ORAL ARGUMENT SCHEDULED FOR MARCH 7, 2025

Civil Action No. 24-CV-100

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

JOHN SMITH,

Appellant,

v.

HOPSCOTCH CORPORATION
and RED ROCK INVESTMENT CO.,

Appellees

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

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BRIEF FOR APPELLEES

Hennessy Team 4
Counsel for Appellees
January 24, 2025

NONGOVERNMENTAL CORPORATION STATEMENT

Counsel for Appellees certifies that there are no other parent or any publicly held corporation who have interest in the matter and have not been disclosed previously to the Court.

/s/ Team 4

Hennessy Team 4

Counsel for Appellees

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STATEMENT OF JURISDICTION

The United States District Court for the District of Minnesota has jurisdiction over this civil action pursuant 29 U.S.C. §1132(e)(1), as well as 28 U.S.C. §1331, as this action involves a federal question in that the claim alleges violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1001 *et seq*.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291 as this appeal is from a final order dismissing with prejudice the Appellant's claims from the United States District Court for the District of Minnesota.

Appellant filed a timely appeal to the United States Court of Appeals for the Eight Circuit.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that there was a plausible claim upon which relief can be granted for breach of fiduciary duties when the Appellees, Hopscotch and Red Rock, considered environmental, social, and governance (ESG) factors in the administration and management of investments of the ERISA-governed Hopscotch 401(k) Plan.

2. Whether the District Court correctly held that the Appellant, John Smith, did not adequately state a claim for breach of fiduciary duties because the he failed to allege Appellees' actions caused actual loss to the Plan.
3. Whether the Appellant has sufficiently alleged that a certifiable class can be established under Federal Rule of Civil Procedure 23.

STATEMENT OF THE STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), the court will apply a *de novo* standard of review. *Meiners v. Wells Fargo & Co.*, 898 F. 3d 820, 821 (8th Cir. 2018). When applying this standard, the court will accept allegations that are "well-pled" as true and draw reasonable inferences in the plaintiff's favor. *Id.* These "well-pleaded" allegations "require[] more than labels and conclusion, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). If a complaint gives a "Threadbare recital[] of the elements" and "conclusory statements" this requirement is not met. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Instead, the complaint must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. When a 12(b)(6) motion is filed, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 555. Granting a motion to dismiss is appropriate if the complaint does not "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. This is because "the complaint has alleged but it has not shown that the pleader is entitled to relief." *Id.* at 679.

STATEMENT OF THE CASE

Factual Summary

Appellee Hopscotch Corporation ("Hopscotch") is a social media platform and technology company incorporated in Minnesota and headquartered in Minneapolis. Compl. at 2. Hopscotch offers their employees an ERISA-governed 401(k) defined-contribution pension plan (the "Plan"). As the Plan sponsor and administrator, Hopscotch is a fiduciary under ERISA. Compl. at 2. Starting in 2018, Hopscotch expressed its commitment to ESG goals as well as Diversity, Equity, and Inclusion (DEI) initiatives consistent with the interests of its primary consumers, i.e., pre-teens and teenagers. Compl. at 1, 3. In 2019, Bobby Whistler, the CEO of Hopscotch, stated in an interview with Forbes that Hopscotch's ESG and DEI activities led the company to become the number one social media platform for their main demographic. Compl. at 3.

Employees participating in the Hopscotch Plan may invest up to 10% of their salary. Hopscotch will then automatically contribute 5% of the employee's salary in employer contributions and an additional match of up to a maximum of 7% of the employee's salary. Compl. at 2 and 3. The Plan offers eight different

investment options including a Hopscotch employee ownership option ("ESOP option"). Compl. at 3. Contributions made by Hopscotch are automatically invested in the default ESOP option until the employee earns a vested (non-forfeitable) right after five years. Compl. at 3. After vesting, an employee is free to keep, or in the alternative, redesignate the ESOP investment option into one or more of the other seven investment options. Compl. at 3.

Appellee Red Rock Investment Company ("Red Rock") is an investment manager for ERISA plans that is registered under the Investment Advisors Act of 1940, 15 U.S.C. §80b-1, and thus a fiduciary under ERISA. Compl. at 2. In 2019, Hopscotch made the business decision to select Red Rock as the Plan's investment manager. Hopscotch manages all Plan options except for the ESOP option, therefore, Red Rock investment management decisions do not affect Plan participants who keep the ESOP investment option. Compl. at 3. Like Hopscotch, Red Rock has publicly demonstrated its commitment to ESG and DEI goals by joining environmental groups such as Climate Action 100+, issuing press affirming their climate sustainability goals, exercising proxy voting rights against the management of companies who showed insufficient progress on environmental sustainability, and opposing investments in traditional energy companies. Compl. at 4.

