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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

PAUL ENOS and DAVID FREITAS,  
individually and as representatives of a  
Class of Participants and Beneficiaries on  
Behalf of the adidas Group 401(k)  
Savings and Retirement Plan,

Plaintiffs,

v.

ADIDAS AMERICA, INC.,

Defendant.

Case No. 3:19-cv-01073-YY

**SECOND AMENDED CLASS ACTION  
COMPLAINT FOR CLAIMS UNDER 29  
U.S.C. § 1132(a)(2)**

DEMAND FOR JURY TRIAL

NOW COME Plaintiffs Paul Enos and David Freitas, individually and as  
representatives of a Class of Participants and Beneficiaries on Behalf of the adidas  
Group 401(k) Savings and Retirement Plan and asserts to the best of his knowledge,

information and belief, formed after an inquiry reasonable under the circumstances, the following:

### INTRODUCTION

1. The duties of loyalty and prudence are “the highest known to the law” and require fiduciaries to keep “an eye single to the interests of the [ERISA] participants and beneficiaries.” *Donovan v. Bierwirth*, 680 F.2d 263, 271-72 n.8 (2<sup>nd</sup> Cir. 1928). This duty is incorporated as a matter of law into ERISA through 29 U.S.C. § 1002(21)(A), which provides that an entity is an ERISA fiduciary “with respect to a plan to the extent that [it] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets.”

2. Defendant adidas America, Inc. (“adidas”) is an ERISA fiduciary. It exercises discretionary authority or discretionary control over the 401(k) defined contribution plan – known as the adidas Group 401(k) Savings and Retirement Plan – that it sponsors and provides to its employees.

3. Beginning in 2013 or earlier, and continuing to at least 2018, adidas maintained one of the most expensive 401K plans in the country compared to applicable benchmarks and peer groups.

4. The adidas 401K plan was so expensive because adidas consistently chose investment options for Plan participants that had unnecessarily high fees, and accordingly, consistently lower net performance than could have been achieved had

adidas chosen different options offered by the same issuer, which had substantially identical portfolios but charged lower fees.

5. These excessive fees cannot be justified. The high fees, occurring over years, represent something more than a sloppy business practice; they are a breach of the fiduciary duties owed by adidas to Plan participants and beneficiaries. Prudent fiduciaries of 401(k) plans continuously monitor plan expenses and administrative fees against applicable benchmarks and peer groups to identify excessive and unjustifiable fees. To remedy, Plaintiffs bring this action on behalf of the Plan under 29 U.S.C. § 1132(a)(2) to enforce adidas's liability under 29 U.S.C. § 1109(a) to make good to the Plan all losses resulting from adidas's breaches of fiduciary duty.

#### **JURISDICTION AND VENUE**

6. This Court has jurisdiction in this ERISA matter via 28 U.S.C. § 1331.

7. Venue is appropriate in this district because adidas may be found in this judicial district within the meaning of 29 U.S.C. § 1132(e)(2).

8. In conformity with 29 U.S.C. § 1132(h), Plaintiffs served the original Complaint by certified mail on the Secretary of Labor and the Secretary of the Treasury.

#### **PARTIES**

9. Plaintiff Paul Enos lives in New Bedford, Massachusetts and, during the Class period, was a participant in the Plan under 29 U.S.C. § 1002(7).

10. Plaintiff David Freitas lives in Acushnet, Massachusetts and, during the Class period, was a participant in the Plan under 29 U.S.C. § 1002(7).

11. The named Plaintiffs and all participants in the Plan suffered financial harm as a result of the imprudent or excessive fee options in the Plan that deprived participants of the opportunity to grow their retirement savings by investing in prudent options with reasonable fees, which would have been available in the Plan if adidas had satisfied its fiduciary obligations. All participants continue to be harmed by the ongoing inclusion of these investment options.

12. adidas is a company with its principal headquarters located at 3449 North Anchor Street, Portland, Oregon. In this Complaint, “adidas” refers to the named defendant and all parent, subsidiary, related, predecessor, and successor entities to which these allegations pertain. Adidas is the Plan sponsor of the adidas Group 401(k) Savings and Retirement Plan.

