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,

Plaintiff-Appellant

v.

Hopscotch Corporation
and Red Rock Investment Co.,

Defendants-Appellees

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

Brief for the Plaintiff-Appellant

Team 6
Counsel for the Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter pursuant to 29 U.S.C. § 1132(e)(1)[1] and 28 U.S.C. § 1331.[2] The District Court's federal question jurisdiction was based on the alleged violation of the Employee Retirement Income Security Act of 1974, as amended (ERISA).[3]

Pursuant to 28 U.S.C. § 1291, the United States Court of Appeals for the Eighth Circuit has appellate jurisdiction as appealed from the final judgment.[4] The Notice of Appeal was properly filed.

[1] 29 U.S.C. § 1132(e)(1) ("… the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title.").
[2] 28 U.S.C. § 1331 ("[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").
[3] 29 U.S.C. § 1132(a)(3).
[4] 28 U.S.C. § 1291 ("[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .").

STATEMENT OF THE ISSUES

I. Whether the defendants-appellees Hopscotch and Red Rock acted as fiduciaries in their administration and management of defendant-appellee Hopscotch's defined contribution plan.

II. Whether the district court erred in finding that plaintiff-appellant, Mr. Smith, properly claimed that the focus on ESG and DEI priorities by defendants-appellees Hopscotch and Red Rock constituted a breach of ERISA's duties of loyalty and prudence.

III. Whether the district court erred in finding that plaintiff-appellant, Mr. Smith, failed to state a claim that the actions of defendants-appellees, Hopscotch and Red Rock, caused a loss to the Plan.

STATEMENT OF THE CASE

This action arises out of John Smith's ("Mr. Smith" or "Plaintiff-Appellant") participation in the Hopscotch Corporation Retirement Savings Fund (the "Fund").[5] On February 4, 2024, Mr. Smith brought a civil action in the United States District Court for the District of Minnesota against Hopscotch Corporation ("Hopscotch"), as Fund sponsor and administrator of the Fund's 401(k) defined contribution pension plan (the "Plan"), as well as Red Rock Investment Co. ("Red

[5] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2 (D. Minn. 2024).

Rock"), as the investment manager for the Plan seeking awarded lost benefits and equitable relief under ERISA Section 502(a)(2).[6]

Defendants moved to dismiss the complaint.[7] The motion to dismiss was granted and Mr. Smith's complaint was dismissed with prejudice by the District Court.[8] Mr. Smith now appeals to the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE FACTS

Plaintiff-Appellant John Smith is a software engineer who worked for Hopscotch from 2016 to 2023.[9] Hopscotch is a social media conglomerate that is "the most popular among the youngest demographic of social media users."[10] Mr. Smith participated in Hopscotch's 401(k) defined contribution pension plan throughout his employment at Hopscotch.[11] The Plan has eight investment options,

[6] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 1-46 (D. Minn. 2024).
[7] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4-5 (D. Minn. 2024).
[8] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 8 (D. Minn. 2024).
[9] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2 (D. Minn. 2024).
[10] Compl. Paragraph 14
[11] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2 (D. Minn. 2024).

all of which are managed by Red Rock.[12] Both Hopscotch and Red Rock do not dispute that they are fiduciaries of this Plan.[13]

All contributions to the Plan from Hopscotch are in the form of Hopscotch stock and are automatically entered into one of the investment options, called the employee stock ownership plan ("ESOP").[14] Employees cannot direct any funds to any of the other seven investment options until the funds have vested, which only happens once the employee has worked at Hopscotch for five years.[15] Mr. Smith worked at Hopscotch in excess of five years, so his contributions to the Plan have been vested.[16]

In 2018, Hopscotch decided to pursue an environmental, social, and governance ("ESG") business campaign and investment strategy.[17] According to its CEO, Hopscotch focused on these priorities because it felt that "it could use the company's commitment to ESG and to DEI to further attract and retain the very

[12] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 3 (D. Minn. 2024).
[13] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024).
[14] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2-3 (D. Minn. 2024).
[15] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2-3 (D. Minn. 2024).
[16] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2 (D. Minn. 2024).
[17] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 3 (D. Minn. 2024).

young demographic of teenagers and pre-teens that constituted its primary consumers."[18] However, since this change, Hopscotch's stock has tanked.[19] As a result, Hopscotch's stock, which makes up of "over 40% of the Plan's investments" has detrimentally affected this Plan.[20]

Hopscotch's decision to pursue ESG priorities was instrumental in its 2019 decision to select Red Rock as investment manager of the Plan.[21] Red Rock, too, had a "commitment to ESG, particularly with respect to the environment but also with respect to diversity, equity and inclusion ('DEI') goals."[22] Red Rock's actions show this commitment—it issued a public statement professing its priority of "climate sustainability."[23] It joined "Climate Action 100+, a group of investors committed to pressing greenhouse gas emitters to change their ways."[24] With respect to investment, Red Rock pledged to, and eventually used its proxy voting power to fill board of director seats with pro-ESG individuals and oppose those

[18] Compl. Paragraph 13.
[19] Compl. Paragraph 14-15.
[20] Compl. Paragraph 15.
[21] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 3 (D. Minn. 2024); Compl. Paragraph 11.
[22] Compl. Paragraph 12.
[23] Compl. Paragraph 17.
[24] Compl. Paragraph 17.

