Team 1

ORAL ARGUMENT SCHEDULED FOR MARCH 7, 2025

Civil Action No.24-CV-100

In the
United States Court of Appeals
For The Eighth Circuit

John Smith.,

Appellant,

v.

Hopscotch Corporation and Red Rock Investment Company.,

Appellee.

On Appeal from the United States District of Minnesota
The Honorable

BRIEF FOR APPELLEE

Team 1
Counsel for Appellee

January 24, 2025

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JURISDICTIONAL STATEMENT

This action was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The United States District Court for the District of Minnesota had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1), as this action involves a federal question.

The United States Court of Appeals for the District of Minnesota has jurisdiction under 28 U.S.C. § 1291. Appellant John Smith and Appellee Hopscotch Corporation and Red Rock Investment Company filed a timely appeal in response to the final decision of the District Court.

ISSUES PRESENTED

1. Whether Appellant has properly stated a claim that Appellee's alleged fiduciary breaches caused a loss to the Plan when Plaintiff did not allege any alternative fund comparator as required by the Eight Circuit?

2. Whether even if the Appellant sufficiently alleged harm, the district court should have dismissed the Complaint on the grounds that the Appellant failed to adequately allege a breach of fiduciary duty by Appellee

STATEMENT OF THE CASE

Statement of Facts

Hopscotch Corporation, ("Hopscotch"), is a technology and social media company and is most popular among the youngest demographic of social media users. (Compl. at ¶ 14).[1]

Defendant Hopscotch offers a 401(k) Plan defined contribution plan, (the "Plan"), that allows participating employees, ("participants"), to invest up to 10% of their salary and Hopscotch automatically contributes 5% of each employee's salary in employer contributions and an additional match of employee contributions up to a maximum of 7% of salary. (*Id.* at ¶ 8). Hopscotch offers a variety of investment options for participants. Of the eight investment options offered by Hopscotch, one is an employee ownership option, ("ESOP option"), and is made up of Hopscotch stock. (*Id.* at ¶ 9). All Hopscotch contributions automatically go into the ESOP option and stays there until the employee has worked at the company for at least five years. (*Id.*; Op. at 2-3). After five years, the contributions have vested, and, under the employee's discretion, the employee may direct some or all of the funds to one or more of the other investment options. (*Id.*). All other investment options are managed by the Plan's investment manager, Red Rock Investment Co. ("Red Rock"). (Compl. at ¶ 11). Defendant Red Rock is a leading investment manager for plans under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et* seq. and other institutional and retail investors worldwide. (*Id.* at ¶ 7).

Plaintiff John Smith, ("Mr. Smith"), is a participant in the Plan, sponsored by his former employer Hopscotch. (Op. at 2). Mr. Smith was employed with Hopscotch for seven years from 2016 until 2023, and therefore all of his contributions to the plan as well as the contributions Hopscotch made on his behalf were vested and he will receive them and any investment earnings

when he retires. (*Id.*). Mr. Smith alleges that both Red Rock and Hopscotch, in recent years, started a complain of environmental, social, and governance ("ESG") activism. (*Id.* at 3). In 2018, Hopscotch determined that the company should pursue ESG goals in relation to investment strategies and options offered in the plan. (Compl. at ¶ 12). The following year, Hopscotch choose Red Rock as the Plan's investment manager. (*Id.*). Red Rock has regularly used its proxy voting power associated with the stock investments it manages to vote in pro-environmental individuals to boards of directors. (Compl. at ¶¶ 18-19; Op. at 3). Red Rock subsequently vote out those who were not as environmentally friendly. (*Id.*). Additionally, Red Rock does not invest in traditional energy companies. (Compl. at ¶ 20).

Mr. Smith asserts a claim for fiduciary and co-fiduciary breaches of prudence and loyalty of ERISA Sections 404 and 405, 29 U.S.C. §§ 1104, 1105. In support of these claims Mr. Smith alleges that the Plan's focus on ESG goals in relation to investment is conflicting with ERISA's fiduciary requirements and that Plan fiduciaries are required to focus entirely on investment returns when considering proper Plan investments. (*Id.*). In supporting the claim of Plan underperformance, Mr. Smith generally asserts that ESG investments underperform their non-ESG counterparts, and that there are similar non-ESG investment options available on the marketplace which allowed for better returns and lower costs during February 4, 2018, until the present ("the relevant time period"). (Compl. at ¶¶ 14, 21; Op. at 3-4). Additionally, Mr. Smith alleges that the ESG proxy voting activism by Red Rock has caused share prices at the targeted companies to go down. (Op. at 4). Mr. Smith contends that all of this has caused financial injury to the Plan and its participants and endangered the retirement securities of participants. (*Id.*).

[1] For record citations hereinafter, "Compl." represents citations to the Complaint, and "Op." represents citations to the District Court Memorandum Opinion and Order.

Procedural History

John Smith filed suit in the District Court for the District Court of Minnesota on February 4, 2024. (Compl.)

The District Court was faced with Defendants' Motion to Dismiss for Failure to state a Claim. (Op. at 1). Defendants asserted two grounds in which Plaintiff's claim should be dismissed. First, Defendants contended that Plaintiff has failed to plausibly allege fiduciary breaches because considering ESG factors when selecting an investment manager or investment option does not constitute a breach of the duties of prudence or loyalty under ERISA. (*Id.* at 4-5). Second, Defendants argue that Plaintiff has failed to plausibly allege any loss caused by their ESG-related actions by plausibly alleging there were other available investment options that a reasonably prudent fiduciary would have chosen. (*Id*. at 5).

Taking these claims in turn, the Court rejected Defendants first allegation because the impact and intent of Defendants investment strategy is a merits issue and cannot be resolved on the pleadings. (*Id*. at 7). The court agreed with Defendants on the second claim, finding that Plaintiff did not plausible allege that Defendant's fiduciary breaches caused any loss to the Plan due to Plaintiff's failure to identify any alternative, non-ESG fund comparators that could have or should have been selected consistent with Defendants' fiduciary duties that outperformed the funds that were chosen as Plan investments options by Red Rock. (*Id*. at 7).

