IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN SMITH,

Plaintiff-Appellant,

v.

HOPSCOTCH COPRORATION and
RED ROCK INVESTMENT CO.,

Defendants-Appellees.

On Appeal from the United States District Court

for the District of Minnesota

BRIEF OF APPELLANT

Team 8

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES....................2

STATEMENT OF JURISDICTION....................5

STATEMENT OF THE ISSUES....................5

STATEMENT OF THE STANDARD OF REVIEW....................5

STATEMENT OF THE CASE....................6

SUMMARY OF ARGUMENT....................8

ARGUMENT....................9

I. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT'S PLEADINGS WERE SUFFICIENT BECAUSE SUPREME COURT PRECEDENT AND THE PLAIN LANGUAGE OF ERISA PROHIBIT A FIDUCIARY'S CONSIDERATION OF NONPECUINARY FACTORS.....................9

A. Red Rock and Hopscotch Both Breached the Duty of Prudence Because Their Decisions to Value nonpecuniary Over Financial Considerations Were Not Within the Range of Reasonable Judgment a Fiduciary May Make......13

1. Red Rock breached the duty of prudence because their actions in following Hopscotch's ESG motivated plan, failure to demand a change in Hopscotch's corporate ESG goals, refusal to invest in any high-value oil and gas stock, and their proxy voting strategies show an unreasonable decision-making process motivated by a political goal rather than a fiduciary goal.....................14

2. Hopscotch breached the duty of prudence by selecting and maintaining Red Rock as Plan Manager because the process behind the choice of Red Rock was not motivated by financial considerations but by political and nonpecuniary motivations.....................17

B. Both Red Rock and Hopscotch Beached Their Duty of Loyalty by Allowing Political and Nonpecuniary Motive to Override Their Primary Duty of Acting for the Exclusive Purpose of Providing Financial Benefits to the Plan.

1. Red Rock breached their duty of loyalty because their investments and proxy votes were motivated by a political and nonpecuniary purpose rather than a financial one and because they refused to use their proxy voting power to force a change in Hopscotch's ESG policies.....................18

2. *Hopscotch directly breached the duty of loyalty by selecting and keeping Red Rock as Plan Manager because their choice was motivated by nonpecuniary considerations.* 22

C. Hopscotch Breached Their Co-Fiduciary Duties Because They Knowingly Participated in, Had Knowledge of, and Facilitated the Breaches of Red Rock's Duties by Failing to Remove Red Rock as Plan Manager. 22

II. THE DISTRICT COURT'S DISMISSAL OF APPELLANT'S COMPLAINT SHOULD BE REVERSED BECAUSE APPELLANT HAS SUFFICIENTLY PLED LOSSES TO THE PLAN AS A RESULT OF APPELLEES' BREACHES. 30

A. Due to the Absence of Pecuniary Benefit Red Rock's ESG Prioritization Gave to the Plan, the District Court Erred by Applying *Matousek* Instead of *Braden*.. 24

B. Alternatively, This Court Should Find That This Case Meets the *Matousek* Standard to Sufficiently Allege a Loss. 27

III. ALLOWING THE DISTRICT COURT'S DECISION TO STAND WILL UNDERMINE THE PURPOSE AND SECURITY OF ERISA BY ALLOWING POLITICAL AGENDAS TO ENDANGER EMPLOYEE RETIREMENT FUNDS. 26

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Supreme Court Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 5, 8, 14

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 8

Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014) 10, 13, 16–18, 20, 27

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) 24, 29

Hughes v. Nw. Univ., 595 U.S. 170 (2022) 14

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 17

Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) 12

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) 10, 29

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 10

Tibble v. Edison Intern., 575 U.S. 523 (2015) 14

Varity Corp. v. Howe, 516 U.S. 489 (1996) 11–13

Circuit Court Cases

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

Brotherston v. Putnam Invs., LLC, 907 F.3d 17 (1st Cir. 2018).. 12, 19–20

Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996) 17, 21

Davis v. Washington Univ. In St. Louis, 960 F.3d 478 (8th Cir. 2020)............................. 14–18, 25

Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982)... 11, 13, 25

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

Mator v. Wesco Distrib., Inc., 102 F.4th 172 (3d Cir. 2024) 15, 17

Matousek v. MidAmerican Energy Co., 51 F.4th 274, 280–82 (8th Cir. 2022).....................*passim*

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

Rozo v. Principal Life Ins. Co., 48 F.4th 589 (8th Cir. 2022) 18

Schaefer v. Arkansas Med. Soc., 853 F.2d 1487 (8th Cir. 1988).. 25

Usenko v. MEMC LLC, 926 F.3d 468 4 (8th Cir. 2019).. 22

Utah v. Su, 109 F.4th 313 (5th Cir. 2024) 12

District Court Cases

In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig., 312 F. Supp. 2d 1165 (D. Minn. 2004) 17, 21

Kling v. Fid. Mgmt. Tr. Co., 323 F. Supp. 2d 132 (D. Mass. 2004) 18, 21

Snyder v. UnitedHealth Grp., Inc., No. CV 21-1049 (JRT/DJF), 2024 WL 1076515 (D. Minn. Mar. 12, 2024)... 18, 19

Spence v. American Airlines, Inc., 4:23-cv-00552-O (N.D. Tex. 2025) 21

White v. Martin, 286 F.Supp.2d 1029 (D. Minn. 2003) 23

Statutes

28 U.S.C. § 1291...5

28 U.S.C. § 1331...5

29 U.S.C. § 1103(c)(1).. 12

29 U.S.C. § 1104(a)(1)... 9, 10

29 U.S.C. § 1104(a)(1)(A) 9, 18

29 U.S.C. § 1104(a)(1)(A)(i) 24

29 U.S.C. § 1104(a)(1)(A)(i)(ii)... 24

29 U.S.C. § 1104(a)(1)(B) 9, 14

29 U.S.C. § 1105(a) 9, 22, 24

29 U.S.C. § 1106(b) 29

29 U.S.C. § 1109(a) 24

29 U.S.C. § 1132 .... 5, 24

29 U.S.C. § 1132(a)(1)(b) 24

Regulations

29 C.F.R. § 2509.75–8, FR–17 .... 17, 21

29 C.F.R. § 2550.404a-1(b)(4) 12

Other Authorities

Employee Retirement Income Security Act of 1974 (“ERISA”) .... *passim*

Fed. R. Civ. P. 12(b)(6) 7, 8

Restatement (Third) of Trusts § 78 (Am. L. Inst. 2007) 11, 12

Soley, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/solely 10

STATEMENT OF JURISDICTION

This case arises under the Employee Retirement Income Security Act of 1974 ("ERISA") and subject-matter jurisdiction existed in the United States District Court for the District of Minnesota pursuant to 29 U.S.C. § 1132 and 28 U.S.C. § 1331. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court correctly conclude that Appellant alleged sufficient facts to state a claim for breach of fiduciary duty against Appellees because of their consideration of nonpecuniary factors in managing the Plan?

