

# **EXHIBIT A**

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,*

No. 16-cv-06123-LTS-BCM

Plaintiff,

v.

NEUBERGER BERMAN GROUP 401(K) PLAN  
INVESTMENT COMMITTEE,

Defendant.

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**CLASS ACTION SETTLEMENT AGREEMENT**

This Class Action Settlement Agreement and Release (“Agreement”) is entered into by Plaintiff (as defined below), on his own behalf and on behalf of the Settlement Class (as defined below) and the Plan (as defined below) on the one hand, and Defendant (as defined below) on the other, in consideration of the promises, covenants and agreements herein described and for other good and valuable consideration acknowledged by each of them to be satisfactory and adequate.

**1. RECITALS**

1.1. On August 2, 2016, Plaintiff, individually, and on behalf of a class of all other persons similarly situated, and on behalf of the Neuberger Berman Group 401(k) Plan, filed his original complaint (the “Complaint”) against Neuberger Berman Group LLC, Neuberger Berman LLC, Neuberger Berman Trust Company N.A, Marvin Schwartz and the Neuberger Berman Group 401(k) Plan Investment Committee (the “Committee”), in the United States District Court for the Southern District of New York titled *Arthur Bekker v. Neuberger Berman Group LLC et al.*, No. 16-cv-06123-LTS-BCM (the “Action”).

1.2. On October 3, 2016, defendants moved to dismiss the Complaint for failure to state a claim and also moved for summary judgment on the basis that Plaintiff's claims were time-barred under ERISA's three-year statute of limitations set forth in ERISA § 413(2), 29 U.S.C. § 1113(2).

1.3. On November 8, 2016, in addition to opposing defendants' motion to dismiss, Plaintiff cross-moved under Federal Rule of Civil Procedure 56(d) for an order denying defendants' summary judgment motion or, in the alternative, deferring consideration of the motion until after Plaintiff had an opportunity to engage in discovery.

1.4. On September 27, 2018, the Court granted defendants' motion to dismiss with respect to all claims other than Plaintiff's prohibited transaction claim against the Committee and, with respect to that claim, granted Plaintiff's Rule 56(d) motion for discovery on the statute of limitations issue. All other defendants were dismissed from the Action.

1.5. On October 17, 2018, Plaintiff moved for leave to file a First Amended Complaint (the "First Amended Complaint"), naming only the Committee as a defendant and asserting two claims for relief: first that the Committee breached its fiduciary duties, in violation of ERISA § 404, by maintaining the Neuberger Berman Value Equity Fund ("VEF") as an investment option in the Plan, and second, by charging allegedly excessive fees for the VEF in violation of ERISA's prohibited transaction rules set forth in ERISA § 406.

1.6. On May 9, 2019, the Court granted Plaintiff leave to file the First Amended Complaint. The Court also ordered that the parties engage in discovery narrowly targeted to the issue of when Plaintiff had actual knowledge of the alleged ERISA violations that formed the basis of his claims, with such discovery to be followed by a renewed motion for summary judgment on statute of limitations grounds. The parties subsequently reached an agreement

on the scope of discovery relating to the statute of limitations issue, which was approved by the Court on May 21, 2019.

1.7. Plaintiff subsequently filed his First Amended Complaint on May 24, 2019.

As a result, the operative complaint became the First Amended Complaint.

1.8. On July 8, 2019, Defendant filed its Answer to the First Amended Complaint, denying all allegations of wrongdoing and liability and asserting a number of affirmative and other defenses.

1.9. On September 13, 2019, after a period of targeted discovery, Defendant filed its Motion for Summary Judgment seeking dismissal of Plaintiff's claims based on ERISA's three-year statute of limitations period.

1.10. On December 16, 2019, the VEF was removed as a Plan investment option. For participants who did not elect to transfer their balances in the VEF to another investment option, their balances were mapped to an age-based target date fund.

1.11. During the course of the Action, the Parties engaged in settlement discussions, including through private mediation with Mediator Judge Morton Denlow (the "Mediator"). The Parties ultimately reached an agreement to settle, with the Mediator's assistance and notified the Court of the same on March 23, 2020. The terms of the Parties' settlement are memorialized in this Agreement.

1.12. Plaintiff, as putative class representative, and Class Counsel, consider it desirable and in the Plan's and Settlement Class Members' best interests that the claims in the Action be settled upon the terms set forth below. Plaintiff and Class Counsel have concluded that such terms are fair, reasonable, and adequate and that this Settlement will result in valuable benefits to the Plan and the Settlement Class.

1.13. Defendant continues to deny all allegations of wrongdoing and denies all

liability for the allegations and claims made in the Action. Defendant maintains that it is without fault or liability and is settling the Action solely to avoid litigation costs.

1.14. Therefore, the Parties, in consideration of the promises, covenants, and agreements herein described, acknowledged by each of them to be satisfactory and adequate, and intending to be legally bound, do hereby mutually agree as follows:

## **2. DEFINITIONS**

2.1. “Administration Costs” shall mean (i) the costs and expenses associated with the production and dissemination of the Notice; (ii) all reasonable costs incurred by the Settlement Administrator in administering and effectuating this Settlement, which costs and expenses are necessitated by performance and implementation of this Agreement and any Court orders relating thereto; and (iii) all reasonable fees charged by the Settlement Administrator.

2.2. “Attorneys’ Fees and Expenses” shall mean any and all attorneys’ fees, costs and expenses of Class Counsel for their past, present, and future work, efforts, and expenditures in connection with this Action and resulting Settlement.

2.3. “Case Contribution Award” shall have the meaning ascribed to it in Section 8.1.

2.4. “Class Counsel” shall mean Bailey & Glasser LLP.

2.5. “Class Period” shall be defined as June 15, 2010 through December 16, 2019.

2.6. “Court” shall mean the United States District Court for the Southern District of New York.