Plaintiff's appeal is before the Court of Appeals for the District Court of Minnesota.

SUMMARY OF THE ARGUMENT

The District Court's affirmation of Appellant's claims should be affirmed. Appellant's claims fail to satisfy the legal requirements for alleging fiduciary breaches and causation of harm under ERISA.

In their complaint, Appellants provide no meaningful benchmark that is sufficient to meet the pleading requirements established by this court. Appellants general statement that each of the ESG investment options offered has a similar non-ESG investment option on the marketplace is insufficient because Appellants fail to plead any additional information regarding the claimed "similar non-ESG investment options." (Compl. at ¶ 21). Instead, Appellant relies on conclusory allegations and provides this court with no comparators.

Additionally, Appellants do not plead *any* investment funds comparable to the Plan's ESG investment options during the relevant time period. Throughout the entirety of the complaint, there is not a single claim alleging the performance of an investment fund that is sufficiently comparable to the challenge funds during the relevant time period. Without these allegations, it is impossible for this court to determine whether a prudent investor would have acted differently in similar circumstances.

Further, it is unclear whether Appellant's comparison between the Energy sector of the S&P 500 and non-Energy sectors is a meaningful benchmark because Appellant fails to allege any details regarding these sectors. (Compl. at ¶ 23). Specifically, Appellants provide no similarities between the non-Energy sector and the challenged fund. Without these details this court cannot determine whether the non-Energy sector is a sufficient comparator in relation to the performance of the Energy-sector. Appellant also does not plead any similarities or details between the non-Energy Sector and the Energy-sector. Without this information it is unclear how

these two sectors relate or at an even more basic level, what these sectors include. Finally, the academic paper cited by Appellants is not a meaningful benchmark because the information provided by Appellants only establishes generalities regarding ESG and non-ESG funds.

Additionally, no burden shifting is applicable because Appellants failed to plead a prima facie case of breach of fiduciary duties due to their insufficient allegations relating to the alleged breach of fiduciary duties causing a loss to the plan.

Primarily, Appellant did not adequately allege loss causation. Appellant failed to provide evidence of harm to the Plan resulting from Appellees' actions. Specifically, Appellant failed to quantify the alleged decline in Hopscotch's stock value due to ESG policies or identify comparable non-ESG investment options that outperformed the Plan's investments. While Appellant claims that ESG-focused investments missed out on returns, for instance, from the energy sector, he provides no specific details on how these investment decisions negatively impacted the overall value of the Plan. The lack of specific comparator data and failure to establish a causal link to financial harm is insufficient under precedents like *Matousek v. Mid-American Energy Co*.

Additionally, there was no breach of fiduciary duty by the Appellees. The Plan's governing document mandates that company contributions be invested in Hopscotch stock through an employee stock ownership plan (ESOP) option. Hopscotch acted as a settlor, not a fiduciary, in including this provision. Such actions are exempt from ERISA's fiduciary duties, as established by *Lockheed Corp. v. Spink*. Red Rock adhered to the Plan's governing document, which required the inclusion of the ESOP option and directed matching contributions into Hopscotch. This compliance demonstrates proper fiduciary conduct. Moreover, Red Rock was obligated to follow these terms under 29 U.S.C. § 1104(a)(1)(D). Hopscotch prudently selected

Red Rock as the Plan's investment manager. Appellant's claim that Red Rock's ESG policies caused harm is speculative and unsupported. Rather, Red Rock's approach to ESG investing aligns with Hopscotch's corporate strategy, which targets a socially conscious demographic and aims to enhance its brand value.

Appellant also alleges that Hopscotch's adoption of ESG policies harmed the Plan's investments. However, these decisions were corporate strategies, not fiduciary decisions, and are therefore beyond ERISA's purview. Hopscotch's ESG policies were designed to appeal to its youthful and environmentally conscious user base, which could increase the value of Hopscotch stock–a major component of the Plan's assets. ESG-focused investments are not inherently prudent. These strategies consider long-term benefits, including mitigating regulatory and reputational risks. Appellant's claim that ESG investments underperformed is based on broad assertions and lacks specific evidence of harm to the Plan. In regard to proxy voting discretion, Red Rock's proxy voting decision was consistent with its fiduciary duties and does not indicate imprudence or disloyalty.

The District Court properly found that Appellant failed to adequately allege losses to the Plan. Appellant's inability to provide specific details, such as the impact of ESG policies on Hopscotch stock value or comparator investment performance, undermines his claims. The Plan's structure, including its ESG investment strategy and proxy voting policies, was consistent with fiduciary and corporate responsibilities. Therefore, the District Court's dismissal of Appellant's claims should be affirmed.

ARGUMENT

The Appellees seek to have the District Court's dismissal of Appellant's claims affirmed. Appellant failed to adequately allege a loss to the plan, as he did not provide a meaningful benchmark to compare the challenged fund's performance, but provided allegations of unsupported generalities. The claims were correctly dismissed by the District Court because without a proper benchmark, the claim lacked the necessary foundation to demonstrate that the fund's performance was imprudent or caused harm to the plan. Even if the Appellant had sufficiently alleged harm, the claims still warranted dismissal since he failed to adequately allege that the Appellees breached their fiduciary duties. The allegations did not meet the exquisite standard to establish that the Appellees acted imprudently or violated their obligations under ERISA. Thus, the District Court's decision was appropriate and should be affirmed.

I. Standard of Review.

The District Court's order dismissing the Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim is reviewed *de novo*. *Davis v. Wash. Univ. in St. Louis*, 960 F.3d 478, 482 (8th Cir. 2020).

II. Fed. R. Civ. P. 12(b)(6) Standard.

In order to survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ascroft v. Iqbal*, 556 U.S. 662, 678 (2009). This standard requires Plaintiffs to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not

'shown[n]'- 'that the pleader is entitled to relief'" and must be dismissed. *Id.* at 679; *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018).

In analyzing the Complaint, the Court must accept well-pleaded facts as true, but conclusory allegations, legal conclusions, and indeterminate factual allegations need not be taken as true and do not suffice to state a plausible claim. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). Further, the Court must examine the plausibility of the Complaint in the context of the applicable substantive law, in this case, ERISA and its fiduciary breach provisions. *Iqbal*, 556 U.S. at 678-79. The United States Supreme Court has held that an important mechanism to weed out meritless ERISA fiduciary breach claims that second-guess fiduciary decisions. *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014).

