CIVIL ACTION No. 24-CV-100

Eighth Circuit of the United States

JOHN SMITH,

Petitioner,

v.

HOPSCOTCH CORPORATION and RED ROCK INVESTMENT CO.,

Respondents.

On Petition for Review from the
United States District Court for the District of Minnesota

APPELLANTS' BRIEF ON THE MERITS

Team 9
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ISSUE PRESENTED

1. Under applicable ERISA law, does a plaintiff adequately allege that one or both defendants breached their fiduciary duties due to considering ESG factors when managing an employee–defined contribution plan?

2. Under applicable ERISA law, does a plaintiff sufficiently allege loss when the plaintiff's complaint asserts three meaningful benchmarks for determining the presence of loss?

STATEMENT OF THE CASE

A. Factual Background

Plaintiff John Smith worked as a software engineer at Hopscotch Corporation ("Hopscotch") from 2016 to 2023. Complaint at 3. Hopscotch is a social media platform and technology company incorporated in Minnesota and headquartered in Minneapolis. Comp. at 2. Smith was a covered participant under the Hopscotch 401(k) Plan (the "Plan"), and the Plan is an employee-defined contribution plan governed by the Employee Retirement Security Act of 1974 ("ERISA"). Comp. at 2. The Plan allows participants to invest up to 10% of their salary, and Hopscotch automatically contributes 5% of each employee's salary to employer contributions and an additional match of employee contributions up to a maximum of 7% of salary. Comp. at 2–3. The Plan offers eight investment options. Comp. at 3. One of the options is a Hopscotch stock employee ownership option ("ESOP option"), which makes up 40% of the Plan's investments. Comp. at 3–4. Because Smith worked for the company and participated in the Plan for more than five years, all his contributions and the contributions made by Hopscotch for his account are vested. Comp. at 3–4.

In 2019, Hopscotch chose Red Rock Investment Co. ("Red Rock") as the Plan's investment manager because Red Rock demonstrated commitment to environmental, social, and governance ("ESG") strategies, particularly concerning the environment and diversity, equity, and inclusion ("DEI") goals. Comp. at 3–4. Further, the CEO of Hopscotch revealed that the company committed itself to ESG and DEI to attract more teenagers and pre-teens and claimed that the strategy had made Hopscotch the number one social media platform for this demographic. Comp. at 3–4. The same year, Red Rock stated climate sustainability would be the company's new guiding principle. Comp. at 4. Red Rock proved this commitment by exercising proxy voting rights on all assets it managed for employee benefit plans against management and directors of companies that were not making sufficient progress on environmental sustainability and boycotting investments in traditional energy companies. Comp. at 4.

From February 4, 2018 to the present ("the relevant period"), Hopscotch experienced slower growth than two other major social media companies. Comp. at 4. Also, in 2021 and 2022, the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors, which Red Rock forwent because of its energy sector boycott. Comp. at 5. And each company Red Rock invested in experienced steep stock price declines after Red Rock announced its proxy voting strategy. Comp. at 5. The University of Chicago ("UC") also found ESG funds underperformed during the last five years by an average of 2.5% (returning an average of 6.3%) as compared to the broader market (which had an average return of 8.9% during the same five-year period). Comp. at 5.

B. Procedural History

In February 2024, Smith filed a class action complaint against Hopscotch and Red Rock ("Defendants") for fiduciary and co-fiduciary breaches of prudence and loyalty in violation of ERISA Sections 404 and 405, 29 U.S.C. §§ 1104, 1105, seeking declaratory, injunctive, equitable and remedial relief under ERISA Sections 409(a), 502(a)(2) and 502(a)(3), 29 U.S.C. §§ 1109, 1132(a)(2), 1132(a)(3). Comp. at 8–9. Defendants jointly moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Order at 4. The district court granted the Defendant's motion, finding that Smith failed to state a claim for fiduciary breach under ERISA. Order at 8. The district court dismissed the case with prejudice because Smith indicated he wished to appeal immediately, and the court found that effort futile. Order at 1.

SUMMARY OF THE ARGUMENT

This is a case about preserving retirement plan participant's opportunity to protect their financial future through the judicial system. Mr. Smith seeks to challenge the controversial investment strategy of his retirement plan's fiduciary, and Congress implemented ERISA to allow him that opportunity. Because Smith sufficiently pled breach of fiduciary duty and loss to the Plan resulting from that breach, this court should reverse and remand.

Smith's complaint further plausibly alleges breaches of fiduciary duties by both Defendants. First, it details facts rising to admittance by both Hopscotch and Red Rock that they failed to act solely in the interests of Plan participants and beneficiaries, instead preferring to prioritize ESG investments. Additionally, the allegations demonstrate that both Defendants failed to properly monitor and remove imprudent investments per *Tibble*. Hopscotch imprudently handled the Plan's ESOP option, as shown by its stock underperformance, and imprudently retained Red Rock, given that Red Rock imprudently managed the Plan's seven other investment options when comparing these options against the broader market. Even if this court remains unconvinced of the totality of the Defendants' breaches, the factual allegations within the complaint assuredly plead a plausible claim of breach to move beyond the dismissal stage of litigation.

