No. 23-

IN THE

Supreme Court of the United States

WILMINGTON TRUST, N.A., BRIAN C. SASS, and E. STOCKTON CROFT IV,

Petitioners,

v.

MARLOW HENRY, ON BEHALF OF THE BSC VENTURES HOLDINGS, INC. EMPLOYEE STOCK OWNERSHIP PLAN, AND ON BEHALF OF A CLASS OF ALL PERSONS SIMILARLY SITUATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this case is whether the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), prohibits individual arbitration of claims brought under that statute pursuant to a binding arbitration provision. The petition for a writ of certiorari in *Argent Trust Co., et al. v. Robert Harrison*, No. 23-30 (Docketed July 11, 2023), currently pending before the Court presents a similar question.

This Court has never held that a federal statute is exempt from individual arbitration under the Federal Arbitration Act ("FAA"). Instead, the Court has consistently rejected all attempts to avoid individual arbitration of numerous federal statutes because there was no clear intention by Congress to override the FAA in those statutes and arbitration would not preclude the assertion of the federal statutory right under the judge-made "effective vindication" (or "prospective waiver") exception.

The Third Circuit, however, joined the Tenth and Seventh Circuits in concluding that ERISA is the first federal statute that can circumvent both the FAA's clear mandate to enforce arbitration agreements as written and this Court's clear instruction to harmonize statutes with the FAA. These decisions, if left in place, not only exempt ERISA claims from individual arbitration but also create a circuit split with the Ninth Circuit, which has compelled individual arbitration of ERISA claims.

The Court should grant this petition to review and reverse the Third Circuit's decision below, along with

the Tenth Circuit's decision in *Harrison v. Envision Management Holding, Inc.*, 59 F.4th 1090 (10th Cir. 2023), and confirm that nothing in ERISA precludes individual arbitration.

PARTIES TO THE PROCEEDING

Petitioners are Wilmington Trust, N.A; Brian C. Sass; and E. Stockton Croft IV.

Respondent is Marlow Henry, who purports to bring claims on behalf of himself, the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan, and all other similarly situated individuals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Wilmington Trust, N.A., successor by merger to Wilmington Trust Retirement and Institutional Services Company, is a wholly owned subsidiary of Wilmington Trust Corporation, which, in turn, is a wholly owned subsidiary of M&T Bank Corporation. M&T Bank Corporation is a publicly traded company, and no person or entity owns 10% or more of the stock of M&T Bank Corporation.

RELATED PROCEEDINGS

Marlow Henry v. Wilmington Trust, N.A., et al., No. 1-19-CV-1925, U.S. District Court for the District of Delaware. Order entered on September 10, 2021.

Marlow Henry v. Wilmington Trust, N.A., et al., No. 21-2801, U.S. Court of Appeals for the Third Circuit. Judgment entered June 30, 2023.

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INTRODUCTION

The Third Circuit is the latest to hold that a valid arbitration provision fails under the effective vindication doctrine, thereby subjugating the FAA to ERISA. In doing so, the Third Circuit's holding flies in the face of decades of this Court's precedent requiring individual arbitration of statutory claims absent a clear congressional mandate to the contrary. The decision also pits ERISA against the FAA, rather than harmonizing the two statutory schemes, and essentially provides ERISA plan providers with a Hobson's choice as to whether they must litigate plan-wide claims in front of an arbitrator or give up the benefits of arbitration. Finally, the decision splits with the Ninth Circuit's opinion in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019), which correctly held that provisions requiring individual arbitration of ERISA claims must be enforced.

The facts of this case are similar to the facts in the recently filed *Argent Trust* petition (Dkt. No. 23-30). Respondent was a participant in the Plan at the time the Plan was amended to include the individual arbitration provision and continued to be a Plan participant after the arbitration provision took effect. Respondent does not dispute that the arbitration provision encompasses Respondent's claim and that its plain terms instructed Respondent to commence an individual arbitration. Nevertheless, Respondent sued in federal court, asserting claims for himself and on behalf of the Plan and its participants. Petitioners filed a motion to dismiss in favor of individual arbitration, asking the district court to enforce the plain terms of the Plan's arbitration provision. Respondent opposed the motion, arguing

that the arbitration provision was unenforceable on two separate theories: that he did not consent to the arbitration provision and that the arbitration provision effectuated an invalid waiver of his statutory rights under ERISA.

The district court denied Petitioner's motion to dismiss solely based on Respondent's consent argument. The district court did not reach Respondent's waiver argument, but acknowledged that under this Court's precedent, "very little will satisfy [Respondent's] burden" to make a showing of an invalid waiver. Pet. App. 30a. Recognizing this Court's standard to establish an invalid waiver, the district court stated that it could not "see that [the relevant ERISA provisions] clear this hurdle." *Id.*

The Third Circuit affirmed the district court's decision, but on wholly distinct grounds. *See* Pet. App. 15a. Whereas the district court focused solely on Respondent's consent argument, the Third Circuit focused solely on whether the arbitration provision's "class action waiver amounts to an illegal waiver of statutory remedies." *See* Pet. App. 10a. Invoking the effective vindication doctrine, the Third Circuit held that the arbitration provision could not be reconciled with ERISA's statutory remedies and "when a provision of an arbitration clause purports to waive rights that a statute creates, it is a prohibited prospective waiver, and the provision must give way to the statute." *See* Pet. App. 13a.

In coming to this conclusion, the Third Circuit did not address this Court's precedents requiring harmony between the FAA and federal statutes, which includes compelling individual arbitration. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *reh'g*

denied, 143 S. Ct. 60 (2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018). The Third Circuit similarly ignored this Court's precedent that determined ERISA plan participants can bring individual claims under ERISA, rather than seeking plan-wide relief in each instance. *See LaRue v. DeWolff, Boberg, & Assocs.*, 552 U.S. 248, 258 (2008). And the Third Circuit failed to consider that this Court has concluded an ERISA claim is not an "agent or proxy" type of representative claim because each plan participant must have an individual interest separate from the plan's interest. *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020).