III. The District Court Properly Dismissed Plaintiff's Breach Of Fiduciary Duties Claim Because Appellants Did Not Allege A Loss To The Plan Since No Meaningful Benchmark Was Plead And The Allegations That Were Plead Were Unsupported Generalities.

Appellant's claim against Appellees is focused on the breach of the duty of loyalty and prudence through their ESG investment strategies. To plausibly allege a breach of fiduciary duty under ERISA, a plaintiff "must make a prima facie showing that a defendant acted as a fiduciary, breached his fiduciary duties, and thereby caused a loss to the plan." *Dormani v. Target Corp.*, 970 F.3d 910, 914 (8th Cir. 2020). The basis for this appeal focuses on the final element, whether the alleged breach caused a loss to the plan.

It is well-established that fiduciaries are not required to choose the best performing fund, nor are they required to choose the lowest-cost fund. *See Davis*, 960 F.3d at 486. In order to show that a prudent fiduciary, in similar circumstances, would have acted differently based on the "performance of the challenged fund, the key to nudging an inference of imprudence from possible to plausible is providing a sound basis for comparison - a meaningful benchmark - not

just alleging that costs are too high, or returns are too low." *Payne v. Hormel Foods Corp.*, 2024 U.S. Dist. LEXIS 168017, *11 (Sept. 18, 2024 Minn. Dist. Ct.) (quoting *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022); *See Davis*, 960 F.3d at 482-83 (explaining at the pleading stage, the complaint must give enough facts to "infer…that the process was flawed.").

Several cases in the Eighth Circuit provide an understanding for what the "meaningful benchmark" standard entails. First, in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d at 595-96 (questioned on other grounds), the plaintiff alleged a breach of the duty of loyalty for failure to inform plan participants of relevant information and breach of the duty of prudence based on excessive fees. The court, in reversing the District Court's dismissal of all claims, found the plaintiff properly pled a breach of fiduciary duties by alleging the defendants "did not change the options included in the Plan despite the fact that most of them underperformed the market indices they were designed to track" and comparators of other shares of the same fund. The court however, cautioned that the "ultimate conclusion rests on the totality of the specific allegations in this case" and that "a claim [is not] stated by a bare allegation that [a] cheaper alternative investments exist in the marketplace." *Id*. at 596 n. 7. Essentially, there is no one-size-fits- all approach in determining when an appropriate meaningful benchmark is pleaded.

Later in, *Meiners v. Wells Fargo Co.*, 898 F.3d 820, 823 (8th Cir. 2018), the plaintiff claimed a breach of the duty of prudence and loyalty against the Benefit Committee for failing to remove expensive and underperforming funds. As evidence of a meaningful benchmark, the plaintiff's alleged that a cheaper alternative investment that was "comparable" to the challenge fund existed in the marketplace. *Id*. The court, finding this allegation insufficient, reasoned that "the existence of a cheaper fund does not mean that a particular fund is too expensive in the

market generally or that it is otherwise an imprudent choice." *Id.* at 823-34. In essence, an ERISA plaintiff must offer more than "labels and conclusion" about the fees before a complaint states a claim. *Id.* at 824.

Additionally, the Eight Circuit in *Davis*, built off the meaningful benchmark standard set up by *Braden* and *Meiners*. In affirming the District Court's dismissal of the plaintiff's imprudence claim for an underperforming investments, the court in *Davis* reasoned that the comparison between the challenged fund and the "benchmark" fund provided by the plaintiff was based on plans with different investment styles, different management styles, different investment goals, different risks and different potential rewards. *Davis*, 960 F.3d at 484-85. The court likened this comparison to "comparing apples and oranges" stating these kinds of comparisons are "not [the] way to show that one is better or worse than the other." *Id.* at 485.

Finally, in *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022), the plaintiff alleged a breach of the duty of prudence for failure to monitor all plan investments and remove the imprudent ones. The Eight Circuit, in affirming the District Court's dismissal, reiterated the necessity for providing a meaningful benchmark. The court reasoned that "rather than pointing to the fees paid by other specific, comparably sized plans, the plaintiffs rely on industry-wide averages." *Id.* at 279-80. However, since these averages are "not all inclusive" but rather measure the "typical…services" and nothing more, this reliance is insufficient for a meaningful benchmark. *Id.* at 280. The court again focused on the lack of specificity in the plaintiff's allegations and found that in order for a benchmark to be "sound and meaningful" it must be similar or consistent with the challenged fund. *Id.* at 279-80.

Taken together, *Braden, Meiners, Davis,* and *Matousek* establish what comparators can function as a meaningful benchmark. The meaningful benchmark standard adopted by the Eight

Circuit, along with the Third, Sixth, Seventh, and Tenth, require "[p]laintiffs to not only identify less expensive or better performing investment options as comparators, but those alternative options must also be similar enough to raise a plausible inference that a prudent investor in like circumstances would not have selected the challenged investment." *Payne*, 2024 U.S. Dist. LEXIS 168017, *16 (analyzing *Meiners*, *Davis*, and *Matouserk* together). With this standard in mind, when the court is faced with determining "whether a comparator is sufficiently similar to the fund at issue, courts may look to its structure, objectives, strategy, and risk profile." *Id*. Plaintiffs must allege something more to nudge their claims from possible to plausible, as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Iqbal*. The meaningful benchmark requirement is simply asking the plaintiff to provide "teeth" to their allegations, that there were in fact better options available to the fiduciaries who monitored the plan.

While none of the facts of the above cited cases exactly match the facts in the instant appeal, the meaningful benchmark standard still controls. The above cited cases analyzed a variety of breach of fiduciary duty claims for a variety of reasons, including loss allegations. While there are distinguishable aspects of the instant case, the purpose behind the meaningful benchmark standard still stands. Its purpose is to make sure Plaintiffs claims are not just possible, but plausible. Without this standard, Appellants and future Plaintiffs would be permitted to bring unsubstantiated and implausible claims by merely finding a less expensive alternative fund or a better performing investment strategy without having to show any similarities or connection between the comparator and the challenged fund. Therefore, not applying the meaningful benchmark standard is unjustified and in order to accurately evaluate whether Appellants properly plead a loss to the plan the meaningful benchmark standard must be applied.