2.7. “Company” shall mean Neuberger Berman Group LLC.

2.8. “Current Participant” shall mean any Settlement Class Member with a balance in the Plan on the Distribution Date.

2.9. “Defendant” shall mean the Neuberger Berman Group 401(k) Plan Investment Committee.

2.10. “Defendant’s Counsel” shall mean Proskauer Rose LLP.

2.11. “Distributable Settlement Amount” shall be the amount described in Section 4.2(a).

2.12. “Distribution Date” shall be the date on which the Settlement Administrator shall determine eligibility for and disbursement amounts for Settlement Class Members, which shall occur as soon as administratively feasible after the Effective Date.

2.13. “Effective Date” shall mean: (a) the date upon which the applicable period to appeal the Final Approval Order and Judgment has expired, if no appeal is taken during such period; or (b) if, during the aforesaid appeals period, an appeal is taken from such judgment, the date upon which all appeals, including petitions for review, rehearing, or certiorari, and any proceedings resulting therefrom, have been finally disposed of, or the date of the expiration of the time to initiate such petitions or proceedings.

2.14. “Escrow Account” shall mean an account at an established Financial Institution (as defined in Section 2.20) agreed upon by the Parties that is established for the deposit of any amounts relating to the Settlement.

2.15. “Escrow Agent” shall mean the entity approved by the Parties to act as escrow agent for any portion of the Settlement Amount deposited in or accruing in the Escrow Account pursuant to this Agreement.

2.16. “Fee and Expense Application” shall mean the petition to be filed by Class Counsel seeking approval of an award of Attorneys’ Fees and Expenses.

2.17. “Fidelity” shall mean Fidelity Management Trust Company, the Plan’s current record-keeper.

2.18. “Final Approval Hearing” shall mean the hearing to be held before the Court pursuant to Federal Rule of Civil Procedure 23(e) to determine whether the Agreement should receive final approval by the Court. The Parties will request that the Final Approval Hearing be scheduled for a date no earlier than one hundred ten (110) days after the entry of the Preliminary Approval Order.

2.19. “Final Approval Order and Judgment” or “Final Approval Order” shall mean a final order entered by the Court after the Final Approval Hearing, substantially the same in all material respects to that attached hereto as **Exhibit A**, granting its approval of the Settlement. The Parties may agree to additions or modifications to the form of the Final Approval Order and Judgment as they agree are appropriate before it is submitted to the Court for final approval of the Settlement.

2.20. “Financial Institution” shall mean the institution at which the Escrow Account is established.

2.21. “Former Participant” shall mean any Settlement Class Member who maintained a positive balance in the Plan on or after June 15, 2010, but who is not carrying a balance in the Plan on the Distribution Date.

2.22. “Independent Fiduciary” shall mean Fiduciary Counselors, Inc.

2.23. “Independent Fiduciary Fees and Costs” shall mean the reasonable fees and expenses of the Independent Fiduciary.

2.24. “Notice” shall mean the notice, identical in all material respects to that attached hereto as **Exhibit B** (or as amended by the Court on agreement of the Parties), to be provided directly to Settlement Class Members pursuant to Section 3.6.

2.25. “Participant” shall mean any person who is or was a participant in the Plan at any time during the Class Period, including any beneficiary of a deceased person who was a

participant in the Plan at any time during the Class Period, and any person who is entitled to a benefit under the Plan as a result of a Qualified Domestic Relations Order.

2.26. “Party” or “Parties” shall mean Plaintiff, the Settlement Class, and Defendant.

2.27. “Plaintiff” shall mean plaintiff Arthur Bekker.

2.28. “Plan” shall mean the Neuberger Berman Group 401(k) Plan.

2.29. “Plan of Allocation” shall mean the plan or formula of allocation of the Distributable Settlement Amount as approved by the Court, which plan or formula shall govern the distribution of the Distributable Settlement Amount, in the form attached hereto as **Exhibit C**.

2.30. “Preliminary Approval Order” shall mean an order entered by the Court preliminarily approving the Settlement, pursuant to Section 3.1 below, that is substantially the same in all material respects to that attached hereto as **Exhibit D**.

2.31. “Released Claims” shall be any and all actual or potential claims, actions, causes of action, demands, obligations, liabilities, attorneys’ fees and costs, whether under local, state or federal law, whether by statute, contract, common law or equity, whether brought in an individual, representative or any other capacity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, against the Released Parties through the date the Court enters the Final Approval Order and Judgment (including, without limitation, any Unknown Claims) arising out of or in any way related to: (a) the conduct alleged in the Complaint or the First Amended Complaint and any subsequent pleading or legal memorandum filed in the Action; (b) the selection, retention, and monitoring of the VEF as a Plan investment option; (c) the performance, fees, and any other characteristic of the VEF; and the approval by the Independent Fiduciary of the Settlement. With respect to the



Released Claims, it is the intention of the Parties and all other Settlement Class Members and the Plan expressly to waive to the fullest extent of the law: (i) the provisions, rights, and benefits of Section 1542 of the California Civil Code, which provides that “A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party”; and (ii) the provisions, rights, and benefits of any similar statute or common law of any other jurisdiction that may be, or may be asserted to be, applicable.

2.32. “Released Parties” shall mean (1) Defendant and, as applicable, each of its predecessors, successors, past, present and future members, fiduciaries, affiliates, agents, and representatives and each of their descendants, dependents, beneficiaries, marital community, heirs, executors, and administrators; (2) the Company and each of its past, present and future parents, subsidiaries, affiliates, divisions, businesses, employee benefit plans, and related entities; (3) the Plan and each of its past, present and future trustees, fiduciaries (except the Independent Fiduciary), parties in interest, committees and committee members, employees, service providers, investment consultants, managers, administrators, actuaries, agents, representatives; (4) the VEF; and (5) each of the past, present, and future officers, directors, partners, shareholders, trustees, fiduciaries, employees, managers, insurers, attorneys, experts, agents and representatives of the entities and individuals in (1) through (4).