Putting these lines of authority together, the effective vindication doctrine—were it to be recognized—must preserve the right of plan participants to arbitrate only *individual* claims, not plan-wide claims. Even though ERISA also provides participants the permissive grant to bring claims on the plan's behalf, this is not a mandatory feature of ERISA and can be curtailed by a valid arbitration provision limiting a plan participant to pursue only his individual claims. The Third Circuit's opinion glosses over this Court's authority and stands in direct conflict with it.

This Court's intervention is required to resolve the growing split in authority among the lower courts over whether to enforce individual arbitration provisions in ERISA cases and to clarify that no ERISA-specific carveout from the FAA exists by means of the effective vindication doctrine.

OPINIONS BELOW

The Third Circuit's decision affirming the district court (Pet. App. 1a–15a) is available at 72 F.4th 499. The district court's order denying Petitioner's motion to dismiss (Pet. App. 16a–31a) is available at 2021 U.S. Dist. LEXIS 171927 and 2021 WL 4133622.

JURISDICTION

The Third Circuit entered its decision on June 30, 2023 (Pet. App. 1a–15a), and its Order remanding to the district court on July 24, 2023. (*See* 3d Cir. Dkt. 64-1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

> 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.

9 U.S.C. § 4.

> **(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 1909 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;

29 U.S.C. § 1132(a)(1)–(3).

> 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.

29 U.S.C. § 1109(a).

STATEMENT OF THE CASE

A. The ERISA Plan in Which Respondent Is a Participant Contains an Individual Arbitration Provision.

Respondent Marlow Henry was an employee of BSC Ventures, Inc. ("BSC") and has been a participant in the BSC Ventures, Inc. Employee Stock Ownership Plan (the "Plan") since its inception. The Plan is a defined contribution plan[1] under ERISA "that invests primarily in the stock of the company that employs the plan participants." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412 (2014); 29 U.S.C. § 1107(d)(6)(A); *see also* 26 U.S.C. § 4975(e)(7).

The Plan's governing document contains an arbitration provision that requires any claim "which arises out of, relates to, or concerns th[e] Plan, the Trust Agreement [for the Plan], or the Trust, including . . . without limitation claims for breach of fiduciary duty," be "resolved

1. A "defined contribution plan" is a "plan which provide[s] for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

exclusively by binding arbitration.[2] *See* D. Ct. Dkt. 13-1. The arbitration provision also contains a class action waiver, under which claims against the Plan "must be brought solely [in an] individual capacity and not in a representative capacity or on a class, collective, or group basis." *Id.* Further, the arbitration provision provides that an individual Plan participant cannot "seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to that participant. *Id.*

B. Despite the Plain Terms of the Arbitration Provision, Respondent Sues in Federal Court and the Lower Courts Decline to Dismiss Based on the Arbitration Provision.

In January 2016, the Plan purchased BSC common stock from Petitioners Brian C. Sass and E. Stockton Croft IV, among others. Petitioner Wilmington Trust, N.A. served as trustee to the Plan in connection with this transaction.

Ignoring the express terms of the Plan's arbitration provision, Respondent filed suit in the U.S. District Court for the District of Delaware purportedly on behalf of the Plan and a putative class of Plan participants. Respondent sued under ERISA claiming breach of fiduciary duty

2. The Plan document was amended to add this arbitration provision in 2017. Another amendment was adopted in 2019 that contained a substantially similar arbitration provision. The Plan document expressly permits BSC to modify or amend the terms of the Plan at any time in its discretion. The arbitration provision was included in the Plan at a time when Respondent was a participant and he continued to participate in the Plan after both amendments.

and violations of ERISA's prohibited transaction rules due to the Plan allegedly paying more than "adequate consideration" for BSC's common stock in 2016. *See* D. Ct. Dkt. 1.

Petitioners jointly moved to dismiss the action based on the arbitration provision.[3] *See* D. Ct. Dkts. 11 & 12. The district court denied the motion, holding that the "facts at this stage of proceedings plausibly support [Respondent's] assertion that he did not have notice and therefore did not have the necessary intent to manifest assent" to the Plan's arbitration provision. *See* Pet. App. 30a. The district court did not reach Respondent's alternative argument that the arbitration provision was an invalid waiver of his statutory rights under ERISA. But the district court surveyed this Court's precedents and acknowledged that "very little will satisfy [Respondent's] burden" to make a showing of an invalid waiver. *Id.* Recognizing this Court's standard to establish an invalid waiver, the district court then offered that it could not "see that [the relevant ERISA provisions] clear this hurdle." *Id.*

The Third Circuit affirmed on different grounds. *See* Pet. App. 10a–15a. The Third Circuit did not address

3. The motion was styled as a motion to dismiss, not a motion to compel arbitration, because the arbitration provision required that arbitration occur in Virginia, and district courts in the Third Circuit cannot compel arbitration outside the Third Circuit. *See* Pet. App. 9a. The Third Circuit determined that it had appellate jurisdiction to review the district court's order under 9 U.S.C. § 16(a) because the order substantively was one denying a motion to compel arbitration. *See id.* at 8a–9a.

whether Respondent had consented[4] to the arbitration provision and focused instead on whether the arbitration provision's "class action waiver amounts to an illegal waiver of statutory remedies." *See* Pet. App. 10a. Relying on the effective vindication exception, the Third Circuit concluded that the arbitration provision "purports to waive plan participants' rights to seek remedies expressly authorized by [ERISA]." *Id.* at 12a. The Third Circuit held that the arbitration provision could not be reconciled with ERISA's statutory remedies and that "when a provision of an arbitration clause purports to waive rights that a statute creates, it is a prohibited prospective waiver, and the provision must give way to the statute." *See* Pet. App. 13a.