A. Appellants Did Not Allege A Meaningful Benchmark.

In their Complaint, Appellants provide no meaningful benchmark that is sufficient to meet the pleading requirements established by this court. Appellants general statement that each of the ESG investment options offered has a similar non-ESG investment option on the marketplace is insufficient because Appellants fail to plead any additional information regarding the claimed "similar non-ESG investment options." (Compl. at ¶ 21). Additionally, Appellants do not plead *any* investment funds comparable to the Plan's ESG investment options during the relevant time period. Further, Appellant's comparison between the Energy sector of the S&P 500 and non-Energy sectors is an insufficient comparator and therefore not a meaningful benchmark for several reasons. (Compl. at ¶ 23). First, Appellants provide no similarities between the Energy sector S&P 500 and non-Energy sector nor do they plead any similarities between the non-Energy Sector and the Energy-sector. Second, there is no information regarding what exactly is included in these sectors and how they relate. Finally, the academic paper cited by Appellants is not a meaningful benchmark because the information provided by Appellants only establishes generalities regarding ESG and non-ESG funds.

1. Appellants Lack Of Investment Fund Comparators And Generalized Statement Of Similar Non-ESG Investment Options On The Marketplace Is An Insufficient Meaningful Benchmark.

When a complaint provides no specifications and references comparators in generalities only, no meaningful benchmark has been pleaded. In *Parmer v. Land O'Lakes, Inc*., 518 F. Supp.3d 1293 (D. Minn. 2021), Plaintiffs challenged several of Defendant's investment options and alleged defendant breached their fiduciary duties by wasting plan and participant assets due to unnecessary costs. In determining the adequacy of the complaint, the court looked to the comparator funds alleged by Plaintiff. The court held that since Plaintiffs "have no plead how

their comparators have similar asset allocation or investment strategies, and a simple comparison…reveal glaring differences…" there is no meaningful benchmark alleged. *See Anderson v. Intel Corp.*, No. 19-cv-46-18, 2021 U.S. Dist. LEXIS 12496, **29-30 (citing *Meiners* and rejecting plaintiff's unsupported allegation that the funds were "comparable").

Appellants here have alleged less than Plaintiffs in *Parmer*. In the instant case, Appellants allege several illusive "similar non-ESG investment options" that had "better investment returns and lower costs during the relevant time period." (Compl. at ¶ 21). In *Parmer*, the court determined there was no meaningful benchmark when the plaintiff alleged specific alternative funds but failed to allege how these funds had similar assets. Here, Appellant does not even allege the names of these non-ESG funds that are apparently similar to the ESG investment options challenged here. Appellant makes unnamed and unsupported allegations regarding the non-ESG funds comparability and therefore cannot be deemed a meaningful benchmark under the Eighth Circuit's standard. *See Braden*, 588 F.3d at 595-96 ("a claim [is not] stated by a bare allegation that [a] cheaper [or better] alternative investments exist in the marketplace").

In the same way, Appellants bare allegations that Appellee's "climate activism and ESG investing has led to lower investments returns for…the [] Plan investments and thus lower retirement savings for Plan participants during the relevant time period" cannot function as a meaningful benchmark. (Compl. at ¶ 16). Without any specifications regarding the alleged "lower investments returns," this court has no basis for comparison. Questions like how much the stock lowered or whether the lower returns occurring prior to the switch arise when Appellants plead bare allegations of "loss." This information is well within Appellants access, but yet is not pleaded anywhere in the complaint. At its core, these allegations do not move the needle from "possible to plausible" required by *Twombly* and *Iqbal*, nor do these allegations

meet the meaningful benchmark standard. With these allegations, Appellants are asking this court to ignore the long standing precedent and ask the court to find conclusory allegations sufficient.

In conclusion, bare allegations and conclusory statements cannot be sufficient to defeat the motion to dismiss standard.

2. Appellants Comparison Of Energy Sector Of The S&P 500 And Non-Energy Sectors Regarding Stock Returns Is Not A Meaningful Benchmark Because Appellants Failed To Plead Specifics Regarding Its Relation To The Challenged Fund.

While market indices may be considered meaningful benchmarks, without properly comparing the market indices with the challenged fund, no meaningful benchmark may be found. Appellants allegations regarding the Energy Sector of the S&P 500 in comparison to the non-Energy sector alone is not a meaningful benchmark because the established standard requires a showing of similarities between the comparator and the challenged fund.

In *Braden*, the plaintiff was found to properly allege a meaningful benchmark by alleging the market index and other shares of the same fund as the challenged fund. Regarding the market index claim, the plaintiff provided that the defendants "did not change the options included…despite the fact that most of them underperformed the market indices they were designed to track." 588 F.3d at 596. The court determined the combination of these allegations was sufficient to meet the meaningful benchmark standard.

Although Appellants allege a market index in comparing the Energy sector of the S&P 500 to the non-Energy sector, this alone is insufficient. In *Braden*, the plaintiff specifically alleged that the challenged fund underperformed the market indices they were designed to track. This allegation provides the court with a similarity between the market indices and the challenged fund; this in combination with comparators from the same fund establishes a

meaningful benchmark. In contrast, Appellants do not plead any details regarding the non-Energy sector, and how this index may compare to the challenged fund. Appellants include no indication of the kind of stocks these sectors include, or whether there are any similarities between the two.

This court cannot make a determination about the "meaningfulness" of an alleged benchmark without knowing any details. This court has no indication on how these market indices relate to the challenged funds, if at all. Appellant provides no information regarding the sector's risk profiles, whether they follow passive or active strategy, or what the bond to equity ratio is. Additionally, a market index is *all* Appellants plead. Unlike *Braden*, where the plaintiff pled additional information regarding other shares of the same fund and how the market indices relate to the challenged fund, Appellant alleges no additional information to assist its general allegations regarding the market index performance. Without any details or additional allegations of any other sufficient comparators, there are no meaningful benchmarks alleged.