2.33. “Settlement” shall mean the compromise and Settlement embodied in this Agreement.

2.34. “Settlement Administrator” shall mean KCC, LLC.

2.35. “Settlement Amount” shall mean seventeen million dollars (\$17,000,000).

2.36. “Settlement Class” shall mean all Participants in the Neuberger Berman

Group 401(k) Plan during the Class Period who had any portion of their Plan accounts, at any time during the Class Period, invested in the VEF. Excluded from the Settlement Class are: (i) Defendant Neuberger Berman Group 401(k) Plan Investment Committee and those of its current and past members who served from June 15, 2010 through August 2, 2016; (ii) non-party Marvin Schwartz, and (iii) the beneficiaries, immediate family members, estates, and executors of (i) and (ii).

2.37. “Settlement Class Member” shall mean a member of the Settlement Class.

2.38. “Settlement Fund” shall have the meaning ascribed to it in Section 4.1(b).

2.39. “Taxes” shall have the meaning ascribed to it in Section 4.1(i).

2.40. “Tax-Related Costs” shall have the meaning ascribed to it in Section 4.1(i).

2.41. “Unknown Claims” shall mean any Released Claim that Plaintiff, the Plan, and/or any Settlement Class Member(s) do not know or suspect to exist in their favor at the time of the release of the Released Parties, including claims which, if known by them, might have affected their settlement with and release of the Released Parties, or might have affected their decision not to object to this Settlement. Class Counsel, Plaintiff, Settlement Class Members, or the Plan may hereafter discover facts in addition to or different from those that they know or believe to be true with respect to the Released Claims. Such facts, if known by them, might have affected the decision to settle with the Released Parties, or the decision to release, relinquish, waive, and discharge the Released Claims, or the decision of a Settlement Class Member not to object to the Settlement. Notwithstanding the foregoing, Plaintiff, Settlement Class Members, and the Plan shall expressly, upon the entry of the Final Approval Order, be deemed to have, and, by operation of the Final Approval Order, shall have fully, finally, and forever settled, released, relinquished, waived, and discharged any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-

contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiff, Class Members, and the Plan acknowledge and shall be deemed by operation of the Final Approval Order to have acknowledged that the foregoing waiver was bargained for separately and is a key element of the Settlement embodied in this Settlement Agreement of which this release is a part.

2.42. “VEF” shall mean the Neuberger Berman Value Equity Fund, both when it was a separate account strategy and following its conversion into a collective investment trust.

### **3. SETTLEMENT APPROVAL/NOTICE**

3.1. ***Motion for Preliminary Approval and Certification of Settlement Class.*** By no later than June 10, 2020, or such other date as agreed by the Parties and approved by the Court after execution of this Agreement, Plaintiff shall move the Court for (i) preliminary approval of the Settlement, including entry of an order substantially similar in all material respects to the form of the Preliminary Approval Order attached as Exhibit D, and (ii) for purposes of this Settlement only, conditional certification of the Settlement Class. Class Counsel shall share a draft of the Motion for Preliminary Approval with Defendant’s Counsel no later than five (5) business days before the date for filing. Defendant will not object to Plaintiff’s motion for preliminary approval and class certification, provided both are consistent with the terms of this Agreement.

3.2. ***Basis for Certification of Settlement Class.*** Plaintiff will seek certification of the Settlement Class under Federal Rule of Civil Procedure 23(b)(1) or 23(b)(2) as a non-opt-

out class.

3.3. ***Certification for Settlement Purposes Only.*** Plaintiff's motion for class certification shall be only for the limited purpose of effectuating this Agreement. Defendant shall not take any position with respect to Plaintiff's request for certification of the Settlement Class, provided that it is consistent with this Agreement, but reserves all rights to object to the propriety of class certification in the Action in all other contexts and for all other purposes.

3.4. ***Rights of Exclusion.*** Settlement Class Members shall not be permitted to exclude themselves from the Settlement Class.

3.5. ***Right to Object.*** Settlement Class Members shall be permitted to object to the Settlement. Requirements for filing an objection shall be as set forth in the Preliminary Approval Order.

3.6. ***Class Notice.*** Within forty-five (45) calendar days of the entry of the Preliminary Approval Order or as may be modified by the Court, the Settlement Administrator shall send the Notice by electronic mail to the Settlement Class Members who have elected to receive their quarterly statements electronically, or by first-class mail to the address on file at Fidelity for Settlement Class Members who do not receive their quarterly statements electronically. For those receiving the Notice via mail, the mailing address will be updated by the Settlement Administrator through the National Change of Address database before mailing (with all returned mail skip-traced and promptly re-mailed).

3.7. ***Class Action Fairness Act Notice.*** Defendant shall comply with the notice requirements of 28 U.S.C. § 1715 by sending a notice, in a form substantially similar to that attached as Exhibit E, to the appropriate state and federal officials no later than ten (10) calendar days after the filing of the Motion for Preliminary Approval.

3.8. ***Settlement Authorized by Independent Fiduciary.***

(a) The Independent Fiduciary will review the Settlement and provide any necessary authorizations, including the authorization required by Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632 (Dec. 31, 2003), as amended by 75 Fed. Reg. 33830 (June 15, 2010). All fees charged by the Independent Fiduciary for its service, together with all costs reasonably borne by the Independent Fiduciary that are chargeable under the agreement with the Independent Fiduciary, shall be paid out of the Settlement Fund.

(b) The Parties agree that they shall comply with reasonable requests for information made by the Independent Fiduciary.