"who were not sufficiently pursuing green goals in Red Rock's view."[25] And it further "boycott[ed] investments in traditional energy companies.".[26]

As was the case with Hopscotch, the priorities and actions of Red Rock have negatively affected its investment funds.[27] For example, all of the companies in which Red Rock exercised its right of proxy voting "decline[d] following reports of Red Rock voting for a more pro-green energy Board of Directors."[28] It should be noted that Red Rock did this during a time in which not only "the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than on-Energy sectors," but when, according to the "Journal of Finance at the University of Chicago . . ESG funds underperformed . . . by an average of 2.5% . . . as compared to the broader market."[29] All in all, the priorities of both Hopscotch and Red Rock led the Hopscotch plan to suffer, as all eight investment options in its plan "ha[d] a similar non-ESG investment option available on the marketplace which had better investments and lower costs during the relevant time period."[30]

These events led to Mr. Smith and a class of "[a]ll participants and beneficiaries of the Hopscotch Corporation 401(k) Plan from February 4, 2018

[25] Compl. Paragraph 17-19.
[26] Compl. Paragraph 20
[27] Compl. Paragraph 22.
[28] Compl. Paragraph 22.
[29] Compl. Paragraph 23, 25.
[30] Compl. Paragraph 12-13, 16-17, 20.

through the date of judgment" to bring a class action alleging that Hopscotch and Red Rock breached their ERISA fiduciary duties of loyalty and prudence.[31]

In adjudicating this case below, the United States District Court for the District of Minnesota acknowledged both defendant-appellee's accepted that they were fiduciaries under this Plan.[32] It also ruled that because the "elevation of [ESG and DEI] considerations above the interests of plan participants in their retirement security would violate a fiduciary's duty to act with utmost prudence and loyalty," that Mr. Smith's complaint put forth enough evidence to plead that both defendant-appellee's breached their fiduciary duties.[33] But the district court ultimately held that Mr. Smith did not put forth enough evidence to show that the actions of the defendant-appellee's caused a loss to the Hopscotch Plan.[34] Therefore, it dismissed this case with prejudice.[35]

Mr. Smith is appealing this ruling to the United States Court of Appeals for the Eighth Circuit.

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[31] Compl. Paragraph 26; Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024).
[32] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 2 (D. Minn. 2024).
[33] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 5, 7 (D. Minn. 2024).
[34] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 7-8 (D. Minn. 2024).
[35] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 8 (D. Minn. 2024).

The issues on appeal are: (1) whether the defendants-appellees Hopscotch and Red Rock acted as fiduciaries in their administration and management of defendant-appellee Hopscotch's defined contribution plan; (2) whether the district court erred in finding that plaintiff-appellant, Mr. Smith, properly claimed that the focus on ESG and DEI priorities by defendants-appellees Hopscotch and Red Rock constituted a breach of ERISA's duties of loyalty and prudence; and (3) whether the district court erred in finding that plaintiff-appellant, Mr. Smith, failed to state a claim that the actions of defendants-appellees, Hopscotch and Red Rock, caused a loss to the Plan.[36]

SUMMARY OF THE ARGUMENT

The District Court erred in granting Defendant's motion and dismissing Mr. Smith's complaint. To state a claim for breach of fiduciary duty under ERISA, "'a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan."'[37]

Mr. Smith satisfied the first prong of showing a breach of fiduciary duty. In the District Court, neither defendant-appellee, Hopscotch or Red Rock, questioned "that they were acting as a fiduciary with respect to the challenged acts and

[36] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 5-8 (D. Minn. 2024) (quoting Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).
[37] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024) (quoting Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).

omissions."[38] Also, neither defendant-appellee appears to have changed its position on appeal the District Court's finding on this front.[39]

Mr. Smith satisfied the second prong of showing a breach of fiduciary duty for three reasons. First, despite ERISA's requirement that conduct themselves "solely in the interest of the [plan] participants and beneficiaries, Hopscotch and Red Rock placed their priority on ESG and DEI objectives.[40] While defendants-appellees attempted to rebut this with the supposed positive results of investing in "ESG" and "DEI", the District Court was correct to point out that this would have run afoul of the pleading standard as articulated by the Eighth Circuit and its application of that rule.[41]

