APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN L. MUNRO, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; DANIEL C. WHEELER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; EDWARD E. VAYNMAN, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California De-	No. 17-55550 D.C. No. 2:16-cv-06191-VAP-E OPINION

fined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; JANE A. SINGLETON, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; SARAH GLEASON, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; REBECCA A. SNYDER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan;

DION DICKMAN; COREY CLARK; STEVEN L. OLSON,

Plaintiffs-Appellees,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA; USC RETIREMENT PLAN OVERSIGHT COMMITTEE; LISA MAZZOCCO,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief Judge, Presiding

Argued and Submitted May 15, 2018
San Francisco, California

Filed July 24, 2018

Before: Sidney R. Thomas, Chief Circuit Judge, Michelle T. Friedland, Circuit Judge, and Thomas S. Zilly,* District Judge.

Opinion by Chief Judge Thomas

* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

THOMAS, Chief Judge:

We consider in this appeal whether current and former employees of the University of Southern California may be compelled to arbitrate their collective claims for breach of fiduciary responsibility against the Defendants (collectively, "USC") for the administration of two ERISA plans. Under the circumstances presented by this case, we conclude that the district court properly denied USC's motion to compel arbitration.

I

Allen Munro and eight other current and former USC employees ("Employees") participate in both the USC Retirement Savings Program and the USC Tax-Deferred Annuity Plan (collectively, the "Plans"). In this putative class action lawsuit, they allege multiple breaches of fiduciary duty in administration of the Plans.

Each of the individual Employees was required to sign an arbitration agreement as part of her employment contract. The nine Employees signed five different iterations of USC's arbitration agreement. Consistent among the various agreements is an agreement to arbitrate all claims that either the Employee or USC has against the other party to the agreement. The agreements expressly cover claims for violations of federal law.

In their putative class action lawsuit, the Employees sought financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including but not limited to: a determination as to the method of calculating losses; removal of breach-

ing fiduciaries; a full accounting of Plan losses; reformation of the Plans; and an order regarding appropriate future investments.

USC moved to compel arbitration, arguing that the Employees' agreements bar the Employees from litigating their claims on behalf of the Plan. It also requested the district court to compel arbitration on an individual, rather than class, basis because the parties did not specifically agree to class arbitration. The district court denied USC's motion, determining that the arbitration agreements, which the Employees entered into in their individual capacities, do not bind the Plans because the Plans did not themselves consent to arbitration of the claims. USC timely appealed.

The district court had jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331. We have jurisdiction under 9 U.S.C. § 16(a)(1)(C), which authorizes the immediate appeal from an order denying an application to compel arbitration. We review the issues presented de novo. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207 (9th Cir. 2016) (denial of a motion to compel arbitration); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016) ("district court decisions about the arbitrability of claims" and "the interpretation and meaning of contract provisions" (citation and alteration omitted)); *Cmty. Bank of Ariz. v. G.V.M. Trust*, 366 F.3d 982, 984 (9th Cir. 2004) (a "district court's interpretation and construction of . . . federal law").

II

The Federal Arbitration Act ("FAA") "was enacted . . . in response to widespread judicial hostility to ar-

bitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). It "reflect[s] both a 'liberal federal policy favoring arbitration,'" *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), "and the 'fundamental principle that arbitration is a matter of contract,'" *id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). By the FAA's terms, "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

"[T]he party resisting arbitration bears the burden[s] of proving that the claims at issue are unsuitable for arbitration . . . ." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone*, 460 U.S. at 24–25.

Where there is no conflict between the FAA and the substantive statutory provision, "the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). "If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp.*, 207 F.3d at 1130. There is no room for discretion, as the FAA "mandates that district courts

shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

III

Turning to the particular arbitration agreements entered into between the Employees and USC, we must decide "whether the agreement encompasses the dispute at issue." *Cox*, 533 F.3d at 1119 (citation omitted). Because the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements.

A

We cannot, of course, compel arbitration in the absence of an agreement to arbitrate; to do so would be to defeat "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). "[T]he FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Info.*, 489 U.S. at 479).

B

To determine whether the agreements extend to the present controversy, we look first to the text of the agreements. *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017).

We recently considered a similar issue in another legal context—whether a standard employment arbitration agreement covered *qui tam* claims brought by the employee on behalf of the United States under the False Claims Act ("FCA"). *Welch*, 871 F.3d 791. In *Welch*, the arbitration agreement extended to any claims "either [the employee] may have against the Company . . . or the Company may have against [the employee]." *Id.* at 794. Because "the underlying fraud claims asserted in a FCA case belong to the government and not to the relator," we held that the claims were not claims that the employee had against the employer and therefore not within the scope of the arbitration agreements. *Id.* at 800 & n.3.

