

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
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.  
-----X

**PLAINTIFF'S UNOPPOSED MOTION FOR FINAL  
APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiff respectfully files this Motion under Rule 23 of the Federal Rules of Civil Procedure for final approval of a Class Settlement, final certification of a Settlement Class, and appointment of Class Counsel.

1. This action was originally filed in this Court on August 2, 2016. Plaintiff alleges Defendant failed to make decisions concerning the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that prudent fiduciaries acting in a like capacity and familiar with such matters would have used. These claims center around the inclusion of the VEF in the Plan, which has since been removed from the Plan. Defendant denied, and continues to deny, the allegations.

2. On June 10, 2020, after an in-person mediation and months of arm's-length negotiation, the Parties entered into a Settlement Agreement and request that the Court preliminarily approve the Settlement Agreement that is attached hereto as Exhibit A.

3. The Settlement Class is defined as:

All Participants in the Neuberger Berman Group 401(k) Plan from June 15, 2010 through December 16, 2019, who had any portion of their Plan accounts, at any time during the Class Period, invested in the Neuberger Berman Value Equity Fund. Excluded from the 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) beneficiaries, immediate family members, estates, and executors of (i) and (ii).

4. The Settlement is fundamentally fair, adequate, and reasonable in light of the circumstances of this case and preliminary approval of the Settlement is in the best interests of the Settlement Class Members. The settlement fundamentally includes Defendant creating a \$17 million settlement fund in exchange for releases of the Class Representative's and Class Members' claims.

5. Rule 23, as amended in 2018, provides direction to federal courts considering whether to grant approval of a class action settlement. Fed. R. Civ. P. 23(e)(2). Those factors are:

(A) the class representatives and counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 330 F.R.D. 11, 29 (E.D.N.Y. 2019).

6. The Settlement reached between the Parties here more than satisfies this standard given the significant nature of the case and the result reached by the Plaintiff, as well as the success in identifying and notifying class members.

7. Plaintiff also submits to the Court a Memorandum in Support of this Motion, as well as a Declaration of the Settlement Administrator and the Independent Fiduciary's Approval of the Settlement.

WHEREFORE, Plaintiff requests the following:

- That the Court enters an Order finally and fully certifying the provisionally certified Settlement Class, and appointing Plaintiff's Counsel as Class Counsel; and
- That following the Final Approval Hearing, the Court enter an Order granting final approval of the Parties' Settlement and dismissing the Action with prejudice.

Dated: October 20, 2020

Respectfully submitted,

/s/ Gregory Y. Porter

Gregory Y. Porter (*pro hac vice*)

Kevin W. Barrett (NY Bar # 2196343)

Ryan T. Jenny (*pro hac vice*)

Mark G. Boyko (NY Bar # 4306122)

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mboyko@baileyglasser.com

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 20, 2020 a copy of the foregoing was filed with the Court. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Gregory Y. Porter  
Gregory Y. Porter, *pro hac vice*

# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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,

vs.

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

Defendant.

Case No. 16-cv-06123-LTS-BCM

CLASS ACTION

**DECLARATION OF ANDREW PERRY  
REGARDING NOTICE**

I, Andrew Perry, declare and state as follows:

1. I am a Senior Project Manager with KCC Class Action Services, LLC (“KCC”), located at 462 South 4th Street, Louisville, KY 40202. The purpose of this declaration is to provide information related to the notice administered by KCC, and to provide projected costs for administering the *Bekker v. Neuberger Berman Group* class action settlement.

**CLASS LIST**

2. On August 31, 2020, KCC received a zip file containing the transactional data for Neuberger Berman Value Equity Fund (“VEF”) participants from the end of quarter 2010 through the end of 2019. KCC identified eligible transactions during the Class Period. KCC also received a file containing the most recent contact information, date of birth, and SSNs for VEF participants. This file included records that were not a part of the Settlement Class. KCC matched the transactional data with the contact information to create the Class List. The Class List contained 1,451 records.

**MAILING OF THE NOTICE**

3. On September 10, 2020, KCC caused the Notice to be printed and mailed to the 1,451 names and mailing addresses in the Class List. A true and correct copy of the Notice is attached hereto as Exhibit A.

4. Since mailing the Notice to Settlement Class Members, KCC has received 40 Notices returned by the USPS with undeliverable addresses. Through credit bureau and/or other public source databases, KCC will perform address searches for these undeliverable Notices and promptly re-mail the Notice to the found new addresses.

**SETTLEMENT WEBSITE**

5. Prior to the Notice, KCC established a website, [www.nb401ksettlement.com](http://www.nb401ksettlement.com), dedicated to this matter to provide information to the Class Members and to answer frequently asked questions. The website URL was set forth in the Notice. Visitors of the website can download copies of the Notice and other case-related documents. As of October 11, 2020, the website has received 147 visits.

**TELEPHONE HOTLINE**

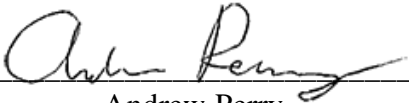
6. KCC established and continues to maintain a toll-free telephone number (1-866-795-5076) for potential Settlement Class Members to call and speak to a live operator during regular business hours. The telephone hotline became operational prior to mailing and is accessible 8 a.m. to 8 p.m. Monday through Friday. As of October 12, 2020, KCC has received a total of 3 calls to the telephone hotline.