Smith's suit should have survived the Defendants' motion to dismiss because, when taking the complaint's factual allegations as true per *Twombly*, the complaint states a plausible claim for relief. As for the loss element, Smith's complaint provides adequate meaningful benchmarks in compliance with *Matousek*, against which this court can measure the Plan's performance. Further, these benchmarks bear significant similarities with other benchmarks used in this very court. Most importantly, Smith's benchmarks plausibly establish a prima facie case of loss to the Plan under the *Donovan-Roth* loss test. Given the material benchmarks provided, this case's dismissal would set an extremely dangerous precedent, blocking the path to relief for countless future ERISA plaintiffs.

Today, this court can rightfully preserve Smith's case for a fact finder to adjudicate his claim while setting a precedent that allows future reasonable ERISA plaintiffs to do the same.

STANDARD OF REVIEW

The Eighth Circuit reviews a dismissal for failure to state a claim de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Barrett v. O'Reilly Auto., Inc.*, 112 F.4th 1135, 1138 (8th Cir. 2024). A complaint can only survive a motion to dismiss if it contains "'sufficient factual matter' to state a facially plausible claim for relief." *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. Both Hopscotch and Red Rock breached their fiduciary duties under ERISA.

To successfully state a claim for breach of fiduciary duty under ERISA, as a fundamental element of the claim, a plaintiff must make a prima facie demonstration that the defendant breached its fiduciary duties. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Further, "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.'" *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Because Smith's original complaint contained sufficient factual allegations which, when taken as true, established a prima facie demonstration that both Defendants breached their fiduciary duties to the Plan, the district court should have denied Hopscotch's and Red Rock's joint motion to dismiss.

ERISA provides that an entity is a fiduciary when it exercises any discretionary authority or control respecting the management of a plan or when it has any discretionary authority or responsibility in the administration of a plan. 29 U.S.C. § 1002(21). Here, as established in the original complaint, Hopscotch served as the sponsor and administrator of the Plan, meaning it exercised these discretionary managerial and administrative powers. Comp. at 2. Further, as noted in the lower court's decision, Hopscotch does not contest that it acted as a fiduciary. Order at 4.

ERISA further provides that any investment manager is a fiduciary when it meets certain criteria. *See* 29 U.S.C. § 1002(38). Here, Red Rock satisfies the requirement of being a registered investment manager under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1. Comp. at 2. Additionally, as the lower court acknowledged, Red Rock does not contest that it acted as a fiduciary with respect to the challenged actions. Order at 4.

A. Both Hopscotch and Red Rock, as Plan fiduciaries, breached their duties of loyalty.

ERISA provides that "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). This language codifies the common law imposition upon fiduciaries of "a duty of loyalty to guarantee beneficiaries' interests." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000). The statute further charges fiduciaries to execute their duties for the "exclusive purpose" of providing benefits to plan participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A). This rule is also referred to as ERISA's "exclusive benefit" rule. *Halperin v. Richards*, 7 F.4th 534, 546 (7th Cir. 2021). Accordingly, as Plan fiduciaries, ERISA requires Hopscotch and Red Rock to discharge their duties solely for the exclusive benefit of Plan participants and beneficiaries to comply with the duty of loyalty.

1. Hopscotch failed to act solely in the interests of Plan beneficiaries when appointing the Plan investment manager.

Under a plain language reading of the statute, § 1104 affords fiduciaries one sole consideration: the interest of plan participants and beneficiaries. 29 U.S.C. § 1104. When Hopscotch selected Red Rock as the investment manager for the Plan, it was acting in its fiduciary role as Plan administrator. Therefore, according to § 1104, Hopscotch's only consideration should have been the interest of plan participants and beneficiaries. However, as reflected in the original complaint, Hopscotch chose Red Rock, particularly as the Plan's investment manager, because of Red Rock's commitment to ESG, which aligned with Hopscotch's corporate goals. Comp. at 3. Because Hopscotch included considerations beyond purely the interest of Plan participants and beneficiaries, this decision constituted a breach of fiduciary duty of loyalty under the plain language of § 1104.

Hopscotch may argue that it was acting in its corporate capacity with respect to its obligations to shareholders. It is true that corporations that "choose to administer their own plans assume responsibilities to both the company and the plan, and, accordingly, owe duties of loyalty and care to both entities." *Varity Corp. v. Howe*, 516 U.S. 489, 526 (1996) (Thomas, J., dissenting). While this would normally constitute a conflict of interests, Congress recognized that either the business or the plan would eventually have to suffer if both duties existed simultaneously all the time. *Id.* at 527. Accordingly, ERISA "defines 'fiduciary' not in terms of a formal trusteeship, but in *functional* terms of control and authority over the plan." *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) (emphasis in original). As such, "an employer that administers its own plan is not a fiduciary to the plan for all purposes and at all times, but only to the extent that it has discretionary authority to administer the plan." *Varity Corp.*, 516 U.S. at 528 (Thomas, J., dissenting); *see* 29 U.S.C. § 1002(21)(A)(iii). Thus, under ERISA, an employer is a fiduciary to a plan only when it is acting as plan administrator. *See Varity Corp.*, 516 U.S. at 528 (Thomas, J., dissenting).

