

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARTHUR BEKKER, *individually, on behalf of a
class of all other persons similarly situated, and on
behalf of the Neuberger Berman 401(k) plan,*

Plaintiff,

16-CV-6123 (LTS) (BCM)

v.

NEUBERGER BERMAN GROUP LLC 401(K)
PLAN INVESTMENT COMMITTEE,

Defendant.

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DEFENDANT’S ANSWER TO THE FIRST AMENDED COMPLAINT

Defendant Neuberger Berman Group LLC 401(k) Plan Investment Committee (“Defendant” or “the Investment Committee”), by and through its undersigned counsel, Proskauer Rose LLP, as and for its Answer to the First Amended Complaint filed by Plaintiff Arthur Bekker, responds to each numbered paragraph in the First Amended Complaint as follows:

I. INTRODUCTION

1. The Investment Committee denies the allegations in Paragraph 1, except admits that Plaintiff purports to seek relief under Sections 404 and 406 of the Employee Retirement Income Security Act, as amended (“ERISA”), 29 U.S.C. §§ 1104 and 1106, for breach of fiduciary duty and prohibited transactions on behalf of himself and a putative class of participants in the Neuberger Berman Group 401(k) Plan (the “Plan”).

2. The Investment Committee admits the allegations in Paragraph 2.

3. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 3, and therefore, denies them.

II. NATURE OF THE ACTION

4. The Investment Committee states that the allegations in Paragraph 4 set forth a legal conclusion to which no response is required.

5. The Investment Committee states that the allegations in Paragraph 5 set forth a legal conclusion to which no response is required.

6. The Investment Committee states that the allegations in Paragraph 6 set forth a legal conclusion to which no response is required.

7. The Investment Committee denies the allegations in Paragraph 7.

8. The Investment Committee denies the allegations in Paragraph 8, except admits that, during the Class Period, it was responsible for selecting, monitoring, and removing Plan investments.

9. The Investment Committee denies the allegations in Paragraph 9, except admits that, in 2011, the Fund was opened to new investors.

10. The Investment Committee admits that the Fund is managed by Marvin Schwartz, who is a Managing Director and shareholder of NBSH Acquisition, LLC (“NBSH”), the parent of Neuberger Berman Group LLC (“Neuberger”). The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 10.

11. The Investment Committee denies the allegations in Paragraph 11, except admits that fees for investments in the Fund were remitted to Neuberger Berman Trust Company N.A. (“Neuberger Trust”).

12. The Investment Committee denies the allegations in Paragraph 12, except admits that, effective July 1, 2014, the Fund charged fees of 80 basis points.

13. The Investment Committee denies the allegations in Paragraph 13, except admits that, effective April 18, 2011, the Fund was converted into a collective investment trust, and that assets invested in the Fund constituted Plan assets.

14. The Investment Committee denies the allegations in Paragraph 14.

15. The Investment Committee admits that Plaintiff purports to bring this action under Sections 404, 406, 409, and 502 of ERISA, 29 U.S.C. §§ 1104, 1106, 1109, and 1132, but denies that he is entitled to any relief under those sections, and further denies the remaining allegations in Paragraph 15.

16. The Investment Committee admits that Plaintiff purports to seek relief for alleged Plan losses and other relief, but denies that he is entitled to any such relief, and further denies the remaining allegations in Paragraph 16.

17. The Investment Committee admits that Plaintiff purports to seek relief on behalf of a putative class of participants in the Plan who invested in the Fund from June 15, 2010 through the present (the “Class Period”), but denies that the putative class is appropriate or that it is entitled to any relief.

III. JURISDICTION AND VENUE

18. The Investment Committee admits that Plaintiff purports to invoke this Court’s jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). The Investment Committee states that the remaining allegations in Paragraph 18 set forth legal conclusions to which no response is required.

19. The Investment Committee admits that Plaintiff purports to invoke this Court’s jurisdiction over it. The Investment Committee states that the remaining allegations in Paragraph 19 set forth legal conclusions to which no response is required.

20. The Investment Committee admits that Plaintiff purports to invoke the venue of this Court pursuant to 29 U.S.C. § 1132(e)(2). The Investment Committee states that the remaining allegations in Paragraph 20 set forth legal conclusions to which no response is required.

IV. PARTIES

21. The Investment Committee admits that Plaintiff has been a participant in the Plan during the entire putative Class Period. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 21.

22. The Investment Committee admits that Plaintiff invested in a number of investment options, including the Fund, during the Class Period. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 22.

23. The Investment Committee admits the allegations in Paragraph 23.

24. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 24, except admits that Plaintiff purports to name individual Investment Committee members as “Jane and John Does 1-25.”

25. Paragraph 25 seeks to state legal conclusions to which no response is required. To the extent a response is required, the Investment Committee denies the allegations in Paragraph 25, except admits that the Investment Committee was a Plan fiduciary during the Class Period.