**OBJECTIONS TO THE SETTLEMENT**

7. The receipt deadline for Settlement Class Members to object to the settlement November 5, 2020. As of the date of this declaration, KCC has received no objections to the settlement.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 20, 2020 at Louisville Kentucky

  
\_\_\_\_\_  
Andrew Perry



# **EXHIBIT A**

Bekker v. Neuberger Berman Group 401(k) Investment Committee

c/o KCC Class Action Services

P.O. Box 43434

Providence, RI 02940-3434

## NUB

### «Barcode»

Postal Service: Please do not mark barcode

Claim#: NUB-«Claim8»-«CkDig»

«FirstName» «LastName»

«Addr1» «Addr2»

«City», «State»«FProv» «Zip»«FZip»

«FCountry»

### **NOTICE OF PROPOSED CLASS ACTION SETTLEMENT**

*A federal court has authorized this Notice. This is not a solicitation from a lawyer.*

#### **PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHTS**

You are receiving this notice (the “Notice”) because the records of the Neuberger Berman Group 401(k) Plan (the “Plan”) indicate that you have been a participant in the Plan and invested some or all of your Plan account in the Neuberger Berman Value Equity Fund (“VEF”) between June 15, 2010 and December 16, 2019. As such, your rights may be affected by a proposed Settlement of the class action litigation in the U.S. Federal Court for the Southern District of New York titled *Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee*, Case No. 16-cv-06123-LTS-BCM (the “Action”).

This Notice summarizes the proposed Settlement. Capitalized terms not defined in this Notice are defined in the Settlement Agreement. The complete terms and conditions of the Settlement are described in the Settlement Agreement, which is available at [www.nb401ksettlement.com](http://www.nb401ksettlement.com), by contacting Class Counsel, Mark G. Boyko at [mboyko@baileyglasser.com](mailto:mboyko@baileyglasser.com), by accessing the Court docket in this case, for a fee, through the Court’s Public Access to Court Electronic Records (PACER) system at <https://ecf.cand.uscourts.gov>, or by visiting the office of the Clerk of the Court for the United States District Court for the Southern District of New York, during public service hours, provided the office is not closed to the public due to COVID-19.

#### **DO NOT TELEPHONE THE COURT OR THE COURT CLERK’S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT.**

#### **What this Litigation is About**

This class action litigation is brought on behalf of participants in the Plan. Arthur Bekker is the Named Plaintiff and the representative on behalf of all members of the Class in the litigation. The lawsuit was originally filed on August 2, 2016. The Class is generally defined as All Participants in the Neuberger Berman Group 401(k) Plan during the period from June 15, 2010 through December 16, 2019, who had any portion of their Plan accounts, at any time during that period, invested in the VEF.

Plaintiff originally sued 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” or “Defendant”). At the time of settlement, only the Committee remained as a defendant. The complaint alleges that Defendant violated its fiduciary duties by continuing to offer the VEF in the Plan after it began charging fees to participants and after its performance weakened.

Plaintiff alleges that there were superior, less expensive investment options available that Defendant should have chosen for the Plan. Plaintiff also alleges that, once the VEF began charging fees, the payment of those fees constituted transactions prohibited by the Employee Retirement Income Security Act of 1974 (“ERISA”).

Defendant denies all allegations of wrongdoing, fault, liability or damage to the Plaintiff and the Class and denies that it engaged in any wrongdoing or violation of law or breach of fiduciary duties. Defendant maintains that it acted in the best interests of Plan participants at all times and complied with its fiduciary obligations to the Plan and its participants. Among other things, Defendant contends that the Plan fiduciaries employed a robust and thorough process for selecting, monitoring, and removing Plan investment options and for monitoring fees.

### **The Terms of the Settlement**

To avoid the time and expense of further litigation, Plaintiff and Defendant have agreed to resolve the litigation. The Settlement is the product of extensive negotiations between the parties, who were assisted in their negotiations by a neutral private mediator. The parties have taken into account the uncertainty and risks of litigation and have concluded that it is desirable to settle on the terms and conditions set forth in the Settlement Agreement. If the Settlement is approved by the Court, the Class will obtain the benefits of the Settlement without the further delay and uncertainty of additional litigation. The Settlement resolves all issues regarding the Plan’s inclusion of the VEF and its fees from June 15, 2010 through December 16, 2019, when the VEF was removed from the Plan.

The terms of the Settlement are set forth in the Settlement Agreement and Release dated June 10, 2020 (the “Settlement Agreement”), which is available on the Settlement Website at [www.nb401ksettlement.com](http://www.nb401ksettlement.com). Those terms are summarized below. This Notice is a summary, and in the event of any inconsistency, the Settlement Agreement controls. Nothing in the Settlement Agreement is an admission or concession on Defendant’s part of any fault or liability, nor is it an admission or concession on Plaintiff’s part that his claims lacked merit.

#### **1. Who Is Covered by the Settlement?**

**Plaintiff will request that the Court certify a Class, and the Settlement will apply to, and be binding on, that Class. The Class is defined as:**

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, 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 December 16, 2019; (ii) non-party Marvin Schwartz; and (iii) beneficiaries, immediate family members, estates, and executors of (i) and (ii).