13. Adidas is a fiduciary with ultimate responsibility for the control, management, and administration of the Plan in accord with 29 U.S.C. § 1102(a). In combination, adidas has exclusive responsibility and complete discretionary authority to control the operation, management, and administration of the Plan, with all powers necessary to properly carry out such responsibilities.

14. The Plan is a “defined contribution” pension plan, meaning that adidas’s contribution to the payment of Plan costs is guaranteed but the pension benefits are not. There are three service providers that provide recordkeeping and information (among other things) to the Plan: KPMG, Charles Schwab and UBS.

15. The Plan is a defined contribution, individual account employee pension benefit plan under 29 U.S.C. §§ 1002(2)(A) and 1002(34). The Plan is established and

maintained under a written document in accord with 29 U.S.C. § 1102(a)(1). The Plan provides for retirement income for eligible adidas employees and their beneficiaries.

### ERISA's FIDUCIARY STANDARDS

16. ERISA imposes strict fiduciary standards of duty and loyalty and prudence on adidas as a fiduciary to the Plan. 29 U.S.C. § 1104(a)(1) provides in relevant part:

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; [and]

(B) 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 like character and with like aims.

17. With certain exceptions not relevant here, 29 U.S.C. § 1103(c)(1) provides in relevant part:

the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

18. 29 U.S.C. § 1109 provides in relevant part:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

19. Under ERISA, fiduciaries that exercise any authority or control over plan assets, including the selection of plan investments and service providers, must act prudently and for the exclusive benefit of participants in the plan, and not for the benefit of third parties including service providers to the plan such as recordkeepers and those who provide investment products. Fiduciaries must ensure that the amount of fees paid to those service providers is no more than reasonable. DOL Adv. Op. 97-15A; DOL Adv. Op. 97-16A; *see also* 29 U.S.C. §1103(c)(1) (plan assets “shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan”).

20. “[T]he duty to conduct an independent investigation into the merits of a particular investment” is “the most basic of ERISA’s investment fiduciary duties.” *In re Unisys Savings Plan Litig.*, 74 F.3d 420, 435 (3d Cir. 1996); *Katsaros v. Cody*, 744 F.2d 270, 279 (2<sup>nd</sup> Cir. 1984) (fiduciaries must use “the appropriate methods to investigate the merits” of plan investments). Fiduciaries must “initially determine, and continue to monitor, the prudence of each investment option available to plan participants.” *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4<sup>th</sup> Cir. 2007); (emphasis original); *see also* 29 C.F.R. § 2550.404a-1; DOL Adv. Opinion 98-04A; DOL Adv. Opinion 88-16A. Thus, a defined contribution plan fiduciary cannot “insulate itself from liability by the simple expedient of including a very large number of investment alternatives in its portfolio and then shifting to the participants the responsibility for choosing among them.” *Hecker v. Deere & Co.*, 569 F.3d 708, 711 (7<sup>th</sup> Cir. 2009). Fiduciaries have “a continuing

duty to monitor investments and remove imprudent ones[.]” *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828-29 (2015).

21. 29 U.S.C. § 1132(a)(2) authorizes plan participants to bring a civil action on behalf of the Plan for appropriate relief under 29 U.S.C. § 1109.

### **THE PLAN**

22. At all relevant times, the adidas Plan had over 5,000 participants, and assets well above \$250 million. In 2017, the Plan had 7,574 participants, and over \$620 million in assets. The adidas Plan offered about 25 different investment choices to its participants.

23. At all relevant times, the adidas Plan’s fees were excessive when compared with other comparable 401K plans offered by other sponsors that had similar numbers of plan participants, and similar amounts of money under management. The excessive fees led to lower net returns than participants in comparable 401K plans enjoyed.

24. 401K plan fiduciaries regularly use benchmarking analysis for monitoring and evaluating plan costs and fees.