A benchmark will not be considered meaningful when the comparator does not have similar securities, investment strategies, or reflect a similar risk profile to the challenged funds. In *Matousek*, the court considered claims against an energy company's employee retirement plan, alleging, in relevant part, that certain plan investment funds consistently underperformed. 51 F.4th at 280. In an attempt to provide a meaningful benchmark, the plaintiffs compared the performance of two funds at issue to alternative investments. *Id.* at 281. The Eighth Circuit held, with respect to the better performing alternative investments, that because the comparator's had too different investment strategies, risk profiles, and potential to be a sufficiently meaningful benchmark. *Id.* at 282.

The comparator provided by Appellants falls directly in line with the plaintiff's comparator in *Matousek*. Appellants allege no similarities between the Energy sector and the non-Energy sector, rather make the general allegation that the Energy sector returned over 55% more than non-Energy sectors. While this may be true, without any specifics alleged, the court has no way to determine whether the market indices can be a meaningful benchmark. As stated, comparators alleged by Plaintiffs "…*must also be similar enough* to raise a plausible inference that a prudent investor in similar circumstances would not have selected the challenged investment." *Payne*, 2024 U.S. Dist. LEXIS 168017, *16 (emphasis added). Appellants have alleged what this court has expressly warned against, a bare allegation that a better performing option exists, without alleging any similarities between the two.

Overall, Appellants allegations regarding the market indices are too generalized and lack the required details in order to be sufficiently labeled as a meaningful benchmark. .

3. A Generalized Academic Paper Which Lacks Relevant Similarities Is Not A Meaningful Benchmark.

Further, Appellants citation to the Journal of Finance at the University of Chicago provide no assistance in pleading a meaningful benchmark. In *Riley v. Olin Corp.*, No. 4:21-cv-01328-SRC, 2022 U.S. Dist. LEXIS 109423, ***11-13 (E.D. Mo. June 21, 2022), the court considered whether a survey offered by the plaintiff was a sufficient meaningful benchmark for an allegation of breach of the duty of prudence. The court explained the survey considered the "recordkeeping, trust, and custody fees charged by a limited samples of investment plans and sizes without spelling it out, in any degree of detail, the services the plans received in return." *Id*. The court reasoned that because the survey "provides information only at a high level of generality," it cannot be accepted as a meaningful benchmark.

Here, Appellants point to an academic paper with the same level of generality, if not more, identical to the plaintiffs in *Riley*. The academic paper cited by the plaintiff states "ESG funds underperformed during the last five years by an average of 2.5% (returning an average of 6.3%) as compared to the broader market." (Compl. at ¶ 25). Appellants provide no details of the specifics this paper examined, the similarities between the challenged funds and the ESG funds cited, or any other similarities. Rather, the information provided by Appellant provides a bird's eye view of the paper's findings and the information speaks only at a high level of generality. Like all other meaningful benchmarks, the alleging of a cheaper or better alternative investment with no similarities must be deemed insufficient by this court.

B. No Burden Shifting Is Available To Appellants Because They Did Not Adequately Pled A Prima Facie Case Of Loss To The Plan.

The Eight Circuit allows for burden shifting in ERISA breach of fiduciary duty case, however this burden shifting is unavailable to Appellants. As outlined in *Martin v. Feilen*, 965 F2d 660, 671 (8th Cir. 1992), "once the ERISA Plaintiff has proved a breach a fiduciary breach and a prima facie case of loss to the plan or ill-gotten profit to the fiduciary, the burden of persuasion shifts to the fiduciary to prove that the lass was not caused by, or his profit not attributable to, the breach of duty." The requirements for burden shifting are clear, the plaintiff *must prove* a fiduciary breach *and* a prima facie case of loss to the plan, Appellant did not meet these requirements. As articulated, in order to plausibly state a case for breach of fiduciary duty, a plaintiff must show, among other requirements, a prima facie loss to the plan. In order to show a prima facie case of loss of the plan, the plaintiff *must* plead a meaningful benchmark. As explained, Appellants have not pled a meaningful benchmark and in turn have not pled a prima facie case of loss to the plan. Therefore, burden shifting is inapplicable in the instant case.

Overall, Appellant has numerous generalities and conclusory allegations that like any type of specificity and therefore has not pled a loss to the plan based on the allegation of breach of fiduciary duties.

IV. Even If Appellant Sufficiently Alleged Harm, The District Court Should Have Dismissed The Complaint On The Grounds That The Appellant Failed To Adequately Allege A Breach Of Fiduciary Duty By Appellees.

The crux of Appellant's claim rests on the assertion that Hopscotch and Red Rock violated their fiduciary obligations under ERISA. However, Hopscotch acted in its role as settlor, not as a fiduciary, when making decisions regarding the structure and objectives of its 401(k) Plan, including its incorporation of environmental, social, and governance ("ESG") principles. Under ERISA, decisions related to the design or adoption of a plan are settlor functions and do not impose fiduciary obligations. Furthermore, Red Rock, as the designated investment manager under the Plan, was responsible for implementing the investment strategy, and its adherence to ESG investment principles aligns with both the Appellees' corporate philosophy and regulatory guidance encouraging consideration of long-term risks such as environmental sustainability.

Moreover, the Appellant's contention that the decision to pursue ESG investments was imprudent lacks merit. Regulatory guidance from the Department of Labor has repeatedly affirmed that ESG considerations can be a valid part of a prudent investment strategy if supported by proper analysis. Appellees demonstrated prudence in selecting investment options aligned with these principles, supported by substantial evidence that ESG strategies are increasingly recognized as financially responsible. Appellant fails to demonstrate that ESG-aligned investments inherently underperform or that they were selected for improper purposes, such as advancing political agendas. Appellees' focus on ESG standards reflects a legitimate corporate strategy rather than a breach of fiduciary duty. Thus, the Complaint's allegations fail to establish that the Appellees violated ERISA's duties of prudence and loyalty.

