. Co.*, 48 F.4th 589, 596 (8th Cir. 2022).[1] Acting in good faith is not a valid defense against a claim for a breach of loyalty. *Leigh*, 727 F.2d at 124.

ESOP Plans and options have slightly different standards of loyalty. ESOP plans do not need to be diversified and can be administered by the employer who might otherwise have a conflict of interest. *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 416 (2014); *Dormani v. Target Corp.*, 970 F.3d 910 (8th Cir. 2020).

If a fiduciary intended to benefit someone other than participants in the plan, the duty of loyalty has been violated. *See Varity Corp.*, 516 U.S. at 506-07 (1996). (Holding that participants who were lied to by their employer about the potential risks related to changing plans was a breach of loyalty because the employer lied to benefit themselves). For a motion to dismiss, the plaintiffs must adequately allege a potential violation which was intended to benefit someone other than the participants of the plan. *See Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009) (finding plaintiffs adequately alleged a breach of loyalty when defendants offered a limited menu of funds, selected by the defendants with higher fees and lower performance, for the benefit of the company over the participants);

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[1] *Compare with Leigh,* 727 F.2d at 127. (The Seventh Circuit looks to “the risk of conflicts between the interests of the fiduciaries and beneficiaries,” “whether fiduciaries with divided loyalties make an intensive and scrupulous investigation of the plan's investment options,” and “the consistent management of plan assets in congruence with the fiduciaries' personal interests.”

Nelsen v. Principal Glob. Inv. Trust Co., 362 F.Supp.3d 627, 637 (S.D. Iowa 2019) (finding that plaintiffs adequately alleged a bread of loyalty surviving a motion to dismiss because defendants retained higher-cost investments so principal could receive the fees from those investments).

Here, questions about the motivations of a company to pursue ESG is a question of fact which should be taken as true for the basis of the pleadings. *Spence v. American Airlines, Inc.*, 718 F.Supp.3d 612, 620–21 (N.D. Tex. 2024) (holding that plaintiffs properly alleged a violation of the duty of loyalty by pursuing ESG initiatives).

a) Hopscotch Breached Their Duty of Loyalty By Hiring and Retaining Red Rock and Publicly Announcing Their Focus on ESG to Retain a Younger Demographic.

We have adequately alleged a breach of loyalty by Hopscotch when they hired and retained their investment manager Red Rock because of their focus on EGS. Hiring an investment manager who exclusively focuses on EGS is not in the best interest of participants. In 2018 Hopscotch announced that they would be pursuing ESG and specifically hired Red Rock. Compl. ¶ 12. Additionally, the CEO and Board announced they were specifically pursuing ESG goals with the intent to benefit the company and not the plan. Compl. ¶ 13. In 2019 the CEO said that the Board had discussed how it could use the company's commitment to ESG and DEI to further attract and retain young demographic of teenagers and pre-

teens. *Id.* These actions to pursue ESG were outside the interests of the Plan participants. While the CEO and Board wanted to grow their company, they were doing so at the expense of participants.

Hopscotch was acting as a fiduciary when they hired Red Rock because they were exercising their discretion over plan assets. These comments and decisions about who to hire directly impacts plan assets and fiduciaries are required to act subject to the duty of loyalty. The decision to hire Red Rock was not just general business decisions, they are investment decisions, regarding assets of the plan that are specifically targeted to do something other than benefit participants in the plan. Since this is about exercising discretion over the plan, Hopscotch should have more carefully considered their investment manager.

Additionally, the announcement that Hopscotch would focus on ESG and DEI initiatives resulted in a decline in their own stock. Compl. ¶ 14. This decrease in the stock price has a direct impact on the Plan overall because the ESOP option is the default investment for participants. Not only was the stock price of Hopscotch decreasing which is bad for the Plan, but the menu of options provided by Red Rock violated the duty of loyalty because they are all focused on ESG.

b) Red Rock Breached Their Duty of Loyalty By Announcing and Pursuing ESG.

Red Rock as an investment manager under ERISA had a fiduciary duty to act with an eye single towards the plan and participants. *Leigh*, 727 F.2d at 123.