Here, too, the parties agreed to arbitrate "all claims . . . that Employee may have against the University or any of its related entities . . . and all claims that the University may have against Employee." As in *Welch*, this language does not extend to claims that other entities have against the University. As in *Welch*, we cannot interpret the catch-all clause agreeing to arbitrate "[a]ny claim that otherwise would have been decidable in a court . . . for violation of any federal . . . statute" to cover claims belonging to other entities. *See Welch*, 871 F.3d at 797–98 (interpreting agreement to arbitrate "all disputes" based on "any . . . federal law" as limited to disputes between the employee and the employer).

The language of the arbitration agreements here is not meaningfully distinguishable from that considered in *Welch*. The issue, then, is whether claims for breach of fiduciary duty brought under ERISA must be treated the same as *qui tam* claims brought under the FCA.

C

There is no shortage of similarities between *qui tam* suits under the FCA and suits for breach of fiduciary duty under ERISA. Most importantly, both *qui tam* relators and ERISA § 502(a)(2) plaintiffs are not seeking relief for themselves. A party filing a *qui tam* suit under the FCA seeks recovery only for injury done to the government, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771–72 (2000), and a plaintiff bringing a suit for breach of fiduciary duty similarly seeks recovery only for injury done to the plan. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008); *accord id.* at 261 (Thomas, J., concurring).

Out of this basic similarity arises a related principle—neither the *qui tam* relator nor the ERISA § 502(a)(2) plaintiff may alone settle a claim because that claim does not exist for the individual relator or plaintiff's primary benefit. In *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), we held that a plaintiff seeking relief under ERISA § 409(a) may not settle a claim on behalf of a plan, but rather can only settle if the plan consents to the settlement. Unsurprisingly, given the similarities between FCA and ERISA fiduciary breach claims, we reached a similar conclusion in a *qui tam* action brought under the FCA where the government had initially declined to intervene, leaving the relator to conduct the action himself. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). But there, unlike here, the government had only a right to be heard on the validity of the settlement, not "an absolute right to block the settlement." *Id.* at 720–23.

Significantly, these principles laid the foundation for our holding in *Welch*, where we held a *qui tam* FCA

claim to be outside the scope of an arbitration agreement because the claim was not one that the employee "may have against [the employer]." 871 F.3d at 800. Our holding was compelled by our recognition that the government, rather than the relator, stands to benefit most from the litigation. *Id.* And we reached our conclusion even though the relator is entitled to more than a nominal share of the government's recovery. *Id.* Moreover, we were unconcerned that the FCA provides that the relator brings suit not only "for the United States Government" but also "for the person." 31 U.S.C. § 3730(b). And even though in a breach-of-fiduciary duty suit under ERISA, "the cause of action belong[s] to the individual plaintiff," *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006), the same is true of a *qui tam* suit under the FCA where the government declines to intervene, *see* 31 U.S.C. § 3730(b)(4)(B) (providing that, in such circumstances, the "right to conduct the action" lies with the relator). *See also Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995) (holding in ERISA context that the statute of limitations begins to run when the individual plaintiff learns of the alleged violations); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217–18 (9th Cir. 1996) (holding similarly in the FCA context).

Relying on *LaRue*, USC argues that individuals may seek individual recovery in the context of defined contribution plans, such as the Plans here, because defined contribution plans comprise individual accounts. However, *LaRue* cannot bear the weight USC places on it. In *LaRue*, the Supreme Court held that an individual may bring an ERISA claim alleging breach of fiduciary duty even if the claim pertains only to her own account and seeks relief for losses limited to that account. 552 U.S. at 256. In doing so, the

Court made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan. *Id.* ("[A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

Even if *LaRue* held the meaning USC attributes to it, it would not control this case. The claims brought by the Employees arise from alleged fiduciary misconduct as to the Plans in their entireties and are not, as in *LaRue*, limited to mismanagement of individual accounts. *Id.* at 250–51 (explaining that the lawsuit arose from the fiduciary's alleged failure to carry out the participant-plaintiff's directions). As we have noted, the Employees seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including a determination as to the method of calculating losses, removal of breaching fiduciaries, a full accounting of Plan losses, reformation of the Plans, and an order regarding appropriate future investments. The relief sought demonstrates that the Employees are bringing their claims to benefit their respective Plans across the board, not just to benefit their own accounts as in *LaRue*.

In short, there is no principled distinction to be drawn between this case and *Welch*. If anything, because recovery under ERISA § 409(a) is recovery singularly for the plan, *compare* 29 U.S.C. § 1109(a), *with* 31 U.S.C. § 3730(b), the *qui tam* relator has a stronger stake in the outcome of an FCA case than does a § 502(a)(2) plaintiff in an ERISA claim. The ERISA

§ 409(a) claims in this suit are not claims an "Employee may have against the University or any of its related entities," and the arbitration agreements cannot be stretched to apply to them.[1]

IV

In sum, the claims asserted on behalf of the Plans in this case fall outside the scope of the arbitration clauses in individual Employees' general employment contracts. Therefore, the district court properly denied the motion to compel arbitration. We need not—and do not—reach any other issues urged by the parties.