Plan records indicate that you may be a member of the Class because you are a current or former participant in the Plan who invested in the VEF from June 15, 2010 through December 16, 2019.

#### **2. Relief Provided to the Class by the Settlement.**

**Under the proposed Settlement, Defendant will arrange for \$17,000,000 to be paid into a Settlement Fund. After payment of Settlement Administration Costs (such as the cost of distributing this Notice), Class Counsel’s attorneys’ fees and costs, and other expenses, the remaining Distributable Settlement Amount will be paid to the Class.**

The Distributable Settlement Amount will be distributed to eligible Settlement Class Members pursuant to a Plan of Allocation to be approved by the Court.<sup>1</sup> Individual payments under the Settlement for each Settlement Class Member will be determined in accordance with that Plan of Allocation, and cannot be quantified with certainty for any individual Settlement Class Member at this time. That is in part because the exact Distributable Settlement Amount and number of Settlement Class Members are not known at this time, although a preliminary review of Plan records suggests that approximately 1,500 individuals will be included in the Class. The proposed Plan of Allocation, and other case and Settlement documents, are available at [www.nb401ksettlement.com](http://www.nb401ksettlement.com).

On a summary level, the Plan of Allocation will work as follows: The Settlement Administrator will determine the Distributable Settlement Amount to be allocated to Settlement Class Members. The Settlement Administrator will then calculate the portion of the Distributable Settlement Amount to be allocated to each Settlement Class Member, based on that Settlement Class Member's quarter-ending account balances in the VEF throughout the Class Period. Thus, a Settlement Class Member's allocation will depend on the amount he or she had invested in the VEF during the Class Period, and for what amount of time. To ensure that no Settlement Class Member receives less than \$10, any Settlement Class Member entitled to receive less than \$10 will be allocated \$10, and the remaining allocations will be adjusted proportionally. If enough assets remain in the Settlement Fund following the initial distribution, one or more subsequent distributions may be made pursuant to the Plan of Allocation.

Settlement benefits will be distributed as follows: Current Plan participants with a balance in the Plan on the Distribution Date will receive their distributions through an electronic transfer directly into their Plan accounts, which will be invested in accordance with the Participant's instructions for new contributions or, absent instruction, in the Plan's applicable default investment, which is currently the Plan's target date funds. Settlement Class Members who no longer maintain a balance in their Plan account as of the Distribution Date will receive a check automatically mailed to them at the address provided in the Settlement Administrator's records (generally, the address where this Notice has been mailed).

**Actual allocation amounts will depend on the final Distributable Settlement Amount, the final number of Settlement Class Members, and the individual Settlement Class Member's aggregate quarterly VEF Plan investment balances and number of quarters in the Plan during the Class Period. It is possible that some Settlement Class Members may receive the minimum recovery of \$10.**

All inquiries related to distributions should be addressed solely to the Settlement Administrator at the address listed below. In addition, if you are no longer a Plan Participant, you can contact the Administrator to request a roll-over of your distribution into a Qualified Retirement Account via email at [info@nb401ksettlement.com](mailto:info@nb401ksettlement.com). If you are still a Plan Participant, your distribution will be made into your Plan account automatically and you do not need to request a roll-over.

The Settlement Administrator can also be reached by mail at:

Bekker v. Neuberger Berman Group  
c/o KCC Class Action Services  
P.O. Box 43434  
Providence, RI 02940-3434

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<sup>1</sup> The Distributable Settlement Amount is the Settlement Amount, minus (i) the amounts approved by the Court for Class Counsel's Attorneys' Fees and Expenses and Case Contribution Awards to the Named Plaintiff, (ii) Administration Costs, (iii) Independent Fiduciary Fees and Costs, and (iv) Taxes and Tax-Related Costs.

3. **Summary of the Claims Released by the Class.** In exchange for the Settlement Amount and other terms of the Settlement, if the Settlement is approved, all members of the Class will release the “Released Claims,” which are defined in the Settlement Agreement as 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 (d) the approval by the Independent Fiduciary of the Settlement.

Settlement Class Members will not have the right to bring any Released Claims against the Defendant or other Released Parties. “Released Parties” is defined in the Settlement Agreement and means (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 (Neuberger Berman Group LLC) 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).

The entire release is set forth in the Settlement Agreement, which can be viewed online at [www.nb401ksettlement.com](http://www.nb401ksettlement.com), or requested from the Settlement Administrator or Class Counsel.

### **The Settlement Approval Process**

The Court has granted preliminary approval of the proposed Settlement and approved this Notice. The Settlement will not take effect, and there will be no benefits distributed under the Settlement, however, if the Court does not enter a Final Approval Order and Judgment or the Settlement otherwise does not become effective. The Court will hold a Final Approval Hearing on November 19, 2020 at 10:00 a.m. The Court and the Parties anticipate the hearing will be conducted in Courtroom 17C at the United States District Court for the Southern District of New York, Daniel Patrick Moynihan Building & United States Courthouse, 500 Pearl Street, New York, New York, but the Court may, by order filed on the public record, change the format, time or place of the hearing. Class Counsel will attend the hearing to answer any questions the Court may have. You are not required to attend the Final Approval Hearing.