In reaching its holding, the Third Circuit did not mention, let alone meaningfully address, this Court's precedent requiring harmony between the FAA and federal statutes, which includes compelling individual arbitration. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *reh'g denied*, 143 S. Ct. 60 (2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018). Nor did it provide any meaningful analysis on how its ruling did not "undermine" Third Circuit precedent and the decisions of other Circuit Courts compelling arbitration of ERISA claims. Pet. App. 10a n.8; *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1116 (3d Cir. 1993). In particular, the Third Circuit made no mention of *Dorman*, which explicitly enforced a provision

4. Recently, the Third Circuit compelled arbitration of ERISA claims because the plan, not plan participants, was "the relevant contracting party." *Berkelhammer v. ADP TotalSource Grp., Inc.*, ---F.4th---, 2023 WL 4554581, at *3 (3d Cir. July 17, 2023).

requiring individual arbitration of a plan member's ERISA claims. 780 F. App'x at 514. Nor did the Third Circuit grapple with the Seventh Circuit's factual distinctions and nuanced analysis in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613 (7th Cir. 2021). There, the Seventh Circuit found that "individualized arbitration" is not "inherently incompatible with ERISA." *Id.* at 622. However, unlike Respondent, the plaintiff in *Smith* expressly sought removal and replacement of the plan trustee pursuant to ERISA, 29 U.S.C. § 1109(a), which the arbitration provision purported to bar. The Seventh Circuit in *Smith* cited this irreconcilable conflict between the fiduciary removal/replacement remedy available under Section 1109(a) and the purported bar of that remedy by the arbitration provision as the basis for rejecting the arbitration provision in total. *Id.* at 617, 621. The Third Circuit failed to address the fact that no such conflict between Respondent's requested relief and the arbitration provision exists in this case. The Third Circuit also is at odds with the Seventh Circuit because it takes the narrow basis for rejection relied upon by the Seventh Circuit and broadens it to apply to claims seeking purely monetary relief, Pet. App. 13a, which the court in *Smith* recognized would be individually arbitrable under this Court's precedent. *See Smith*, 13 F.4th at 622.

The Third Circuit entered its Order remanding to the district court on July 24, 2023 (s*ee* 3d Cir. Dkt. 64-1), and Petitioners timely filed this petition.

REASONS FOR GRANTING THE WRIT

I. If This Court Does Not Intervene, ERISA Will Stand Alone as the Only Federal Statute Exempt from Individual Arbitration, in Violation of the FAA and This Court's Clear Precedents.

The FAA created "a liberal federal policy favoring arbitration agreements[.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Court has insisted that the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms[.]" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010).

There is no dispute that, if enforced, the plain terms of the Plan's arbitration provision here require individual arbitration of Respondent's ERISA claims. The Third Circuit, however, invalidated the arbitration provision based on its conclusion that plan participants such as Respondent must be allowed to pursue plan-wide relief under ERISA. *See* Pet. App. 10a–15a. While masked under the effective vindication exception, the Third Circuit's decision has the troubling effect of putting ERISA "at war" with the FAA and declaring ERISA the victor. If the Third Circuit's decision is not reversed, ERISA will stand alone as the only federal statute to trump the FAA and this Court's mandate to harmonize federal law.[5]

5. The Third Circuit's decision also runs headlong into *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 571 U.S. 99, 108 (2013), in which this Court found it "especially appropriate"

"It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys.*, 138 S. Ct. at 1619. This Court has *never* found any conflict between the FAA and another federal statute. And for good reason: Courts are not at "'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both,'" because they otherwise risk transforming from "expounders of what the law *is* into policymakers choosing what the law *should be*." *Epic Sys.*, 138 S. Ct. at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Any attempt to override the FAA's "liberal federal policy favoring arbitration agreements" therefore "faces a stout uphill climb"—there must be a "clearly expressed congressional intent" that is "clear and manifest." *Id.* at 1621, 1624.

Given this high bar, it is unsurprising that no federal statute has succeeded in displacing the FAA. "[T]his Court has rejected *every* such effort to date . . . with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act." *Id.* at 1627.

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to enforce the terms of an ERISA plan "as written." An ERISA plan is a written instrument that governs the parties' expectations. 29 U.S.C. § 1102. The plan document "is at the center of ERISA." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (ERISA's statutory scheme is "built around reliance on the face of written plan documents"). Because the arbitration provision was included within a valid ERISA-compliant plan document, this Court's precedents required enforcement of that provision "as written." *See Heimeshoff*, 571 U.S. at 108.

Indeed, this Court has permitted individual arbitration of claims arising under federal statutes that *expressly permit* class-wide or representative action. Consider this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). There, petitioner sought to avoid arbitration of his claims under the Age Discrimination in Employment Act ("ADEA"), which expressly allows employees to recover on behalf of "themselves and other employees similarly situated." *Id.* at 32; 29 U.S.C. § 216(b); *see also Am. Express Co.*, 570 U.S. at 237 (2013) (noting that *Gilmer* upheld an arbitration agreement and class waiver even though the ADEA "expressly permitted collective actions"). Despite the ADEA's plain language, "this Court had no qualms in enforcing a class waiver in an arbitration agreement[.]" *Am. Express Co.*, 570 U.S. at 237. As this Court made clear, "the fact that the [ADEA] provides for the *possibility* of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (citation omitted) (emphasis added).[6]

In *Epic Systems*, petitioners argued that Section 7 of the National Labor Relations Act ("NLRA") created an unwaivable statutory right to engage in representative litigation on behalf of other similarly situated parties because the NLRA protects workers' right to engage in

6. Similarly, the Fair Labor Standards Act ("FLSA") authorizes employees to sue on behalf of "themselves and other employees similarly situated" (29 U.S.C. § 216(b)), but "'[e]very circuit to consider the question' has held that the FLSA allows agreements for individualized arbitration." *Epic Sys. Corp.,* 138 S. Ct. at 1626 (quoting *NLRB v. Alternative Ent., Inc.*, 858 F.3d 393, 413 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part) (collecting cases)).