   Suggested Answer: Yes.

2. Did the District Court correctly grant Appellees' motion to dismiss Appellant's complaint for failure to sufficiently allege that Appellees' breach caused harm to the Plan?

   Suggested Answer: No.

STATEMENT OF THE STANDARD OF REVIEW

Appellate review of motions to dismiss for failure to state a claim is de novo. *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009). To survive a 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.'" *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A complaint is facially plausible if its "factual content. . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Braden*, at 594. The complaint should be assessed "as a whole, not parsed piece by piece. . ." *Id.*

STATEMENT OF THE CASE

John Smith ("Appellant") is a covered participant under the Hopscotch Corporation ("Hopscotch") 401(k) Plan ("the Plan"), an ERISA-governed and Hopscotch-sponsored employee defined contribution pension plan. R. at 2. Hopscotch is a social media and technology corporation incorporated in Minnesota and headquartered in Minneapolis. *Id.* Hopscotch's consumer base primarily consists of teenagers and pre-teens. R. at 3. The Plan investment manager is Red Rock Investment Co. ("Red Rock") (Hopscotch and Red Rock referred to collectively as "Appellees"), a large investment management firm with clients around the globe. R. at 2. Accordingly, Red Rock is a Plan fiduciary. *Id.*

A Plan participant may invest up to 10% of their salary into the Plan, with Hopscotch automatically contributing 5% of a participant's salary and matching participant contributions up to 7% of the participant's salary. R. at 2–3. The Plan has eight investment options, one being an Employee Stock Ownership Program ("ESOP"). R. at 3. Hopscotch's contributions are automatically invested in the ESOP until a participant vests into the Plan after five years; after the participant has vested, they may reallocate Hopscotch's contributions into any of the other seven investment options. *Id*. The ESOP constitutes approximately 40% of the Plan's investments. R. at 4. Hopscotch manages the ESOP, leaving investment management of the other seven options in the hands of Red Rock. R. at 3.

Beginning in 2018, Hopscotch's Board of Directors elected to pursue environmental, social, and governance ("ESG") goals regarding the company's investment strategies and options, as well as the company's operations. *Id.* In a 2019 interview, Hopscotch CEO Bobby Whistler indicated that this decision was made to strengthen the company's grip on its young consumer base. R. at 3–4. As part of this strategy, Hopscotch chose Red Rock as its Plan investment manager, owing to Red Rock's noteworthy commitment to ESG and diversity, equity, and inclusion ("DEI") policies. R. at 3. For example, in recent years, Red Rock has dedicated itself to environmental activism, boycotting traditional energy investments and using its proxy voting abilities to pressure companies that do not comport with Red Rock's political values. R. at 4.

Despite Hopscotch's assertions that pivoting toward ESG and DEI policies would strengthen its financial health, the opposite has occurred. Hopscotch's stock, which comprises approximately 40% of Plan investments, has grown appreciably slower than its social media competitors, Tok and Boom. R. at 4. Similarly, Red Rock-managed funds, which are exclusively managed in accordance with Red Rock's ESG and DEI political values, have underperformed and experienced less growth compared to their non-ESG comparators. *Id*. Furthermore, by boycotting traditional energy investments, Red Rock has neglected appreciable investment opportunities that demonstrate substantial growth compared to non-energy investments. R. at 5. Academic literature corroborated these observations, such as a paper from University of Chicago's Journal of Finance finding that ESG funds underperform their non-ESG counterparts. *Id.* In summation, the political activism of both Hopscotch and Red Rock harmed the Plan and reduced Plan returns for approximately 10,000 Plan participants like Appellant. R. at 1–2, 4–5.

Appellant brought a class-action lawsuit against Appellees in the United States District Court for the District of Minnesota on February 4, 2024, alleging that Appellees breached their fiduciary duties of loyalty and prudence in violation of ERISA. R. at 5–10. In response, Appellees filed a motion to dismiss the complaint pursuant to the Federal Rules of Civil Procedure. R. at 11; Fed. R. Civ. P. 12(b)(6). The District Court granted the motion, finding that although Appellant pled enough facts to plausibly allege Appellees' breach of fiduciary duty, Appellant nevertheless failed to properly allege loss to the Plan because of such breach and dismissed the complaint with prejudice. R. at 11, 15–18. This timely appeal now follows.

SUMMARY OF ARGUMENT

The decision of the District Court should be affirmed in part and reversed in part. To successfully advance a claim under ERISA, a plaintiff must demonstrate a prima facie case against the defendant by demonstrating (1) breach of fiduciary duty and (2) the breach caused loss to the plan. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Once a prima facie case has been established, the burden of persuasion shifts to the defendant. *Id.* The District Court correctly concluded that Appellant alleged sufficient facts suggesting that Appellees breached their fiduciary duties of loyalty and prudence. However, it then erred by finding that Appellant failed to allege losses to the Plan and by granting Appellees' motion to dismiss Appellant's complaint pursuant to Fed. R. Civ. P. 12(b)(6).

Under Rule 12(b)(6), a complaint "does not need detailed factual allegations"; rather, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations, if taken as true, must create "facial plausibility. . . that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Appellant has sufficiently alleged that (1) Appellees breached their duties of prudence and loyalty by considering nonpecuniary factors in their Plan investment strategies, and (2) Appellees' breaches caused appreciable losses to the Plan by categorically excluding investment opportunities that, but for Appellees' breaches, would have provided stronger returns to Plan participants.