AFFIRMED.

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[1] The Employees also argue that claims for breach of fiduciary duty seeking a remedy under ERISA 409(a) are inarbitrable as a matter of law, citing our decision in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). In *Amaro*, we held that ERISA's mandated "minimum standards [for] assuring the equitable character of [ERISA] plans" could not be satisfied in an arbitral proceeding. 724 F.2d at 752. As a three-judge panel, *Amaro* binds us unless we conclude that the case is "clearly irreconcilable" with intervening binding authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). USC contends that *Amaro* is "clearly irreconcilable" with intervening Supreme Court case law and, therefore, we should overrule it. Although the Supreme Court has never expressly held that ERISA claims are arbitrable, there is considerable force to USC's position. *See, e.g., Comer v. Micor, Inc.*, 436 F.3d 1098, 1100–01 (9th Cir. 2006) (discussing the issue in dicta). However, given our decision that the claims asserted in this case fall outside the arbitration clauses in the employee agreements, it is unnecessary to decide that question here. Therefore, we leave the issue of *Amaro's* viability for another day.

APPENDIX B

2017 WL 1654075
United States District Court, C.D. California

Allen L. MUNRO et al., Plaintiffs,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA et al., Defendants.

CV 16–6191–VAP (CFEx)

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Signed 03/23/2017

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION (Doc. No. 47)

Virginia A. Phillips, Chief United States District Judge

On December 19, 2016, USC Retirement Plan Oversight Committee and Lisa Mazzocco ("Defendants") filed their Motion to Compel Arbitration and Dismiss for Improper Venue, or in the Alternative, to Stay Proceedings ("Motion"). (Doc. No. 47.) On January 30, 2017, Allen Munro, Daniel C. Wheeler, Edward E. Vaynman, Jane A. Singleton, Sarah Gleason, Rebecca A. Snyder, Dion Dickman, Corey Clark, and Steven L. Olson ("Plaintiffs") filed their opposition. (Doc. No. 48.) Defendants filed their reply on February 21, 2017. (Doc. No. 49.) After considering all papers filed in support of and in opposition to the Motion, as well as all oral argument made at the March 13, 2017 hearing, the Court DENIES the Motion.

I. BACKGROUND

Plaintiffs all work or have worked at the University of Southern California ("USC") in different capacities and all participate in either the University of Southern California Retirement Savings Program or the University of Southern California Tax–Deferred Annuity Plan (the "Plans"). (Doc. No. 40 ¶¶ 21–29.) Defendant USC Retirement Plan Oversight Committee is the body responsible for administering and investing the plans' assets, and defendant Lisa Mazzocco is the current chairperson of the committee. (Id. ¶¶ 32–33.) Plaintiffs have sued Defendants for violating their fiduciary duties under the Employee Retirement Income Security Act ("ERISA"). (Id. ¶¶ 1–5, 36–42.)

Defendants brought this Motion based on arbitration agreements that Plaintiffs were required to sign upon beginning their employment at USC. (Doc. No. 47 at 13–14; Doc. No. 48 at 10.) The arbitration agreements signed by Plaintiffs Munro, Wheeler, Gleason, Snyder, Singleton, Dickman, Clark, and Olson state, in pertinent part:

> the University and the faculty or staff member named below ("Employee") agree to the resolution by arbitration of all claims, whether or not arising out of Employee's University employment, remuneration or termination, that Employee may have against the University or any of its related entities, including but not limited to faculty practice plans, or its or their officers, trustees, administrators, employees or agents, in their capacity as such or otherwise; and all

> claims that the University may have against Employee. Any claim that otherwise would have been decidable in a court of law—whether under local, state or federal law—will instead be decided by arbitration, except as specifically excluded by this Agreement. The claims covered by this Agreement include, but are not limited to, . . . claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance . . . . The parties agree that final and binding arbitration shall be the sole and exclusive remedy for resolving any claims covered by this Agreement, instead of any court action, which is hereby expressly waived.

(Doc. Nos. 47–6, 47–7, 47–8, 47–9, 47–10, 47–12, 47–13, 47–14.)

The arbitration agreement signed by plaintiff Vaynman states, in pertinent part:

> The University and Edward Vaynman ("Employee") agree to the resolution by arbitration of all claims, not arising out of Employee's University employment, remuneration or termination, that Employee may have against the University, its officers, trustees, administrators, employees or agents, in their capacity as such or otherwise, and all claims that the University may have against Employee. The claims covered by this Agreement to Arbitrate Claims ("Agreement") include

> and are limited to, claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); claims for personal, physical, or emotional injury, or for any tort; claims for discrimination or harassment (including and [sic] limited to, race, sex, religion, national origin, age, marital status, sexual orientation, or medical condition or disability); claims for benefits; and claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance. The parties agree that final and binding arbitration shall be the sole, but not exclusive remedy for resolving any claims covered by this Agreement, including of any court action, which is hereby expressly allowed except that matters which are subject to review by writ of mandamus under California Code of Civil Procedure, Section 1094.5 shall be resolved exclusively under that procedure . . . . Employee understands and agrees that by signing this Agreement he/ she and the University are not giving up their respective rights to a jury trial.