"'concerted activities for . . . mutual aid or protection.'" 138 S. Ct. at 1624 (quoting 29 U.S.C. § 157). This Court rejected petitioners' argument, finding no "clear and manifest" evidence that Congress intended the NLRA to displace the FAA's requirement to enforce waivers of class and collective actions because NLRA Section 7 "does not mention class or collective action procedures." *Id.*

And, more recently, in *Viking River Cruises*, this Court enforced individual arbitration of claims under California's Private Attorneys General Act ("PAGA"). At issue was an arbitration provision prohibiting "any dispute as a class, collective, *or representative* PAGA action." 142 S. Ct. at 1915–16 (emphasis added). Even though PAGA permitted "representative claims" that were "predicated on code violations sustained by other employees," this Court still enforced the arbitration provision that expressly precluded such actions. *See id.* at 1916, 1922–24.

ERISA—like the other federal statutes this Court found appropriate for individual arbitration—may be read to authorize plan participants such as Respondent to bring a representative action and pursue plan-wide relief. *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 253 (2008) (explaining that ERISA authorizes participants "to bring actions on behalf of a plan to recover for violations of the obligations defined in § 409(a)" of ERISA). But the import of this Court's precedents is clear: The FAA authorizes individual arbitration of claims under federal statutes that allow for class-wide or representative actions.

ERISA is no exception, as the district court in this case understood. The district court acknowledged that

"very little" would "satisfy [Respondent's] burden" to show that ERISA should displace the FAA and noted that it "cannot see that [the relevant ERISA provisions] clear this hurdle." Pet. App. 30a. The Third Circuit simply ignored the district court's discussion and this Court's decisions cited therein (in fact, they are not even mentioned).[7] Moreover, in reaching its decision, the Third Circuit offered no explanation as to why ERISA should override the FAA's "liberal policy" and this Court's emphatic instruction to harmonize federal statutes wherever possible. This is particularly concerning because ERISA does not "provide a congressional command sufficient to displace the Arbitration Act," let alone be the first statute to do so. *See Epic Sys. Corp.*, 138 S. Ct. at 1627–28 ("Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.").

This Court has provided guideposts for lower courts to consider when determining whether a statute overrides the FAA. The Court has "stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* at 1627. The Court has also recognized that Congress has

> shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, '[n]otwithstanding any other

7. The Third Circuit did cite *Epic Systems* for the broad proposition that "[t]he FAA creates a 'liberal federal policy favoring arbitration agreements,'" but it failed to follow the clear directive of that opinion. *See* Pet. App. 11a (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1621).

> provision of law, . . . arbitration may be used . . . only if' certain conditions are met, 15 U.S.C. § 1226(a)(2); or that '[n]o predispute arbitration agreement shall be valid or enforceable' in other circumstances, 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5567(d)(2); or that requiring a party to arbitrate is 'unlawful' in other circumstances yet, 10 U.S.C. § 987(e)(3).

Id. at 1626.

ERISA contains none of the hallmark indications that Congress intended for ERISA to override the FAA and preclude individual arbitration of ERISA claims. Nowhere does ERISA prohibit (or even reference) "arbitration." Nor does the statute mention "class actions." ERISA was enacted nearly fifty years after the FAA. If Congress wanted ERISA to modify or override the FAA's mandates, it knew how to do so and could have done so at the time. That Congress chose not to reinforces that the Third Circuit's decision cannot stand.

Further, this Court has already held that plan participants have a right to litigate claims individually, rather than on behalf of the plan. *See LaRue*, 552 U.S. at 256. In *LaRue*, the Court made clear that an individual in a defined contribution plan (like the Plan here) seeking recovery under 29 U.S.C. § 1132(a)(2) for a breach of fiduciary duty can bring a claim to remedy alleged harm that only affects that participant's account. *Id. Thole* is consistent with *LaRue* in requiring a plaintiff seeking to sue under an ERISA plan to show *individualized* injury to the plaintiff's own interest. *Thole*, 140 S. Ct. at 1620. In this regard, this Court in *Thole* clarified that

a plaintiff claiming injury under ERISA cannot do so solely in a representative capacity on behalf of the plan. *Id.* (distinguishing qui tam actions). Thus, taken together, *LaRue* and *Thole* demonstrate not only that ERISA claims are compatible with individual arbitration, but also that the Third Circuit's focus on a participant's ability to seek plan-wide relief was prioritized over the FAA improperly.

The Third Circuit's decision undermines this Court's clear guidance to the lower courts and opens the door to other statutes receiving similar exemptions from individual arbitration in violation of the FAA and this Court's precedent. The Court should review the Third Circuit's decision to remind the lower courts that it means what it has repeatedly said: Individual arbitration is permitted under federal statutes, including ERISA, absent clear and manifest congressional intent to the contrary. Because ERISA does not meet this high bar, claims under the statute can be subject to individual arbitration pursuant to a valid arbitration agreement.

B. This Court Should Review the Third Circuit's Decision to Clarify that Individual Arbitration Does Not Constitute "Ineffective" Means of Pursuing Rights Under ERISA.

"Given so much precedent pointing strongly in one direction," *Epic Sys.*, 138 S. Ct. at 1627, the Third Circuit could not rely on a congressional intent to limit arbitration of ERISA claims, and instead ignored *Epic Systems* and its related decisions by deploying the judge-made effective vindication (or prospective waiver) exception to invalidate the arbitration provision at issue here. *See* Pet App. 12a–15a. In doing so, the Third Circuit followed the

same analytical path as the Tenth and Seventh Circuits which end-runs this Court's precedents and the FAA.

The effective vindication exception "originated as dictum" in a footnote in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) in which the Court said that it may be willing to invalidate on "public policy" grounds an arbitration agreement that "operat[es] . . . as a prospective waiver of a party's right to pursue statutory remedies." The Court in *Mitsubishi* also noted that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637.

Since *Mitsubishi*, this Court has acknowledged the effective vindication exception in passing but has *never* applied it to invalidate an arbitration provision. *See Am. Express Co.*, 570 U.S. at 236 (collecting cases). Indeed, at least one Supreme Court Justice has suggested that the Court's consistent refusal to invoke the hypothetical exception means it no longer has any force. *See DirecTV, Inc. v. Imburgia*, 577 U.S. 47, 68 n.3 (2015) (Kagan, J., dissenting) ("[T]he Court's refusal to apply the principle in [*American Express*] suggests that the principle will no longer apply in any case."). Lower courts, however, are using the effective vindication exception to void arbitration provisions and circumvent this Court's clear mandate to permit individual arbitration to harmonize the FAA and other federal statutes. *See, e.g.*, *Henry*, 72 F.4th 499 at 507–08; *Harrison*, 59 F.4th at 1108–09; *Smith,* 13 F.4th at 621–22. The Court should review the Third Circuit's decision to clarify for the lower courts that the effective vindication exception does not bar individual arbitration

of a federal statute if the litigant can still pursue their cause of action under that statute.