(c) At least thirty (30) calendar days prior to the Final Approval Hearing, the Independent Fiduciary shall have approved and authorized in writing the Settlement, and given a release in its capacity as fiduciary of the Plan for and on behalf of the Plan, on the terms set forth in Section 6, in accordance with Prohibited Transaction Class Exemption 2003-39. If the Independent Fiduciary disapproves or otherwise does not authorize the Settlement or refuses to execute the release on behalf of the Plan, then Defendant, at its sole election, shall be entitled to terminate the Agreement pursuant to Section 9.3 below.

3.9 ***Motion for Final Approval.*** Plaintiff shall move the Court for final approval of the Settlement no later than the deadline set by the Court in the Preliminary Approval Order, or as may be extended by the Court on application of the Parties. On or after the date set by the Court for the Final Approval Hearing pursuant to Federal Rule of Civil Procedure 23(e)(2), the Court shall determine, among other things, (a) whether to enter the Final Order and Judgment finally approving the Settlement; and (b) what, if any, Case Contribution Award and/or

Attorneys' Fees and Expenses should be awarded to Plaintiff and Class Counsel, respectively, pursuant to Sections 8.1 and 8.2 of this Agreement.

**4. PAYMENTS TO THE SETTLEMENT CLASS**

4.1. *The Settlement Amount.*

- (a) In consideration of all the promises and agreements set forth in this Agreement, Defendant will cause the Settlement Amount to be paid. No other Released Party shall have any obligation to contribute financially to this Settlement.
- (b) Defendant shall cause the Settlement Amount to be deposited into the Escrow Account within thirty (30) calendar days after entry of the Preliminary Approval Order. The Settlement Amount together with any interest and investment earnings thereon, shall constitute the "Settlement Fund."
- (c) The Settlement Amount shall be used solely for the purposes set forth in Section 4.1(j) below.
- (d) Subject to Court approval and oversight, the Escrow Account will be controlled by the Settlement Administrator. Neither Defendant nor Plaintiff shall have any liability whatsoever for the acts or omissions of the Settlement Administrator appointed by the Court. The Settlement Administrator shall not disburse the Settlement Fund or any portion thereof except as provided for in this Agreement, by an Order of the Court, or with prior written agreement of Class Counsel and Defendant's Counsel.
- (e) The Settlement Administrator is authorized to execute transactions on behalf of the Settlement Class Members that are consistent with the terms of this Agreement and with Orders of the Court.
- (f) All funds held in the Escrow Account shall be deemed to be in the custody of

the Court and shall remain subject to the jurisdiction of the Court until the funds are distributed in accordance with this Agreement.

- (g) The Settlement Administrator shall, to the extent practicable, invest the Settlement Amount in discrete and identifiable instruments backed by the full faith and credit of the United States Government or fully insured by the United States Government or an agency thereof and shall reinvest the proceeds of these instruments as they mature in similar instruments at their then current market rates. The Settlement Administrator and Settlement Class Members shall bear all risks related to investment of the Settlement Amount.
- (h) The Escrow Account is intended to be a “Qualified Settlement Fund” within the meaning of Treasury Regulation § 1.468B-1. The Settlement Administrator, as administrator of the Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-2(k)(3), shall be solely responsible for filing tax returns for the Escrow Account and paying from the Escrow Account any Taxes owed with respect to the Escrow Account. Defendant agrees to provide the Settlement Administrator with the statement described in Treasury Regulation §1.468B-3(e). Neither Defendant, Defendant’s Counsel, the Released Parties, Plaintiff, or Class Counsel shall have any liability or responsibility of any sort for filing any tax returns or paying any taxes with respect to the Escrow Account.
- (i) All (i) taxes on the income of the Escrow Account (“Taxes”) and (ii) expenses and costs incurred in connection with the taxation of the Escrow Account (including, without limitation, expenses of tax attorneys and accountants) (“Tax-Related Costs”) shall be timely paid by the Settlement Administrator out of the Escrow Account.

- (j) The Settlement Fund will be used to pay the following amounts associated with the Settlement:
- i. Compensation to Settlement Class Members determined in accordance with Section 4.2;
  - ii. Any Case Contribution Award approved by the Court;
  - iii. All Attorneys' Fees and Expenses approved by the Court;
  - iv. Independent Fiduciary Fees and Costs;
  - v. Administration Costs; and
  - vi. Taxes and Tax-Related Costs.

**4.2 Distribution to Settlement Class Members.**

- (a) After payment of Class Counsel's Attorneys' Fees and Expenses approved by the Court, Administration Costs (including an estimated provision for the costs of the distribution to Settlement Class Members and other post-distribution related Administration Costs, as proposed by the Settlement Administrator and approved by Class Counsel and Defendant's Counsel as reasonable), Independent Fiduciary Fees and Costs, Case Contribution Award approved by the Court, and Taxes and Tax-Related Costs, the money remaining in the Settlement Fund, including any interest thereon (the "Distributable Settlement Amount") will be distributed to Settlement Class Members.
- (b) The Distributable Settlement Amount will be distributed to Settlement Class Members as described in the Plan of Allocation attached hereto as **Exhibit C** or such other allocation plan as may be ordered by the Court. It is understood and agreed by the Parties that the proposed Plan of Allocation is not part of this



Agreement and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement, and any order or proceeding relating to the Plan of Allocation shall not operate to terminate or cancel this Agreement or affect the finality of the Court's Final Approval Order and Judgment approving the Settlement or any other Orders entered pursuant to the Agreement. Notwithstanding the foregoing, or anything else in this Agreement, any revisions to the Plan of Allocation that would increase the Settlement Amount or require any Released Party to incur additional expenses or costs or to provide data not already readily available on its computer systems shall be deemed a material alteration of this Agreement and entitle Defendant, at its sole election, to terminate the Agreement.