The Company has announced its own commitments to ESG and has also used its proxy power to affect the returns of other investments without consideration of effects on the plan options. Even after the stock price of Hopscotch decreased as a result of their ESG announcement, Red Rock actively joined the Climate Action 100+ stating that "climate sustainability would be the company's new guiding principle." Compl. ¶14-17. Red Rock intended to benefit someone other than participants when it announced its commitment to ESG. This was plainly a violation of loyalty to the investments in the Plan. When considering plan assets, again the investment managers focus should be on the Plan not ESG goals.

Plaintiff in this case has met their burden to allege a breach of loyalty under ERISA. They have alleged that both Hopscotch and Red Rock considered something other than the best options for the plan participants and beneficiaries. The complaint has adequately allowed the Court to infer that Hopscotch and Red Rock acted with the intent to benefit someone other than the participants. Since the complaint should be read in favor of the non-moving party, the Plaintiff has met their burden.

ii. Both Hopscotch and Red Rock Violated Their Duty of Prudence.

Under ERISA, a Fiduciary must 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 in the conduct of an

enterprise of a like character and with like aims." 29 U.S.C.A. §1104 (a)(1)(B). "The statute's prudent person standard is an objective standard ... that focuses on the fiduciary's conduct preceding the challenged decision." *See Braden*, 588 F.3d at 595. Courts are to "focus on the process by which it makes its decisions rather than the results of those decisions." *Id*. The acts of the fiduciary should be viewed "from the perspective of the time of the challenged decision rather than from the vantage point of hindsight." *See Roth v. Sawyer-Cleator Lumber Co*., 16 F.3d 915, 917-18 (8th Cir. 1994) ("*Roth I*") (internal citations omitted). The standard is that of a prudent investor, not a lay person. *Wildman*, 362 F.Supp.3d at 703 ("what a prudent investor under similar circumstances would have done").

The duty of prudence requires that fiduciaries continue to monitor investments and remove imprudent investments. *See Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015). This duty applies even when participants choose their own investment options. *See Hughes v. Northwestern University*, 595 U.S. 170, 176 (2022).

To survive a motion to dismiss, the plaintiffs only need to allege a plausible breach of prudence. *See Nelsen*, 362 F.Supp.3d at 637 (Finding plaintiffs adequately alleged a breach of prudence surviving a motion to dismiss because "defendants imprudently retained high-cost, low-performing investments despite the availability of lower-cost investments that either outperformed or performed

identical to the proprietary investments chosen by the investment manager); *Braden*, 588 F.3d at 595-97. (Plaintiffs adequately alleged a breach prudence when defendants which could have used their bargaining power in the marketplace to provide lower fees and that fiduciaries failed to change options despite the under performance of the market); *Krueger*, 2012 WL 5873825 at *11 (Finding a breach of prudence was adequately alleged when a plan administrator hired a record keeper without a competitive process, invested in options with poor or non-existent performance histories and continued to invest in these options); *Larson v. Allina Health System*, 350 F.Supp.3d 780, 797-99 (D. Minn. 2018) (Finding that plaintiff adequately stated a claim for breach of prudence and monitoring when an investment manager to include and not remove higher cost investment options); *Spence*, 718 F.Supp.3d at 618 (N.D. Tex. 2024) (Holding plaintiffs adequately alleged a breach of prudence for the plan administrator "imprudently choosing to invest Plan assets with investment managers who pursue ESG objectives through proxy voting and shareholder activism and failing to monitor or stop these managers from pursuing objectives harmful to the Plan participants' investments").

a) Hopscotch Breach Their Duty of Prudence By Hiring Red Rock Without Adequate Investigation and Failing To Continue Monitoring the Plan.

Hopscotch as Plan Administrator should have made a better decision as a fiduciary when it decided to hire Red Rock. Hopscotch announced that it had hired

Red Rock because of their stances on ESG and recent shareholder activism which they believed would retain a young demographic on their social media platform. Compl. ¶ 12. Based on the information at this stage, nothing suggests that Hopscotch compared ESG and non ESG funds or intended to benefit anyone other than themselves by hiring Red Rock. This is a clear violation of a fiduciaries duty to thoroughly investigate the potential manager of the plan. *Krueger*, 2012 WL 5873825 at *11. While more information will be uncovered through discovery about the hiring process, the Plaintiff has adequately alleged a procedural prudence violation because Hopscotch hired Red Rock to manage plan assets unlike that of a prudent fiduciary.