The Third Circuit (like the Tenth Circuit in *Harrison*) determined that a plan participant has an unwaivable right to pursue plan-wide relief. *See* Pet. App. 14a–15a. As explained, this interpretation violates the long line of this Court's decisions permitting individual arbitration of federal statutory claims. *See supra* at 11–18. Further, the Third Circuit's decision lacks support in the statute's text or this Court's interpretative guidance under ERISA.

The Third Circuit invalidated the arbitration provision based on ERISA Sections 409 and 502. Under Section 502, a plan participant can bring a civil action "for appropriate relief under section 1109 of this title." 29 U.S.C. § 1132(a)(1), (2). That section, in turn, provides that a plan fiduciary who breaches its ERISA responsibilities:

> 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.

29 U.S.C. § 1109.

Nothing in these provisions indicates a congressional intent to create a substantive, unwaivable right to obtain plan-wide relief. Only Section 502 expressly addresses

a participant's rights, authorizing the participant to file suit for "appropriate relief under section 1109." 29 U.S.C. § 1132(a)(2). There is no mention of what qualifies as "appropriate relief" for an individual plan participant. And Section 409 does not address a participant's rights at all. *See* 29 U.S.C. § 1109. Rather, the provision articulates the extent of a fiduciary's liability in the event of a fiduciary breach.

At most, Sections 409 and 502 can be read to contemplate the *possibility* of plan-wide relief, but that does not mean they *guarantee* the right to pursue such relief. *See Am. Express Co.*, 570 U.S. at 236 (quoting *Gilmer*, 500 U.S. at 32) ("[S]tatutory permission [does] 'not mean that individual attempts at conciliation [are] intended to be barred.'") Any "right" conferred to a plan participant under these provisions is procedural and can be waived through a valid arbitration agreement requiring individual arbitration. *See supra* at 11–18.

The Court reached a similar conclusion in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). There, the Court enforced an arbitration provision that prohibited class-wide relief[8] under the Credit Repair Organization Act ("CROA") even though that statute expressly provided a "right to sue," referenced "class action," and declared that "[a]ny waiver" of the rights under the statute were "void." *Id.* at 99–100. The Court reasoned that "[h]ad Congress

8. Although not mentioned in this Court's decision, the arbitration provision stated that "[i]f a dispute is resolved by binding arbitration, you will have no right to . . . participate as part of a class of claimants relating to such dispute." *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1206 (9th Cir. 2010), *rev'd and remanded*, 565 U.S. 95 (2012).

meant to prohibit these very common provisions in the CROA, it would have done so." *Id.* at 103–04. So too here. If Congress had intended for the ability to pursue plan-wide remedies under ERISA to be unwaivable, it could have and would have made that clear in the statute's text. ERISA's silence on the issue is determinative.

The conclusion that plan-wide relief under ERISA is waivable through individual arbitration also finds support in this Court's prior decisions. In *LaRue*, the Court made clear that for a defined contribution plan (like the Plan at issue here), a participant's rights under ERISA are tied to his or her own individual account, not to the "entire plan." 552 U.S. at 256. For that reason, the Court found that Section 409(a) identifies the available "recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.*[9]

Application of *LaRue* in deciding the arbitrability of individual ERISA claims has split the Circuits.[10] The

9. In *Thole*, this Court held that an individual plan participant must have an individual interest independent from the plan to pursue a breach of fiduciary duty cause of action under ERISA. 140 S. Ct. at 1620. The Court rejected the argument that ERISA authorizes for plan participants "a general cause of action to sue for restoration of plan losses and other equitable relief," finding that the participants still needed to show a concrete and particularized injury under ERISA. *Id*. at 1620–21.

10. The questions presented in this petition are especially ripe as two additional appeals of decisions to deny motions to compel individual arbitration of ERISA claims currently are pending before the Second Circuit. *See Cedeno v. Argent Tr. Co.*, No. 20-cv-9987, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021), *appeal docketed*, No. 21-2891 (2d Cir. Nov. 22, 2021); *Lloyd v. Argent Tr.*

Ninth Circuit applied *LaRue* to hold that ERISA claims can be arbitrated on an individual basis. *See Dorman*, 780 F. App'x at 514. The court in *Dorman* explained that claims brought under 29 U.S.C. § 1132(a)(2) "are inherently individualized when brought in the context of a defined contribution plan," regardless of whether the claims "seek relief on behalf of a plan[.]" *Id.* (citing *LaRue*, 552 U.S. at 256). And because of this, nothing about requiring the plaintiff to engage in individual arbitration violated his rights or "relieve[d] a fiduciary from responsibility or liability." *Id.* at 513.

On the other hand, the Third, Seventh, and Tenth Circuits have split with *LaRue* and invalidated individual arbitration provisions under the theory that the arbitration provisions at issue did not allow the plaintiffs to seek plan-wide relief. *See Henry*, 72 F.4th at 507–08 & n.9; *Envision* 59 F.4th 1090, 1108–09; *Smith*, 13 F.4th at 616–19, 621–22. In doing so, each of these Circuits deployed the effective vindication exception which works to gut a party's ability to arbitrate on an individual basis in favor of a reading of ERISA that would allow for a plan participant to seek plan-wide relief, *see supra* at 11–18.

In sacrificing the provisions of the FAA due to the courts' perceived conflict with the provisions of ERISA, the Third, Seventh, and Tenth Circuits have forced parties to make the "same impermissible choice" between either arbitrating on a plan-wide basis or not arbitrating at all. *See Viking River Cruises*, 142 S. Ct. at 1918. At the same time, these decisions create unnecessary tension between

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Co., No. 22-cv-4129, 2022 WL 17542071 (S.D.N.Y. Dec. 6, 2022), *appeal docketed*, No. 22-3116 (2d Cir. Dec. 9, 2022).

the FAA and ERISA, as there is no provision in ERISA that expressly prohibits or curtails individual arbitrations of participant's claims.