ERISA imposes the twin duties of loyalty and prudence on fiduciaries. The duty of loyalty requires fiduciaries to "discharge [their] 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), 1104(a)(1)(A). The duty of prudence mandates fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). Appellant has sufficiently alleged that Appellees' consideration of ESG and DEI, nonpecuniary factors, represents a breach of both duties by prioritizing other considerations above the benefit of Plan participants. Having sufficiently alleged Red Rock's breach of their fiduciary duties, Appellant has also sufficiently alleged Hopscotch's liability as co-fiduciary under 29 U.S.C. § 1105(a). Lastly, Appellant has sufficiently alleged that Appellees' political activism caused them to ignore lucrative investment opportunities that caused comparative losses to the Plan.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT'S PLEADINGS WERE SUFFICIENT BECAUSE SUPREME COURT PRECEDENT AND THE PLAIN LANGUAGE OF ERISA PROHIBIT A FIDUCIARY'S CONSIDERATION OF NONPECUINARY FACTORS.

The plain language and purpose of ERISA, as well as the common law of trusts, prohibits a fiduciary from considering nonpecuniary factors when making an investment. Both the duty of prudence and loyalty require that the fiduciary act "[s]olely in the interest of the participants and beneficiaries." 29 U.S.C. §§ 1104(a)(1). "Solely" means "to the exclusion of all else," or "without another." *Soley*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/solely (last visited Jan. 21, 2025). Congress intended ERISA to protect retirement plans, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987), and to prevent "the great personal tragedy" suffered by those whose retirements were jeopardized by the instability of poorly managed plans. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374–75 (1980).

The United States Supreme Court assumed that Congress created ERISA's fiduciary duties to protect the financial benefits of plan participants to the exclusion of all other considerations. This characterization comes from the Court's decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014). In that case, the employer included an ESOP option in their plan's menu. *Id.* at 412. Plan beneficiaries challenged the inclusion of the ESOP option when the value of the company stock plunged following a financial crisis. *Id.* at 414. The employer tried to graft a rule onto ERISA that would subject ESOP options to reduced scrutiny under the fiduciary duties because of its nonpecuniary purpose. *Id.* at 418. A typical plan, they said, looks to maximize retirement savings for participants while avoiding excessive risk. *Id.* at 420. On the other hand, ESOP options had the added goal of looking to promote employee ownership of employer stock. *Id.*

The Court rejected the employer's argument as changing the nature of ERISA's fiduciary duties to depend on a nonpecuniary goal. *Id.* at 420. The Court reasoned that when read in context, the fiduciaries' duties' "reference 'to an enterprise of a like character and with like aims' means an enterprise with what the. . . preceding provision calls 'the exclusive purpose' to be pursued by all ERISA fiduciaries: 'providing benefits to participants and their beneficiaries' while 'defraying reasonable expenses of administering the plan.'" *Id.* at 420. Thus, considering the language of both fiduciary duties, the Court said that the term "benefits" in the duty of loyalty must be understood as. . . financial benefits." *Id.* at 421. Further, that "the term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock." *Id*.

Earlier decisions generally recognizing that fiduciaries must make their investment decisions with the sole purpose of providing pecuniary benefits to the plan's participants and beneficiaries. For example, in *Donovan v. Bierwirth*, the Second Circuit held that trustees may make investment decisions benefitting plan sponsors only when that benefit is incidental to the primary concern of providing benefits to plan participants and beneficiaries. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982). In *Donovan*, members of an employer's board also served as plan trustees. *Id.* at 266–67. These trustees voted to buy up more company stock even though its value was inflated because of a pending hostile takeover attempt. *Id.* at 267–68. This action created a lose-lose situation for the beneficiaries. *Id*. If the trustees prevented the takeover, then the plan would lose value as stock values declined. *Id.* at 275. If the takeover succeeded, then the plan would be left as a minority stockholder. *Id.* Rather than acting "with a single eye to the interest of the participants and beneficiaries," the trustees failed to live up to "the high standard of duty placed upon them." *Id.* at 271, 272. Rather, the trustees should have stepped aside when making an investment decision that involved a conflict of interest between their duties as corporate board members and plan trustees. *Id.* at 272.

The fact that only a fiduciary may only consider financial benefits also finds support in the common law of trusts. ERISA's fiduciary duties "draw much of their content from the common law of trust." *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996). Courts frequently consider the law of trusts when interpreting an ERISA's fiduciary duties. *See, e.g.*, *Varity Corp*, 516 U.S. at 496; *Brotherston v. Putnam Invs.*, LLC, 907 F.3d 17, 32 (1st Cir. 2018). The Restatement of Trusts notes that "a trustee has a duty to administer the trust solely in the interest of the beneficiaries." Restatement (Third) of Trusts § 78 (Am. L. Inst. 2007). As Comment f explains, "[i]n administering a trust the trustee has a duty to the beneficiaries not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust." *Id.* at cmt. f. Paramount is the mandate that a trustee should not be influenced by "motives" other than the accomplishment of the purpose of the trust. In the ERISA context, "the purpose of the trust" is "the exclusive purpose of providing benefits to participants in the plan and their beneficiaries." 29 U.S.C. § 1103(c)(1).

Under then-President Biden, the DOL promulgated a rule allowing ERISA fiduciaries to consider "the economic effects of climate change" but only when that investment option would "equally serve the financial interest of the plan." 29 C.F.R. § 2550.404a-1(b)(4); *Utah*, 109 F.4th 313, 318 (5th Cir. 2024). The validity of this rule is already questionable. In *Utah v. Su*, the Fifth Circuit remanded a case challenging this "tiebreaker" rule to consider its validity under the rule announced in *Loper Bright Enterprise v. Raimondo*, which prohibits a court from deferring to an agency's interpretation of the law. *Utah*, 109 F.4th at 313; *see also generally Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Similarly, while a note to Comment f in the Restatement of Trusts does observe disagreement about the duty of loyalty for "social investing" in tiebreaker-like cases. Restatement (Third) of Trusts § 78 cmt. f (Am. L. Inst. 2007), such discourse does not save Red Rock or Hopscotch. As the Supreme Court noted, "ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." *Varity Corp.,* 516 U.S. at

497. This is why this Court has referred to ERISA's fiduciary duties as "the highest known to the law." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598, 602 (8th Cir. 2009). Allowing any "tiebreaker" provision would diminish this duty and allow a fiduciary's political values to steer funds disloyally.

