EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU AND ASHLEY SCHIEFER, individually and as the representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiffs, v. Bessemer Trust Company and Profit Sharing Plan Committee of Bessemer Trust Company, Defendants.	Case No. 22-cv-1019-MKV

CLASS ACTION SETTLEMENT AGREEMENT & RELEASE

This CLASS ACTION SETTLEMENT AGREEMENT & RELEASE ("Settlement Agreement") is entered into by and between Named Plaintiffs, as defined in Section 1.24 below, on the one hand, and Defendants, as defined in Section 1.11 below, on the other hand. Capitalized terms and phrases have the meanings provided in Section 1 below or as specified elsewhere in this Settlement Agreement.

1. DEFINITIONS

1.1. "Action" shall mean: *Pecou et al. v. Bessemer Trust Company et al.*, No. 22-cv-1019-MKV, pending in the U.S. District Court for the Southern District of New York.

1.2. "CAFA" shall mean: the Class Action Fairness Act of 2005, as amended.

1.3. "Case Contribution Award" shall mean: any monetary amount awarded by the Court in recognition of the Named Plaintiffs' assistance in the prosecution of this Action and payable pursuant to Section 11 below.

1.4. "Challenged Investments" shall mean: the Plan investment options to which Participants can allocate employee and employer contributions, including the Fixed Income Model, Conservative Model – 20/80, Balanced Model – 55/45, Balanced Growth Model – 70/30, Growth Model – 90/10, and All Equity Model, and all of their component funds.

1.5. "Class Counsel" and/or "Plaintiffs' Counsel" shall mean: Nichols Kaster, PLLP.

1.6. "Class Settlement Amount" is defined in Section 8.2 below.

1.7. "Class Period" shall mean: the period from January 26, 2016 through the Effective Date of Settlement.

1.8. "Complaint" shall mean: the Amended Class Action Complaint filed in the Action on August 26, 2022 (Dkt. 46) and any complaint preceding and thus superseded by the Amended Class Action Complaint.

1.9. "Court" shall mean: the U.S. District Court for the Southern District of New York.

1.10. "Current Participants" shall mean: Settlement Class members who have a positive balance in their Plan account at the time the Court enters the Final Approval Order.

1.11. "Defendants" shall mean: Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company.

1.12. "Defendants' Released Claims" shall mean: any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action, whether known or unknown, based on facts which have been, or could have been, asserted in the Action or in any court or forum, by Defendants against either of the Named Plaintiffs, which arise out of the institution, prosecution or settlement of the Action, except for any rights or duties arising out of the Settlement Agreement, including the enforcement of the Settlement Agreement.

1.13. "Defendant Releasees" shall mean: Defendants, The Bessemer Group, Incorporated, Bessemer Trust Company, N.A., Bessemer Securities Corporation, and its or their, as applicable, current and former parents, subsidiaries, affiliates, and successors, including, without limitation, its or their, as applicable, 401(k) plans, directors, trustees, managers, fiduciaries, members of 401(k) plan fiduciary committees, officers, governors, management committee members, in-house counsel, employees, agents, representatives, insurers, reinsurers, consultants, administrators, investment advisors, investment underwriters, estates, beneficiaries and spouses.

1.14. "Defense Counsel" shall mean: Proskauer Rose LLP.

1.15. "Effective Date of Settlement" shall mean: the date on which all of the conditions to settlement set forth in Section 3 of this Settlement Agreement have been fully satisfied or waived and the Settlement shall have become Final.

1.16. "ERISA" shall mean: the Employee Retirement Income Security Act of 1974, as amended, including all rules and regulations promulgated thereunder.

1.17. "Escrow Agent" shall mean: the custodian of the Qualified Settlement Fund, which shall be selected by Class Counsel and approved by Defendants.

1.18. "Final" when referring to the Final Approval Order or any other judgment or court order in this Action shall mean: (a) if no appeal is filed, the expiration date of the time provided for filing or noticing of any appeal under the Federal Rules of Appellate Procedure, *i.e.*, thirty (30) days after entry of the judgment or order; or (b) if there is an appeal from the judgment or order, the latter of (i) the date of final dismissal of all such appeals, or the final dismissal of any proceeding on certiorari or otherwise, or (ii) the date the judgment or order is finally affirmed on

an appeal, the expiration of the time to file a petition for a writ of certiorari or other form of review, or the denial of a writ of certiorari or other form of review, and, if certiorari or other form of review is granted, the date of final affirmance following review pursuant to that grant.

1.19. "Final Approval Order" shall mean: the order of dismissal with prejudice entered by the Court as contemplated by Sections 3.2.5 and 3.6 of this Settlement Agreement.

1.20. "Final Individual Dollar Recovery" shall mean: the portion of the Net Settlement Fund payable to an individual Settlement Class member, as determined by the Settlement Administrator according to the procedures described in the Plan of Allocation.

1.21. "Former Participants" shall mean: Settlement Class members who have no account balance in the Plan at the time the Court enters the Final Approval Order.

1.22. "Independent Fiduciary" shall mean: the fiduciary retained for purposes of Section 3.4.

1.23. "Mediator" shall mean: Robert A. Meyer, JAMS.

1.24. "Named Plaintiffs" shall mean: Jubril Pecou and Ashley Schiefer.

1.25. "Net Settlement Fund" shall mean: the Qualified Settlement Fund, plus any interest or income earned on the Qualified Settlement Fund, less any: (a) taxes and tax-related expenses; (b) Settlement Administration Expenses; (c) reimbursement of expenses incurred by Class Counsel that are awarded by the Court; (d) attorneys' fees to Class Counsel that are awarded by the Court; and (e) Case Contribution Awards to Named Plaintiffs that are awarded by the Court.

1.26. "Participant" shall mean: any person who was a participant in the Plan at any time during the Class Period.

1.27. "Party" or "Parties" shall mean: the Named Plaintiffs and Defendants, either individually or collectively.

1.28. "Person" shall mean: an individual, partnership, limited liability company, corporation, or any other form of organization.

1.29. "Plan" shall mean: the Bessemer Trust Company 401(k) and Profit Sharing Plan.

1.30. "Plan of Allocation" is defined in Section 9.3 below.

1.31. "Qualified Settlement Fund" is defined in Section 8.1 below.

1.32. "Plaintiffs" shall mean: Named Plaintiffs, the Plan, and each and every Settlement Class member and their Successors-In-Interest.

1.33. "Plaintiffs' Released Claims" shall mean: subject to Section 10 below and the Carved Out Claims, any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, disgorgement, and causes of action, whether arising under federal, state or local law, whether by statute, regulation, contract or equity, whether brought in

an individual, derivative, or representative capacity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, against the Defendant Releasees for actions, inactions, or omissions during the Class Period that: (a) would have been barred by the doctrine of *res judicata* or claim preclusion had the Action been fully litigated to a final judgment; (b) arise out of the same operative facts as those alleged in the Complaint; (c) were asserted in the Complaint, or arise out of the conduct alleged in the Complaint whether or not pleaded in the Complaint; (d) arise out of, relate to, are based on, or have any connection with (i) the selection, oversight, retention, or performance of the Challenged Investments, or (ii) the fees, costs, or expenses charged in connection with the Challenged Investments, directly or indirectly; (e) relate to the direction to calculate, the calculation of, and/or the method or manner of allocation, implementation or administration of the Qualified Settlement Fund or Net Settlement Fund to the Plan or any member of the Settlement Class in accordance with the Plan of Allocation; or (f) relate to the approval by the Independent Fiduciary of the Settlement Agreement.

The Parties stipulate and agree that, upon the Effective Date of Settlement, Named Plaintiffs and Defendants shall expressly waive, the Plan and each of the other Settlement Class members and each of the Plaintiff Releasees shall be deemed to have waived, and by operation of the Final Approval Order, shall have waived expressly, any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, which is similar, comparable or equivalent to California Civil Code § 1542, which provides:

> **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.**

1.34. "Carved Out Claims" are the following rights and/or claims which are specifically excluded from the Plaintiffs' Released Claims:

(a) Any rights or duties arising out of the Settlement Agreement, including the enforcement of the Settlement Agreement;

(b) Claims of individual denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) that do not fall within Section 1.33 above; or

(c) Claims arising exclusively from conduct after the Final Approval Order becomes Final.

In no event shall any member of the Settlement Class be permitted to recover more than 100% of his or her vested benefits.

1.35. "Plaintiff Releasees" shall mean: Plaintiffs and any and all of their related parties or entities, including, without limitation, any and all members of their immediate families, agents or other persons acting on their behalf at any time, heirs, beneficiaries, and estates.

1.36. "Representatives" shall mean: representatives, attorneys, agents, directors, officers, employees, insurers, and/or reinsurers.

1.37. "Settlement" shall mean: the settlement to be consummated under this Settlement Agreement pursuant to the Final Approval Order.

1.38. "Settlement Administration Expenses" shall mean: the expenses of the implementation of the Settlement and the Plan of Allocation, including the fees and expenses associated with the Independent Fiduciary and Defendants' compliance with CAFA described herein, and the fees and expenses of the Settlement Administrator and Escrow Agent, including: (a) providing notice to the Settlement Class; (b) calculating each Settlement Class member's Final Individual Dollar Recovery and implementing the Plan of Allocation; (c) distributing to Former Participants their Final Individual Dollar Recoveries; (d) paying taxes on the Qualified Settlement Fund and tax-related expenses; and (e) generally administering the Settlement. All Settlement Administration Expenses shall be paid from the Qualified Settlement Fund. The Parties agree that the record-keeper, trustee, and Defendants will not be exercising any discretion when distributing Final Individual Dollar Recoveries to Current Participants based on the instructions of Class Counsel. Furthermore, the Parties, Class Counsel and Defense Counsel do not exercise discretion when assisting the Settlement Administrator with the implementation or administration of the Court-approved Plan of Allocation.

1.39. "Settlement Administrator" shall mean: a third party retained by Class Counsel, subject to approval by Defendants and the Court, who will: (a) issue the Class Notice (as defined in Section 3.2.1 below); (b) calculate each Settlement Class member's Final Individual Dollar Recovery and implement the Plan of Allocation; (c) distribute to Former Participants their Final Individual Dollar Recoveries; (d) effectuate the payment of all taxes and tax expenses, including tax reporting, remittance, and/or withholding obligations for distributions to Settlement Class members; and (e) generally administer the Settlement.

1.40. "Settlement Amount" shall mean: the five million U.S. dollars ($5,000,000) deposited in the Qualified Settlement Fund pursuant to Section 8.1 below.

1.41. "Settlement Class" shall mean: all Participants except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

1.42. "Settlement Website" shall mean: a website established by the Settlement Administrator no later than thirty (30) days after the entry of the Preliminary Approval Order and maintained for no more than six (6) months after the Effective Date of Settlement, which shall contain a copy of the Settlement Agreement, the Plan of Allocation, Class Notice, and relevant case documents to be agreed to by the Parties including but not limited to a copy of the operative complaint and all documents filed with the Court in connection with the Settlement, along with a toll-free telephone number and mailing address through which members of the Settlement Class

may contact the Settlement Administrator. No other information or documents shall be posted on the Settlement Website unless agreed to in advance by the Parties.

1.43. "Successor-In-Interest" shall mean: a Person's estate, legal representatives, heirs, beneficiaries, successors or assigns, and any other Person who can make a legal claim by or through such Person.

1.44. "Term Sheet" shall mean: the Settlement Term Sheet executed by the Parties on January 6, 2023.

2. RECITALS

2.1. Class Counsel has conducted an investigation into the facts, circumstances and legal issues associated with the allegations made in the Action. This investigation has included, *inter alia*: (a) reviewing and analyzing documents relating to Defendants and the Plan; and (b) researching the applicable law with respect to the claims asserted in the Action and the defenses and potential defenses thereto.

2.2. In the Complaint, the Named Plaintiffs allege that Defendants were fiduciaries of the Plan and that they breached fiduciary duties owed to the Participants in the Plan.

2.3. Defendants deny any and all liability, and deny any and all allegations of wrongdoing made in the Complaint and Action. Defendants deny that some or all of them were fiduciaries under ERISA, or were acting as ERISA fiduciaries at the time of the events complained of, or to the extent that any of them were acting as fiduciaries, that any breach of fiduciary duty occurred in connection with the investment, acquisition, oversight, monitoring, or retention of the Challenged Investments in, or any other actions taken with respect to, the Plan. Defendants further contend that they acted prudently and loyally at all times and in all respects with regard to the Plan.

2.4. On November 23, 2022, the Court issued an Order (Dkt. 57) holding Defendants' Motion to Dismiss the Amended Complaint (Dkt. 47) in abeyance pending the outcome of the Parties' mediation.

2.5. During the course of the Action, the Parties engaged in settlement discussions, including through private mediation with the Mediator. The Parties signed the Term Sheet on January 6, 2023. The terms of the Parties' Settlement are memorialized in this Settlement Agreement.

2.6. On January 13, 2023, the Court adjourned all deadlines in the Action and ordered Plaintiffs' Counsel to file their Preliminary Approval Motion (as defined in Section 3.2.1) on or before March 10, 2023. (Dkt. 59.)

2.7. Plaintiffs' Counsel believes that the Settlement will provide a benefit to the Settlement Class and the Plan, and, when that benefit is weighed against the attendant risks of continuing the prosecution of the Action, the Settlement represents a reasonable and fair resolution of the claims of the Settlement Class. In reaching this conclusion, Plaintiffs' Counsel has considered, among other things, the risks of litigation, the relevant law, the time necessary to achieve a final

resolution through litigation, the complexity of the claims set forth in the Complaint, and the benefit accruing to the Plan's Participants under the Settlement.

2.8. Defendants maintain that the Plan has been managed, operated, and administered at all relevant times in compliance with its terms, ERISA, and all applicable laws and regulations, and further maintain that they acted prudently and loyally at all times and in all respects with regard to the Plan. This Settlement Agreement, and the prior negotiations between the Parties, shall in no event be construed as, or be deemed evidence of, an admission or concession of any wrongdoing, fault or liability of any kind by Defendants.

2.9. Defendants desire to resolve fully and settle with finality the Action and all of Plaintiffs' Released Claims for themselves and the Plan, thereby avoiding the expense, inconvenience, burden, distraction and diversion of their personnel and resources, and uncertainty of outcome that is inherent in any litigation.

2.10. The Named Plaintiffs and Defendants have thus reached this Settlement by and through their respective counsel on the terms and conditions set forth herein, which is subject to Court approval.

3. CONDITIONS TO EFFECTIVENESS OF THE SETTLEMENT

3.1. *Effectiveness of Settlement*. The Settlement provided for in this Settlement Agreement shall not become binding unless and until each and every one of the following conditions in Sections 3.2 through 3.8 shall have been satisfied or waived.

3.2. *Court Approval*. The Settlement contemplated under this Settlement Agreement shall have been approved by the Court, as provided for in this Section 3.2. The Parties agree to jointly recommend to the Court that it approve the terms of this Settlement Agreement and the Settlement contemplated hereunder. The Parties agree to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement, and any other steps or efforts which may become necessary by order of the Court (unless such order modifies the terms of this Settlement Agreement) or otherwise, to carry out this Settlement Agreement, including the following:

3.2.1. *Preliminary Approval of Settlement and of Notices*. The Court shall have approved the motion for preliminary approval of settlement filed by Named Plaintiffs (the "Preliminary Approval Motion") by issuing an order in substantially the same form as attached hereto as Exhibit 1 (the "Preliminary Approval Order"):

(a) preliminarily approving the Settlement embodied in this Settlement Agreement;

(b) directing the Settlement Administrator to mail by electronic means or by first class mail the class notice, substantially in the form attached to the Preliminary Approval Order as Exhibit A (the "Class Notice") and Exhibit B (the "Rollover Form"), to all Settlement Class members;

(c) finding that: (i) the proposed Class Notice fairly and adequately (A) describes the terms and effect of this Settlement Agreement and of the Settlement, (B) provides

sufficient notice to all members of the Settlement Class of the time and place of the Fairness Hearing (defined below in Section 3.2.5), and (C) describes the rights of all Settlement Class members including that the recipients of the Class Notice may object to approval of the Settlement; and (ii) the proposed manner of distributing the Class Notice to the members of the Settlement Class is the best notice practicable under the circumstances and complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process;

(d) setting the Fairness Hearing; setting the deadline for all objections to any aspect of the Settlement Agreement that is at least twenty-one (21) days prior to the Fairness Hearing; and setting the deadline for a notice to be filed by any Person who wishes to speak at the Fairness Hearing at least twenty-one (21) days prior to the Fairness Hearing;

(e) providing that any Party may file a response to an objection to the Settlement at least fourteen (14) calendar days before the Fairness Hearing; and

(f) approving the form of the CAFA notice attached to the Preliminary Approval Order as Exhibit C (the "CAFA Notice"), and ordering that upon mailing of the CAFA Notice, Defendants will have fulfilled their obligations under CAFA.

3.2.2. *Class Certification*.

(a) The Court shall have certified the Action as a class action for settlement purposes only pursuant to Rule 23(b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure, with Named Plaintiffs as the named Settlement Class representatives, Nichols Kaster, PLLP as Class Counsel, and a Settlement Class as defined above, except that this condition shall also be deemed satisfied if another member of the Settlement Class is named as Settlement Class representative.

(b) The Parties agree to stipulate to a certification of the Action as a non-opt-out class action for settlement purposes only, pursuant to Rule 23(b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure, on the foregoing terms. If the Settlement does not become Final, then no Settlement Class will be deemed to have been certified by, or as a result of, this Settlement Agreement, and the Action will for all purposes revert to its status as of January 5, 2023, the day immediately prior to the date on which the Term Sheet was executed. In such event, Defendants will not have consented to class certification, the agreements and stipulations in this Settlement Agreement concerning the Settlement Class definition or class certification shall not be used as evidence or argument to support class certification, and Defendants will retain all rights and arguments with respect to any motions for class certification that Named Plaintiffs may make.

3.2.3. *Issuance of Class Notice*. On the date and in the manner set by the Court in its Preliminary Approval Order, the Settlement Administrator shall have caused the Class Notice to be sent to members of the Settlement Class in the form and manner approved by the Court. The Parties shall confer in good faith with regard to the form and content of the Class Notice in an

effort to utilize cost effective forms of notice. Defendants shall provide reasonable cooperation with respect to the Class Notice, including by providing Participant addresses and contact information, to the extent Defendants have such information. The Parties agree, and the form of Preliminary Approval Order attached hereto as Exhibit 1 shall provide, that the last known email addresses and/or mailing addresses for the Settlement Class members in the possession of the Plan's current record-keeper will suffice for all purposes in connection with this Settlement, including, without limitation, the furnishing of the Class Notice; provided, however, that if the Settlement Administrator obtains an updated address through its efforts to verify the last known address provided by the Plan's recordkeeper, then Class Notice shall be sent thereto. The Settlement Administrator shall enter into a confidentiality agreement and information security agreement ("Confidentiality and Information Security Agreements"), both of which shall be satisfactory to Defendants to adequately protect information provided to the Settlement Administrator relating to the Settlement and the identification of Settlement Class members.

3.2.4. *Internet Publication of Class Notice*. Class Counsel also shall have given notice by publication of the Settlement Agreement and Class Notice on the Settlement Website.

3.2.5. *The Fairness Hearing*. On the date set by the Court in its Preliminary Approval Order, the Parties shall have participated in the hearing (the "Fairness Hearing"), during or after which the Court will issue the Final Approval Order. The Parties further agree that they will reasonably cooperate with one another in obtaining an acceptable Final Approval Order at the Fairness Hearing. The Parties will not do anything inconsistent with obtaining such a Final Approval Order in substantially the same form as attached hereto as Exhibit 2, which is an Order by the Court that:

(a) the proposed Settlement between the Parties on the terms and conditions provided for in this Settlement Agreement is fair, reasonable, and adequate and should be approved by the Court;

(b) final judgment should be entered;

(c) the Settlement Class should be certified as a non-opt-out class meeting the applicable requirements for a settlement class imposed by Federal Rule of Civil Procedure 23;

(d) the Class Notice distributed to members of the Settlement Class constituted the best notice practicable under the circumstances and sufficient notice of the Fairness Hearing and all rights of members of the Settlement Class was provided consistent with Federal Rule of Civil Procedure 23 and the requirements of due process;

(e) the requirements of CAFA have been satisfied;

(f) the proposed Plan of Allocation, to be filed with the Court and described below in Section 9.3, has been approved;

(g) Settlement Administration Expenses shall be paid from the Qualified Settlement Fund;

(h) Named Plaintiffs shall be awarded Case Contribution Award(s) in the amount(s) approved by the Court, but not to exceed $7,500 for each Named Plaintiff;

(i) Class Counsel shall receive attorneys' fees and reimbursement of expenses as approved by the Court, but not to exceed one-third of the Settlement Amount;

(j) the Settlement Administrator shall have final authority to determine the amount of the Final Individual Dollar Recovery, if any, to be allocated to each Current Participant and Former Participant pursuant to the Plan of Allocation approved by the Court;

(k) the Settlement Administrator shall distribute the Net Settlement Fund in accordance with the Plan of Allocation that is approved by the Court;

(l) the payments made from the Net Settlement Fund to effect the Plan of Allocation constitute restorative payments in accordance with Revenue Ruling 2002-45;

(m) all Settlement Class members and the Plan are barred and enjoined from asserting any of Plaintiffs' Released Claims against any of the Defendant Releasees, and Defendants are barred and enjoined from asserting any of Defendants' Released Claims against the Named Plaintiffs;

(n) the Parties shall take the necessary steps to effectuate the terms of the Settlement Agreement;

(o) the Action is dismissed with prejudice and without costs, except as contemplated by this Settlement Agreement; and

(p) the Court shall retain jurisdiction to enforce and interpret the Settlement Agreement in accordance with its terms for the mutual benefit of the Parties, but without affecting the finality of the Final Approval Order.

3.2.6. *Motion for Final Approval of Class Action Settlement*. On the date set by the Court in its Preliminary Approval Order, Named Plaintiffs shall have filed a motion for final approval of the Settlement (the "Final Approval Motion"). However, such date shall be at least fourteen (14) days before the Fairness Hearing. The Final Approval Motion shall seek the Court's finding that the Final Approval Order is a final judgment disposing of all claims and all Parties.

3.3. *Finality of Final Approval Order*. The Final Approval Order shall have become Final.

3.4. *Determination by Independent Fiduciary*. At least twenty-one (21) days prior to the deadline for filing the Final Approval Motion, the Independent Fiduciary shall have approved and authorized in writing the Settlement in accordance with Prohibited Transaction Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended by 72 Fed. Reg. 65,597 (the "Class Exemption"). If the Independent Fiduciary disapproves or otherwise does not authorize the Settlement, then the Parties, through their counsel, shall attempt to agree in writing prior to filing the Final Approval Motion to modify the Settlement to satisfy objections by the Independent Fiduciary to the Settlement. If the Parties are unable to reach

agreement on any modification required by the Independent Fiduciary, Defendants may, at their sole discretion, terminate the Settlement Agreement at which point the Settlement Agreement will be null and void and the provisions of Section 10.3 shall apply.

3.4.1. The Independent Fiduciary's fees and expenses shall be paid from the Qualified Settlement Fund. The Independent Fiduciary shall acknowledge in writing that it is a fiduciary with respect to the Settlement of this Action on behalf of the Plan. Defendants and Class Counsel will comply with reasonable requests for non-privileged information made by the Independent Fiduciary that are for the purpose of reviewing and evaluating the Settlement Agreement.

3.5. *Compliance with CAFA*. Defendants shall have fulfilled their obligations under CAFA and the Court shall have determined that Defendants complied with CAFA and its notice obligations therein by providing appropriate federal and state officials with information about the Settlement.

3.6. *Dismissal of Action with Prejudice*. The Action shall have been dismissed with prejudice on the Effective Date of Settlement.

3.7. *Funding of Settlement Amount*. Bessemer Trust Company shall have caused to be deposited five million U.S. dollars ($5,000,000) into the Qualified Settlement Fund (defined below in Section 8.1) within thirty (30) days after the date on which both of the following have occurred: (i) the Court has issued the Preliminary Approval Order; and (ii) Bessemer Trust Company has been provided wiring instructions and a completed W-9 from the Settlement Administrator.

3.8. *No Termination*. The Settlement shall not have terminated pursuant to Section 10 below.

3.9. *Materiality of Settlement Conditions*. The Parties expressly acknowledge that this Settlement is specifically conditioned upon the occurrence of each and every one of the foregoing conditions precedent prior to the Effective Date of Settlement, and that a failure of any condition set forth in Sections 3.2 through 3.8 above at any time prior to the Effective Date of Settlement shall make this Settlement Agreement, and any obligation to pay the Settlement Amount, or any portion thereof, null, void, and of no force and effect, unless the Parties agree in writing that despite the non-occurrence of one of the above conditions the remainder of the Settlement Agreement shall go forth.

4. **RELEASES AND COVENANT NOT TO SUE**

4.1. *Release By Named Plaintiffs, the Settlement Class, Defendants, and the Plan*.

4.1.1. *Releases of the Defendant Releasees and Named Plaintiffs*. Subject to Section 10 below and the Carved Out Claims, upon the Effective Date of Settlement, Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class and their Successors-In-Interest, absolutely and unconditionally release and forever discharge the Defendant Releasees from any and all of Plaintiffs' Released Claims that Named Plaintiffs or the Settlement Class directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have. Defendants release and forever discharge the Named Plaintiffs for any and all of

Defendants' Released Claims that Defendants directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have.

4.1.2. *Plan Release*. Subject to Section 10 below, upon the Effective Date of Settlement, the Independent Fiduciary's approval of the Settlement shall constitute a release of any and all of Plaintiffs' Released Claims the Plan ever had, now has or hereafter may have against any and all of Defendant Releasees.

4.1.3. *Covenant Not to Sue*. Subject to Section 10 below, Named Plaintiffs, on behalf of themselves and each member of the Settlement Class, their Successors-In-Interest, their Representatives, and the Plan (subject to Independent Fiduciary approval as required by Section 3.4), expressly covenant and agree that they, acting individually, derivatively, or together, or in combination with others, shall not sue or seek to institute, maintain, prosecute, argue, or assert against Defendant Releasees, in any action or proceeding, any cause of action, demand, or claim on the basis of, connected with, or arising out of any of Plaintiffs' Released Claims, and that the foregoing covenant and agreement shall be a complete defense to any such Plaintiffs' Released Claims against any of the Defendant Releasees. Defendants expressly covenant and agree that they shall not sue or seek to institute, maintain, prosecute, argue, or assert against Named Plaintiffs, in any action or proceeding, any cause of action, demand, or claim on the basis of, connected with, or arising out of any of Defendants' Released Claims, and that the foregoing covenant and agreement shall be a complete defense to all of Defendants' Released Claims against either of the Named Plaintiffs. Nothing herein shall preclude any action to enforce the terms of this Settlement Agreement or Named Plaintiff Jubril Pecou's Release (as discussed in Section 5.3 below).

5. **COVENANTS**

5.1. *No Amendment or Modification of Any Plan.* Notwithstanding anything to the contrary herein, Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, hereby covenant that nothing in this Settlement Agreement, including the Plan of Allocation, shall constitute an amendment or modification of any rights or obligations under any of Defendant Releasees' employee benefit plans, including the Plan.

5.2. *Taxation of Qualified Settlement Fund*. Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, hereby covenant that neither the Parties, Defendant Releasees, Defense Counsel, Class Counsel nor any of their Representatives or Successors-In-Interest shall have any responsibility for any taxes due on the Qualified Settlement Fund, or on any funds that the Plan, members of the Settlement Class, or Named Plaintiffs receive from the Qualified Settlement Fund. Nothing herein shall constitute an admission or representation that any taxes will or will not be due on the Qualified Settlement Fund or any allocation or distribution therefrom.

5.3. *Named Plaintiff Jubril Pecou's Release*. Notwithstanding anything to the contrary herein, Named Plaintiff Jubril Pecou hereby covenants that his participation in the Settlement, and Defendants' agreement that he may receive relief in connection with the Action, does not in

any way waive, modify, alter, or amend the release agreement that Jubril Pecou signed in connection with the termination of his employment.

5.4. *Cooperation*.

5.4.1. Defendants shall use their best efforts to provide Class Counsel with the names, last known email addresses, and last known addresses of members of the Settlement Class, along with other information as agreed to by Class Counsel and Defense Counsel that is reasonably necessary for the Settlement Administrator to implement the Plan of Allocation, in electronic spreadsheet format (to the extent Defendants have such information) as soon as reasonably possible upon entry of the Preliminary Approval Order. However, Defendants will not transfer any such information until Defendants have fully approved the Settlement Administrator and the Settlement Administrator has entered into the Confidentiality and Information Security Agreements, both of which shall be satisfactory to Defendants to adequately protect information provided to the Settlement Administrator relating to the Settlement and the identification of Settlement Class members. Such information shall be used by the Settlement Administrator to deliver the Class Notice, and implement the Settlement, including the Plan of Allocation, and for no other purpose.

5.4.2. Class Counsel anticipates that the Settlement Administrator and Class Counsel will receive inquiries from Persons concerning whether they are members of the Settlement Class. To the extent that such Persons are not included in the information provided in the paragraph immediately above, Defendants and/or their Representatives will reasonably assist the Settlement Administrator and Class Counsel in determining whether or not such Persons are members of the Settlement Class.

6. REPRESENTATIONS AND WARRANTIES

6.1. *Parties' Representations and Warranties*.

6.1.1. Named Plaintiffs, on behalf of themselves and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, represent and warrant that they have not assigned or otherwise transferred any interest in any of Plaintiffs' Released Claims against any of the Defendant Releasees, and further covenant that they will not assign or otherwise transfer any interest in any of Plaintiffs' Released Claims.

6.1.2. Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, represent and warrant that they shall have no surviving claim or cause of action against any of the Defendant Releasees with respect to Plaintiffs' Released Claims.

6.1.3. The Parties, and each of them, represent and warrant that: (a) they are voluntarily entering into this Settlement Agreement as a result of arm's-length negotiations among their counsel; (b) in executing this Settlement Agreement they are relying solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the nature, extent and duration of their rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof; (c) except as expressly stated herein, they have not been influenced to any extent whatsoever in

executing this Settlement Agreement by any representations, statements or omissions pertaining to any of the foregoing matters by any other Party or its Representatives; and (d) each Party assumes the risk of mistake as to facts or law.

6.1.4. The Parties, and each of them, represent and warrant that: (a) they have carefully read the contents of this Settlement Agreement; (b) they have made such investigation of the facts pertaining to the Settlement, this Settlement Agreement, and all of the matters pertaining thereto as they deem necessary; and (c) this Settlement Agreement is signed freely by each individual executing this Settlement Agreement on behalf of each of the Parties.

6.2. *Signatories' Representations and Warranties*. Each individual executing this Settlement Agreement on behalf of any other Person does hereby personally represent and warrant to the other Parties that he or she has the authority to execute this Settlement Agreement on behalf of, and fully bind, each Person which such individual represents or purports to represent.

7. NO ADMISSION OF LIABILITY

The Parties understand and agree that this Settlement Agreement embodies a compromise and settlement of disputed claims, and that nothing in this Settlement Agreement, including the furnishing of consideration for this Settlement Agreement, shall be deemed to constitute any finding of fiduciary status under ERISA or wrongdoing by any of the Defendant Releasees, or give rise to any inference of fiduciary status under ERISA or wrongdoing or admission of wrongdoing or liability in this or any other proceeding. This Settlement Agreement and the payment made hereunder are made in compromise of disputed claims and are not admissions of any liability of any kind, whether legal or factual. Moreover, the Defendant Releasees specifically deny any and all such liability or wrongdoing. Neither the fact nor the terms of this Settlement Agreement shall be offered or received in evidence in any action or proceeding for any purpose, except in an action or proceeding to enforce this Settlement Agreement or arising out of or relating to the Final Approval Order.

8. THE QUALIFIED SETTLEMENT FUND; DELIVERIES INTO THE QUALIFIED SETTLEMENT FUND ACCOUNT

8.1. *The Qualified Settlement Fund*.