25. There is also publicly available benchmarking data available. For example, a 2017 Brightscope/ICI report aggregates data from 53,856 plans totaling \$4.4 trillion in assets. See [www.ici.org/pdf/20\\_ppr\\_dcplan\\_profile\\_401k.pdf](http://www.ici.org/pdf/20_ppr_dcplan_profile_401k.pdf) at Exh. 4-2, page 58.

26. A benchmarking analysis of the type often employed by plan fiduciaries and financial advisors alike shows that the administrative fees charged to Plan

participants is near or greater than 90 percent of its comparator fees. In 2017, the adidas Plan's expenses amounted to 0.63% of assets under management. This compared unfavorably to the median among comparator plans with an asset range between \$500 million and \$1 billion, the median plan had expenses of 0.38% of assets under management, the 10th percentile had 0.19%, and the 90<sup>th</sup> percentile plan had expenses of 0.57 basis.

27. Comparisons in prior year show similar variances between the adidas Plan and comparator groups, with the adidas Plan always more costly to participants.

28. A prudent fiduciary would have investigated why the adidas plan expenses were excessive and above the 90th percentile of comparator plan expenses.

29. A prudent fiduciary investigating why the adidas plan expenses were so high would have discovered one reason is because between 2013 and 2018, nearly two-thirds of all Plan funds were invested in high-fee T. Rowe Price target date investment funds.

30. "Target Date" investments are intended for retirement savings. These investment options are intended for individuals who expect to begin making withdrawals from their 401k investments, in specific ranges of years. For example, a Target 2030 investment would be intended for individuals who reach retirement age around the year 2030.

31. The fees from these T. Rowe Price target date funds accounted for over 71% of the total Plan investment fees participants paid in 2017 and, upon information



and belief, accounted for a similar percentage of the total Plan investment fees participants paid in prior years.

32. Adidas' decision to retain high-fee T. Rowe Price target date funds and, for years, do nothing to significantly reduce Plan expenses cannot be justified. An examination of the investment options the Plan fiduciaries chose and available alternatives they either did not consider or did not choose provides a telling example of why they breached their fiduciary duties.

33. Many other highly regarded companies offer target date funds, including Fidelity, Schwab, State Street, and Vanguard. Had adidas evaluated any of those alternatives to T. Rowe Price, it would have discovered many had higher 3 year returns, and all had significantly lower expense ratios. For example, compare the 2030 target date funds:

	Symbol	3 year return	Expense Ratio
T Rowe Price 2030 TDF	TRPCX	7.24%	0.49%
Fidelity	FFEGX	7.80%	0.08%
Schwab	SWYEX	7.16%	0.08%
State Street	SSBYX	8.23%	0.09%
Vanguard	VTHR	7.08%	0.09%

34. As just one example, the Plan already included at least one investment option by Fidelity. A prudent fiduciary would have known that had it also opted to

include Fidelity target date funds it would have saved Plan participants over \$2 million dollars in fees in 2017 and, upon information and belief, would have also saved Plan participants a similar amount in fees in prior years.

35. As another example, the Target Date investment funds offered by T. Rowe Price are also offered as Collective Investment Trusts (“CIT’s”). T. Rowe Price Target Date CIT’s follow the same investment strategy, and frequently make the same investments, as its Investment funds. Therefore, they can expect to receive the same gross returns on investments.

36. T. Rowe Price CIT’s required minimum investments by plans (or wealthy individuals) of \$50 million, which was reduced to \$20 million in 2017. Because of the higher minimum required investment, and because Collective Investment Trusts are not subject to certain Securities Exchange Commission reporting requirements applicable to investment funds, Collective Investment Trusts offered by T. Rowe Price have lower fees than the same company’s comparable investment funds. Since the investment strategies are substantially identical, T. Rowe Price Target Date CIT’s have consistently had higher net returns for investors over time than its Target date Investment Funds.

37. About two-thirds of the total assets of the adidas Plan consisted of T. Rowe Price Target Plans in the 2013-2017 period. While CITs were not necessarily the best selection compared to other available funds, despite the obvious advantages of CIT’s, and despite the adidas’s Plan having over \$250 million in Target Date Plans at all relevant times so that it qualified for the minimum required investment amounts, adidas also failed to include any Target Date CIT’s among its investment options prior

to 2018. As the charts below demonstrate, this resulted in the Plan paying substantially higher fees to T. Rowe Price than it would have had the Plan chosen lower priced options.