Compared to Red Rock's ESG investment choices, other similar non-ESG investment options available on the marketplace had better investment returns and lower cost. Compl. at 4. For example, the Journal of Finance at the University of Chicago, reported that ESG funds underperformed by an average of 2.5% (returning an average of 6.3%) as compared to the broader market (which had an average return of 8.9%) during the same five-year period. Compl. at 5. Similarly, the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors in 2021 and 2022. Compl. at 5.

Appellant, John Smith, is a Minnesota resident who worked as a software engineer for Hopscotch from 2016 until he was terminated in November 2023, and at all relevant times, a covered participant of the Hopscotch Plan. Compl. at 2. While the Appellant was a vested employee, he does not claim that he exercised his right to redesignate any of his investment options to or from the default ESOP option. Compl. at 3.

Statutory Background

On September 2nd, 1974, Congress enacted ERISA to protect interstate commerce, participants, and beneficiaries by, among other requirements, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." 29 U.S.C. §1001(b). Under ERISA, a

fiduciary includes any person who “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,” or who “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.” 29 U.S.C. §1002(21)(A). Hopscotch’s 401(k) defined-contribution pension Plan is an employee pension benefit plan governed by ERISA. Compl. at 1. 29 U.S.C. §1002(2). Hopscotch and Red Rock, as Plan Administrator and Plan Investment Manager respectively, do not dispute their role as fiduciaries. Mem. Op. & Order at 4.

Under ERISA, “a fiduciary shall discharge duties with respect to a plan solely in the interest of the participants and beneficiaries” and “for the exclusive purpose of providing benefits to participants and their beneficiaries.” 29 U.S.C. §1104(a)(1)((A). Further, a fiduciary should act “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use.” 29 U.S.C. §1104(a)(1)((B). However, business decisions made by the employer are not fiduciary in nature and not governed by ERISA. “When making these decisions, an employer is acting on behalf of its business, not the plan, and, therefore, is not a

fiduciary." U.S. Dep't Labor, Employee Benefits Security Administration (EBSA), Meeting Your Fiduciary Responsibilities (2021).

A fiduciary who is in breach of the duties of loyalty and prudence "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits" and that such person "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. §1109(a). Additionally, a fiduciary is liable for breach of a co-fiduciary when (1) "he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach," (2) if he, by failure to comply with his duties under 29 U.S.C. §1104(a)(1), enables breach by another fiduciary, or (3) "he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. §1105(a).

A Plan participant, beneficiary, or fiduciary may bring a civil action for appropriate relief due to a breach of fiduciary duties under §1109. 29 U.S.C. §1132(a)(2). A participant, beneficiary, or fiduciary may also bring suit to enjoin any act or practice which violates any provision of ERISA or the terms of the Plan, or to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of ERISA or the terms of the Plan. 29 U.S.C. §1132(a)(3).

A court in its discretion may also allow "a reasonable attorney's fee and costs of action" to a participant or beneficiary. 29 U.S.C. §1132(g).

Procedural History

On February 4th, 2024, the Appellant filed a complaint in the United States District Court for the District of Minnesota alleging that: (1) Appellee Hopscotch breached their fiduciary duty of loyalty under 29 U.S.C. §1104(a)(1)(A) and duty of prudence under section 29 U.S.C. §1104(a)(1)(B) by pursuing ESG objectives for Hopscotch and by retaining Red Rock as the Plan investment manager, "despite Red Rock's open pursuit of ESG strategies and investment options that are known to underperform" relative to similar investment options; (2) Appellee Red Rock breached their fiduciary duty of loyalty under 29 U.S.C. §1104(a)(1)(A) and duty of prudence under 29 U.S.C. §1104(a)(1)(B) by selecting "ESG funds for the Plan despite the availability of better performing and lower cost investment options readily available in the marketplace." Compl. at 1-2, 8-9. Further, the Appellant alleges that each Appellee knowingly participated in each breach of the other Appellee and thus, each Appellant is liable for breach of its co-fiduciaries under ERISA. Compl. at 9.

The complaint was brought as a class action on behalf of all participants and beneficiaries of the Plan, regardless of their chosen investment options in the Plan, from February 4, 2018, through the date of judgment under Fed. R. Civ. P. 23(a),

23(b)(1), and 23(b)(3). Compl. at 5. Appellant seeks declaratory, injunctive, equitable and remedial relief under 29 U.S.C. §1109, 1132(a)(2), and 1132(a)(3). Compl. at 9.