Both *Dudenhoeffer* and *Donovan* represent the Court's prohibition on making investment decisions unrelated to the economic health of funds governed by ERISA. *Dudenhoeffer* affirmed the single-minded obligation of ERISA plan fiduciaries: the loyal and prudent investment of plan funds for the sole benefit of participants and their beneficiaries. Here, Red Rock and Hopscotch allowed their political values to unduly influence their actions. In *Donovan*, the court held that a plan sponsor could only ever be incidentally benefited by plan investments. However, in that instance, the plan trustees allowed their business interest eclipse their responsibilities as ERISA fiduciaries. Similarly, both Hopscotch and Red Rock allowed their political activism to sway the management of the fund, resulting in their intentional exclusion of investment opportunities that would have greatly benefitted the Plan, akin to the situation in *Donovan*. Therefore, both ERISA's plain language and court precedent maintain that fiduciaries who make nonpecuniary considerations breach their fiduciary obligations to act in the sole interest of plan participants and their beneficiaries.

A. Red Rock and Hopscotch Both Breached the Duty of Prudence Because Their Decisions to Value Nonpecuniary Causes Over Financial Considerations Were Not Within the Range of Reasonable Judgment a Fiduciary May Make.

Rather than focusing on the financial stability of the retirement fund of over 10,000 participants and beneficiaries, Red Rock and Hopscotch imprudently focused on managing the Plan following their own political agenda. Under the duty of prudence, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” 29 U.S.C. § 1104(a)(1)(B). While fiduciaries aren’t obligated to pick "the best performing fund" *Davis v. Washington Univ. In St. Louis*, 960 F.3d 478, 486 (8th Cir. 2020), they must select initial investment options with care. *Forman v. TriHealth, Inc.*, 40 F.4th 443, 448 (6th Cir. 2022) (citing *Tibble v. Edison Int'l*, 575 U.S. 523, 528-29). At times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on their experience and expertise. *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). The prudent man standard is an objective standard which focuses on the process the fiduciary takes rather than the results of those decisions. *Davis* 960 F.3d at 482. At the pleading stage, a complaint must allege enough facts to allow the district court to reasonably infer that the process was flawed. *Id.* at 482–83; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint need not demonstrate how the plan was directed or managed, nor does a plaintiff need to rule out every potentially lawful explanation of a fiduciary’s conduct. *Davis*, 960 F.3d at 283; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009).

1. *Red Rock breached the duty of prudence because their actions in following Hopscotch’s ESG motivated plan, failure to demand a change in Hopscotch’s corporate ESG goals, refusal to invest in any high-value oil and gas stock, and their proxy voting strategies show an unreasonable decision-making process motivated by a political goal rather than a fiduciary goal.*

Red Rock’s ESG activism compromised their judgment, resulting in the firm making objectively poor investment decisions for the Plan. This method of decision-making has been rejected by this Court and its sister courts.

For example, in *Davis v. Washington Univ. In St. Louis*, this Court held that a complaint that showed a “failure of effort or competence” was sufficiently pled to show a breach of the duty of prudence. *Davis*, 960 F.3d at 483. Several plaintiffs challenged the inclusion of their plan's investment management fees as imprudent. *Id.* The plan included two types of share classes, one "institutional" and one "retail." *Id.* at 483. Larger plans could access institutional shares with lower fees than retail shares. *Id*. The plaintiffs claimed that the plan fiduciary's process was flawed because they either did not negotiate aggressively enough to get the institutional shares, or they failed to consider the savings conferred by access to institutional shares. *Id.* This Court reasoned that this was enough to plausibly plead either a failure of effort or competence. *Id.* The plan's fiduciary argued that they included the retail shares to enable them to use bundle fees. *Id.* They also argued that the plan was shifting into offering more institutional shares. *Id.* This Court rejected these arguments, reasoning that when considering a motion to dismiss, the court is required "to draw every reasonable inference in favor of the plaintiff." *Id.* at 483–84. Concluding that mismanagement was a plausible inference, this Court found the complaint to be sufficient. *Id*. at 483.

Courts give deference only to reasonable judgments a fiduciary makes when faced with a difficult tradeoff. In *Mator v. Wesco Distribution, Inc.*, the Third Circuit held that while courts give some deference to the range of reasonable judgments may make, plaintiffs don't need to "rule out every possible lawful explanation for the conduct he challenges." *Mator v. Wesco Distrib., Inc*., 102 F.4th 172, 184 (3d Cir. 2024) (quoting *Braden* 588 F.3d at 597). In *Mator*, the plaintiff alleged that the recordkeeping fees were much higher than what other similar plans paid. *Id.* at 185. The defendant argued the overall recordkeeping fees paid by their fund fell overall during the relevant period and that the plan offered rebates of some fees to participants. *Id.* at 189. While the Court gave "due regard to reasonable judgments made by a fiduciary," the alternative explanation offered by the defendants was not patently more reasonable or better supported than that of the plaintiffs. *Id*.

Furthermore, improvidently drafted plan documents do not diminish plan fiduciaries' duty to act prudently. In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court held "that the duty of prudence trumps the instructions of a plan document. . . if financial goals demand the contrary." *Dudenhoeffer*, 573 U.S. at 421. In *Dudenhoeffer*, the employer's plan required that all matching contributions were to be invested in their ESOP option. *Id.* at 412. Following a fiscal crisis, several employees challenged the entirety of the ESOP option. *Id.* at 413. The fiduciary argued that "the duty of prudence is defined by the aims of the particular plan set out in plan documents." *Id.* at 420. The fiduciary also argued that the plan's purpose was to encourage employee ownership of employer stock, which should have been valued over financial considerations. *Id.* The Court sensibly rejected this argument, as it would effectively allow a plan to simply write away the fiduciary duties in pursuit of a "nonpecuniary goal." *Id.* As Justice Breyer stated, "we cannot accept the claim. . . that the content of ERISA's duty of prudence varies depending upon the specific nonpecuniary goal set out in an ERISA plan." *Id.*

