**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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| **JOHN SMITH,** | ) | |
| **Plaintiff,** | ) | |
| | ) | **CIVIL ACTION NO. 24-CV-100** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **HOPSCOTCH CORPORATION** | ) | |
| **and RED ROCK INVESTMENT CO.,** | ) | |
| **Defendants.** | ) | |
| _____ | ) | |

**CLASS ACTION COMPLAINT**

Plaintiff, through his undersigned counsel, complains and alleges as follows:

**INTRODUCTION**

1. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*., is designed to protect the retirement security of American workers. To this end, it imposes strict fiduciary duties of prudence and loyalty on those who manage and administer pension plans and their assets, such as the Defendants Hopscotch Corporation ("Hopscotch"), the sponsor and administrator of the 401(k) defined contribution pension plan (the "Plan") at issue here, and Red Rock Investment Company ("Red Rock"), the investment manager for the Plan.

2. Hopscotch and Red Rock did not live up to these responsibilities. Instead of choosing investment options and pursuing strategies that seek to maximize investment returns for the Plan, Defendants chose to pursue political agendas through environmental, social and

governance ("ESG") strategies and proxy voting and shareholder activism, resulting in millions of dollars in losses to the Plan and threatening the retirement security of the nearly 10,000 Plan participants.

## JURISDICTION AND VENUE

3. This action arises under ERISA. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 1132(e)(1), as well as 28 U.S.C. § 1331, as this action involves a federal question.

4. Venue is proper within this district pursuant to 29 U.S.C. § 1132(e)(2), because Defendants maintain business activities in and may be found in this district, and the breaches at issue took place in this district.

## PARTIES

5. Plaintiff John Smith is a resident of Minneapolis, Minnesota. He was, at all times relevant, a covered participant under the Hopscotch Corporation 401(k) Plan (the "Plan"), an ERISA-governed employee defined contribution pension plan sponsored by Mr. Smith's employer, Hopscotch Corporation.

6. Defendant Hopscotch Corporation is a social media platform and technology company incorporated in Minnesota and headquartered in Minneapolis. Hopscotch is the Plan sponsor and the named Plan administrator for the Plan.

7. Defendant Red Rock Investment Co. is a leading investment manager for ERISA plans and other institutional and retail investors worldwide. It is a registered investment manager under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1, and is the investment manager for the Plan within the meaning of Section 3(38) of ERISA, 29 U.S.C. § 1002(38). As such, Red Rock is a Plan fiduciary.

## FACTUAL ALLEGATIONS

8. The Plan is a 401(k) defined contribution plan in which participating employees ("participants") such as Plaintiff may choose to invest up to 10% of their salary and Hopscotch

automatically contributes 5% of each employee's salary in employer contributions and an additional match of employee contributions up to a maximum of 7% of salary.

9. The Plan offers eight investment options, one of which is a Hopscotch stock employee ownership option ("ESOP option"). Employer contributions are automatically invested in the ESOP option and must remain there until a Plan participant has a vested (non-forfeitable) right to it (after five years), at which point participants have the option of redesignating any such amounts into one or more of the other seven investment options. Moreover, the ESOP option is the default option for employees who do not select other investment options with respect to their own contributions.

10. Mr. Smith worked as a software engineer for Hopscotch from 2016 until he was terminated in November 2023. He is a participant in the Plan and because he has worked for the company and participated in the Plan for more than five years, all of his own contributions and the contributions made by Hopscotch for his account are vested.

11. The investment options other than the ESOP are managed by the Plan's investment manager, Red Rock.

12. Starting in or around 2018, the Board of Directors of Hopscotch determined that the company should pursue ESG goals both with respect to how Hopscotch itself operated and with respect to the investment strategies and options offered in the Plan. For this reason, it chose Red Rock as the Plan's investment manager in 2019 because of Red Rock's commitment to ESG, particularly with respect to the environment but also with respect to diversity, equity and inclusion ("DEI") goals.

13. In a 2019 interview with Forbes, Bobby Whistler, the CEO of Hopscotch, reported that the Board had discussed how it could use the company's commitment to ESG and to DEI to further attract and retain the very young demographic of teenagers and pre-teens that constituted its primary consumers. Mr. Whistler further stated in the Forbes interview that the strategy was paying off and Hopscotch, in just one year, had managed to become the number one

social media platform for this demographic.