**4.3 Responsibility for Taxes on Distribution.** Each Settlement Class Member who receives a payment under this Agreement shall be fully and ultimately responsible for payment of any and all federal, state or local taxes resulting from or attributable to the payment received by such person. Each Settlement Class Member shall hold Defendants, Defendants' Counsel, the Released Parties, Class Counsel, and the Settlement Administrator harmless from any tax liability, including penalties and interest, related in any way to payments or credits under the Agreement, and shall hold Defendant, Defendant's Counsel, the Released Parties, Class Counsel, and the Settlement Administrator harmless from the costs (including, for example, attorneys' fees and disbursements) of any proceedings (including, for example, investigation and suit), related to such tax liability. Plaintiff acknowledges that the Released Parties have no responsibility for any taxes due on funds deposited in or distributed from the Settlement Fund or that Plaintiff or Class Counsel receive from the Settlement Amount.

**4.4 Administration Costs.** The Administration Costs shall be paid from the Settlement Fund. The Settlement Administrator will reserve from the Settlement Fund its estimated costs of completing settlement administration activities, including the costs of distributing the Distributable Settlement Amount to Settlement Class Members as described in Section 4.2. Beginning thirty (30) days after the entry of the Preliminary Approval Order, and on every thirty (30) days thereafter, the Settlement Administrator shall provide the Parties with a detailed accounting of any Administration Costs expended to date and an invoice for the amount of such Administration Costs. Any disputes as to whether amounts billed by the Settlement Administrator are reasonable and necessary under this Agreement shall be resolved by the Court.

**4.5 Entire Monetary Obligation.** Notwithstanding anything else in this Agreement, in no event shall Defendant or any Released Party be required to pay any amounts other than the Settlement Amount.

## **5 SETTLEMENT ADMINISTRATION**

5.1 Within fourteen (14) calendar days of the entry of the Preliminary Approval Order, Defendant shall use reasonable efforts to cause the Settlement Administrator to receive the Participant data sufficient to effectuate class Notice, implement the Plan of Allocation, and distribute the Settlement Fund.

5.2 The Settlement Administrator shall administer the Settlement subject to the supervision of Class Counsel and the Court as circumstances may require.

5.3 Defendant, Defendant's Counsel and the Released Parties shall have no responsibility for, interest in, or liability whatsoever, with respect to:

- (a) any act, omission or determination of the Settlement Administrator, Class Counsel, or designees or agents of Class Counsel or the Settlement

Administrator;

- (b) any act, omission or determination of Class Counsel or their designees or agents in connection with the administration of the Settlement;
- (c) the management, investment, or distribution of the Settlement Amount or the Distributable Settlement Amount; or
- (d) the determination, administration, calculation, or payment of any claims asserted against the Settlement Amount or the Distributable Settlement Amount.

5.4 The Settlement Administrator shall provide to Class Counsel and Defendant's Counsel, no less frequently than monthly, a full accounting of all expenditures made in connection with the Settlement, including Administration Costs, and any distributions from the Settlement Amount.

5.5 The Settlement Administrator shall provide such information as may reasonably be requested by Plaintiff or Defendant or their respective counsel relating to administration of this Agreement.

## **6 RELEASES, COVENANTS AND JUDICIAL FINDINGS**

6.1 *Release of Defendant and Released Parties.* Upon and through the date of the Court's entry of the Final Approval Order and Judgment, Plaintiff and each Settlement Class Member (on behalf of themselves and their past, present and future heirs, beneficiaries, executors, administrators, estates, partners, officers, directors, agents, attorneys, predecessors, successors, and assigns), for themselves and on behalf of the Plan, absolutely and unconditionally release and forever discharge all Released Claims. Upon and through the date of the Court's entry of the Final Approval Order and Judgment, the Plan (subject to Independent Fiduciary approval as required by Section 3.8) absolutely and unconditionally

releases and forever discharges all Released Claims.

6.2 ***Independent Fiduciary.*** The Independent Fiduciary is not a Released Party and claims brought solely against the Independent Fiduciary are not released.

6.3 ***Covenant Not to Sue.*** Upon and through the date of the Court's entry of the Final Approval Order and Judgment, Plaintiff and each Settlement Class Member (on behalf of themselves and their past, present and future heirs, beneficiaries, executors, administrators, estates, partners, officers, directors, agents, attorneys, predecessors, successors, and assigns), for themselves and on behalf of the Plan, and the Plan (subject to Independent Fiduciary approval as required by 3.8), expressly agree that they, acting individually or together, or in combination with others, shall not sue or seek to institute, maintain, prosecute, argue, or assert in any action or proceeding (including but not limited to an IRS determination letter proceeding, a Department of Labor proceeding, an arbitration or a proceeding before any state insurance or other department or commission), any cause of action, demand, or claim on the basis of, connected with, or arising out of any of the Released Claims and that the foregoing covenants and agreements shall be a complete defense to any such Released Claims against any of the respective Released Parties. Nothing herein shall preclude any action to enforce the terms of this Settlement Agreement.

6.4 ***Releases of Plaintiff, the Plan, the Settlement Class, and Class Counsel.*** Upon and through the date of the Court's entry of the Final Approval Order and Judgment, Defendant shall be deemed to have, and by operation of the Final Approval Order and Judgment, shall have, fully, finally, and forever released, relinquished, and discharged, and shall forever be enjoined from prosecution of Plaintiff, the Plan, the Settlement Class and Class Counsel from any and all actual or potential claims, actions, causes of action, demands, obligations, liabilities, attorneys' fees and costs, whether under local, state or federal law,

whether by statute, contract, common law or equity, whether brought in an individual, representative or any other capacity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, relating to the pursuit of the Action.

6.5 ***Use of Settlement Administrator Information.*** Class Counsel, Defendants' Counsel and Defendant shall have equal access to information held by the Settlement Administrator, but only to the extent that such information is necessary to administer this Settlement; however, such information shall be kept in strict confidence, shall not be disclosed to any other person or entity or used for any purpose other than to administer and implement the Settlement, and shall be destroyed no later than two (2) years after the Settlement Administration is complete.