Appellant's complaint has facts alleging that Red Rock's investing strategies were imprudent. A prudent fiduciary would have at least considered investing in traditional energy stocks. Red Rock did not do this. Similarly, in *Davis*, the plaintiff presented facts of either a failure of effort or incompetence in their failure to negotiate for better prices. More similarities can be found in *Dudenhoeffer*, where nonpecuniary goals motivated investment rather than financial goals. Red Rock followed the defective Plan provision requiring that all matching contributions be initially invested in Hopscotch's ESOP fund. This is akin to *Dudenhoeffer*, where the employer's plan required investment in their ESOP fund even when financial goals demanded the contrary. Like in *Dudenhoefer*, this Court should not permit Appellees to hide behind the language of a defective Plan. Furthermore, Appellant's complaint bears factual pleadings like those previously approved by courts. For example, Red Rock joined Climate Action 100+ and began exercising their proxy voting rights to support activist board members. Red Rock's proxy voting patterns weren't motivated by financial considerations, but rather by a political agenda. Red Rock refused to exercise their proxy voting powers to encourage Hopscotch to abandon their commitment to ESG, despite its knowledge that 40% of the Plan's investments comprised of Hopscotch's stock, which experienced slow growth due to Hopscotch's actions. As in *Dudenhoeffer*, Red Rock was impermissibly influenced by nonpecuniary factors.

The appellees may argue that their investments were reasonable because it attracted young users to Hopscotch, whose userbase skews young, and forcing Hopscotch to abandon ESG may have driven away some ESG-minded users. Even assuming such an argument's plausibility, a motion to dismiss requires that all reasonable inferences must be drawn in the nonmoving party's favor, i.e., Appellant's. *See, e.g.*, *Davis v. Washington Univ. In St. Louis*, 960 F.3d 478, 483–84 (8th Cir. 2020). This Court should follow *Mator*, where the alternative explanation of the defendant's conduct was not patently more reasonable than that of the plaintiffs.

2. *Hopscotch breached the duty of prudence by selecting and maintaining Red Rock as Plan Manager because the process behind the choice of Red Rock was not motivated by financial considerations but by political and nonpecuniary motivations*.

While employee benefit plan amendments are not subject to review, the management or administration of a plan are. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). The power to appoint fiduciaries is itself a fiduciary function. *Coyne & Delany Co. v. Selman*, 98 F.3d 1457, 1465 (4th Cir. 1996). Implicit in the duties given to persons empowered to appoint and remove plan fiduciaries is the duty to monitor. *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1176 (D. Minn. 2004); *Kling v. Fid. Mgmt. Tr. Co.*, 323 F. Supp. 2d 132, 142 (D. Mass. 2004); 29 C.F.R. § 2509.75–8, FR–17.

The District Court should have drawn all reasonable inferences in Appellant's favor. Appellant has sufficiently pled enough facts to reasonably suggest that Hopscotch appointed Red Rock solely because of their shared political agendas. There was no difficult financial trade-off, unlike in *Davis*, where the plan fiduciary at least had a financial argument to explain their conduct. Hopscotch never removed Red Rock from their position as plan fiduciary even as the Plan lost out on lucrative investment opportunities. Thus, the complaint shows sufficient facts that Hopscotch breached their duty of prudence by selecting and keeping red rock as plan manager.

B. Both Red Rock and Hopscotch Beached Their Duty of Loyalty by Allowing Political and Nonpecuniary Motive to Override Their Primary Duty of Acting for the Exclusive Purpose of Providing Financial Benefits to the Plan.

The duty of loyalty requires a fiduciary to perform their duties, "for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). These benefits are "financial benefits." *Dudenhoeffer*, 573 U.S. at 421 (2014). Duty of loyalty claims involve a two-step framework. First, the court assesses the difference of interests between fiduciary and beneficiary. *Rozo v. Principal Life Ins. Co.*, 48 F.4th 589, 596 (8th Cir. 2022). If these interests conflict, the court then scrutinizes the fiduciaries' actions more closely and ascertains their state of mind when acting. *Id.* at 597. The duty of loyalty "is a subjective standard; what matters is why the defendant acted as they did." *Snyder v. UnitedHealth Grp., Inc.*, No. CV 21-1049 (JRT/DJF), 2024 WL 1076515, at *8 (D. Minn. Mar. 12, 2024). A fiduciary's motive is a question of fact. *Id.* at 7.

1. *Red Rock breached their duty of loyalty because their investments and proxy votes were motivated by a political and nonpecuniary purpose rather than a financial one and because they refused to use their proxy voting power to force a change in Hopscotch's ESG policies.*

Red Rock did not act "for the exclusive purpose" of providing "financial benefits" to the Plan they managed because they allowed an improper political motivation to dominate their fiduciary activities.

In *Snyder v. UnitedHealth Grp.*, the District Court of Minnesota found that there was enough evidence to find the employer allowed their business motives to bleed into their fiduciary obligations. *Snyder*, at *8. In *Snyder*, an employer selected the worst performing fund out of a list of funds to be the default investment option for the plan. *Id.* at *3. The employer wished to keep a contract with the provider that was coming up for renewal. *Id.* at *8. During the selection process, the CFO of the employer, who sat as trustee for the plan, consulted a ledger showing how much business the employer did with each investment fund candidate during the selection process. *Id.* at *4. This same CFO was disheartened when the provider did not keep their lucrative contract, saying in an email he, "stepped in front of a freight train to save their business from leaving." *Id.* at *6. The court reasoned that the existing business relationship showed a clear potential conflict of interest, and so only examined the employer's motive when selecting the providers fund. *Id.* at *8. The fact the poorest performing fund was selected showed circumstantial evidence of improper motive. *Id.* The CFO consulting business ledgers during the selection process and his email conversation were direct evidence of an improper motive. *Id.*

Additionally, courts have stated that ERISA fiduciaries lacking "unswerving allegiance" to a plan's financial wellbeing have improper motives. For example, in *Brotherston v. Putnam Invs*, the First Circuit held that the duty of loyalty is breached when the fiduciary's "operative motive was to further its own interests." *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 40 (1st