Hopscotch also breached its fiduciary duty to monitor investments. While Red Rock was retained as the investment manager Hopscotch, as Plan administrator, still had a continued duty to account for investments and returns of the Plan. *Hughes*, 595 U.S. at 175. When Hopscotch conducted a review of the Plan, they either knew or should have known that the ESG investments were yielding lower returns than their non ESG counterparts. Failure of Hopscotch to conduct a review or failure to review and remove the investment could amount to a breach.

b) Red Rock Breached Its Duty of Prudence by Pursuing ESG, Failing to Monitor, and Remove Imprudent Investments.

Red Rock breached their duty of prudence by pursuing ESG goals for the Plan and implementing proxy voting policies with their investment power instead of considering the financial goals of their plans. Red Rock selected and managed seven of the plan options, apart from the ESOP option, all of which focused on ESG. Compl. ¶ 11, 12, 20. This investment strategy to pursue ESG over any other financial considerations left participants with few options and lower returns on investments. At the time Red Rock was investing in ESG, the funds were underperforming. Therefore, it was imprudent for Red Rock to offer only ESG investment options to the Plan.

Additionally, by failing to remove these ESG investments, Red Rock also breached their duty of prudent monitoring. As an investment manager Red Rock is required to conduct their own investigation to monitor plan investments. *Hughes*, 595 U.S. at 175. When Red Rock conducted their investigation they knew the ESG options were performing at lower rates. After monitoring the investments, Red Rock had a duty to remove poorly performing investments. *Tibble*, 575 U.S. at 530. It is not clear what processes Red Rock had in place to monitor these seven investments, if they had discussed the poor performance or if their loyalty was

instead to the ESG objectives at the cost of participants. Here Red Rock should have removed the investments after they realized they were underperforming.

Plaintiff has adequately alleged that both Hopscotch and Red Rock could have violated their fiduciary obligations of loyalty and prudence by elevating ESG "considerations above the interests of plan participants." *Smith*, No. 24-CV-100 at 5. Hopscotch acted imprudent by hiring and retaining Red Rock as an investment manager. Further both Hopscotch and Red Rock violated their ongoing duty to monitor and remove imprudent investments. The Plaintiff has illustrated with enough plausibility that defendants acted imprudently. At this stage, the Court should draw all inferences in favor of the Plaintiff and find at least the possibility of breach.

III. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS BECAUSE PLAINTIFF ADEQUATELY STATED A CLAIM THAT THE ALLEGED FIDUCIARY BREACHES CAUSED A LOSS TO THE PLAN.

A. Plaintiff Sufficiently Pleaded the Losses to the Plan in the Form of Underperforming Returns Related to the ESG Options and Declining Stock Prices Related to the ESOP Option.

i. Plaintiff Must Only Plead Sufficient Facts To Draw a Reasonable Inference of Defendants' Liability at This Stage.

"A complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal,* 556 U.S. at 678. (internal citations omitted). So long as plaintiffs plead sufficient facts which allow the court

to "draw the reasonable inference that the defendant is liable for the misconduct," the claim has "facial plausibility." *Id.*; *Twombly*, 550 U.S. at 556. Plausibility is a fact specific and contextual inquiry. *See Braden*, 588 F.3d at 594. Courts should read allegations as a whole and review based on its judicial experience and common sense. *Iqbal,* 556 U.S. at 663-64.