26. The Investment Committee admits the allegations in Paragraph 26.

27. The Investment Committee denies the allegations in Paragraph 27, except admits that on January 1, 2017, Neuberger Berman LLC changed its name to Neuberger Berman BD LLC and completed its transfer of its investment advisory business to Neuberger Berman Investment Advisers LLC, formerly known as Neuberger Berman Fixed Income LLC.

28. The Investment Committee denies the allegations in Paragraph 28, except admits that Neuberger Trust is an indirect wholly-owned subsidiary of Neuberger and is a national bank with its principal place of business in New York, New York.

29. The Investment Committee admits that Marvin Schwartz is the lead manager of the Fund through the Straus Group, that he is a Managing Director and a shareholder in NBSH, the parent of Neuberger, and that he resides in New York. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 29.

V. FACTS

a. The Plan and Administration of the Plan.

30. The Investment Committee admits the allegations in Paragraph 30.

31. The Investment Committee admits the allegations in Paragraph 31.

32. The Investment Committee denies the allegations in Paragraph 32, except admits that the Plan covers eligible employee of Neuberger and certain of its affiliated companies.

33. The Investment Committee admits the allegations in Paragraph 33.

34. The Investment Committee admits the allegations in Paragraph 34.

35. The Investment Committee admits the allegations in Paragraph 35.

36. The Investment Committee states that the allegations in Paragraph 36 refer to the Plan's Form 5500 filing for the 2017 Plan year, and that the content of that document speaks for itself. To the extent a response is required, the Investment Committee denies the allegations in Paragraph 36 to the extent they are inconsistent with the content of that document.

37. The Investment Committee denies the allegations in Paragraph 37, except admits that it is responsible for selecting, monitoring, and removing investment options available under the Plan, and that its individual members are officers and/or employees of Neuberger and its affiliates.

38. The Investment Committee denies the allegations in Paragraph 38, except admits that since December 2014, Neuberger has been owned by employees, former employees, and their permitted assignees, and that approximately 25% of all current Neuberger employees own equity in Neuberger.

b. The Value Equity Fund

39. The Investment Committee denies the allegations in Paragraph 39, except admits that Neuberger Trust, a wholly-owned subsidiary of Neuberger, maintains fiduciary authority over the management of and investments made in the Fund, and that since April 18, 2011, the Fund has been part of a collective investment trust.

40. The Investment Committee admits the allegations in Paragraph 40.

41. The allegations in Paragraph 41 refer to a May 18, 2009 online article, the content of which speaks for itself.

42. The Investment Committee denies the allegations in Paragraph 42, except admits that, effective April 18, 2011, the Fund was converted into a collective investment trust and re-opened to new investments.

43. The Investment Committee denies the allegations in Paragraph 43.

44. The Investment Committee denies the allegations in Paragraph 44, except admits that as of December 31, 2010, the Plan's investments in the Fund through the separate account included common stocks, certain of which were included in the S&P 500 index, and cash-equivalents.

45. The Investment Committee denies the allegations in Paragraph 45, except admits that as of December 31, 2012, the eighteen (18) largest holdings in the Fund were of companies listed in the S&P 500 index.

46. The Investment Committee admits the allegations in Paragraph 46.

47. The Investment Committee denies the allegations in Paragraph 47.

48. The Investment Committee denies the allegations in Paragraph 48, except admits that certain language quoted in Paragraph 48 is from a May 18, 2009 online article, the content of which speaks for itself.

49. The Investment Committee denies the allegations in Paragraph 49, except admits that the allegations in Paragraph 49 purport to summarize a 2014 Annual Report, the content of which speaks for itself.

50. The Investment Committee admits the allegations in Paragraph 50.

51. The Investment Committee denies the allegations in Paragraph 51 and the contents of Table 1, except admits that the Fund charges fees of 80 basis points, and that these fees are paid to Neuberger Trust.

52. The Investment Committee denies the allegations in Paragraph 52.

53. The Investment Committee denies the allegations in Paragraph 53.

54. The Investment Committee denies the allegations in Paragraph 54, except admits that the allegations in Paragraph 54 refer to a report by the Investment Company Institute, the content of which speaks for itself.

55. The Investment Committee lacks information sufficient to form a belief as to allegations in Paragraph 55 or the contents of Table 2.

56. The Investment Committee denies the allegations in Paragraph 56 and the contents of Table 3, except admits that the Fund had an investment objective to “provide capital return opportunities afforded by the equity market” and that it applied “principles of value investing to select investments.”

57. The Investment Committee denies the allegations in Paragraph 57.

58. The Investment Committee denies the allegations in Paragraph 58, except admits that the Fund charges fees that are higher than the Neuberger Berman Value Fund and the Neuberger Berman Large Cap Value Fund.