Instead, the more logical extension of *LaRue* and *Thole*—consistent with ERISA's plain text—is that individual plan participants have an unwaivable right to bring a claim for *individual* relief when they have been harmed by alleged ERISA violations. That is the right that must be preserved through individual arbitration under the effective vindication exception. The Third Circuit's contrary holding must be reviewed and overturned by this Court.

CONCLUSION

For all these reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Third Circuit Court of Appeals.

DATED this 4th day of August, 2023.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 30, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2801

MARLOW HENRY, ON BEHALF OF THE BSC VENTURES HOLDINGS, INC. EMPLOYEE STOCK OWNERSHIP PLAN, AND ON BEHALF OF A CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED

v.

WILMINGTON TRUST NA; BRIAN SASS;
E. STOCKTON CROFT, IV,

Appellants.

On Appeal from the United States District Court for the District of Delaware. (D.C. Civil No. 1-19-cv-1925).
District Judge: Honorable Maryellen Noreika.

Before: CHAGARES, *Chief Judge*, JORDAN and SCIRICA, *Circuit Judges.*

November 9, 2022, Argued
June 30, 2023, Filed

OPINION

Appendix A

CHAGARES, *Chief Judge.*

Marlow Henry participated in an employee stock ownership plan ("ESOP") sponsored by his employer. After the ESOP purchased stock at what Henry believed was an inflated price, Henry filed a lawsuit against Wilmington Trust, N.A. ("Wilmington Trust"), the plan's trustee, and Brian Sass and E. Stockton Croft, executives of his employer (collectively, the "defendants"). He alleged that the defendants breached their fiduciary duties to the ESOP imposed by the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and engaged in transactions prohibited by ERISA. The defendants moved to dismiss. They contended that an arbitration provision, added to the ESOP's plan documents after Henry joined the ESOP, barred Henry from pursuing his claims in federal court. The District Court denied the motion to dismiss. For the following reasons, we will affirm the judgment of the District Court.

I.

Henry worked at BSC Ventures Holdings, Inc. ("BSC"), a company that makes custom return envelopes for mass mailings, between 2012 and 2019. In 2015, BSC created an ESOP for its employees. The ESOP is a pension plan subject to the requirements of ERISA. All BSC employees, including Henry, were automatically enrolled in the ESOP and were not permitted to opt out. Wilmington Trust served as the ESOP's trustee. Sass and Croft were executives at BSC who owned BSC stock and provided financial information and projections about BSC to Wilmington Trust.

Appendix A

All ERISA plans must "be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). In accordance with that statutory requirement, a plan document sets forth the structure of the BSC ESOP. ERISA plans must also "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). The plan document gave BSC "the right to amend the [ESOP] from time to time in its sole discretion," subject to restrictions not relevant here. Appendix ("App.") 144. BSC also reserved the right to terminate the ESOP at any time.

The ESOP purchased $50 million in BSC stock from Sass, Croft, and others in 2016. That purchase was mainly funded by a note payable to BSC. BSC stock was not (and is not) publicly traded, so Wilmington Trust had to value the stock before the ESOP could purchase it. Henry contends that Wilmington Trust breached its fiduciary duty to the ESOP by incurring debt to purchase BSC stock at an inflated price. Henry alleges that the price was excessive given the relative weakness of BSC's business model and the fair market value of the stock. He also contends that Wilmington Trust improperly relied on flawed financial projections provided by self-interested executives Sass and Croft to justify the transaction.

BSC amended the plan document in 2017 to include an arbitration provision. In relevant part, this arbitration provision required that any "claims for breach of fiduciary

duty" be "resolved exclusively by binding arbitration."[1] App. 159. The arbitration provision also included a class action waiver. That class action waiver stipulated that claims against the ESOP "must be brought solely [in an] individual capacity and not in a representative capacity or on a class, collective, or group basis." App. 160. It further prohibited a claimant from "seek[ing] or receiv[ing] any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to anyone other than the claimant. *Id.* The class action waiver was expressly nonseverable from the rest of the arbitration provision: "[i]n the event a court of competent jurisdiction were to find [the class action waiver's] requirements to be unenforceable or invalid, then the entire [a]rbitration [p]rocedure . . . shall be rendered null and void in all respects." App. 160-61.

Henry filed suit in the United States District Court for the District of Delaware on October 10, 2019. Suing on behalf of a putative class of ESOP participants, he sought several forms of relief, including a declaratory judgment that the defendants breached their fiduciary duties, a declaratory judgment that an indemnification agreement between Wilmington Trust and BSC violates ERISA, disgorgement, attorneys' fees, and "other appropriate equitable relief to the [ESOP] and its participants and beneficiaries." App. 60.

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1. BSC again amended the arbitration provision in 2019. The 2019 changes are immaterial to this appeal.

The defendants moved to dismiss in December 2019, arguing that Henry lacked Article III standing to bring his ERISA claims [2] and that, even if he had standing, Henry failed to state a claim for relief because the plan document required him to pursue his claims in arbitration. Henry opposed the motion to dismiss, arguing that the arbitration clause was invalid because it was added unilaterally and he had not consented to it. Henry also argued that the class action waiver — and, because of the nonseverabilty provision, the arbitration clause as a whole — was invalid because it required him to waive his rights to pursue plan-wide relief authorized by ERISA.[3] After oral argument on the motion, the parties filed supplemental briefing on whether the class action waiver was invalid because it required him to waive his right to pursue plan-wide relief.

The District Court denied the motion to dismiss. It concluded that it could not dismiss Henry's complaint in favor of arbitration because all parties to an arbitration agreement must manifest assent to the agreement, and Henry had not manifested his assent to BSC's addition of an arbitration provision to the ESOP plan document. Because it disposed of the motion by concluding that Henry had not consented to adding the arbitration clause,

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2. The District Court rejected this standing argument. The defendants do not press it on appeal.