6.6 ***Use of Company and Plan Information.*** Class Counsel and their agents shall use any information provided by Defendant and/or Fidelity pursuant to the express provisions of this Agreement solely for the purpose of providing the Notice and administering this Settlement and for no other purpose. Such information shall be kept in strict confidence and shall not be disclosed to any other person or entity and shall be destroyed no later than two (2) years after the Settlement Administration is complete.

6.7 ***Confidential Information Provided During the Action.*** Class Counsel and Plaintiff acknowledge that the information they received from Defendant in discovery during the Action which was marked "Confidential – Subject to Protective Order" was intended to be kept confidential and be subject to a draft Stipulation of Confidentiality being negotiated by the Parties. Class Counsel and Plaintiff agree that such information shall not be disclosed or shared with any third party or person and shall be destroyed within thirty (30) calendar days of the Effective Date.

## 7 **REPRESENTATIONS AND WARRANTIES**

7.1 ***Settling Parties' Representations and Warranties.*** The Parties, and each of them, represent and warrant as follows, and each settling Party acknowledges that each other Party is relying on these representations and warranties in entering into this Settlement Agreement:

- (a) The Settlement avoids the risk to Plaintiff of no recovery at all through further litigation of the Action.
- (b) Plaintiff has diligently investigated the claims in this Action; that Plaintiff is voluntarily entering into this Agreement as a result of arm's-length negotiations among the Parties' counsel; that in executing this Agreement he is relying solely upon his own judgment, belief and knowledge, and the advice and recommendations of his own independently-selected counsel, concerning the nature, extent and duration of his rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof, and that, except as provided in this Agreement, Plaintiff has not been influenced to any extent whatsoever in executing this Agreement by any representations, statements, or omissions pertaining to any of the foregoing matters by the other Party or by any person representing any settling Party.
- (c) Each Party assumes the risk of mistake as to facts or law.
- (d) The Parties recognize that additional evidence could come to light, but that they nevertheless desire to avoid the expense and uncertainty of litigation by entering into the Settlement.
- (e) The Parties have carefully read the contents of this Agreement and this Agreement is signed freely by each person executing the Agreement on behalf of

each of the Parties. The Parties, and each of them, further represent and warrant to each other that he, she, or it has made such investigation of the facts pertaining to this Settlement, this Agreement, and all of the matters pertaining thereto, as he, she or it deems necessary.

7.2 ***Signatories' Representations and Warranties.*** Each person executing this Agreement on behalf of any other person does hereby personally represent and warrant that he or she has the authority to execute this Agreement on behalf of, and fully bind, each principal whom such individual represents or purports to represent and that no right or claim compromised pursuant to this Agreement has been assigned or hypothecated to any third party. Further, each person executing this Agreement on behalf of any other person does hereby personally represent and warrant that he or she indemnifies the Defendant referenced in Plaintiff's Complaint and First Amended Complaint against all representations and warranties herein.

## **8 MONETARY PAYMENTS**

### **8.1 *Case Contribution Award***

(a) Class Counsel intends to seek a Case Contribution Award for Plaintiff not to exceed the amount of twenty thousand dollars (\$20,000.00), which shall be subject to Court approval (the "Case Contribution Award"). Any Case Contribution Award approved by the Court shall be caused to be paid within thirty (30) days of the Effective Date. The Case Contribution Award shall be paid by the Settlement Administrator solely out of the Settlement Fund and shall be deducted (to the extent approved by the Court) from the Settlement Amount on or after the Effective Date and prior to the distribution to the Settlement Class Members. Plaintiff shall also be entitled to further distribution under this

Settlement pursuant to Section 4.2 as a Settlement Class Member.

(b) Notwithstanding any other provision of this Agreement to the contrary, the procedure for and the allowance or disallowance (in whole or in part) by the Court of any application for the Case Contribution Award shall be considered by the Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement, and any Order or proceedings relating to the Case Contribution Award, or any appeal of any Order relating thereto, shall not operate to terminate or cancel this Agreement or be deemed material thereto.

(c) Defendant shall have no obligations whatsoever with respect to any Case Contribution Award to Plaintiff, which shall be payable solely out of the Settlement Fund.

## 8.2 *Attorneys' Fees and Expenses*

(a) No later than sixty (60) days before the Final Approval Hearing, Class Counsel will submit a Fee and Expense Application, seeking an award of Attorneys' Fees not exceeding one-third of the Settlement Fund (\$5,666,666), plus reimbursement of Expenses not to exceed \$60,000.

(b) Any amount awarded by the Court in response to such Fee and Expense Application shall be paid by the Settlement Administrator solely out of the Settlement Fund and shall be deducted (to the extent approved by the Court) from the Settlement Fund and paid to Class Counsel within forty-five (45) days of the Effective Date.

(c) Notwithstanding any other provision of this Agreement to the contrary, the procedure for and the allowance or disallowance (in whole or in part) by the Court of the Fee and Expense Application to be paid out of the Settlement Fund shall be considered by



the Court separately from its consideration of the fairness, reasonableness, and adequacy of the Settlement, and any Order or proceedings relating to the award of Attorneys' Fees, or any appeal of any Order relating thereto, shall not operate to terminate or cancel this Agreement or be deemed material thereto.

(d) Defendant shall have no obligations whatsoever with respect to any attorneys' fees or expenses incurred by Class Counsel, which shall be payable solely out of the Settlement Fund.