59. The Investment Committee denies the allegations in Paragraph 59, and states that the allegations in Paragraph 59 refer to the Neuberger Berman Investment Advisers LLC Client Brochure, the content of which speaks for itself.

60. The Investment Committee denies the allegations in Paragraph 60.

61. The Investment Committee denies the allegations in Paragraph 61.

62. The Investment Committee denies the allegations in Paragraph 62, except admits that, for the ten years ending June 30, 2016, the Fund had an annualized return of 2.97% and the VIIIIX had an annualized return of 7.45%.

63. The Investment Committee denies the allegations in Paragraph 63 and the contents of the corresponding Table 3, except admits that: (i) for the five years ending June 30, 2016, the Fund, VIIIIX, the Neuberger Berman Value Fund, and the Neuberger Berman Large Cap Value Fund had annualized returns of, respectively, 4.73%, 12.1%, 7.01%, and 9.32%, and (ii) for the one year ending June 30, 2016, the Fund had an annualized return of -10.15% and the VIIIIX had an annualized return of 4%.

64. The Investment Committee denies the allegations in Paragraph 64.

65. The Investment Committee denies the allegations in Paragraph 65.

66. The Investment Committee admits that the Fund remains available as an investment option under the Plan.

c. Neuberger and its Officers and Senior Managers Benefit from the Fund's continued inclusion in the Plan.

67. The Investment Committee denies the allegations in Paragraph 67.

68. The Investment Committee admits that Marvin Schwartz is the lead manager of the Fund through the Straus Group. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 68.

69. The Investment Committee denies the allegations in Paragraph 69, except admits that Neuberger is employee-owned and that Schwartz and other managers own equity in Neuberger.

70. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 70.

d. The Fund has Failed in the Market.

71. The Investment Committee denies the allegations in Paragraph 71, except admits the allegations in the first, second, third, fourth, and seventh sentences of Paragraph 71.

72. The Investment Committee admits that the Weil, Gotschal & Manges Partners' Defined Contribution Plan, the Weil Gotschal & Manges Section 401(k) Savings and Investment Trust, the WGM Master Trust, the GoldenTree Asset Management Retirement Plan, and the MUFG Fund Services (USA) LLC 401(k) Plan all offer or offered the Fund as an investment option. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 72.

73. The Investment Committee admits that the Occidental Petroleum Corporation Savings Plan offered the Fund as an investment option. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 73.

74. The Investment Committee admits that the Jefferies Group LLC Employees' Profit Sharing Plan offered the Fund as an investment option. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 74.

75. The Investment Committee admits that the Kane-Miller Corp Employees' Retirement Plan and the Ophthalmic Consultants, P.C. Retirement Plan and Trust offered the Fund as an investment option. The Investment Committee lacks information sufficient to form a belief as to the remaining allegations in Paragraph 75.

e. The Committee Failed to Apply Its Removal Policy for Poor Performing Funds to the Fund, but Applied it to Unaffiliated Funds.

76. The Investment Committee states that the allegations in Paragraph 76 refer to a webpage, the content of which speaks for itself.

77. The Investment Committee admits the allegations in Paragraph 77.

78. The Investment Committee admits the allegations in Paragraph 78.

79. The Investment Committee denies the allegations in Paragraph 79, and states that the PIMCO Total Return Fund was terminated in 2014 after a mass exodus of investors following the resignation of Bill Gross, PIMCO's Chief Investment Officer.

80. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 80.

81. The Investment Committee denies the allegations in Paragraph 81, and states that the Virtus Emerging Markets Fund was terminated in 2016 after the departure of its manager, Rajiv Jain, in May 2016.

82. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 82.

83. The Investment Committee admits the allegations in Paragraph 83.

84. The Investment Committee denies the allegations in Paragraph 84.

85. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 85 or the contents of Figure 1.

86. The Investment Committee lacks information sufficient to form a belief as to the allegations in Paragraph 86 or the contents of Figure 2.

87. The Investment Committee denies the allegations in Paragraph 87.

VI. ERISA'S FIDUCIARY STANDARDS AND PROHIBITED TRANSACTIONS

88. The Investment Committee states that the allegations in Paragraph 88 set forth a legal conclusion to which no response is required.

89. The Investment Committee states that the allegations in Paragraph 89 set forth a legal conclusion to which no response is required.

90. The Investment Committee states that the allegations in Paragraph 90 set forth a legal conclusion to which no response is required.

91. The Investment Committee states that the allegations in Paragraph 91 set forth a legal conclusion to which no response is required.

92. The Investment Committee states that the allegations in Paragraph 92 set forth a legal conclusion to which no response is required.

93. The Investment Committee states that the allegations in Paragraph 93 set forth a legal conclusion to which no response is required.

94. The Investment Committee states that the allegations in Paragraph 94 set forth a legal conclusion to which no response is required.