Appellees filed a joint Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6) alleging that Appellant failed to state a plausible claim for which relief may be granted because (1) the consideration of ESG factors while administering the Plan or managing investments does not constitute a breach of duties, and (2) the Appellant did not allege any loss to the Plan. Mem. Op. & Order at 4-5. Because the Appellant indicated he wishes to immediately appeal and because the Court found an amendment would be futile, the Court dismissed the matter with prejudice. Mem. Op. & Order at 1. Appellant appealed the decision to this Court.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the District Court dismissing the Appellant's complaint for failure to allege a plausible claim for breach of fiduciary duty of loyalty and prudence under ERISA as required by Fed. R. Civ. P. 12(b)(6) because (1) the Appellant failed to show that Appellees Hopscotch and Red Rock breached their fiduciary duties, (2) there were no losses to the plan, and (3) the Appellant failed to properly allege a certifiable Class under Fed. R. Civ. P. 23.

First, the District Court incorrectly concluded that the Appellant provided factual and legally sufficient evidence to give rise to an entitlement of relief under ERISA, as required by Fed. R. Civ. P. 12(b)(6). No provision or language in ERISA forbids fiduciaries from administering a plan or offering investment options guided by ESG goals. Nor do the facts alleged by the Appellant show any indicia of disloyalty proving that the Appellees acted dishonestly or unfairly when they publicly exercised their commitment to climate sustainability and DEI principles by making decisions related to ESOP investment options consistent with those ESG goals. The Appellant also failed to sufficiently allege how the Appellees' decision-making process showed that a prudent fiduciary in like circumstances would have decided to pursue a different investment strategy or monitor investments in a different manner, instead, he only provided conclusory statements regarding the performance of other non-ESG investment options. Lastly, the District Court failed to adequately consider alternative explanations for the Appellees' decisions, such as Hopscotch's desire to align business goals with the interests of its primary teen and pre-teen customer base.

Next, the District Court correctly held that the Appellant did not meet the required 12(b)(6) standard for alleging a plausible claim for breach of fiduciary duties because the Appellant failed to adequately allege that the Appellees' actions caused actual loss to the plan. The Appellant has not made factual allegations—

such as by providing actual growth rates of similarly situated companies— to support the conclusion that Hopscotch consideration of ESG factors lowered its investment returns. Instead of the “meaningful benchmark” that this Court relies on for forming a sound basis for comparison, the Appellant has merely provided industry-wide averages that lacking the required specificity.

Lastly, the Appellant has failed to sufficiently allege that a certifiable class can be established under Fed. R. Civ. P. 23. This Court has held that “it is sensible” to dismiss a class allegation at the pleading stages when it is apparent that a class cannot be certified, and that the District Court has the duty to ensure that the class is certifiable up to the point of final judgment. Here, the Appellant has not pleaded sufficient facts about the nature of the investments held by the Plan participants purported to be Class members. Given the numerous options provided by Hopscotch as well as the that some investments are not affected by Red Rock management decisions, the Appellant incorrectly concluded that all employees participating in the Plan since February 2018 are common and typical, that they will have the same questions of law or fact, or that there is no risk of inconsistent adjudications as required by Fed. R. Civ. P. 23.

Thus, the Appellant has failed to state a claim upon which relief can be granted, and this Court should affirm the District Court’s dismissal of the complaint.

ARGUMENT

I. APPELLEES' CONSIDERATION OF ESG FACTORS FOR INVESTMENTS DOES NOT CONSTITUTE A CLAIM FOR BREACH OF FIDUCIARY DUTIES UNDER ERISA

Contrary to the District Court's conclusion, Appellant's assertions do *not* present "enough to plausibly state a claim for breach of fiduciary duties." (Mem. Op. & Order at 6.) Appellees Hopscotch and Red Rock, by including ESG factors in their administration and management of the Plan respectively, did not breach their duties of prudence or loyalty. The Appellant alleged that Hopscotch and Red Rock focused on ESG factors, instead of focusing on "solely … the financial merits of each investment and … the best interests of Plan participants and beneficiaries." Compl. at 39–42. These bare assertions do not satisfy the requisite pleading standards, though, because (1) they do not include "sufficient facts to give rise to a plausible inference that Appellees breached their duty," *Allen v. Wells Fargo & Co.*, 967 F.3d 767, 775 (8th Cir. 2020), and (2) they do not properly state an actionable breach within the parameters of a Plan fiduciary's responsibilities. Moreover, the District Court incorrectly construed the pleadings under both the substantive law and according to prevailing standards of pleading.

A. The Appellant alleged no facts sufficient for the Court to infer that the Appellees, functioning as fiduciaries, acted disloyally towards the Plan.

The Appellant's complaint failed to claim a plausible breach of the duty of loyalty, because the facts alleged did not "'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Iqbal,* 556 U.S. at 678). Principally, investment strategies that utilize ESG goals do not violate the duty of loyalty, because (1) there is no conflict between participant or beneficiary interests and ESG strategies, and (2) whether or not a fiduciary pursues ESG goals has no bearing on their honesty, a paradigm of loyalty.