(Doc. No. 47–11.)

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") "was enacted . . . in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). It governs arbitration agreements in contracts involving

transactions in interstate commerce, including employment contracts. *See* 9 U.S.C. § 1; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

Section 2 of the FAA states: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 of the FAA "reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339 (citation and internal quotation marks omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Id.* (citations omitted).

"Because the FAA mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (citation and internal quotation marks omitted). "If the response is affirmative on both counts, then the [FAA] requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91–92 (2000).

III. DISCUSSION

As Plaintiffs are the parties opposing arbitration, they "bear the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.*, 531 U.S. at 91–92.

A. ARBITRABILITY OF ERISA CLAIMS

Plaintiffs argue ERISA claims are not arbitrable because "[o]ne of the purposes of Congress in enacting ERISA was to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" (Doc. No. 48 at 12.)

The Ninth Circuit, "in the past, expressed skepticism about the arbitrability of ERISA claims, *see Amaro v. Cont'l Can Co.*, 724 F.2d 747, 750 (9th Cir. 1984), but those doubts seem to have been put to rest by the Supreme Court's opinions." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006). Recent case law from within the Ninth Circuit now holds that ERISA claims are subject to arbitration when the parties have executed a valid arbitration agreement. *Jeld–Wen Master Welfare Ben. Plan v. Tri–City Health Care Dist.*, No. 12CV197-GPC RBB, 2012 WL 5944215, at *7 (S.D. Cal. Nov. 27, 2012) ("Courts have uniformly held that ERISA claims are arbitrable."); *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728, 733–34 (C.D. Cal. 1991) ("Fabian has not carried its burden of showing, either by the text or legislative history of ERISA, or by analysis of ERISA's underlying purpose, that Congress in-

tended to preclude a waiver of ERISA's judicial remedies"); *Sanzone–Ortiz v. Aetna Health of Cal., Inc.*, No. 15-CV-03334-WHO, 2015 WL 9303993, at *5 (N.D. Cal. Dec. 22, 2015) (finding "that 29 U.S.C. § 1001(b) does not provide the requisite congressional command necessary to override the FAA," and a plaintiff's ERISA claims were arbitrable); *Luchini v. Carmax, Inc.*, No. CV F 12-0417 LJO DLB, 2012 WL 2995483, at *6 (E.D. Cal. July 23, 2012) ("We hold that Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims. We further hold that the FAA requires courts to enforce agreements to arbitrate such claims"); *Shappell v. Sun Life Assur. Co.*, No. 2:10-CV-03020-MCE, 2011 WL 2070405, at *3 (E.D. Cal. May 23, 2011) ("In *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100–01 (9th Cir. 2006), the Ninth Circuit went so far as to note that any skepticism about the arbitrability of ERISA claims has been put to rest by the Supreme Court's decisions in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) and *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 481 (1989)."); *see Hornsby v. Macon Cty. Greyhound Park, Inc.*, No. 3:10CV680-MHT, 2012 WL 2135470, at *5 (M.D. Ala. June 13, 2012) ("courts have analyzed the purpose of both ERISA and the FAA and have 'uniformly held that ERISA claims are arbitrable.'"). In view of this case law and the clear "liberal federal policy favoring arbitration," the Court holds Plaintiffs' ERISA claims are arbitrable. *Concepcion*, 131 S. Ct. at 1745.

B. THE ARBITRATION AGREEMENTS DO NOT CONTROL PLAINTIFFS' § 1132(A)(2) CLAIMS BECAUSE THE RETIREMENT PLANS DID NOT CONSENT TO ARBITRATE

Civil actions to protect employee benefit plans are addressed in § 1132(a)(2),[1] which states "a civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." *Id.* Section 1109 states,

> [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary.

29 U.S.C.A. § 1109.

Even though Plaintiffs signed arbitration agreements, Plaintiffs argue they are not required to arbitrate their fiduciary duty claims under 29 U.S.C. §§ 1132(a)(2) and 1109 because claims under 29 U.S.C. §§ 1132(a)(2) and 1109 are brought on behalf of the Plans themselves, and Plaintiffs' arbitration agreements cannot bind the Plans. (Doc. No. 48 at 13–14.) While Defendants agree Plaintiffs' arbitration

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[1] 29 U.S.C. § 1132(a)(2) is often referred to in case law as ERISA § 502(a)(2). As § 1132(a)(2) is simply the codification of ERISA § 502(a)(2), the two are used interchangeably.

agreements cannot bind the Plans, Defendants argue the agreements still bind Plaintiffs, and thus since it is Plaintiffs who are bringing the claim on behalf of the Plans, Plaintiffs are required to arbitrate. (Doc. No. 49 at 12.)