The date, modality and location of the Final Approval Hearing are subject to change by order of the Court without further notice to the Class. If you would like to attend the Final Approval Hearing, you should check the Settlement Website, [www.nb401ksettlement.com](http://www.nb401ksettlement.com), or the Court’s online docket to confirm that the date, modality or location has not been changed. Prior to the Final Approval Hearing, an Independent Fiduciary will be asked to approve the Settlement and Released Claims on behalf of the Plan, as may be required by ERISA Prohibited Transaction Exemption 2003-39 or any other applicable class or statutory exemptions. The Court will be informed as to whether the Independent Fiduciary approved the

Settlement and Released Claims on behalf of the Plan prior to ruling on the application for final approval of the Settlement.

**The Opportunity to Object to the Settlement**

As a Settlement Class Member, you can ask the Court to deny approval of the Settlement by filing an objection. You cannot, however, ask the Court to order a settlement on different terms; the Court can approve or reject the Settlement only on the terms reached by the Parties. If the Court denies approval, the Settlement Amount will not be distributed and the litigation will resume.

Any objection to the proposed Settlement must be made in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must be served upon Class Counsel and counsel for Defendant, and submitted to the Court either by mailing to the Clerk of the Court, United States District Court for the Southern District of New York, 500 Pearl Street, Room 120, New York, NY 10007, or by filing in person at any location of the United States District Court for the Southern District of New York. The objection must be filed (actually received by the Court) on or before November 5, 2020. Each objection must contain (a) the name and case number of the Action (*Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee*, Case No. 16-cv-06123-LTS-BCM); (b) the Settlement Class Member's full name, address, telephone number, and signature; (c) a statement that the person submitting the comments or objections is a Settlement Class Member and an explanation of the basis upon which the person claims to be a Settlement Class Member; (d) all grounds for the objection, accompanied by any legal support known to the objector or his or her counsel; (e) a statement as to whether the Settlement Class Member or his or her counsel intends to personally appear and/or testify at the Final Approval Hearing; and (f) a list of any persons the objector or his or her counsel may call to testify at the Final Approval Hearing in support of the objection.

Those Settlement Class Members or their attorneys intending to appear at the Final Approval Hearing must give notice of their intention to appear setting forth, among other things, the name, address, and telephone number of the Settlement Class Member (and, if applicable, the name, address, and telephone number of that Settlement Class Member's attorney) to Class Counsel and Defendant's Counsel and file it with the Court Clerk on or before November 5, 2020.

If the Court approves the Settlement, you will be bound by it and will receive whatever benefits you are entitled to under its terms. You cannot exclude yourself (or "opt out") from the Settlement. The Court has conditionally certified the Class under Federal Rule of Civil Procedure 23(b)(1), which does not permit Class Members to opt out of the Class.

**Attorneys' Fees and Case Contribution Award for Named Plaintiff**

The Class is represented by Class Counsel. The attorneys for the Class are as follows:

Gregory Y. Porter  
Mark G. Boyko  
BAILEY & GLASSER LLP  
1055 Thomas Jefferson Street NW  
Suite 540  
Washington, DC 20007  
mboyko@baileyglasser.com  
314-863-5446



Class Counsel and the Named Plaintiff have devoted many hours to investigating the claims, bringing this litigation, and pursuing it for four years. During that time, Class Counsel incurred litigation expenses in addition to the time spent by attorneys, paralegals, and others. Class Counsel also took the risk of litigation and have not been paid for their time and expenses while this litigation has been pending before the Court.

Class Counsel will file a motion with the Court seeking approval of reasonable attorneys' fees and reimbursement of the expenses they incurred in prosecuting the litigation, to be paid from the Settlement Fund. Their request will not exceed (1) attorneys' fees of one-third of the Settlement Amount, or \$5,666,667, and (2) reimbursement of expenses of up to \$60,000.

Plaintiff will also request that the Court approve a Case Contribution Award of \$20,000 for Plaintiff Bekker from the Settlement Fund.

Plaintiff's preliminary approval motion and supporting papers were filed on June 10, 2020, and the final approval motion and fee and expense motion will be filed on or before October 20, 2020 and September 21, 2020 respectively. You may review these filings at [www.nb401ksettlement.com](http://www.nb401ksettlement.com). Any award of Attorneys' Fees and Expenses and Case Contribution Awards approved by the Court, in addition to the Administration Costs, Independent Fiduciary Fees and Costs, and Taxes and Tax-Related Costs, will be paid from the Settlement Fund.

#### **Getting More Information**

**You do not need to do anything to be a part of this Class or, if the Settlement is approved, to be eligible to receive your share of the Settlement Fund. If you still have a Plan account with a positive balance when Settlement Fund distributions are made, your Settlement benefits will be distributed to your Plan account. If you no longer have a Plan account, a check will be mailed to you.**

You can visit the Settlement Website at [www.nb401ksettlement.com](http://www.nb401ksettlement.com), where you will find the full Settlement Agreement, the Court's order granting preliminary approval, this Notice, and other relevant documents. If there are any changes to the deadlines identified in this Notice, the date of the Final Approval Hearing, or the Settlement Agreement, those changes will be posted to the Settlement Website. You will not receive an additional mailed notice with those changes, unless separately ordered by the Court. If you cannot find the information you need on the Settlement Website, you may also call **1-866-795-5076** for more information. Please do not contact the Court or counsel for Defendant to get additional information.