3. Henry does not appear to contest that the ESOP included the amendment procedure required by 29 U.S.C. § 1102(b)(3), nor does he appear to contest that BSC complied with the ESOP's amendment procedure when it added the arbitration provision.

the District Court only briefly addressed the class action waiver issue in a footnote. It expressed skepticism that Henry could succeed on that issue. The District Court suggested that only a "clear and express command by Congress that an arbitration provision requiring a class action waiver is void" could establish the invalidity of the class action waiver and indicated that, in its view, the relevant remedial provisions of ERISA did not amount to the requisite clear statement by Congress. App. 15 n.9 (citing *Epic Sys. Corp. v. Lewis,* 138 S.Ct. 1612, 1628, 200 L. Ed. 2d 889 (2018)). The defendants timely appealed.

II.

As a threshold matter, Henry argues that we lack appellate jurisdiction to review the District Court's order denying the defendants' motion to dismiss.[4] "[W]e have an obligation to assure ourselves that jurisdiction exists," *Ellison v. Am. Bd. of Orthopaedic Surgery,* 11 F.4th 200, 205 (3d Cir. 2021), so we must address Henry's jurisdictional challenge before we may turn to the merits of this appeal. We have jurisdiction to review our own jurisdiction when it is in doubt. *Duncan v. Governor of Virgin Islands,* 48 F.4th 195, 203 n.6 (3d Cir. 2022).

The Federal Arbitration Act ("FAA") authorizes us to exercise jurisdiction in appeals "from . . . order[s] . . . denying a petition [under 9 U.S.C. § 4] to order arbitration

4. Because this ERISA case is a "civil action[] arising under the . . . laws . . . of the United States," the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

to proceed." 9 U.S.C. § 16(a)(1)(B). But, as Henry notes, the defendants did not bring a petition to order arbitration to proceed under 9 U.S.C. § 4: they brought a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).[5] The ultimate relief sought — a court order declining to adjudicate Henry's claims because an agreement requires that those claims be heard in an arbitral forum — is substantively similar across these two categories of motion. The text of the FAA, however, refers only to motions to compel arbitration. As we have acknowledged, "linguistically, a motion to dismiss . . . is a far cry from a motion to compel arbitration." *Harrison v. Nissan Motor Corp. in U.S.A.,* 111 F.3d 343, 349 (3d Cir. 1997) (quotation marks omitted). And if we cannot rely on 9 U.S.C. § 16(a)(1)(B) as a basis for appellate jurisdiction, we must face the question of whether we have jurisdiction to review the District Court's order denying the defendants'

5. In this case, the defendants could not have enforced the arbitration provision through the procedure set forth in 9 U.S.C. § 4. We have held that 9 U.S.C. § 4 does not permit a district court to enter an order compelling arbitration outside the district where it sits. *Econo-Car Int'l., Inc. v. Antilles Car Rentals, Inc.,* 499 F.2d 1391, 1394, 11 V.I. 258 (3d Cir. 1974). Henry brought his lawsuit in Delaware and the arbitration provision requires arbitration to occur in Roanoke, Virginia. The District Court therefore could not have granted a 9 U.S.C. § 4 petition to compel arbitration in this case. Accordingly, a Rule 12(b)(6) motion to dismiss was the appropriate procedural mechanism for enforcing the arbitration provision at issue in this litigation. *See Singh v. Uber Techs. Inc.,* 939 F.3d 210, 214 (3d Cir. 2019) ("[The defendant] moved for the District Court to dismiss the case and compel [the plaintiff] to have it decided by an arbitrator, on the basis of an agreement to arbitrate.").

motion to dismiss. Indeed, in most cases, we do not have appellate jurisdiction to review district court orders denying motions to dismiss. This is because our statutory jurisdiction is limited to "appeals from . . . final decisions of the district courts of the United States." 28 U.S.C. § 1291. An order denying a motion to dismiss is not a final decision because it does not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Weber v. McGrogan,* 939 F.3d 232, 236 (3d Cir. 2019) (quoting *Catlin v. United States,* 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945)).

Although there is some textual appeal to Henry's argument that we have appellate jurisdiction to review only denials of motions styled as petitions to compel arbitration under 9 U.S.C. § 4 — and not denials of other motions that have the effect of declining to enforce an arbitration agreement — that argument departs from our precedent. We have consistently held that under 9 U.S.C. § 16(a), "all orders that have the effect of declining to compel arbitration [are] reviewable." *Palcko v. Airborne Express, Inc.,* 372 F.3d 588, 592 (3d Cir. 2004) (quoting *Sandvik AB v. Advent Intern. Corp.,* 220 F.3d 99, 103 (3d Cir. 2000)). The substance of the motion and order, and not its form, determines its appealability. To determine whether an order is one that, in substance, declines to compel arbitration, "we examine the label and the operative terms of the district court's order, as well as the caption and relief requested in the underlying motion." *Devon Robotics, LLC v. DeViedma,* 798 F.3d 136, 146-47 (3d Cir. 2015). If we determine "that the order denied a motion to compel arbitration, then we will exercise jurisdiction

even if that order is not final." *Bacon v. Avis Budget Grp., Inc.,* 959 F.3d 590, 597 (3d Cir. 2020) (concluding that the denial of a motion for summary judgment was immediately appealable when the motion was, in substance, a motion to compel arbitration).

In this case, the defendants' motion to dismiss was substantively a motion to compel arbitration, and the District Court's order denying the motion to dismiss was substantively an order denying a motion to compel arbitration. While the defendants' motion to dismiss was not captioned as a motion to compel arbitration, much of their brief in support of their motion to dismiss focused on why Henry's claims were subject to arbitration. The brief explained that the defendants were pursuing a motion to dismiss rather than a motion to compel arbitration because the Delaware-based District Court could not compel arbitration in Virginia as the arbitration provision required. The District Court's order denying the motion to dismiss acknowledged that the defendants' motion to dismiss was "pursuant to a mandatory arbitration clause." App. 20. These documents make clear that the motion to dismiss before the District Court was effectively a motion to compel arbitration. And since the motion to dismiss was in substance a motion to compel arbitration, 9 U.S.C. § 16(a) gives us appellate jurisdiction to review the denial of that motion to dismiss.