8.1.1. As noted above in Section 3.7, Bessemer Trust Company shall cause the Settlement Amount to be deposited into the Qualified Settlement Fund within thirty (30) days after the date on which both of the following have occurred: (i) the Court has issued the Preliminary Approval Order; and (ii) Bessemer Trust Company has been provided wiring instructions and a completed W-9 from the Settlement Administrator. The Qualified Settlement Fund is an interest-bearing escrow account, trusteed by the Escrow Agent.

8.1.2. The Qualified Settlement Fund shall: (a) bear interest for the benefit of the Settlement Class; (b) be structured and managed to qualify as a Qualified Settlement Fund under Section 468B-1 of the Internal Revenue Code and Treasury regulations promulgated thereunder; and (c) contain customary provisions for such funds, including obligations of the Qualified Settlement Fund to make tax filings and to provide reports to the Parties concerning taxes. The Escrow Agent timely shall make such elections as necessary or advisable to carry out the

provisions of this paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to prepare and deliver, in a timely and proper manner, the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur. The Parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment.

8.1.3. Class Counsel agrees to use best efforts to attempt to have the Escrow Agent structure the Qualified Settlement Fund to the extent possible to preserve for the Settlement Class the tax benefits associated with retirement plans.

8.1.4. The Parties acknowledge and agree that neither the Parties, Defense Counsel, Class Counsel, nor the Defendant Releasees shall have authority or liability in connection with the management, investment, maintenance or control of the Qualified Settlement Fund.

8.2. *The Class Settlement Amount*. The Settlement Amount deposited in the Qualified Settlement Fund pursuant to Section 8.1 above, plus all interest income earned thereon and less expenditures authorized under this Settlement Agreement, shall constitute the "Class Settlement Amount."

8.3. *Sole Monetary Contribution*. The Settlement Amount shall be the full and sole monetary contribution and consideration made by or on behalf of the Defendant Releasees in connection with the Action and Settlement. The Settlement Amount specifically satisfies any and all claims for expenses and attorneys' fees by Class Counsel, claims for Case Contribution Awards to Named Plaintiffs, any costs or expenses of the Class Notice, the costs of the Independent Fiduciary and compliance with CAFA, and all taxes on the Qualified Settlement Fund, in addition to any amounts to be distributed to Current Participants and Former Participants pursuant to this Settlement. Except as set forth in Section 11 below, as otherwise specified in this Settlement Agreement, or as provided for in any applicable contract of insurance or other written agreement between the Parties, the Parties shall bear their own costs and expenses (including attorneys' fees) in connection with effectuating the Settlement and securing all necessary court orders and approvals with respect to the same.

9. EFFECTIVE DATE OF SETTLEMENT; DISBURSEMENT FROM QUALIFIED SETTLEMENT FUND; PLAN OF ALLOCATION

9.1. *Establishment of Effective Date of Settlement*. If Named Plaintiffs and Defendants disagree as to whether each and every condition set forth in Section 3 has been satisfied or waived, they shall promptly confer in good faith and, if unable to resolve their differences within five (5) business days thereafter, shall present their disputes as provided for in Section 14.

9.2. *Disbursement from Qualified Settlement Fund*.

9.2.1. No distribution of part, or all, of the Class Settlement Amount shall be made from the Qualified Settlement Fund until the Final Approval Order is Final, and the Escrow Agent has

received: (a) a notice by Class Counsel and Defense Counsel, directing that the Class Settlement Amount be disbursed and designating the appropriate recipient(s); or (b) a Court Order, directing that the Class Settlement Amount be disbursed and designating the appropriate recipient(s).

9.2.2. After the Final Approval Order is Final, the Settlement Administrator or Class Counsel may direct the Escrow Agent to pay from the Qualified Settlement Fund the following: (a) taxes; (b) Settlement Administration Expenses; (c) Case Contribution Awards to Named Plaintiffs; and (d) Class Counsel's attorneys' fees and expenses.

9.2.3. The Settlement Administrator and/or the Escrow Agent shall discharge their duties under Class Counsel's supervision and subject to the jurisdiction of the Court. Except as otherwise expressly provided herein, the Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility whatsoever for the administration of the Settlement, and shall have no liability whatsoever to any Person, including, but not limited to, any Settlement Class member, in connection with any such administration.

9.2.4. The Settlement Administrator shall have sole and final discretion to determine the amounts to be paid to Settlement Class members in accordance with the Plan of Allocation set forth in Section 9.3 and as ordered by the Court.

9.3. *Plan of Allocation*.

9.3.1. At least fourteen (14) days prior to the submission of the Plan of Allocation to the Court along with the Preliminary Approval Motion, Class Counsel shall provide a copy of the Plan of Allocation to Defendants for review and comment.

9.3.2. The distribution of the Net Settlement Fund to the Settlement Class members shall be made in accordance with the Plan of Allocation to be proposed by Class Counsel, reviewed by Defendants, and approved by the Court. Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility or liability for calculating the amounts payable to the Settlement Class members, and Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility or liability for distributing the Net Settlement Fund to the Settlement Class members in accordance with the Court-approved Plan of Allocation.

9.3.3. After the Final Approval Order is Final, the Settlement Administrator or Class Counsel may direct the Escrow Agent to pay from the Qualified Settlement Fund the Net Settlement Fund.

9.3.4. To effectuate the distribution of the Net Settlement Fund to Settlement Class members, the Settlement Administrator shall calculate each Settlement Class member's Final Individual Dollar Recovery based on the Plan of Allocation approved by the Court and shall provide to the Plan's record-keeper and trustee the total amount of the aggregate recoveries for Current Participants.

9.3.5. All inquiries by the Settlement Class members concerning the amount distributed to a particular Settlement Class member shall be handled in the first instance by the Settlement

Administrator. Thereafter, Class Counsel and Defense Counsel shall work cooperatively to resolve any such inquiries.

9.3.6. Neither the Parties, Defense Counsel, Class Counsel, nor the Defendant Releasees shall have any responsibility for or liability whatsoever with respect to any tax advice given to the Former Participants or the Current Participants. Deductions will be made, and reporting will be performed, by the Settlement Administrator, as required by law in respect of all payments made under the Settlement Agreement. Payments from the Qualified Settlement Fund shall not be treated as wages by the Parties.

9.3.7. Any and all Settlement Administration Expenses incurred for the implementation of the Settlement and of the Plan of Allocation shall be paid from the Qualified Settlement Fund.

9.3.8. In the event that Defense Counsel or Class Counsel determines that it is necessary to modify the Plan of Allocation, Class Counsel and Defense Counsel shall jointly discuss such modification and determine whether the modification is reasonable and appropriate under the circumstances. The Parties will jointly petition the Court for approval of any such material modification.

9.3.9. Notwithstanding anything in this Settlement Agreement to the contrary, the Plan of Allocation is a matter separate and apart from the Settlement between the Parties, and no decision by the Court concerning the Plan of Allocation shall affect the validity of the Settlement Agreement or finality of the proposed Settlement in any manner.

9.3.10. The determination of "Current Participants" and "Former Participants" will be based on Settlement Class members' Plan account balances as of the date the Court enters the Final Approval Order, as long as the "Current Participants" and "Former Participants" data is available at that time. Defendants shall use their best efforts to provide Class Counsel with updated information on the names, last known addresses, and email addresses of "Current Participants" and "Former Participants" (to the extent Defendants have such information) within thirty (30) days of the Final Approval Order.

10. TERMINATION OF THE SETTLEMENT AGREEMENT

10.1. *Termination by Defendants*. Defendants may terminate this Settlement Agreement if, before the issuance of the Final Approval Order, the U.S. Department of Labor files any objection to the Settlement Agreement or Settlement in any court, brings a claim against any of the Defendant Releasees, or notifies any of the Defendant Releasees that it intends to bring such a claim.

10.2. *Automatic Termination*. This Settlement Agreement shall automatically terminate, and thereupon become null and void, in the following circumstances:

10.2.1. If the Court declines to approve the Settlement, and if such order declining approval has become Final, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the date that any such order becomes Final, provided, however, that if the Court declines to approve the Settlement for any reason, the Parties shall negotiate in good faith to cure any deficiency identified by the Court, and further provided that if necessary to cure

any such deficiency, Class Counsel shall re-submit within a reasonable time the Preliminary Approval Motion and/or Final Approval Motion with an additional or substitute member of the Settlement Class as a named Settlement Class representative.

10.2.2. If the Court issues an order in the Action modifying the Settlement Agreement, and if within thirty-one (31) days after the date of any such order the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Court or by the Parties, then, provided that no appeal, petition for writ of certiorari, or any other request for review of such order is then pending, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first (31st) day after issuance of the order referenced in this Section.

10.2.3. If the U.S. Court of Appeals for the Second Circuit reverses the Court's Final Approval Order, and if within ninety-one (91) days after the date of any such ruling the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Second Circuit or by the Parties, then, provided that no appeal, petition for writ of certiorari, or any other request for review of such order is then pending, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the ninety-first (91st) day after issuance of the Second Circuit order referenced in this Section.

10.2.4. If the Supreme Court of the United States reverses or remands a Second Circuit order approving the Settlement, and if within thirty-one (31) days after the date of any such ruling the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Supreme Court or by the Parties, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first (31st) day after issuance of the Supreme Court order referenced in this Section.

10.2.5. If an appeal of or petition for writ of certiorari to the Supreme Court regarding an order declining to approve the Settlement Agreement or modifying this Settlement Agreement is pending, this Settlement Agreement shall not be terminated until final resolution or dismissal of any such appeal or petition, except by written agreement of the Parties.

10.3. *Consequences of Termination of the Settlement Agreement*. If the Settlement Agreement is terminated and rendered null and void for any reason, the following shall occur:

10.3.1. Within three (3) days after the date of termination of the Settlement Agreement, Class Counsel shall notify the Escrow Agent in writing to return to Defendants the Qualified Settlement Fund and all net income earned thereon, and direct the Escrow Agent to effect such return as soon as possible.

10.3.2. The Action shall for all purposes with respect to the Parties revert to its status as of January 5, 2023, the day immediately prior to the execution of the Term Sheet. The Parties will cooperate in trying to return the Action to the Court for decision on the matters pending before the Court at the time of execution of the Term Sheet.

10.3.3. All releases given or executed pursuant to the Settlement Agreement shall be null and void; none of the terms of the Settlement Agreement shall be effective or enforceable, except those provisions providing for reimbursement of costs as set forth in Section 10.3.1; and neither

the fact nor the terms of the Settlement Agreement shall be offered or received in evidence in this Action or in any other action or proceeding for any purpose, except in an action or proceeding arising under this Settlement Agreement.

11. ATTORNEYS' FEES AND EXPENSES; NAMED PLAINTIFFS' CASE CONTRIBUTION AWARDS

11.1. *Application for Fees, Expenses, and Case Contribution Awards*. As provided in Section 3 above, and pursuant to the common fund doctrine, Class Counsel shall petition the Court no later than twenty-one (21) days prior to the deadline for objections for an award of attorneys' fees and Case Contribution Awards, and for reimbursement of expenses incurred by Class Counsel, to be paid from the Qualified Settlement Fund. The Case Contribution Awards and attorneys' fees and reimbursed expenses, if any are awarded by the Court, shall be paid from the Qualified Settlement Fund. The Case Contribution Awards are not to exceed $7,500 to each Named Plaintiff. Class Counsel shall not seek more than one-third of the Qualified Settlement Fund for attorneys' fees and expenses. Defendants, their Representatives, and their Successors-In-Interest expressly agree not to take any position with respect to any application for attorneys' fees and expenses incurred by Class Counsel with respect to this Settlement, and acknowledge that these matters are left to the sound discretion of the Court. Defendants, their Representatives, and their Successors-in-Interest also expressly agree not to contest or take any position with respect to the Case Contribution Awards and will leave this matter to the sound discretion of the Court.

11.2. *Disbursement of Fees, Costs, Expenses, and Case Contribution Awards*.

11.2.1. Attorneys' fees, costs, and expenses shall be payable to Class Counsel out of the Qualified Settlement Fund after the Final Approval Order is Final.

11.2.2. The Case Contribution Awards shall be payable from the Qualified Settlement Fund and shall be in addition to any portion of the Net Settlement Fund that Named Plaintiffs would otherwise be entitled to receive as members of the Settlement Class. The Case Contribution Awards will only be distributed after the Final Approval Order is Final.

12. NON-DISPARAGEMENT

The Parties agree to take no action in connection with the Settlement that is intended to, or that would reasonably be expected to, harm the reputation of any other Party (including a Party's officers, directors, employees, agents, or attorneys), or that would reasonably be expected to lead to unfavorable publicity for any other Party.

13. STATEMENTS TO THE PUBLIC

No press release or other publicity relating to the Settlement or the Action shall be issued by Class Counsel or Named Plaintiffs. If any Party (including his, her, or its counsel) is asked by a member of the press about the status of the Settlement or Action, the answer shall be "no comment."

14. MISCELLANEOUS PROVISIONS

14.1. *Disputes*. If any disputes arise out of this Settlement Agreement, including but not limited to disputes concerning the meaning of any express or implied terms of the Settlement Agreement, the Mediator will resolve them in the first instance. The Parties will split any Mediator-related costs necessary to resolve any disputes arising out of the Settlement Agreement.

14.2. *Jurisdiction*. The Court shall retain jurisdiction over Named Plaintiffs, the Settlement Class, the Plan, and Defendants to resolve any dispute that may arise regarding this Settlement Agreement or the orders and notices referenced in Section 3 above insofar as such dispute(s) cannot in the first instance be resolved by the Mediator.

14.3. *Governing Law*. This Settlement Agreement shall be governed by the laws of the United States, including federal common law, except to the extent that, as a matter of federal law, state law controls, in which case New York law will apply without regard to conflict of law principles.

14.4. *Severability*. The provisions of this Settlement Agreement are not severable.

14.5. *Amendment*. Before entry of a Final Approval Order, the Settlement Agreement may be modified or amended only by written agreement signed by or on behalf of all Parties. Following entry of a Final Approval Order, the Settlement Agreement may be modified or amended only by written agreement signed on behalf of all Parties, and approved by the Court.

14.6. *Waiver*. The provisions of this Settlement 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 Settlement Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.

14.7. *Construction*. None of the Parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

14.8. *Principles of Interpretation*. The following principles of interpretation apply to this Settlement Agreement:

14.8.1. *Headings*. The headings of this Settlement Agreement are for reference purposes only and do not affect in any way the meaning or interpretation of this Settlement Agreement.

14.8.2. *Singular and Plural*. Definitions apply to the singular and plural forms of each term defined.

14.8.3. *Gender*. Definitions apply to the masculine, feminine, and neuter genders of each term defined.

14.8.4. *References to a Person*. References to a Person are also to the Person's permitted successors and assigns.

14.8.5. *Terms of Inclusion*. Whenever the words "include," "includes" or "including" are used in this Settlement Agreement, they shall not be limiting but rather shall be deemed to be followed by the words "without limitation."

14.9. *Further Assurances*. Each of the Parties agrees, without further consideration, and as part of finalizing the Settlement hereunder, that they will in good faith execute and deliver such other documents and take such other actions as may be necessary to consummate and effectuate the subject matter and purpose of this Settlement Agreement.

14.10. *Survival*. All representations, warranties and covenants set forth in this Settlement Agreement shall be deemed continuing and shall survive the Effective Date of Settlement.

14.11. *Notices*. Any notice, demand or other communication under this Settlement Agreement (other than notices to members of the Settlement Class) shall be in writing and shall be deemed duly given upon receipt if it is addressed to each of the intended recipients as set forth below and personally delivered, sent by registered or certified mail (postage prepaid), sent by confirmed email, or delivered by reputable express overnight courier:

A. IF TO NAMED PLAINTIFFS:

Brock J. Specht
Paul J. Lukas
Steven J. Eiden
NICHOLS KASTER, PLLP
4700 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
Telephone: (612) 256-3200
bspecht@nka.com
lukas@nka.com
seiden@nka.com

B. IF TO DEFENDANTS:

Russell L. Hirschhorn
Joseph E. Clark
Sydney L. Juliano
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000
rhirschhorn@proskauer.com
jclark@proskauer.com
sjuliano@proskauer.com

Any Party may change the address at which it is to receive notice by written notice delivered to the other Parties in the manner described above.

14.12. *Entire Agreement*. This Settlement Agreement contains the entire agreement among the Parties relating to this Settlement. It specifically supersedes any settlement terms or settlement agreements relating to Defendants that were previously agreed upon orally or in writing by any of the Parties, including the terms of the Term Sheet.

14.13. *Counterparts*. This Settlement Agreement may be executed by exchange of faxed or scanned executed signature pages, and any signature transmitted by facsimile or by email attachment for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement. This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

14.14. *Binding Effect*. This Settlement Agreement binds and inures to the benefit of the Parties hereto, their assigns, heirs, beneficiaries, administrators, executors and Successors-in-Interest.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates set forth below.

FOR NAMED PLAINTIFFS, THE PLAN AND THE SETTLEMENT CLASS

Dated this 10th day of March, 2023.

By: _____

Brock J. Specht
Paul J. Lukas
Steven J. Eiden
NICHOLS KASTER, PLLP
4700 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 256-3200

FOR ALL DEFENDANTS

Dated this 10th day of March, 2023.

By: _____

Russell L. Hirschhorn
Joseph E. Clark
Sydney L. Juliano
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3286

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU and ASHLEY SCHIEFER, individually and as representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan,

Plaintiffs,

v.

BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY,

Defendants.

Case No. 1:22-cv-01019-MKV

[Proposed] Order on Plaintiffs' Motion for Preliminary Approval of Class Action Settlement

This litigation arose out of claims of alleged breaches of fiduciary duties in violation of the Employee Retirement Income Security Act of 1974 ("ERISA") asserted against Defendants Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company in connection with the management of the Bessemer Trust Company 401(k) and Profit Sharing Plan (the "Plan").

Presented to the Court for preliminary approval is a settlement of the litigation as against all Defendants. The terms of the Settlement are set out in a Settlement Agreement dated March 10, 2023, executed on behalf of the Parties by Class Counsel and Defense Counsel. Except as otherwise defined herein, all capitalized terms used herein shall have the same meaning as ascribed to them in the Settlement Agreement.

Upon reviewing the Settlement Agreement and the papers submitted in connection with the Motion for Preliminary Approval, and good cause appearing therefore,

It is hereby ORDERED as follows:

1. **Preliminary Finding Regarding Proposed Settlement**: The Court preliminarily finds that:

A. The proposed Settlement resulted from arm's-length negotiations by experienced and competent counsel overseen by an experienced and neutral mediator;

B. The Settlement was negotiated only after Class Counsel had received pertinent information from Defendants;

C. Class Counsel and Named Plaintiffs have submitted declarations in support of the Settlement; and

D. Considering the relevant Second Circuit factors, the Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class.

2. **Fairness Hearing**: A hearing will be held on [a date no sooner than one-hundred-thirty (130) calendar days after the date of the Preliminary Approval Order] _____, 2023, at _____.M., in Courtroom _____ of the United States District Court for the Southern District of New York, before the undersigned United States Judge, to determine, among other issues:

A. Whether the Court should approve the Settlement as fair, reasonable, and adequate;

B. Whether the Court should enter the Final Approval Order; and

C. Whether the Court should approve Class Counsel's motion for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards.

3. **Settlement Administrator**: The Court approves and orders that Analytics Consulting LLC shall serve as the Settlement Administrator and be responsible for carrying out the responsibilities set forth in the Settlement Agreement.

A. The Settlement Administrator shall be bound by the Confidentiality and Information Security Agreements and any further non-disclosure or security protocol jointly required by the Parties, set forth in writing to the Settlement Administrator;

B. The Settlement Administrator shall use the data provided by Defendants, Defense Counsel, Class Counsel, Settlement Class members, and the Plan's recordkeeper solely for the purpose of meeting its obligations as Settlement Administrator, and for no other purpose; and

C. The Parties shall have the right to approve a written protocol to be provided by the Settlement Administrator concerning how the Settlement Administrator will maintain, store, and dispose of information provided to it in order to ensure that reasonable and necessary precautions are taken to safeguard the privacy and security of such information.

4. Class Certification: The following Settlement Class is preliminarily certified for settlement purposes only pursuant to Fed R. Civ. P. 23(b)(1):

> All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the "Class Period"), except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

The Court appoints Jubril Pecou and Ashley Schiefer as representatives for the Settlement Class. Further, the Court appoints Nichols Kaster, PLLP as counsel for the Settlement Class.

5. Class Notice: The Parties have presented to the Court the Class Notice, attached as Exhibit A to the proposed Preliminary Approval Order, which is the proposed form of notice regarding the Settlement for distribution to Settlement Class members.

A. The Court approves the text of the Class Notice and finds that:

i. the proposed Class Notice fairly and adequately:

a. describes the terms and effect of this Settlement Agreement and of the Settlement;

b. provides sufficient notice to all members of the Settlement Class of the time and place of the Fairness Hearing;

c. describes the rights of all Settlement Class members including that the recipients of the Class Notice may object to approval of the Settlement; and

ii. The proposed manner of distributing the Class Notice to Settlement Class members is the best notice practicable under the circumstances and fully complies with the requirements of Federal Rule of Civil Procedure 23 and due process.

B. Within forty-five (45) days after entry of this Order, the Settlement Administrator shall distribute the Class Notice to each Settlement Class member as specified in the Settlement Agreement, based on data provided by the Plan's recordkeeper. The Class Notice shall be mailed by electronic means and/or by first class mail to all Settlement Class members to the last known email addresses and/or mailing addresses for the Settlement Class members in the possession of the Plan's recordkeeper, provided, however, that if the Settlement Administrator obtains an updated address through its efforts to verify the last known email address provided by the Plan's recordkeeper, then Class Notice shall be sent thereto.

C. On or before the date that Class Notice is sent to the Settlement Class, the Settlement Administrator shall establish a Settlement Website and telephone

support line as provided by the Settlement Agreement. The Settlement Administrator shall post a copy of the Class Notice on the Settlement Website.

D. Former Participants electing to receive their Final Individual Dollar Recovery via rollover to a qualified retirement account must mail their Former Participant Rollover Form, attached as Exhibit B to the proposed Preliminary Approval Order, to the Settlement Administrator postmarked within thirty (30) days after the Settlement Administrator has distributed the Class Notice to each Settlement Class member.

6. Preliminary Injunction: Each Settlement Class member and their respective Successors-In-Interest is preliminarily enjoined from suing Defendants, the Plan, or any other Defendant Releasees in any action or proceeding alleging any of Plaintiffs' Released Claims, even if any Settlement Class member may thereafter discover facts in addition to or different from those which the Settlement Class members or Class Counsel now know or believe to be true with respect to the Action and Plaintiffs' Released Claims. Further, pending final determination of whether the Settlement Agreement should be approved, no Settlement Class member may directly, through representatives, or in any other capacity, commence any action or proceeding in any court or tribunal asserting any of Plaintiffs' Released Claims against Defendants, the Plan, or any other Defendant Releasees.

7. Objections to Settlement: Any objections to any aspect of the Settlement shall be heard, and any papers submitted in support of said objections shall be considered, by the Court at the Fairness Hearing if they have been timely sent to Class Counsel and Defense Counsel. To be timely, the objection and any supporting documents must be sent to Class Counsel and Defense Counsel at least twenty-one (21) calendar days prior to the scheduled Fairness Hearing.

8. Responses to Objections and Final Approval Motion: Any Party may file a response to an objection by a Settlement Class member at least fourteen (14) calendar days before the Fairness Hearing, and Named Plaintiffs shall file their Final Approval Motion at least fourteen (14) calendar days before the Fairness Hearing.

9. Continuance of Hearing: The Court may adjourn, modify, or continue the Fairness Hearing without further direct notice to Settlement Class members, other than by notice via the Court's docket or the Settlement Website.

10. CAFA Notice: The Court approves the form of the CAFA Notice attached as Exhibit C to the proposed Preliminary Approval Order and orders that upon the distribution of the CAFA Notice, Defendants shall have fulfilled their obligations under the Class Action Fairness Act, 28 U.S.C. §§ 1711, *et seq*.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Mary Kay Vyskocil
United States District Judge

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU and ASHLEY SCHIEFER, individually and as the representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiffs, v. BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY, Defendants.	Case No. 1:22-cv-1019-MKV

NOTICE OF CLASS ACTION SETTLEMENT AND FAIRNESS HEARING

PLEASE READ THIS SETTLEMENT NOTICE CAREFULLY.
This is a notice of a proposed class action settlement in the above-referenced lawsuit. Your legal rights may be affected if you are a member of the following Settlement Class:

All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the "Class Period"), except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

- The Court has given its preliminary approval to a proposed class action settlement (the "Settlement"), in a lawsuit brought by certain participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan (the "Plan") against Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company (collectively, "Defendants"), alleging violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") in relation to the management of the Plan. Defendants deny any and all claims, and nothing in the Settlement is an admission or concession on Defendants' part of any fault or liability whatsoever. Defendants further maintain that they acted prudently and loyally at all times when acting in any fiduciary capacity with respect to the Plan.

- The Settlement will provide for payment of a Settlement Amount of $5,000,000 ("Settlement Amount") to resolve the claims against Defendants. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of any attorneys' fees and expenses to Class Counsel, Settlement Administration Expenses, and Case

Contribution Awards to Named Plaintiffs. The Net Settlement Fund will be allocated to Settlement Class members according to a Plan of Allocation to be approved by the Court and further described below.

- Settlement Class members (i) with a positive balance in the Plan at the time the Court enters the Final Approval Order ("Current Participants"), and (ii) who maintain a positive balance through the time Settlement monies are distributed, will be eligible, pursuant to the process described herein and in the Plan of Allocation, to automatically receive allocations directly to their Plan accounts.

- Settlement Class members who participated in the Plan during the Class Period but who have no account balance in the Plan at the time the Court enters the Final Approval Order ("Former Participants") will be eligible, pursuant to the process described herein and in the Plan of Allocation, to receive their settlement payment in the form of a check. Alternatively, Former Participants can elect to receive their payment, if any, through a rollover to qualified retirement account.

- The terms and conditions of the Settlement are set forth in the Settlement Agreement dated March 10, 2023. Capitalized terms used in this Notice but not defined in this Notice have the meanings assigned to them in the Settlement Agreement. The Settlement Agreement is available at [www.settlementwebsite.com]. Certain other documents also will be posted on that website. You should visit that website if you would like more information about the Settlement or the lawsuit. All papers filed in this lawsuit are also available for review by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

- Your rights and the choices available to you—and the applicable deadlines to act—are explained in this Notice. Please note that neither Defendants nor any employees, attorneys, or representatives of Defendants may advise you as to what the best choice is for you or how you should proceed.

- The Court still has to decide whether to give its final approval to the Settlement. Payments under the Settlement will be made only if the Court finally approves the Settlement, and that final approval is upheld in the event of any appeal.

- A Fairness Hearing will take place on [DATE], at [TIME], before the Honorable Mary Kay Vyskocil, in Courtroom X of the United States Courthouse located at 500 Pearl Street – Suite X, New York, New York 10007, to determine whether to grant final approval of the Settlement and approve the requested attorneys' fees and expenses to Class Counsel, Settlement Administration Expenses, and Case Contribution Awards to Named Plaintiffs. If the Fairness Hearing is rescheduled, or if it is held by video conference or telephone, a notice will be posted on the Settlement Website at [www.settlementwebsite.com].

- Any objections to the Settlement, or to the requested attorneys' fees and expenses, Settlement Administration Expenses, or Case Contribution Awards, must be served in writing on Class Counsel and Defense Counsel, as identified on page 8 of this Settlement Notice, at least 21 calendar days before the Fairness Hearing.

YOUR LEGAL RIGHTS AND OPTIONS UNDER THE SETTLEMENT:	
IF YOU ARE A CURRENT PARTICIPANT: YOU DO NOT NEED TO DO ANYTHING TO RECEIVE YOUR SHARE OF THE SETTLEMENT.	You do not need to do anything to receive your *pro rata* share, if any, of the Net Settlement Fund.
IF YOU ARE A FORMER PARTICIPANT: YOU MAY SUBMIT A ROLLOVER FORM IF YOU WANT TO RECEIVE YOUR PAYMENT THROUGH A ROLLOVER.	You can elect to receive your payment, if any, through a rollover to a qualified retirement account. If you would prefer to receive your settlement payment through a rollover to a qualified retirement account, you must complete, sign, and mail the enclosed Former Participant Rollover Form by [DATE]. Former Participants who fail to complete, sign, and mail their Former Participant Rollover Form will receive their *pro rata* share of the Net Settlement Fund, if any, by check mailed to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].
YOU CAN OBJECT (NO LATER THAN [DATE])	You cannot opt out of this Settlement. But, if you wish to object to any part of the Settlement, or to the requested attorneys' fees and expenses, Settlement Administration Expenses, or Case Contribution Awards, you may do so. You must submit your objection and any supporting documents to Class Counsel and Defense Counsel (as identified on page 8 below) at least 21 calendar days before the Fairness Hearing.
YOU CAN ATTEND A HEARING ON [DATE]	You may also attend the Fairness Hearing and speak at the Fairness Hearing on [DATE]. Please note that you will not be permitted to make an objection to the Settlement at the hearing if you do not comply with the requirements for making objections.

The Class Action

The above-referenced lawsuit, *Pecou, et al. v. Bessemer Trust Company, et al.*, No. 1:22-cv-01019-MKV (S.D.N.Y.) (the "Action" or "lawsuit"), has been pending since February 4, 2022. The Court supervising the case is the United States District Court for the Southern District of New York. The individuals who brought this lawsuit are called the Named Plaintiffs, and the persons that were sued are called the Defendants. Named Plaintiffs (Jubril Pecou and Ashley Schiefer) are former participants in the Plan. Defendants are Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company. The claims in the lawsuit are described below on page 5, and additional information about them, including a copy of the operative Complaint, is available at [www.settlementwebsite.com].

The Settlement

Following mediation before an experienced, neutral mediator, and negotiations between Class Counsel and Defense Counsel, the parties to this lawsuit reached a Settlement. The Settlement will provide for a combined Settlement Amount of $5,000,000 to be paid to resolve the claims against Defendants. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of any Settlement Administration Expenses, any attorneys' fees and expenses that the Court awards to Class Counsel, and any Case Contribution Award that the Court awards to Named Plaintiffs. The Net Settlement Fund will be allocated to Settlement Class members according to a Plan of Allocation to be approved by the Court and further described below.

Statement of Attorneys' Fees and Expenses to Class Counsel, Administrative Expenses, and Named Plaintiffs' Compensation Sought in the Class Action

Class Counsel has devoted substantial time and effort to investigating the facts, prosecuting the lawsuit, and negotiating the Settlement. During that time, they also have advanced costs necessary to pursue the case. Class Counsel took the risk of litigation and have not been paid for any of their time or for any of these costs throughout the time this case has been pending.

Class Counsel will apply to the Court for payment of attorneys' fees for their work in the case. In addition, Class Counsel also will seek to recover their litigation costs and recoverable administrative expenses associated with the Settlement. The amount of fees, costs, and expenses that Class Counsel will request will not exceed one-third of the Settlement Amount ($1,666,66.67). Any attorneys' fees and expenses and Settlement Administration Expenses awarded by the Court will be paid from the Settlement Amount. Class Counsel also will ask the Court to approve a payment, not to exceed $7,500, for each of the Named Plaintiffs who took on the risk of litigation and committed to spend the time necessary to bring the case against Defendants to a conclusion. Any Case Contribution Award approved by the Court will also be paid from the Settlement Amount.

A full and formal application for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards will be filed with the Court on or before [DATE]. This application will be made available at [www.settlementwebsite.com]. You may also obtain a copy of this application by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

1. Why Did I Receive This Settlement Notice?

The Settlement Administrator has caused this Notice to be sent to you because its records indicate that you may be a Settlement Class member. If so, you have a right to know about the Settlement and about all of the options available to you before the Court decides whether to give its final approval to the Settlement.

2. What Is the Class Action About?

In the Class Action, Named Plaintiffs claim that Defendants failed to prudently and loyally monitor and manage the Plan's investment lineup in the best interest of participants and beneficiaries and gave an improper preference to investment options managed, in part, by affiliates of the Plan's sponsor. A more complete description of what Named Plaintiffs allege is in the Complaint, which is available on the Settlement Website at [www.settlementwebsite.com].