Importantly, ERISA does not mandate that ordinary corporate decisions—even those that may impact prospective employee benefits—be made in the sole interest of plan participants. *See Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988). Yet Hopscotch's decision to select Red Rock as the Plan investment manager is no ordinary corporate decision; it is an exercise of discretionary authority with respect to the Plan under § 1002. *See* 29 U.S.C. § 1002(21)(A)(iii). Hopscotch may include ESG considerations in any truly corporate decisions that it makes. That said, when exercising discretionary authority over the Plan, as was done when selecting an investment manager, such considerations cannot take the place of the interest of plan participants and beneficiaries—which is mandated as the sole consideration under the exclusive benefit rule. 29 U.S.C. § 1104. Hopscotch was a Plan fiduciary when it made important decisions about the Plan, and the failure to solely consider the interests of Plan participants and beneficiaries constituted a breach of the duty of loyalty.

2. Red Rock failed to act solely in the interests of Plan beneficiaries when acting as the Plan investment manager.

As a Plan fiduciary, like Hopscotch, Red Rock's only consideration in discharging its duties should have been the exclusive benefit of Plan participants and beneficiaries, per § 1104. Here, however, the original complaint outlines multiple ways Red Rock failed to meet this standard. As a primary example, Red Rock announced its plan to depart from its duty of loyalty in a press release, stating that "climate sustainability would be the company's new guiding principle." Comp. at 4. As a leading investment manager for ERISA plans, one would think—and hope—that the guiding principle for such a company would be achieving the greatest benefits for its beneficiaries.

This statement alone would not constitute a breach of Red Rock's duty of loyalty, but Red Rock actually acted to this end. For instance, Red Rock exercised proxy voting powers on "dozens of occasions" to prevent appointments of board members who "were not sufficiently pursuing green goals in Red Rock's view." Comp. at 4. Further, Red Rock abstained from investing in traditional energy companies. Comp. at 4. While these actions could—and will—be argued as breaches of the duty of care, they nonetheless remain breaches of the duty of loyalty because they constitute the elevation of outside considerations above the exclusive benefit of Plan beneficiaries. The district court rightly concluded that such action would violate the duty of loyalty. Order at 5.

Red Rock—and Hopscotch, too, for that matter—may argue that allowing the consideration of ESG factors constitutes good policy; after all, aiming to achieve goals involving climate sustainability and DEI considerations generally promotes the public interest and well-being of society as a whole. While the merits of these considerations are uncontestable, they are also entirely irrelevant. The fact that fiduciaries act for the exclusive benefit of another is a foundational and essential aspect of fiduciary law. "Once interests and considerations other than participant welfare are legitimated, they tend to take a life of their own and begin to compete with — and sometimes crowd out — concern for participant well-being." Edward A. Zelinsky, *Economically Targeted Investments: A Critical Analysis*, 6-WTR Kan. J.L. & Pub. Pol'y 39, 44 (1997). While ERISA's duty of loyalty is "exacting" and "prophylactic," it necessarily narrows the fiduciary's view to focus solely and comprehensively on the well-being of beneficiaries, eliminating *any* criteria that may obstruct that objective. *Id.*

Because Red Rock prioritized climate sustainability as its "new guiding principle," it failed to act in the sole interest of and exclusive benefit for Plan participants and beneficiaries, as mandated by § 1104. Accordingly, Red Rock's elevation of outside considerations constituted a breach of ERISA's duty of loyalty.

B. Both Hopscotch and Red Rock, as Plan fiduciaries, breached their duties of care.

ERISA further charges fiduciaries with a duty of care, mandating that they 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). This statute "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and dispositions of assets. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 143 n.10 (1985). When determining whether a fiduciary has acted prudently, courts must "focus on the process by which it makes its decisions rather than the results of those decisions." *Braden*, 588 F.3d at 595 (citing *Roth v. Sawyer-Cleater Lumber Co.*, 16 F.3d 915, 917–18 (8th Cir. 1994)).

1. Red Rock failed to manage the Plan as a reasonable and prudent investment manager would.

As previously discussed, Red Rock's decision-making process reoriented its focus to climate sustainability. Comp. at 4. To this end, Red Rock abstained from investing in traditional energy companies and employed its proxy voting powers to support investor activism and prevent appointments of board members who did not pursue environmental goals to Red Rock's liking. Comp. at 4. In contrast to these actions constituting an instantaneous breach of the duty of loyalty, though, Red Rock's decisions to pursue ESG goals did not instantly cause a breach of its duty of prudence.

Indeed, Red Rock will likely argue that considering ESG factors falls within "the range of reasonable judgments a fiduciary may make based on her experience and expertise." *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022). This argument, however, relies on dicta in the form of a single sentence at the end of an opinion that reversed the dismissal of a claim for breach of fiduciary duty. *Id.* In *Hughes*, the holding centered on the Seventh Circuit's "exclusive focus on investor choice" and failure to consider a fiduciary's duty to "conduct a regular review of its investment. *Id.* at 175–76 (quoting *Tibble v. Edison Intern.*, 575 U.S. 523, 528 (2015)).