A. Hopscotch Acted In Its Role As Settlor, Not Fiduciary, In Making Plan Decisions.

Under ERISA, the distinction between actions taken in a "settlor" capacity versus a "fiduciary" capacity is critical in evaluating whether Hopscotch Corporation acted properly in requiring employer contributions to be invested in company stock. When drafting and amending plan documents, Hopscotch acted in its role as settlor, not fiduciary, in drafting the governing Plan document to require investment of company contributions in Hopscotch stock.

ERISA's language does not specifically include plan design among the discretionary actions that give rise to fiduciary status, as compared to is inclusion of plan administration, management, and control of plan assets to which the act of amending a plan is not a fiduciary act. *Lockheed Corp v. Spink*, 517 U.S. 882, 890 (1996). In *Hughes Aircraft Co. v. Jacobson*, the Supreme Court noted that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets," as well as decisions "regarding the form or structure of the Plan . . .." 525 U.S. 432, 444 (1999). The *Jacobson* Court emphatically concluded that "without exception, plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id*. at 444-45.

This reasoning applies equally to pension plans, including defined contribution plans like the Hopscotch Corporation 401(k) Plan. When Hopscotch required employer contributions to be invested in company stock through the governing plan document, it was exercising settlor authority to structure the plan's terms. This is a quintessential settlor function, as it involves plan design, not the fiduciary administration of plan assets.

The inclusion of company stock as an investment option, particularly in the form of an Employee Stock Ownership Plan ("ESOP"), is specifically encouraged under ERISA. Congress

has expressed a clear policy favoring employee ownership of company stock through ESOPs. *See* 29 U.S.C. § 1107(d)(6)). Courts have recognized that requiring employer contributions to be invested in company stock reflects a valid business judgment and plan design decision, not a fiduciary breach.

Furthermore, in *Hughes*, the Supreme Court held that employers do not act as fiduciaries when amending a plan—even if the amendment affects plan funding or benefits—because such actions are settlor functions. 525 U.S. at 444. Similarly, in *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 254 (5th Cir. 2008), the court emphasized that requiring investment in employer stock, as set forth in a plan document, is a settlor decision immune from fiduciary challenge. For that reason, Hopscotch's decision to mandate that employer contributions be invested in Hopscotch stock, as outlined in the governing plan document, aligns with its role as a settlor. This decision reflects the company's business goals, such as promoting employee ownership and aligning employees' interests with the company's success. (Compl. at ¶ 13). Under *Lockheed* and *Hughes Aircraft*, these are permissible settlor activities, not fiduciary acts.

Courts have repeatedly upheld the distinction between settlor and fiduciary functions in the context of plan design. In *Becker v. Mack Trucks, Inc.*, the court ruled that an employer's decision to amend a plan to require investment in employer stock was a settlor action. 281 F.3d 372, 383 (3d Cir. 2002). Similarly, in *Loomis v. Exelon Corp.*, the court confirmed that an employer's choice of plan investment options reflects settlor authority, even if it impacts participant outcomes. 658 F.3d 667, 672 (7th Cir. 2011).

Nonetheless, ERISA expressly permits employers to limit investment options in defined contribution plans. Under 29 U.S.C. § 1104(c), participants in such plans retain responsibility for their own investment decisions unless the plan's terms dictate specific investments, as in an

ESOP. Here, the governing plan document designated Hopscotch stock as the default investment for employer contributions, a decision made at the plan's design stage. (Compl. at ¶¶ 9, 40). This is consistent with the statutory framework and does not trigger fiduciary liability.

B. Red Rock Was An Investment Manager Under The Plan.

Under ERISA, an investment manager is defined as a fiduciary to whom the power to manage, acquire, or dispose of plan assets has been delegated in writing. 29 U.S.C. § 1102(c)(3); 29 U.S.C. § 1002(38). Based on the governing plan document and allegations made in the Complaint, Red Rock qualifies as an investment manager and is therefore bound by the fiduciary duties of prudence and loyalty under 29 U.S.C. § 1104(a)(1).

To qualify as an investment manager under ERISA, an entity must: (1) Have discretionary authority over the management or disposition of plan assets; (2) Be registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 et seq.); and (3) Accept delegation of responsibility in writing. Red Rock fulfills these criteria. The Complaint explicitly states that Red Rock was selected as the Plan's investment manager and managed non-ESOP investment options. (Compl. at ¶¶ 7, 11). Red Rock is also a registered investment adviser under the Investment Advisers Act of 1940 (Compl. at ¶ 7), fulfilling ERISA's qualifications for an investment manager under 29 U.S.C. § 1002(38).

Moreover, its acceptance of this role establishes a fiduciary relationship with respect to the assets it managed. In *Finkel v. Romanowicz*, the court emphasized that fiduciary status under ERISA depends on the actual authority and control exercised over plan assets. 577 F.3d 79, 86 (2d Cir. 2009). Red Rock's management of the Plan's investments, as outlined in the Complaint, demonstrates its fiduciary control.

Red Rock exercised fiduciary discretion through its selection and management of Plan investments, including its adoption of ESG-focused strategies and exclusion of traditional energy sector investments. (Compl. at ¶¶ 17, 20). These discretionary decisions directly impacted the economic value of Plan assets, a hallmark of fiduciary authority under 29 U.S.C. § 1002(21)(A).

Additionally, Red Rock's proxy voting activities, which involved supporting "pro-green energy" directors and engaging in shareholder activism further underscore its control over Plan assets. (Compl. at ¶¶ 18-19). Courts and the Department of Labor have long recognized proxy voting as a fiduciary act under ERISA. In *Donovan v. Bierwirth*, the Second Circuit held that fiduciaries must exercise their voting authority solely to maximize the economic value of plan assets. 680 F.2d 263, 271 (2d Cir. 1982).

C. Hopscotch's Decision To Follow ESG Standards As A Corporation Were Not Fiduciary Decisions Subject To ERISA.

Under ERISA, fiduciary duties apply only to actions taken in a fiduciary capacity, such as the management or administration of plan assets, and do not extend to business decisions made in a corporate capacity. ERISA § 404(a), codified at 29 U.S.C. § 1104(a)(1), imposes fiduciary duties of prudence and loyalty on plan fiduciaries, but only when they act "with respect to a plan." The Supreme Court in *Pegram v. Herdrich*, emphasized that not all decisions made by plan sponsors implicate fiduciary obligations, as fiduciary status is limited to plan-specific functions. 530 U.S. 211, 226 (2000).