Dated: September 10, 2020

By Order of the United States District Court  
District Judge Laura Taylor Swain



Report of the Independent Fiduciary  
for the Settlement in  
*Bekker v. Neuberger Berman Group 401(k) Plan  
Investment Committee*  
(Case No. 16-cv-06123-LTS-BCM (S.D.N.Y.))

October 20, 2020



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**Report of the Independent Fiduciary  
for the Settlement in  
*Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee*  
(Case No. 16-cv-06123-LTS-BCM (S.D.N.Y.))**

**I. Introduction**

Fiduciary Counselors has been appointed as an independent fiduciary for the Neuberger Berman Group 401(k) Plan (the “Plan”) in connection with the settlement (the “Settlement”) reached in *Bekker v. Neuberger Berman Group 401(k) Plan Investment Committee*, (the “Litigation” or “Action”), which was brought in the United States District Court for the Southern District of New York, (the “Court”). Fiduciary Counselors has reviewed over 70 previous settlements involving ERISA plans.

**II. Executive Summary of Conclusions**

After a review of key pleadings, decisions and orders, selected other materials and interviews with relevant parties, Fiduciary Counselors has determined that:

- The Court has preliminarily certified the Litigation as a class action, and in any event, there is a genuine controversy involving the Plan.
- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys’ fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan’s likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone.
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm’s-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.
- The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.
- The transaction is not described in Prohibited Transaction Exemption (“PTE”) 76-1.
- All terms of the Settlement are specifically described in the written settlement agreement.
- The Plan is receiving no assets other than cash in the Settlement.

Based on these determinations about the Settlement, Fiduciary Counselors hereby approves and authorizes the Settlement on behalf of the Plan in accordance with PTE 2003-39.

**III. Procedure**

Fiduciary Counselors reviewed the Complaint, the Motion to Dismiss, the First Amended Complaint, the Settlement, the Motion for Preliminary Approval and related papers, the Court’s

Order Preliminarily Approving Settlement, the Notice and Plaintiff's Motion for Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Award. In order to help assess the strengths and weaknesses of the claims and defenses in the Litigation, as well as the process leading to the Settlement, the members of the Fiduciary Counselors Litigation Committee conducted separate telephone interviews with counsel for both Defendant and Plaintiff.

#### IV. Background

##### A. Procedural History of Case

###### *Litigation.*

Plaintiff Arthur Bekker filed his action in 2016, at a time when nearly half of the Plan's assets were invested in a single investment — the Value Equity Fund ("VEF"). Plaintiff's complaint alleges, among other things, that the fiduciary committee ("the Committee" or "Defendant") responsible for overseeing the Plan breached its duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by allowing the Plan to pay excessive fees to a Neuberger affiliate and by keeping the VEF in the Plan despite deteriorating performance and high fees.

The Complaint identified Neuberger Berman Group LLC, Neuberger Berman LLC, Neuberger Berman Trust Company N.A., Marvin Schwartz, the Neuberger Berman Group 401(k) Investment Committee, and the individual members of the Committee (as Jane and John Does) as defendants. All defendants moved to dismiss and for summary judgment, arguing that Plaintiff lacked standing, failed to allege fiduciary status against most of the defendants, and that his claims were barred by a shortened ERISA statute of limitations applicable where a plaintiff has "actual knowledge" of his claim. The Court dismissed defendants other than the Neuberger Berman Investment Committee ("the Committee"), but permitted discovery as to whether Plaintiff had "actual knowledge" of his claim. Plaintiff filed an Amended Complaint against the Committee alone, and the Committee again moved for Summary Judgment concerning the statute of limitations. The Court permitted discovery on that issue, causing the Parties to engage in document discovery, including third-party discovery, and the deposition of Plaintiff, Arthur Bekker.

Defendant denies the claims and all liability. It argued, among other things, that (a) the Plan offered an appropriate investment mix for participants, both proprietary and non-proprietary and across different asset classes, risk profiles, fee structures, and outcome opportunities; (b) the fees charged by the VEF were less than Marvin Schwartz — the VEF's manager — charged outside investors for his services; (c) the VEF provided participants with strong performance before and during the Class Period; (d) the Plan was better off having concentrated its investments in the VEF than it would have been if the investments were more diversified across stock and bonds; (e) Neuberger met the Prohibited Transaction Exemption requirements to offer its own products as investment options for the Plan; and (f) Plaintiff's comparator funds were either offered in the Plan alongside the VEF, or not sufficiently similar to the VEF to award damages based on their alternative performance.

Separately, in the interest of continuing settlement discussions, and at Plaintiff's request, the Committee produced a complete set of meeting agendas, minutes, and materials, including assessments of the VEF conducted by an independent investment consultant, Mercer, at various times during the Class Period as well as VEF investment information for each Plan participant during the relevant period. The parties briefed the statute of limitations issue following this discovery, and again following the U.S. Supreme Court's decision in *Intel v. Sulyma*, a case addressing whether a plaintiff is presumed to have "actual knowledge" of material published on plan websites or mailed to plan participants. The Court's consideration of the motion in light of the *Intel v. Sulyma* decision was pending at the time of the Settlement.