In *Tibble*, the Court undertook the common practice of extending the law of trusts and trustees to ERISA fiduciaries. *Tibble*, 575 U.S. at 528–29. Trustees have an ongoing duty to systematically monitor trust investments at regular intervals and to remove imprudent ones. *Id.* at 529. Notably, "a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones." *Id.* at 530. Hence, while *Braden* established that a breach of the duty of prudence could not be established through mere results, the decision to persist with specific investments in light of consistent underperformance constitutes a failure to remove imprudent investments, thus comprising a breach of the duty of prudence. Accordingly, as discussed earlier, it was not Red Rock's initial decision that constituted a breach but its subsequent failure to remedy the earlier lapse in judgment.

Here, the data provided in the original complaint displays an ironic loyalty to ESG-based investments that chronically underperformed economic alternatives. For example, while Red Rock abstained from investing in traditional energy companies, the Energy sector of the S&P 500 returned over 55% more than non-Energy sectors in 2021 and 2022. Comp. at 4–5. Additionally, Red Rock's proxy voting decisions significantly impacted the companies it invested in, with each suffering a severe decline in stock price after reports of Red Rock "voting for a more pro-green energy Board of Directors." Comp. at 5. Most notably—and damning—recent scholarship indicates that ESG funds underperformed the broader market by an average of 2.5% over the past five years, returning 6.3% and 8.9%, respectively. Comp. at 5. Overall, each of the Plan's ESG investment options had a similar, non-ESG option available, yielding higher returns and boasting lower costs during the relevant period. Comp. at 4. Despite this negative data, Red Rock maintained its dedication to ESG investments, costing Plan participants and beneficiaries millions of dollars. As part of its duty to systematically and regularly review investments, Red Rock should have identified the consistent underperformance of these ESG investment options and adjusted its course of action accordingly.

Red Rock will likely argue that it was bound to invest this way in compliance with "the documents and instruments governing the plan." *See* 29 U.S.C. § 1104(a)(1)(D). However, the full text of § 1104(a)(1)(D) clarifies that "such documents and instruments [must be] consistent with the provisions of this subchapter." *Id.* In *Fifth Third Bancorp v. Dudenhoeffer,* the Supreme Court found that "this provision *makes clear that the duty of prudence trumps the instructions of a plan document*, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary." 573 U.S. 409, 421 (2014) (emphasis added). This language suggests that Red Rock had the freedom and obligation to deviate from the Plan's official instructions regarding ESG investments if that was the prudent course of action. Accordingly, it could have—and should have—adjusted to "better performing and lower cost investment options readily available in the marketplace," given the underperformance of the ESG investments. Comp. at 8.

2. Hopscotch failed to act as a reasonable administrator by imprudently selecting and retaining an ineffective investment manager.

Hopscotch selected and retained Red Rock as the Plan investment manager—presumably due to Red Rock's commitment to ESG goals. Although Hopscotch, as Plan administrator, was not making investment decisions on behalf of the Plan, it nonetheless bore the duty of selecting—and subsequently retaining—an investment manager as a prudent administrator would. ERISA imposes the same "prudent man standard of care" on a fiduciary, whether that fiduciary manages investments or manages the manager of investments. *See* 29 U.S.C. § 1104(a).

Here, Hopscotch's decision to retain Red Rock as the Plan's investment manager, despite Red Rock's previously discussed severe underperformance over multiple years, constitutes a breach of Hopscotch's duty of prudence. Just as Red Rock should have realized that its ESG investments were underperforming against the broader market and adjusted, Hopscotch should have recognized this recurring underperformance and subsequently removed Red Rock as the Plan investment manager. Hopscotch's failure to remove an imprudent investment manager amounts to its own imprudence in violation of § 1104.

3. Alternatively, Hopscotch breached co-fiduciary duties under § 1105.

Even if the court is unconvinced that Hopscotch breached its fiduciary duty of care under § 1104, § 1105 provides that a fiduciary for a plan "shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan" in select circumstances, including when the fiduciary knows of a breach by such other fiduciary, unless the fiduciary "makes reasonable efforts under the circumstances to remedy the breach." 29 U.S.C. § 1105(a)(3). Accordingly, Hopscotch can also incur liability for Red Rock's breach under § 1105.

Here, Hopscotch had access to the same facts giving rise to the allegations in the original complaint. Therefore, it understood—or should have understood—that Red Rock's selection of investments for the Plan was underperforming compared to the broader market. Thus, Hopscotch should have taken reasonable steps to remedy Red Rock's breach. Given Hopscotch's knowledge of Red Rock's underperformance, it should have replaced Red Rock as the Plan investment manager. Hopscotch's failure to do so constitutes a breach of its co-fiduciary duty under § 1105.