Next, ERISA's fiduciary duty requirement mandates that trustees "investigate all decisions that will affect the pension plan."[42] A trustee's ERISA

[38] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024).
[39] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, (D. Minn. 2024).
[40] *See* Compl. Paragraphs 1-46; *See* also Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).
[41] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 6-7 (D. Minn. 2024); *See* Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009); *See also* Fed. R. Civ. P. 8.
[42] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917-18 (8th Cir. 1994) (quoting Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988)).

fiduciary duty only comes into play when it is "investing the ESOP's assets or administering the plan."[43]

The decisions made by the fiduciaries in this case satisfied this requirement and went right to the heart of plan administration—Hopscotch in choosing Red Rock as its investment manager, and Red Rock, acting in this capacity to choose which funds to invest in for Hopscotch's plan.[44] Simply put, there is no sign that either defendant-appellee satisfied its investigative responsibility.[45]

Furthermore, ERISA's fiduciary duty requirement mandates that trustees exercise "'a continuing duty of some kind to monitor investments and remove imprudent ones.'"[46] Yet, defendants-appellees continued to invest in poorer performing options, and did not remove them from its plan. Because of this, both defendant-appellees breached their fiduciary duty as described above.[47]

ARGUMENT

[43] Martin v. Feilen, 965 F.2d 660, 666 (8th Cir. 1992) (citing Canale v. Yegen, 782 F. Supp. 963, 967 (D.N.J. 1992)).
[44] Compl. paragraphs 11-12, 21.
[45] *See* Compl. Paragraphs 1-46; *See also* Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917-18 (8th Cir. 1994) (quoting Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988)).
[46] Hughes v. Nw. Univ., 595 U.S. 170, 175 (2022) (quoting Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015)).
[47] *See* Compl. Paragraphs 1-46.

ERISA imposes duties of loyalty and prudence on fiduciaries, requiring them to "discharge duties with respect to a plan solely in the interest of the [plan] participants and beneficiaries."[48] The prudent person standard of ERISA is examined by the courts from an objective standpoint.[49]

With respect to pleading:

> [I]t is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled 'give the defendant fair notice of what the claim is and the grounds upon which it rests' . . . and 'allow[ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief.[50]

As the United States District Court for the District Court for Minnesota noted, to state a claim for breach of fiduciary duty under ERISA "'a plaintiff must make a prima facie showing that the defendant acted as a fiduciary, breached its fiduciary duties, and thereby caused a loss to the Plan.'"[51] In this case, Mr. Smith made this necessary showing that both Hopscotch and Red Rock satisfied all three of these requirements.

I. HOPSCOTCH AND RED ROCK UNQUESTIONABLY ACTED AS FIDUCIARIES TO THE PLAN.

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[48] 29 U.S.C. § 1104(a)(1); *see also* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).
[49] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994).
[50] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
[51] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024) (quoting Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).

First, to be considered ERISA fiduciaries, individuals or entities "jointly or severally shall have the authority to control and manage the operation and administration of the plan."[52] Mr. Smith adequately showed that both Hopscotch and Red Rock "acted as . . . fiduciar[ies]" to the plan.[53] As the District Court noted, "neither Defendant disputes that they were acting as a fiduciary with respect to the challenged acts and omissions."[54] There is no sign in the record that either Hopscotch or Red Rock has changed their position on this issue, or is appealing this point.[55] Thus, Mr. Smith satisfied the first requirement for showing that Hopscotch and Red Rock breached their fiduciary duties under ERISA.[56]

II. HOPSCOTCH AND RED ROCK PLACED EMPHASIS ON ESG FACTORS WHEN MAKING INVESTMENT DECISIONS, CONSTITUTING A BREACH OF THEIR ERISA FIDUCIARY DUTIES OF LOYALTY AND PRUDENCE.

Second, the United States Supreme Court has written "that an ERISA fiduciary's duty is 'derived from the common law of trusts.'"[57] The Eighth Circuit Court of Appeals has made clear that a fiduciary has "'a duty . . . to advise [a

[52] 29 U.S.C. § 1102(a)(1); *see also* Martin v. Feilen, 965 F.2d 660, 668 (8th Cir. 1992).
[53] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009)).
[54] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 4 (D. Minn. 2024).
[55] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100 (D. Minn. 2024).
[56] *See* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009)).
[57] Tibble v. Edison Int'l, 575 U.S. 523, 528 (2015) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc., 472 U.S. 559, 570 (1985)).