95. The Investment Committee states that the allegations in Paragraph 95 set forth a legal conclusion to which no response is required.

96. The Investment Committee states that the allegations in Paragraph 96 set forth a legal conclusion to which no response is required.

97. The Investment Committee states that the allegations in Paragraph 97 set forth a legal conclusion to which no response is required.

98. The Investment Committee states that the allegations in Paragraph 98 set forth a legal conclusion to which no response is required.

99. The Investment Committee states that the allegations in Paragraph 99 set forth a legal conclusion to which no response is required.

100. The Investment Committee states that the allegations in Paragraph 100 set forth a legal conclusion to which no response is required.

101. The Investment Committee states that the allegations in Paragraph 101 set forth a legal conclusion to which no response is required.

VII. CLASS ALLEGATIONS

102. The Investment Committee states that the allegations in Paragraph 102 set forth a legal conclusion to which no response is required.

103. The Investment Committee admits that Plaintiff purports to seek relief on behalf of the Class as defined in Paragraph 103, but denies that the putative class is appropriate or that it is entitled to any relief.

104. The Investment Committee denies the allegations in Paragraph 104.

VIII. CLAIMS FOR RELIEF

Count 1: Breach of Fiduciary Duty ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A)

105. The Investment Committee repeats and realleges its answers in the preceding paragraphs as if fully set forth herein.

106. The Investment Committee admits the allegations in Paragraph 106.

107. The Investment Committee denies the allegations in Paragraph 107.

108. The Investment Committee denies the allegations in Paragraph 108.

109. The Investment Committee denies the allegations in Paragraph 109.

110. The Investment Committee denies the allegations in Paragraph 110.

111. The Investment Committee denies the allegations in Paragraph 111.

112. The Investment Committee denies the allegations in Paragraph 112.

Count 2: Prohibited Transactions
ERISA § 406, 29 U.S.C. § 1106

113. The Investment Committee repeats and realleges its answers in the preceding paragraphs as if fully set forth herein.

114. The Investment Committee admits that Plaintiff purports to allege a claim for prohibited transactions, but states that Plaintiff fails to state a claim, and otherwise denies the allegations in Paragraph 114.

115. The Investment Committee denies the allegations in Paragraph 115, except admits that it is a fiduciary of the Plan and a party in interest with respect to the Plan.

116. The Investment Committee denies the allegations in Paragraph 116.

117. The Investment Committee denies the allegations in Paragraph 117.

118. The Investment Committee denies the allegations in Paragraph 118.

119. The Investment Committee denies the allegations in Paragraph 119.

120. The Investment Committee denies the allegations in Paragraph 120.

121. The Investment Committee denies the allegations in Paragraph 121.

122. The Investment Committee denies the allegations in Paragraph 122.

123. The Investment Committee denies the allegations in Paragraph 123.

124. The Investment Committee denies the allegations in Paragraph 124.

IX. JURY TRIAL

125. The Investment Committee denies that Plaintiff is entitled to a jury trial for the claims alleged in the First Amended Complaint.

X. PRAYER FOR RELIEF

The Investment Committee states that Plaintiff is not entitled to the relief requested in its Prayer for Relief and otherwise denies the allegations contained in the Prayer for Relief.

AFFIRMATIVE AND OTHER DEFENSES

1. Plaintiff's claims are barred for lack of subject matter jurisdiction.
2. Plaintiff lacks standing to pursue his claims.
3. Plaintiff's claims are barred, in whole or in part, because he fails to state a claim upon which relief may be granted.
4. Plaintiff's claims are time-barred under ERISA § 413, 29 U.S.C. § 1113.
5. Plaintiff's claims are barred by an exemption promulgated under ERISA § 408, 29 U.S.C. § 1108.
6. Plaintiff's claims are barred by his exercise of control over his individual account pursuant to ERISA § 404(c), 29 U.S.C. § 1104(c).
7. Plaintiff's alleged losses were not caused by any alleged breach of fiduciary duty by the Investment Committee within the meaning of ERISA § 409(a), 29 U.S.C. § 1109(a).
8. To the extent Plaintiff states a claim on which relief can be granted, Plaintiff proximately caused, contributed to, and/or failed to mitigate any and all of his alleged losses.
9. The Investment Committee engaged in a prudent process to select, monitor, and remove Plan investments.
10. The Plan's inclusion of the Fund was substantively and objectively prudent.
11. The Investment Committee reserves the right to assert any additional defenses as established by the facts of the case, and each and every defense that may become known during the course of this litigation, including discovery, trial, or otherwise.

WHEREFORE, the Investment Committee respectfully requests that this Court find in its favor and against the Plaintiff, and award it all other relief that this Court deems just and appropriate.

Dated: July 8, 2019
New York, NY

PROSKAUER ROSE LLP

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