Defendants have denied and continue to deny liability as to any and all claims and assert that they have always acted prudently, loyally, and in keeping with their fiduciary duties under ERISA by monitoring, reviewing, and evaluating the Plan's investment lineup.

3. Why Is There A Settlement?

The Court has not reached a final decision as to Named Plaintiffs' claims. Instead, Named Plaintiffs and Defendants have agreed to the Settlement. The Settlement is the product of arm's-length negotiations between Named Plaintiffs, Defendants, and their counsel, who were assisted in their negotiations by a neutral, experienced mediator. The parties to the Settlement have taken into account the uncertainty, risks, and costs of litigation, and have concluded that it is desirable to settle on the terms and conditions set forth in the Settlement Agreement. Named Plaintiffs and Class Counsel believe that the Settlement is best for the Settlement Class. Nothing in the Settlement Agreement is an admission or concession on Defendants' part of any fault or liability whatsoever. Defendants have entered into the Settlement Agreement to avoid the expense, inconvenience, burden, distraction and diversion of their personnel and resources, and uncertainty of outcome that is inherent in any litigation.

4. What Does the Settlement Provide?

As part of the Settlement, a Settlement Amount of $5,000,000 is being paid to resolve the claims in the Action. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of Settlement Administration Expenses, any attorneys' fees and expenses that the Court awards to Class Counsel, and any Case Contribution Award that the Court awards to Named Plaintiffs. Allocations to Current Participants who are entitled to a distribution under the Plan of Allocation will be made into their existing accounts in the Plan. Former Participants who are entitled to a distribution will receive their distribution through a rollover to a qualified retirement account, or a check will be sent to their last known address.

In exchange for the foregoing monetary relief, all Settlement Class members and anyone claiming through them will fully release Defendants and other Defendant Releasees from Plaintiffs' Released Claims, as defined in the Settlement Agreement, which is available at [www.settlementwebsite.com]. Generally, the release means that Settlement Class members will not have the right to sue the Plan, Defendants, or any related parties for conduct during the Class Period arising out of or related to the allegations in the Action.

5. How Much Will My Distribution Be?

The amount, if any, that will be allocated to you will be based upon records maintained by the Plan's recordkeeper. Calculations regarding individual distributions will be performed by the Settlement Administrator, whose determinations will be final and binding, pursuant to the Court-approved Plan of Allocation.

To receive a distribution from the Net Settlement Fund, you must either be a (1) "Current Participant" as described on page 3; or (2) a "Former Participant" as described on page 3; or (3) an eligible Successor-In-Interest to a person identified in (1) or (2).

There are approximately 2,600 Settlement Class members. The Net Settlement Fund will be divided *pro rata* among Settlement Class members (and eligible Successors-In-Interest) based on their Final Individual Dollar Recovery in relation to other Settlement Class members. To calculate the Final Individual Dollar Recovery, the Settlement Administrator will review Settlement Class members' account balances in the Plan for each quarter during the Class Period, and will award

one point for each dollar invested in the Challenged Investments in the Plan, at the end of each quarter. A Settlement Class member's Final Individual Dollar Recovery shall be the average of the quarterly scores during the Class Period, weighted to account for partial quarters.

To avoid disproportionate expenses in particular cases, no distribution will be made to any Settlement Class member who (1) is a Former Participant; and (2) would otherwise be entitled to a Final Individual Dollar Recovery of less than $5.

The Plan of Allocation will be posted on the Settlement Website at [www.settlementwebsite.com]. An additional description of the Plan of Allocation can be found in Section 9 of the Settlement Agreement, available at [www.settlementwebsite.com].

6. How Can I Receive My Distribution?

If you are a Current Participant, you do not need to do anything to receive your *pro rata* share, if any, of the Net Settlement Fund. As long as you maintain a positive balance in your Plan account through the time Settlement monies are distributed, you will automatically receive your distribution, if any, directly to your Plan account.

If you are considered a Current Participant because you had a Plan account with a balance greater than $0.00 at the time the Court enters the Final Approval Order, but it is determined that you no longer have a Plan account balance greater than $0.00 when the Settlement proceeds are distributed to Settlement Class members, if you are entitled to a distribution the Settlement Administrator will mail you a check for your *pro rata* share of the Net Settlement Fund to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].

If you are a Former Participant who would prefer to receive your *pro rata* share, if any, of the Net Settlement Fund through a rollover to a qualified retirement account, you must complete, sign, and mail the enclosed Former Participant Rollover Form postmarked within [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER].

For Former Participants who fail to complete, sign, and mail their Former Participant Rollover Form, if you are entitled to a distribution the Settlement Administrator will mail you a check for your *pro rata* share of the Net Settlement Fund to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].

7. When Will I Receive My Distribution?

The timing of the distribution of the Net Settlement Fund is conditioned on several matters, including the Court's final approval of the Settlement and any approval becoming final and no longer subject to any appeals in any court. An appeal of the final approval order may take several years. If the Settlement is approved by the Court and there are no appeals, the Settlement distribution likely will occur within approximately six months of the Court's Final Approval Order, unless there are unforeseen circumstances. There will be no payments under the Settlement if the Settlement Agreement is terminated.

8. Can I Get Out of The Settlement?

No. The Settlement Class has been certified for settlement purposes under Federal Rule of Civil Procedure 23(b)(1). Therefore, as a Settlement Class member, you are bound by the Settlement (if it receives final Court approval) and any judgments or orders that are entered in the Action. If you wish to object to any part of the Settlement, you may write to Class Counsel and Defense Counsel about why you object to the Settlement, as discussed below.

9. Who Represents the Settlement Class?

For purposes of the Settlement, the Court has appointed Nichols Kaster, PLLP as Class Counsel in the Action. If you want to be represented by your own lawyer, you may hire one at your own expense. In addition, the Court appointed Jubril Pecou and Ashley Schiefer (Named Plaintiffs) to serve as representatives of the Settlement Class. They are also Settlement Class members.

10. How Will the Lawyers Be Paid?

Class Counsel will file a motion for an award of attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards at least 42 days prior to the Fairness Hearing. This motion will be considered at the Fairness Hearing. Class Counsel will limit their application for attorneys' fees and expenses to not more than one-third of the Settlement Amount. In addition, Class Counsel will seek Case Contribution Awards for the Named Plaintiffs of no more than $7,500 each. The Court will determine the amount of attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards that will be awarded, if any. Class Counsel's motion for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards, will be posted on the Settlement Website at www.settlementwebsite.com, and can be obtained in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

11. How Do I Tell the Court If I Don't Like the Settlement?

If you are a Settlement Class member, you can object to the Settlement by mailing a written objection to Class Counsel and to Defense Counsel (as identified below) that explains why you object.

Your written objection must: (1) clearly identify the case name and number: *Jubril Pecou, et al. v. Bessemer Trust Company, et al.*, No. 1:22-cv-01019-MKV (S.D.N.Y.); (2) include your full name, current address, and telephone number; (3) describe the basis for your objection; and (4) include your signature.

Your written objection and supporting documents must be personally delivered, or sent by U.S. mail or courier, to Class Counsel and Defense Counsel as set forth below **no later than [21 days prior to Fairness Hearing]** to be considered. Class Counsel and Defendants will have an opportunity to respond to your objection.

CLASS COUNSEL	DEFENSE COUNSEL
Brock Specht Paul Lukas Steven Eiden Nichols Kaster, PLLP 4700 IDS Center 80 South 8th Street Minneapolis, MN 55402	Russell L. Hirschhorn Joseph Clark Sydney Juliano Proskauer Rose LLP Eleven Times Square New York, NY 10036

12. When and Where Will the Court Decide Whether to Approve the Settlement?

The Court will hold a Fairness Hearing at **[TIME]** on **[DATE]**, at the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007, in Courtroom X. At the Fairness Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. The Court also will consider the motion for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards. If there are objections, the Court will consider them then. Please note that if the Fairness Hearing is rescheduled, or if it is held by video conference or telephone, a notice will be posted on the Settlement Website at [www.settlementwebsite.com].

13. Do I Have to Attend the Fairness Hearing?

No, but you are welcome to come at your own expense. You may also make an appearance through an attorney. If you send an objection, you do not have to come to the Court to talk about it. As long as you mailed your written objection on time, the Court will consider it.

14. May I Speak at The Fairness Hearing?

Yes, but you must comply with the requirements for making an objection (described above) if you wish to object to the Settlement. If you do not comply with the requirements for making an objection, you will not be permitted to object at the Fairness Hearing.

15. What Happens If I Do Nothing at All?

If you are a "Former Participant" as described on page 3, and you do nothing, if you are eligible for a distribution you will receive your *pro rata* share of the Net Settlement Fund via check if the Settlement is finally approved. If you are a "Current Participant" as described on page 3, and you do nothing, if you are eligible for a distribution you will receive your *pro rata* share of the Net Settlement Fund as a deposit to your Plan account if the Settlement is finally approved.

16. How Do I Get More Information?

If you have questions regarding the Settlement, you can visit [www.settlementwebsite.com], call [phone number], or write to the Settlement Administrator at [mailing address]. All papers filed in this lawsuit are also available for review by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007. Please note that none of the Defendants nor any employees, attorneys, or representatives of Defendants may advise you regarding the Settlement or how you should

proceed.

EXHIBIT B

Bessemer Trust Company 401(k) and Profit Sharing Plan Settlement Administrator
[ADDRESS]
[www.settlementwebsite.com]

FORMER PARTICIPANT ROLLOVER FORM

JOHN Q CLASSMEMBER
123 MAIN ST APT 1
ANYTOWN, ST 12345

Claim Number: 1111111

This Former Participant Rollover Form is **ONLY** for Settlement Class members who are **Former Participant Settlement Class** members, or the Successors-In-Interest of Former Participant Settlement Class members (all of whom will be treated as Former Participant Settlement Class members).[1] A Former Participant Settlement Class member is a Settlement Class member who had a Plan account with a balance greater than $0.00 during the Class Period but does not have a Plan account with a balance greater than $0.00 at the time the Court enters the Final Approval Order.

Former Participant Settlement Class members that would like to elect to receive their settlement payment through a rollover to a qualified retirement account must complete, sign, and mail this form with a postmark on or before [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER]. Please review the instructions below carefully. Former Participant Settlement Class member**s who do not complete and timely return this form will receive their settlement payment by a check.** If you have questions regarding this form, you may contact the Settlement Administrator as indicated below:

WWW.SETTLEMENTWEBSITE.COM OR CALL [PHONE NUMBER]

****

PART 1: INSTRUCTIONS FOR COMPLETING FORMER PARTICIPANT ROLLOVER FORM

1. If you would like to receive your settlement payment through a rollover to a qualified retirement account, complete this rollover form. You should also keep a copy of all pages of your Former Participant Rollover Form, including the first page with the address label, for your records.

2. **Mail your completed Former Participant Rollover Form postmarked on or before** [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER] **to the Settlement Administrator at the following address:**

Bessemer Trust Company 401(k) and Profit Sharing Plan Settlement Administrator
P.O. Box [number] [City, State, ZIP]

It is your responsibility to ensure the Settlement Administrator has timely received your Former Participant Rollover Form.

3. Other Reminders:

- You must provide date of birth, signature, and a completed Substitute IRS Form W-9, which is attached as part 5 to this form.

[1] All capitalized terms not specifically defined herein shall have the definitions provided in the Settlement Agreement.

- If you desire to do a rollover and you fail to complete all of the rollover information in Part 4, below, payment will be made to you by check.

- If you change your address after sending in your Former Participant Rollover Form, please provide your new address to the Settlement Administrator.

- **Timing of Payments to Eligible Settlement Class Members.** The timing of the distribution of the Settlement payments are conditioned on several matters, including the Court's final approval of the Settlement and any approval becoming final and no longer subject to any appeals in any court. An appeal of the final approval order may take several years. If the Settlement is approved by the Court, and there are no appeals, the Settlement distribution likely will occur within six months of the Court's Final Approval Order.

4. **Questions?** If you have any questions about this Former Participant Rollover Form, please call the Settlement Administrator at [phone number]. The Settlement Administrator will provide advice only regarding completing this form and will not provide financial, tax or other advice concerning the Settlement. You therefore may want to consult with your financial or tax advisor. Information about the status of the approval of the Settlement and the Settlement administration is available on the Settlement Website, [www.settlementwebsite.com].

   You are eligible to receive a payment from a class action settlement. The Court has preliminarily approved the class settlement of *Pecou, et al. v. Bessemer Trust Company, et al.*, No. 1:22-cv-01019-MKV (S.D.N.Y.). That Settlement provides allocation of monies to the individual accounts of certain persons who participated in the Bessemer Trust Company 401(k) and Profit Sharing Plan ("Plan") at any time from January 26, 2016 through the Effective Date of Settlement. Settlement Class members who had a Plan account with a balance greater than $0.00 during the Class Period but who do not have a Plan account with a balance greater than $0.00 at the time the Court enters the Final Approval Order ("Former Participant Class Members") will receive their allocations, if any, in the form of a check or in the form of a rollover if and only if they mail a valid Former Participant Rollover Form postmarked on or before [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER] to the Settlement Administrator with the required information to effectuate the rollover. For more information about the Settlement, please see the Notice Of Class Action Settlement And Fairness Hearing, visit [www.settlementwebsite.com], or call [phone number].

Because you are a Former Participant Settlement Class member in the Plan, you must decide whether you want your payment, if any, (1) sent payable to you directly by check or (2) to be rolled over into another qualified retirement plan or into an individual retirement account ("IRA"). To elect a rollover, please complete and mail this Former Participant Rollover Form postmarked on or before [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER] to the Settlement Administrator. If you do not return this form, your payment will be sent to you directly by check.

PART 2: PARTICIPANT INFORMATION

First Name | Middle | Last Name

Mailing Address

City | State | Zip Code

Home Phone

Work Phone or Cell Phone

Participant's Social Security Number

Participant's Date of Birth

M M D D Y Y Y Y

Email Address

[FORMER PARTICIPANT ROLLOVER FORM CONTINUES ON THE NEXT PAGE]

PART 3: BENEFICIARY OR ALTERNATE PAYEE INFORMATION (*IF APPLICABLE*)

☐ Check here if you are the **surviving spouse or other beneficiary** for the Former Participant Settlement Class member and the Former Participant Settlement Class member is deceased. **Documentation must be provided showing current authority of the representative to file on behalf of the deceased**. Please complete the information below and then continue on to Parts 4 and 5 on the next page.

☐ Check here if you are an alternate payee under a qualified domestic relations order (QDRO). The Settlement Administrator may contact you with further instructions. Please complete the information below and then continue on to Parts 4 and 5 on the next page.

First Name | Middle | Last Name

Mailing Address

City | State | Zip Code

Home Phone

Work Phone or Cell Phone

Participant's Social Security Number

Participant's Date of Birth

Email Address

M M D D Y Y Y Y

[FORMER PARTICIPANT ROLLOVER FORM CONTINUES ON THE NEXT PAGE]

PART 4: PAYMENT ELECTION

Direct Rollover to an Eligible Plan – Check only one box below and complete the Rollover Information Section below:

☐ Government 457(b) ☐ 401(a)/401(k) ☐ 403(b)

☐ Direct Rollover to a Traditional IRA ☐ Direct Rollover to a Roth IRA (subject to ordinary income tax)

Rollover Information:

Company or Trustee's Name (to whom the check should be made payable)

Company or Trustee's Mailing Address 1

Company or Trustee's Mailing Address 2

Company or Trustee's City State Zip Code

Your Account Number Company or Trustee's Phone Number

PART 5: SIGNATURE, CONSENT, AND SUBSTITUTE IRS FORM W-9

UNDER PENALTIES OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA, I CERTIFY THAT ALL OF THE INFORMATION PROVIDED ON THIS FORMER PARTICIPANT ROLLOVER FORM IS TRUE, CORRECT, AND COMPLETE AND THAT I SIGNED THIS FORMER PARTICIPANT ROLLOVER FORM.

1. The Social Security number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me); and

2. I am not subject to back up withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and

3. I am a U.S. person (including a U.S. resident alien).

M M – D D – Y Y Y Y

Participant Signature **Date Signed *(Required)***

Note: If you are subject to backup withholding, you must cross out item 2 above. The IRS does not require your consent to any provision of this document other than this Form W-9 certification to avoid backup withholding.

EXHIBIT C

Proskauer Rose LLP Eleven Times Square New York, NY 10036-8299

Russell L. Hirschhorn
Member of the Firm
d +1.212.969.3286
f 212.969.2900
rhirschhorn@proskauer.com
www.proskauer.com

March __, 2023

By First Class Mail Return Receipt Requested

Re: *Pecou et al. v. Bessemer Trust Co. et al.*, Case No. 1:22-cv-01019-MKV (S.D.N.Y.)

Dear Sir/Madam:

Defendants Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company (collectively, "Defendants"), through their undersigned counsel, hereby provide this notice of a Proposed Class Action Settlement in the above-referenced matter pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"). The proposed settlement will resolve the action.[1]

On March 10, 2023, Plaintiffs' Counsel filed a Motion for Preliminary Approval of Class Action Settlement, attached hereto as Exhibit A, which includes the parties' Class Action Settlement Agreement and Release (the "Settlement Agreement"). The Settlement Agreement contemplates that the Court will certify a class, defined as:

> All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the "Class Period"), except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

In accordance with CAFA, Defendants enclose the following:

[1] All capitalized terms not specifically defined herein shall have the definitions provided in the Settlement Agreement (Exhibit A to the Specht Decl., enclosed within Exhibit A hereto).

1. The Complaint, any materials filed with the Complaint, and any Amended Complaints.

Plaintiffs' Class Action Complaint and Amended Class Action Complaint are attached hereto as Exhibits B and C, respectively.

2. Notice of any scheduled judicial hearing in the class action.

The Preliminary Approval Hearing is scheduled for [DATE], 2023 at [TIME] EST. Once the Court schedules the Final Approval Hearing, the date of the hearing and a copy of the Court's order will be posted on the Settlement Website to be established by the Settlement Administrator at [ADDRESS].

3. Any proposed or final notification to class members.

The proposed Notice of Class Action Settlement submitted to the Court is attached hereto as Exhibit D.

4. Any proposed or final class action settlement.

The Settlement Agreement entered into by the Parties and submitted to the Court is enclosed as Exhibit A to the Specht Decl., enclosed within Exhibit A hereto.

5. Any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants.

There are no agreements other than the Settlement Agreement contemporaneously made between Class Counsel and Defense Counsel.

6. Any final judgment or notice of dismissal.

Final judgment has not yet been entered. Once the Court issues its Final Approval Order, a copy of the Court's order will be posted on the Settlement Website.

7. A reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement.

Attached hereto as Exhibit E is a table with a reasonable estimate of the number of Settlement Class members residing in each state according to the Plan's records. The estimated proportionate share of the claims of such members to the Settlement is described in the Plan of Allocation, enclosed as Exhibit B to the Specht Decl., enclosed within Exhibit A hereto.

8. Any written judicial opinion relating to the materials described in (3) through (6).

There are no written judicial opinions relating to the materials described in sections (3) through (6) at this time.

If you have questions about this notice, the Action, or the attached materials, please do not hesitate to contact me.

Sincerely,

/DRAFT/

Russell L. Hirschhorn

Enclosures

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU AND ASHLEY SCHIEFER, individually and as the representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiffs, v. Bessemer Trust Company and Profit Sharing Plan Committee of Bessemer Trust Company, Defendants.	Case No. 22-cv-1019-MKV

CLASS ACTION SETTLEMENT AGREEMENT & RELEASE

This CLASS ACTION SETTLEMENT AGREEMENT & RELEASE ("Settlement Agreement") is entered into by and between Named Plaintiffs, as defined in Section 1.24 below, on the one hand, and Defendants, as defined in Section 1.11 below, on the other hand. Capitalized terms and phrases have the meanings provided in Section 1 below or as specified elsewhere in this Settlement Agreement.

1. DEFINITIONS

1.1. "Action" shall mean: *Pecou et al. v. Bessemer Trust Company et al.*, No. 22-cv-1019-MKV, pending in the U.S. District Court for the Southern District of New York.

1.2. "CAFA" shall mean: the Class Action Fairness Act of 2005, as amended.

1.3. "Case Contribution Award" shall mean: any monetary amount awarded by the Court in recognition of the Named Plaintiffs' assistance in the prosecution of this Action and payable pursuant to Section 11 below.

1.4. "Challenged Investments" shall mean: the Plan investment options to which Participants can allocate employee and employer contributions, including the Fixed Income Model, Conservative Model – 20/80, Balanced Model – 55/45, Balanced Growth Model – 70/30, Growth Model – 90/10, and All Equity Model, and all of their component funds.

1.5. "Class Counsel" and/or "Plaintiffs' Counsel" shall mean: Nichols Kaster, PLLP.

1.6. "Class Settlement Amount" is defined in Section 8.2 below.

1.7. "Class Period" shall mean: the period from January 26, 2016 through the Effective Date of Settlement.

1.8. "Complaint" shall mean: the Amended Class Action Complaint filed in the Action on August 26, 2022 (Dkt. 46) and any complaint preceding and thus superseded by the Amended Class Action Complaint.

1.9. "Court" shall mean: the U.S. District Court for the Southern District of New York.

1.10. "Current Participants" shall mean: Settlement Class members who have a positive balance in their Plan account at the time the Court enters the Final Approval Order.

1.11. "Defendants" shall mean: Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company.

1.12. "Defendants' Released Claims" shall mean: any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action, whether known or unknown, based on facts which have been, or could have been, asserted in the Action or in any court or forum, by Defendants against either of the Named Plaintiffs, which arise out of the institution, prosecution or settlement of the Action, except for any rights or duties arising out of the Settlement Agreement, including the enforcement of the Settlement Agreement.

1.13. "Defendant Releasees" shall mean: Defendants, The Bessemer Group, Incorporated, Bessemer Trust Company, N.A., Bessemer Securities Corporation, and its or their, as applicable, current and former parents, subsidiaries, affiliates, and successors, including, without limitation, its or their, as applicable, 401(k) plans, directors, trustees, managers, fiduciaries, members of 401(k) plan fiduciary committees, officers, governors, management committee members, in-house counsel, employees, agents, representatives, insurers, reinsurers, consultants, administrators, investment advisors, investment underwriters, estates, beneficiaries and spouses.

1.14. "Defense Counsel" shall mean: Proskauer Rose LLP.

1.15. "Effective Date of Settlement" shall mean: the date on which all of the conditions to settlement set forth in Section 3 of this Settlement Agreement have been fully satisfied or waived and the Settlement shall have become Final.

1.16. "ERISA" shall mean: the Employee Retirement Income Security Act of 1974, as amended, including all rules and regulations promulgated thereunder.

1.17. "Escrow Agent" shall mean: the custodian of the Qualified Settlement Fund, which shall be selected by Class Counsel and approved by Defendants.

1.18. "Final" when referring to the Final Approval Order or any other judgment or court order in this Action shall mean: (a) if no appeal is filed, the expiration date of the time provided for filing or noticing of any appeal under the Federal Rules of Appellate Procedure, *i.e.*, thirty (30) days after entry of the judgment or order; or (b) if there is an appeal from the judgment or order, the latter of (i) the date of final dismissal of all such appeals, or the final dismissal of any proceeding on certiorari or otherwise, or (ii) the date the judgment or order is finally affirmed on

an appeal, the expiration of the time to file a petition for a writ of certiorari or other form of review, or the denial of a writ of certiorari or other form of review, and, if certiorari or other form of review is granted, the date of final affirmance following review pursuant to that grant.

1.19. "Final Approval Order" shall mean: the order of dismissal with prejudice entered by the Court as contemplated by Sections 3.2.5 and 3.6 of this Settlement Agreement.

1.20. "Final Individual Dollar Recovery" shall mean: the portion of the Net Settlement Fund payable to an individual Settlement Class member, as determined by the Settlement Administrator according to the procedures described in the Plan of Allocation.

1.21. "Former Participants" shall mean: Settlement Class members who have no account balance in the Plan at the time the Court enters the Final Approval Order.

1.22. "Independent Fiduciary" shall mean: the fiduciary retained for purposes of Section 3.4.

1.23. "Mediator" shall mean: Robert A. Meyer, JAMS.

1.24. "Named Plaintiffs" shall mean: Jubril Pecou and Ashley Schiefer.

1.25. "Net Settlement Fund" shall mean: the Qualified Settlement Fund, plus any interest or income earned on the Qualified Settlement Fund, less any: (a) taxes and tax-related expenses; (b) Settlement Administration Expenses; (c) reimbursement of expenses incurred by Class Counsel that are awarded by the Court; (d) attorneys' fees to Class Counsel that are awarded by the Court; and (e) Case Contribution Awards to Named Plaintiffs that are awarded by the Court.

1.26. "Participant" shall mean: any person who was a participant in the Plan at any time during the Class Period.

1.27. "Party" or "Parties" shall mean: the Named Plaintiffs and Defendants, either individually or collectively.

1.28. "Person" shall mean: an individual, partnership, limited liability company, corporation, or any other form of organization.

1.29. "Plan" shall mean: the Bessemer Trust Company 401(k) and Profit Sharing Plan.

1.30. "Plan of Allocation" is defined in Section 9.3 below.

1.31. "Qualified Settlement Fund" is defined in Section 8.1 below.

1.32. "Plaintiffs" shall mean: Named Plaintiffs, the Plan, and each and every Settlement Class member and their Successors-In-Interest.

1.33. "Plaintiffs' Released Claims" shall mean: subject to Section 10 below and the Carved Out Claims, any and all claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, disgorgement, and causes of action, whether arising under federal, state or local law, whether by statute, regulation, contract or equity, whether brought in

an individual, derivative, or representative capacity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, against the Defendant Releasees for actions, inactions, or omissions during the Class Period that: (a) would have been barred by the doctrine of *res judicata* or claim preclusion had the Action been fully litigated to a final judgment; (b) arise out of the same operative facts as those alleged in the Complaint; (c) were asserted in the Complaint, or arise out of the conduct alleged in the Complaint whether or not pleaded in the Complaint; (d) arise out of, relate to, are based on, or have any connection with (i) the selection, oversight, retention, or performance of the Challenged Investments, or (ii) the fees, costs, or expenses charged in connection with the Challenged Investments, directly or indirectly; (e) relate to the direction to calculate, the calculation of, and/or the method or manner of allocation, implementation or administration of the Qualified Settlement Fund or Net Settlement Fund to the Plan or any member of the Settlement Class in accordance with the Plan of Allocation; or (f) relate to the approval by the Independent Fiduciary of the Settlement Agreement.

The Parties stipulate and agree that, upon the Effective Date of Settlement, Named Plaintiffs and Defendants shall expressly waive, the Plan and each of the other Settlement Class members and each of the Plaintiff Releasees shall be deemed to have waived, and by operation of the Final Approval Order, shall have waived expressly, any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, which is similar, comparable or equivalent to California Civil Code § 1542, which provides:

> **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.**

1.34. "Carved Out Claims" are the following rights and/or claims which are specifically excluded from the Plaintiffs' Released Claims:

(a) Any rights or duties arising out of the Settlement Agreement, including the enforcement of the Settlement Agreement;

(b) Claims of individual denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) that do not fall within Section 1.33 above; or

(c) Claims arising exclusively from conduct after the Final Approval Order becomes Final.

In no event shall any member of the Settlement Class be permitted to recover more than 100% of his or her vested benefits.

1.35. "Plaintiff Releasees" shall mean: Plaintiffs and any and all of their related parties or entities, including, without limitation, any and all members of their immediate families, agents or other persons acting on their behalf at any time, heirs, beneficiaries, and estates.

1.36. "Representatives" shall mean: representatives, attorneys, agents, directors, officers, employees, insurers, and/or reinsurers.

1.37. "Settlement" shall mean: the settlement to be consummated under this Settlement Agreement pursuant to the Final Approval Order.

1.38. "Settlement Administration Expenses" shall mean: the expenses of the implementation of the Settlement and the Plan of Allocation, including the fees and expenses associated with the Independent Fiduciary and Defendants' compliance with CAFA described herein, and the fees and expenses of the Settlement Administrator and Escrow Agent, including: (a) providing notice to the Settlement Class; (b) calculating each Settlement Class member's Final Individual Dollar Recovery and implementing the Plan of Allocation; (c) distributing to Former Participants their Final Individual Dollar Recoveries; (d) paying taxes on the Qualified Settlement Fund and tax-related expenses; and (e) generally administering the Settlement. All Settlement Administration Expenses shall be paid from the Qualified Settlement Fund. The Parties agree that the record-keeper, trustee, and Defendants will not be exercising any discretion when distributing Final Individual Dollar Recoveries to Current Participants based on the instructions of Class Counsel. Furthermore, the Parties, Class Counsel and Defense Counsel do not exercise discretion when assisting the Settlement Administrator with the implementation or administration of the Court-approved Plan of Allocation.

1.39. "Settlement Administrator" shall mean: a third party retained by Class Counsel, subject to approval by Defendants and the Court, who will: (a) issue the Class Notice (as defined in Section 3.2.1 below); (b) calculate each Settlement Class member's Final Individual Dollar Recovery and implement the Plan of Allocation; (c) distribute to Former Participants their Final Individual Dollar Recoveries; (d) effectuate the payment of all taxes and tax expenses, including tax reporting, remittance, and/or withholding obligations for distributions to Settlement Class members; and (e) generally administer the Settlement.

1.40. "Settlement Amount" shall mean: the five million U.S. dollars ($5,000,000) deposited in the Qualified Settlement Fund pursuant to Section 8.1 below.

1.41. "Settlement Class" shall mean: all Participants except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

1.42. "Settlement Website" shall mean: a website established by the Settlement Administrator no later than thirty (30) days after the entry of the Preliminary Approval Order and maintained for no more than six (6) months after the Effective Date of Settlement, which shall contain a copy of the Settlement Agreement, the Plan of Allocation, Class Notice, and relevant case documents to be agreed to by the Parties including but not limited to a copy of the operative complaint and all documents filed with the Court in connection with the Settlement, along with a toll-free telephone number and mailing address through which members of the Settlement Class

may contact the Settlement Administrator. No other information or documents shall be posted on the Settlement Website unless agreed to in advance by the Parties.

1.43. "Successor-In-Interest" shall mean: a Person's estate, legal representatives, heirs, beneficiaries, successors or assigns, and any other Person who can make a legal claim by or through such Person.

1.44. "Term Sheet" shall mean: the Settlement Term Sheet executed by the Parties on January 6, 2023.

2. RECITALS

2.1. Class Counsel has conducted an investigation into the facts, circumstances and legal issues associated with the allegations made in the Action. This investigation has included, *inter alia*: (a) reviewing and analyzing documents relating to Defendants and the Plan; and (b) researching the applicable law with respect to the claims asserted in the Action and the defenses and potential defenses thereto.

2.2. In the Complaint, the Named Plaintiffs allege that Defendants were fiduciaries of the Plan and that they breached fiduciary duties owed to the Participants in the Plan.

2.3. Defendants deny any and all liability, and deny any and all allegations of wrongdoing made in the Complaint and Action. Defendants deny that some or all of them were fiduciaries under ERISA, or were acting as ERISA fiduciaries at the time of the events complained of, or to the extent that any of them were acting as fiduciaries, that any breach of fiduciary duty occurred in connection with the investment, acquisition, oversight, monitoring, or retention of the Challenged Investments in, or any other actions taken with respect to, the Plan. Defendants further contend that they acted prudently and loyally at all times and in all respects with regard to the Plan.

2.4. On November 23, 2022, the Court issued an Order (Dkt. 57) holding Defendants' Motion to Dismiss the Amended Complaint (Dkt. 47) in abeyance pending the outcome of the Parties' mediation.

2.5. During the course of the Action, the Parties engaged in settlement discussions, including through private mediation with the Mediator. The Parties signed the Term Sheet on January 6, 2023. The terms of the Parties' Settlement are memorialized in this Settlement Agreement.

2.6. On January 13, 2023, the Court adjourned all deadlines in the Action and ordered Plaintiffs' Counsel to file their Preliminary Approval Motion (as defined in Section 3.2.1) on or before March 10, 2023. (Dkt. 59.)