beneficiary] of circumstances that threaten interests relevant to the relationship"[58] and must "act 'solely in the interest of [plan] participants and beneficiaries.'"[59] A fiduciary's responsibilities also include "investigat[ing] all decisions that will affect the pension plan"[60] as well as "monitor[ing] all plan investments and remov[ing] any imprudent ones."[61] An examination of caselaw and the facts of this case demonstrate that Mr. Smith made an adequate showing that both Hopscotch and Red Rock fell short of these requirements and stated a claim that both entities breached their fiduciary duties of loyalty and prudence that it owed to him under to ERISA.[62]

In *Braden v. Wal-Mart Stores, Inc.*, the plaintiff brought a breach of fiduciary action against the defendant due to its failure to "act 'solely in the interest of [plan] participants and beneficiaries.'"[63] The plaintiff substantiated this claim with evidence that the options offered by the trustee in its plan were not only being outperformed by "better options" on the market, but were also being "charge[d]

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[58] Howe v. Varity Corp., 36 F.3d 746, 754 (8th Cir. 1994).
[59] Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (quoting 29 U.S.C. § 1104(a)(1)).
[60] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 918 (8th Cir. 1994) (quoting Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988)).
[61] Hughes v. Nw. Univ., 595 U.S. 170, 173 (2022) (citing Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015)).
[62] *See* 29 U.S.C. § 1104(a)(1); *see also* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).
[63] Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (quoting 29 U.S.C. § 1104(a)(1)).

significantly higher fees than institutional shares for the same return on investment."[64] The plaintiff also alleged that options in that plan "made revenue sharing payments to the trustee . . . not . . . for services rendered, but rather were a quid pro quo for inclusion in the Plan."[65] The Eighth Circuit Court of Appeals admonished the District Court that "Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct" and reversed the District Court, holding that the plaintiff's allegations, and the support he provided for them, constituted a claim against the defendant for breach of fiduciary duty.[66]

In this matter, Mr. Smith's former company, Hopscotch, has a "contribution pension plan" that is set up with "eight investment options."[67] One option consists entirely of Hopscotch stock, known as an "employee stock ownership plan" or an "ESOP option."[68] The other options in the plan are also managed by Red Rock, who serves as "the Plan's investment manager."[69]

Mr. Smith adequately showed that Defendant-Appellee Hopscotch breached the fiduciary duties it owed him due to its failure to "act 'solely in the interest of

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[64] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594-96 (8th Cir. 2009).
[65] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009).
[66] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009).
[67] Compl. paragraph 9.
[68] Compl. paragraph 9.
[69] Compl. paragraph 9, 11.

[plan] participants and beneficiaries.'"[70] Hopscotch made no efforts to inform or seek the advice of class participants such as Mr. Smith about their desire to pursue ESG objectives.[71] Specifically, Hopscotch's Board of Directors decided to integrate ESG objectives in its investment strategies without regard for its potential and ultimately negative impact on the plan value.[72] This unilateral action, which subsequently lead to a negative effect of ESG activities on Hopscotch's stock, was done in conscious disregard and breach of Hopscotch's fiduciary duties of loyalty and prudence under ERISA.[73]

For the same reason, Mr. Smith adequately showed that Defendant-Appellee Red Rock, too, breached its fiduciary duties.[74] In its management of the plan, rather than making its beneficiaries like Mr. Smith the priority, Red Rock declared "that climate sustainability would be [its] new guiding principle."[75] As a result, on "dozens of occasions from 2020 through 2023," Red Rock "boycott[ed] investments in traditional energy companies" and "vot[ed] against appointment of

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[70] Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (quoting 29 U.S.C. § 1104(a)(1)).
[71] *See* Compl. Paragraphs 1-46; *See also* Smith v. Hopscotch Corp., Civil Action No. 24-CV-100 (D. Minn. 2024).
[72] *See* Compl. Paragraphs 12-13.
[73] *See* Compl. Paragraphs 14-15. *See also* 29 U.S.C. § 1104(a)(1); *see also* Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009).
[74] *See* Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 595 (8th Cir. 2009) (quoting 29 U.S.C. § 1104(a)(1)).
[75] Compl. paragraph 17.

Board members who were not sufficiently pursuing green goals in Red Rock's view."[76]

Red Rock's decisions in this respect yielded results that hurt Hopscotch plan beneficiaries like Mr. Smith. They led to "a negative impact of returns for Red Rock investment funds during the relevant time period" and "the companies which it does invest in" to undergo "a steep stock price decline."[77]

Like the plaintiff in *Braden,* Mr. Smith substantiated his claim with evidence—for example, that there were "similar non-ESG investment option[s] available on the marketplace which had better investment returns and lower costs during the relevant time period."[78] He also used the "Journal of Finance at the University of Chicago" paper that "establish[ed] that ESG funds underperformed during the last five years by an average of 2.5% . . . as compared to the broader market."[79] Therefore, like the plaintiff in *Braden*, Mr. Smith put forth an adequate claim that Red Rock breached its fiduciary duties that it owed him by not "act[ing] 'solely in the interest of [plan] participants and beneficiaries.'"[80]

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[76] Compl. paragraph 19-20.
[77] Compl. paragraph 22, 24.
[78] Compl. paragraph 21.
[79] Compl. paragraph 25.
[80] Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 594-95 (8th Cir. 2009) (quoting 29 U.S.C. § 1104(a)(1)).