**9 CONTINGENCIES, EFFECT OF DISAPPROVAL OR TERMINATION OF SETTLEMENT**

9.1 This Agreement and the Settlement shall terminate and be cancelled if, within ten (10) business days after any of the following events, one of the Parties provides written notification of an election to terminate the Settlement:

- (a) The Court declines to provide preliminary approval of this Agreement, or declines to enter or materially modifies the contents of the Preliminary Approval Order attached hereto as **Exhibit D** without the consent of the Parties, or the Preliminary Approval Order is vacated, reversed or modified in any material respect on any appeal or other review or in a collateral proceeding occurring prior to the Effective Date;
- (b) The Court declines to provide final approval of this Agreement, or declines to enter or materially modifies the contents of the Final Approval Order and Judgment attached hereto as **Exhibit A** without the consent of the Parties;

- (c) The Court's Final Approval Order and Judgment is vacated, reversed or modified in any material respect on any appeal or other review or in a collateral proceeding occurring prior to the Effective Date;
- (d) The Settlement Class is not certified pursuant to Fed.R.Civ.P. 23(b)(1) as a non-opt out class or in a form that is otherwise agreed to by the Parties;
- (e) The Effective Date does not occur for some other reason.

9.2 For purposes of this Agreement, no order of the Court, or modification or reversal on appeal of any order of the Court, solely concerning the administration of the Settlement or the persons performing such administrative functions, or the amount or award of any Attorneys' Fees and Expenses or Case Contribution Award shall constitute grounds for cancellation or termination of the Agreement.

9.3 This Agreement and the Settlement shall terminate, at the sole election of Defendant, if (1) the Independent Fiduciary does not approve the Settlement, or disapproves the Settlement for any reason whatsoever or Defendant reasonably concludes that the Independent Fiduciary's approval does not include the determinations required by PTE 2003-39; and (2) the Parties do not mutually agree to modify the terms of the Settlement to facilitate an approval by the Independent Fiduciary or the Independent Fiduciary's determinations required by PTE 2003-39, or to address Defendant's concerns that the Independent Fiduciary's approval does not satisfy PTE 2003-39.

9.4 This Agreement and the Settlement shall terminate and be cancelled if (a) any federal or state authorities object to or request material modifications to the Agreement to

which the Parties do not agree; and (b) within ten (10) business days after the deadline set in the Preliminary Approval Order for such objections or requests, or within ten (10) business days of receiving any such objection or request, if later, Plaintiff or Defendant provides written notice of their election to terminate the Settlement.

9.5 If for any reason this Agreement is terminated or fails to become effective, then:

- (a) The Parties shall be deemed to have reverted to their respective status in the Action as of March 23, 2020, and shall then resume proceedings in the Court, and, except as otherwise expressly provided in this Agreement, the Parties shall proceed in all respects as if this Agreement and any related orders had not been entered.
- (b) Nothing in this Agreement shall be admissible as evidence for any purpose against Defendant in any pending or future litigation involving any individual or entity.
- (c) Class Counsel and Defendant's Counsel shall within ten (10) calendar days after the date of termination of the Agreement jointly notify the Financial Institution in writing to return to Defendant, or its designee, the full amount contained in the Settlement Fund, with all interest and income earned thereon, after deduction of any amounts earlier disbursed and/or incurred by the Settlement Fund as of the termination, and direct the Financial Institution to effect such return within fourteen (14) calendar days after such notification. Prior to the return of amounts contemplated by this Section 9.5(c), the Financial Institution shall fully and

finally fulfill and set aside for any and all tax obligations of the Settlement Fund as set forth in Section 4.1(i) and no Released Party shall have any past, present, or future liability whatsoever for any such tax obligations.

- (d) This Section and its provisions, and Sections 4.3, 5.3, 6.6, 6.7, 6.8 and 10.1 of this Agreement, shall survive any termination of this Settlement.

## **10 NO ADMISSION OF WRONGDOING**

**10.1** The Parties understand and agree that this Agreement embodies a compromise settlement of disputed claims, and that nothing in this Agreement, including the furnishing of consideration for this Agreement, shall be deemed to constitute any finding or admission of any wrongdoing or liability by any Released Party, or give rise to any inference of wrongdoing or liability in the Action or any other proceeding, whether or not the Agreement is consummated. This Agreement and the consideration provided hereunder are made in compromise of disputed claims and are not admissions of any liability of any kind, whether legal or factual. The Defendant specifically denies any such liability or wrongdoing and Defendant states that it is entering into the Agreement solely to eliminate the burden and expense of further litigation. Further, Plaintiff, while believing that all Claims brought in the Action against Defendant have merit, has concluded that the terms of this Agreement are fair, reasonable, and adequate to the Plan, himself and the Settlement Class Members given, among other things, the inherent risks, difficulties and delays in complex ERISA litigation such as the Action and the vigorous defenses asserted by Defendant. Defendant believes the claims brought in this Action against it have no merit and has not seen any evidence that any member of the Committee acted

negligently or disloyally to the Plan or in any way that was not in the best interests of the Plan. Neither the fact nor the terms of this Agreement shall be offered, used, or received in evidence in any action or proceeding for any purpose, except in an action or proceeding to enforce this Agreement.

## **11 MISCELLANEOUS**

11.1 ***Cooperation.*** The Parties agree to cooperate fully with each other in seeking Court approval of the Preliminary Approval Order and the Final Approval Order, and to do all things as may reasonably be required to effectuate preliminary and final approval and the implementation of this Agreement according to its terms.

11.2 ***No Disparaging Statements.*** Defendants, Defendants' Counsel, Plaintiff, and Class Counsel shall make no public statements describing this Settlement that disparage any Party or Released Parties or accuse one another of wrongdoing. Nothing in this Agreement shall be construed to prevent Plaintiff and Class Counsel from freely and frankly communicating with the Settlement Class Members.

11.3 ***Waiver.*** The provisions of this Agreement may be waived only by an instrument in writing executed by the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

11.4 ***Entire Agreement.*** This Agreement and the exhibits attached hereto constitute the entire agreement among the Parties and supersede any prior agreements, written or oral, between the Parties, and no representations, warranties, or inducements have been made to any

Party concerning the Settlement other than those contained in this Agreement and the exhibits thereto. No Party is relying on anything not expressly set forth in this Agreement and the exhibits thereto.