4. Hopscotch breached its duty of prudence with respect to the maintenance of the Plan's ESOP option.

The Plan's ESOP option itself presents a difficult inquiry. Hopscotch will likely argue that it acted as the Plan's settlor, rather than as a fiduciary, in selecting the ESOP as the default option for participants and directing all company contributions toward the ESOP. *See Lockheed Corp v. Spink*, 517 U.S. 882, 890 (1996) (citing *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). Notably, *Lockheed* involved amendments to an ERISA retirement plan rather than the creation of one—as is at issue. 517 U.S. at 885. Further, a holding that creating or establishing an ERISA-governed plan is not a fiduciary act would seemingly conflict with the statutory definition of fiduciary as one who "exercises any discretionary authority or discretionary control respecting management of such plan." 29 U.S.C. 1002(21)(A). Categorically excluding the acts of creating or establishing ERISA plans from those that must meet fiduciary standards would constitute poor policy; it is not difficult to conjure a situation in which an employer drafts a governing plan document calling for a violation of the duty of loyalty—take, for instance, the mandate before the court requiring ESG investments.

Here, Hopscotch did not falter by merely establishing the ESOP option. These options are commonplace in ERISA retirement plans. *See, eg.*, *Dudenhoeffer*, 573 U.S. at 412; *Roth*, 16 F.3d at 916. Hopscotch's breach manifested itself by continuing to direct company contributions into the ESOP and maintaining the ESOP as the default option for employee contributions, considering the underperformance of Hopscotch stock compared to similar market competitors. Comp. at 4. In *Dudenhoeffer*, the Supreme Court held that ESOP fiduciaries must meet the same standard of care as all other ERISA fiduciaries, except for the diversification requirement. 573 U.S. at 418–19. Accordingly, Hopscotch had the duty to monitor the investments in its stock for underperformance. *Tibble*, 575 U.S. at 529.

Considering the relative underperformance of Hopscotch stock compared to similar social media companies in the market, Hopscotch should have changed the Plan's policies surrounding the ESOP option. It should not have mandated that all company contributions go toward the ESOP until participants' rights are vested, and it should not have maintained the ESOP as the default option for employee contributions. At the very least, Hopscotch should have informed employees that this was the case, giving participants the complete picture of how the Defendants allocated their retirement funds. The impact of Hopscotch's failure to act appropriately with respect to the ESOP cannot be overstated. The ESOP constitutes over 40% of the Plan's investments, all of which suffered because of Hopscotch's underperforming stock. Comp. at 4.

II. This court should reverse the decision of the District Court because Smith pled a sufficient factual matter that states a facially plausible claim for relief.

Federal Rule of Civil Procedure 8 requires a plaintiff to present a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands a claim to relief that is plausible on its face to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678. To be clear, the plausibility standard does not impose a probability requirement at the pleading stage. *Twombly*, 550 U.S. at 556. Instead, it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the defendant's misconduct. *Id.* In addition, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and "that a recovery is very remote and unlikely." *Id.*

To state a claim under ERISA, a plaintiff must make a prima facie showing that (1) the defendant acted as a fiduciary, (2) breached its fiduciary duties, and (3) thereby caused a loss to the Plan. *Braden*, 588 F.3d at 594. Further, once the plaintiff has proved a breach of fiduciary duty and a prima facie case of loss to the Plan, the burden of persuasion shifts to the fiduciary to prove that the breach of duty did not cause the loss. *Martin v. Feilen*, 965 F.2d 660, 671 (8th Cir. 1992). Therefore, at the pleading stage, the plaintiff must only sufficiently plead with respect to breach of duty and loss to survive a motion to dismiss for failure to state a claim.

Interestingly, the district court held Smith plausibly stated a claim that Defendants breached their fiduciary duties but held that Smith failed to plausibly allege that Defendants' actions had caused a loss or other harm to the Plan. Order at 7. In reaching this conclusion, the district court erred in granting the Defendants' motion to dismiss by misapplying the pleading standards. Therefore, this court must correct the district court's error and reverse its decision because (1) Smith's allegations provide meaningful benchmarks, which establish a plausible basis for determining loss or harm to the Plan, (2) Smith's meaningful benchmarks establish a prima facia case of loss to the Plan, and (3) the decision to dismiss Smith's claim will make it unnecessarily difficult for future ERISA plaintiffs.

A. Smith's allegations provide meaningful benchmarks for determining whether the Defendants' acts caused loss or harm to the Plan.

Smith asserts three allegations that provide meaningful benchmarks for determining whether the Defendants' acts caused loss or harm to the Plan. Interestingly, this court has never heard a case where a district court held a plaintiff plausibly stated a claim that defendants breached their fiduciary duties but also held the plaintiff did not do the same as to loss or harm. And yet, the meaningful benchmark standard adopted by this court for evaluating prudence in the context of breach and duty also provides a workable standard for determining the presence of cause and harm. By applying this standard, this court should find Smith's allegations surpassed the requisite threshold to adequately establish meaningful benchmarks. Then, this court can use the meaningful benchmarks to evaluate whether the Plan's value changed because of the Defendant's acts. The first issue is, therefore, whether Smith alleged meaningful benchmarks.