### ***Settlement and Preliminary Approval.***

The Settlement was the product of extensive arms-length negotiation with the assistance of Judge Morton Denlow (Ret.) of JAMS. During the Parties' September 26, 2019 all-day mediation, no resolution was reached. However, the parties engaged in a series of continuing conversations before and after the removal of the VEF from the Plan and before and after the U.S. Supreme Court's decision in *Intel v. Sulyma*, the outcome of which the parties agreed would figure significantly in resolving this Action. On March 23, 2020, the Parties reached an agreement in principle and, on May 27, 2020, finally agreed to and executed the Settlement.

After reaching a settlement, Plaintiff filed an unopposed motion seeking preliminary approval of the Settlement on June 10, 2020. The Court granted the motion on July 27, 2020. The Court's Order (1) preliminarily certified the class for settlement purposes; (2) approved KCC Class Action Services LLC, as the Settlement Administrator; (3) approved the form and method of class notice; (4) set November 19, 2020 as the date for a Final Approval Hearing; and (5) set November 5, 2020 as the deadline for objections.

### ***Objections.***

November 5, 2020 is the date for Class Members to file objections to the Settlement. As of the date of this report, no Class Members have filed any objections.

## **V. Settlement**

### **A. Settlement Consideration**

The Settlement provides for a Settlement Amount of \$17,000,000. The amount that will be available for distribution to Settlement Class Members (known as the "Distributable Settlement Amount") will be the Settlement Amount of \$17,000,000 minus any 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.

**B. Class and Class Period**

The Settlement defines the Settlement Class as follows:

[A]ll 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).

The Class Period is defined as June 15, 2010 through December 16, 2019, which is when the VEF was removed as a Plan investment option.

The Court has preliminarily certified the Settlement Class, for settlement purposes only.

**C. The Release**

The Settlement defines Released Claims as follows:

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.

The terms of the release, including the provision for the Independent Fiduciary to provide a release of claims by the Plan, are reasonable.

#### **D. The Plan of Allocation**

Under the Settlement Agreement, the Plan of Allocation will allocate the Distributable Settlement Amount in proportion to VEF balances of the participants across each quarterly period during the Class Period. The Settlement Administrator will determine, based on information from Fidelity, the market value of each Class Member's Plan investment in the VEF as of the last day of each quarter of the Class Period, through and including December 16, 2019 (not including those persons excluded from the Class). Plan investments in the VEF from June 30, 2010 will be used for the first quarterly data and Plan investments in the VEF from December 15, 2019 will be used for the last quarterly data for purposes of the Plan of Allocation. The sum of the market value of each Class Member's VEF investment in the Plan across each quarterly period is referred to as the "Quarterly Account Balance."

Allocation of payments shall be in proportion to Class Member Quarterly Account Balances. The Distributable Settlement Amount will be allocated as follows:

- a. First: Calculate the sum of all Quarterly Account Balances.
- b. Second: Allocate each Class Member a share of the Distributable Settlement Amount in proportion to that participant's Quarterly Account Balance, where the numerator is Class Member's Quarterly Account Balances and the denominator is the total of all Class Members' Quarterly Account Balances.

Class Members who are entitled to a distribution of less than \$10 (combining all Plan accounts) will receive a distribution of \$10. Class Members who have a Plan investment in the VEF during the Class Period, but not at the close of any quarter as defined above, will also receive a distribution of \$10. Class Members' awards falling below \$10.00 will be progressively increased to \$10 from the Distributable Settlement Amount and the Distributable Settlement Amount will be re-allocated until the lowest participating Class Member's award is \$10.00. This modified award is referred to as the Class Member's Entitlement Amount.

For Current Participants with multiple Plan accounts with positive balances on the Distribution Date, the Class Member's Entitlement Amount will be deposited into his or her accounts and invested according to the Class Member's designated investment allocations on file with the Plan Administrator. For Participants with multiple accounts only one of which has a balance on the Distribution Date, the entire Class Member's Entitlement Amount will be allocated to the account with a balance. Former Participants will receive a payment directly from the Settlement Administrator.

Class Members who continue to have an account balance in the Plan will be paid by electronic distribution to their Plan accounts. All other Class Members will have the option to be paid by check or deposit into an IRA or other tax-qualified savings account.

These payments to Current Participants and Former Participants shall be called the “Initial Distribution.” Following the voidance for time of all checks mailed in the Initial Distribution (not the voidance of all Reissued Checks), a Second Distributable Amount will be calculated using the balance of the Qualified Settlement Fund minus anticipated future Administrative Expenses and the sum of all non-voided Reissued Checks. If the Second Distributable Amount exceeds \$100,000, the Settlement Administrator shall allocate each Class Member a share of the Second Distributable Settlement Amount in proportion to that participant’s Entitlement Amount. Modifications of the amount to ensure a \$10 minimum distribution to each Class Member will be made consistent with the Initial Distribution. Class Members who continue to have an account balance in the Plan as of a date as near as practicable to this second distribution will be paid by electronic distribution to their Plan accounts.