The core of the Appellant's contentions, that Hopscotch and Red Rock's inclusion of ESG goals in their investment and broader business strategies does not implicate the duty of loyalty. Instead, under ERISA, the duty of loyalty requires that "[a] fiduciary must 'discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries,' and must comply with the common-law duty of loyalty, including the 'obligation to deal fairly and honestly with all plan members.'" *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) (quoting 29 U.S.C. §1104(a)(1), and then quoting *Shea v. Esensten,* 107 F.3d 625, 628 (8th Cir. 1997)).

i. Plan fiduciaries may simultaneously consider ESG factors and discharge their fiduciary duties, solely in the interest of participants and beneficiaries, without conflict between the two objectives.

At this stage, the core question is whether "Appellant[] [can] allege any specific facts from which a court can infer that Appellees were motivated by disloyal reasons in choosing" ESG investment strategies. *Allen*, 967 F.3d at 776. The Appellant's complaint, read in light of this Circuit's case law identifying actionable disloyalty, does not suggest that Appellees were motivated by disloyal reasons in so choosing.

Contrary to the Appellant's assertions, Appellees' consideration of ESG strategies is not disloyal, because in itself it does not suggest the Appellees' subjective intent "to further [their] own interests rather than the interests of the fund." *In re Wells Fargo ERISA 401(k) Litig.*, 331 F. Supp. 3d 868, 875 (D. Minn. 2018), *aff'd sub nom. Allen*, 967 F.3d at 767. Although the complaint alleged a Hopscotch strategy of "commitment to ESG and to DEI to further attract and retain … its primary consumers[,]" Compl. at 13, such a strategy does not derogate from the provision of benefits or defraying of reasonable expenses. For one, "fiduciaries may also act in other capacities, even capacities that conflict with the individual's fiduciary duties." *Trustees of the Graphic Commc'ns Int'l Union Upper Midwest Loc. 1M Health & Welfare Plan v. Bjorkedal*, 516 F.3d 719, 732 (8th Cir. 2008). In

essence, "[t]he fiduciary status … 'is not an all-or-nothing concept.'" *Id.* (quoting *Darcangelo v. Verizon Communications, Inc.,* 292 F.3d 181, 192 (4th Cir. 2002)).

Simply put, "normal business decisions with potential collateral effects on prospective, contingent benefits need not be made in the interest of plan participants." *Kalda*, 481 F.3d at 646 (citing *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988)). Further, adopting a strategy for purposes of investment or public relations is a far cry from what is paradigmatic of a duty of loyalty breach, namely dishonesty or unfairness.

ii. The Appellant raises no facts to suggest that Appellees acted dishonestly or unfairly in the requisite legal sense.

Most often, the duty of loyalty is implicated where a fiduciary misleads the beneficiary about material information, whether affirmatively or by omission. *Kalda*, 481 F.3d at 644 (collecting cases regarding affirmative miscommunication, duty to inform, and duty to disclose). Here, the Appellant focused on Hopscotch and Red Rock's corporate and investment strategies. If anything, though, Appellees were transparently open about their ESG philosophy: Hopscotch affirmed its commitment to ESG in a Forbes interview, and Red Rock is a vocal member of investor advocacy groups. Compl. at 13, 17–18. The Appellant himself alluded to this fact in mentioning "Red Rock's *open* pursuit of ESG strategies." Compl. at 41 (emphasis added).

On the other hand, missing from the Appellant's alleged facts are any of the indicia of disloyalty that courts view as actionable. For instance, there are no kickbacks. *See Braden*, 588 F.3d at 590. There are no material facts withheld from the Appellant regarding hidden incentives adverse to his interests. *See Shea*, 107 F.3d 625 at 627–29 (concluding that "financial incentives that were designed to minimize [medical] referrals" implicated fiduciary duty to disclose). There is no insider trading. *See In re Wells Fargo ERISA 401(k) Litig.*, 331 F. Supp. 3d at 875 (discussing a hypothetical insider trading fact pattern to illustrate the subjective standard of proving a fiduciary defendant's breach). In sum, a cognizable claim for disloyalty is about manifest deceit, selfishness, or illegality—Appellant's contentions raise none of these hallmarks. He merely asserted that the Appellees prefer to invest in a specific portfolio area.

B. The Appellees' alleged conduct was not imprudent, because there is no indication that a prudent fiduciary in like circumstances may not consider ESG factors when making investment choices.

Inclusion of ESG factors in a fiduciary's Plan strategy is entirely consistent with the requirement that "[t]he fiduciary shall also discharge its duties '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.'" *Meiners*, 898 F.3d at 822 (8th Cir. 2018) (quoting 29 U.S.C. §1104(a)(1)). The duty of prudence

inquiry is contextual. *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022) (quoting *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 425 (2014)). In this vein, "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Id.*

Imprudence is determined by reference to the process for decision-making, as opposed to the results of a decision. *Braden*, 588 F.3d at 595 (citations omitted). In turn, "[ERISA's] 'prudent person standard is an objective standard ... that focuses on the fiduciary's conduct preceding the challenged decision.'" *Braden*, 588 F.3d at 595 (quoting *Roth v. Sawyer-Cleator Lumber Co.,* 16 F.3d 915, 917 (1994)).