11.5 ***Modification or Amendment.*** Before entry of the Preliminary Approval Order and approval of the Independent Fiduciary, this Settlement Agreement may be modified or amended only by written agreement signed by or on behalf of all Parties. Following approval by the Independent Fiduciary, the Agreement may be modified or amended only if such modification or amendment is set forth in a written agreement signed by or on behalf of all Parties and only if the Independent Fiduciary approves such modification or amendment in writing. Following entry of the Preliminary Approval Order, this Agreement may be modified or amended only by written agreement signed on behalf of all Parties, and only if the modification or amendment is approved by the Independent Fiduciary in writing and approved by the Court.

11.6 ***Construction of Agreement.*** This Agreement shall be construed to effectuate the intent of the Parties to resolve all disputes encompassed by the Agreement. All Parties have participated in the drafting of this Agreement, and any ambiguity shall not be resolved by virtue of a presumption in favor of any Party. The Agreement was reached at arm's-length by the Parties represented by counsel. None of the Parties shall be considered to be the drafter of this Agreement or any provision hereof for the purposes of any statute, case law, or rule of interpretation or construction.

11.7 ***Principles of Interpretation.*** The following principles of interpretation apply to

this Agreement:

- (a) The headings of this Agreement are for reference only and do not affect in any way the meaning or interpretation of this Agreement.
- (b) Definitions apply to the singular and plural forms of each term defined.
- (c) Definitions apply to the masculine, feminine, and neutral genders of each term defined.
- (d) References to a person are also to the person's permitted successors and assignees.
- (e) Whenever the words "include," "includes," or "including" are used in this Agreement, they shall not be limiting but rather shall be deemed to be followed by the words "without limitation."

11.8 ***Executed in Counterparts.*** This Agreement may be executed in counterparts, all of which shall be considered the same as if a single document had been executed, and shall become effective when such counterparts have been signed by each of the Parties and delivered to each other Party. Counterpart copies of signature pages, whether delivered in original, by electronic mail in pdf format and/or by facsimile, taken together shall all be treated as originals and binding signatures.

11.9 ***Notices.*** Unless otherwise provided herein, any notice, request, instruction, application for Court approval, or application for Court Order sought in connection with the Agreement, shall be in writing and delivered personally or sent by certified mail or overnight delivery service, postage prepaid, with copies by facsimile or e-mail to the attention of Class

Counsel or Defendant's Counsel (as well as to any other recipients that a court may specify). Parties may change the person(s) to whom such notices should be directed by giving notice pursuant to this Section. As of the date hereof, the respective representatives are as follows:

**For Defendant:**

**Myron D. Rumeld**  
Proskauer Rose LLP  
11 Times Square  
New York, NY 10036  
Telephone: (212) 969-3000  
Facsimile: (212) 969-2900  
Email: [mrumeld@proskauer.com](mailto:mrumeld@proskauer.com)

**For Plaintiff:**

**Gregory Y. Porter**  
Bailey & Glasser, LLP  
910 17th Street, NW  
Suite 800  
Washington, D.C. 20006  
Telephone: (202) 463-2101  
Facsimile: (202) 463-2103  
Email: [gporter@baileyglasser.com](mailto:gporter@baileyglasser.com)

-and-

**Mark G. Boyko**  
Bailey & Glasser, LLP  
8012 Bonhomme Ave.  
Suite 300  
St. Louis, MO 63105  
Telephone: (314) 863-5446  
Facsimile: (314) 863-5483  
Email: [mboyko@baileyglasser.com](mailto:mboyko@baileyglasser.com)

11.10 ***Extensions of Time.*** The Parties may agree, subject to the approval of the Court where required, to reasonable extensions of time to carry out the provisions of the Agreement.

11.11 ***Governing Law.*** This Agreement shall be governed by and construed in accordance with the laws of New York without giving effect to any conflict of law provisions



that would cause the application of the laws of any jurisdiction other than New York and any dispute arising out of shall be adjudicated in the United States District Court for the Southern District of New York.

11.12 ***Fees and Expenses.*** Except as otherwise expressly set forth herein, each Party hereto shall pay all of his, her, or its fees, costs and expenses incurred in connection with the Action, including fees, costs and expenses incident to his, her or its negotiation, preparation or compliance with this Agreement, and including any fees, expenses and disbursements of its counsel, accountants, and other advisors. Nothing in this Agreement shall require Defendant to pay any monies other than as expressly provided herein.

11.13 ***Communication With Participants.*** Nothing in this Agreement or Settlement shall prevent or inhibit the ability of Defendant, the Plan, or the Company to communicate with Current or Former Participants of the Plan.

11.14 ***Retention of Jurisdiction.*** The Parties shall request that the Court retain jurisdiction of this matter after the Effective Date and enter such orders as necessary or appropriate to effectuate the terms of the Agreement.

**Agreed to on behalf of plaintiff Arthur Bekker**

Dated: <u>6/10/2020</u>	<p>By: </p> <p><b>Mark G. Boyko</b> Bailey &amp; Glasser, LLP 8012 Bonhomme Ave. Suite 300 St. Louis, MO 63105 Telephone: (314) 863-5446 Facsimile: (314) 863-5483 Email: <a href="mailto:mboyko@baileyglasser.com">mboyko@baileyglasser.com</a></p>
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**Agreed to on behalf of defendant Neuberger Berman Group 401(k) Plan Investment Committee**

Dated: <u>6/10/2020</u>	<p>By: <u><i>Myron D. Rumeld</i></u></p> <p><b>Myron D. Rumeld</b> Proskauer Rose LLP 11 Times Square New York, NY 10036 Telephone: (212) 969-3021 Facsimile: (212) 969-2900 Email: <a href="mailto:mrumeld@proskauer.com">mrumeld@proskauer.com</a></p>
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