As soon as practicable following the voidance of all outstanding checks from the Second Distribution, or if the Second Distributable Amount is less than \$100,000, the Settlement Fund shall be closed. All remaining assets, following the payment of all outstanding costs, shall be deposited in the Plan and distributed among the individual accounts of Class Members who, at that time, continue to have active accounts in the Plan. Only Class Members who continue to have an account balance in the Plan as of a date as near as practicable to the Final Distribution will be paid in the final distribution and they will only be paid by electronic distribution to their Plan accounts. Each payment shall be proportional to the Class Member’s Entitlement Amount as a total of the Entitlement Amounts of Class Members entitled to the Final Distribution. Payments under the Final Distribution are not subject to the \$10 minimum and may be less than \$10 to any given Class Member. Any remaining funds after the Final Distribution may be paid to the Plan to pay Plan Expenses, provided that in no case shall such funds be paid to or for the benefit of the Company or Defendant or to pay Plan administrative expenses currently paid by the Company.

We find the Plan of Allocation to be reasonable, including the allocation of payments in proportion to Class Member Quarterly Account Balances and the provisions for payments to current and former participants. They put the allocations of current participants in their Plan accounts, and allow others to elect a rollover or receive a direct cash payment, which is a reasonable and efficient method of distribution.

**E. Attorneys’ Fees and Case Contribution Award**

Class Counsel will seek approval from the Court of their attorneys’ fee of \$4,760,000 or 28% of the Settlement Fund. Plaintiff’s counsel will also seek reimbursement for all reasonable litigation costs and expenses. Plaintiff’s counsel’s total lodestar (which includes an additional 50 hours of work anticipated after the filing of the fee motion) was \$813,410, which would produce a lodestar multiplier of 5.85 if the requested \$4,760,000 were awarded.

In Plaintiff’s Memorandum in Support of Motion for Attorney’s Fees, Reimbursement of Expenses, and Case Contribution Award, Class Counsel noted that, for purposes of



evaluating the reasonableness of attorneys' fees, courts in the Second Circuit consider the following factors: (1) the time and labor expended by counsel; (2) the magnitude and complexity of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. Class Counsel argued that the benefit obtained for Class Members was substantial, the results achieved were impressive in light of the risks involved, Class Counsel was experienced in this complex area of the law, Class Counsel invested considerable time and effort in the case, there were no objections as of the date of Plaintiffs' fee filing, and public policy considerations support the requested fee. Further, Class Counsel stated that the requested fee award of 28% of the Settlement Fund is below awards in similar ERISA class actions involving 401(k) plans and that other class action cases in the Second Circuit would support a higher fee. In addition, counsel stated that the lodestar multiplier of 5.85 falls well within the range of multipliers awarded by courts in this jurisdiction. "Courts award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers." Class Counsel also noted that another firm "practicing in this narrow area of law charges approved hourly rates" that are substantially higher than Class Counsel's hourly rates.

In our experience, the percentage requested and the lodestar multiplier are within the range of attorney fee awards for similar ERISA cases. In light of the work performed, the result achieved, the litigation risk assumed by Plaintiff's counsel, and the combination of the percentage and the lodestar multiplier, Fiduciary Counselors finds the requested attorneys' fees to be reasonable.

Class Counsel also request reimbursement of \$41,083.58 in litigation costs. The majority of these expenses related to experts and travel costs related to discovery and mediation. Fiduciary Counselors finds the request for expenses to be reasonable.

Furthermore, Class Counsel seek a Case Contribution Award to Mr. Bekker in the amount of \$20,000 for his work on behalf of the Class. He has actively participated in this Action since its inception. Mr. Bekker invested significant time reviewing case materials (including pleadings, interrogatory responses, and the Settlement Agreement), producing documents, appearing for his deposition, monitoring the litigation, mediation, and Settlement progress, and communicating with Class Counsel. This award is within the range of similar awards in ERISA cases. Additionally, the award is not material in comparison to the total Settlement amount and is reasonable.

## VI. PTE 2003-39 Determination

As required by PTE 2003-39, Fiduciary Counselors has determined that:

- **The Court has certified the Litigation as a class action.** Thus, the requirement of a determination by counsel regarding the existence of a genuine controversy does not apply. Nevertheless, we have determined that there is a genuine controversy involving the Plan. Based on the Amended Complaint, the motion to dismiss, the supporting and opposing memoranda, and the filing in support of preliminary approval of the settlement,



we find that there is a genuine controversy involving the Plan within the meaning of the Department of Labor Class Exemption, which the Settlement will resolve.

- **The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.**

Plaintiff brought this case under ERISA to challenge Defendant's inclusion of the VEF in the Plan offered to qualified employees of Neuberger Berman. Prior to filing the initial Complaint, Class Counsel conducted an in-depth investigation of the Plan, the Plan's expenses compared to peers, and the merits of the VEF and other proprietary Plan investments compared to benchmarks and other available options, and met with Plaintiff Arthur Bekker about his claims and Plan allegations. The Amended Complaint alleged that the selection and continued offering of the VEF constituted a fiduciary breach under ERISA, 29 U.S.C. § 1104(a), and that the selection of the VEF and payment of fees from the VEF to Neuberger constituted prohibited transactions under 29 U.S.C. §§ 1106(a)(1), (b)(1) and (b)(2). Defendant denied any breaches or ERISA violations. The Settlement represents a culmination of nearly four years of litigation.