1. This court should apply the *Matousek* "meaningful benchmark" standard to evaluate Smith's allegations.

This court should use the meaningful benchmark standard from *Matousek* as the first step in evaluating Smith's allegations. In *Matousek*, this court held a plaintiff typically clears the pleading bar by alleging enough facts to "infer...that the process was flawed" and that the key to nudging an inference of imprudence from possible to plausible is providing a meaningful benchmark, also phrased as a sound basis for comparison. *Matousek*, 51 F.4th at 278. As to loss, this court can use the evidence presented by Smith as a sound basis for comparison to the Plan's actual performance. In his complaint, Smith alleges three acts on the part of the Defendants that caused loss or harm to the Plan: (1) Red Rock did not include Energy-sector stocks in the Plan even while they outperformed non-Energy sector stocks in the same index during the relevant period; (2) stock prices, including Hopscotch's, dropped in companies where Red Rock employed its proxy voting strategy; and (3) the Defendants committed to ESG despite evidence ESG funds underperformed the broader market during the relevant period.

Smith pointed to the performance of stocks in the S&P 500 to allege the Plan incurred loss or harm. Comp. at 4–5. The Standard & Poor's (S&P) 500 Index is a market capitalization-weighted index of 500 leading publicly traded companies in the U.S., and a market capitalization-weighted index measures a subset of the stock market by weighting together the market caps of companies that meet a specific criterion. Will Kenton, *S&P 500 Index: What It's for and Why It's Important in Investing*, Investopedia (Jan. 22, 2025, 10:42 PM) https://www.inv estopedia .com/terms/s/sp500.asp. As of January 2025, twenty-two companies are in the S&P 500 Energy sector index. Trading View, *S&P 500 Energy*, Trading View (Jan. 22, 2025, 10:47 PM) https://www.tradingview.com/symbols/SP-SPN/components/. In his complaint, Smith alleged Red Rock's ESG-focused investment activities prevented the Plan from benefitting from the high returns of the S&P 500's energy sector. Comp. at 4–5. During the relevant period, from 2021 to 2022, the Energy sector of the S&P 500 for large and mid-cap stocks returned over 55% more than non-Energy sectors. Comp. at 5. Therefore, the S&P 500's Energy sector market cap provides a meaningful benchmark to determine whether loss is present because the S&P 500 is a recognizable, specific subset of stocks that Red Rock avoided that amounts to a "like-for-like comparison" to the investment options Red Rock did select. *See Matousek*, 51 F.4th at 279.

Smith also alleged the Plan incurred loss or harm because of Red Rock's proxy voting strategies. Comp. at 4–5. Proxy voting allows shareholders to influence a company's operations, corporate governance, and social responsibility activities. Will Kenton, *What is a Proxy Vote, and How Does It Work? With Examples*, Investopedia (Jan. 22, 2025, 10:48 PM) https://www.investopedia.com/terms/p/proxy-vote.asp. Red Rock used the strategy for all assets that it managed for employee benefit plans to support investor activism and vote against the appointment of board members who were not making sufficient progress on environmental sustainability. Comp. at 4. Accordingly, all the companies Red Rock invested in suffered a steep decline following reports of Red Rock's proxy voting activities. Comp. at 5. If this allegation is taken as true, the court should take the pre-proxy voting stock prices in Red Rock's portfolio as the meaningful benchmark for determining whether the Plan suffered a loss because of the activity.

Lastly, Smith alleges ESG funds underperformed compared to the broader market during the relevant period, according to the Journal of Finance at the University of Chicago ("UC"). Comp. at 5. The journal article establishes that ESG funds underperformed the broader market over five years during the relevant period. Comp. at 5. Smith's complaint also references "papers" in the plural, meaning that when this allegation is taken as true, other papers present further details on the underperforming nature of ESG funds. To address a counterpoint, the district court determined Smith failed to identify non-ESG corollaries. Order at 7–8. However, finance experts at UC distinguish between ESG and the broader market. Thus, Smith implicitly alleged that the Defendants could have selected the broader market, composed of the funds UC used to conduct the study. With all this in mind, even if it strikes a savvy judge that actual proof of those facts is improbable, an allegation citing the findings of multiple finance papers that highlight the weakness of ESG, especially from a reputable source such as UC, is sufficient to survive the pleading stage.

Additionally, the three allegations above are not to be evaluated in isolation. The reason is, in the context of the duty of prudence under ERISA, the Supreme Court held in *Hughes* that courts must apply the *Iqbal* pleading standard by evaluating the claimant's allegation as a whole. *Hughes*, 595 U.S. at 177. The Court also noted the appropriate inquiry will necessarily be context-specific. *Id*. These allegations may not amount to detailed factual allegations or meet the pleading standard as stand-alone allegations, but taken as a whole and taken in a light most favorable to Smith, the allegations are sufficient to raise a reasonable expectation that discovery will reveal evidence of the Defendants' misconduct. *Iqbal*, 556 U.S. at 678.

2. Smith's allegations are analogous to allegations where this court found at least a prima facie case of duty or loss to be present.

It is novel for a district court in this circuit to find that a plaintiff sufficiently pled breach of duty but not cause of harm, but it is not novel for a plaintiff to successfully allege meaningful benchmarks. In fact, several cases provide clear precedents on what a meaningful benchmark looks like. This case law further strengthens the sufficiency of Smith's allegations.