In response, Hopscotch and Red Rock emphasized some of the positive results that came from focusing on "ESG and DEI strategies"—including increased attraction "among the young people" and an increase in the value of Hopscotch's stock during the time, which "constitute[d] over 40% of the value of the Plan"—to argue that they did not breach their fiduciary duties under ERISA.[81] Nonetheless, the District Court held that Mr. Smith "plausibly stated a claim that Defendants breached their fiduciary duties with respect to their ESG investing" and that "the impact of [the Defendants'] strategy is a merits issue."[82]

This particular aspect of the District Court's ruling is a correct application of the pleading standard as articulated in *Braden v. Wal-Mart*.[83] If the Court of Appeals were to reverse this finding by the District Court, it would be running afoul of the same aforementioned admonishment that "Rule 8 does not require a plaintiff to plead facts tending to rebut all possible lawful explanations for a defendant's conduct."[84]

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[81] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 6 (D. Minn. 2024).
[82] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 7 (D. Minn. 2024).
[83] *See* Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009); *See also* FED. R. CIV. P. 8.
[84] Braden v. Wal Mart Stores, Inc., 588 F.3d 585, 596 (8th Cir. 2009).

As evident by two important precedents of the Eighth Circuit Court of Appeals, another important aspect of a trustee's fiduciary duty under ERISA is "to investigate all decisions that will affect the pension plan."[85]

In the first case, *Roth v. Sawyer-Cleator Lumber Co.*, two retirees from the defendant company sold their stock in the defendant company to the company ESOP "and in return received a promissory note providing for periodic payments from the ESOP over a ten-year period."[86] The defendant company then gave each of the employees "security interests in the stock each had sold to it."[87] Because the company ESOP was running out of money, the retirees, notwithstanding the promissory note they received, stopped receiving funds from the company ESOP.[88] As time elapsed, both the company and its ESOP ran out of money.[89] This led both retirees to assert a breach of fiduciary duty claim against the defendant company for "fail[ure] to investigate the propriety of securing [their] promissory notes with Company stock."[90] Although there was evidence that the defendant company consulted with an appraiser and an attorney, the court found that the case record contained testimony "suggesting that the trustees did very little to evaluate the

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[85] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917-18 (8th Cir. 1994) (quoting Schaefer v. Ark. Med. Soc'y, 853 F.2d 1487, 1491 (8th Cir. 1988)).
[86] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 916 (8th Cir. 1994).
[87] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994).
[88] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 916-17 (8th Cir. 1994).
[89] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994).
[90] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994).

propriety of securing the notes with Company stock" which "could support a judgment at trial for the plaintiffs on the issue of breach of fiduciary duty."[91]

In the second case, *Schaefer v. Arkansas Medical Society,* the plaintiff, who was a trustee of the plan at issue, made recommendations to alter the plan's COLA and fringe benefits provisions.[92] In doing this, not only did the plaintiff not investigate how much these changes would cost, but he also did not tell the body in charge of approving amendments to the plan about reservations that had been expressed to him by consultants.[93] The court found that the plaintiff and the plan's trustees breached their fiduciary duty under ERISA because they "failed to investigate the merits of the proposals made by Schaefer to determine whether they were in the best interest of the Plan."[94]

Similar to the companies in *Roth* and *Schaefer*, the record of this case does not show any indication that either Hopscotch or Red Rock investigated the effects that its focus on "ESG" and "DEI" would have on the beneficiaries of this Plan.[95] Furthermore, unlike the defendants in *Roth*, there is no evidence that Hopscotch or

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[91] Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 918-19 (8th Cir. 1994).
[92] Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1488-89 (8th Cir. 1988).
[93] Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1488-90 (8th Cir. 1988).
[94] Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1491, 1493-94 (8th Cir. 1988).
[95] *See* Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, (D. Minn. 2024); *See also* Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 917 (8th Cir. 1994); *See also* Schaefer v. Arkansas Med. Soc'y, 853 F.2d 1487, 1491, 1493-94 (8th Cir. 1988).