In the absence of a Settlement, Class Counsel would have faced significant litigation risks. These risks are highlighted not only by the Court's dismissal of the fiduciary breach claim in Plaintiff's initial Complaint, but also by the trial judgment that was recently entered in favor of the defendants in the New York University case in this District, which concerned alleged breaches of the duties of prudence and loyalty in the selection of investments for a retirement plan. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

The Defendant offered a host of arguments in support of its denial of liability, including assertions that the VEF was prudently offered based on long-term prior outperformance, was offered at a fee lower than Neuberger offered comparable investments in the marketplace, charged fees in line with other actively managed similar funds, and, that had the VEF been removed, the assets would have moved to less profitable investments, including the Plan's default investment option. Defendant also emphasized the fact that it relied on an outside investment consultant (Mercer), which reviewed the Plan's investment lineup during and prior to the Class Period and did not recommend that the VEF be removed during the Class Period. These were facts Plaintiff learned only after receiving discovery years after filing the litigation. It was uncertain whether and to what extent this outside advice would affect the Court's views of the case.

Even after the U.S. Supreme Court's decision in *Intel v. Sulyma*, Plaintiff faced the risk that the Court would find he had knowledge sufficient for his claim to be subject to ERISA's 3-year statute of limitations.

Defendant also contended that damages should be zero (or negative) because it argued that if the VEF had been removed, the assets would have either been disbursed among all

of the Plan's investment options, including very conservative funds, or would have moved into the Plan's target date funds (where Plan assets were actually moved when the VEF was removed). In either case, the VEF outperformed those alternatives over the Class Period.

Continued litigation would have likely resulted in appeals, causing more expense and further delaying resolution. Instead of a drawn-out decade of costly litigation, with a risk of no recovery, class members will receive a certain benefit now whether they are current participants in the Plan or former participants.

The size of the Settlement is \$17,000,000, a fair and reasonable recovery given the results in numerous similar cases in the last several years, the defenses the Defendant would have asserted, the risks involved in proceeding to trial, and the possibility of reversal on appeal of any favorable judgment. Since the Court rejected Plaintiff's initial proposed alternative, an index fund managed by Vanguard, Plaintiff's expert calculated damages from the underperformance of the VEF compared to the applicable Morningstar category median and calculated damages of \$87.5 million. The recovery is substantial not only in the aggregate but also on a per-participant basis and as a percentage of potential damages. A total of 1,451 Class Members will receive their portion of a collective \$17 million Settlement without the need to complete a claim form or make any other affirmative act. In Plaintiff's Memorandum in Support of Motion for Attorney's Fees, Reimbursement of Expenses, and Case Contribution Award, Class Counsel states that the gross recovery is \$11,716 per Class Member, making it 3.75 times as large per participant as any prior proprietary funds settlement. Across comparable settlements, the average participants' gross recovery is \$263.16, whereas the average gross class member recovery in this Settlement is 44.5 times that. Further, the Settlement represents nearly 20% of the Class' potential damages. This amount is reasonable in light of the risks and delay involved in continued litigation.

The Parties were represented by highly qualified counsel and reached the Settlement after extensive arm's-length negotiations supervised by a mediator. Continuing the Litigation would have been complex and time consuming, with any recovery for Class Members delayed substantially and reduced by substantial additional litigation expenses and potentially additional attorneys' fees.

In sum, Plaintiff's counsel secured a Gross Settlement Amount of \$17,000,000 for the Class Members, which represented a fair and reasonable recovery given the results in numerous similar cases filed in the last several years, the multiple defenses advanced by Defendant, the risks involved in proceeding to trial, and the possibility of reversal on appeal of any favorable judgment.

Given the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement is reasonable.

Fiduciary Counselors finds the scope of the release and attorneys' fees and expenses to be reasonable. In addition, the Plan of Allocation and requested Case Contribution Award to the Class Representative are reasonable.

- **The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.** As indicated in the finding above, Fiduciary Counselors determined that Plaintiff's counsel obtained a favorable agreement from Defendant in light of the challenges in proving the underlying claims. The agreement also was reached after arm's-length negotiations supervised by a mediator.
- **The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.** Fiduciary Counselors found no indication the Settlement is part of any broader agreement between Defendant and the Plan.
- **The transaction is not described in PTE 76-1.** The Settlement did not relate to delinquent employer contributions to multiple employer plans and multiple employer collectively bargained plans, the subject of PTE 76-1.
- **All terms of the Settlement are specifically described in the written settlement agreement.**
- **The Plan is receiving no assets other than cash in the Settlement.** Therefore, conditions in PTE 2003-39 relating to non-cash consideration and extensions of credit do not apply.
- **Acknowledgement of fiduciary status.** Fiduciary Counselors has acknowledged in its engagement that it is a fiduciary with respect to the settlement of the Litigation on behalf of the Plan.
- **Recordkeeping.** Fiduciary Counselors will keep records related to this decision and make them available for inspection by the Plan's participants and beneficiaries as required by PTE 2003-39.
- **Fiduciary Counselors' independence.** Fiduciary Counselors has no relationship to, or interest in, any of the parties involved in the litigation, other than the Plan, that might affect the exercise of our best judgment as a fiduciary.

Based on these determinations about the Settlement, Fiduciary Counselors (i) authorizes the Settlement in accordance with PTE 2003-39; and (ii) gives a release in its capacity as a fiduciary of the Plan, for and on behalf of the Plan. Fiduciary Counselors also has determined not to object to any aspect of the Settlement.

Sincerely,



Stephen Caflisch

Senior Vice President & General Counsel