2.7. Plaintiffs' Counsel believes that the Settlement will provide a benefit to the Settlement Class and the Plan, and, when that benefit is weighed against the attendant risks of continuing the prosecution of the Action, the Settlement represents a reasonable and fair resolution of the claims of the Settlement Class. In reaching this conclusion, Plaintiffs' Counsel has considered, among other things, the risks of litigation, the relevant law, the time necessary to achieve a final

resolution through litigation, the complexity of the claims set forth in the Complaint, and the benefit accruing to the Plan's Participants under the Settlement.

2.8. Defendants maintain that the Plan has been managed, operated, and administered at all relevant times in compliance with its terms, ERISA, and all applicable laws and regulations, and further maintain that they acted prudently and loyally at all times and in all respects with regard to the Plan. This Settlement Agreement, and the prior negotiations between the Parties, shall in no event be construed as, or be deemed evidence of, an admission or concession of any wrongdoing, fault or liability of any kind by Defendants.

2.9. Defendants desire to resolve fully and settle with finality the Action and all of Plaintiffs' Released Claims for themselves and the Plan, thereby avoiding the expense, inconvenience, burden, distraction and diversion of their personnel and resources, and uncertainty of outcome that is inherent in any litigation.

2.10. The Named Plaintiffs and Defendants have thus reached this Settlement by and through their respective counsel on the terms and conditions set forth herein, which is subject to Court approval.

3. CONDITIONS TO EFFECTIVENESS OF THE SETTLEMENT

3.1. *Effectiveness of Settlement*. The Settlement provided for in this Settlement Agreement shall not become binding unless and until each and every one of the following conditions in Sections 3.2 through 3.8 shall have been satisfied or waived.

3.2. *Court Approval*. The Settlement contemplated under this Settlement Agreement shall have been approved by the Court, as provided for in this Section 3.2. The Parties agree to jointly recommend to the Court that it approve the terms of this Settlement Agreement and the Settlement contemplated hereunder. The Parties agree to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement, and any other steps or efforts which may become necessary by order of the Court (unless such order modifies the terms of this Settlement Agreement) or otherwise, to carry out this Settlement Agreement, including the following:

3.2.1. *Preliminary Approval of Settlement and of Notices*. The Court shall have approved the motion for preliminary approval of settlement filed by Named Plaintiffs (the "Preliminary Approval Motion") by issuing an order in substantially the same form as attached hereto as Exhibit 1 (the "Preliminary Approval Order"):

(a) preliminarily approving the Settlement embodied in this Settlement Agreement;

(b) directing the Settlement Administrator to mail by electronic means or by first class mail the class notice, substantially in the form attached to the Preliminary Approval Order as Exhibit A (the "Class Notice") and Exhibit B (the "Rollover Form"), to all Settlement Class members;

(c) finding that: (i) the proposed Class Notice fairly and adequately (A) describes the terms and effect of this Settlement Agreement and of the Settlement, (B) provides

sufficient notice to all members of the Settlement Class of the time and place of the Fairness Hearing (defined below in Section 3.2.5), and (C) describes the rights of all Settlement Class members including that the recipients of the Class Notice may object to approval of the Settlement; and (ii) the proposed manner of distributing the Class Notice to the members of the Settlement Class is the best notice practicable under the circumstances and complies fully with the requirements of Federal Rule of Civil Procedure 23 and due process;

(d) setting the Fairness Hearing; setting the deadline for all objections to any aspect of the Settlement Agreement that is at least twenty-one (21) days prior to the Fairness Hearing; and setting the deadline for a notice to be filed by any Person who wishes to speak at the Fairness Hearing at least twenty-one (21) days prior to the Fairness Hearing;

(e) providing that any Party may file a response to an objection to the Settlement at least fourteen (14) calendar days before the Fairness Hearing; and

(f) approving the form of the CAFA notice attached to the Preliminary Approval Order as Exhibit C (the "CAFA Notice"), and ordering that upon mailing of the CAFA Notice, Defendants will have fulfilled their obligations under CAFA.

3.2.2. *Class Certification*.

(a) The Court shall have certified the Action as a class action for settlement purposes only pursuant to Rule 23(b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure, with Named Plaintiffs as the named Settlement Class representatives, Nichols Kaster, PLLP as Class Counsel, and a Settlement Class as defined above, except that this condition shall also be deemed satisfied if another member of the Settlement Class is named as Settlement Class representative.

(b) The Parties agree to stipulate to a certification of the Action as a non-opt-out class action for settlement purposes only, pursuant to Rule 23(b)(1) and/or (b)(2) of the Federal Rules of Civil Procedure, on the foregoing terms. If the Settlement does not become Final, then no Settlement Class will be deemed to have been certified by, or as a result of, this Settlement Agreement, and the Action will for all purposes revert to its status as of January 5, 2023, the day immediately prior to the date on which the Term Sheet was executed. In such event, Defendants will not have consented to class certification, the agreements and stipulations in this Settlement Agreement concerning the Settlement Class definition or class certification shall not be used as evidence or argument to support class certification, and Defendants will retain all rights and arguments with respect to any motions for class certification that Named Plaintiffs may make.

3.2.3. *Issuance of Class Notice*. On the date and in the manner set by the Court in its Preliminary Approval Order, the Settlement Administrator shall have caused the Class Notice to be sent to members of the Settlement Class in the form and manner approved by the Court. The Parties shall confer in good faith with regard to the form and content of the Class Notice in an

effort to utilize cost effective forms of notice. Defendants shall provide reasonable cooperation with respect to the Class Notice, including by providing Participant addresses and contact information, to the extent Defendants have such information. The Parties agree, and the form of Preliminary Approval Order attached hereto as Exhibit 1 shall provide, that the last known email addresses and/or mailing addresses for the Settlement Class members in the possession of the Plan's current record-keeper will suffice for all purposes in connection with this Settlement, including, without limitation, the furnishing of the Class Notice; provided, however, that if the Settlement Administrator obtains an updated address through its efforts to verify the last known address provided by the Plan's recordkeeper, then Class Notice shall be sent thereto. The Settlement Administrator shall enter into a confidentiality agreement and information security agreement ("Confidentiality and Information Security Agreements"), both of which shall be satisfactory to Defendants to adequately protect information provided to the Settlement Administrator relating to the Settlement and the identification of Settlement Class members.

3.2.4. *Internet Publication of Class Notice*. Class Counsel also shall have given notice by publication of the Settlement Agreement and Class Notice on the Settlement Website.

3.2.5. *The Fairness Hearing*. On the date set by the Court in its Preliminary Approval Order, the Parties shall have participated in the hearing (the "Fairness Hearing"), during or after which the Court will issue the Final Approval Order. The Parties further agree that they will reasonably cooperate with one another in obtaining an acceptable Final Approval Order at the Fairness Hearing. The Parties will not do anything inconsistent with obtaining such a Final Approval Order in substantially the same form as attached hereto as Exhibit 2, which is an Order by the Court that:

(a) the proposed Settlement between the Parties on the terms and conditions provided for in this Settlement Agreement is fair, reasonable, and adequate and should be approved by the Court;

(b) final judgment should be entered;

(c) the Settlement Class should be certified as a non-opt-out class meeting the applicable requirements for a settlement class imposed by Federal Rule of Civil Procedure 23;

(d) the Class Notice distributed to members of the Settlement Class constituted the best notice practicable under the circumstances and sufficient notice of the Fairness Hearing and all rights of members of the Settlement Class was provided consistent with Federal Rule of Civil Procedure 23 and the requirements of due process;

(e) the requirements of CAFA have been satisfied;

(f) the proposed Plan of Allocation, to be filed with the Court and described below in Section 9.3, has been approved;

(g) Settlement Administration Expenses shall be paid from the Qualified Settlement Fund;

(h) Named Plaintiffs shall be awarded Case Contribution Award(s) in the amount(s) approved by the Court, but not to exceed $7,500 for each Named Plaintiff;

(i) Class Counsel shall receive attorneys' fees and reimbursement of expenses as approved by the Court, but not to exceed one-third of the Settlement Amount;

(j) the Settlement Administrator shall have final authority to determine the amount of the Final Individual Dollar Recovery, if any, to be allocated to each Current Participant and Former Participant pursuant to the Plan of Allocation approved by the Court;

(k) the Settlement Administrator shall distribute the Net Settlement Fund in accordance with the Plan of Allocation that is approved by the Court;

(l) the payments made from the Net Settlement Fund to effect the Plan of Allocation constitute restorative payments in accordance with Revenue Ruling 2002-45;

(m) all Settlement Class members and the Plan are barred and enjoined from asserting any of Plaintiffs' Released Claims against any of the Defendant Releasees, and Defendants are barred and enjoined from asserting any of Defendants' Released Claims against the Named Plaintiffs;

(n) the Parties shall take the necessary steps to effectuate the terms of the Settlement Agreement;

(o) the Action is dismissed with prejudice and without costs, except as contemplated by this Settlement Agreement; and

(p) the Court shall retain jurisdiction to enforce and interpret the Settlement Agreement in accordance with its terms for the mutual benefit of the Parties, but without affecting the finality of the Final Approval Order.

3.2.6. *Motion for Final Approval of Class Action Settlement*. On the date set by the Court in its Preliminary Approval Order, Named Plaintiffs shall have filed a motion for final approval of the Settlement (the "Final Approval Motion"). However, such date shall be at least fourteen (14) days before the Fairness Hearing. The Final Approval Motion shall seek the Court's finding that the Final Approval Order is a final judgment disposing of all claims and all Parties.

3.3. *Finality of Final Approval Order*. The Final Approval Order shall have become Final.

3.4. *Determination by Independent Fiduciary*. At least twenty-one (21) days prior to the deadline for filing the Final Approval Motion, the Independent Fiduciary shall have approved and authorized in writing the Settlement in accordance with Prohibited Transaction Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended by 72 Fed. Reg. 65,597 (the "Class Exemption"). If the Independent Fiduciary disapproves or otherwise does not authorize the Settlement, then the Parties, through their counsel, shall attempt to agree in writing prior to filing the Final Approval Motion to modify the Settlement to satisfy objections by the Independent Fiduciary to the Settlement. If the Parties are unable to reach

agreement on any modification required by the Independent Fiduciary, Defendants may, at their sole discretion, terminate the Settlement Agreement at which point the Settlement Agreement will be null and void and the provisions of Section 10.3 shall apply.

3.4.1. The Independent Fiduciary's fees and expenses shall be paid from the Qualified Settlement Fund. The Independent Fiduciary shall acknowledge in writing that it is a fiduciary with respect to the Settlement of this Action on behalf of the Plan. Defendants and Class Counsel will comply with reasonable requests for non-privileged information made by the Independent Fiduciary that are for the purpose of reviewing and evaluating the Settlement Agreement.

3.5. *Compliance with CAFA*. Defendants shall have fulfilled their obligations under CAFA and the Court shall have determined that Defendants complied with CAFA and its notice obligations therein by providing appropriate federal and state officials with information about the Settlement.

3.6. *Dismissal of Action with Prejudice*. The Action shall have been dismissed with prejudice on the Effective Date of Settlement.

3.7. *Funding of Settlement Amount*. Bessemer Trust Company shall have caused to be deposited five million U.S. dollars ($5,000,000) into the Qualified Settlement Fund (defined below in Section 8.1) within thirty (30) days after the date on which both of the following have occurred: (i) the Court has issued the Preliminary Approval Order; and (ii) Bessemer Trust Company has been provided wiring instructions and a completed W-9 from the Settlement Administrator.

3.8. *No Termination*. The Settlement shall not have terminated pursuant to Section 10 below.

3.9. *Materiality of Settlement Conditions*. The Parties expressly acknowledge that this Settlement is specifically conditioned upon the occurrence of each and every one of the foregoing conditions precedent prior to the Effective Date of Settlement, and that a failure of any condition set forth in Sections 3.2 through 3.8 above at any time prior to the Effective Date of Settlement shall make this Settlement Agreement, and any obligation to pay the Settlement Amount, or any portion thereof, null, void, and of no force and effect, unless the Parties agree in writing that despite the non-occurrence of one of the above conditions the remainder of the Settlement Agreement shall go forth.

4. RELEASES AND COVENANT NOT TO SUE

4.1. *Release By Named Plaintiffs, the Settlement Class, Defendants, and the Plan*.

4.1.1. *Releases of the Defendant Releasees and Named Plaintiffs*. Subject to Section 10 below and the Carved Out Claims, upon the Effective Date of Settlement, Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class and their Successors-In-Interest, absolutely and unconditionally release and forever discharge the Defendant Releasees from any and all of Plaintiffs' Released Claims that Named Plaintiffs or the Settlement Class directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have. Defendants release and forever discharge the Named Plaintiffs for any and all of

Defendants' Released Claims that Defendants directly, indirectly, derivatively, or in any other capacity ever had, now have or hereafter may have.

4.1.2. *Plan Release*. Subject to Section 10 below, upon the Effective Date of Settlement, the Independent Fiduciary's approval of the Settlement shall constitute a release of any and all of Plaintiffs' Released Claims the Plan ever had, now has or hereafter may have against any and all of Defendant Releasees.

4.1.3. *Covenant Not to Sue*. Subject to Section 10 below, Named Plaintiffs, on behalf of themselves and each member of the Settlement Class, their Successors-In-Interest, their Representatives, and the Plan (subject to Independent Fiduciary approval as required by Section 3.4), expressly covenant and agree that they, acting individually, derivatively, or together, or in combination with others, shall not sue or seek to institute, maintain, prosecute, argue, or assert against Defendant Releasees, in any action or proceeding, any cause of action, demand, or claim on the basis of, connected with, or arising out of any of Plaintiffs' Released Claims, and that the foregoing covenant and agreement shall be a complete defense to any such Plaintiffs' Released Claims against any of the Defendant Releasees. Defendants expressly covenant and agree that they shall not sue or seek to institute, maintain, prosecute, argue, or assert against Named Plaintiffs, in any action or proceeding, any cause of action, demand, or claim on the basis of, connected with, or arising out of any of Defendants' Released Claims, and that the foregoing covenant and agreement shall be a complete defense to all of Defendants' Released Claims against either of the Named Plaintiffs. Nothing herein shall preclude any action to enforce the terms of this Settlement Agreement or Named Plaintiff Jubril Pecou's Release (as discussed in Section 5.3 below).

5. **COVENANTS**

5.1. *No Amendment or Modification of Any Plan.* Notwithstanding anything to the contrary herein, Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, hereby covenant that nothing in this Settlement Agreement, including the Plan of Allocation, shall constitute an amendment or modification of any rights or obligations under any of Defendant Releasees' employee benefit plans, including the Plan.

5.2. *Taxation of Qualified Settlement Fund*. Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, hereby covenant that neither the Parties, Defendant Releasees, Defense Counsel, Class Counsel nor any of their Representatives or Successors-In-Interest shall have any responsibility for any taxes due on the Qualified Settlement Fund, or on any funds that the Plan, members of the Settlement Class, or Named Plaintiffs receive from the Qualified Settlement Fund. Nothing herein shall constitute an admission or representation that any taxes will or will not be due on the Qualified Settlement Fund or any allocation or distribution therefrom.

5.3. *Named Plaintiff Jubril Pecou's Release*. Notwithstanding anything to the contrary herein, Named Plaintiff Jubril Pecou hereby covenants that his participation in the Settlement, and Defendants' agreement that he may receive relief in connection with the Action, does not in

any way waive, modify, alter, or amend the release agreement that Jubril Pecou signed in connection with the termination of his employment.

5.4. *Cooperation*.

5.4.1. Defendants shall use their best efforts to provide Class Counsel with the names, last known email addresses, and last known addresses of members of the Settlement Class, along with other information as agreed to by Class Counsel and Defense Counsel that is reasonably necessary for the Settlement Administrator to implement the Plan of Allocation, in electronic spreadsheet format (to the extent Defendants have such information) as soon as reasonably possible upon entry of the Preliminary Approval Order. However, Defendants will not transfer any such information until Defendants have fully approved the Settlement Administrator and the Settlement Administrator has entered into the Confidentiality and Information Security Agreements, both of which shall be satisfactory to Defendants to adequately protect information provided to the Settlement Administrator relating to the Settlement and the identification of Settlement Class members. Such information shall be used by the Settlement Administrator to deliver the Class Notice, and implement the Settlement, including the Plan of Allocation, and for no other purpose.

5.4.2. Class Counsel anticipates that the Settlement Administrator and Class Counsel will receive inquiries from Persons concerning whether they are members of the Settlement Class. To the extent that such Persons are not included in the information provided in the paragraph immediately above, Defendants and/or their Representatives will reasonably assist the Settlement Administrator and Class Counsel in determining whether or not such Persons are members of the Settlement Class.

6. REPRESENTATIONS AND WARRANTIES

6.1. *Parties' Representations and Warranties*.

6.1.1. Named Plaintiffs, on behalf of themselves and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, represent and warrant that they have not assigned or otherwise transferred any interest in any of Plaintiffs' Released Claims against any of the Defendant Releasees, and further covenant that they will not assign or otherwise transfer any interest in any of Plaintiffs' Released Claims.

6.1.2. Named Plaintiffs, on behalf of themselves, the Plan, and each member of the Settlement Class, their Successors-In-Interest, and their Representatives, represent and warrant that they shall have no surviving claim or cause of action against any of the Defendant Releasees with respect to Plaintiffs' Released Claims.

6.1.3. The Parties, and each of them, represent and warrant that: (a) they are voluntarily entering into this Settlement Agreement as a result of arm's-length negotiations among their counsel; (b) in executing this Settlement Agreement they are relying solely upon their own judgment, belief and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the nature, extent and duration of their rights and claims hereunder and regarding all matters which relate in any way to the subject matter hereof; (c) except as expressly stated herein, they have not been influenced to any extent whatsoever in

executing this Settlement Agreement by any representations, statements or omissions pertaining to any of the foregoing matters by any other Party or its Representatives; and (d) each Party assumes the risk of mistake as to facts or law.

6.1.4. The Parties, and each of them, represent and warrant that: (a) they have carefully read the contents of this Settlement Agreement; (b) they have made such investigation of the facts pertaining to the Settlement, this Settlement Agreement, and all of the matters pertaining thereto as they deem necessary; and (c) this Settlement Agreement is signed freely by each individual executing this Settlement Agreement on behalf of each of the Parties.

6.2. *Signatories' Representations and Warranties*. Each individual executing this Settlement Agreement on behalf of any other Person does hereby personally represent and warrant to the other Parties that he or she has the authority to execute this Settlement Agreement on behalf of, and fully bind, each Person which such individual represents or purports to represent.

7. NO ADMISSION OF LIABILITY

The Parties understand and agree that this Settlement Agreement embodies a compromise and settlement of disputed claims, and that nothing in this Settlement Agreement, including the furnishing of consideration for this Settlement Agreement, shall be deemed to constitute any finding of fiduciary status under ERISA or wrongdoing by any of the Defendant Releasees, or give rise to any inference of fiduciary status under ERISA or wrongdoing or admission of wrongdoing or liability in this or any other proceeding. This Settlement Agreement and the payment made hereunder are made in compromise of disputed claims and are not admissions of any liability of any kind, whether legal or factual. Moreover, the Defendant Releasees specifically deny any and all such liability or wrongdoing. Neither the fact nor the terms of this Settlement Agreement shall be offered or received in evidence in any action or proceeding for any purpose, except in an action or proceeding to enforce this Settlement Agreement or arising out of or relating to the Final Approval Order.

8. THE QUALIFIED SETTLEMENT FUND; DELIVERIES INTO THE QUALIFIED SETTLEMENT FUND ACCOUNT

8.1. *The Qualified Settlement Fund*.

8.1.1. As noted above in Section 3.7, Bessemer Trust Company shall cause the Settlement Amount to be deposited into the Qualified Settlement Fund within thirty (30) days after the date on which both of the following have occurred: (i) the Court has issued the Preliminary Approval Order; and (ii) Bessemer Trust Company has been provided wiring instructions and a completed W-9 from the Settlement Administrator. The Qualified Settlement Fund is an interest-bearing escrow account, trusteed by the Escrow Agent.

8.1.2. The Qualified Settlement Fund shall: (a) bear interest for the benefit of the Settlement Class; (b) be structured and managed to qualify as a Qualified Settlement Fund under Section 468B-1 of the Internal Revenue Code and Treasury regulations promulgated thereunder; and (c) contain customary provisions for such funds, including obligations of the Qualified Settlement Fund to make tax filings and to provide reports to the Parties concerning taxes. The Escrow Agent timely shall make such elections as necessary or advisable to carry out the

provisions of this paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to prepare and deliver, in a timely and proper manner, the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur. The Parties shall cooperate to ensure such treatment and shall not take a position in any filing or before any tax authority inconsistent with such treatment.

8.1.3. Class Counsel agrees to use best efforts to attempt to have the Escrow Agent structure the Qualified Settlement Fund to the extent possible to preserve for the Settlement Class the tax benefits associated with retirement plans.

8.1.4. The Parties acknowledge and agree that neither the Parties, Defense Counsel, Class Counsel, nor the Defendant Releasees shall have authority or liability in connection with the management, investment, maintenance or control of the Qualified Settlement Fund.

8.2. *The Class Settlement Amount*. The Settlement Amount deposited in the Qualified Settlement Fund pursuant to Section 8.1 above, plus all interest income earned thereon and less expenditures authorized under this Settlement Agreement, shall constitute the "Class Settlement Amount."

8.3. *Sole Monetary Contribution*. The Settlement Amount shall be the full and sole monetary contribution and consideration made by or on behalf of the Defendant Releasees in connection with the Action and Settlement. The Settlement Amount specifically satisfies any and all claims for expenses and attorneys' fees by Class Counsel, claims for Case Contribution Awards to Named Plaintiffs, any costs or expenses of the Class Notice, the costs of the Independent Fiduciary and compliance with CAFA, and all taxes on the Qualified Settlement Fund, in addition to any amounts to be distributed to Current Participants and Former Participants pursuant to this Settlement. Except as set forth in Section 11 below, as otherwise specified in this Settlement Agreement, or as provided for in any applicable contract of insurance or other written agreement between the Parties, the Parties shall bear their own costs and expenses (including attorneys' fees) in connection with effectuating the Settlement and securing all necessary court orders and approvals with respect to the same.

9. EFFECTIVE DATE OF SETTLEMENT; DISBURSEMENT FROM QUALIFIED SETTLEMENT FUND; PLAN OF ALLOCATION

9.1. *Establishment of Effective Date of Settlement*. If Named Plaintiffs and Defendants disagree as to whether each and every condition set forth in Section 3 has been satisfied or waived, they shall promptly confer in good faith and, if unable to resolve their differences within five (5) business days thereafter, shall present their disputes as provided for in Section 14.

9.2. *Disbursement from Qualified Settlement Fund*.

9.2.1. No distribution of part, or all, of the Class Settlement Amount shall be made from the Qualified Settlement Fund until the Final Approval Order is Final, and the Escrow Agent has

received: (a) a notice by Class Counsel and Defense Counsel, directing that the Class Settlement Amount be disbursed and designating the appropriate recipient(s); or (b) a Court Order, directing that the Class Settlement Amount be disbursed and designating the appropriate recipient(s).

9.2.2. After the Final Approval Order is Final, the Settlement Administrator or Class Counsel may direct the Escrow Agent to pay from the Qualified Settlement Fund the following: (a) taxes; (b) Settlement Administration Expenses; (c) Case Contribution Awards to Named Plaintiffs; and (d) Class Counsel's attorneys' fees and expenses.

9.2.3. The Settlement Administrator and/or the Escrow Agent shall discharge their duties under Class Counsel's supervision and subject to the jurisdiction of the Court. Except as otherwise expressly provided herein, the Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility whatsoever for the administration of the Settlement, and shall have no liability whatsoever to any Person, including, but not limited to, any Settlement Class member, in connection with any such administration.

9.2.4. The Settlement Administrator shall have sole and final discretion to determine the amounts to be paid to Settlement Class members in accordance with the Plan of Allocation set forth in Section 9.3 and as ordered by the Court.

9.3. *Plan of Allocation*.

9.3.1. At least fourteen (14) days prior to the submission of the Plan of Allocation to the Court along with the Preliminary Approval Motion, Class Counsel shall provide a copy of the Plan of Allocation to Defendants for review and comment.

9.3.2. The distribution of the Net Settlement Fund to the Settlement Class members shall be made in accordance with the Plan of Allocation to be proposed by Class Counsel, reviewed by Defendants, and approved by the Court. Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility or liability for calculating the amounts payable to the Settlement Class members, and Defendant Releasees, Named Plaintiffs, Defense Counsel, and Class Counsel shall have no responsibility or liability for distributing the Net Settlement Fund to the Settlement Class members in accordance with the Court-approved Plan of Allocation.

9.3.3. After the Final Approval Order is Final, the Settlement Administrator or Class Counsel may direct the Escrow Agent to pay from the Qualified Settlement Fund the Net Settlement Fund.

9.3.4. To effectuate the distribution of the Net Settlement Fund to Settlement Class members, the Settlement Administrator shall calculate each Settlement Class member's Final Individual Dollar Recovery based on the Plan of Allocation approved by the Court and shall provide to the Plan's record-keeper and trustee the total amount of the aggregate recoveries for Current Participants.

9.3.5. All inquiries by the Settlement Class members concerning the amount distributed to a particular Settlement Class member shall be handled in the first instance by the Settlement

Administrator. Thereafter, Class Counsel and Defense Counsel shall work cooperatively to resolve any such inquiries.

9.3.6. Neither the Parties, Defense Counsel, Class Counsel, nor the Defendant Releasees shall have any responsibility for or liability whatsoever with respect to any tax advice given to the Former Participants or the Current Participants. Deductions will be made, and reporting will be performed, by the Settlement Administrator, as required by law in respect of all payments made under the Settlement Agreement. Payments from the Qualified Settlement Fund shall not be treated as wages by the Parties.

9.3.7. Any and all Settlement Administration Expenses incurred for the implementation of the Settlement and of the Plan of Allocation shall be paid from the Qualified Settlement Fund.

9.3.8. In the event that Defense Counsel or Class Counsel determines that it is necessary to modify the Plan of Allocation, Class Counsel and Defense Counsel shall jointly discuss such modification and determine whether the modification is reasonable and appropriate under the circumstances. The Parties will jointly petition the Court for approval of any such material modification.

9.3.9. Notwithstanding anything in this Settlement Agreement to the contrary, the Plan of Allocation is a matter separate and apart from the Settlement between the Parties, and no decision by the Court concerning the Plan of Allocation shall affect the validity of the Settlement Agreement or finality of the proposed Settlement in any manner.

9.3.10. The determination of "Current Participants" and "Former Participants" will be based on Settlement Class members' Plan account balances as of the date the Court enters the Final Approval Order, as long as the "Current Participants" and "Former Participants" data is available at that time. Defendants shall use their best efforts to provide Class Counsel with updated information on the names, last known addresses, and email addresses of "Current Participants" and "Former Participants" (to the extent Defendants have such information) within thirty (30) days of the Final Approval Order.

10. TERMINATION OF THE SETTLEMENT AGREEMENT

10.1. *Termination by Defendants*. Defendants may terminate this Settlement Agreement if, before the issuance of the Final Approval Order, the U.S. Department of Labor files any objection to the Settlement Agreement or Settlement in any court, brings a claim against any of the Defendant Releasees, or notifies any of the Defendant Releasees that it intends to bring such a claim.

10.2. *Automatic Termination*. This Settlement Agreement shall automatically terminate, and thereupon become null and void, in the following circumstances:

10.2.1. If the Court declines to approve the Settlement, and if such order declining approval has become Final, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the date that any such order becomes Final, provided, however, that if the Court declines to approve the Settlement for any reason, the Parties shall negotiate in good faith to cure any deficiency identified by the Court, and further provided that if necessary to cure

any such deficiency, Class Counsel shall re-submit within a reasonable time the Preliminary Approval Motion and/or Final Approval Motion with an additional or substitute member of the Settlement Class as a named Settlement Class representative.

10.2.2. If the Court issues an order in the Action modifying the Settlement Agreement, and if within thirty-one (31) days after the date of any such order the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Court or by the Parties, then, provided that no appeal, petition for writ of certiorari, or any other request for review of such order is then pending, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first (31st) day after issuance of the order referenced in this Section.

10.2.3. If the U.S. Court of Appeals for the Second Circuit reverses the Court's Final Approval Order, and if within ninety-one (91) days after the date of any such ruling the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Second Circuit or by the Parties, then, provided that no appeal, petition for writ of certiorari, or any other request for review of such order is then pending, this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the ninety-first (91st) day after issuance of the Second Circuit order referenced in this Section.

10.2.4. If the Supreme Court of the United States reverses or remands a Second Circuit order approving the Settlement, and if within thirty-one (31) days after the date of any such ruling the Parties have not agreed in writing to proceed with all or part of the Settlement Agreement as modified by the Supreme Court or by the Parties, then this Settlement Agreement shall automatically terminate, and thereupon become null and void, on the thirty-first (31st) day after issuance of the Supreme Court order referenced in this Section.

10.2.5. If an appeal of or petition for writ of certiorari to the Supreme Court regarding an order declining to approve the Settlement Agreement or modifying this Settlement Agreement is pending, this Settlement Agreement shall not be terminated until final resolution or dismissal of any such appeal or petition, except by written agreement of the Parties.

10.3. *Consequences of Termination of the Settlement Agreement*. If the Settlement Agreement is terminated and rendered null and void for any reason, the following shall occur:

10.3.1. Within three (3) days after the date of termination of the Settlement Agreement, Class Counsel shall notify the Escrow Agent in writing to return to Defendants the Qualified Settlement Fund and all net income earned thereon, and direct the Escrow Agent to effect such return as soon as possible.

10.3.2. The Action shall for all purposes with respect to the Parties revert to its status as of January 5, 2023, the day immediately prior to the execution of the Term Sheet. The Parties will cooperate in trying to return the Action to the Court for decision on the matters pending before the Court at the time of execution of the Term Sheet.

10.3.3. All releases given or executed pursuant to the Settlement Agreement shall be null and void; none of the terms of the Settlement Agreement shall be effective or enforceable, except those provisions providing for reimbursement of costs as set forth in Section 10.3.1; and neither

the fact nor the terms of the Settlement Agreement shall be offered or received in evidence in this Action or in any other action or proceeding for any purpose, except in an action or proceeding arising under this Settlement Agreement.

11. ATTORNEYS' FEES AND EXPENSES; NAMED PLAINTIFFS' CASE CONTRIBUTION AWARDS

11.1. *Application for Fees, Expenses, and Case Contribution Awards*. As provided in Section 3 above, and pursuant to the common fund doctrine, Class Counsel shall petition the Court no later than twenty-one (21) days prior to the deadline for objections for an award of attorneys' fees and Case Contribution Awards, and for reimbursement of expenses incurred by Class Counsel, to be paid from the Qualified Settlement Fund. The Case Contribution Awards and attorneys' fees and reimbursed expenses, if any are awarded by the Court, shall be paid from the Qualified Settlement Fund. The Case Contribution Awards are not to exceed $7,500 to each Named Plaintiff. Class Counsel shall not seek more than one-third of the Qualified Settlement Fund for attorneys' fees and expenses. Defendants, their Representatives, and their Successors-In-Interest expressly agree not to take any position with respect to any application for attorneys' fees and expenses incurred by Class Counsel with respect to this Settlement, and acknowledge that these matters are left to the sound discretion of the Court. Defendants, their Representatives, and their Successors-in-Interest also expressly agree not to contest or take any position with respect to the Case Contribution Awards and will leave this matter to the sound discretion of the Court.

11.2. *Disbursement of Fees, Costs, Expenses, and Case Contribution Awards*.

11.2.1. Attorneys' fees, costs, and expenses shall be payable to Class Counsel out of the Qualified Settlement Fund after the Final Approval Order is Final.

11.2.2. The Case Contribution Awards shall be payable from the Qualified Settlement Fund and shall be in addition to any portion of the Net Settlement Fund that Named Plaintiffs would otherwise be entitled to receive as members of the Settlement Class. The Case Contribution Awards will only be distributed after the Final Approval Order is Final.

12. NON-DISPARAGEMENT

The Parties agree to take no action in connection with the Settlement that is intended to, or that would reasonably be expected to, harm the reputation of any other Party (including a Party's officers, directors, employees, agents, or attorneys), or that would reasonably be expected to lead to unfavorable publicity for any other Party.