Red Rock even consulted with an attorney or appraiser regarding either its decision to focus on "ESG" and "DEI" or the effects that such a decision would have on plan beneficiaries.[96]

In *Howe v. Varity Corp.*, the Eighth Circuit Court of Appeals acknowledged that "not every business decision made by a fiduciary will subject it to liability for breach of fiduciary duty, even though the decision may detrimentally affect the prosperity of the company."[97] *Martin v. Phelen*, which is cited by the District Court, touched upon this principle, stating that "ERISA's fiduciary duty requirements" do not cover "'day-to-day corporate business transaction[s]' made in their capacity as corporate officers."[98] Rather, it is limited "to transactions that involve investing the ESOP's assets or administering the plan."[99]

In *Howe*, the breach of fiduciary duty stemmed from Variety Corp's decision to transfer employees into a stock option plan that was essentially bankrupt at the time.[100] The court cited statements about the bankrupt stock option by Varity's management, in which they said that it "unloaded his losers into one

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[96] Compl. paragraph 1-46; *See* Smith v. Hopscotch Corp., Civil Action No. 24-CV-100 (D. Minn. 2024); *See also* Roth v. Sawyer-Cleator Lumber Co., 16 F.3d 915, 918-19 (8th Cir. 1994).
[97] Howe v. Varity Corp., 36 F.3d 746, 753 (8th Cir. 1994).
[98] Martin v. Feilen, 965 F.2d 660, 666 (8th Cir. 1992).
[99] Martin v. Feilen, 965 F.2d 660, 666 (8th Cir. 1992) (citing Canale v. Yegen, 782 F. Supp. 963, 967 (D.N.J. 1992)).
[100] Howe v. Varity Corp., 36 F.3d 746, 750 (8th Cir. 1994).

wagon."[101] Similar to these statements, Hopscotch's board of directors decided to pursue ESG objectives as it related to investment strategies directly impacting plan participants.[102]

In a case that *Martin v. Phelen* heavily relies on, the defendant company had a pension plan that would give employees "with 30 years of service who are 55 years old at the time of termination . . . '*full*' early retirement benefits."[103] But the defendant company fired the plaintiffs before they reached the age of 55.[104] Not only did the defendant company offer them '"*reduced*' early retirement benefits," but it refused to allow the plaintiffs to "'remain on the payroll"' until they turned 55 years old.[105] The plaintiffs alleged that by not allowing this '"bridging,"' the defendant company committed a breach of the fiduciary duty that it owed to them.[106] After noting that the plan at issue in this case did not allow for either of the plaintiff's actions, the Court of Appeals sided with the defendant company, writing that its actions "were employment decisions that did not directly affect the administration of the pension plan or the investment of its assets."[107]

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[101] Howe v. Varity Corp., 36 F.3d 746, 750 (8th Cir. 1994).
[102] Compl. Paragraph 12.
[103] Hickman v. Tosco Corp., 840 F.2d 564, 565 (8th Cir. 1988) (emphasis in original).
[104] Hickman v. Tosco Corp., 840 F.2d 564, 565 (8th Cir. 1988).
[105] Hickman v. Tosco Corp., 840 F.2d 564, 564-65, n.2 (8th Cir. 1988) (emphasis in original).
[106] Hickman v. Tosco Corp., 840 F.2d 564, 564-65 (8th Cir. 1988).
[107] Hickman v. Tosco Corp., 840 F.2d 564, 566-67 (8th Cir. 1988).

Furthermore, in *Howe*, the breach of fiduciary duty claim stemmed from Variety Corp's decision to transfer employees into a stock option plan that was essentially bankrupt at the time.[108] The court cited statements about the bankrupt stock option by Varity's management, in which they said that it "unloaded his losers into one wagon."[109]

Unlike the actions taken by the employer in *Hickman* and *Howe*, the actions taken by Hopscotch and Red Rock were not merely corporate decisions that would be inapplicable to the scope of an ERISA trustee's fiduciary duties.[110] Rather, their decisions went right to the heart of how it administered Hopscotch's ESOP—both entities made a "commitment to ESG, particularly with respect to the environment but also with respect to diversity, equity and inclusion ('DEI') goals."[111] But in favoring ESG investment options, they acted on this commitment—Hopscotch by choosing Red Rock to be "the Plan's investment manager"—and Red Rock as a "investment manager" by avoiding "similar non-ESG investment option[s] available on the marketplace which had better investment returns and lower costs during the relevant time period."[112] This has had "a significant negative impact on

[108] Howe v. Varity Corp., 36 F.3d 746, 750 (8th Cir. 1994).
[109] Howe v. Varity Corp., 36 F.3d 746, 750 (8th Cir. 1994).
[110] *See* Martin v. Feilen, 965 F.2d 660, 666 (8th Cir. 1992).
[111] Compl. paragraph 12.
[112] Compl. paragraph 11-12, 21.