14. Upon information and belief, Hopscotch's own ESG and DEI activities have had a significant negative impact on returns and ultimately on the value of Hopscotch's own stock during the period February 4, 2018 to the present ("the relevant time period"). Hopscotch is the second largest social media company and the most popular among the youngest demographic of social media users but has experienced slower growth in share price when compared to the number one company, Tok, and the number three company, Boom.

15. This lower stock value has led to lower returns with respect to the Plan's sizable company stock investment, which currently constitutes over 40% of the Plan's investments.

16. Likewise, upon information and belief, Red Rock's climate activism and ESG investing has led to lower investment returns for the Red Rock-managed Plan investments and thus to lower retirement savings for Plan participants during the relevant time period.

17. In 2019, Red Rock joined Climate Action 100+, a group of investors committed to pressing greenhouse gas emitters to change their ways. Red Rock then issued formal press releases stating that climate sustainability would be the company's new guiding principle.

18. In keeping with this new focus, Red Rock stated that it would exercise proxy voting rights of all assets that it managed for employee benefit plans against management and Board directors of companies that were not making sufficient progress on environmental sustainability.

19. And Red Rock did so on dozens of occasions from 2020 through 2023 through use of proxy voting to support investor activism and to vote against appointment of Board members who were not sufficiently pursuing green goals in Red Rock's view.

20. Red Rock also boycotts investments in traditional energy companies.

21. Each of the ESG investment options offered by the Plan has a similar non-ESG investment option available on the marketplace which had better investment returns and lower costs during the relevant time period.

22. These ESG activities by Red Rock have had a negative impact of returns for Red Rock investment funds during the relevant time period.

23. For instance, 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. By foregoing most Energy-sector investments, Red Rock has missed out on achieving these high returns for Plan participants.

24. Moreover, Red Rock's proxy voting activism has had a measurable impact on the companies which it does invest in, each of which suffered a steep stock price decline following reports of Red Rock voting for a more pro-green energy Board of Directors.

25. Recent papers, including one from the Journal of Finance at the University of Chicago, establish that 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).

## CLASS ACTION ALLEGATIONS

26. This lawsuit is brought as a class action on behalf of the following class:

> All participants and beneficiaries of the Hopscotch Corporation 401(k) Plan from February 4, 2018 through the date of judgment ("Class period"), excluding Defendants and any of their Directors, officers or employees with responsibility for the Plan's investments, management or administration.

27. This lawsuit is properly maintained as a class action under Rules 23(a), 23(b)(1) and 23(b)(3) of the Federal Rules of Civil Procedure.

### A. Rule 23(a)

28. Class certification is appropriate under Rule 23(a) because Plaintiff's claims and allegations satisfy the requirements of numerosity, commonality, typicality and adequacy.

**Numerosity**

29. The exact number of members of the class is not presently known but there are

over 10,000 participants and beneficiaries of the Plan, thus making joinder impractical and satisfying the numerosity requirement.

**Commonality**

30. Defendants have engaged in a common course of conduct giving rise to violations of ERISA which Plaintiff and the class members seek to remedy uniformly. This complaint alleges a common nucleus of operative fact and concerns similar or identical violations of ERISA fiduciary duties of loyalty and prudence, and similar or identical resulting harm. Proceeding as a class action will generate answers to common questions that are apt to drive resolution of the litigation. Such common questions include:

i. Whether Hopscotch and Red Rock breached their fiduciary duties to the Plan;

ii. What amount of damages resulted from each such breach; and

iii. What Plan-wide equitable and other relief should be awarded to remedy Defendants' breaches of fiduciary duty.

**Typicality**

31. The claims alleged by Plaintiff and the resultant harms are typical of the claims of each member of the class. Typicality exists because all class members have been harmed, or are at risk of harm, in the same or a similar manner, as a result of the same violations of ERISA alleged herein.

**Adequacy**

32. Plaintiff will fairly and adequately represent and protect the interests of the class. There are no conflicts of interests between Plaintiff and other class members. Plaintiff has retained counsel with extensive experience litigating complex ERISA class actions in federal court. Plaintiff's counsel has committed sufficient resources to represent the class. Plaintiff's

counsel are therefore well suited to fairly and adequately represent the interests of the class.

**B. Rule 23(b)(1)**

33. Class certification is appropriate under Rule 23(b)(1)(A) because prosecution of separate actions for breaches of fiduciary duties would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct regarding Defendants' fiduciary duties and liability to the Plan under ERISA.