38. The charges that follow are expressed as a percentage of assets under management, or “expense ratio.” For example, if the mutual fund deducts 1% of fund assets each year in fees, the fund’s expense ratio would be 1%, or 100 basis points or bps (One basis point is equal to 1/100th of one percent, or 0.01%). The fees deducted from a mutual fund’s assets reduce the return on investment and the value of the shares owned by fund investors. Expense data for Investment Funds is taken from documents filed with the Securities and Exchange Commission; expense information for CIT’s is taken from promotional material disseminated by T. Rowe Price.

**PLAN FUNDS COMPARED TO IDENTICAL LOWER COST COLLECTIVE INVESTMENT TRUSTS 2013-2017**

**2013:**

<b>adidas Plan Fund</b>	<b>Plan Fee</b>	<b>Corresponding CIT</b>	<b>Corresponding CIT Fee</b>
T. Rowe Price Retirement 2005 (TRRFY)	59 bps	T. Rowe Price Retirement Trust 2005	58 bps
T. Rowe Price Retirement 2010 (TRRAX)	60 bps	T. Rowe Price Retirement Trust 2010	58 bps
T. Rowe Price Retirement 2015 (TRRGX)	65 bps	T. Rowe Price Retirement Trust 2015	58 bps
T. Rowe Price Retirement 2020 (TRRBX)	69 bps	T. Rowe Price Retirement 2020 Trust	58 bps

T. Rowe Price Retirement 2025 (TRRHX)	72 bps	T Rowe Price Retirement Trust 2025	58 bps
T. Rowe Price Retirement 2030 (TRRCX)	78 bps	T. Rowe Price Retirement Trust 2030	58 bps
T. Rowe Price Retirement I2035 (TRRJX)	76 bps	T. Rowe Price Retirement Trust 2035	58 bps
T. Rowe Price Retirement 2040 (TRRDY)	78 bps	T. Rowe Price Retirement Trust 2040	58 bps
T. Rowe Price Retirement 2045 (TRRKX)	78 bps	T. Rowe Price Retirement Trust 2045	58 bps
T. Rowe Price Retirement 2050 (TRRMX)	78 bps	T. Rowe Price Retirement Trust 2050	58 bps
T. Rowe Price Retirement 2055 (TRRNX)	78 bps	T. Rowe Price Retirement Trust 2055	58 bps
T. Rowe Price Retirement 2060 (TRRLX)	78 bps	T. Rowe Price Retirement Trust 2060	58 bps

**2014:**

T. Rowe Price Retirement 2005 (TRRFY)	59 bps	T. Rowe Price Retirement Trust 2005	58 bps
T. Rowe Price Retirement 2010 (TRRAX)	59 bps	T. Rowe Price Retirement Trust 2010	58 bps
T. Rowe Price Retirement 2015 (TRRGX)	63 bps	T. Rowe Price Retirement Trust 2015	58 bps
T. Rowe Price Retirement 2020 (TRRBX)	67 bps	T. Rowe Price Retirement Trust 2020	58 bps

T. Rowe Price Retirement 2025 (TRRHX)	70 bps	T Rowe Price Retirement Trust 2025	58 bps
T. Rowe Price Retirement 2030 (TRRCX)	73 bps	T. Rowe Price Retirement Trust 2030	58 bps
T. Rowe Price Retirement 2035 (TRRJX)	75 bps	T. Rowe Price Retirement Trust 2035	58 bps
T. Rowe Price Retirement 2040 (TRRDY)	76 bps	T. Rowe Price Retirement Trust 2040	58 bps
T. Rowe Price Retirement 2045 (TRRKX)	76 bps	T. Rowe Price Retirement Trust 2045	58 bps
T. Rowe Price Retirement 2050 (TRRMX)	76 bps	T. Rowe Price Retirement Trust 2050	58 bps
T. Rowe Price Retirement 2055 (TRRNX)	76 bps	T. Rowe Price Retirement Trust 2055	58 bps
T. Rowe Price Retirement 2060 (TRRLX)	76 bps	T. Rowe Price Retirement Trust 2060	58 bps