At bottom, the Appellant must "show that 'a prudent fiduciary in like circumstances' would have selected a different fund based on the … performance of the selected fund," which in turn requires that he "provide a sound basis for comparison—a meaningful benchmark." *Meiners*, 898 F.3d at 822. The District Court, though, paid scant attention to the substance of the Appellant's benchmarking, which was inadequate to provide a basis for comparison and therefore insufficient to suggest that a prudent fiduciary would have sought non-ESG funds.

The Appellant raised three distinct sets of data to support his attempt at comparison. All of these fail under closer scrutiny. First, he alluded to "similar

non-ESG investment option[s] available on the marketplace" for each of the Plan's ESG options, which "had better investment returns and lower costs during the relevant time period." (Mem. Op. & Order at 21.) This conclusory statement, though, does not go any further in providing information for a meaningful comparison. Second, the Appellant cited data ostensibly showing foregone "high returns" in Energy sector S&P 500 investments, contrasting these prospective returns to any Energy investments that the Appellees did make. Compl. at 23. Similarly, he referenced academic papers documenting a trend of ESG underperformance, measured by a surplus in the single digits. Compl. at 25. Finally, Appellant alluded to stock price declines at Red Rock's invested companies, "following reports of Red Rock voting for a more pro-green energy Board of Directors." Compl. at 24.

This small array of data neglects to meet the benchmark standard laid out by this Circuit. Like in *Matousek*, where "[n]one [of Plaintiff's data points] clear[ed] the pleading bar," *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 281 (8th Cir. 2022), here the Appellant's argument is similarly unsound, for the reason that the Appellant did not provide context such as fees or investment strategy. Like in *Matousek*, "[a]mong the missing details is whether they hold similar securities, have similar investment strategies, and reflect a similar risk profile." *Id.* Looking at the "totality of the specific allegations," the complaint does not provide grounds

for the District Court to infer a breach of fiduciary duty. *Id.* (quoting *Meiners*, 898 F.3d at 822).

Further, return is not the supreme end by which a fiduciary's performance is measured: "[n]o authority requires a fiduciary to pick the best performing fund." *Meiners*, 898 F.3d at 823 (citing *Braden*, 588 F.3d at 596 n.7). Unlike in *Braden*, where the court linked suspect fiduciary performance to "significantly higher fees" and the majority charged fees with no benefit to the participants, *Braden*, 588 F.3d at 595–96, here the Appellant's grievance centers on his contention that the Appellees did not pick the most lucrative funds by his measure. In essence, the Appellant's factual support says nothing about the underlying decision-making process—the focus of an imprudence inquiry, *Braden*, 588 F.3d at 595 (citations omitted) and it utilizes invalid assumptions that a lower return on investment is automatically equivalent to a breach of the duty of prudence.

Additionally, Appellant's allegations fall short of touching on any "continuing duty of some kind to monitor investments and remove imprudent ones." *Matousek*, 51 F.4th at 280 (quoting *Hughes*, 595 U.S. at 175). This conclusion stands because, as mentioned above, a fund's lower performance does not in itself indicate imprudent decision-making. *Meiners*, 898 F.3d at 823 (citing *Braden*, 588 F.3d at 596 n.7) ("[n]o authority requires a fiduciary to pick the best

performing fund.”). Therefore, alleged lower performance cannot absolutely necessitate a failure to monitor.

Although undoubtedly “a fiduciary is obligated to investigate all decisions that will affect the pension plan,” *Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1491 (8th Cir. 1988) (citations omitted), here the Appellant has failed to produce any facts showing a deficient investigatory process, or conduct contrary to beneficiaries’ best interests. Unlike in *Schaefer*, where fiduciaries uncritically accepted a conflicted trustee's recommendation for self-serving amendments to the Plan's administration without further independent investigation, here the Appellees' only fault is maintaining a broader corporate strategy. *Schaefer*, 853 F.2d at 1488–93. The Appellant made no predicate showing.

C. The District Court's technical engagement with Appellant's pleadings was otherwise legally incorrect.

The District Court (1) overlooked obvious alternative explanations and (2) incorrectly subsumed fiduciary duties within one single duty. First, the District Court skirted around the “more likely explanations” for Hopscotch’s investment strategy. *Braden*, 588 F.3d at 596 (quoting *Iqbal*, 556 U.S. at 681). Although “Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct,” this Court and the Supreme Court have recognized that there are instances where allegations carry “obvious alternative

explanation[s].” *Id.* (quoting *Iqbal*, 556 U.S. at 682). Here, Hopscotch’s target demographic is teenagers and pre-teen children. (Mem. Op. & Order at 2.) As part of Hopscotch’s strategy to remain successful, a natural explanation for such conduct is to grow the company’s market share, conduct which is legal—and will be beneficial to Hopscotch employees and Plan beneficiaries. Chiefly, the Appellant’s “inference … is not plausible” since “the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.” *Braden*, 588 F.3d at 597.