Cir. 2018). There, the plaintiff claimed the fiduciary acted disloyally because they kept their underperforming proprietary funds in the plan by default, buried evidence those funds were evaluated poorly, and never considered alternative investment options. *Id.* Regardless of these facts, the plaintiff did not present evidence of the defendant's motivations. *Id.* The court found the plaintiff's claims insufficient, reasoning that loyalty is a state of mind of "unswerving allegiance," and therefore, pointing to mere self-dealing without evidence of improper motivation is insufficient. *Id.*

Red Rock's ESG activism improperly taints its motivations and puts it in conflict with its fiduciary duties and Plan participant interests, jeopardizing the latter with Red Rock and Hopscotch's political campaign. Appellant has shown Red Rock's improper motive by referencing Red Rock's proxy voting record and statements against the traditional energy industry. Combined with Red Rock's total boycott of all traditional energy companies and refusal to pressure Hopscotch to abandon their self-destructive ESG goals, Appellant has given enough facts to give rise to a reasonable inference of Red Rock's breach. This is like *Snyder*, where the explicit statements of the CFO showed direct evidence of improper motive. Furthermore, this case is distinguishable from the First Circuit's decision in *Brotherston*. The plaintiff in *Brotherston* proffered facts showing improper behavior and failed to allege that the improper behavior was paired with improper motivation. Here, Red Rock's ESG activism demonstrates its prioritization of nonpecuniary interests. The Supreme Court prohibited this type of conduct in *Dudenhoeffer*, where the Court held that the duty of loyalty requires a focus on "financial" rather than "nonpecuniary" considerations. Allowing political motivations to steer investments risks the retirement stability provided by ERISA and undermines the importance of fiduciary duties.

2. *Hopscotch breached the duty of loyalty by selecting and keeping Red Rock as Plan Manager because their choice was motivated by nonpecuniary considerations.*

The power to appoint fiduciaries is itself a fiduciary function. *Coyne & Delany Co.*, 98 F.3d at 1465. Implicit in the duties given to persons empowered to appoint and remove plan fiduciaries in the duty to monitor. *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 312 F. Supp. 2d 1165, 1176 (D. Minn. 2004); *Kling*, 323 F. Supp. 2d at 142; 29 C.F.R. § 2509.75–8, FR–17. Hopscotch prioritized its shared political agenda with Red Rock, improperly appointed Red Rock as plan manager, and failed to monitor Red Rock's actions.

Recently, the District Court for the Northern District of Texas assessed a case similar to Appellant's, holding that a fiduciary breached their duty by maintaining a plan manager with known ESG goals. In *Spence v. American Airlines, Inc*., a pilot sued his employer and plan manager for breaching their fiduciary duties. *Spence v. American Airlines*, Inc., 4:23-cv-00552-O, at 12 (N.D. Tex. 2025). The Employer had set both ESG and DEI goals for itself. *Id.* at 37–38. The plan manager similarly made a commitment to ESG activism. *Id.* at 29. The plan manager had joined a climate activist group and published an open letter outlining its newly ESG-motivated investment strategies. *Id.* at 31. The employer failed to oppose the plan manger's public support of ESG. *Id.* at 65–66. One officer of the employer noted their support for the plan manger's actions, stating that the employer and plan manager shared values concerning "climate change and sustainability." *Id.* at 60. The court reasoned that the employer and plan manager breached their fiduciary duties by allowing their corporate commitments to improperly taint their stewardship of the plan. *Id.* at 68.

Hopscotch selected Redrock because of their ESG and DEI commitments, akin to *Spence*, where the employer knew of the plan manager's impermissible ESG considerations but failed to act. More egregiously than the situation in *Spence*, Hopscotch chose Red Rock as Plan Manager for nonpecuniary reasons, eschewing any consideration of potential fiscal impact on the Plan. This is like the direct evidence showing improper motivation in *Snyder*, where the statements of the CFO's disappointment their lucrative conduct was not retained showed direct evidence of improper motive. By selecting and maintaining Red Rock as Plan Manager, Hopscotch directly breached their duty to act with a single eye towards the financial benefits of the Plan. This Court should align with the reasoning and holding in *Spence*.

C. Hopscotch Breached Their Co-Fiduciary Duties Because They Knowingly Participated in, Had Knowledge of, and Facilitated the Breaches of Red Rock's Duties by Failing to Remove Red Rock as Plan Manager.

Appellant seeks to hold Hopscotch accountable for Red Rock's breaches and has alleged sufficient facts to support his claim. Under ERISA, co-fiduciaries are liable in three circumstances: "(1) if [they] participate[] knowingly in, or knowingly undertake[] to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; (2) if by reason of [their] failure to comply with [the fiduciary duties] in the administration of [their] specific responsibilities which give rise to [their] status as fiduciary, [they] ha[ve] enabled such other fiduciary to commit a breach; or (3) if [they] ha[ve] knowledge of a breach by such other fiduciary, unless [they] make reasonable efforts under the circumstances to remedy the breach." 29 U.S.C.A. § 1105(a). Plaintiffs need only plead two elements to establish a claim of co-fiduciary breach. Firstly, that the other fiduciary breached a fiduciary duty, i.e., "an underlying breach." *Usenko v. MEMC LLC*, 926 F.3d 468, 474 n. 4 (8th Cir. 2019) ("[Plaintiff's] claim that the defendants also breached their co-fiduciary obligations by knowingly participating in each other's purported breaches cannot 'survive without a sufficiently pled theory of an underlying breach.'") Secondly, that that the co-fiduciary either participated in or knew of those breaches but did nothing to remedy them. *See, e.g.*, *White v. Martin*, 286 F.Supp.2d 1029, 1042 (D. Minn. 2003).

District Courts within this Circuit have held that failure to prevent or remedy breach represents an actionable breach of co-fiduciary duties. For example, in *White v. Martin*, the District Court for the District of Minnesota held that a plan fiduciary was liable for her failure to prevent the breaches of her co-fiduciary. *Martin*, 286 F.Supp.2d at 1042–44. In *White*, several employees took loans against their vested Plan benefits, which would be repaid by automatically deducting repayments from employee salaries. *Id.* at 1033–34. The plan fiduciary discovered that her co-fiduciary had not delivered the payment to the creditor. *Id.* at 1034. Employee-plaintiffs sued, alleging that the fiduciary and co-fiduciary breached their duties. *Id.* at 1036. Default judgment was entered against the co-fiduciary, leaving the plan fiduciary as the sole defendant. *Id.* at 1037. The District Court found her liable for the breaches of the co-fiduciary, as she had repeatedly failed to prevent his unlawful conduct, thereby enabling it. *Id.* at 1043–44. However, District Court did not hold her liable for the co-fiduciary's failure to tender payment to the plan creditor, as she had appropriately remedied the harm to the plan. *Id.* at 1043.