13. STATEMENTS TO THE PUBLIC

No press release or other publicity relating to the Settlement or the Action shall be issued by Class Counsel or Named Plaintiffs. If any Party (including his, her, or its counsel) is asked by a member of the press about the status of the Settlement or Action, the answer shall be "no comment."

14. MISCELLANEOUS PROVISIONS

14.1. *Disputes*. If any disputes arise out of this Settlement Agreement, including but not limited to disputes concerning the meaning of any express or implied terms of the Settlement Agreement, the Mediator will resolve them in the first instance. The Parties will split any Mediator-related costs necessary to resolve any disputes arising out of the Settlement Agreement.

14.2. *Jurisdiction*. The Court shall retain jurisdiction over Named Plaintiffs, the Settlement Class, the Plan, and Defendants to resolve any dispute that may arise regarding this Settlement Agreement or the orders and notices referenced in Section 3 above insofar as such dispute(s) cannot in the first instance be resolved by the Mediator.

14.3. *Governing Law*. This Settlement Agreement shall be governed by the laws of the United States, including federal common law, except to the extent that, as a matter of federal law, state law controls, in which case New York law will apply without regard to conflict of law principles.

14.4. *Severability*. The provisions of this Settlement Agreement are not severable.

14.5. *Amendment*. Before entry of a Final Approval Order, the Settlement Agreement may be modified or amended only by written agreement signed by or on behalf of all Parties. Following entry of a Final Approval Order, the Settlement Agreement may be modified or amended only by written agreement signed on behalf of all Parties, and approved by the Court.

14.6. *Waiver*. The provisions of this Settlement 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 Settlement Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.

14.7. *Construction*. None of the Parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

14.8. *Principles of Interpretation*. The following principles of interpretation apply to this Settlement Agreement:

14.8.1. *Headings*. The headings of this Settlement Agreement are for reference purposes only and do not affect in any way the meaning or interpretation of this Settlement Agreement.

14.8.2. *Singular and Plural*. Definitions apply to the singular and plural forms of each term defined.

14.8.3. *Gender*. Definitions apply to the masculine, feminine, and neuter genders of each term defined.

14.8.4. *References to a Person*. References to a Person are also to the Person's permitted successors and assigns.

14.8.5. *Terms of Inclusion*. Whenever the words "include," "includes" or "including" are used in this Settlement Agreement, they shall not be limiting but rather shall be deemed to be followed by the words "without limitation."

14.9. *Further Assurances*. Each of the Parties agrees, without further consideration, and as part of finalizing the Settlement hereunder, that they will in good faith execute and deliver such other documents and take such other actions as may be necessary to consummate and effectuate the subject matter and purpose of this Settlement Agreement.

14.10. *Survival*. All representations, warranties and covenants set forth in this Settlement Agreement shall be deemed continuing and shall survive the Effective Date of Settlement.

14.11. *Notices*. Any notice, demand or other communication under this Settlement Agreement (other than notices to members of the Settlement Class) shall be in writing and shall be deemed duly given upon receipt if it is addressed to each of the intended recipients as set forth below and personally delivered, sent by registered or certified mail (postage prepaid), sent by confirmed email, or delivered by reputable express overnight courier:

A. IF TO NAMED PLAINTIFFS:

Brock J. Specht
Paul J. Lukas
Steven J. Eiden
NICHOLS KASTER, PLLP
4700 IDS Center
80 South 8th Street
Minneapolis, Minnesota 55402
Telephone: (612) 256-3200
bspecht@nka.com
lukas@nka.com
seiden@nka.com

B. IF TO DEFENDANTS:

Russell L. Hirschhorn
Joseph E. Clark
Sydney L. Juliano
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3000
rhirschhorn@proskauer.com
jclark@proskauer.com
sjuliano@proskauer.com

Any Party may change the address at which it is to receive notice by written notice delivered to the other Parties in the manner described above.

14.12. *Entire Agreement*. This Settlement Agreement contains the entire agreement among the Parties relating to this Settlement. It specifically supersedes any settlement terms or settlement agreements relating to Defendants that were previously agreed upon orally or in writing by any of the Parties, including the terms of the Term Sheet.

14.13. *Counterparts*. This Settlement Agreement may be executed by exchange of faxed or scanned executed signature pages, and any signature transmitted by facsimile or by email attachment for the purpose of executing this Settlement Agreement shall be deemed an original signature for purposes of this Settlement Agreement. This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same instrument.

14.14. *Binding Effect*. This Settlement Agreement binds and inures to the benefit of the Parties hereto, their assigns, heirs, beneficiaries, administrators, executors and Successors-in-Interest.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates set forth below.

FOR NAMED PLAINTIFFS, THE PLAN AND THE SETTLEMENT CLASS

Dated this 10th day of March, 2023.

By: 

Brock J. Specht
Paul J. Lukas
Steven J. Eiden
NICHOLS KASTER, PLLP
4700 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 256-3200

FOR ALL DEFENDANTS

Dated this ___ day of March, 2023.

By: _____

Russell L. Hirschhorn
Joseph E. Clark
Sydney L. Juliano
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036
Telephone: (212) 969-3286

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU, individually and as the representative of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiff, v. BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY Defendants.	Case No. 22-cv-1019 **COMPLAINT – CLASS ACTION**

NATURE OF THE ACTION

1. Plaintiff Jubril Pecou ("Plaintiff"), individually and as the representative of the Class described herein, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan (the "Plan"), brings this action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"), against Defendants Bessemer Trust Company ("Bessemer Trust") and the Profit Sharing Plan Committee of Bessemer Trust Company (the "Committee") (collectively, "Defendants"). As described herein, Defendants have breached their fiduciary duties and engaged in unlawful self-dealing with respect to the Plan in violation of ERISA, to the detriment of the Plan, its participants, and its beneficiaries. Plaintiff brings this action to remedy this unlawful conduct, recover losses to the Plan, and obtain other appropriate relief as provided by ERISA.

INTRODUCTION

2. As of the third quarter of 2021, Americans had approximately $10.4 trillion in assets invested in defined contribution plans, such as 401(k) and 403(b) plans.[1] Since the passage of Section 401(k) of the Internal Revenue Code in 1978 only 15% of private-sector workers have access to pension plans, meaning 401(k) type plans have replaced pensions to become the most common retirement program for American workers.[2]

3. The potential for disloyalty and imprudence is much greater in defined contribution plans than in defined benefit plans. "In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Because the sponsor is responsible for making sure that the plan is sufficiently capitalized, the sponsor bears all risks related to excessive fees and investment underperformance and has every incentive to keep costs low and promptly remove imprudent investments. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). But in a defined contribution plan, participants' benefits "are limited to the value of their own investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015); *see also Thole*, 140 S. Ct. at 1618 (noting that in defined contribution plans, retirees' level of benefits

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[1] *See* Investment Company Institute, *Retirement Assets Total $37.4 Trillion in Third Quarter 2021* (Dec. 2021), *available at* https://www.ici.org/statistical-report/ret_21_q3 (last visited Feb. 3, 2022).

[2] *See* Investopedia, *The Demise of the Defined-Benefit Plan* (Nov. 28, 2021), *available at* https://www.investopedia.com/articles/retirement/06/demiseofdbplan.asp (last visited Feb. 3, 2022); CNBC, *How 401(k) Accounts Killed Pensions to Become One of the Most Popular Retirement Plans for U.S. Workers* (Mar. 24, 2021), *available at* https://www.cnbc.com/2021/03/24/how-401k-brought-about-the-death-of-pensions.html (last visited Feb. 3, 2022).

"can turn on the plan fiduciaries' particular investment decisions"). Thus, because all risks related to high fees and poorly performing investments are borne by participants, the sponsor has no direct stake in keeping costs low or closely monitoring the plan to ensure every investment remains prudent.

4. The real-life effect of such imprudence on workers can be severe. According to one study, the average working household with a defined contribution plan will lose $154,794 to fees and lost returns over a 40-year career.[3] Put another way, excessive fees can force an employee to work an extra five to six years to make up for the imprudent management of a retirement plan.

5. For financial services companies like Bessemer Trust, which serves as the advisor to the Old Westbury line of mutual funds through its subsidiary Bessemer Investment Management LLC, the potential for imprudent and disloyal conduct is especially high, because the Plan's fiduciaries are positioned to benefit the company through the Plan by, for example, using proprietary investment products that a non-conflicted and objective fiduciary would not select or retain.

6. To safeguard retirement plan participants, ERISA imposes strict fiduciary duties of loyalty and prudence upon plan sponsors and other plan fiduciaries. 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 270-71, 272 n.8 (2d Cir. 1982). Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), with the "care, skill, prudence, and

[3] *See* Melanie Hicken, *Your Employer May Cost You $100K in Retirement Savings*, CNN Money (Mar. 27, 2013), *available at* http://money.cnn.com/2013/03/27/retirement/401k-fees/ (last visited Feb. 3, 2022).

diligence" that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B).

7. Contrary to these fiduciary duties, Defendants have failed to administer the Plan in the best interest of participants and failed to employ a prudent process for managing the Plan. Instead, Defendants have managed the Plan in a manner that benefits Bessemer Trust at participants' expense, using the Plan as an opportunity to promote Bessemer Trust's Old Westbury mutual fund business and maximize profits in lieu of participants' best interests.

8. Defendants' favoritism shown toward Bessemer Trust's proprietary investments (the "Old Westbury Funds" or "proprietary funds") is evident through a simple comparison to other similarly sized plans. Among all plans with at least $100 million in assets, ***no plan*** other than the Plan is invested in a single Old Westbury fund. Despite the Old Westbury Funds' clear disfavor among similarly situated plan fiduciaries, Defendants have selected and retained a lineup of funds laden with Old Westbury Funds. Indeed, Defendants have not passed up a single opportunity to self-deal in the Plan: the only non-Old Westbury options in the Plan represent 401(k)-staple asset classes or investment styles for which Old Westbury does not maintain a proprietary offering.[4]

9. Defendants' proclivity for proprietary mutual funds has cost Plan participants millions of dollars in excess fees. For plans with $100 million to $500 million in assets, like the Plan, the average asset-weighted total plan cost is between 0.42% and 0.47%.[5] In contrast, the

[4] The Plan's capital preservation option is managed by State Street Global Advisors, as Old Westbury does not offer its own capital preservation or money market fund. In 2017, two Vanguard index mutual funds were added to the Plan, as Old Westbury does not offer passively managed investments.

[5] INVESTMENT COMPANY INSTITUTE, The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2018, at 55 (Jul. 2021), *available at* https://www.ici.org/system/files/2021-07/21_ppr_dcplan_profile_401k.pdf (last visited Feb. 3

Plan's total costs were approximately ***two times*** higher, ranging from 0.73% to 0.99% throughout the statutory period.[6] The Plan's excessive fees are entirely due to its concentration of proprietary funds, which, on average, account for over **98%** of the Plan's investment expenses.

10. Defendants' favoritism towards Old Westbury Funds has not only led to the retention of overpriced proprietary funds, but also the retention of underperforming proprietary funds. For example, the Old Westbury Large Cap Strategies fund, the Plan's largest holding, trailed its benchmark by a staggering 6.40% percent *per year* over the five-year period ending 2020.

11. Defendants' preference for proprietary investments has also harmed participants through the selection of new funds for the Plan. Despite Old Westbury Funds' miniscule 0.23% industry market share, Defendants failed to look beyond their proprietary lineup of mutual funds when considering actively managed investments for the Plan. Defendants did not consider a non-Old Westbury actively managed fund for inclusion in the Plan at any time throughout the statutory period. For example, in 2020 Defendants imprudently and disloyally added the Old Westbury Credit Income fund to the Plan's lineup within three months of its inception despite a multitude of superior, lower cost non-proprietary options with proven track records available in the marketplace. Defendants consistently selected and retained Old Westbury Funds to benefit their business interests at the expense of the Plan's participants' retirement savings.

2022) (hereinafter "2018 ICI Study"). The Investment Company Institute is the leading trade association for the mutual fund industry. *Id.* at 86. The report's measure of average total plan costs is derived from audited Form 5500 reports for more than 56,000 private-sector 401(k) plans for the 2018 plan year. *Id.* at 8. The measure of a plan's fees is derived from the fees reported on the Form 5500 reports as well as the fees paid through investment expense ratios. *Id.* at 9.

[6] The Plan's total costs fell below 0.90% only after the introduction of two Vanguard index funds to the Plan in 2017. Excluding the Vanguard index funds and State Street capital preservation option results in total plan costs of between 0.95% and 1.07% throughout the statutory period.

12. Courts have reasonably determined that similar conduct by other financial services companies is sufficient to state a claim for breach of fiduciary duty. *See, e.g.*, *Falberg v. Goldman Sachs Group, Inc.*, No. 19-cv-9910, 2020 WL 3893285, at *9 (S.D.N.Y. Jul. 9, 2020) (allegations that proprietary funds underperformed and failed to warrant their elevated expense ratios sufficiently stated a claim); *Moreno v. Deutsche Bank Am. Holding Corp.*, No. 15-cv-9936, 2016 WL 5957306, at *6 (S.D.N.Y. Oct. 13, 2016) (allegations of excessive fees in connection with proprietary funds were sufficient to raise an inference that defendants' process was flawed); *Baker v. John Hancock Life Ins. Co. (U.S.A.)*, No. 1:20-cv-10397, 2020 WL 8575183, at *1 (D. Mass July 23, 2020) (allegations that proprietary funds underperformed relative to their custom benchmarks and to similar market comparators, and that "no other fiduciary managing a like-sized plan chose to offer the proprietary funds," sufficiently stated a claim); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153, 2019 WL 7482134, at *5 (S.D. Ohio Sept. 26, 2019) (breach of fiduciary duty claim sufficiently stated where plaintiffs allege that the proprietary funds offered by the plan were more expensive than similar alternatives and that the higher fees were unjustified); *Velazquez v. Massachusetts Fin. Servs. Co.*, 320 F. Supp. 3d. 252, 259 (D. Mass. 2018) (claim for breach of fiduciary duties is sufficiently stated where a plaintiff "plausibly alleges that the higher fees were unjustified or otherwise improper"); *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 793 (N.D. Tex. 2017) (allegation that proprietary mutual funds "were more expensive than similar alternatives" supported claim of fiduciary breach); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *7 (C.D. Cal. Aug. 5, 2016) (allegations that proprietary mutual funds were selected to benefit plan sponsor, and that the retention of the high-cost investment options was to the detriment of participants, sufficiently stated a claim for breach of fiduciary duties).

13. By selecting and retaining Old Westbury Funds as investment options within the Plan in lieu of superior alternative options utilized by similarly situated fiduciaries, Defendants have failed to act in the best interest of participants and exercise appropriate care, costing participants millions of dollars in excess fees and investment underperformance.

14. Based on this conduct, Plaintiff asserts claims against Defendants for breach of the fiduciary duties of loyalty and prudence (Count One). Plaintiff also asserts a claim against Defendant Bessemer Trust Company for its failure to monitor fiduciaries (Count Two).

JURISDICTION AND VENUE

15. Plaintiff brings this action pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and other prohibited conduct, and to obtain monetary and appropriate equitable relief as set forth in 29 U.S.C. §§ 1109 and 1132.

16. This case presents a federal question under ERISA, and therefore this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

17. Venue is proper pursuant to the Plan's forum selection clause, which states that actions, including those brought under ERISA as here, must be filed in the United States District Court for the Southern District of New York.

THE PARTIES

PLAINTIFF

18. Plaintiff Jubril Pecou resides in Brooklyn, New York and was a participant in the Plan until 2020. As a Plan participant, Plaintiff invested in multiple investment options managed by Bessemer Trust through its Old Westbury Funds and has been financially injured by the unlawful conduct described herein. Plaintiff's account would be worth more today had Defendants not violated ERISA as described herein.

THE PLAN

19. The Bessemer Trust Company 401(k) and Profit Sharing Plan was established by Bessemer Trust Company on December 1, 1965.

20. The Plan is an "employee pension benefit plan" within the meaning of 29 U.S.C. § 1002(2)(A) and a "defined contribution plan" within the meaning of 29 U.S.C. § 1002(34), covering all eligible current and former employees of Bessemer Trust Company, The Bessemer Group, Inc., Bessemer Investment Management LLC, Bessemer Trust Company of Delaware, N.A., and Bessemer Trust Company of Florida, including Plaintiff. The Plan is a qualified plan under 26 U.S.C. § 401 and is of the type commonly referred to as a "401(k) plan."

21. The Plan has held approximately $240 million to $500 million in assets during the statutory period. The Plan has also had approximately 1,000 to 1,300 active participants with balances at any time during the relevant period.

22. Participants may direct a portion of their earnings to their account in the Plan, and participants also may receive contributions from Bessemer Trust and participating affiliates as their employer. Participant contributions are held in trust.

23. Participants in the Plan may direct the investment of their account assets from among the lineup of designated investment alternatives (a/k/a investment options) offered by the Plan.[7] Because the Committee determines the designated investment alternatives that are offered, the investment lineup maintained by the Committee is critical to participants' investment results and, ultimately, the retirement benefits they receive.

[7] Participants in a defined contribution plan are limited in their investment choices to the lineup of options offered by their plan. *See* 2018 ICI Study at 8.

24. The Plan's investment menu has consisted of five actively managed Old Westbury Funds, one capital preservation option managed by State Street Global Advisors, and, beginning in 2017, two passively managed Vanguard mutual funds. The Plan's default investment is the Balanced Growth Model, which provides a mix of equity and fixed income exposure through investment in the Plan's various investment options (which, as described above, are predominately Old Westbury Funds).

DEFENDANTS

Bessemer Trust Company

25. Defendant Bessemer Trust Company is a New Jersey state chartered bank and depository trust company located in Woodbridge, New Jersey.

26. Bessemer Trust is the "plan sponsor" within the meaning of 29 U.S.C. § 1002(16)(B), and has the ultimate authority to control and manage the operation and administration of the Plan. Because Bessemer Trust exercises discretionary authority or control with respect to management and administration of the Plan and disposition of Plan assets, Bessemer Trust is a functional fiduciary under 29 U.S.C. § 1002(21)(A).

27. Bessemer Trust is also a fiduciary because it has authority to appoint and remove members of the Committee. It is well accepted that the authority to appoint, retain, and remove plan fiduciaries constitutes discretionary authority or control over the management or administration of the plan, and thus confers fiduciary status under 29 U.S.C. § 1002(21)(A). *See* 29 C.F.R. § 2509.75-8 (D-4); *In re Pfizer Inc. ERISA Litigation*, 2009 WL 749545, at *7 (S.D.N.Y. Mar. 20, 2009).

28. The responsibility for appointing and removing members of such a committee carries with it an accompanying duty to monitor the appointed fiduciaries, and to ensure that they

are complying with the terms of the Plan and ERISA's statutory mandates. 29 C.F.R. § 2509.75-8 (FR-17); *In re Morgan Stanley ERISA Litigation*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009). Furthermore, this monitoring duty carries with it a responsibility to "take required corrective action" upon discovery of possible deficiencies. *In re Williams Co. ERISA Litig.*, No. 02-153 (N.D. Okla. Aug. 22, 2003) (DOL Amicus Brief, at 5, 8-9).

Profit Sharing Plan Committee of Bessemer Trust Company

29. Bessemer Trust delegates a portion of its fiduciary responsibilities for investing Plan assets to the Profit Sharing Plan Committee of Bessemer Trust Company. Among other things, the Committee is responsible for maintaining the Plan's investment lineup, including monitoring the Plan's designated investment alternatives and making changes as appropriate. The Committee is therefore a functional fiduciary pursuant to 29 U.S.C. § 1002(21)(A). According to the Plan's Forms 5500, the Committee is also the "plan administrator" within the meaning of 29 C.F.R. § 2509.75-8 at D-3. Thus, the Committee is also a named fiduciary pursuant to 29 U.S.C. § 1102(a).

30. Each Defendant identified above as a Plan fiduciary is also subject to co-fiduciary liability under 29 U.S.C. § 1105(a)(1)-(3) because it enabled other fiduciaries to commit breaches of fiduciary duties, failed to comply with 29 U.S.C. § 1104(a)(1) in the administration of its duties, and/or failed to remedy other fiduciaries' breaches of their duties, despite having knowledge of the breaches.

ERISA FIDUCIARY DUTIES

31. ERISA imposes strict fiduciary duties of loyalty and prudence upon fiduciaries of retirement plans. 29 U.S.C. § 1104(a)(1) states, in relevant part:

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

(A) for the exclusive purpose of

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

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . .

32. These statutory parameters of loyalty and prudence impose a fiduciary standard that is considered "the highest known to law." *Donovan*, 680 F.2d at 272 n.8.

DUTY OF LOYALTY

33. The duty of loyalty requires fiduciaries to act with "an eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000); *Donovan,* 680 F.2d at 271. "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Pegram*, 530 U.S. at 224 (quoting G Bogert et al., *Law of Trusts and Trustees* § 543 (rev. 2d ed. 1980)). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an investment may not be influenced by non-economic factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." U.S. Dep't of Labor ERISA Adv. Op. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

DUTY OF PRUDENCE

34. ERISA also "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v.*

Dudenhoeffer, 573 U.S. 409, 419 (2014) (quotation omitted); *see also Donovan*, 680 F.2d at 271. This includes "a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments." *Tibble v. Edison Intern.*, 575 U.S. 523, 529 (2015). If an investment is imprudent, the plan fiduciary "must dispose of it within a reasonable time." *Id.* at 530 (quotation omitted). Fiduciaries therefore may be held liable for either "assembling an imprudent menu of investment options" or for failing to monitor the plan's investment options to ensure that each option remains prudent. *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 271 (D. Mass. 2008) (quoting *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3, 423–24 (4th Cir. 2007)). It is no defense to the imprudence of some investments that others may have been prudent; a meaningful mix and range of investment options does not insulate plan fiduciaries from liability for breach of fiduciary duty. *See Hughes v. Northwestern University*, No. 19-1401, 2022 WL 199351, at *4 (U.S. Jan. 24, 2022).

DEFENDANTS' VIOLATIONS OF ERISA

I. DEFENDANTS USED A DISLOYAL AND IMPRUDENT PROCESS TO MANAGE THE PLAN

35. As discussed below, Defendants constructed and maintained a Plan investment lineup which was unlike that of any similarly sized plan. Defendants' selection of proprietary investments that were shunned by other fiduciaries resulted in unnecessarily high costs for the Plan and siphoned assets from Plan participants to Bessemer Trust. In addition, Defendants' process for evaluating and monitoring the Plan's investments gave preferential treatment to proprietary investments, failed to properly consider alternative investments, and failed to control Plan costs, in violation of ERISA's fiduciary standards.

36. As of the end of 2015 and at the beginning of the statutory period, Defendants offered six designated investment alternatives within the Plan: Old Westbury Fixed Income, Old

Westbury Large Cap Core, Old Westbury Large Cap Strategies, Old Westbury Small & Mid-Cap, Old Westbury Strategic Income Opportunities, and State Street Institutional U.S. Government Money Market. As of the end of 2020, Defendants continue to offer five Old Westbury Funds,[8] the State Street money market, and two Vanguard index funds.

37. Despite the significant presence of Old Westbury Funds within the Plan, Bessemer Trust's standing in the retirement plan marketplace is essentially nonexistent. Fiduciaries of other defined contribution plans have wholly rejected the Old Westbury Funds retained for the Plan. Of the 4,337 defined contribution plans with at least $200 million assets, Plaintiff is not aware of a single plan, other than the Plan, that invests in *any* Old Westbury Fund. This disfavor is also reflected in the mutual fund marketplace as a whole, where Old Westbury maintains a 0.23% market share as of year-end 2021, declining from a 0.24% market share at the end of 2015.[9] Yet, throughout the statutory period, Defendants have selected and maintained an investment lineup in which *all* of the actively managed funds available to Plan participants are Old Westbury Funds.

38. Based on the actions of similarly situated fiduciaries and comparison of the Old Westbury Funds to marketplace alternatives, Defendants appear to display favoritism toward Bessemer Trust's proprietary Old Westbury Funds in maintaining the Plan's investment menu. This favoritism has led to the payment of excessive investment management fees by participants

[8] As of year-end 2020, the Plan's proprietary lineup included Old Westbury Large Cap Strategies, Old Westbury Fixed Income, Old Westbury All Cap Core, Old Westbury Small & Mid Cap Strategies, and Old Westbury Credit Income. Old Westbury Large Cap Core was renamed Old Westbury All Cap Core in 2017, and Old Westbury Strategic Income Opportunities was renamed Old Westbury Multi-Asset Opportunities in 2019, prior to its liquidation in 2020.

[9] This miniscule market share is not a reflection of the limited number of Old Westbury Fund offerings, but instead a byproduct of the Funds' high fees and prolonged underperformance. For example, Dodge & Cox, which offers fewer individual mutual funds than Old Westbury, has maintained a market share five to six times that of Old Westbury since 2015.

to Bessemer Trust and its affiliates, a failure to prudently monitor and remove underperforming proprietary Plan investment options, and a failure to engage in a prudent and loyal process in the selection of new Plan investment options.

A. Defendants' Unwavering Use of Proprietary Actively Managed Funds Caused Participants to Incur Excessive Fees

39. The Old Westbury Funds in the Plan are actively managed and serve as the only actively managed investments available to participants. While a fiduciary may consider higher-cost, actively managed mutual funds as an alternative to lower-cost alternatives, "[a]ctive strategies . . . entail investigation and analysis expenses and tend to increase general transaction costs . . . . [T]hese added costs . . . must be justified by realistically evaluated return expectations." Restatement (Third) of Trusts § 90 cmt. h(2); *see also id.* § 90 cmt. b ("[C]ost-conscious management is fundamental to prudence in the investment function."). As discussed below, the Old Westbury Funds did not earn their fees. *See infra* at § I.B.

40. Moreover, even in comparison to other *actively* managed funds, the Old Westbury Funds charged higher fees relative to non-proprietary alternatives used by similarly sized plans. Accordingly, it is reasonable to infer that Defendants failed to prudently investigate lower-cost, nonproprietary alternatives. *See*, *e.g., Falberg*, 2020 WL 3893285, at *10.

41. Because the Plan is laden with high-cost, proprietary Old Westbury Funds, the Plan's expenses are significantly higher than other comparable retirement plans. Throughout the statutory period, annual fees paid by Plan participants were at least 0.73% to 0.99% of total Plan assets, consistently higher than the average 401(k) plan.[10] For example, the average 401(k) plan

[10] Total plan cost, as determined by the BrightScope/ICI Defined Contribution Plan annual profiles, "includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of ERISA-covered DC plans." 2018 ICI Study 80.

with $100 million to $500 million in assets had total plan costs between 0.44% and 0.50% in 2016, down to between 0.42% and 0.47% in 2018, the most recent year for which total plan cost data is available.[11] Thus, throughout the statutory period, the Plan's expenses were around 50% to 100% higher than the total expenses incurred by the average similarly sized 401(k) plan.

42. The Plan's excessive fees are due to the excess fees of the Old Westbury Funds.[12] In 2018, the most recent year for which average fee data is available, the Old Westbury Funds' fees exceeded the average expense ratio for funds within the same asset class category among plans with $100 million to $500 million in assets by anywhere from 82% to 130%. When looking solely at leading actively managed funds invested in similar styles to the Old Westbury Funds, the excessive fees range from 26% to 193% above average:

[11] Total plan cost in 2016, as determined by BrightScope averaged 0.50% for plans with $100 million to $250 million in assets, and 0.44% for plans with $250 million to $500 million in assets. Total plan cost for 2018, as determined by BrightScope, averaged 0.47% for plans with $100 million to $250 million in assets, and 0.42% for plans with $250 million to $500 million in assets.

[12] The Plan's non-Old Westbury investments are low-cost index funds, ranging between 0.04% and 0.08% in fees, and a money market fund that charges 0.15% in fees.

Proprietary Domestic Equity Fund (Ticker)	ICI/BrightScope Category/ Morningstar Global Category	Fund Net Expense Ratio (2018)	Average 401(k) Fund Expense Ratio (2018)[13]	Percentage Fee Excess Over 401(k) Average	Average Actively Managed Expense Ratio (2018)[14]	Percentage Fee Excess Over Actively Managed Average
Old Westbury All Cap Core (OWACX)	Domestic Equity/US Equity Large Cap	0.99%	0.43%	130% higher	0.34%	191% higher
Old Westbury Large Cap Strategies (OWLSX)	International Equity/Global Equity Large Cap	1.12%	0.57%	100% higher	0.62%	81% higher
Old Westbury Small & Mid Cap (OWSMX)	International Equity/Global Equity Mid-Small Cap	1.12%	0.57%	100% higher	0.89%	26% higher
Old Westbury Fixed Income (OWFIX)	Domestic Bond/US Fixed Income	0.62%	0.36%	82% higher	0.32%	93% higher
Old Westbury Strategic Opportunities (OWSOX)	Other/Cautious Allocation	1.38%	0.63%	122% higher	0.47%	193% higher

43. Despite the high cost of the proprietary investments in the Plan, Defendants failed to consider removing the Old Westbury Funds in favor of lower-cost, nonproprietary options because doing so would have been contrary to Defendants' business interests.

44. Had Defendants prudently monitored the investments within the Plan, in a process that was not tainted by self-interest, Defendants would have removed the Plan's investments in

[13] For plans with $100 million to $500 million in assets as of 2018, the most recent data available. Average 401(k) fund expense ratios for each asset class are the averages of expense ratios for plans with $100 million to $250 million in assets, and plans with $250 million to $500 million in assets. Average numbers are shown for domestic equity, international equity, domestic bond, and non-target date balanced funds. 2018 ICI Study at 60.

[14] The "Actively Managed Average Expense Ratio" consists of the average annual report expense ratio of the least expensive share class of the twenty largest actively managed mutual funds by assets under management managed in a similar investment style. Averages are calculated separately for, global equity large cap, global equity mid-small, U.S. equity large cap, U.S. fixed income, and cautious allocation categories.

Old Westbury Funds in favor of other nonproprietary funds that offered comparable investment management services and superior performance at significantly less expense. Given the excessive fees charged by the Old Westbury Funds in the Plan, and the availability of comparable or superior funds with significantly lower expenses, the compensation paid to Bessemer Trust and its affiliates for their services was unreasonably high.

B. Defendants Failed to Remove Underperforming Proprietary Funds

45. Defendants' favoritism toward proprietary investments is also displayed through the imprudent monitoring and retention of underperforming funds.

46. In large part because of the high fees charged by the Old Westbury Funds, those investments tended to underperform, costing the Plan tens of millions of dollars in lost benefits that participants otherwise would have had in their accounts if the Plan's investments had been managed in a prudent and impartial manner. A prudent fiduciary offering high-fee options like the Old Westbury Funds would continuously monitor whether the extra fees were justified by a reasonable expectation of increased returns. *See Baker*, 2020 WL 8575183, at *1 (noting that although ERISA "permits a financial services firm to offer its proprietary funds in its retirement plan ... an ERISA fiduciary has 'a continuing duty to monitor [plan] investments and remove imprudent ones.'") (citations omitted). Yet Defendants failed to do so and maintained an investment lineup whose actively managed funds were entirely proprietary despite prolonged underperformance in comparison to benchmarks and superior marketplace alternatives.

47. Based on net investment returns compared to a universe of 2,440 peer plans with comparable data,[15] the Plan ranked in the bottom **one percent** in plan-wide returns over the five-

[15] This sample includes defined contribution plans with at least $100 million in assets as of the end of 2009, complete Form 5500 filings for each year 2009-2020, a 1/1 – 12/31 plan accounting year, and no investment in employer stock.

year period ending 2015. This significant plan-wide underperformance is a direct result of the Old Westbury funds' struggles, as the Plan held only proprietary funds during this period. The introduction of Vanguard index funds to the Plan in 2017 helped mitigate the adverse impact of the proprietary funds' performance on plan-wide performance, but participants still suffered through plan-wide performance ranking in the bottom quintile over the five-year period ending 2020.