returns and ultimately on the value of Hopscotch's own stock."[113] As stated above, Red Rock's "ESG activities . . . have had a negative impact of returns for Red Rock investment funds during the relevant time period."[114] And similar to the statements made by the employer in *Howe*, Hopscotch's board of directors decided to pursue ESG objectives as it related to investment strategies directly impacting plan participants.[115]

An additional aspect of a trustee's fiduciary duty under ERISA is that it "'has a continuing duty of some kind to monitor investments and remove imprudent ones.'"[116] In *Hughes v. Northwestern University*, the plaintiffs launched a breach of fiduciary duty claim that the defendant's inability "to provide cheaper and otherwise-identical alternative investments" led to "respondents . . . fail[ing] to remove imprudent investments from the Plans' offerings."[117] The Court of Appeals did not consider this a breach of the trustee's fiduciary duty because the defendant's plan contained options that the plaintiffs desired.[118] In remanding this

[113] Compl. paragraph 14.
[114] Compl. paragraph 22.
[115] Compl. Paragraph 12.
[116] Hughes v. Nw. Univ., 595 U.S. 170, 175 (2022) (quoting Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015)).
[117] Hughes v. Nw. Univ., 595 U.S. 170, 176 (2022).
[118] *See* Hughes v. Nw. Univ., 595 U.S. 170, 172-73 (2022).

case, the Supreme Court reiterated that an ERISA fiduciary has a "duty to monitor *all* plan investments and remove *any* imprudent ones."[119]

The District Court's findings in this matter should be sustained for precisely the same reason. In this matter, from "lower investment returns for the Red Rock-managed Plan investments," to Red Rock's staying with the worse-performing "ESG investment options," to investing in companies "which suffered a steep stock price decline following reports of Red Rock voting for a more pro-green energy Board of Directors," there is plenty of evidence that the options Red Rock offered as a part of the Hopscotch plan were imprudent.[120] Yet, there is no evidence of Hopscotch or Red Rock either actively monitoring these poor options, or removing them.[121]

For these reasons, the District Court's ruling that "[p]laintiff has plausibly stated a claim that [d]efendants breached their fiduciary duties with respect to their ESG investing" was correct and should thus be affirmed by this court on appeal.[122]

III. MR. SMITH SUFFICIENTLY ARTICULATED THAT THE ACTIONS OF THE DEFENDANTS CAUSED A LOSS TO THE PLAN.

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[119] Hughes v. Nw. Univ., 595 U.S. 170, 173 (2022) (citing Tibble v. Edison Int'l, 575 U.S. 523, 530 (2015)).
[120] Compl. paragraph 16, 21, 24.
[121] Compl. paragraph 1-46.
[122] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 5-7 (D. Minn. 2024).

When an ERISA fiduciary breaches his duty, it "is liable to the plan (i) for 'any losses to the plan resulting from each such breach,' (ii) for 'any profits . . . made through use of assets of the plan by the fiduciary,' and (iii) for 'such other equitable or remedial relief the court may deem appropriate.'"[123] The Court of Appeals has written that "[i]t is clear that 'nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund.'"[124] Specifically, the Court of Appeals noted that loss must be demonstrated by a "sound basis for comparison—a meaningful benchmark."[125] This includes "us[ing] the data about the selected funds and some circumstantial allegations about methods to show that 'a prudent fiduciary in like circumstances would have acted differently.'"[126]

[123] Martin v. Feilen, 965 F.2d 660, 671 (8th Cir. 1992); *See also* 29 U.S.C. § 1109(a).
[124] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 596 n.7 (8th Cir. 2009) (quoting Hecker v. Deere & Co., 556 F.3d 575, 586 (7th Cir. 2009)).
[125] Matousek v. Midamerican Energy Co., 51 F. 4th 274, 280 (8th Cir. 2022) (quoting Davis v. Washington Univ. in St. Louis, 960 F.3d 478, 484 (8th Cir. 2020)).
[126] Meiners v. Wells Fargo & Co., 898 F.3d 820, 822 (8th Cir. 2018) (citing Pension Benefit Guar. Corp. ex rel. St. Vincent Cath. Med. Ctrs. Retirement Plan v. Morgan-Stanley Inv. Mgmt. Inc., 712 F.3d 705, 720 (2d Cir. 2013); 29 U.S.C. § 1104(a)(1)(B)).