Accordingly, the issue here is whether an arbitration agreement, signed by participants at the start of their employment, not signed by anyone with authority to bind an ERISA plan, and not part of the plan documents, can require participants who file suit on behalf of the plan under 29 U.S.C. §§ 1132(a)(2) and 1109 to submit those claims to arbitration.

The parties have not cited, and the Court has not found, any Ninth Circuit case law directly addressing this issue. The Ninth Circuit, however, has addressed a closely related issue: whether a release and covenant not to sue prevents a participant from suing on behalf of a plan under 29 U.S.C. §§ 1132(a)(2) and 1109. *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999). In *Bowles*, a retired participant sued her retirement plan's fiduciaries for breach of fiduciary duties to the plan, which the court later construed to be a claim under § 502(a)(2). *Id.* at 756, 760. The participant settled with one of the fiduciaries, and as part of the settlement, the participant signed a release. *Id.* at 756. The release stated the participant "for herself and her respective attorneys, trustees, fiduciaries, administrators, conservators, guardians, representatives, heirs, successors and assigns, present and future, hereby fully and forever releases and discharges" the fiduciary, but the plan never signed the settlement or agreed to the release. *Id.* The participant and fiduciary then moved to dismiss the fiduciary with prejudice, pursuant to the settlement. *Id.*

The court held the breach of fiduciary duty claims under § 502(a)(2) could not be dismissed without the plan's consent, and thus the court refused to dismiss these claims against the fiduciary. *Id.* at 759–60. Indeed, "[b]ecause [the participant's] claims [we]re not truly individual, it was proper for the district court to conclude that [the participant] could not settle them without The Plans' consent." *Id.* at 760.

In *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585 (3d Cir. 2009), the Third Circuit reached the same conclusion. *Id.* at 593. In *Schering*, a participant signed a release contained in a separation agreement after leaving her former employer, stating, "I release the Company (which includes Schering–Plough, and all of its subsidiaries, affiliates, officers, directors, and employees) from all claims and liabilities which I have or may have against it as of the date on which I sign this Agreement." *Id.* at 592 n.4. The agreement continued, "I promise that I will not file a lawsuit against the Company in connection with any aspect of my employment or termination. I also waive the right to all remedies in any such action that may be brought on my behalf." *Id.* The participant then brought a § 502(a)(2) claim on behalf of her retirement plan against her employer, and the employer argued the release barred the claim. *Id.* at 595. The court held that even though the participant signed the release and the release was valid, "[§] 502(a)(2) claims are, by their nature, plan claims." *Id.* Thus, because the participant's claims were brought under § 502(a)(2), they were "causes of action that belong[ed] to the Plan and [we]re based on duties owed to the Plan" and could not be affected by the participant's release. *Id.* The court stated, "[t]he vast majority of courts have concluded that an individual release has

no effect on an individual's ability to bring a claim on behalf of an ERISA plan under § 502(a)(2)." *Id.*

Similarly, in *Johnson v. Couturier*, No. 2:05CV02046 RRB KJM, 2006 WL 2943160 (E.D. Cal. Oct. 13, 2006), a participant sued his employer for unpaid vacation time and wages and eventually settled. *Id.* at *1. As a part of the settlement, the participant signed a release of all claims against his employer. *Id.* The release stated the participant "on behalf of his heirs, agents, executors, successors, administrators, attorneys and assigns, and any and all persons claiming by or through him, does hereby release, quit and forever discharge [the employer], their respective predecessors, successors, assigns, parents, affiliated companies." *Id.* The release included "any and [all] liabilities, damages, actions, causes of action, claims, demands or suits . . . including . . . any claims . . . or proceeding in federal, state, or local court . . . including claims under . . . the Employee Retirement Income Security Act of 1974." *Id.* The participant then brought a claim under § 502(a)(2) on behalf of his retirement plan against the plan's fiduciaries, and the fiduciaries, who were included in the release, argued the release barred the claim. *Id.* at *2. The court agreed that the release barred "all individual claims [the participant] could assert against" the fiduciaries but held the release could not bar the participant's suit on behalf of the plan under § 502(a)(2). *Id.* The Court reasoned, "[w]hile [the participant] could waive his individual claims against the Individual Defendants, he could not waive the claims brought under § 502(a)(2) for the benefit of the [plan] without the consent of the [plan]." *Id.* Accordingly, "[w]ithout the consent of the Plan (or Plan administrator/fiduciary), [the participant] had no authority or power to release the § 502(a)(2) claims." *Id.*