Additionally, the Appellant’s claims of disloyalty and imprudence are “based on the same alleged acts[,]” a pleading practice which this Circuit previously interpreted unfavorably. *Allen*, 967 F.3d at 777 (affirming district court's dismissal of Appellants' disloyalty claim, on the basis that it "merely recast[] the imprudence claim"). Moreover, the failure to properly plead breach of fiduciary duties should facilitate the dismissal of “derivative claims of co-fiduciary liability and breach of the duty to monitor.” *Id.* (citing *Brown v. Medtronic, Inc.*, 628 F.3d 451, 461 (8th Cir. 2010)).

II. APPELLANT FAILED TO ADEQUATELY ALLEGE APPELLEES’ ACTIONS CAUSED ACTUAL LOSS TO THE PLAN

Additionally, the District Court correctly granted the Appellees’ motion to dismiss for failure to state a claim for breach of fiduciary duties upon which relief

can be granted under Fed. R. Civ. P. 12(b)(6), because the Appellant failed to provide meaningful benchmarks that established the plausibility of actual loss to the retirement plan.

A. Dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate because the Appellant failed to identify "meaningful benchmarks" to plausibly allege that the Appellees' actions caused loss to the Plan

There are three elements that make up the *prima facie* case under 29 U.S.C. §1104. These elements are "the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the plan." *Braden*, 588 F.3d at 594. There are two different types of retirement plans in ERISA cases. The first is a defined-benefit plan where "retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 540 (2020). The other is a defined contribution plan, where "the retiree's benefits are typically tied to the value of their accounts." *Id.*

When a case involves losses to a defined-contribution plan, courts will look for a "meaningful benchmark." *Meiners,* 898 F.3d at 822. This meaningful benchmark is defined as a "sound basis for comparison" to other plans. *Id.* A "bare allegation that costs are too high, or returns are too low" does not meet this standard when dealing with investment-by-investment challenges. *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020). When determining whether this standard is met, this Court has noted that "there is no

one-size-fits-all approach," but that the "totality of the specific allegations" should be examined. *Id.*

When seeing if a benchmark is "sound" or "meaningful" courts have held that plaintiffs must "identify similar plans offering the same services" but without the alleged wrongdoing. *Matousek*, 51 F.4th at 279. Courts are hesitant to rely on "industry-wide averages." *Id.* at 280. This hesitancy is because they are "not all-inclusive." *Id.* They allow for greater diversity in the way a plan is run rather than giving specific examples. *Id.* Furthermore, even cases where specific examples were provided have been found to not meet this standard of a "meaningful benchmark" if the services provided or the details of the plan differ. *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135, 1139 (8th Cir. 2024). Otherwise, the proposed benchmark is seen as "comparing apples and oranges." *Davis*, 960 F.3d at 485.

In *Matousek*, the employer offered a defined-contribution retirement plan. *Matousek*, 51 F.4th at 277-78. Plan beneficiaries argued that recordkeeping expenses were too high, the Plan should have lower fees, and some investments underperformed but were too costly. *Id.* at 278. Further, the beneficiaries contended that a reasonable fee for a plan with around $1 billion in assets and 5,000 participants would be under $100. *Id.* at 279. Concerning the cost of the fees, "suite of administration services" ranged from $32 to $48 per participant, indirect "revenue-sharing payments" made up $37, and other, non-recordkeeping services

made up the rest. *Id.* Although it observed that the fees looked high, the court required that the plaintiffs show that "similarly sized plans spend less on the same services." *Id.*

The Appellant in this case did not point to specific examples but rather cited industry-wide averages. Furthermore, these averages only took "basic recordkeeping services" into account and did not factor in the other services that were being provided. *Id.* at 279-80. For the court, it was "almost impossible to tell if the[] figures provide[d] a meaningful benchmark." *Id.* at 280. This difficulty existed because all of the sources given either only factored in recordkeeping, or analyzed smaller plans. *Id*.

The *Matousek* plaintiffs, like the Appellant here, claimed that the fiduciaries should not have kept certain investments. *Id*. At 277-78. The court noted, though, that the employer's fund used "a value investment philosophy" while the benchmark fund used "a balanced approach to invest in a broad range of securities, including both growth and value stocks." *Id.* at 282. The two different approaches had "different aims, different risks, and different potential rewards," and therefore could not be a "meaningful benchmark." *Id.* Because no "meaningful benchmarks" were given, the Court granted the motion to dismiss. *Id.* at 283.