In the ERISA context, plaintiffs alleging a breach of fiduciary duty must prove enough for the court to "infer from what is alleged that the process was flawed." *Pension Benefit Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 718 (2d Cir. 2013) (*quoting Braden*, 588 F.3d at 596). In support of this, plaintiffs must point to losses suffered by the plan. 29 U.S.C. § 1109(a); *Braden*, 588 F.3d at 594 (internal citations omitted). To measure the loss to a plan, we can compare the "actual profit to potential profit that would have been realized in the absence of breach." *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 604 (8th Cir. 1995) ("Roth II"). In other words, we weigh "what the Plan actually earned" against "what the Plan would have earned." *Donovan*, 754 F.2d at 1056. Here, Plaintiff has proven a prima facie case with the evidence available at this stage, prior to discovery, alleging losses to the plan in foregone opportunities, lower returns, and declining stock prices.

ii. Plaintiff Sufficiently Pleaded the Losses To The Plan Regarding the Seven ESG-Limited Options Of The 401(K) Managed By Red Rock and Provided a "Meaningful Benchmark."

At the pleading stage, a plaintiff must only allege enough facts to infer that the fiduciary's decision making process was flawed. *See Matousek v. Mid-American Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022); *Davis v. Washington Univ. in St. Louis,* 960 F.3d 478, 482-83 (8th Cir. 2020). In support of such inference, plaintiffs may provide "a sound basis for comparison—a meaningful benchmark." *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). A "meaningful benchmark" should not be an alternative investment with "some similarities" but rather be a comparable plan that holds "similar securities, have similar investment strategies, and reflect a similar risk profile." *Id.* at 823; *Matousek*, 51 F.4th at 281. By providing a "meaningful benchmark," plaintiffs avoid an inappropriate argument of "comparing apples and oranges." *Davis*, 960 F.3d at 485. Importantly, there is not and cannot be a "one-size-fits all-approach" in pointing to a certain benchmark, but rather must be considered in light of the "totality of the specific allegations." *Matousek,* 51 F.4th at 281 (citing *Meiners*, 898 F.3d at 822). What fails to qualify as a "meaningful benchmark" in one case may be sufficient for pleadings in another case, depending on the facts and context.

The holding in *Matousek* should not be misconstrued as a bright line rule for what qualifies as a "meaningful benchmark." In *Matousek*, plan participants

brought a duty of prudence claim against plan fiduciaries, based on underperformance of investments.[2] 51 F.4th at 278. In attempting to provide the court with a "meaningful benchmark," plaintiffs relied on the performance of peer groups and performance of alternative investments, both, according to the plaintiffs, showed better performance than those chosen by the fiduciaries. *Id.* at 281. This Court found fault with the plaintiff's comparisons because there was "no explanation of what types of funds are in each group, much less the criteria used to sort them." *Id.* Most notably, the *Matousek* plaintiffs failed to consider or attempt to justify how investments with different strategies, one of growth and one of value, could properly be compared. *Id.* at 282. If any general rule is to be found in the case, *Matousek* stands for the simple principle that it is inappropriate to compare growth stocks versus value stocks, as they are "just different." *Matousek*, 51 F.4th at 282. However, Plaintiff here is not asking the Court to compare funds of two different investment strategies, nor is Plaintiff comparing a plan that is only slightly similar to the plan in question. The facts of this case and the context the Court must view as a whole are, for different reasons, "just different." *Id.*

The Defendants did not use a growth strategy or a value strategy, because, as Plaintiff alleged in the Complaint, the Defendants simply did not use *any*

[2] The *Matousek* plaintiffs also alleged a breach of duty of prudence based on excessive fees and costs. Plaintiffs looked to expense ratios as "meaningful benchmarks," which this court found was insufficient due to the difference in responsibilities and actions going into the fee pricing. Because the case at hand is not alleging excessive fees, this Brief will focus on the underperforming investments arguments.

economically motivated investment strategy. Compl. ¶ 18-22. Plaintiff in this case cannot point to another fund using a well-known or industry adopted approach because Defendants did not take one into account. *Id.* Rather, Plaintiff alleges that Defendants' actions clearly exemplified that the only "strategy" at play was picking ESG investments at the exclusion of non-ESG choices. Compl. ¶ 20. Of the eight options plan participants have regarding their 401(k) plan, seven options are all managed by Red Rock. *See* Compl. ¶ 11; *Smith*, No. 24-CV-100 at 3. As investment manager, Red Rock has control over the investment selection as well as has the right to proxy vote for all Plan investments. *Smith*, No. 24-CV-100 at 3. Plaintiff alleges Defendants' actions permitting seven plan options to invest strictly in ESG investments, forfeiting energy sector investments, and proxy voting purely toward ESG and DEI goals at the sacrifice of prioritizing plan participants' benefits, all caused a harm to the plans. The nature of this case, with an approach not based in any economically founded reasoning, makes it an improper setting to search for a "meaningful benchmark" as could be found in *Matousek*.