48. Not only has the Plan ranked near the bottom in plan-wide performance, but it has incurred great amounts of risk while doing so. A common metric used to assess a portfolio's risk-adjusted return is the Sharpe Ratio.[16] The Sharpe Ratio removes the risk-free rate of return from a portfolio, as expressed through the yield of a United States Treasury bill, to determine whether returns associated with a portfolio are due to prudent investment decisions or a result of too much risk.

49. For the Plan, its Sharpe Ratio ranked in the bottom 1.5% of peer plans over the five-years ending 2015 and remained near the bottom of peer rankings even after the addition of the Vanguard index funds, falling in the bottom 17% of plans over the five-year period ending 2020.

50. This exceptionally poor plan-wide performance stems from the retention of Plan's underlying proprietary investments. To illustrate, one example of an imprudently retained fund is the Old Westbury Fixed Income fund, which serves as the Plan's only core fixed income investment, either passively or actively managed, and has been in the Plan throughout the statutory period. Leading up to and throughout the statutory period, this fund has consistently

[16] *Sharpe Ratio*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sharperatio.asp (last visited Feb. 3, 2022).

and materially trailed its benchmark[17] as well as less expensive funds that share similar investment objectives and risk, yet has nevertheless remained in the Plan:

Fund (Ticker)	Net Expense Ratio	2015 (5-Year Return)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)
Old Westbury Fixed Income (OWFIX)	0.57%	1.73%	1.01%	0.66%	0.98%	1.88%	2.97%
Bloomberg US Agg Bond TR USD	*n/a*	*3.25%*	*2.23%*	*2.10%*	*2.52%*	*3.05%*	*4.44%*
American Funds Bond Fund of Am. R6 (RBFGX)	0.21%	3.53%	2.80%	2.27%	2.66%	3.14%	5.21%
Baird Aggregate Bond I (BAGIX)	0.30%	4.32%	3.47%	2.74%	2.94%	3.43%	5.04%
JPMorgan Core Bond R6 (JCBUX)	0.33%	3.45%	2.48%	2.21%	2.61%	3.22%	4.67%
Western Asset Core Bond IS (WACSX)	0.42%	4.25%	3.60%	3.21%	3.45%	4.02%	5.60%
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
Old Westbury Fund Expenses Paid by Participants		$216,000	$279,000	$298,000	$298,000	$455,000	$527,000

51. Moreover, this underperformance versus the fund's benchmark and market alternatives is the product of the Old Westbury Fixed Income fund managers' lack of skill, and not its risk profile, as demonstrated through an analysis of the fund's alpha:[18]

[17] The listed Benchmark (Bloomberg US Agg Bond TR USD) is that shown in the most recent participant fee disclosure, with historical returns calculated using Morningstar, a leading investment research platform.

[18] Alpha is a metric used to measure a manager's skill on a risk-adjusted basis. Positive alpha demonstrates skill, an alpha of zero demonstrates zero skill, and negative alpha shows the manager made decisions that were worse than simply tracking the benchmark. *See Alpha*, INVESTOPEDIA, https://www.investopedia.com/terms/a/alpha.asp (last visited Feb. 3, 2022)

Fund (Ticker)	2015 (5-Year Alpha)[19]	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)
Old Westbury Fixed Income (OWFIX)	-0.17	-0.39	-0.73	-0.88	-0.60	-0.41
American Funds Bond Fund of Am. R6 (RBFGX)	0.32	0.52	0.14	0.17	0.19	0.86
Baird Aggregate Bond I (BAGIX)	1.03	1.16	0.60	0.41	0.39	0.44
JPMorgan Core Bond R6 (JCBUX)	0.60	0.42	0.24	0.20	0.21	0.15
Western Asset Core Bond IS (WACSX)	1.17	1.31	1.05	0.91	1.03	0.99

52. A prudent fiduciary would have removed the Old Westbury Fixed Income fund from the Plan given its significant underperformance leading up to and throughout the statutory period. The fact that Defendants retained this proprietary fund in spite of its consistent underperformance versus its benchmark and superior alternatives in the marketplace, and its negative alpha, supports an inference that Defendants' process for monitoring the Plan's investments was self-interested and imprudent.

53. Another illustrative example of Defendants' flawed monitoring process is the retention of the Old Westbury Large Cap Strategies fund, which has been in the Plan throughout the statutory period. Like the Old Westbury Fixed Income fund, the Old Westbury Large Cap Strategies fund has failed to keep pace with its benchmark[20] and less expensive funds that share similar investment objectives and risk:

[19] Alpha's calculation benchmark is the Bloomberg US Aggregate Bond TR USD index.
[20] Benchmark is that shown in the most recent participant fee disclosure, with historical returns calculated using Morningstar, a leading investment research platform.

Fund (Ticker)	Net Expense Ratio	2015 (5-Year Return)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)
Old Westbury Large Cap Strategies (OWLSX)	1.10%	5.11%	9.87%	10.68%	3.91%	7.19%	10.54%
MSCI ACWI Growth NR USD	*n/a*	*7.35%*	*9.71%*	*12.10%*	*5.72%*	*10.70%*	*16.94%*
American Funds New Economy R6 (RNGGX)	0.42%	13.12%	14.94%	16.79%	7.74%	11.90%	17.68%
Artisan Global Opportunities I (APHRX)	0.89%	10.90%	13.54%	13.77%	6.87%	13.07%	19.10%
Morgan Stanley Inst Global Opp IS (MGTSX)	0.81%	13.65%	15.05%	22.34%	12.99%	18.03%	24.62%
T. Rowe Price Global Stock I (TRGLX)	0.66%	9.23%	13.26%	16.36%	9.03%	14.29%	22.65%
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
Old Westbury Fund Expenses Paid by Participants		$937,000	$1,050,000	$1,140,000	$1,000,000	$1,220,000	$1,540,000

54. Likewise, the Large Cap Strategies' underperformance is the product of a lack of skill, as exhibited through the fund's inferior alpha, and not its risk profile:

Fund (Ticker)	2015 (5-Year Alpha)[21]	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)
Old Westbury Large Cap Strategies (OWLSX)	-1.66	0.71	-0.31	-1.23	-2.20	-4.30
American Funds New Economy R6 (RNGGX)	5.86	5.11	4.51	2.15	1.22	0.81
Artisan Global Opportunities I (APHRX)	3.37	3.19	1.06	1.05	2.16	2.54
Morgan Stanley Inst Global Opp IS (MGTSX)	5.44	5.11	8.61	6.69	6.28	6.26
T. Rowe Price Global Stock I (TRGLX)	0.99	2.27	2.87	2.90	2.49	3.57

55. The ongoing retention of the Old Westbury Funds, including the Core Fixed Income and Large Cap Strategies, in the face of their high fees, significant underperformance, and overall disfavor within the marketplace, and despite the availability of superior alternatives in the marketplace, reflects a fiduciary process imprudently and disloyally tilted in Defendants' favor.

56. The only occasion in which an Old Westbury fund was removed from the Plan during the statutory period was in 2020 when Old Westbury Multi-Asset Opportunities was withdrawn from the menu. This removal, however, was not the result of a prudent and loyal review of the fund, but instead a default result of the fund's marketplace liquidation in September 2020. While other investors fled the Multi-Asset Opportunities fund and divested over $3 billion in assets from the fund in the twelve months leading up to liquidation, Defendants stubbornly continued to retain it in the Plan until it ultimately closed and ceased operations.

[21] Alpha's calculation benchmark is the MSCI ACWI Growth NR USD index.

57. The foregoing examples are illustrative of overall struggles within the Old Westbury Funds generally. Given their high costs, poor performance, and lack of utilization among fiduciaries of other similarly sized plans, it was imprudent to retain these funds in the Plan. Defendants improperly retained these funds to serve their business interests, not participants' interests, and generate additional investment fee income for Bessemer Trust and its affiliates. The retention of the Plan's proprietary funds under these circumstances is indicative of Defendants' breaches of their fiduciary duties of prudence and loyalty.[22]

C. Defendants Utilized an Imprudent and Disloyal Fund Selection Process

58. Defendants' imprudent and disloyal process for managing the Plan's investment menu also extended to the selection of new actively managed funds for the Plan. Despite the uniform non-utilization of Old Westbury Funds by other fiduciaries, Defendants failed to look outside the confines of Bessemer Trust-affiliated funds for the Plan's actively managed investment options.

59. During the statutory period, Defendants added one actively managed fund to the Plan, Old Westbury Credit Income. This addition took place in 2020, less than *three months* after the fund's inception and without any meaningful track record. With no track record to assess, the inference may be drawn that Defendants' acted imprudently and disloyally in selecting the Old

[22] When asset management companies such as Bessemer Trust favor retention of their own funds when acting as service providers, this favoritism has empirically resulted in worse performance within defined contribution plans. Veronica Pool et al., *It Pays the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71 J. FIN. 1779 (Aug. 2016). Further, this poor performance tends to persist, empirically demonstrating that "the decisions to retain poorly performing affiliated funds is not driven by information about the future performance of these funds." *Id.* at 1781, 1808-10. A study of third-party administrators such as Bessemer Trust similarly shows that plans administered by asset management firms tend to have the highest fees and the lowest net returns, and that both the higher fees and lower returns are attributable to the use of proprietary mutual funds. Thomas Doellman & Sabuhi Sardarli, *Investment Fees, Net Returns, and Conflict of Interest in 401(k) Plans*, 39 J. FIN. RES. 5 (Spring 2016).

Westbury Credit Income fund for the Plan. *See*, *e.g.*, *Troudt v. Oracle Corporation*, Civ. Action No. 1:16-cv-00175-REB-CBS, 2017 WL 1100876, at *2 (D. Colo. Mar. 22, 2017) (denying motion to dismiss where plaintiffs alleged in part that funds added to the plan had inadequate performance histories to warrant investment in them at all).

60. Defendants' reckless use of Plan assets to seed this new proprietary fund has harmed Plan participants. In the time since the fund's inception, Credit Income has materially underperformed many established, lower-cost market comparators with proven track records. The following chart provides some examples:

Fund (Ticker)	Net Expense Ratio	10/1/20 – 12/31/21 Cumulative Performance
Old Westbury Credit Income (OWCIX)	0.90%	6.05%
Fidelity Strategic Income (FADMX)	0.67%	9.20%
JPMorgan Income R6 (JMSFX)	0.40%	7.37%
PIMCO Income I (PIMIX)	0.62%	7.18%

61. With the addition of the Old Westbury Credit Income fund to the Plan, *all* non-municipal bond mutual funds managed by Bessemer Trust were included on the Plan's investment menu.[23] The addition of the Credit Income fund to the Plan, mere months after its inception, paired with the presence of all other non-municipal bond Old Westbury funds (none of which were adopted by fiduciaries of other similarly sized plans), further indicates that Defendants' process for managing the Plan's investments was imprudent and tainted with self-interest.

[23] Municipal bond funds are exempt from federal taxes. As 401(k) plans, like the Plan, are tax-deferred investment vehicles, the added tax benefits municipal bond funds provide are irrelevant to participants, and therefore municipal bond funds are rarely, if ever, included in a plan's investment lineup.

II. PLAINTIFF LACKED KNOWLEDGE OF DEFENDANTS' CONDUCT AND PRUDENT ALTERNATIVES

62. Plaintiff did not have knowledge of all material facts (including, among other things, the actions of similarly situated fiduciaries, the availability of less expensive investment alternatives, the costs of the Plan's investments compared to those in similarly sized plans, investment performance versus other available alternatives in similarly sized plans, and plan-wide performance versus other similarly sized plans) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA, until shortly before the suit was filed. Further, Plaintiff does not have actual knowledge of the details of Defendants' decision-making processes with respect to the Plan (including Defendants' specific processes for selecting, monitoring, evaluating, and removing Plan investments), because this information is solely within the possession of Defendants prior to discovery. For purposes of this Complaint, Plaintiff has drawn reasonable inferences regarding these processes based upon (among other things) the facts set forth above.

CLASS ACTION ALLEGATIONS

63. 29 U.S.C. § 1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to obtain for the Plan the remedies provided by 29 U.S.C. § 1109(a). Plaintiff seeks certification of this action as a class action pursuant to this statutory provision and Fed. R. Civ. P. 23.

64. Plaintiff asserts his claims in Counts I–II on behalf of a class of participants and beneficiaries of the Plan defined as follows:[24]

> All participants and beneficiaries of the Bessemer Trust Company 401(k) and Profit Sharing Plan invested in funds managed by

[24] Plaintiff reserves the right to propose other or additional classes or subclasses in his motion for class certification or subsequent pleadings in this action.

> Bessemer Trust Company or its affiliates at any time on or after January 26, 2016, excluding any persons with responsibility for the Plan's investment or administrative functions.[25]

65. Numerosity: The Class is so numerous that joinder of all Class members is impracticable. The Plan had approximately 1,000 to 1,300 participants at all relevant times during the applicable period.

66. Typicality: Plaintiff's claims are typical of the Class members' claims. Like other Class members, Plaintiff participated in the Plan during the class period and suffered financial harm as a result of Defendants' mismanagement of the Plan. Defendants treated Plaintiff consistently with other Class members with regard to the Plan. Defendants' imprudent and disloyal investment decisions affected all Plan participants similarly.

67. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's interests are aligned with the Class that he seeks to represent, and Plaintiff has retained counsel experienced in complex class action litigation, including ERISA litigation. Plaintiff does not have any conflicts of interest with any Class members that would impair or impede his ability to represent such Class members.

68. Commonality: Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members, including but not limited to:

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[25] Plaintiff seeks relief for the period from January 26, 2016 onward, as he initially filed a Complaint in the District of New Jersey on January 26, 2022. *See Pecou v. Bessemer Trust Company, et al*, Civil Action No. 2:22-cv-00377-JXN-JSA (D.N.J. Jan. 26, 2022). Defendants subsequently requested that matter be voluntarily dismissed and refiled in the Southern District of New York. Counsel for Plaintiff and Defendants stipulated to a dismissal of that action without prejudice, and that the instant action in the Southern District of New York shall be treated as if it had been initiated on January 26, 2022. *See id. at ECF No. 4*. The claims asserted in this Complaint are identical to the claims originally asserted in the District of New Jersey.

a. Whether Defendants are fiduciaries with respect to the Plan;

b. Whether Defendants breached their fiduciary duties by engaging in the conduct described herein;

c. The proper form of equitable and injunctive relief; and

d. The proper measure of monetary relief.

69. Class certification is appropriate under Fed R. Civ. P. 23(b)(1)(A) because prosecuting separate actions against Defendants would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

70. Class certification is also appropriate under Fed R. Civ. P. 23(b)(1)(B) because adjudications with respect to individual Class members, as a practical matter, would be dispositive of the interests of the other persons not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. Any award of prospective equitable relief by the Court would be dispositive of non-party participants' interests. The accounting and restoration of the property of the Plan that would be required under 29 U.S.C. §§ 1109 and 1132 would be similarly dispositive of the interests of other Plan participants.

71. Class certification is also appropriate under Fed R. Civ. P. 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting individual class members, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendants' conduct as described in this Complaint applied uniformly to all members of the Class. Class members do not have an interest in pursuing separate actions against Defendants, as the amount of each Class member's

individual claims is relatively small compared to the expense and burden of individual prosecution, and Plaintiff is unaware of any similar claims brought against Defendants by any Class members on an individual basis. Class certification also will obviate the need for unduly duplicative litigation that might result in inconsistent judgments concerning Defendants' practices. Moreover, management of this action as a class action will not present any likely difficulties. In the interests of justice and judicial efficiency, it would be desirable to concentrate the litigation of all Class members' claims in a single forum.

COUNT I
Breach of Fiduciary Duties of Loyalty and Prudence
29 U.S.C. § 1104(a)(1)(A)–(B)

72. As alleged above, Defendants are fiduciaries with respect to the Plan and are subject to ERISA's fiduciary duties.

73. 29 U.S.C. § 1104 imposes fiduciary duties of prudence and loyalty upon the Defendants in connection with the administration of the Plan and the selection and monitoring of Plan investments.

74. The scope of the fiduciary duties and responsibilities of Defendants includes managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and acting with appropriate care, skill, diligence, and prudence. Further, Defendants are directly responsible for ensuring that the Plan's fees are reasonable, selecting and retaining prudent investment options, evaluating and monitoring the Plan's investments on an ongoing basis and eliminating imprudent ones, and taking all necessary steps to ensure that the Plan's assets are invested prudently. This includes "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829.

75. As described throughout the Complaint, Defendants failed to prudently and objectively monitor the Plan's proprietary investments to ensure that each of the Plan's proprietary investments were and remained appropriate for the Plan. Defendants uniquely retained Bessemer-affiliated funds as Plan investments despite the availability of superior alternative investments from other firms that would have cost Plan participants significantly less. Further, Defendants imprudently selected proprietary investments for the Plan and improperly favored proprietary investments over superior, less costly non-proprietary investment alternatives in their investment selection process.

76. Based on the conduct described above and throughout this Complaint, it is evident that Defendants did not make Plan investment decisions based solely on the merits of each investment and what was in the interest of Plan participants. Instead, Defendants' conduct and decisions were influenced by their desire to drive revenues and profits to Bessemer Trust Company and its affiliates. Through their actions and omissions, Defendants failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of their fiduciary duty of loyalty under 29 U.S.C. § 1104(a)(1)(A).

77. Further, each of the actions and omissions described in paragraph 77 above and elsewhere in this Complaint demonstrate that Defendants failed to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would have used in the conduct of an enterprise of like character and with like aims, in violation of 29 U.S.C. § 1104(a)(1)(B).

78. As a consequence of Defendants' fiduciary breaches, the Plan and its participants suffered millions of dollars in losses. Defendants are liable, under 29 U.S.C. §§ 1109 and 1132, to make good to the Plan all such losses resulting from the aforementioned fiduciary breaches.

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

COUNT II
Failure to Monitor Fiduciaries

80. The Committee and its members (as well as Bessemer Trust Company) are fiduciaries of the Plan with responsibilities relating to the selection and monitoring of Plan investment options.

81. Bessemer Trust Company is responsible for appointing and removing members of the Committee. Bessemer Trust Company therefore has a fiduciary responsibility to monitor the performance of the Committee and its members.

82. A monitoring fiduciary must ensure that its appointed fiduciaries are performing their fiduciary obligations, including those with respect to the investment and monitoring of plan assets, and must take prompt and effective action to protect the Plan and participants when they fail to perform their fiduciary obligations in accordance with ERISA.

83. Bessemer Trust Company breached its fiduciary monitoring duties by, among other things:

a. failing to monitor and evaluate the performance of the Committee or have a system in place for doing so, standing idly by as the Plan suffered significant losses as a result of the Committee's imprudent actions and omissions;

b. failing to monitor the processes by which Plan investments were selected, monitored, and retained, which would have alerted a prudent fiduciary to the breaches of fiduciary duties outlined above; and

c. failing to remove Committee members whose performance was inadequate in that they selected and retained imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan and Plan participants' retirement savings.

84. As a consequence of the foregoing breaches of the duty to monitor, the Plan suffered millions of dollars per year in losses due to excessive fees and investment performance.

85. Pursuant to 29 U.S.C. §§ 1109(a), 1132(a)(2), and 1132(a)(3), Bessemer Trust Company is liable to restore the Plan all losses suffered as a result of the fiduciary breaches that resulted from its failure to properly monitor its appointed fiduciaries on the Committee.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Jubril Pecou, individually, as the representative of the Class defined herein, and on behalf of the Plan, prays for relief as follows:

A. A determination that this action may proceed as a class action under Rule 23(b)(1), or in the alternative, Rule 23(b)(3) of the Federal Rules of Civil Procedure;

B. Designation of Plaintiff as Class Representative and designation of Plaintiff's counsel as Class Counsel;

C. A declaration that Defendants breached their fiduciary duties under ERISA;

D. An order compelling Defendants to personally make good to the Plan all losses that the Plan incurred as a result of the breaches of fiduciary duties described herein, and to restore the Plan to the position it would have been in but for this unlawful conduct;

E. An order enjoining Defendants from any further violation of ERISA;

F. Other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate;

G. An award of pre-judgment interest;

H. An award of attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g) and/or the common fund doctrine; and

I. An award of such other and further relief as the Court deems equitable and just.

Dated: February 4, 2022

s/ Paul J. Lukas
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**pro hac vice* motions to be filed

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU and ASHLEY SCHIEFER, individually and as the representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiffs, v. BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY Defendants.	Case No. 22-cv-1019 **AMENDED COMPLAINT – CLASS ACTION**

NATURE OF THE ACTION

1. Plaintiffs Jubril Pecou and Ashley Schiefer ("Plaintiffs"), individually and as the representatives of the Class described herein, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan (the "Plan"), bring this action under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq. ("ERISA"), against Defendants Bessemer Trust Company ("Bessemer Trust") and the Profit Sharing Plan Committee of Bessemer Trust Company (the "Committee") (collectively, "Defendants"). As described herein, Defendants have breached their fiduciary duties and engaged in unlawful self-dealing with respect to the Plan in violation of ERISA, to the detriment of the Plan, its participants, and its beneficiaries. Plaintiffs bring this action to remedy this unlawful conduct, recover losses to the Plan, and obtain other appropriate relief as provided by ERISA.

INTRODUCTION

2. As of the third quarter of 2021, Americans had approximately $10.4 trillion in assets invested in defined contribution plans, such as 401(k) and 403(b) plans.[1] Since the passage of Section 401(k) of the Internal Revenue Code in 1978 only 15% of private-sector workers have access to pension plans, meaning 401(k) type plans have replaced pensions to become the most common retirement program for American workers.[2]

3. The potential for disloyalty and imprudence is much greater in defined contribution plans than in defined benefit plans. "In a defined-benefit plan, retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan or because of the plan fiduciaries' good or bad investment decisions." *Thole v. U. S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). Because the sponsor is responsible for making sure that the plan is sufficiently capitalized, the sponsor bears all risks related to excessive fees and investment underperformance and has every incentive to keep costs low and promptly remove imprudent investments. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). But in a defined contribution plan, participants' benefits "are limited to the value of their own investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1826 (2015); *see also Thole*, 140 S. Ct. at 1618 (noting that in defined contribution plans, retirees' level of benefits

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[1] *See* Investment Company Institute, *Retirement Assets Total $37.4 Trillion in Third Quarter 2021* (Dec. 2021), *available at* https://www.ici.org/statistical-report/ret_21_q3 (last visited Feb. 3, 2022).

[2] *See* Investopedia, *The Demise of the Defined-Benefit Plan* (Nov. 28, 2021), *available at* https://www.investopedia.com/articles/retirement/06/demiseofdbplan.asp (last visited Feb. 3, 2022); CNBC, *How 401(k) Accounts Killed Pensions to Become One of the Most Popular Retirement Plans for U.S. Workers* (Mar. 24, 2021), *available at* https://www.cnbc.com/2021/03/24/how-401k-brought-about-the-death-of-pensions.html (last visited Feb. 3, 2022).

"can turn on the plan fiduciaries' particular investment decisions"). Thus, because all risks related to high fees and poorly performing investments are borne by participants, the sponsor has no direct stake in keeping costs low or closely monitoring the plan to ensure every investment remains prudent.

4. The real-life effect of such imprudence on workers can be severe. According to one study, the average working household with a defined contribution plan will lose $154,794 to fees and lost returns over a 40-year career.[3] Put another way, excessive fees can force an employee to work an extra five to six years to make up for the imprudent management of a retirement plan.

5. For financial services companies like Bessemer Trust, which serves as the advisor to the Old Westbury line of mutual funds through its subsidiary Bessemer Investment Management LLC, the potential for imprudent and disloyal conduct is especially high, because the Plan's fiduciaries are positioned to benefit the company through the Plan by, for example, using proprietary investment products that a non-conflicted and objective fiduciary would not select or retain.

6. To safeguard retirement plan participants, ERISA imposes strict fiduciary duties of loyalty and prudence upon plan sponsors and other plan fiduciaries. 29 U.S.C. § 1104(a)(1). These twin fiduciary duties are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 270-71, 272 n.8 (2d Cir. 1982). Fiduciaries must act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1)(A), with the "care, skill, prudence, and

[3] *See* Melanie Hicken, *Your Employer May Cost You $100K in Retirement Savings*, CNN Money (Mar. 27, 2013), *available at* http://money.cnn.com/2013/03/27/retirement/401k-fees/ (last visited Feb. 3, 2022).

diligence" that would be expected in managing a plan of similar scope. 29 U.S.C. § 1104(a)(1)(B).

7. Contrary to these fiduciary duties, Defendants have failed to administer the Plan in the best interest of participants and failed to employ a prudent process for managing the Plan. Instead, Defendants have managed the Plan in a manner that benefits Bessemer Trust at participants' expense, using the Plan as an opportunity to promote Bessemer Trust's Old Westbury mutual fund business and maximize profits in lieu of participants' best interests.

8. Defendants' favoritism shown toward Bessemer Trust's proprietary investments (the "Old Westbury Funds" or "proprietary funds") is evident through a simple comparison to other similarly sized plans. Among all plans with at least $100 million in assets, ***no plan*** other than the Plan is invested in a single Old Westbury fund. Despite the Old Westbury Funds' clear disfavor among similarly situated plan fiduciaries, Defendants have selected and retained a lineup of funds laden with Old Westbury Funds. Indeed, Defendants have not passed up a single opportunity to self-deal in the Plan: the only non-Old Westbury options in the Plan represent 401(k)-staple asset classes or investment styles for which Old Westbury does not maintain a proprietary offering.[4]

9. Defendants' proclivity for proprietary mutual funds has cost Plan participants millions of dollars in excess fees. For plans with $100 million to $500 million in assets, like the Plan, the average asset-weighted total plan cost is between 0.42% and 0.47%.[5] In contrast, the

[4] The Plan's capital preservation option is managed by State Street Global Advisors, as Old Westbury does not offer its own capital preservation or money market fund. In 2017, two Vanguard index mutual funds were added to the Plan, as Old Westbury does not offer passively managed investments.

[5] INVESTMENT COMPANY INSTITUTE, The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2018, at 55 (Jul. 2021), *available at* https://www.ici.org/system/files/2021-07/21_ppr_dcplan_profile_401k.pdf (last visited Feb. 3

Plan's total costs were approximately ***two times*** higher, ranging from 0.73% to 0.99% throughout the statutory period.[6] The Plan's excessive fees are entirely due to its concentration of proprietary funds, which, on average, account for over **98%** of the Plan's investment expenses.

10. Defendants' favoritism towards Old Westbury Funds has not only led to the retention of overpriced proprietary funds, but also the retention of underperforming proprietary funds. For example, the Old Westbury Large Cap Strategies fund, the Plan's largest holding, trailed its benchmark by a staggering 6.40% percent *per year* over the five-year period ending 2020.

11. Defendants' preference for proprietary investments has also harmed participants through the selection of new funds for the Plan. Despite Old Westbury Funds' miniscule 0.23% industry market share, Defendants failed to look beyond their proprietary lineup of mutual funds when considering actively managed investments for the Plan. Defendants did not consider a non-Old Westbury actively managed fund for inclusion in the Plan at any time throughout the statutory period. For example, in 2020 Defendants imprudently and disloyally added the Old Westbury Credit Income fund to the Plan's lineup within three months of its inception despite a multitude of superior, lower cost non-proprietary options with proven track records available in the marketplace. Defendants consistently selected and retained Old Westbury Funds to benefit their business interests at the expense of the Plan's participants' retirement savings.

2022) (hereinafter "2018 ICI Study"). The Investment Company Institute is the leading trade association for the mutual fund industry. *Id.* at 86. The report's measure of average total plan costs is derived from audited Form 5500 reports for more than 56,000 private-sector 401(k) plans for the 2018 plan year. *Id.* at 8. The measure of a plan's fees is derived from the fees reported on the Form 5500 reports as well as the fees paid through investment expense ratios. *Id.* at 9.

[6] The Plan's total costs fell below 0.90% only after the introduction of two Vanguard index funds to the Plan in 2017. Excluding the Vanguard index funds and State Street capital preservation option results in total plan costs of between 0.95% and 1.07% throughout the statutory period.

12. Courts have reasonably determined that similar conduct by other financial services companies is sufficient to state a claim for breach of fiduciary duty. *See, e.g.*, *Falberg v. Goldman Sachs Group, Inc.*, No. 19-cv-9910, 2020 WL 3893285, at *9 (S.D.N.Y. Jul. 9, 2020) (allegations that proprietary funds underperformed and failed to warrant their elevated expense ratios sufficiently stated a claim); *Moreno v. Deutsche Bank Am. Holding Corp.*, No. 15-cv-9936, 2016 WL 5957306, at *6 (S.D.N.Y. Oct. 13, 2016) (allegations of excessive fees in connection with proprietary funds were sufficient to raise an inference that defendants' process was flawed); *Baker v. John Hancock Life Ins. Co. (U.S.A.)*, No. 1:20-cv-10397, 2020 WL 8575183, at *1 (D. Mass July 23, 2020) (allegations that proprietary funds underperformed relative to their custom benchmarks and to similar market comparators, and that "no other fiduciary managing a like-sized plan chose to offer the proprietary funds," sufficiently stated a claim); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153, 2019 WL 7482134, at *5 (S.D. Ohio Sept. 26, 2019) (breach of fiduciary duty claim sufficiently stated where plaintiffs allege that the proprietary funds offered by the plan were more expensive than similar alternatives and that the higher fees were unjustified); *Velazquez v. Massachusetts Fin. Servs. Co.*, 320 F. Supp. 3d. 252, 259 (D. Mass. 2018) (claim for breach of fiduciary duties is sufficiently stated where a plaintiff "plausibly alleges that the higher fees were unjustified or otherwise improper"); *Main v. Am. Airlines Inc.*, 248 F. Supp. 3d 786, 793 (N.D. Tex. 2017) (allegation that proprietary mutual funds "were more expensive than similar alternatives" supported claim of fiduciary breach); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2016 WL 4507117, at *7 (C.D. Cal. Aug. 5, 2016) (allegations that proprietary mutual funds were selected to benefit plan sponsor, and that the retention of the high-cost investment options was to the detriment of participants, sufficiently stated a claim for breach of fiduciary duties).

13. By selecting and retaining Old Westbury Funds as investment options within the Plan in lieu of superior alternative options utilized by similarly situated fiduciaries, Defendants have failed to act in the best interest of participants and exercise appropriate care, costing participants millions of dollars in excess fees and investment underperformance.

14. Based on this conduct, Plaintiffs assert claims against Defendants for breach of the fiduciary duties of loyalty and prudence (Count One). Plaintiffs also assert a claim against Defendant Bessemer Trust Company for its failure to monitor fiduciaries (Count Two).

JURISDICTION AND VENUE

15. Plaintiffs bring this action pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and other prohibited conduct, and to obtain monetary and appropriate equitable relief as set forth in 29 U.S.C. §§ 1109 and 1132.

16. This case presents a federal question under ERISA, and therefore this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1).

17. Venue is proper pursuant to the Plan's forum selection clause, which states that actions, including those brought under ERISA as here, must be filed in the United States District Court for the Southern District of New York.

THE PARTIES

PLAINTIFFS

18. Plaintiff Jubril Pecou resides in Brooklyn, New York and was a participant in the Plan until 2020. As a Plan participant, Plaintiff invested in multiple investment options managed by Bessemer Trust through its Old Westbury Funds and has been financially injured by the unlawful conduct described herein. Plaintiff's account would be worth more today had Defendants not violated ERISA as described herein.

19. Plaintiff Ashley Schiefer resides in North Reading, Massachusetts and was a participant in the Plan until 2022. As a Plan participant, Plaintiff invested in multiple investment options managed by Bessemer Trust through its Old Westbury funds and has been financially injured by the unlawful conduct described herein. Plaintiff's account would be worth more today had Defendants not violated ERISA as described herein.

THE PLAN

20. The Bessemer Trust Company 401(k) and Profit Sharing Plan was established by Bessemer Trust Company on December 1, 1965.

21. The Plan is an "employee pension benefit plan" within the meaning of 29 U.S.C. § 1002(2)(A) and a "defined contribution plan" within the meaning of 29 U.S.C. § 1002(34), covering all eligible current and former employees of Bessemer Trust Company, The Bessemer Group, Inc., Bessemer Investment Management LLC, Bessemer Trust Company of Delaware, N.A., and Bessemer Trust Company of Florida, including Plaintiffs. The Plan is a qualified plan under 26 U.S.C. § 401 and is of the type commonly referred to as a "401(k) plan."