In 1995, this court made its standard for evaluating a plan's loss clear, and the district court did not account for this standard in rendering its decision. In *Roth*, two former employees filed suits against their employer after the company terminated its business operations due to financial difficulties. *Roth*, 61 F.3d at 601. The company's retirement plan allowed the former employees to participate in an ESOP, and after the company declared bankruptcy, their security interest in the company stock became worthless. *Id.* After the district court granted the defendants' motion for summary judgment, this court reversed the decision and qualified the decline in the value of the company stock as loss. *Id.* at 605. Behind the decision, this court reasoned that loss should have been measured over a broader time frame by considering the ESOP's actual profit compared to the potential profit that could have been realized in the absence of a breach. *Id.* at 604. And this court affirmed dicta from a previous ERISA case by quoting, "we would not hesitate to construe 'losses to the plan' in § 1109 broadly in order to further the remedial purposes of ERISA." *Id.* (quoting *Physicians HealthChoice, Inc. v. Trustees of Auto. Employee Ben. Tr.*, 988 F.2d 53, 56 (8th Cir. 1993)). Here, Smith alleged three acts by the Defendants' caused a change in the value of the Plan that can be observed over a significant period. And this court would further the remedial purposes of ERISA by allowing Smith to survive the pleading stage.

When allegations are sufficient to infer loss occurred to a retirement plan, the burden shifts to the defendant to rebut those inferences. *See Braden*, 588 F.3d at 596. In *Braden*, the claimant alleged the fiduciaries did not take advantage of lower fees, charged fees that did not derive a benefit, and issued revenue sharing payments that did not receive services in exchange. *Id.* at 594–95. This court acknowledged there may have been lawful reasons why the fiduciaries may have made those decisions and still held that the district court erred in granting a motion for failure to state a claim. *Id.* In this case, perhaps the Plan did not lose profit, and perhaps even if it did that the Defendants' acts did not cause it. All the same, the Defendants have the burden of proving either of those two outcomes because Smith's allegations must be taken as true and considered as a whole with inferences made in his favor where possible. *Id.*

Davis v. Washington Univ. provides another example of a plaintiff who met the pleading standard for one of their allegations. In *Davis*, this court did not require the plaintiff to directly address how the fiduciaries made their investment selections in finding a plaintiff sufficiently alleged breach due to high fees. *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 483 (8th Cir. 2020). In contrast, Smith alleged why the Defendants' made the investment decisions, and he further presented three different time frames and potential causes for losses to the Plan. Therefore, Smith provided weightier allegations than at least one other plaintiff in this jurisdiction that met the standard.

Though this case will be evaluated independent of other holdings within its own context, ERISA cases contain several similarities regardless of the specifics. Here, the important similarities are found where Smith made more than one allegation, shifted the burden to the Defendants', and included more depth in his complaint than another plaintiff who met the pleading standard.

3. Smith's meaningful benchmarks are distinguishable from benchmarks where breach of duty was sufficiently alleged or proven.

Plaintiffs fail to meet the pleading standard when they fail to provide meaningful benchmarks to analyze the defendants' acts and the results of those acts. But a survey of cases where plaintiffs failed to provide meaningful benchmarks reveals Smith did in fact provide meaningful benchmarks for the court to analyze.

Typically, plaintiffs must identify more than just one fund to plead a meaningful benchmark. In *Meiners*, the claimant did not state a plausible claim because it lacked a factual matter to demonstrate imprudence on the part of the fiduciaries. *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018). This court determined the fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the investment funds in the plan underperformed. *Id.* Nevertheless, Smith provided much more than one singular fund. In fact, he identified an entire sector of stocks that were not included in the Plan, a strategy that affected the stocks in the Plan, and evidence the general strategy failed to perform at the level of the rest of the market. Therefore, the holding in *Meiners* does not necessitate the same holding in Smith's case because Smith provided more allegations to consider.

The district court cites *Matousek* to make the argument Smith failed to identify non-ESG corollaries that outperformed the ESG funds selected by the Defendants'. In *Matousek*, the plaintiff alleged that fees should not exceed a certain amount based on the retirement plans size and number of participants. *Matousek*, 51 F.4th at 279. The plaintiff based this maximum number on industry wide averages instead of specific, comparable-sized plans. *Id*. at 279–280. The plaintiff also asserted three peer groups performed better than the groups chosen by the fiduciaries. *Id*. at 281. Because of the general nature of the excessive fee allegation and because the composition of the higher performing peer groups remained a mystery, this court ruled the plaintiff did not provide meaningful benchmarks for finding breach of duty. *Id.* at 280-281.

With that in mind, a potential criticism in line with the reasoning from *Matousek* is that the S&P 500 and "broader market" from the finance article are akin to "industry wide averages." But Smith's allegations are distinguishable from the failed allegations in *Matousek*. First, Smith points to the S&P 500 Energy sector as an example for showing the gains the Plan could have experienced if not for the boycott. As a reminder, Rule 8 announces does not require "detailed factual allegations." *Iqbal*, 556 U.S. at 678. Smith's allegations provide a plausible basis for concluding discovery will reveal even more opportunities in the energy sector that were missed. *Twombly*, 550 U.S. at 556. Further, the composition of the S&P 500 Energy sector is not a "mystery." The S&P 500 maintains objective criteria for which stocks are included and the members of the index in 2021 and 2022 are a matter of public, historical record.