In *In re JDS Uniphase Corp. ERISA Litig.*, No. 03-04743 WWS, 2006 WL 2597995 (N.D. Cal. Sept. 11, 2006), participants signed release agreements with their employer upon receiving severance packages. *Id.* at *1. The releases stated the participants "completely release from and agree not to file, cause to be filed, or otherwise pursue against the company, its affiliated, related, parent or subsidiary corporations, and its present and former directors, officers, and employees any and all claims [the participants] may now have or have ever had against the [employer]." *Id.* The participants then brought claims under § 502(a)(2) on behalf of their retirement plan against the employer, who was a fiduciary of the plan. *Id.* The court held the releases did "not bar ERISA fiduciary duty claims brought by plan beneficiaries on behalf of the plan." *Id.* Thus, because the participants "allege[d] plan-wide fiduciary wrongdoing and s[ought] plan-wide relief[, the participants'] individual releases . . . d[id] not bar the [§ 502(a)(2)] claims." *Id.* at *2.

Numerous other courts have also held waivers signed by individual participants cannot bar claims made by the same participants on behalf of a retirement plan under § 502(a)(2). *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 75 (S.D.N.Y. 2006) ("numerous courts have held that under ERISA, individuals do not have the authority to release a defined contribution plan's right to recover for breaches of fiduciary duty"); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 423 (N.D. Okla. 2005) ("First, the Court notes that the claims here are brought on behalf of the Plan, and a participant cannot release the Plan's claims, as a matter of law"); *In re Aquila ERISA Litig.*, 237 F.R.D. 202, 210 (W.D. Mo. 2006) ("As discussed throughout this Order, the instant claims in this action are brought on

behalf of the Plan, pursuant to ERISA § 502(a)(2), not by ERISA plan participants seeking individual benefits. As a matter of law, a plan participant cannot release the Plan's claims")

The Court is persuaded the same rule applies to participants' agreements to arbitrate. Just as a participant suing on behalf of a plan under § 502(a)(2) cannot waive a plan's right to pursue claims, a participant cannot waive a plan's right to file its claims in court. In each of *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase*, plan participants signed broad releases of their right to sue their plan's fiduciaries as part of either settlements or separation agreements. Even though the courts in *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase* all found the releases were valid, properly named the plans' fiduciaries, and fully bound the participants, the courts unanimously held the participants' ability to bring claims under § 502(a)(2) was unaffected by the releases because "[§] 502(a)(2) claims are, by their nature, plan claims." Similarly here, each of the Plaintiffs signed a broad release of their right to bring an action in court—i.e. an agreement to arbitrate—as a condition to their employment. Just as in *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase*, even if the Court decided the Plaintiffs' releases of their right to bring an action in court are valid, properly name Defendants, and fully bind the Plaintiffs, the Court still must find Plaintiffs' ability to bring claims under § 502(a)(2) is unaffected by the releases because "[§] 502(a)(2) claims are, by their nature, plan claims." Indeed, while the Plaintiffs can "waive [their] individual claims against . . . Defendants, [they can] not waive the claims brought under § 502(a)(2) for the benefit of the [plan] without the consent of the [plan]."

Defendants would have the Court draw a line between (1) participants' ability to release their right to pursue a plan's claims and (2) participants' ability to release their right to pursue a plan's claims in court. Defendants, however, have offered no support for why this line should be drawn. *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase* each held that it was the plans' refusal to consent (or the plan's absence of consent) that prevented the participants from releasing their § 502(a)(2) claims on the plans' behalf. Just as the plans in *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase* did not consent to release their right to pursue claims, here the Plans have not consented to release their rights to proceed in court.

Defendants argue that *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase* only establish the "commonsense principle" that individual participants "obviously cannot abandon claims belonging to others." (Doc. No. 49 at 12–13.) Thus, Defendants argue, the right to pursue a claim is different than the right to file in court because when a participant releases a claim the participant is abandoning something "belonging to others." (*Id.* at 12.) This is unpersuasive. Indeed, *Bowles*, *Schering*, *Johnson*, and *JDS Uniphase* did more than just establish participants "obviously cannot abandon claims belonging to others;" these cases held participants could not abandon even their own claims under § 502(a)(2) to sue on the plans' behalf. Further, when a participant releases the right to proceed in court the participant is just as much abandoning something "belonging to others." Indeed, when a plan owns a right, it cannot be bargained away without the plan's consent; it makes no difference whether that right is to a claim or a court trial.

Defendants also argue that an "individual participant is permitted to make a wide range of strategic procedural decisions about how to litigate an ERISA claim without the consent of the Plan, including the venue in which to file suit, the attorney to employ, and the evidence to seek in discovery." (Doc. No. 49 at 13.) Thus, they claim, the choice to arbitrate is no different. This too is unpersuasive. There are significant differences between decisions regarding "the venue in which to file suit, the attorney to employ, and the evidence to seek in discovery," on one hand, and the decision to settle or submit a claim to arbitration, on the other.