**2015:**

T. Rowe Price Retirement 2020 (TRRBX)	61 bps	T. Rowe Price Retirement 2020 Trust	58 bps
T. Rowe Price Retirement 2025 (TRRHX)	64 bps	T Rowe Price Retirement Trust 2025	58 bps
T. Rowe Price Retirement 2030 (TRRCX)	67 bps	T. Rowe Price Retirement Trust 2030	58 bps
T. Rowe Price Retirement 2035 (TRRJX)	70bps	T. Rowe Price Retirement Trust 2035	58 bps

T. Rowe Price Retirement 2040 (TRRDY)	72 bps	T. Rowe Price Retirement Trust 2040	58 bps
T. Rowe Price Retirement 2045 (TRRKX)	72 bps	T. Rowe Price Retirement Trust 2045	58 bps
T. Rowe Price Retirement 2050 (TRRMX)	72 bps	T. Rowe Price Retirement Trust 2050	58 bps
T. Rowe Price Retirement 2055 (TRRNK)	72 bps	T. Rowe Price Retirement Trust 2055	58 bps
T. Rowe Price Retirement I 2060 I (TRRLX)	72 bps	T. Rowe Price Retirement Trust 2060	58 bps

**2016:**

T. Rowe Price Retirement I 2020 I (TRBRX)	55 bps	T. Rowe Price Retirement 2020 Trust	54 bps
T. Rowe Price Retirement I 2025 I (TRPHX)	58 bps	T Rowe Price Retirement Trust 2025	54 bps
T. Rowe Price Retirement I 2030 I (TRPCX)	61 bps	T. Rowe Price Retirement Trust 2030	54 bps
T. Rowe Price Retirement I 2035 I (TRPJX)	63 bps	T. Rowe Price Retirement Trust 2035	54 bps
T. Rowe Price Retirement I 2040 I (TRPDX)	65 bps	T. Rowe Price Retirement Trust 2040	54 bps
T. Rowe Price Retirement I 2045 I (TRPKX)	65 bps	T. Rowe Price Retirement Trust 2045	54 bps
T. Rowe Price Retirement I 2050 I (TRPMX)	65 bps	T. Rowe Price Retirement Trust 2050	54 bps
T. Rowe Price Retirement I 2055 I (TRPNX)	65 bps	T. Rowe Price Retirement Trust 2055	54 bps

T. Rowe Price Retirement I 2060 I (TRPLX)	65 bps	T. Rowe Price Retirement Trust 2060	54 bps
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**2017:**

T. Rowe Price Retirement I 2030 I (TRPCX)	55 bps	T. Rowe Price Retirement Trust 2030	54 bps
T. Rowe Price Retirement I 2035 I (TRPJX)	58 bps	T. Rowe Price Retirement Trust 2035	54 bps
T. Rowe Price Retirement I 2040 I (TRPDX)	59 bps	T. Rowe Price Retirement Trust 2040	54 bps
T. Rowe Price Retirement I 2045 I (TRPKX)	60bps	T. Rowe Price Retirement Trust 2045	54 bps
T. Rowe Price Retirement I 2050 I (TRPMX)	60 bps	T. Rowe Price Retirement Trust 2050	54 bps
T. Rowe Price Retirement I 2055 I (TRPNX)	60 bps	T. Rowe Price Retirement Trust 2055	54 bps
T. Rowe Price Retirement I 2060 I (TRPLX)	60 bps	T. Rowe Price Retirement Trust 2060	54 bps

39. By selecting and retaining the Plan's excessive cost investments while failing to adequately investigate the use of superior lower-cost alternatives such as those identified above that were readily available to the Plan, or foregoing those alternatives without any prudent reason for doing so, adidas caused Plan participants to lose millions of dollars of their retirement savings each year through excessive fees.