34. Class certification is also appropriate under Rule 23(b)(1)(B) because adjudication by individual participants and beneficiaries regarding breaches of fiduciary duties and remedies for the Plan would, as a practical matter, be dispositive of the interests of participants and beneficiaries not parties to the adjudication or would substantially impair or impede these participants' and beneficiaries' ability to protect their interests.

**C. Rule 23(b)(3)**

35. In the alternative, class certification is appropriate under Rule 23(b)(3) because a class action is the superior method for the fair and efficient adjudication of this lawsuit because joinder of all participants and beneficiaries is impracticable and, the harm to some individual participants and beneficiaries may be relatively small and impracticable for individual class members to enforce their rights through individual actions, and the common questions of law and fact may predominate over individual questions predominate. Given the nature of the allegations, no class member has an interest in individually controlling the prosecution of this lawsuit, and Plaintiff is aware of no difficulties likely to be encountered in the management of this matter as a class action.

## CAUSE OF ACTION
## FOR FIDUCIARY AND CO-FIDUCIARY BREACHES
## OF THE DUTIES OF LOYALTY AND PRUDENCE

**IN VIOLATION OF 29 U.S.C §§ 1104, 1105**

**(Against Both Defendants)**

36. Plaintiffs incorporate by reference the preceding paragraphs as though fully set forth herein.

37. Defendant Hopscotch was at all times relevant a fiduciary of the Plan under 29 U.S.C. § 1002(21).

38. Defendant Red Rock was at all relevant times a fiduciary of the Plan under 29 U.S.C. § 1002(38).

39. Defendants failed to select and include investment options for the Plan based solely on the financial merits of each investment and in the best interests of Plan participants and beneficiaries.

40. Instead, Defendant Hopscotch disloyally and imprudently pursued ESG objectives for Hopscotch and then selected it as the matching and default investment option for the Plan.

41. Defendant Hopscotch also disloyally and imprudently selected and retained Red Rock as the Plan investment manager, despite Red Rock's open pursuit of ESG strategies and investment options that are known to underperform relative to their benchmark indices and other similar investment options available in the marketplace.

42. Likewise, Defendant Red Rock disloyally and imprudently selected ESG funds for the Plan despite the availability of better performing and lower cost investment options readily available in the marketplace.

43. Through these actions and omissions, Defendants failed to discharge their duties with respect to the Plan solely in the interests of Plan participants and beneficiaries, and for the exclusive purpose of providing benefits to Plan participants and beneficiaries and defraying reasonable expenses of administering the Plan, in violation of their fiduciary duties of loyalty under 29 U.S.C. § 1104(a)(1)(A).

44. Through these actions and omissions, Defendants failed to discharge their duties with respect to the Plan with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person in a like capacity and familiar with such matters would have used in the conduct of an enterprise of like character and with like aims, in violation of their duties of prudence under 29 U.S.C. § 1104(a)(1)(B).

45. Each Defendant is personally liable, and Defendants are jointly and severally liable under 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), to make good to the Plan and to Plan participants the losses resulting from their breaches.

46. Each Defendant knowingly participated in each breach of the other Defendant knowing that such acts were a breach, enabled the other Defendant to commit such breaches by failing to discharge the Defendant's own duties, including the duty to monitor, and knowing of the breaches of the other Defendant, failed to make any reasonable and timely effort to remedy the breaches. Accordingly, each Defendant is liable for the breaches of its co-fiduciaries under 29 U.S.C. § 1105(a).

## REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Hopscotch as follows:

1. A declaratory judgment that the acts and omissions described herein violate ERISA;
2. Injunctive and other equitable relief against Defendants prohibiting the practices described herein and affirmatively requiring them to: (1) remove from the Plan all investment options that use ESG investment strategies; and (2) exercise all voting proxies without regard to ESG policy goals.
3. Equitable or remedial relief restoring all Plan losses;
4. Pursuant to 29 U.S.C. § 1132(g), payment of all costs and attorneys' fees incurred in pursuing this action;
5. Payment of prejudgment and post-judgment interest as allowed for under ERISA; and

6. For such other and further relief as the Court deems just and proper.

Dated this 4th day of February, 2024.

Respectfully Submitted,

Attorney X
ATTORNEY FOR PLAINTIFF

BY: /s/ Attorney X

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