Decisions to settle or arbitrate are steadfastly vested with a client, as opposed to the client's attorney, and the decision to settle or arbitrate always requires client consent. *Blanton v. Womancare, Inc.*, 38 Cal.3d 396, 407 (1985); *Toal v. Tardif*, 178 Cal.App.4th 1208, 1221 (2009) ("client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement"). Decisions as to venue, discovery methods, and evidence to seek in discovery, however, are vested in a lawyer's discretion, as opposed to a client's. *Blanton*, 38 Cal.3d at 403–04 ("In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client."). When a suit

is brought on behalf of a plan under § 502(a)(2), the lawyer bringing the suit is litigating the plan's claims. Thus, as the claims belong to the plan, the plan occupies the position of a client, and thus the plan is the one vested with the right to decide when to settle or submit to arbitration. *See Bowles*, 198 F.3d at 760; *Schering*, 589 F.3d at 593; *Johnson*, 2006 WL 2943160 at *2; *JDS Uniphase*, 2006 WL 2597995 at *2. Similarly, as the plan occupies the position of a client, it need not consent to venue and discovery decisions, as these are generally decisions vested with the lawyer litigating the claims. Thus, even though a plan need not consent to venue and discovery decisions, this division of decision-making authority shows why the plan's consent is still required when settling or submitting a claim to arbitration.

Although the choice of "attorney to employ" is admittedly one that rests with a client, and plans are not required to consent to a participant's choice of attorney, this is a necessary evil of any derivative claim. The nature of derivative claims under § 502(a)(2) make it impossible for plans to consent to an attorney bringing suit because § 502(a)(2) authorizes "a participant, beneficiary or fiduciary" to bring "a civil action" on behalf of the plan against "a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries." Further, the only persons authorized to approve an attorney on a plan's behalf are necessarily fiduciaries of the plan itself. Thus, as the fiduciaries of the plan are very objects of suits brought under § 502(a)(2), it cannot be the case that § 502(a)(2) would require fiduciaries to approve the very attorneys who are suing them. Accordingly, the fact that a plan is not required to consent to a participant's choice of attorney is not a

reason to hold it is not required to consent to submit a claim to arbitration.

Further, holding that the participants' arbitration agreements cannot affect their claims under § 502(a)(2) makes practical sense and is closely aligned with the goals of ERISA. One of ERISA's main purposes is "[t]o protect pension plans from looting by unscrupulous employers and their agents." *Landwehr v. DuPree*, 72 F.3d 726, 733 (9th Cir. 1995). If the Court were to hold participants' arbitration agreements controlled their § 502(a)(2) claims, fiduciaries could mitigate their ERISA obligations to their plans and erect barriers to ERISA enforcement on behalf of plans by requiring employees to sign arbitration agreements—including provisions requiring confidentiality, expedited arbitration procedures, limited discovery, required splitting of arbitrators' fees, and mandatory payment of the prevailing party's attorneys' fees—as a condition of employment. Given that § 502(a)(2) actions are almost exclusively brought by participants, this would (1) guarantee fiduciaries would essentially never be held to account for their potential wrongdoings in court and (2) give fiduciaries many procedural advantages at the outset of any § 502(a)(2) action that they would not be entitled to in a court proceeding. Allowing fiduciaries to limit their ERISA obligations in this manner would directly conflict with the Supreme Court's holding that "Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' [and] 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Indeed allowing such arbitration agreements to control participants' § 502(a)(2) claims would, in a sense, be allowing the fox to guard the henhouse.

Defendants argue *Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995), requires the Court to hold Plaintiffs' § 502(a)(2) claims on behalf of the Plans are bound by the arbitration agreements. In *Landwehr*, a retirement plan's fiduciary embezzled money from the plan by writing his personal driver checks from the plan's bank accounts between April 1988 and February 1989. *Landwehr*, 72 F.3d at 730. The plan's participants learned of these actions in January 1990, and they brought suit on behalf of the plan against a fiduciary in June 1992. *Id.* at 731. The fiduciary argued the claims were barred by ERISA's three-year statute of limitations because "the real 'plaintiff' in this case [was] the Plan," and the plan had actual knowledge of the stolen money by at least February 1989 because several of the fiduciaries of the plan knew of the illicit money transfers. *Landwehr*, 72 F.3d at 732. ERISA's statute of limitations is set forth in 29 U.S.C. § 1113 and states actions for breach of fiduciary duty must be brought before "(1) six years after . . . the date of the last action which constituted a part of the breach or violation, or . . . (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113. The court reasoned, for the purposes of the statute of limitations, "[t]he plaintiff in such actions . . . is not the plan itself but the fiduciary, beneficiary, or participant bringing suit." *Id.* Thus, the court held "the limitations period begins to run on the date that the person bringing suit on behalf of the plan learned of the breach or violation." *Id.* The court explained it ruled thus because,

> [i]f the statute of limitations started to run on the first day that a fiduciary knew

> of the violation, then the statute of limitations would begin to run on the date that [the fiduciary] breached his duties—or, in the alternative, on the date that agents hired by [the fiduciary] were told of the underlying facts by [the fiduciary] in the course of seeking their advice. That would obviously defeat the purpose of section 1113's requirement that the limitations period run from the date when the plaintiff acquired actual knowledge of the breach, rather than on the date of the breach. Moreover, it would undermine one of the primary purposes of ERISA: To protect pension plans from looting by unscrupulous employers and their agents.