Other cases confirm that sound comparisons and the effect of judicial intervention are central. In *Brown*, 628 F.3d at 451, the plaintiffs sought to divest more than $1

billion in stock; however, the court dismissed their claim, considering that a different course of action would have more severely impacted Plan funds. *Brown*, 628 F.3d at 453, 460–61. *Barrett v. O'Reilly Automotive, Inc.* dealt with a defined-contribution plan in which employees sued claiming fees and overall cost were too high. *O'Reilly Auto*, 112 F.4th at 1137-38. The Court gave an example that if a complaint said a 100,000 participant plan had recordkeeping costs of $7,000,000 it might initially seem "excessive" but ultimately does not mean anything if additional context isn't given. *Id.* at 1138. If similar plans cost $120 per participant then the $70 per participant would be relatively cheap. *Id.* at 1138-39. The Appellant in this case did provide an annual report that showed the costs were between $47 to $88 which was more than some other plans. *Id.* at 1139. The complaint ran into problems when it ignored the fact that the plan included other services than just recordkeeping with no way provided to tell the cost of just the recordkeeping. *Id.* The comparisons given were either just for recordkeeping or for different bundles than provided in the case at hand. *Id.* Of further notice to the Court was that the complaint did not try to explain how the comparisons were similar and only leveled conclusory allegations. *Id.* at 1140. As such, the motion to dismiss was granted here as well. *Id.* at 1141.

The Appellant argued that Red Rock's investment in ESG has led to lower returns and that this satisfies the element of loss in the *prima facie* case for breach

of fiduciary duty. However, the Appellant does not give any specific examples to provide a meaningful benchmark with which to base a plausible claim of loss on.

i. <u>There is no evidence supporting Appellant's assertion that ESG investment lowered Hopscotch stock returns.</u>

The Appellant offered no facts to support his allegations that Hopscotch stock would be more valuable if it did not invest in ESG. Hopscotch's public image, advertised as committed to ESG, is ostensibly what made it so popular among younger crowds. Like in *Brown*, the alternative sought—to divest from ESG funds—may prove more harmful, given Hopscotch's broader strategy of including ESG factors. If it did not have this commitment, its stock could be worth less. The Appellant focused on one factor, return on investment, in his meager comparison. In the full context, he offered no evidence that Hopscotch stock would have been more valuable if it had taken a different approach, because the company may not have had as much success without its commitment to ESG. Furthermore, although the Appellant alleged that the value of stock has declined, nowhere does he assert by how much, only stating that the stock experiences slower growth than the stock of two other companies. The rates of growth for any of the companies is not given either in the complaint. This statement has no context and is therefore no help in determining if there was a loss to the value of the plan.

ii. Red Rock's Investment Strategy is different from that of other companies, and therefore cannot provide a meaningful benchmark.

Regarding the Appellant's argument that Red Rock's investment strategy caused loss by its boycotting of the energy sector, this is the exact same situation as in *Matousek.* In that case, the employees complained that certain investments should not have been made. There, the Court noted the discrepancy was largely due to a value investment plan vs. a value and growth investment plan. Like in *Matousek*, Red Rock's investment strategy is value-focused. As such the comparison is not a "meaningful benchmark" because the two investment strategies have "different aims, different risks, and different potential rewards." Therefore, the complaint here does not give specific examples of the same category to allege its loss, which is what is required under *Matousek*.

iii. The study Finding that ESG Investment Provides Lower Rates of Returns does not Give Specific Examples.

The last argument in favor of loss, that there are recent studies finding that ESG investment has lower rates of returns, does not satisfy the requirement for a "meaningful benchmark" either. In *Matousek*, the plaintiffs tried to rely on industry-wide averages to support their claim. The Court found this not to meet the standard because it did not cite to any specific similar funds; many of the funds included in the averages were too different to be helpful. This is also the case here.

There is a lack of specific plans similar to the one that Hopscotch has that have been hurt by ESG investing to serve as a "meaningful benchmark" to support the claim that these investments hurt the plan financially. Furthermore, in *O'Reilly*, the plaintiff still lost even providing specific examples because of differences in the examples with no explanation as to how they were similar. Not only does the Appellant here not have specific examples, but they do not explain how the study is similar to their situation. As such, they are just conclusory statements like in *O'Reilly*, and should not be considered by the court when determining if there were any losses to the retirement plan.

B. There is no reason to distinguish cases dealing with recordkeeping because these cases also require the Appellant to show loss to the Plan.