In *Matousek*, the court looked for similar plans with similar strategies to compare performance. 51 F.4th at 279. Here, Defendants' actions made that an impossible task for Plaintiff. This is not a "strategy" which Plaintiff can provide a meaningful benchmark like this court has seen before. The only "plausible" comparison Plaintiff can show, and have shown, is how the plan would have

benefited had it not strictly excluded energy investments. *See Iqbal,* at 556 U.S. at 663 (defining plausible as one with sufficient facts to draw such reasonable inferences). Plaintiff alleged, and to be taken as true, that the S&P 500 showed a 55% higher return in the Energy sector compared to non-Energy sectors in 2021 and 2022. Compl. ¶ 23. Plaintiff alleged, and to be taken as true, that ESG investments continue to underperform by 2.5% compared to the broader market, returning an average of 6.3% compared to the market return average of 8.9%. Compl. ¶ 25 (referring to the publication from the University of Chicago Journal of Finance). Even if there was precedent against using the S&P 500 in one scenario, it cannot be understood to mean that in *every* scenario, and certainly not in one as unprecedented as Defendants' actions here. Plaintiff has not merely made a "bare allegation" that "returns are too low." *Davis*, 960 F.3d at 484. Plaintiff has gone beyond comparing apples to oranges and rather Plaintiff has presented sufficient evidence to show a continuous underperformance of an unprecedented strategy, one which Defendants chose and continued to pursue despite the reported market results.

Therefore, it is improper to look to *Matousek* as a guiding case, and rather the facts of this case, on their own, present an unprecedented issue that requires a unique application of a "meaningful benchmark." Plaintiff here has provided a sound basis for comparison, showing how Defendants' actions to limit themselves

to one sector of investments saw lower returns compared to higher returns in a foregone sector. *See Braden*, 588 F.3d at 596 (finding the plaintiffs sufficiently pointed to the underperformance of the plan compared to market indices the plan was designed to track). The value of the market provides a sound basis to compare ESG performance as a whole, the only factor Defendants had in choosing investments, with the performance of non-ESG options. Defendants failed to consider alternatives when creating the plan's menu of options, and Plaintiff has presented the court with evidence that had Defendants not ignored entire sectors of opportunities, the plan would not have been confined to its underperforming assets. Plaintiff's allegation, which the Court must take as true, that for every ESG investment option there is a "similar non-ESG investment option available," further supports this. Compl. ¶ 21. This harmed not only one but all seven of Red Rock managed options of the Hopscotch sponsored 401(k) plan. Therefore, Plaintiff has sufficiently pleaded the loss to the plan, providing the Court with a "meaningful benchmark" specific to the unprecedented context of this case.

iii. Plaintiff Sufficiently Pleaded a Loss To the Plan Regarding the ESOP Option of the 401(K).

In addition to the seven options managed by Red Rock, employees also could choose the ESOP option of the 401(k) plan. Compl. ¶ 9. Defendants' actions additionally resulted in harm to this option; therefore, despite how eligible employees divided their options, the plan as a whole saw a loss. The 401(k) plan's

ESOP option, made entirely of Hopscotch stock, is directly tied with the value of the company. 26 U.S.C. § 4975(e)(7) (defining an ESOP as one "designed to invest primarily in qualifying employer securities"). Hopscotch's change in strategy, emphasizing DEI and ESG, negatively impacted the Hopscotch stock price, leading to the lower share growth rate. Compl. ¶ 14. To support this allegation, Plaintiff points to the slower growth in Hopscotch compared to the rate of the other top performing social media platforms, Tok and Boom, who did not make such a strategy shift. *Id.* Further, Plaintiff alleged that had Hopscotch not participated in such ESG and DEI activities, Hopscotch would have faced greater growth comparable to Tok and Boom. *Id.*