40. During the relevant time period, Plaintiff Enos was invested in the Plan's T. Rowe Price Retirement 2030 target date fund (TRPCX) and, therefore, paid excessive fees due to adidas' breach of fiduciary duty.

41. Moreover, having learned of the Plan's excessive investment fees, a prudent fiduciary would not have focused solely on the Plan's target date funds but would have evaluated the fees charged by *all* Plan investments to determine if Plan investment fees could be reduced even further.

42. As one example, as of 2017, the Plan had over \$12 million invested in Eaton Vance Parametric Structured Emerging Markets, which charged participants over \$136,300 (1.13%) in 2017 and, upon information and belief, charged a similar percentage in prior years.

43. A prudent fiduciary, as part of its duty to monitor and evaluate investment fees, would have investigated these high fees and learned that there were numerous alternatives, including alternatives offered by, Fidelity, a financial services company that the Plan already selected funds from. For example, Fidelity offered a comparable Emerging Markets Index that would have charged Plan participants only



\$9,172 (0.076%) in 2017, a full percentage point less that would have saved participants over \$127,000.

44. Adidas apparently did nothing to review the costs of other Plan investments either, however, and retained the Eaton Vance Parametric Structured Emerging Markets investment option in the Plan from 2013 to 2017, thereby wasting participant funds on high fee investments.

45. Plaintiff Freitas was invested in the Plan's Eaton Vance Parametric Structured Emerging Markets fund and, therefore, paid excessive fees due to adidas breach of fiduciary duty.

46. Plaintiffs had no knowledge of how the fees charged to and paid by adidas Plan participants compared to market norms or other investments available to the Plan. Indeed, when adidas provided Plan participants benchmarking examples of alternative investments, it omitted information about comparator fees.

**THE OVERCHARGES BREACHED**  
**DEFENDANT'S FIDUCIARY OBLIGATIONS TO THE PLAN**

47. The administrative fees of the investment offerings were paid for by the Plan participants. adidas, as a fiduciary, was responsible for ensuring that these administrative fees were reasonable.

48. A plan's fiduciaries have control over defined contribution plan expenses. The fiduciaries have exclusive control over the menu of investment options to which participants may direct the assets in their accounts. Those selections each have their own fees, which are deducted from the returns that participants receive on their investments.

49. At retirement, employees' benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses. Accordingly, excessive fees can impair the value of a participant's account. Over time, even small differences in fees and performance can result in vast differences in the amount of savings available at retirement.

50. Prudent fiduciaries exercising control over administration of a plan and the selection and monitoring of designated investment alternatives will minimize plan expenses by hiring low-cost service providers and by curating a menu of low-cost investment options. *See* Restatement (Third) of Trusts § 90 cmt. b ("[C]ost-conscious management is fundamental to prudence in the investment function. . . .").

51. The Supreme Court has noted that the legal construction of an ERISA fiduciary's duties is "derived from the common law of trusts." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015). Therefore, "[i]n determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Id.* In fact, the duty of prudence imposed under 29 U.S.C. § 1104(a)(1)(B) is a codification of the common law prudent investor rule found in trust law. *Buccino v. Continental Assur. Co.*, 578 F. Supp. 1518, 1521 (S.D.N.Y. 1983).

52. Given the significant variation in total plan fees attributable to plan size, the reasonableness of administrative expenses and investment management expenses should be determined by comparison to other similarly-sized plans. *See* 29 U.S.C. § 1104(a)(1)(B) (requiring ERISA fiduciaries to discharge their duties in the manner "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").

53. A fiduciary must initially determine, and continue to monitor, the prudence of each investment option available to plan participants. A plan fiduciary cannot assume that an investment that began as a prudent one will remain so, particularly when the original circumstances change or the investment reveals itself to be deficient. An ERISA fiduciary's investment decisions also must account for changed circumstances and a trustee who simply ignores changed circumstances that have increased the risk of loss to the trust's beneficiaries is imprudent.

54. Accordingly, investment fees are of paramount importance to prudent investment selection, and a prudent investor will not select higher-cost actively

managed funds unless there has been a documented process leading to the realistic conclusion that the fund is likely to be that extremely rare exception, if one even exists, that will outperform its benchmark over time, net of investment expenses.