The Appellant will likely argue that *O'Reilly* and *Matousek* dealt with the issue of recordkeeping and should therefore be distinguished. This argument fails for two reasons. First *Matousek* dealt with claims that certain investments should not have been made because they were more costly and offered less in return in addition to the recordkeeping claim. The Court still applied the need for a "meaningful benchmark" in that situation too which is the issue in this case, whether the ESG investments should have been made due to their alleged lesser returns. Second, both the recordkeeping claims and the question of ESG investment are questions about how a retirement investment plan is being run, and

both involve the actions of an investment company. Furthermore, loss to the plan is one of the elements for breach of fiduciary duty so the plaintiff should be required to plead facts showing that there was an actual loss rather than just conclusory statements asserting that one of the *prima facie* elements was met to satisfy the standards under *Twombly* and *Iqbal*.

For these reasons, the Court should find that the Appellant must show a "meaningful benchmark" in their complaint to show that loss to the plan is plausible, and that the Appellant has not done so. Therefore, the Court should uphold the decision of the District Court and dismiss the action for failure to state a claim.

III. APPELLANT HAS NOT SUFFICIENTLY ALLEGED THAT A CERTIFIABLE CLASS CAN BE ESTABLISHED UNDER FED. R. CIV. P. 23.

A separate issue for this Court to consider is that the Appellant has not sufficiently pleaded that a certifiable class under Fed. R. Civ. P. 23(a), 23(b)(1) or (3) can be established. This Court has held that,

> It is "sensible . . . to permit class allegations to be stricken at the pleading stage" if it is "apparent from the pleadings that the class cannot be certified" because "unsupportable class allegations bring 'impertinent' material into the pleading" and "permitting such allegations to remain would prejudice the defendant by requiring the mounting of a defense against claims that ultimately cannot be sustained."

Donelson v. Ameriprise Fin. Servs., 999 F.3d 1080, 1092 (8th Cir. 2021) (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380 (3d ed.)). This Court has also held that, consistent with Fed. R. Civ. P. 23(c)(1)(C), a district court has a duty to ensure the class remains certifiable until the final judgment decision. *Day v. Celadon Trucking Servs*., 827 F.3d 817, 830-831 (8th Cir. 2016).

When bringing a class action lawsuit, a plaintiff has the initial burden to show that a class meets Fed. R. Civ. P. 23 requisites of numerosity, commonality, typicality, and fair and adequate representation. *Id.* at 830 (quoting *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994)). Commonality requires that questions of law or fact are common to the class, whereas typicality requires that the class representatives' claims or defenses are typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a). If all pre-requisites are met, the Appellant must then show that the class is certifiable under Fed. R. Civ. P. 23(b)(1) and 23(b)(3). For consideration in this case are Fed. R. Civ. P. 23(b)(1), which provides that a class action is appropriate when separate actions create a risk of inconsistent adjudications or that adjudications would be dispositive of or substantially impede or impair interests of some members, and Fed. R. Civ. P. 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members". Fed. R. Civ. P. 23(b).

Here, the Appellant alleges that the class action lawsuit is brought on behalf of "[a]ll participants and beneficiaries of the Hopscotch Corporation 401(k) Plan from February 4, 2018 through the date of judgment ("Class period")…". Compl. at 5. The Appellant contends that the class is properly maintained under Fed. R. Civ. P. 23(a) requisites and that it is certifiable under Fed. R. Civ. P. 23(b)(1) or, in the alternative, 23(b)(3). However, the Appellant failed to show that all Plan participants in the Class Period selected non-ESOP investment options managed by Red Rock. In fact, Plan participants are free to choose from eight different investment options including the Hopscotch ESOP option and, upon vesting, Participants can choose to redesignate investments into the non-ESOP option. Compl. at 3. Under these conditions, it is possible that a Plan participant may have chosen to redesignate his investment options after Hopscotch publicly selected Red Rock as its Plan's investment manager in 2019 or when Red Rocks publicly demonstrated its intent to manage Plan investments based on their climate sustainability principles that same year. Compl. at 3, 4. Without sufficiently alleged facts regarding the investment options the alleged Class members selected during the relevant period, the class certification inquiry to ascertain whether there are 1) questions of law or fact that are common to the class, 2) separate actions create a risk of inconsistent adjudications or the interests of some members are impaired or impeded, or 3) questions of law or fact common to class members

which predominate over question by individual members. Fed. R. Civ. P. 23(a) and (b).

Thus, the Appellant has raised unsupportable class allegations that could bring 'impertinent' material into the pleading" as the Court warned in *Donelson*. Because this Court must ensure that the class can be certified and that it remains certifiable until the final judgment decision, the Court should dismiss the complaint for failure to allege a claim for which relief may be granted under Fed. R. Civ. P. 12(b)(6). In the alternative, this Court should deny certification at the earliest practicable time and before final judgment as required by Fed. R. Civ. P. 23(c)(1).

CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's decision to grant the Appellees' motion to dismiss the complaint for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) and hold that the Appellant has failed to establish a certifiable class as required by Fed. R. Civ. P. 23.

Respectfully submitted,

/s/

Hennessy Team 4
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