22. The Plan has held approximately $240 million to $500 million in assets during the statutory period. The Plan has also had approximately 1,000 to 1,300 active participants with balances at any time during the relevant period.

23. Participants may direct a portion of their earnings to their account in the Plan, and participants also may receive contributions from Bessemer Trust and participating affiliates as their employer. Participant contributions are held in trust.

24. Participants in the Plan may direct the investment of their account assets from among the lineup of designated investment alternatives (a/k/a investment options) offered by the

Plan.[7] Because the Committee determines the designated investment alternatives that are offered, the investment lineup maintained by the Committee is critical to participants' investment results and, ultimately, the retirement benefits they receive.

25. The Plan's investment menu has consisted of five actively managed Old Westbury Funds, one capital preservation option managed by State Street Global Advisors, and, beginning in 2017, two passively managed Vanguard mutual funds. The Plan's default investment is the Balanced Growth Model, which provides a mix of equity and fixed income exposure through investment in the Plan's various investment options (which, as described above, are predominately Old Westbury Funds).

DEFENDANTS

Bessemer Trust Company

26. Defendant Bessemer Trust Company is a New Jersey state chartered bank and depository trust company located in Woodbridge, New Jersey.

27. Bessemer Trust is the "plan sponsor" within the meaning of 29 U.S.C. § 1002(16)(B), and has the ultimate authority to control and manage the operation and administration of the Plan. Because Bessemer Trust exercises discretionary authority or control with respect to management and administration of the Plan and disposition of Plan assets, Bessemer Trust is a functional fiduciary under 29 U.S.C. § 1002(21)(A).

28. Bessemer Trust is also a fiduciary because it has authority to appoint and remove members of the Committee. It is well accepted that the authority to appoint, retain, and remove plan fiduciaries constitutes discretionary authority or control over the management or

[7] Participants in a defined contribution plan are limited in their investment choices to the lineup of options offered by their plan. *See* 2018 ICI Study at 8.

administration of the plan, and thus confers fiduciary status under 29 U.S.C. § 1002(21)(A). *See* 29 C.F.R. § 2509.75-8 (D-4); *In re Pfizer Inc. ERISA Litigation*, 2009 WL 749545, at *7 (S.D.N.Y. Mar. 20, 2009).

29. The responsibility for appointing and removing members of such a committee carries with it an accompanying duty to monitor the appointed fiduciaries, and to ensure that they are complying with the terms of the Plan and ERISA's statutory mandates. 29 C.F.R. § 2509.75-8 (FR-17); *In re Morgan Stanley ERISA Litigation*, 696 F. Supp. 2d 345, 366 (S.D.N.Y. 2009). Furthermore, this monitoring duty carries with it a responsibility to "take required corrective action" upon discovery of possible deficiencies. *In re Williams Co. ERISA Litig.*, No. 02-153 (N.D. Okla. Aug. 22, 2003) (DOL Amicus Brief, at 5, 8-9).

Profit Sharing Plan Committee of Bessemer Trust Company

30. Bessemer Trust delegates a portion of its fiduciary responsibilities for investing Plan assets to the Profit Sharing Plan Committee of Bessemer Trust Company. Among other things, the Committee is responsible for maintaining the Plan's investment lineup, including monitoring the Plan's designated investment alternatives and making changes as appropriate. The Committee is therefore a functional fiduciary pursuant to 29 U.S.C. § 1002(21)(A). According to the Plan's Forms 5500, the Committee is also the "plan administrator" within the meaning of 29 C.F.R. § 2509.75-8 at D-3. Thus, the Committee is also a named fiduciary pursuant to 29 U.S.C. § 1102(a).

31. Each Defendant identified above as a Plan fiduciary is also subject to co-fiduciary liability under 29 U.S.C. § 1105(a)(1)-(3) because it enabled other fiduciaries to commit breaches of fiduciary duties, failed to comply with 29 U.S.C. § 1104(a)(1) in the administration

of its duties, and/or failed to remedy other fiduciaries' breaches of their duties, despite having knowledge of the breaches.

ERISA FIDUCIARY DUTIES

32. ERISA imposes strict fiduciary duties of loyalty and prudence upon fiduciaries of retirement plans. 29 U.S.C. § 1104(a)(1) states, in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . . .

33. These statutory parameters of loyalty and prudence impose a fiduciary standard that is considered "the highest known to law." *Donovan*, 680 F.2d at 272 n.8.

DUTY OF LOYALTY

34. The duty of loyalty requires fiduciaries to act with "an eye single" to the interests of plan participants. *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000); *Donovan,* 680 F.2d at 271. "Perhaps the most fundamental duty of a [fiduciary] is that he [or she] must display . . . complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons." *Pegram*, 530 U.S. at 224 (quoting G Bogert et al., *Law of Trusts and Trustees* § 543 (rev. 2d ed. 1980)). Thus, "in deciding whether and to what extent to invest in a particular investment, a fiduciary must ordinarily consider *only* factors relating to the interests of plan participants and beneficiaries . . . . A decision to make an

investment may not be influenced by non-economic factors unless the investment, when judged *solely* on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan." U.S. Dep't of Labor ERISA Adv. Op. 88-16A, 1988 WL 222716, at *3 (Dec. 19, 1988) (emphasis added).

DUTY OF PRUDENCE

35. ERISA also "imposes a 'prudent person' standard by which to measure fiduciaries' investment decisions and disposition of assets." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 419 (2014) (quotation omitted); *see also Donovan*, 680 F.2d at 271. This includes "a continuing duty to monitor [plan] investments and remove imprudent ones" that exists "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments." *Tibble v. Edison Intern.*, 575 U.S. 523, 529 (2015). If an investment is imprudent, the plan fiduciary "must dispose of it within a reasonable time." *Id.* at 530 (quotation omitted). Fiduciaries therefore may be held liable for either "assembling an imprudent menu of investment options" or for failing to monitor the plan's investment options to ensure that each option remains prudent. *Bendaoud v. Hodgson*, 578 F. Supp. 2d 257, 271 (D. Mass. 2008) (quoting *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n.3, 423–24 (4th Cir. 2007)). It is no defense to the imprudence of some investments that others may have been prudent; a meaningful mix and range of investment options does not insulate plan fiduciaries from liability for breach of fiduciary duty. *See Hughes v. Northwestern University*, No. 19-1401, 2022 WL 199351, at *4 (U.S. Jan. 24, 2022).

DEFENDANTS' VIOLATIONS OF ERISA

I. DEFENDANTS USED A DISLOYAL AND IMPRUDENT PROCESS TO MANAGE THE PLAN

36. As discussed below, Defendants constructed and maintained a Plan investment lineup which was unlike that of any similarly sized plan. Defendants' selection of proprietary

investments that were shunned by other fiduciaries resulted in unnecessarily high costs for the Plan and siphoned assets from Plan participants to Bessemer Trust. In addition, Defendants' process for evaluating and monitoring the Plan's investments gave preferential treatment to proprietary investments, failed to properly consider alternative investments, and failed to control Plan costs, in violation of ERISA's fiduciary standards.

37. As of the end of 2015 and at the beginning of the statutory period, Defendants offered six designated investment alternatives within the Plan: Old Westbury Fixed Income, Old Westbury Large Cap Core, Old Westbury Large Cap Strategies, Old Westbury Small & Mid-Cap, Old Westbury Strategic Income Opportunities, and State Street Institutional U.S. Government Money Market. As of the end of 2020, Defendants continue to offer five Old Westbury Funds,[8] the State Street money market, and two Vanguard index funds.

38. Despite the significant presence of Old Westbury Funds within the Plan, Bessemer Trust's standing in the retirement plan marketplace is essentially nonexistent. Fiduciaries of other defined contribution plans have wholly rejected the Old Westbury Funds retained for the Plan. Of the 4,337 defined contribution plans with at least $200 million assets, Plaintiffs are not aware of a single plan, other than the Plan, that invests in *any* Old Westbury Fund. This disfavor is also reflected in the mutual fund marketplace as a whole, where Old Westbury maintains a 0.23% market share as of year-end 2021, declining from a 0.24% market share at the end of 2015.[9] Yet, throughout the statutory period, Defendants have selected and

[8] As of year-end 2020, the Plan's proprietary lineup included Old Westbury Large Cap Strategies, Old Westbury Fixed Income, Old Westbury All Cap Core, Old Westbury Small & Mid Cap Strategies, and Old Westbury Credit Income. Old Westbury Large Cap Core was renamed Old Westbury All Cap Core in 2017, and Old Westbury Strategic Income Opportunities was renamed Old Westbury Multi-Asset Opportunities in 2019, prior to its liquidation in 2020.

[9] This miniscule market share is not a reflection of the limited number of Old Westbury Fund offerings, but instead a byproduct of the Funds' high fees and prolonged underperformance. For

maintained an investment lineup in which *all* of the actively managed funds available to Plan participants are Old Westbury Funds.

39. Based on the actions of similarly situated fiduciaries and comparison of the Old Westbury Funds to marketplace alternatives, Defendants appear to display favoritism toward Bessemer Trust's proprietary Old Westbury Funds in maintaining the Plan's investment menu. This favoritism has led to the payment of excessive investment management fees by participants to Bessemer Trust and its affiliates, a failure to prudently monitor and remove underperforming proprietary Plan investment options, and a failure to engage in a prudent and loyal process in the selection of new Plan investment options.

A. Defendants' Unwavering Use of Proprietary Actively Managed Funds Caused Participants to Incur Excessive Fees

40. The Old Westbury Funds in the Plan are actively managed and serve as the only actively managed investments available to participants. While a fiduciary may consider higher-cost, actively managed mutual funds as an alternative to lower-cost alternatives, "[a]ctive strategies . . . entail investigation and analysis expenses and tend to increase general transaction costs . . . . [T]hese added costs . . . must be justified by realistically evaluated return expectations." Restatement (Third) of Trusts § 90 cmt. h(2); *see also id.* § 90 cmt. b ("[C]ost-conscious management is fundamental to prudence in the investment function."). As discussed below, the Old Westbury Funds did not earn their fees. *See infra* at § I.B.

41. Moreover, even in comparison to other *actively* managed funds, the Old Westbury Funds charged higher fees relative to non-proprietary alternatives used by similarly sized plans.

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example, Dodge & Cox, which offers fewer individual mutual funds than Old Westbury, has maintained a market share five to six times that of Old Westbury since 2015.

Accordingly, it is reasonable to infer that Defendants failed to prudently investigate lower-cost, nonproprietary alternatives. *See*, *e.g., Falberg*, 2020 WL 3893285, at *10.

42. Because the Plan is laden with high-cost, proprietary Old Westbury Funds, the Plan's expenses are significantly higher than other comparable retirement plans. Throughout the statutory period, annual fees paid by Plan participants were at least 0.73% to 0.99% of total Plan assets, consistently higher than the average 401(k) plan.[10] For example, the average 401(k) plan with $100 million to $500 million in assets had total plan costs between 0.44% and 0.50% in 2016, down to between 0.42% and 0.47% in 2018, the most recent year for which total plan cost data is available.[11] Thus, throughout the statutory period, the Plan's expenses were around 50% to 100% higher than the total expenses incurred by the average similarly sized 401(k) plan.

43. The Plan's excessive fees are due to the excess fees of the Old Westbury Funds.[12] In 2018, the most recent year for which average fee data is available, the Old Westbury Funds' fees exceeded the average expense ratio for funds within the same asset class category among plans with $100 million to $500 million in assets by anywhere from 82% to 130%. When looking solely at leading actively managed funds invested in similar styles to the Old Westbury Funds, the excessive fees range from 26% to 193% above average:

[10] Total plan cost, as determined by the BrightScope/ICI Defined Contribution Plan annual profiles, "includes asset-based investment management fees, asset-based administrative and advice fees, and other fees (including insurance charges) from the Form 5500 and audited financial statements of ERISA-covered DC plans." 2018 ICI Study 80.

[11] Total plan cost in 2016, as determined by BrightScope averaged 0.50% for plans with $100 million to $250 million in assets, and 0.44% for plans with $250 million to $500 million in assets. Total plan cost for 2018, as determined by BrightScope, averaged 0.47% for plans with $100 million to $250 million in assets, and 0.42% for plans with $250 million to $500 million in assets.

[12] The Plan's non-Old Westbury investments are low-cost index funds, ranging between 0.04% and 0.08% in fees, and a money market fund that charges 0.15% in fees.

Proprietary Domestic Equity Fund (Ticker)	ICI/BrightScope Category/ Morningstar Global Category	Fund Net Expense Ratio (2018)	Average 401(k) Fund Expense Ratio (2018)[13]	Percentage Fee Excess Over 401(k) Average	Average Actively Managed Expense Ratio (2018)[14]	Percentage Fee Excess Over Actively Managed Average
Old Westbury All Cap Core (OWACX)	Domestic Equity/US Equity Large Cap	0.99%	0.43%	130% higher	0.34%	191% higher
Old Westbury Large Cap Strategies (OWLSX)	International Equity/Global Equity Large Cap	1.12%	0.57%	100% higher	0.62%	81% higher
Old Westbury Small & Mid Cap (OWSMX)	International Equity/Global Equity Mid-Small Cap	1.12%	0.57%	100% higher	0.89%	26% higher
Old Westbury Fixed Income (OWFIX)	Domestic Bond/US Fixed Income	0.62%	0.36%	82% higher	0.32%	93% higher
Old Westbury Strategic Opportunities (OWSOX)	Other/Cautious Allocation	1.38%	0.63%	122% higher	0.47%	193% higher

[13] For plans with $100 million to $500 million in assets as of 2018, the most recent data available. Average 401(k) fund expense ratios for each asset class are the averages of expense ratios for plans with $100 million to $250 million in assets, and plans with $250 million to $500 million in assets. Average numbers are shown for domestic equity, international equity, domestic bond, and non-target date balanced funds. 2018 ICI Study at 60.

[14] The "Actively Managed Average Expense Ratio" consists of the average annual report expense ratio of the least expensive share class of the twenty largest actively managed mutual funds by assets under management managed in a similar investment style. Averages are calculated separately for, global equity large cap, global equity mid-small, U.S. equity large cap, U.S. fixed income, and cautious allocation categories.

44. Despite the high cost of the proprietary investments in the Plan, Defendants failed to consider removing the Old Westbury Funds in favor of lower-cost, nonproprietary options because doing so would have been contrary to Defendants' business interests.

45. Had Defendants prudently monitored the investments within the Plan, in a process that was not tainted by self-interest, Defendants would have removed the Plan's investments in Old Westbury Funds in favor of other nonproprietary funds that offered comparable investment management services and superior performance at significantly less expense. Given the excessive fees charged by the Old Westbury Funds in the Plan, and the availability of comparable or superior funds with significantly lower expenses, the compensation paid to Bessemer Trust and its affiliates for their services was unreasonably high.

B. Defendants Failed to Remove Underperforming Proprietary Funds

46. Defendants' favoritism toward proprietary investments is also displayed through the imprudent monitoring and retention of underperforming funds.

47. In large part because of the high fees charged by the Old Westbury Funds, those investments tended to underperform, costing the Plan tens of millions of dollars in lost benefits that participants otherwise would have had in their accounts if the Plan's investments had been managed in a prudent and impartial manner. A prudent fiduciary offering high-fee options like the Old Westbury Funds would continuously monitor whether the extra fees were justified by a reasonable expectation of increased returns. *See Baker*, 2020 WL 8575183, at *1 (noting that although ERISA "permits a financial services firm to offer its proprietary funds in its retirement plan ... an ERISA fiduciary has 'a continuing duty to monitor [plan] investments and remove imprudent ones.'") (citations omitted). Yet Defendants failed to do so and maintained an

investment lineup whose actively managed funds were entirely proprietary despite prolonged underperformance in comparison to benchmarks and superior marketplace alternatives.

48. Based on net investment returns compared to a universe of 2,440 peer plans with comparable data,[15] the Plan ranked in the bottom **one percent** in plan-wide returns over the five-year period ending 2015. This significant plan-wide underperformance is a direct result of the Old Westbury funds' struggles, as the Plan held only proprietary funds during this period. The introduction of Vanguard index funds to the Plan in 2017 helped mitigate the adverse impact of the proprietary funds' performance on plan-wide performance, but participants still suffered through plan-wide performance ranking in the bottom quintile over the five-year period ending 2020.

49. Not only has the Plan ranked near the bottom in plan-wide performance, but it has incurred great amounts of risk while doing so. A common metric used to assess a portfolio's risk-adjusted return is the Sharpe Ratio.[16] The Sharpe Ratio removes the risk-free rate of return from a portfolio, as expressed through the yield of a United States Treasury bill, to determine whether returns associated with a portfolio are due to prudent investment decisions or a result of too much risk.

50. For the Plan, its Sharpe Ratio ranked in the bottom 1.5% of peer plans over the five-years ending 2015 and remained near the bottom of peer rankings even after the addition of the Vanguard index funds, falling in the bottom 17% of plans over the five-year period ending 2020.

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[15] This sample includes defined contribution plans with at least $100 million in assets as of the end of 2009, complete Form 5500 filings for each year 2009-2020, a 1/1 – 12/31 plan accounting year, and no investment in employer stock.

[16] *Sharpe Ratio*, INVESTOPEDIA, https://www.investopedia.com/terms/s/sharperatio.asp (last visited Feb. 3, 2022).

51. This exceptionally poor plan-wide performance stems from the retention of Plan's underlying proprietary investments. To illustrate, one example of an imprudently retained fund is the Old Westbury Fixed Income fund, which serves as the Plan's only core fixed income investment, either passively or actively managed, and has been in the Plan throughout the statutory period. Leading up to and throughout the statutory period, this fund has consistently and materially trailed its benchmark[17] as well as less expensive funds that share similar investment objectives and risk, yet has nevertheless remained in the Plan:

Fund (Ticker)	Net Expense Ratio	2015 (5-Year Return)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)
Old Westbury Fixed Income (OWFIX)	0.57%	1.73%	1.01%	0.66%	0.98%	1.88%	2.97%
Bloomberg US Agg Bond TR USD	*n/a*	*3.25%*	*2.23%*	*2.10%*	*2.52%*	*3.05%*	*4.44%*
American Funds Bond Fund of Am. R6 (RBFGX)	0.21%	3.53%	2.80%	2.27%	2.66%	3.14%	5.21%
Baird Aggregate Bond I (BAGIX)	0.30%	4.32%	3.47%	2.74%	2.94%	3.43%	5.04%
JPMorgan Core Bond R6 (JCBUX)	0.33%	3.45%	2.48%	2.21%	2.61%	3.22%	4.67%
Western Asset Core Bond IS (WACSX)	0.42%	4.25%	3.60%	3.21%	3.45%	4.02%	5.60%
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
Old Westbury Fund Expenses Paid by Participants		$216,000	$279,000	$298,000	$298,000	$455,000	$527,000

[17] The listed Benchmark (Bloomberg US Agg Bond TR USD) is that shown in the most recent participant fee disclosure, with historical returns calculated using Morningstar, a leading investment research platform.

52. Moreover, this underperformance versus the fund's benchmark and market alternatives is the product of the Old Westbury Fixed Income fund managers' lack of skill, and not its risk profile, as demonstrated through an analysis of the fund's alpha:[18]

Fund (Ticker)	2015 (5-Year Alpha)[19]	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)
Old Westbury Fixed Income (OWFIX)	-0.17	-0.39	-0.73	-0.88	-0.60	-0.41
American Funds Bond Fund of Am. R6 (RBFGX)	0.32	0.52	0.14	0.17	0.19	0.86
Baird Aggregate Bond I (BAGIX)	1.03	1.16	0.60	0.41	0.39	0.44
JPMorgan Core Bond R6 (JCBUX)	0.60	0.42	0.24	0.20	0.21	0.15
Western Asset Core Bond IS (WACSX)	1.17	1.31	1.05	0.91	1.03	0.99

53. A prudent fiduciary would have removed the Old Westbury Fixed Income fund from the Plan given its significant underperformance leading up to and throughout the statutory period. The fact that Defendants retained this proprietary fund in spite of its consistent underperformance versus its benchmark and superior alternatives in the marketplace, and its negative alpha, supports an inference that Defendants' process for monitoring the Plan's investments was self-interested and imprudent.

54. Another illustrative example of Defendants' flawed monitoring process is the retention of the Old Westbury Large Cap Strategies fund, which has been in the Plan throughout

[18] Alpha is a metric used to measure a manager's skill on a risk-adjusted basis. Positive alpha demonstrates skill, an alpha of zero demonstrates zero skill, and negative alpha shows the manager made decisions that were worse than simply tracking the benchmark. *See Alpha*, INVESTOPEDIA, https://www.investopedia.com/terms/a/alpha.asp (last visited Feb. 3, 2022)
[19] Alpha's calculation benchmark is the Bloomberg US Aggregate Bond TR USD index.

the statutory period. Like the Old Westbury Fixed Income fund, the Old Westbury Large Cap Strategies fund has failed to keep pace with its benchmark[20] and less expensive funds that share similar investment objectives and risk:

Fund (Ticker)	Net Expense Ratio	2015 (5-Year Return)	2016 (5-Year Return)	2017 (5-Year Return)	2018 (5-Year Return)	2019 (5-Year Return)	2020 (5-Year Return)
Old Westbury Large Cap Strategies (OWLSX)	1.10%	5.11%	9.87%	10.68%	3.91%	7.19%	10.54%
MSCI ACWI Growth NR USD	*n/a*	*7.35%*	*9.71%*	*12.10%*	*5.72%*	*10.70%*	*16.94%*
American Funds New Economy R6 (RNGGX)	0.42%	13.12%	14.94%	16.79%	7.74%	11.90%	17.68%
Artisan Global Opportunities I (APHRX)	0.89%	10.90%	13.54%	13.77%	6.87%	13.07%	19.10%
Morgan Stanley Inst Global Opp IS (MGTSX)	0.81%	13.65%	15.05%	22.34%	12.99%	18.03%	24.62%
T. Rowe Price Global Stock I (TRGLX)	0.66%	9.23%	13.26%	16.36%	9.03%	14.29%	22.65%
		2015	**2016**	**2017**	**2018**	**2019**	**2020**
Old Westbury Fund Expenses Paid by Participants		$937,000	$1,050,000	$1,140,000	$1,000,000	$1,220,000	$1,540,000

[20] Benchmark is that shown in the most recent participant fee disclosure, with historical returns calculated using Morningstar, a leading investment research platform.

55. Likewise, the Large Cap Strategies' underperformance is the product of a lack of skill, as exhibited through the fund's inferior alpha, and not its risk profile:

Fund (Ticker)	2015 (5-Year Alpha)[21]	2016 (5-Year Alpha)	2017 (5-Year Alpha)	2018 (5-Year Alpha)	2019 (5-Year Alpha)	2020 (5-Year Alpha)
Old Westbury Large Cap Strategies (OWLSX)	-1.66	0.71	-0.31	-1.23	-2.20	-4.30
American Funds New Economy R6 (RNGGX)	5.86	5.11	4.51	2.15	1.22	0.81
Artisan Global Opportunities I (APHRX)	3.37	3.19	1.06	1.05	2.16	2.54
Morgan Stanley Inst Global Opp IS (MGTSX)	5.44	5.11	8.61	6.69	6.28	6.26
T. Rowe Price Global Stock I (TRGLX)	0.99	2.27	2.87	2.90	2.49	3.57

56. The ongoing retention of the Old Westbury Funds, including the Core Fixed Income and Large Cap Strategies, in the face of their high fees, significant underperformance, and overall disfavor within the marketplace, and despite the availability of superior alternatives in the marketplace, reflects a fiduciary process imprudently and disloyally tilted in Defendants' favor.

57. The only occasion in which an Old Westbury fund was removed from the Plan during the statutory period was in 2020 when Old Westbury Multi-Asset Opportunities was

[21] Alpha's calculation benchmark is the MSCI ACWI Growth NR USD index.

withdrawn from the menu. This removal, however, was not the result of a prudent and loyal review of the fund, but instead a default result of the fund's marketplace liquidation in September 2020. While other investors fled the Multi-Asset Opportunities fund and divested over $3 billion in assets from the fund in the twelve months leading up to liquidation, Defendants stubbornly continued to retain it in the Plan until it ultimately closed and ceased operations.

58. The foregoing examples are illustrative of overall struggles within the Old Westbury Funds generally. Given their high costs, poor performance, and lack of utilization among fiduciaries of other similarly sized plans, it was imprudent to retain these funds in the Plan. Defendants improperly retained these funds to serve their business interests, not participants' interests, and generate additional investment fee income for Bessemer Trust and its affiliates. The retention of the Plan's proprietary funds under these circumstances is indicative of Defendants' breaches of their fiduciary duties of prudence and loyalty.[22]

C. Defendants Utilized an Imprudent and Disloyal Fund Selection Process

59. Defendants' imprudent and disloyal process for managing the Plan's investment menu also extended to the selection of new actively managed funds for the Plan. Despite the uniform non-utilization of Old Westbury Funds by other fiduciaries, Defendants failed to look

[22] When asset management companies such as Bessemer Trust favor retention of their own funds when acting as service providers, this favoritism has empirically resulted in worse performance within defined contribution plans. Veronica Pool et al., *It Pays the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71 J. FIN. 1779 (Aug. 2016). Further, this poor performance tends to persist, empirically demonstrating that "the decisions to retain poorly performing affiliated funds is not driven by information about the future performance of these funds." *Id.* at 1781, 1808-10. A study of third-party administrators such as Bessemer Trust similarly shows that plans administered by asset management firms tend to have the highest fees and the lowest net returns, and that both the higher fees and lower returns are attributable to the use of proprietary mutual funds. Thomas Doellman & Sabuhi Sardarli, *Investment Fees, Net Returns, and Conflict of Interest in 401(k) Plans*, 39 J. FIN. RES. 5 (Spring 2016).

outside the confines of Bessemer Trust-affiliated funds for the Plan's actively managed investment options.

60. During the statutory period, Defendants added one actively managed fund to the Plan, Old Westbury Credit Income. This addition took place in 2020, less than *three months* after the fund's inception and without any meaningful track record. With no track record to assess, the inference may be drawn that Defendants' acted imprudently and disloyally in selecting the Old Westbury Credit Income fund for the Plan. *See*, *e.g.*, *Troudt v. Oracle Corporation*, Civ. Action No. 1:16-cv-00175-REB-CBS, 2017 WL 1100876, at *2 (D. Colo. Mar. 22, 2017) (denying motion to dismiss where plaintiffs alleged in part that funds added to the plan had inadequate performance histories to warrant investment in them at all).

61. Defendants' reckless use of Plan assets to seed this new proprietary fund has harmed Plan participants. In the time since the fund's inception, Credit Income has materially underperformed many established, lower-cost market comparators with proven track records. The following chart provides some examples:

Fund (Ticker)	Net Expense Ratio	10/1/20 – 12/31/21 Cumulative Performance
Old Westbury Credit Income (OWCIX)	0.90%	6.05%
Fidelity Strategic Income (FADMX)	0.67%	9.20%
JPMorgan Income R6 (JMSFX)	0.40%	7.37%
PIMCO Income I (PIMIX)	0.62%	7.18%

62. With the addition of the Old Westbury Credit Income fund to the Plan, *all* non-municipal bond mutual funds managed by Bessemer Trust were included on the Plan's investment menu.[23] The addition of the Credit Income fund to the Plan, mere months after its

[23] Municipal bond funds are exempt from federal taxes. As 401(k) plans, like the Plan, are tax-deferred investment vehicles, the added tax benefits municipal bond funds provide are irrelevant

inception, paired with the presence of all other non-municipal bond Old Westbury funds (none of which were adopted by fiduciaries of other similarly sized plans), further indicates that Defendants' process for managing the Plan's investments was imprudent and tainted with self-interest.

II. PLAINTIFFS LACKED KNOWLEDGE OF DEFENDANTS' CONDUCT AND PRUDENT ALTERNATIVES

63. Plaintiffs did not have knowledge of all material facts (including, among other things, the actions of similarly situated fiduciaries, the availability of less expensive investment alternatives, the costs of the Plan's investments compared to those in similarly sized plans, investment performance versus other available alternatives in similarly sized plans, and plan-wide performance versus other similarly sized plans) necessary to understand that Defendants breached their fiduciary duties and engaged in other unlawful conduct in violation of ERISA, until shortly before the suit was filed. Further, Plaintiffs do not have actual knowledge of the details of Defendants' decision-making processes with respect to the Plan (including Defendants' specific processes for selecting, monitoring, evaluating, and removing Plan investments), because this information is solely within the possession of Defendants prior to discovery. For purposes of this Complaint, Plaintiffs have drawn reasonable inferences regarding these processes based upon (among other things) the facts set forth above.

CLASS ACTION ALLEGATIONS

64. 29 U.S.C. § 1132(a)(2) authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to obtain for the Plan the remedies provided by

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to participants, and therefore municipal bond funds are rarely, if ever, included in a plan's investment lineup.

29 U.S.C. § 1109(a). Plaintiffs seek certification of this action as a class action pursuant to this statutory provision and Fed. R. Civ. P. 23.

65. Plaintiffs assert their claims in Counts I–II on behalf of a class of participants and beneficiaries of the Plan defined as follows:[24]

> All participants and beneficiaries of the Bessemer Trust Company 401(k) and Profit Sharing Plan invested in funds managed by Bessemer Trust Company or its affiliates at any time on or after January 26, 2016, excluding any persons with responsibility for the Plan's investment or administrative functions.[25]

66. Numerosity: The Class is so numerous that joinder of all Class members is impracticable. The Plan had approximately 1,000 to 1,300 participants at all relevant times during the applicable period.

67. Typicality: Plaintiffs' claims are typical of the Class members' claims. Like other Class members, Plaintiffs participated in the Plan during the class period and suffered financial harm as a result of Defendants' mismanagement of the Plan. Defendants treated Plaintiffs consistently with other Class members with regard to the Plan. Defendants' imprudent and disloyal investment decisions affected all Plan participants similarly.

68. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs' interests are aligned with the Class that he seeks to represent, and Plaintiffs have

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[24] Plaintiffs reserve the right to propose other or additional classes or subclasses in their motion for class certification or subsequent pleadings in this action.

[25] Plaintiffs seek relief for the period from January 26, 2016 onward, as Plaintiff Pecou initially filed a Complaint in the District of New Jersey on January 26, 2022. *See Pecou v. Bessemer Trust Company, et al*, Civil Action No. 2:22-cv-00377-JXN-JSA (D.N.J. Jan. 26, 2022). Defendants subsequently requested that matter be voluntarily dismissed and refiled in the Southern District of New York. Counsel for Plaintiff Pecou and Defendants stipulated to a dismissal of that action without prejudice, and that the instant action in the Southern District of New York shall be treated as if it had been initiated on January 26, 2022. *See id. at ECF No. 4*. The claims asserted in this Complaint are identical to the claims originally asserted in the District of New Jersey.

retained counsel experienced in complex class action litigation, including ERISA litigation. Plaintiffs do not have any conflicts of interest with any Class members that would impair or impede his ability to represent such Class members.

69. Commonality: Common questions of law and fact exist as to all Class members and predominate over any questions solely affecting individual Class members, including but not limited to:

a. Whether Defendants are fiduciaries with respect to the Plan;

b. Whether Defendants breached their fiduciary duties by engaging in the conduct described herein;

c. The proper form of equitable and injunctive relief; and

d. The proper measure of monetary relief.

70. Class certification is appropriate under Fed R. Civ. P. 23(b)(1)(A) because prosecuting separate actions against Defendants would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants.

71. Class certification is also appropriate under Fed R. Civ. P. 23(b)(1)(B) because adjudications with respect to individual Class members, as a practical matter, would be dispositive of the interests of the other persons not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. Any award of prospective equitable relief by the Court would be dispositive of non-party participants' interests. The accounting and restoration of the property of the Plan that would be required under 29 U.S.C. §§ 1109 and 1132 would be similarly dispositive of the interests of other Plan participants.