55. Prudent fiduciaries of defined contribution plans continuously monitor the investment performance of plan options against applicable benchmarks and peer groups to identify underperforming investments. Based on this process, prudent fiduciaries replace those imprudent investments with better-performing and reasonably priced options.

56. Adidas's decision-making, monitoring and soliciting bids from investment funds was deficient in that it resulted in almost no passively-managed funds options for Plan participants, resulting in inappropriately high administrative Plan fees.

#### **CLASS ACTION ALLEGATIONS**

57. 29 U.S.C. § 1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce a breaching fiduciary's liability to the Plan under 29 U.S.C. § 1109(a).

58. In acting in this representative capacity, Plaintiffs seek to certify this action as a class action on behalf of all participants and beneficiaries of the Plan.

Plaintiffs seek to certify, and to be appointed as representatives of, the following Class:

*All participants and beneficiaries of the adidas Group 401(k) Savings and Retirement Plan from July 10, 2013 through the date of judgment excluding the Defendant or any participant who is a fiduciary to the Plan.*

59. The Class includes more than 7,478 members and is so large that joinder of all its members is impracticable, pursuant to Federal Rule of Civil Procedure 23(a)(1).

60. There are questions of law and fact common to this Class pursuant to Federal Rule of Civil Procedure 23(a)(2), because adidas owed fiduciary duties to the Plan and to all participants and beneficiaries and took the actions and omissions alleged as the Plan and not as to any individual participant. Common questions of law and fact include but are not limited to the following:

- a. Who are fiduciaries liable for the remedies provided by 29 U.S.C. § 1109(a);
- b. Whether the fiduciaries of the Plan breached their fiduciary duties to the Plan;
- c. What are the losses to the Plan resulting from each breach of fiduciary duty; and
- d. What Plan-wide equitable and other relief the Court should impose in light of adidas's breach of duty.

61. Plaintiffs' claims are typical of the claims of the Class pursuant to Federal Rule of Civil Procedure 23(a)(3), because Plaintiffs are participants during the time period at issue and all participants in the Plan were harmed by adidas's misconduct.

62. Plaintiffs will adequately represent the Class pursuant to Federal Rule of Civil Procedure 23(a)(4), because they participated in the Plan during the Class period, have no interest that conflicts with the Class, are committed to the vigorous representation of the Class, and have engaged experienced and competent lawyers to represent the Class.

63. Pursuant to Federal Rule of Civil Procedure 23(b)(1), prosecution of separate actions for these breaches of fiduciary duties by individual participants and beneficiaries would create the risk of (1) inconsistent or varying adjudications that would establish incompatible standards of conduct for defendant concerning its discharge of their fiduciary duties to the Plan and personal liability to the Plan under 29

U.S.C. § 1109(a) and (2) adjudications by individual participants and beneficiaries regarding these breaches of fiduciary duties and remedies for the Plan would, as a practical matter, be dispositive of the interests of the participants and beneficiaries who are not parties to the adjudication, or (3) would substantially impair those participants' and beneficiaries' ability to protect their interests.

64. Certification is also appropriate under Fed. R. Civ. P. 23(b)(2) because adidas acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

65. A class action is the superior method for fair and efficient adjudication of this controversy because joinder of all participants and beneficiaries is impracticable, the losses suffered by individual participants and beneficiaries may be small and impracticable for individual members to enforce their rights through individual actions, and the common questions of law and fact predominate over individual questions. Given the nature of the allegations, no class member has an interest in individually controlling the prosecution of this matter, and Plaintiffs are aware of no difficulties likely to be encountered in the management of this matter as a class action.

Alternatively, then, this action may be certified as a class under Federal Rule of Civil Procedure 23(b)(3), if it is not certified under Federal Rule of Civil Procedure 23(b)(1).

66. Plaintiffs' attorneys are experienced in complex commercial and class litigation and will adequately represent the Class.