Id. at 732–33.

The holding in *Landwehr* does not suggest the Court should rule a participant can agree to arbitrate § 502(a) (2) claims without a plan's consent. Indeed, *Landwehr* specifically limited its ruling to issues involving the statute of limitations and the interpretation of the word "plaintiff" as it appears in § 1113. Its decision that a participant was the "plaintiff" for the purposes of § 1113 was necessitated by the wording of § 1113 because holding otherwise would have rendered § 1113(1) a nullity. The Ninth Circuit did not purport to hold a participant is the "plaintiff" for the purposes of agreeing to arbitrate or settle. In fact, doing so would directly conflict with the Ninth Circuit's more recent holding in *Bowles*.

Additionally, the Ninth Circuit's reasoning for holding a participant was the "plaintiff" for the purposes of § 1113 weighs in favor of this Court ruling that a plan must consent to arbitration before participants are allowed to submit their § 502(a)(2) claims to arbitration. This is because, in *Landwehr*, the court reasoned that unless it ruled the "plaintiff" was the participant for statutory limitations purposes, the statute of limitations would (1) limit participants' ability to bring claims on behalf of plans and (2) place fiduciaries at a procedural advantage by having the statute of limitations begin to run as soon as a breach of fiduciary duty occurred. Similarly here, for the reasons discussed above, unless the Court rules participants' arbitration agreements cannot control participants' § 502(a)(2) claims on behalf of a plan, the arbitration agreements would (1) limit participants' ability to bring claims on behalf of plans and (2) place plan fiduciaries at a procedural advantage because the terms of arbitration agreements could limit the ease of bringing § 502(a)(2) claims and the effectiveness of the § 502(a)(2) claims. Accordingly, *Landwehr*'s holding that a participant is the "plaintiff" for statute of limitations purposes does require this Court to hold a participant's arbitration agreement can affect the participant's ability to bring a § 502(a)(2) claim on behalf of a plan in court. Indeed, the reasoning in *Landwehr* affirmatively supports this Court's decision that a participant's arbitration agreement cannot affect the participant's ability to bring a § 502(a)(2) claim on behalf of a plan in court.[2]

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[2] To the extent the Defendants argue the decision to arbitrate is more akin to a statute of limitations issue than the decision to settle, the Court disagrees. Deciding to settle and deciding to ar-

In sum, the Court holds participants cannot sign an arbitration agreement, without the consent of a plan, that prevents the participants from bringing a § 502(a)(2) claim on behalf of the plan. Thus, the Plaintiffs' arbitration agreements do not prevent them from filing their § 502(a)(2) claims in court on behalf of the Plans, and Defendants' motion to compel arbitration of these claims is DENIED.

C. INDIVIDUAL ARBITRATION

The Court has ruled Plaintiffs' § 502(a)(2) claims are not required to be arbitrated, and Plaintiffs have brought no claims other than those under § 502(a)(2). Thus, the Court need not address the issue of individualized arbitration.

IV. CONCLUSION

For the reasons stated above, Defendants' motion to compel arbitration is DENIED.

IT IS SO ORDERED.

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bitrate are both decisions made by clients in the course of litigation. Both concern a party's ability to consent on the behalf of another and whether it would be equitable to do so. The statute of limitations, to the contrary, is a concept that simply determines when suits are too old to be actionable.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN L. MUNRO, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; et al., Plaintiffs - Appellants, v. UNIVERSITY OF SOUTHERN CALIFORNIA; et al., Defendants - Appellees.	No. 17-55550 D.C. No. 2:16-cv-06191-VAP-E Central District of California, Las Vegas ORDER

Before: THOMAS, Chief Judge, FRIEDLAND, Circuit Judge, and ZILLY,* District Judge.

The panel has voted to deny the petition for rehearing.

* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX D

Statutory Provisions Involved

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1132. Civil Enforcement.

(a) Persons empowered to bring a civil action.

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), (7), (8), or (9) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [1] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 1085 of this title, if the plan sponsor--

(A) has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section, by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of section 1021 of this title (or, in the case of an employer, subsection (l) of such section), or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

Federal Arbitration Act – Title 9 U.S.C.

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with

the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding there under, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy

the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or

persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.

If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed

or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgement; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.