Notably, this form of a loss does not require a "meaningful benchmark" as discussed above. A loss in an ESOP option is not one of failure to select an alternative investment, as the only investment is the employer's stock. Rather, to plead such a loss, Plaintiff can simply point to the breach and the harm, forming a sufficient prima facie case. Here, Plaintiff has alleged sufficiently to raise a facially plausible claim, that it was Defendants' actions in shifting to a ESG and DEI approach that negatively impacted employer stock, thereby negatively impacting the plan's ESOP option. As further evidence of such harm, Plaintiff points to two comparable social media companies, who saw greater growth and were not

hindered by such ESG and DEI backlash. At the motion to dismiss stage, Plaintiff stated a claim for which relief can be granted.

B. Plaintiff Must Not Prove Causation, as This Circuit Recognizes the Burden Shifting Framework in an ERISA Breach of Fiduciary Duty Claim.

While ERISA defines a fiduciary breach to be one in which the act is the proximate cause of the losses, the statute is silent on who carries the burden of proving such. 29 U.S.C. § 1109; *Pioneer Ctrs. Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1335 (10th Cir. 2017) ("[T]he statute is silent as to who bears the burden of proving a resulting loss."). This Circuit understands that once the plaintiff has "proved a breach of fiduciary duty and a prima facie case of loss to the plan," the burden shifts to the Defendants to prove the "loss was not caused by [...] the breach of duty." *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). This Circuit is joined by the First, Fourth, and Fifth Circuits applying the burden shifting framework. *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 35–39 (1st Cir. 2018) ("[T]he burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent."); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 362–63 (4th Cir. 2014) ("[T]his burden-shifting framework comports with the structure and purpose of ERISA."); *McDonald v. Provident Indem. Life Ins.*, 60 F.3d 234, 237 (5th Cir. 1995) ("We review these claims under

a three step analysis" including the burden on plaintiffs to prove "a breach of a fiduciary duty and a prima facie case of loss" shifting the burden of persuasion to fiduciaries.). This burden falls on Defendants to answer for their actions, as "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In re Beck Indus., Inc.*, 605 F.2d 624, 636 (2d Cir. 1979).

The Eighth Circuit has not wavered its position. *See e.g., Roth I*, 16 F.3d at 917 (remanding the case with instructions for the lower court to follow *Martin*'s "three step-analysis"). District courts within this Circuit have also relied on this framework in ERISA litigation. *See e.g., Perez v. Harris*, 2015 WL 6872453 at *11 (D. Minn. Nov. 9, 2015) (ruling against defendant-fiduciary for failing "to prove that the loss was not caused by the breach of duty"); *Harley v. Minn. Mining & Mfg. Co.*, 42 F.Supp.2d 898, 906 (D. Minn. 1999) ("While the Second Circuit now may hold otherwise, in this circuit, the defendant bears the burden on [the issue of causation]."). So long as sufficient facts are presented alleging a breach of fiduciary duty and a prima facie case of loss, the burden of persuasion shifts to Defendants.

Plaintiff has sufficiently pleaded a breach and a prima facie case of loss. As argued above, Plaintiff alleges the Defendants breached their fiduciary duties by selecting ESG investments, known to underperform and which continued to

underperform, investments. *Infra*, II(B). Further, Plaintiff alleges the plan saw losses as the ESOP option was limited by the negative performance of Hopscotch stock and the underperformance and limited opportunity in the remaining seven ESG options. *Id.* Plaintiff has shown the fiduciary breaches and made a prima facie case of loss to the plan. In other words, Plaintiff has pleaded sufficient facts, which this Court takes as true, permitting a reasonable inference of Defendants' liability. Therefore, as this Circuit recognizes, the burden has shifted to Defendants to prove that alleged breaches *did not* cause the losses to the plan. *Martin*, 965 F.2d at 671. Defendants have not only failed to meet such a burden, but further, given the sufficiency of Plaintiff's pleadings, granting the motion to dismiss against Plaintiff was improper.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully requests this Court reverse the District Court Order granting the Motion to Dismiss and find Plaintiff adequately alleged a claim for fiduciary breach under ERISA.