**LEGAL CLAIMS**

**Count 1 – Breach of Duties of Loyalty and Prudence  
29 U.S.C. § 1104(a)(1)(A)-(B), (D)**

67. Plaintiffs restate the above allegations as if fully set forth.

68. Adidas is a fiduciary of the Plan under 29 U.S.C. §§ 1002(21) and/or 1102(a)(1). Adidas is responsible for selecting prudent investment options, ensuring that those options charge only reasonable fees, and taking any other necessary steps to ensure that the Plan’s assets are invested prudently. Adidas had a continuing duty to evaluate and monitor the Plan’s investments on an ongoing basis and to “remove imprudent ones” regardless of how long a fund has been in the plan. *Tibble v. Edison*, 135 S. Ct. 1823, 1829 (2015).

69. 29 U.S.C. § 1104 imposes fiduciary duties of prudence and loyalty upon adidas in its administration of the Plan. The scope of the fiduciary duties and responsibilities of adidas includes managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, defraying reasonable expenses of administering the Plan, and acting with the care, skill, diligence, and prudence required by ERISA. These duties further required adidas to independently assess whether each option was a prudent choice for the Plan. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 423 (4<sup>th</sup> Cir. 2007); see *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 590, 595–96 (8<sup>th</sup> Cir. 2009).

70. Adidas was directly responsible for ensuring that the Plan’s fees were reasonable, selecting investment options in a prudent fashion in the best interest of Plan participants, prudently evaluating and monitoring the Plan’s investments on an

ongoing basis and eliminating funds that did not serve the best interest of Plan participants, and taking all necessary steps to ensure that the Plan's assets were invested prudently and appropriately.

71. Adidas failed to employ a prudent and loyal process by failing to critically or objectively evaluate the cost and performance of the Plan's investments and fees in comparison to other investment options. Adidas selected and retained for years as Plan investment options mutual funds with high expenses relative to other investment options that were readily available to the Plan at all relevant times.

72. Adidas failed to engage in a prudent process for monitoring the Plan's investments and removing imprudent ones within a reasonable period. This resulted in the Plan continuing to offer excessively expensive funds compared to equivalent and/or comparable low-cost alternatives that were available to the Plan.

73. Thus, Adidas failed to make Plan investment decisions based solely on the merits of each investment and in the best interest of Plan participants; failed to ensure the Plan was invested in the lowest-cost investment vehicles. Through these actions and omissions, Adidas failed to discharge its duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of its fiduciary duty of loyalty under 29 U.S.C. § 1104(a)(1)(A).

74. Adidas failed to discharge its duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent



person acting 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, thereby breaching its duties under 29 U.S.C. § 1104(a)(1)(B).

75. Adidas is liable under 29 U.S.C. §§ 1109(a) and 1132(a)(2) to make good to the Plan the losses resulting from the breaches, to restore to the Plan any profits adidas made through the use of Plan assets, and to restore to the Plan any profits resulting from the breaches of fiduciary duties alleged in this Court. In addition, adidas is subject to other equitable relief pursuant to 29 U.S.C. §§ 1109(a) and 1132(a)(3).

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of the Plan and all similarly situated participants and beneficiaries of the Plan, request the following:

- A declaration that adidas breached its fiduciary duties as described above;
- An order that requires adidas to make good to the Plan all losses resulting from each breach of fiduciary duty, and to otherwise restore the Plan to the position it would have occupied but for the breaches of fiduciary duty;
- Order an accounting to determine the amounts that adidas must make good to the Plan;
- Remove the fiduciaries who have breached their fiduciary duties;
- Certify the Class, appointing each named Plaintiff as a class representative and appoint undersigned counsel as Class Counsel;
- Awarding to Plaintiffs and the Class their attorneys' fees and costs under 29 U.S.C. § 1132(g)(1) and the common fund doctrine;
- Award interest to the extent it is allowed by law; and
- Grant all other equitable and/or remedial relief the Court deems appropriate.

**JURY TRIAL DEMANDED**

Plaintiffs demand a trial by jury for all issues so triable.

RESPECTFULLY SUBMITTED AND DATED this 4th day of December, 2020.

CRUEGER DICKINSON LLC

By: /s/ Charles J. Crueger

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