Because the meaningful benchmark standard applies on a case-by-case basis, it requires judges to use discretion. This court must place a Smith's allegations somewhere on the spectrum between too general and sufficiently detailed. And after comparing Smith's allegations to case precedent, this court should hold Smith's loss allegations are distinguishable from pleadings that failed to state a claim, thus placing it in group of allegations on the sufficiently detail end of the spectrum.

B. Smith's meaningful benchmarks establish a prima facia case of loss to the Plan.

Meaningful benchmarks are not sufficient on their own to establish a plausible case for loss to the Plan. The meaningful benchmarks serve as the baseline for determining whether the Plan decreased in value. This court adopted specific language for such a test in the context of a motion for summary judgment, and the same test should be adopted for analyzing pleadings that are being challenged by Rule 12(b)(6) motions.

1. This court should determine the plausibility of loss by employing the *Donovan-Roth* Loss Test.

As mentioned above, this court clarified its test for determining loss in *Roth* in the context of a summary judgment. Because the isolated issue of analyzing loss at the pleading stage is at issue, this court should adapt the test from *Roth* to determine whether Smith sufficiently pled loss. According to *Roth*, a comparison must be made between the value of the plan assets before and after the breach. *Roth*, 61 F.3d at 603. Of note, the time frame selected by the court is particularly important. For instance, a broader time frame is appropriate when the case does not involve an overpayment or a breach of trust by self-dealing or price manipulation. *Id.* And a snapshot approach to evaluating a retirement plan's change in value is inappropriate because this test holds that loss must be determined by examining the assets of the plan as a whole over a period of time, not at an instant. *Id.* at 603–04.

In light of those requirements, the test determines loss by comparing the Plan's actual profit to potential profit that could have been realized in the absence of breach. *Id.* at 604 (citing *Donovan v. Bierwirth*, 754 F.2d 1049, 1054–55 (2d Cir. 1985)). Essentially, if the assets of the Plan before the alleged breach are compared with the assets of the Plan after the Defendants breached their fiduciary duty there is a loss. *Id.* Taking Smith's allegations as true, the Plan's value before the Defendants' began boycotting the energy sector, started engaging in proxy voting, and established ESG as its guiding principle.

2. Applying the *Donovan-Roth* Loss Test using Smith's meaningful benchmarks demonstrates a prima facie case of loss to the Plan.

Smith's allegations provide grounds for three distinct applications of the *Donovan-Roth* Test. Due to the time element, the applications should be considered in chronological order. Also, the end date for each period of comparison is February 2024 when Smith filed the complaint.

First, the Plan's actual profit from February 2018, when the Board of Directors started pursuing ESG goals, to filing of the complaint, must be compared to the potential profit the Plan would have realized from the broader market, which outperformed ESG by 2.5% for at least five of those years. Comp. at 5. Second, the actual profit of the Plan must be compared to the potential profit the Plan would have realized if energy companies were included in the portfolio, starting in 2019 when Red Rock began managing the Plan and ending in when the complaint was filed. Comp. at 3–4. Lastly, the actual profit of the Plan must be compared to the potential profit the Plan would have realized from 2019 when Red Rock announced its plan to engage in proxy voting, leading to stock price decline, to when the complaint was filed. Comp. at 4–5.

As with the meaningful benchmark standard, a savvy judge may find it improbable to prove those facts are true. However, by analyzing the assets of the Plan as a whole over the relevant period in a light most favorable to Smith, this court should hold his allegations plausible that the Plan incurred loss.

C. The decision to dismiss Smith's claim will undermine the purpose of ERISA and make it unnecessarily difficult for future ERISA plaintiffs.

The primary purpose of ERISA is the protection of individual pension rights. H.R. Rep. No. 93-553 (1974). In other words, Congress implemented ERISA to protect the future financial interests of those who have entrusted the investment of their current earnings into the hands of others. *Id.* In this case, an individual filed suit to challenge the fiduciary prudence of a controversial investment strategy. This is not the only case in the American court system with ESG as a key component and different presidential administrations have released different administrative rules on the validity of ESG as a strategy under ERISA. *See Utah v. Su*, 109 F.4t 313 (5th Cir. 2024) (case remanded to assess the merits of ESG after *Loper Bright* overruled *Chevron* doctrine and a Biden administration rule no longer bound judicial interpretation of ERISA). Financial markets and investment strategies are already complicated enough to begin with. The topic becomes further complicated by adding in the factor of an ideological-based investment strategy. If a participant under ERISA asserts a claim on those grounds, the courts should hesitate to throw out his claim before it's been heard on the merits, especially when such a dismissal was rendered with prejudice in a class action suit.

CONCLUSION

For these reasons, this Court should reverse the district court's decision and remand for further proceedings.

Respectfully submitted,

/s/ Team 9

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