Hopscotch's decision to adopt ESG standards as part of its corporate strategy was not a fiduciary act under ERISA because it pertained to Hopscotch's operations as a business, rather than the administration or management of the 401(k) Plan. (Compl. at ¶ 12). In *Lockheed*, the Court held that actions such as adopting corporate policies or amending a plan to reflect business objectives are settlor functions, not fiduciary ones. 517 U.S. at 890. Similarly, Hopscotch's

decision to integrate ESG principles was a corporate decision unrelated to its fiduciary role as Plan administrator.

Furthermore, even if Hopscotch's corporate ESG focus indirectly impacted the Plan, such as by affecting Hopscotch stock performance, ERISA fiduciary obligations do not extend to business decisions that may have downstream effects on the value of employer stock. (Compl. at ¶ 14). In *Steinman v. Hicks*, the court recognized that employer stock fluctuations stemming from corporate management decisions do not transform those decisions into fiduciary acts. 352 F.3d 1101, 1106 (7th Cir. 2003). Similarly, Hopscotch's ESG initiatives and proxy voting policies were business strategies intended to enhance its overall market position, not actions taken "with respect to" the Plan under ERISA § 404(a).

Appellant alleges that Red Rock, as the Plan's investment manager, was responsible for managing the Plan's non-ESOP investments and implementing ESG strategies. (Compl. at ¶¶ 11, 17). By delegating investment management to Red Rock, Hopscotch discharged its fiduciary responsibility under 29 U.S.C. § 1102(c)(3). Courts have consistently held that appointing an investment manager is a settlor action. For example, in *Chicago Board Options Exchange, Inc. v. Connecticut General Life Insurance Co.*, the court ruled that appointing fiduciaries does not impose ongoing fiduciary liability for their actions, as long as the appointment was prudent. 713 F.2d 254, 259 (7th Cir. 1983).

ERISA recognizes that corporate business decisions often impact employer stock but does not impose fiduciary liability for such decisions. The Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer*, clarified that fiduciaries must manage plan investments prudently but are not liable for stock fluctuations resulting from corporate management. 573 U.S. 409, 424 (2014). Similarly, Hopscotch's ESG initiatives, aimed at aligning with its market strategy (Compl. at ¶

13), were business decisions that do not invoke ERISA's fiduciary obligations. Hopscotch's decision to delegate management responsibilities to Red Rock underscores the separation between its corporate ESG policies and fiduciary obligations. Any fiduciary breaches related to ESG investments lie with Red Rock, not Hopscotch.

D. The Decision To Pursue An ESG Investment Was Prudent.

Red Rock's implementation of ESG principles was consistent with ERISA's fiduciary standards. ESG factors are well within "the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes*, 595 U.S. at 177. Hopscotch's integration of ESG strategies served legitimate corporate objectives, such as enhancing its brand and attracting younger users. As Appellant acknowledges, this strategy increased Hopscotch's market share among pre-teens and teenagers, benefiting the plan by bolstering the value of Hopscotch stock, which constituted over 40% of the plan's portfolio. (Compl. at ¶¶ 13, 15).

In cases involving the selection and retention of plan investments, ERISA's "prudence standard normally focuses on the fiduciary's conduct in making investment decisions, and not on the results." *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 793 (N.D. Tex. 2017) (O'Connor, J); *see also, e.g.*, *Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983). And in assessing a fiduciary's conduct, courts regularly look to the prevailing standards and practices among other fiduciaries at the time. *Cunningham v. Cornell Univ*., 86 F.4th 961, 984 (2d Cir. 2023) (affirming summary judgment in defendants' favor where defendants' processes were consistent with prevailing practices among fiduciaries during the relevant time period). In fact, ERISA fiduciaries' performance must be evaluated against "contemporary industry practices." *Sweda v. Univ. of Pa*., 923 F.3d 320, 330 (3d Cir. 2019); *see Pfeil v. State St. Bank & Tr. Co*., 806 F.3d 377, 388 (6th Cir. 2015) (holding that decisions by defendant conformed to those of

"fiduciaries of other pension plans and non pension-plan investment funds" which "demonstrates the reasonable nature of those decisions").

Hopscotch's adoption of an ESG investment strategy was not only prudent under the fiduciary standards set forth by ERISA, but it also aligned with the company's broader goals of increasing shareholder value, growing its user base, and ensuring long-term financial success. ERISA imposes fiduciary duties of loyalty and prudence, requiring plan administrators to act "solely in the interest of the participants and beneficiaries" and with the "care, skill, prudence, and diligence" of a prudent person. 29 U.S.C. § 1104(a)(1)(A); § 1104(a)(1)(B). Hopscotch's ESG investment strategy complies with these duties because it is both financially beneficial and aligned with the demographic expectations of its users and employees.

Hopscotch's primary consumer base is teenagers and pre-teens, as noted in the Complaint's factual allegations. (Compl. at ¶¶ 12-13). This demographic increasingly prioritizes ESG considerations, with studies demonstrating that younger consumers are more likely to support companies with strong environmental and social commitments. As Hopscotch's CEO, Bobby Whistler, noted in a 2019 Forbes interview, adopting an ESG-focused strategy had made Hopscotch the most popular social media platform for its target demographic within a year. (Compl. at ¶ 13). This indicates that the ESG strategy directly contributed to the company's revenue growth and market position.

Given that 40% of the Plan's assets are invested in Hopscotch stock, actions that increase the company's long-term profitability and brand loyalty naturally enhance the value of Plan assets. (Compl. at ¶ 15). A growing user base among younger consumers translates into increased advertising revenue, which strengthens the company's stock price. Courts have acknowledged that fiduciaries may consider factors that indirectly affect investment performance

when selecting or retaining investment strategies. For example, in *Tibble v. Edison International*, the Supreme Court emphasized the importance of ongoing monitoring of investments to ensure their prudence over time. 75 U.S. 523 (2015). Here, ESG considerations were a key part of Hopscotch's strategy to remain competitive and sustain long-term growth—a prudent course of action for safeguarding Plan assets.