The District Court opinion stated that while Mr. Smith pleaded that there existed non-ESG corollary funds that outperformed the ESG funds, he failed to identify specific comparator funds.[127]

The District Court opinion relied on *Matousek v. Midamerican Energy Co.* to establish that Mr. Smith did not sufficiently allege that the actions of the Hopscotch ESOP fiduciaries caused a loss to the plan.[128] In *Matousek*, the plaintiffs brought a breach of the duty of prudence complaint against defendant company, alleging that its "investment committee . . . failed to 'monitor all plan investments and remove [the] imprudent ones.'"[129] The Court of Appeals dismissed the plaintiffs' claim, writing that its evidence of "the *performance* of three of the five funds to their 'peer groups,'" and comparing two such funds to "alternative investments," as well as comparing the "*expense ratios* of all but one [of these] fund[s] to the mean and median expense ratios in their groups" did not present an adequate benchmark that demonstrated loss.[130]

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[127] *See* Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 7-8 (D. Minn. 2024).
[128] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 7 (D. Minn. 2024) (citing Matousek v. Midamerican Energy Co., 51 F. 4th 274, 281 (8th Cir. 2022)).
[129] Matousek v. Midamerican Energy Co., 51 F. 4th 274, 278, 280 (8th Cir. 2022) (quoting Hughes v. Nw. Univ., 595 U.S. 170, 173 (2022)).
[130] Matousek v. Midamerican Energy Co., 51 F. 4th 274, 278, 281 (8th Cir. 2022) (emphasis in original).

Furthermore, in *Meiners v. Wells Fargo*, the court ruled the ERISA plaintiff failed to demonstrate the alleged comparable fund, Vanguard, performed better than the fiduciary's chosen plan.[131] Unlike the facts in *Meiners*, in this case, Mr. Smith identified multiple similar non-ESG investment options that yielded stronger investment returns for plan participants than those options pursued by Hopscotch, through Red Rock, that focused on ESG related goals.[132]

Contrasting these cases with *Braden*, in which the Court of Appeals found that the plaintiffs' following allegations were sufficient to get that case past the pleading stage—the Plan at issue in this case covered more than one million participants and contained "a very large pool of assets" that included "ten mutual funds."[133] And it was alleged that defendants breached their fiduciary duty because they "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."[134] Besides this context, the case cleared the pleading stage because plaintiffs' presented a successful benchmark— "a combination of a 'market index and other shares of the

[131] Meiners v. Wells Fargo & Co., 898 F.3d 820, 823 (8th Cir. 2018).
[132] Compl. paragraph 21.
[133] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 589, 595 (8th Cir. 2009)).
[134] Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 589, 596 (8th Cir. 2009)) (emphasis added).

same fund.'"[135] A "market index" is defined as "a portfolio of securities that represent a particular section of the stock market" and examples are "the S&P 500, Nasdaq Composite, and Dow Jones."[136]

In this case, like *Braden,* the plaintiff alleged sufficient facts to show loss that should have cleared the pleading stage.[137] The Hopscotch ESOP is large, as evidenced by its approximately 10,000 participants, and the actions of the defendants "result[ed] in millions of dollars in losses to the Plan."[138] Mr. Smith also demonstrated a benchmark and used comparisons that adequately showed the loss—for instance, there was no evidence that the plan was ever changed, despite allegations that *all seven* of the Red Rock options, plus the ESOP, failed to take advantage of "better investment returns and lower costs during the relevant time period."[139] More specifically, with respect to market index, Mr. Smith noted that "the Energy sector of the S&P 500," of which Red Rock refuses to invest in, performed "over 55% more than non-Energy sectors."[140] Also, with respect to "other shares of the same fund" that *Matousek* requires, Mr. Smith pleaded that

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[135] Matousek v. Midamerican Energy Co., 51 F. 4th 274, 280 (8th Cir. 2022) (quoting Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 595-96 (8th Cir. 2009)) (emphasis in original).
[136] *Market Index,* CORP. FIN. INST., corporatefinanceinstitute.com/resources/career-map/sell-side/capital-markets/market-index/ (last visited Jan. 23, 2025).
[137] *See* Compl. paragraph 1-46.
[138] Compl. paragraph 2.
[139] Compl. paragraph 21.
[140] Compl. paragraph 23.

"[e]ach of the ESG investment options offered by the Plan has a similar non-ESG investment option available on the marketplace which had better investment returns and lower costs during the relevant time period."[141]

On this front, Mr. Smith put forth enough evidence to state a claim that both Hopscotch and Red Rock's "actions have caused a loss or other harm to the Plan."[142] Therefore, the District Court's ruling to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Mr. Smith, respectfully requests that this Court reverse the decision of the United States District Court for the District of Minnesota and remand this matter for further proceedings.

Dated: January 24, 2025
Washington, DC

Respectfully submitted,
/s/ Team 6
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[141] Compl. paragraph 21; *see* Matousek v. Midamerican Energy Co., 51 F. 4th 274, 280 (8th Cir. 2022).
[142] Smith v. Hopscotch Corp., Civil Action No. 24-CV-100, slip op. at 7 (D. Minn. 2024).