72. Class certification is also appropriate under Fed R. Civ. P. 23(b)(3) because questions of law and fact common to the Class predominate over any questions affecting individual class members, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. Defendants' conduct as described in this Complaint applied uniformly to all members of the Class. Class members do not have an interest in pursuing separate actions against Defendants, as the amount of each Class member's individual claims is relatively small compared to the expense and burden of individual prosecution, and Plaintiffs are unaware of any similar claims brought against Defendants by any Class members on an individual basis. Class certification also will obviate the need for unduly duplicative litigation that might result in inconsistent judgments concerning Defendants' practices. Moreover, management of this action as a class action will not present any likely difficulties. In the interests of justice and judicial efficiency, it would be desirable to concentrate the litigation of all Class members' claims in a single forum.

COUNT I
Breach of Fiduciary Duties of Loyalty and Prudence
29 U.S.C. § 1104(a)(1)(A)–(B)

73. As alleged above, Defendants are fiduciaries with respect to the Plan and are subject to ERISA's fiduciary duties.

74. 29 U.S.C. § 1104 imposes fiduciary duties of prudence and loyalty upon the Defendants in connection with the administration of the Plan and the selection and monitoring of Plan investments.

75. The scope of the fiduciary duties and responsibilities of Defendants includes managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and acting with appropriate care, skill, diligence, and prudence. Further,

Defendants are directly responsible for ensuring that the Plan's fees are reasonable, selecting and retaining prudent investment options, evaluating and monitoring the Plan's investments on an ongoing basis and eliminating imprudent ones, and taking all necessary steps to ensure that the Plan's assets are invested prudently. This includes "a continuing duty to monitor investments and remove imprudent ones[.]" *Tibble*, 135 S. Ct. at 1829.

76. As described throughout the Complaint, Defendants failed to prudently and objectively monitor the Plan's proprietary investments to ensure that each of the Plan's proprietary investments were and remained appropriate for the Plan. Defendants uniquely retained Bessemer-affiliated funds as Plan investments despite the availability of superior alternative investments from other firms that would have cost Plan participants significantly less. Further, Defendants imprudently selected proprietary investments for the Plan and improperly favored proprietary investments over superior, less costly non-proprietary investment alternatives in their investment selection process.

77. Based on the conduct described above and throughout this Complaint, it is evident that Defendants did not make Plan investment decisions based solely on the merits of each investment and what was in the interest of Plan participants. Instead, Defendants' conduct and decisions were influenced by their desire to drive revenues and profits to Bessemer Trust Company and its affiliates. Through their actions and omissions, Defendants failed to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the Plan, in violation of their fiduciary duty of loyalty under 29 U.S.C. § 1104(a)(1)(A).

78. Further, each of the actions and omissions described in paragraph 77 above and elsewhere in this Complaint demonstrate that Defendants failed to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would have used in the conduct of an enterprise of like character and with like aims, in violation of 29 U.S.C. § 1104(a)(1)(B).

79. As a consequence of Defendants' fiduciary breaches, the Plan and its participants suffered millions of dollars in losses. Defendants are liable, under 29 U.S.C. §§ 1109 and 1132, to make good to the Plan all such losses resulting from the aforementioned fiduciary breaches.

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

COUNT II
Failure to Monitor Fiduciaries

81. The Committee and its members (as well as Bessemer Trust Company) are fiduciaries of the Plan with responsibilities relating to the selection and monitoring of Plan investment options.

82. Bessemer Trust Company is responsible for appointing and removing members of the Committee. Bessemer Trust Company therefore has a fiduciary responsibility to monitor the performance of the Committee and its members.

83. A monitoring fiduciary must ensure that its appointed fiduciaries are performing their fiduciary obligations, including those with respect to the investment and monitoring of plan assets, and must take prompt and effective action to protect the Plan and participants when they fail to perform their fiduciary obligations in accordance with ERISA.

84. Bessemer Trust Company breached its fiduciary monitoring duties by, among other things:

a. failing to monitor and evaluate the performance of the Committee or have a system in place for doing so, standing idly by as the Plan suffered significant losses as a result of the Committee's imprudent actions and omissions;

b. failing to monitor the processes by which Plan investments were selected, monitored, and retained, which would have alerted a prudent fiduciary to the breaches of fiduciary duties outlined above; and

c. failing to remove Committee members whose performance was inadequate in that they selected and retained imprudent, excessively costly, and poorly performing investments within the Plan, all to the detriment of the Plan and Plan participants' retirement savings.

85. As a consequence of the foregoing breaches of the duty to monitor, the Plan suffered millions of dollars per year in losses due to excessive fees and investment performance.

86. Pursuant to 29 U.S.C. §§ 1109(a), 1132(a)(2), and 1132(a)(3), Bessemer Trust Company is liable to restore the Plan all losses suffered as a result of the fiduciary breaches that resulted from its failure to properly monitor its appointed fiduciaries on the Committee.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Jubril Pecou and Ashley Schiefer, individually, as the representatives of the Class defined herein, and on behalf of the Plan, pray for relief as follows:

A. A determination that this action may proceed as a class action under Rule 23(b)(1), or in the alternative, Rule 23(b)(3) of the Federal Rules of Civil Procedure;

B. Designation of Plaintiffs as Class Representatives and designation of Plaintiffs' counsel as Class Counsel;

C. A declaration that Defendants breached their fiduciary duties under ERISA;

D. An order compelling Defendants to personally make good to the Plan all losses that the Plan incurred as a result of the breaches of fiduciary duties described herein, and to restore the Plan to the position it would have been in but for this unlawful conduct;

E. An order enjoining Defendants from any further violation of ERISA;

F. Other equitable relief to redress Defendants' illegal practices and to enforce the provisions of ERISA as may be appropriate;

G. An award of pre-judgment interest;

H. An award of attorneys' fees and costs pursuant to 29 U.S.C. § 1132(g) and/or the common fund doctrine; and

I. An award of such other and further relief as the Court deems equitable and just.

Dated: August 26, 2022

s/ Brock J. Specht
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EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU and ASHLEY SCHIEFER, individually and as the representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan, Plaintiffs, v. BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY, Defendants.	Case No. 1:22-cv-1019-MKV

NOTICE OF CLASS ACTION SETTLEMENT AND FAIRNESS HEARING

PLEASE READ THIS SETTLEMENT NOTICE CAREFULLY.
This is a notice of a proposed class action settlement in the above-referenced lawsuit. Your legal rights may be affected if you are a member of the following Settlement Class:

All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the "Class Period"), except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

- The Court has given its preliminary approval to a proposed class action settlement (the "Settlement"), in a lawsuit brought by certain participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan (the "Plan") against Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company (collectively, "Defendants"), alleging violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") in relation to the management of the Plan. Defendants deny any and all claims, and nothing in the Settlement is an admission or concession on Defendants' part of any fault or liability whatsoever. Defendants further maintain that they acted prudently and loyally at all times when acting in any fiduciary capacity with respect to the Plan.

- The Settlement will provide for payment of a Settlement Amount of $5,000,000 ("Settlement Amount") to resolve the claims against Defendants. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of any attorneys' fees and expenses to Class Counsel, Settlement Administration Expenses, and Case

Contribution Awards to Named Plaintiffs. The Net Settlement Fund will be allocated to Settlement Class members according to a Plan of Allocation to be approved by the Court and further described below.

- Settlement Class members (i) with a positive balance in the Plan at the time the Court enters the Final Approval Order ("Current Participants"), and (ii) who maintain a positive balance through the time Settlement monies are distributed, will be eligible, pursuant to the process described herein and in the Plan of Allocation, to automatically receive allocations directly to their Plan accounts.

- Settlement Class members who participated in the Plan during the Class Period but who have no account balance in the Plan at the time the Court enters the Final Approval Order ("Former Participants") will be eligible, pursuant to the process described herein and in the Plan of Allocation, to receive their settlement payment in the form of a check. Alternatively, Former Participants can elect to receive their payment, if any, through a rollover to qualified retirement account.

- The terms and conditions of the Settlement are set forth in the Settlement Agreement dated March 10, 2023. Capitalized terms used in this Notice but not defined in this Notice have the meanings assigned to them in the Settlement Agreement. The Settlement Agreement is available at [www.settlementwebsite.com]. Certain other documents also will be posted on that website. You should visit that website if you would like more information about the Settlement or the lawsuit. All papers filed in this lawsuit are also available for review by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

- Your rights and the choices available to you—and the applicable deadlines to act—are explained in this Notice. Please note that neither Defendants nor any employees, attorneys, or representatives of Defendants may advise you as to what the best choice is for you or how you should proceed.

- The Court still has to decide whether to give its final approval to the Settlement. Payments under the Settlement will be made only if the Court finally approves the Settlement, and that final approval is upheld in the event of any appeal.

- A Fairness Hearing will take place on [DATE], at [TIME], before the Honorable Mary Kay Vyskocil, in Courtroom X of the United States Courthouse located at 500 Pearl Street – Suite X, New York, New York 10007, to determine whether to grant final approval of the Settlement and approve the requested attorneys' fees and expenses to Class Counsel, Settlement Administration Expenses, and Case Contribution Awards to Named Plaintiffs. If the Fairness Hearing is rescheduled, or if it is held by video conference or telephone, a notice will be posted on the Settlement Website at [www.settlementwebsite.com].

- Any objections to the Settlement, or to the requested attorneys' fees and expenses, Settlement Administration Expenses, or Case Contribution Awards, must be served in writing on Class Counsel and Defense Counsel, as identified on page 8 of this Settlement Notice, at least 21 calendar days before the Fairness Hearing.

YOUR LEGAL RIGHTS AND OPTIONS UNDER THE SETTLEMENT:	
IF YOU ARE A CURRENT PARTICIPANT: YOU DO NOT NEED TO DO ANYTHING TO RECEIVE YOUR SHARE OF THE SETTLEMENT.	You do not need to do anything to receive your *pro rata* share, if any, of the Net Settlement Fund.
IF YOU ARE A FORMER PARTICIPANT: YOU MAY SUBMIT A ROLLOVER FORM IF YOU WANT TO RECEIVE YOUR PAYMENT THROUGH A ROLLOVER.	You can elect to receive your payment, if any, through a rollover to a qualified retirement account. If you would prefer to receive your settlement payment through a rollover to a qualified retirement account, you must complete, sign, and mail the enclosed Former Participant Rollover Form by [DATE]. Former Participants who fail to complete, sign, and mail their Former Participant Rollover Form will receive their *pro rata* share of the Net Settlement Fund, if any, by check mailed to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].
YOU CAN OBJECT (NO LATER THAN [DATE])	You cannot opt out of this Settlement. But, if you wish to object to any part of the Settlement, or to the requested attorneys' fees and expenses, Settlement Administration Expenses, or Case Contribution Awards, you may do so. You must submit your objection and any supporting documents to Class Counsel and Defense Counsel (as identified on page 8 below) at least 21 calendar days before the Fairness Hearing.
YOU CAN ATTEND A HEARING ON [DATE]	You may also attend the Fairness Hearing and speak at the Fairness Hearing on [DATE]. Please note that you will not be permitted to make an objection to the Settlement at the hearing if you do not comply with the requirements for making objections.

The Class Action

The above-referenced lawsuit, *Pecou, et al. v. Bessemer Trust Company, et al.*, No. 1:22-cv-01019-MKV (S.D.N.Y.) (the "Action" or "lawsuit"), has been pending since February 4, 2022. The Court supervising the case is the United States District Court for the Southern District of New York. The individuals who brought this lawsuit are called the Named Plaintiffs, and the persons that were sued are called the Defendants. Named Plaintiffs (Jubril Pecou and Ashley Schiefer) are former participants in the Plan. Defendants are Bessemer Trust Company and the Profit-Sharing Plan Committee of Bessemer Trust Company. The claims in the lawsuit are described below on page 5, and additional information about them, including a copy of the operative Complaint, is available at [www.settlementwebsite.com].

The Settlement

Following mediation before an experienced, neutral mediator, and negotiations between Class Counsel and Defense Counsel, the parties to this lawsuit reached a Settlement. The Settlement will provide for a combined Settlement Amount of $5,000,000 to be paid to resolve the claims against Defendants. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of any Settlement Administration Expenses, any attorneys' fees and expenses that the Court awards to Class Counsel, and any Case Contribution Award that the Court awards to Named Plaintiffs. The Net Settlement Fund will be allocated to Settlement Class members according to a Plan of Allocation to be approved by the Court and further described below.

Statement of Attorneys' Fees and Expenses to Class Counsel, Administrative Expenses, and Named Plaintiffs' Compensation Sought in the Class Action

Class Counsel has devoted substantial time and effort to investigating the facts, prosecuting the lawsuit, and negotiating the Settlement. During that time, they also have advanced costs necessary to pursue the case. Class Counsel took the risk of litigation and have not been paid for any of their time or for any of these costs throughout the time this case has been pending.

Class Counsel will apply to the Court for payment of attorneys' fees for their work in the case. In addition, Class Counsel also will seek to recover their litigation costs and recoverable administrative expenses associated with the Settlement. The amount of fees, costs, and expenses that Class Counsel will request will not exceed one-third of the Settlement Amount ($1,666,66.67). Any attorneys' fees and expenses and Settlement Administration Expenses awarded by the Court will be paid from the Settlement Amount. Class Counsel also will ask the Court to approve a payment, not to exceed $7,500, for each of the Named Plaintiffs who took on the risk of litigation and committed to spend the time necessary to bring the case against Defendants to a conclusion. Any Case Contribution Award approved by the Court will also be paid from the Settlement Amount.

A full and formal application for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards will be filed with the Court on or before [DATE]. This application will be made available at [www.settlementwebsite.com]. You may also obtain a copy of this application by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

1. Why Did I Receive This Settlement Notice?

The Settlement Administrator has caused this Notice to be sent to you because its records indicate that you may be a Settlement Class member. If so, you have a right to know about the Settlement and about all of the options available to you before the Court decides whether to give its final approval to the Settlement.

2. What Is the Class Action About?

In the Class Action, Named Plaintiffs claim that Defendants failed to prudently and loyally monitor and manage the Plan's investment lineup in the best interest of participants and beneficiaries and gave an improper preference to investment options managed, in part, by affiliates of the Plan's sponsor. A more complete description of what Named Plaintiffs allege is in the Complaint, which is available on the Settlement Website at [www.settlementwebsite.com].

Defendants have denied and continue to deny liability as to any and all claims and assert that they have always acted prudently, loyally, and in keeping with their fiduciary duties under ERISA by monitoring, reviewing, and evaluating the Plan's investment lineup.

3. Why Is There A Settlement?

The Court has not reached a final decision as to Named Plaintiffs' claims. Instead, Named Plaintiffs and Defendants have agreed to the Settlement. The Settlement is the product of arm's-length negotiations between Named Plaintiffs, Defendants, and their counsel, who were assisted in their negotiations by a neutral, experienced mediator. The parties to the Settlement have taken into account the uncertainty, risks, and costs of litigation, and have concluded that it is desirable to settle on the terms and conditions set forth in the Settlement Agreement. Named Plaintiffs and Class Counsel believe that the Settlement is best for the Settlement Class. Nothing in the Settlement Agreement is an admission or concession on Defendants' part of any fault or liability whatsoever. Defendants have entered into the Settlement Agreement to avoid the expense, inconvenience, burden, distraction and diversion of their personnel and resources, and uncertainty of outcome that is inherent in any litigation.

4. What Does the Settlement Provide?

As part of the Settlement, a Settlement Amount of $5,000,000 is being paid to resolve the claims in the Action. Settlement Class members are eligible to receive a *pro rata* share of the Net Settlement Fund remaining after payment of Settlement Administration Expenses, any attorneys' fees and expenses that the Court awards to Class Counsel, and any Case Contribution Award that the Court awards to Named Plaintiffs. Allocations to Current Participants who are entitled to a distribution under the Plan of Allocation will be made into their existing accounts in the Plan. Former Participants who are entitled to a distribution will receive their distribution through a rollover to a qualified retirement account, or a check will be sent to their last known address.

In exchange for the foregoing monetary relief, all Settlement Class members and anyone claiming through them will fully release Defendants and other Defendant Releasees from Plaintiffs' Released Claims, as defined in the Settlement Agreement, which is available at [www.settlementwebsite.com]. Generally, the release means that Settlement Class members will not have the right to sue the Plan, Defendants, or any related parties for conduct during the Class Period arising out of or related to the allegations in the Action.

5. How Much Will My Distribution Be?

The amount, if any, that will be allocated to you will be based upon records maintained by the Plan's recordkeeper. Calculations regarding individual distributions will be performed by the Settlement Administrator, whose determinations will be final and binding, pursuant to the Court-approved Plan of Allocation.

To receive a distribution from the Net Settlement Fund, you must either be a (1) "Current Participant" as described on page 3; or (2) a "Former Participant" as described on page 3; or (3) an eligible Successor-In-Interest to a person identified in (1) or (2).

There are approximately 2,600 Settlement Class members. The Net Settlement Fund will be divided *pro rata* among Settlement Class members (and eligible Successors-In-Interest) based on their Final Individual Dollar Recovery in relation to other Settlement Class members. To calculate the Final Individual Dollar Recovery, the Settlement Administrator will review Settlement Class members' account balances in the Plan for each quarter during the Class Period, and will award

one point for each dollar invested in the Challenged Investments in the Plan, at the end of each quarter. A Settlement Class member's Final Individual Dollar Recovery shall be the average of the quarterly scores during the Class Period, weighted to account for partial quarters.

To avoid disproportionate expenses in particular cases, no distribution will be made to any Settlement Class member who (1) is a Former Participant; and (2) would otherwise be entitled to a Final Individual Dollar Recovery of less than $5.

The Plan of Allocation will be posted on the Settlement Website at [www.settlementwebsite.com]. An additional description of the Plan of Allocation can be found in Section 9 of the Settlement Agreement, available at [www.settlementwebsite.com].

6. How Can I Receive My Distribution?

If you are a Current Participant, you do not need to do anything to receive your *pro rata* share, if any, of the Net Settlement Fund. As long as you maintain a positive balance in your Plan account through the time Settlement monies are distributed, you will automatically receive your distribution, if any, directly to your Plan account.

If you are considered a Current Participant because you had a Plan account with a balance greater than $0.00 at the time the Court enters the Final Approval Order, but it is determined that you no longer have a Plan account balance greater than $0.00 when the Settlement proceeds are distributed to Settlement Class members, if you are entitled to a distribution the Settlement Administrator will mail you a check for your *pro rata* share of the Net Settlement Fund to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].

If you are a Former Participant who would prefer to receive your *pro rata* share, if any, of the Net Settlement Fund through a rollover to a qualified retirement account, you must complete, sign, and mail the enclosed Former Participant Rollover Form postmarked within [RETURN DATE SET FORTH IN PRELIMINARY APPROVAL ORDER].

For Former Participants who fail to complete, sign, and mail their Former Participant Rollover Form, if you are entitled to a distribution the Settlement Administrator will mail you a check for your *pro rata* share of the Net Settlement Fund to your last known address. You may contact the Settlement Administrator to confirm or update your mailing address. The Settlement Administrator may be contacted by phone at [telephone number] or by mail at [mailing address].

7. When Will I Receive My Distribution?

The timing of the distribution of the Net Settlement Fund is conditioned on several matters, including the Court's final approval of the Settlement and any approval becoming final and no longer subject to any appeals in any court. An appeal of the final approval order may take several years. If the Settlement is approved by the Court and there are no appeals, the Settlement distribution likely will occur within approximately six months of the Court's Final Approval Order, unless there are unforeseen circumstances. There will be no payments under the Settlement if the Settlement Agreement is terminated.

8. Can I Get Out of The Settlement?

No. The Settlement Class has been certified for settlement purposes under Federal Rule of Civil Procedure 23(b)(1). Therefore, as a Settlement Class member, you are bound by the Settlement (if it receives final Court approval) and any judgments or orders that are entered in the Action. If you wish to object to any part of the Settlement, you may write to Class Counsel and Defense Counsel about why you object to the Settlement, as discussed below.

9. Who Represents the Settlement Class?

For purposes of the Settlement, the Court has appointed Nichols Kaster, PLLP as Class Counsel in the Action. If you want to be represented by your own lawyer, you may hire one at your own expense. In addition, the Court appointed Jubril Pecou and Ashley Schiefer (Named Plaintiffs) to serve as representatives of the Settlement Class. They are also Settlement Class members.

10. How Will the Lawyers Be Paid?

Class Counsel will file a motion for an award of attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards at least 42 days prior to the Fairness Hearing. This motion will be considered at the Fairness Hearing. Class Counsel will limit their application for attorneys' fees and expenses to not more than one-third of the Settlement Amount. In addition, Class Counsel will seek Case Contribution Awards for the Named Plaintiffs of no more than $7,500 each. The Court will determine the amount of attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards that will be awarded, if any. Class Counsel's motion for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards, will be posted on the Settlement Website at www.settlementwebsite.com, and can be obtained in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007.

11. How Do I Tell the Court If I Don't Like the Settlement?

If you are a Settlement Class member, you can object to the Settlement by mailing a written objection to Class Counsel and to Defense Counsel (as identified below) that explains why you object.

Your written objection must: (1) clearly identify the case name and number: *Jubril Pecou, et al. v. Bessemer Trust Company, et al.*, No. 1:22-cv-01019-MKV (S.D.N.Y.); (2) include your full name, current address, and telephone number; (3) describe the basis for your objection; and (4) include your signature.

Your written objection and supporting documents must be personally delivered, or sent by U.S. mail or courier, to Class Counsel and Defense Counsel as set forth below **no later than [21 days prior to Fairness Hearing]** to be considered. Class Counsel and Defendants will have an opportunity to respond to your objection.

CLASS COUNSEL	DEFENSE COUNSEL
Brock Specht Paul Lukas Steven Eiden Nichols Kaster, PLLP 4700 IDS Center 80 South 8th Street Minneapolis, MN 55402	Russell L. Hirschhorn Joseph Clark Sydney Juliano Proskauer Rose LLP Eleven Times Square New York, NY 10036

12. When and Where Will the Court Decide Whether to Approve the Settlement?

The Court will hold a Fairness Hearing at **[TIME]** on **[DATE]**, at the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007, in Courtroom X. At the Fairness Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. The Court also will consider the motion for attorneys' fees and expenses, Settlement Administration Expenses, and Case Contribution Awards. If there are objections, the Court will consider them then. Please note that if the Fairness Hearing is rescheduled, or if it is held by video conference or telephone, a notice will be posted on the Settlement Website at [www.settlementwebsite.com].

13. Do I Have to Attend the Fairness Hearing?

No, but you are welcome to come at your own expense. You may also make an appearance through an attorney. If you send an objection, you do not have to come to the Court to talk about it. As long as you mailed your written objection on time, the Court will consider it.

14. May I Speak at The Fairness Hearing?

Yes, but you must comply with the requirements for making an objection (described above) if you wish to object to the Settlement. If you do not comply with the requirements for making an objection, you will not be permitted to object at the Fairness Hearing.

15. What Happens If I Do Nothing at All?

If you are a "Former Participant" as described on page 3, and you do nothing, if you are eligible for a distribution you will receive your *pro rata* share of the Net Settlement Fund via check if the Settlement is finally approved. If you are a "Current Participant" as described on page 3, and you do nothing, if you are eligible for a distribution you will receive your *pro rata* share of the Net Settlement Fund as a deposit to your Plan account if the Settlement is finally approved.

16. How Do I Get More Information?

If you have questions regarding the Settlement, you can visit [www.settlementwebsite.com], call [phone number], or write to the Settlement Administrator at [mailing address]. All papers filed in this lawsuit are also available for review by appearing in person during regular business hours at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, located at 500 Pearl Street, New York, New York 10007. Please note that none of the Defendants nor any employees, attorneys, or representatives of Defendants may advise you regarding the Settlement or how you should

proceed.

EXHIBIT E

Statement Pursuant to 28 U.S.C. § 1715(b)(7)(B)

State or Territory	Number of Class Members	Proportionate Recovery[1]
Alaska	1	0.04%
Arizona	3	0.11%
California	156	5.92%
Colorado	20	0.76%
Connecticut	63	2.39%
Delaware	15	0.57%
Florida	222	8.43%
Georgia	57	2.16%
Illinois	74	2.81%
Kansas	1	0.04%
Kentucky	2	0.08%
Louisiana	1	0.04%
Maryland	20	0.76%
Massachusetts	44	1.67%
Michigan	6	0.23%
Nevada	4	0.15%
New Hampshire	3	0.11%
New Jersey	779	29.59%

[1] The amounts shown in the table represent reasonable estimates of the number of class members residing in each state and the proportionate recovery allocable to the class members in each state. The actual payments to class members will be determined and distributed by the Settlement Administrator in accordance with the Plan of Allocation (*see* Exhibit B to the Specht Decl., enclosed within Exhibit A hereto) following Final Approval of the Settlement.

State or Territory	Number of Class Members	Proportionate Recovery[1]
New York	674	25.60%
North Carolina	9	0.34%
Ohio	3	0.11%
Oregon	2	0.08%
Pennsylvania	35	1.33%
Rhode Island	1	0.04%
South Carolina	2	0.08%
Tennessee	1	0.04%
Texas	60	2.28%
Utah	2	0.08%
Vermont	1	0.04%
Virginia	41	1.56%
Washington	10	0.38%
Wisconsin	1	0.04%
Washington, D.C.	15	0.57%

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUBRIL PECOU and ASHLEY SCHIEFER, individually and as representatives of a class of similarly situated persons, and on behalf of the Bessemer Trust Company 401(k) and Profit Sharing Plan,

Plaintiffs,

v.

BESSEMER TRUST COMPANY and PROFIT SHARING PLAN COMMITTEE OF BESSEMER TRUST COMPANY,

Defendants.

Case No. 1:22-cv-01019-MKV

[Proposed] Order on Plaintiffs' Motion for Final Approval of Class Action Settlement

Wherefore, this ___ day of _____ 2023, upon consideration of Plaintiffs' Motion for Final Approval of the Class Action Settlement Agreement dated March 10, 2023, in the above matter, the Court hereby orders and adjudges as follows:

1. For purposes of this Final Approval Order, except as otherwise defined herein, all capitalized terms used herein shall have the same meaning as are ascribed to them in the Settlement Agreement.

2. The Court has jurisdiction over the subject matter of this action and personal jurisdiction over all Parties to the action, including all members of the Settlement Class.

3. The following Settlement Class is certified under Rule 23(b)(1) of the Federal Rules of Civil Procedure for purposes of this Settlement only:

> All Participants in the Bessemer Trust Company 401(k) and Profit Sharing Plan from January 26, 2016 through the Effective Date of Settlement (the "Class Period"), except a Person who was a member of the Profit-Sharing Plan Committee of Bessemer Trust Company during the Class Period.

The Court finds that this Settlement Class meets all the requirements of Rule 23(a) and 23(b)(1).

4. Under Rules 23(e)(1)(A) and (C), the Court hereby approves and confirms the Settlement and the terms therein as being fair, reasonable, and adequate to the Plan and the Settlement Class members.

5. The Court hereby approves the Settlement and orders that the Parties take all necessary steps to effectuate the terms of the Settlement Agreement.

6. In accordance with the Court's Orders, and as reflected in the information from the Settlement Administrator, Analytics Consulting LLC, the Class Notice was timely distributed by first-class mail and/or email to all Settlement Class members who could be identified with reasonable effort. The Settlement Administrator searched for updated address information for those returned as undeliverable, and re-mailed notices to those Settlement Class members. In addition, under the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq.* ("CAFA"), notice was provided to the Attorneys General for each of the states in which a Settlement Class member resides and the Attorney General of the United States.

7. The form and methods of notifying the Settlement Class members of the terms and conditions of the proposed Settlement Agreement met the requirements of Rule 23(c)(2) and (e), and due process, and constituted the best notice practicable under the circumstances. Due and sufficient notices of the Fairness Hearing and the rights of all Settlement Class members have been provided to all people, powers and entities entitled thereto, consistent with Rule 23 and due process.

8. The Court finds that the Settlement is fair, reasonable, and adequate, based on the following findings of fact, conclusions of law, and determinations of mixed fact/law questions:

A. The Settlement resulted from arm's-length negotiations by experienced and competent counsel overseen by an experienced and neutral mediator;

B. The Settlement was negotiated only after Class Counsel had received pertinent information from Defendants;

C. The Parties were well positioned to evaluate the value of the Action;

D. If the Settlement had not been achieved, both Named Plaintiffs and Defendants faced the expense, risk, and uncertainty of extended litigation;

E. The amount of the Settlement ($5,000,000.00) is fair, reasonable, and adequate. The Settlement Amount is within the range of reasonable settlements that would have been appropriate in this case, based on the nature of the claims, the potential recovery, the risks of litigation, and settlements that have been approved in other similar cases;

F. Named Plaintiffs and Class Counsel have concluded that the Settlement Agreement is fair, reasonable, and adequate;

G. Settlement Class members had the opportunity to be heard on all issues regarding the Settlement and release of claims by submitting objections to the Settlement Agreement to the Court;

H. There were no objections to the Settlement; and

I. The Settlement was reviewed by an independent fiduciary, [Name of Independent Fiduciary], who has approved the Settlement.

9. The Motion for Final Approval of the Settlement Agreement is hereby GRANTED, the Settlement of the Class Action is APPROVED as fair, reasonable, and adequate to the Plan and the Settlement Class.

10. The Court finds that all applicable CAFA requirements have been satisfied.

11. Settlement Administration Expenses shall be paid from the Qualified Settlement Fund.

12. Named Plaintiffs shall be awarded Case Contribution Awards in the amount of $7,500 for each Named Plaintiff.

13. Class Counsel shall receive reimbursement of expenses and attorneys' fees in the amount of one-third of the Settlement Amount.

14. The Plan of Allocation has been approved.

15. The Settlement Administrator shall have final authority to determine the share of the Net Settlement Fund to be allocated to each eligible Current Participant and Former Participant under the Plan of Allocation.

16. The Settlement Administrator shall distribute the Net Settlement Fund in accordance with the Plan of Allocation.

17. The payments made from the Net Settlement Fund to effect the Plan of Allocation constitute restorative payments in accordance with Revenue Ruling 2002-45.

18. All Settlement Class members and the Plan are barred and enjoined from asserting any of Plaintiffs' Released Claims against any of the Defendant Releasees, and Defendants are barred and enjoined from asserting any of Defendants' Released Claims against Named Plaintiffs.

19. This Action and all of Plaintiffs' Released Claims asserted therein, whether asserted by Named Plaintiffs on their own behalf or on behalf of the Settlement Class members, or derivatively to secure relief for the Plan, are dismissed with prejudice, without costs to any of the Parties other than as provided for in the Settlement Agreement.

20. The Plan, Named Plaintiffs, and each Settlement Class member and their respective Successors-In-Interest, shall be (1) conclusively deemed to have, and by operation of the Final Approval Order shall have, fully, finally, and forever settled, released, relinquished, waived, and discharged Defendants, the Plan, and any other Defendant Releasees from all of Plaintiffs' Released Claims, and (2) barred and enjoined from suing Defendants, the Plan, or any other Defendant Releasees in any action or proceeding alleging any of the Plaintiffs' Released Claims, even if any Settlement Class member may thereafter discover facts in addition to or different from those which the Settlement Class member or Class Counsel now know or believe to be true with respect to the Action and the Plaintiffs' Released Claims, whether or not such Settlement Class members actually received the Class Notice, whether or not such Settlement Class members have filed an objection to the Settlement, and whether or not the objections or claims for distribution of such Settlement Class members have been approved or allowed.

21. Named Plaintiffs and each Settlement Class member shall release Defendants, the Plan, any other Defendant Releasees, Defense Counsel, Class Counsel, and Plaintiff Releasees, from any claims, liabilities, and attorneys' fees and expenses arising from the allocation of the Settlement Amount or Net Settlement Fund and from all tax liability and associated penalties and interest as well as related attorneys' fees and expenses.

22. The Court finds that it has subject matter jurisdiction over the claims herein and personal jurisdiction over Defendants and the Settlement Class members pursuant to the provisions of ERISA, and expressly retains that jurisdiction for purposes of enforcing and interpreting this Final Approval Order and/or Settlement Agreement.

23. Upon the Effective Date of this Order under the Settlement Agreement, all Parties, the Settlement Class, and the Plan shall be bound by the Settlement Agreement and by this Final Approval Order.

IT IS SO ORDERED.

Dated: _____ _____

Hon. Mary Kay Vyskocil
United States District Judge