Here, Hopscotch knowingly selected Red Rock because of their shared political agenda. Hopscotch had reason to know that Red Rock's traditional energy boycott and ESG activism would harm the Plan. As in *White*, Appellant has pled enough facts to demonstrate Hopscotch's liability for enabling Red Rock's breach. Finally, Hopscotch had actual knowledge of Red Rock's breach because they specifically selected them to be Plan Manager. Hopscotch made no reasonable effort to prevent Red Rock's breach, nor did Hopscotch attempt to remedy the breach by selecting a new Plan Manager. This is distinguishable from *White*, where the plan fiduciary, in at least one respect, remedied the breach of her co-fiduciary. In summation, Hopscotch (1) knowingly participated in Red Rock's breach by embarking on a joint, self-destructive campaign of ESG activism; (2) failed to adequately monitor Red Rock's underperforming investment decisions; and (3) completely disregarded their remedial duty by failing to even attempt to replace Red Rock as Plan Manager. Accordingly, Hopscotch should be found liable as a co-fiduciary under all three circumstances enumerated in 29 U.S.C. § 1105(a).

II. THE DISTRICT COURT DISMISSAL'S OF APPELLANT'S COMPLAINT SHOULD BE REVERSED BECAUSE APPELLANT HAS SUFFICIENTLY PLED LOSSES TO THE PLAN AS A RESULT OF APPELLEES' BREACHES.

A. Due to the Absence of Pecuniary Benefit Red Rock's ESG Prioritization Gave to the Plan, the District Court Erred by Applying *Matousek* Instead of *Braden*.

The district court erred in ruling that the loss alleged in Appellant's complaint was not sufficient and granting the defense's motion to dismiss. Red Rock's failure to consider non-ESG stocks was based on their political ambitions. Accordingly, the meaningful comparator is not one-to-one stock choices, but rather their choice to purposefully invest into stocks in a sector that underperformed their non-ESG counterparts without a proper investigation into what was best for the plan.

The plain language of ERISA states "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. §§ 1104(a)(1)(A)(i)–(ii). When a breach is shown, ERISA provides that the fiduciary must cover the loss that resulted from their breach. 29 U.S.C. § 1109(a). ERISA allows beneficiaries to sue fiduciaries to recover any benefits they are owed. 29 U.S.C. § 1132(a)(1)(b). The Supreme Court held that, when dealing with ERISA, the strict language of the statute controls. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Furthermore, when the language of ERISA points to a conclusion, that conclusion should be accepted. *Id.*

In the pleadings stage for ERISA violations, this court has found that an inference that supports a claim of a flawed process is acceptable. *Davis,* 960 F.3d at 482. To show a claim for an ERISA violation, the allegation must show that the plan is covered under ERISA, that there was a breach of fiduciary duty, and that there is a loss from that breach. *Braden*, 588 F.3d at 594-95. The plaintiffs often lack clear information about the methodologies of the fiduciary, so plaintiffs must use meaningful comparators to show that a reasonably prudent fiduciary would not have done the same. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 822 (8th Cir. 2018). This court adopted the Second Circuit's interpretation of ERISA under the *Donovan* decision, which required a fiduciary to investigate all options for the plan both impartially and carefully. *Schaefer v. Arkansas Med. Soc.*, 853 F.2d 1487, 1492 (8th Cir. 1988).

In *Matousek v. MidAmerican Energy Co.*, this Court ruled that the plaintiffs lacked a meaningful comparison between the allegedly overpriced fees that the retirement plan was paying compared to similarly sized plans. *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 280–82 (8th Cir. 2022). The issue was that the plaintiffs compared plans of every size, noting that the average plan did not pay the amount of administrative fees that their retirement plan was facing. *Id.* at 281. This court found that it was not meaningful to compare the average plan, as the plaintiff's plan was well outside the average. *Id.* at 281–82. Ultimately, this Court affirmed the dismissal of the complaint because its proffered comparators were overly broad. *Id.* at 281. However, *Matousek* itself relied on *Meiners v. Wells Fargo & Co.* Like in *Matousek*, *Meiners* affirmed dismissal of a complaint that identified only a single comparator fund. *Id.* at 823. Both *Matousek* and *Meiners* dealt with issues of sample size: one overly broad, the other too narrow.

The instant matter is much more comparable to *Braden. Braden* affirmed the pleadings of a complaint alleging that the Plan's investments underperformed market indices. *Braden*, 588

F.3d at 603. *Braden* addressed the defendant's restricted number of investment options that had high administrative costs and poor performance compared to similar plans. *Id.* at 595–96. Significantly, this Court stated that the combination of high administrative costs combined with underperformance relative to cheaper plans was enough to infer mismanagement and therefore sufficient to allege loss. *Id.* at 596. Furthermore, while the Court noted that other plausible, lawful explanations for the defendant's limited menu of investment options, rebutting those explanations was not the plaintiff's responsibility. *Id.*

Braden, not *Matousek*, should have controlled Appellant's case. The loss alleged in *Matousek* concerned the price of the administrative fees; however, as this Court noted, those administrative fees were accompanied by beneficial services—some tangible, pecuniary benefit to plan participants. In the instant matter, Red Rock provided no tangible, pecuniary benefit to the Plan by categorically excluding non-ESG investment opportunities. Red Rock caused the Plan to suffer losses by neglecting to even consider non-ESG funds that, as Appellant alleged, would have resulted in stronger Plan growth and increased returns to Plan participants. *Braden*'s standard is more applicable because it addressed comparisons between options that could have been chosen but were neglected. In *Braden*, the plaintiff contended that, due to the size of the defendant's plan, they could have bargained for lower prices and better options, which they had not done. Similarly, in Appellant's case, the complaint alleges that Red Rock's failure to consider non-ESG investment funds caused the Plan to lose lucrative investment opportunities. Because Red Rock utterly failed to consider non-ESG funds, such funds are appropriate comparators.