Contrary to Appellant's allegations, ESG investments are not inherently less profitable than traditional investment options. Numerous studies have shown that ESG-focused funds can perform as well as, if not better than, their non-ESG counterparts over the long term. According to the Complaint, the energy sector of the S&P 500 outperformed other sectors in 2021 and 2022. However, short-term sector-specific trends do not undermine the validity of ESG investing as a long-term strategy. (Compl. at ¶¶ 23-24).

Additionally, ERISA's prudence requirement does not mandate the selection of the highest-performing investment at every moment in time but rather the implementation of a strategy designed to maximize returns while managing risk over the long term. In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court stated that fiduciaries must rely on publicly available information and reasonable assumptions when making investment decisions. 573 U.S. 409 (2014). Hopscotch and its investment manager, Red Rock, relied on well-documented trends indicating the growing importance of sustainability to consumers, investors, and regulators. By focusing on ESG investments, Hopscotch aligned its strategy with these trends to mitigate risks associated with climate change, regulatory shifts, and changing consumer preferences.

There is likewise no genuine evidence of disloyalty. ESG investments often focus on long-term sustainability and ethical practices, which can contribute to the long-term financial health of the plan. This long-term perspective aligns with the duty of loyalty by ensuring that the

plan remains robust and capable of providing benefits over time. *See UN PRI*, "Fiduciary Duty in the 21st Century" (2015).

To be sure, Appellant has offered innuendo and conjecture. Appellant, for example, has suggested that Hopscotch favored Red Rock because of Red Rock's "commitment to ESG, particularly with respect to the environment but also with respect to diversity, equity, and inclusion ("DEI") goals. (Compl. at ¶ 12). However, the speculative claim could be asserted no matter what investment manager Hopscotch had selected. Thus, any manager the Hopscotch chose to provide an S&P 500 index fund would necessarily be an investor, and any leading provider would be a large investor. What Appellant lacks is actual evidence–any–that Hopscotch chose the challenged managers for reasons other than the investment managers' strong track records, and the attractive terms they offered the Plans.

E. ESG Investment Aligns With Regulatory Guidance.

The Department of Labor ("DOL") has clarified that fiduciaries may consider ESG factors as part of a prudent investment strategy. In its 2022 final rule on ESG investing, the DOL stated that "risk-return factors may include the economic effects of climate change and other ESG factors on the particular investment or investment course of action." 87 Fed. Reg. 73822 (Dec. 1, 2022). This guidance underscores that ESG considerations are not separate from financial performance but are instead integral to prudent investment analysis.

Hopscotch's decision to retain Red Rock as the Plan's investment manager was consistent with this regulatory guidance. Red Rock's expertise in ESG investing and its commitment to shareholder advocacy were aligned with Hopscotch's goal of delivering sustainable returns to Plan participants. Although Appellant criticizes Red Rock's proxy voting and divestment from traditional energy companies, these actions reflect a strategic focus on

industries with long-term growth potential, such as renewable energy and technology—sectors that are particularly relevant to Hopscotch's young and environmentally conscious user base. (Compl. at ¶¶ 17-20).

Investments do not need to be "the same in each and every respect"; rather, investments "may serve the financial interests of the plan equally well" even when they "differ in a wide range of attributes." 87 Fed. Reg. at 73,836. Although Appellant alleges that Appellee breached ERISA-imposed fiduciary duties of prudence and loyalty by selecting or retaining managers who have used their proxy voting to pursue ESG policies, Appellant has failed to marshal any meaningful evidence to support that claim. Appellant has nonetheless suggested that Hopscotch's monitoring process was inadequate because Hopscotch did not personally review managers' proxy voting practices. However, as the Fifth Circuit has recognized, the retention and reliance on experts can be part of a prudent investment selection and monitoring process. *Bussian v. RJR Nabisco*, Inc., 223 F.3d 286, 300-01 (5th Cir. 2000); *see also Donovan*, 716 F.2d at 1474 ("ERISA fiduciaries need not become experts in the valuation of closely-held stock–they are entitled to rely on the expertise of others.").

The DOL's final rule, effective January 30, 2023, explicitly allows plan fiduciaries to consider climate change and other ESG factors when selecting retirement investments and exercising shareholder rights, such as proxy voting. This rule marks a significant shift towards a more permissive regulatory environment for fiduciaries considering ESG factors, recognizing them as material to investment risk and return. §21.07 The Authority and Duties of a Fiduciary.

Appellant's assertion that proxy voting by Red Rock caused stock price declines is speculative and unsupported by causal evidence. (Compl. at ¶¶ 19, 24). Proxy voting practices that emphasize sustainability often lead to improved governance and reduced regulatory risks,

outcomes that strengthen long-term financial performance. Without credible evidence tying proxy votes to negative financial outcomes, Appellant's claims remain conclusory and fail to meet the pleading standards established in *Braden*, 588 F.3d at 594.

In *Neil v. Zell*, the court concluded that the fiduciary act of managing plan assets includes the voting of proxies appurtenant to those shares of stock. 677 F. Supp. 2d 1010 (N.D. Ill. 2010). The court declined to follow the broad language of the majority opinion in *Grindstaff v. Green*, instead finding that voting shares held by an ESOP Constitutes the management or use of plan assets, thus subjecting such actions to fiduciary duties under ERISA. 133 F.3d 416 (6th Cir. 1998). Consequently, in *Spires v. Schools*, the court agreed with the reasoning in Neil v. Zell, holding that the voting of shares held by an ESOP is the use or management of a plan asset. 271 F. Supp. 3d 795 (D.S.C. 2017). The court emphasized that fiduciaries must act solely in the interest of plan participants and beneficiaries when making voting decisions. *Id.* Therefore the court, here, should find that Red Rock has likewise reflected the interest of plan participants and beneficiaries when making voting decisions.

CONCLUSION

For the reasons stated herein, this Court should affirm the District Court's dismissal of Appellant's claim.

Respectfully, submitted,
/s/ Team 1
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Attorneys for Defendant/Appellee

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