The District Court appropriately found that Appellant alleged sufficient facts to plead Red Rock's breach of fiduciary duty. This breach caused unreasonable decisions to be made regarding the Plan's investments, which led to less profit than a reasonably prudent fiduciary likely would have been able to achieve in Red Rock's place. The District Court admits in their ruling that, under *Dudenhoeffer*, Red Rock's actions would likely result in more harm than good when investing for the Plan, therein a harm and loss is alleged through the meaningful comparison between Red Rock's ESG-linked investments and the non-ESG opportunities it neglected to even consider.

B. Alternatively, This Court Should Find That This Case Meets the *Matousek* Standard to Sufficiently Allege a Loss.

Should this Court find *Matousek* controlling, Appellant's complaint nevertheless met the standard established there. *Matousek* addressed allegations of a breach from the result of overspending on administrative fees, faulting the plaintiffs for not identifying reasonable comparator plans to form a "meaningful benchmark." *Matousek*, 51 F.4th at 279. However, Appellant's complaint identified comparable investment areas and comparator funds, as well as an academic paper, indicating that Red Rock's ESG-motivated investment strategies caused comparative losses to the Plan.

Appellant has provided a bounty of information demonstrating Red Rock's underperformance. Appellant has alleged that the Plan's ESG-oriented investments underperformed their non-ESG comparators by as much as 55%. Furthermore, Red Rock's ESG and DEI-motivated proxy voting has had a demonstrably negative impact on its managed investments. A similar negative impact has been observed on Hopscotch's stock values, and it bears repeating that 40 percent of the Plan's investments are within Hopscotch's stocks. Furthermore, Appellant has proffered an academic analysis indicating that ESG-focused funds underperform their non-ESG counterparts. While it is true that Appellant has not identified any specific fund, that is not the standard; instead, this Court must assess the "totality of the specific allegations." *Id.* at 281. Under the totality of the circumstances, Appellant has sufficiently alleged that Red Rock, because of its politically motivated activism, chose investment opportunities that underperformed alternative options.

Appellant satisfies *Matousek* in multiple ways. Firstly, this Court should consider factual allegations presented by the plaintiff. In *Matousek*, the plaintiff alleges a breach of fiduciary duty due to the high costs of the administrative fees. *Matousek*, 51 F.4th at 279. They argued that a reasonably prudent fiduciary in the same position would not have paid those costs. *Id.* However, this Court found that they had not provided the necessary comparison to other account fees of similar sizes. *Id.* 279–80. In contrast, Appellant alleges that Red Rock caused harm to the Plan by categorically excluding promising, healthier investment opportunities compared to its ESG-aligned portfolio. Accordingly, the "meaningful benchmark" demanded by *Matousek* in this case should not be investment funds of like-kind to Red Rock's ESG portfolio, but rather, non-ESG investment opportunities, such as the traditional energy sector that Red Rock boycotts.

Appellant's complaint complies with *Matousek* when considering how *Matousek* outlines how a case should state its allegation of loss. *Matousek* demands a "meaningful benchmark" to "nudg[e] an inference of imprudence from possible to plausible." *Id.* at 278. Here, the meaningful benchmark is in the comparison between the ESG investments and the neglected non-ESG investment opportunities. Appellant's allegation is not that there was a mishandling or mistake in the selection of ESG options over non-ESG options, but rather, that Red Rock's failure to diligently and prudently investigate these options caused losses to the Plan. The additional evidence of more stocks would show the same results, as each stock that did not comply with Red Rock's ESG activism was improperly excluded from consideration for purely political reasons.

III. ALLOWING THE DISTRICT COURT'S DECISION TO STAND WILL UNDERMINE THE PURPOSE AND SECURITY OF ERISA BY ALLOWING POLITICAL AGENDAS TO ENDANGER EMPLOYEE RETIREMENT FUNDS.

Allowing the District Court's decision to stand will create significant hurdles for claimants seeking relief from disloyal and imprudent fiduciaries. Americans depend on retirement savings to accurately plan for their life on a fixed income. To this end, Congress created ERISA with the understanding that these retirement accounts served a special purpose to workers and created specific fiduciary duties on the part of employers who encouraged employees to participate in their plans. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987); *see also Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374–75 (1980). The Supreme Court has also fiercely guarded ERISA's importance, holding that ERISA's statutory language should control. *See Hughes Aircraft Co.*, 525 U.S. at 438. Appellees' activity raises serious concerns that their stewardship of the Plan has been tainted by political motivations. ERISA's list of prohibited transactions clearly forbids self-interested plan management. 29 U.S.C. § 1106(b). Appellant alleges that such self-interest has corrupted their stewardship of the Plan and endangered Appellant's retirement, as well as the retirements of approximately 10,000 other Plan participants. Appellees may view their actions as socially conscious investment strategies, but their actions plainly levy the retirements of Plan participants for political goals and impermissibly jeopardizes the Plan's fiscal health.

Mr. Smith was not asked permission to entrust his retirement savings to Appellees' crusade. To be clear: Appellant does not chafe at Appellees' political values. The issue lies in Appellees' methodology, not their ideology. Had Appellees done the reverse and instead levied the Plan to support traditional energy investments and anti-ESG/DEI values, the breach and resultant harm would be the same. This is emphasized to show that a ruling against Appellees would have very little effect on other companies and the way that they do business. Outside of the rarity that a financial institution would engage in similar behavior to Appellees, the issue is the black and white nature of Appellees' policy. If another company sought to prioritize ecofriendly companies, it is unlikely that it would cause a breach because it would still be considering non-ESG stocks. Affirming the District Court's dismissal would enable more companies to use retirement accounts as political weapons and ignore the best interests of their plans.

IV. CONCLUSION

For the foregoing reasons, Appellant humbly requests that the decision of the United States District Court for the District of Minnesota dismissing Appellant's complaint be affirmed in part and reversed in part, and this matter be remanded with instructions consistent with such a ruling.

Respectfully submitted,

Counsel for John Smith (Team 8)