III.

Having confirmed our jurisdiction, we turn to the merits.[6] The defendants argue that the District Court erred in concluding that the arbitration provision was unenforceable because Henry did not consent to it. Henry disagrees, but also argues on appeal that the class action waiver (and, by extension, the arbitration provision as a whole) is not enforceable because it requires him to waive statutory rights and remedies guaranteed by ERISA. We need address only the latter issue — whether the class action waiver amounts to an illegal waiver of statutory remedies — to resolve this appeal.[7] We agree with Henry that the class action waiver is unenforceable because it requires him to waive statutory remedies.[8] And because

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6. Since the questions presented in this appeal involve "the validity and enforceability of an agreement to arbitrate," our review is plenary. *Puleo v. Chase Bank USA, N.A.,* 605 F.3d 172, 177 (3d Cir. 2010).

7. Although the District Court focused on the issue of Henry's consent, "we may affirm on any basis supported by the record, even if it departs from the District Court's rationale." *Bedrosian v. United States Dep't of Treasury, Internal Revenue Serv.,* 42 F.4th 174, 185 (3d Cir. 2022) (quotation marks omitted). We express no position on whether, and under what circumstances, an ERISA plan participant must consent to the addition of an arbitration provision to an ERISA plan document before the plan participant may be bound by it.

8. We have held that ERISA claims are arbitrable, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 7 F.3d 1110, 1116 (3d Cir. 1993), and this opinion does not undermine that holding. We solely address the question of whether an arbitration clause

the class action waiver is expressly nonseverable from the rest of the arbitration provision, we will affirm the District Court's order declining to enforce the arbitration provision.

A.

The FAA creates a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp.,* 138 S. Ct. at 1621 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). But despite this federal policy, arbitration agreements are not enforceable in some cases. One such circumstance is when an arbitration provision functions as a "prospective waiver of a party's right to pursue statutory remedies." *Am. Exp. Co. v. Italian Colors Rest.,* 570 U.S. 228, 236, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (emphasis and quotation marks omitted). "Put differently, while arbitration may be a forum to resolve disputes, an agreement to resolve disputes in that forum will be enforced only when a litigant can pursue his statutory rights there." *Williams v. Medley Opportunity Fund II, LP,* 965 F.3d 229, 238 (3d Cir. 2020) (citations omitted). If an arbitration provision prohibits a litigant from pursuing his statutory rights in the arbitral forum, the arbitration provision operates as a forbidden prospective waiver and is not enforceable. *Id.*

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in an ERISA plan document may prevent a plan participant from pursuing the full range of statutory remedies created by ERISA.

Henry alleged that the defendants engaged in prohibited transactions and breached their fiduciary duties, in violation of ERISA. ERISA authorizes plan participants to bring suit to remedy breaches of fiduciary duties. 29 U.S.C. § 1132(a)(2). "[A]ctions for breach of fiduciary duty" under § 1132(a) are "brought in a representative capacity on behalf of the plan as a whole." *Massachusetts Mut. Life. Ins. Co. v. Russell,* 473 U.S. 134, 142 n.9, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). The statute also expressly authorizes certain remedies for violations. For instance, ERISA provides that a fiduciary who "breaches any" of his "responsibilities, obligations, or duties" to a plan "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. § 1109(a). A court may also order "such other equitable or remedial relief as the court may deem appropriate." *Id.* That relief may include "removal of [the] fiduciary." *Id.*

The class action waiver here purports to waive plan participants' rights to seek remedies expressly authorized by statute. Recall that the class action waiver claims to prohibit ESOP participants from bringing a lawsuit that "seek[s] or receive[s] any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to any third party. App. 160. But § 1109(a) expressly allows ERISA plan participants to seek such relief. For example, § 1109(a) allows a plan participant to bring a lawsuit seeking removal of a plan fiduciary. Such relief necessarily has plan-wide effect: it is impossible for

a court or arbitrator to order a plan's fiduciary removed *only* for the litigant, while leaving the plan's fiduciary in place for all other participants. *See Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 621-22 (7th Cir. 2021). Or take the clause of § 1109(a) that authorizes a plan member to seek restitution of plan losses from a fiduciary. That provision does not limit restitution to the plaintiff's losses: it "permit[s] recovery of *all* plan losses caused by a fiduciary breach." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 261, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008) (Thomas, J., concurring) (emphasis in original). Restitution of "all plan losses" would necessarily result in monetary relief to non-party plan participants. Yet the class action waiver purports to prohibit plan participants from bringing claims that have the "purpose or effect" of providing "monetary . . . relief" to third parties. App. 160.

Because the class action waiver purports to prohibit statutorily authorized remedies, the class action waiver and the statute cannot be reconciled. "[W]hat the statute permits, the plan precludes." *Smith,* 13 F.4th at 621. And when a provision of an arbitration clause purports to waive rights that a statute creates, it is a prohibited prospective waiver, and the provision must give way to the statute. In short, the class action waiver in this case cannot be enforced.[9] *Williams,* 965 F.3d at 238.

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9. We note that two other Courts of Appeals have addressed the validity of similar or identical waiver provisions in ERISA plan documents, and both have concluded that the provisions are invalid because they purport to waive the right to pursue forms of relief expressly authorized by ERISA. *See Harrison v. Envision Mgmt. Holding, Inc.*, 59 F.4th 1090, 1108-09 (10th Cir. 2023); *Smith,* 13 F.4th at 621-22.

The defendants argue that the prospective waiver doctrine does not bar enforcement of the class action waiver because Henry's complaint seeks only monetary remedies that can be logically constrained to Henry alone, rather than equitable remedies that are necessarily plan-wide. Not so. It is true that, as the defendants note, Henry's complaint does not explicitly request removal of Wilmington Trust as the plan fiduciary. But Henry's complaint asks the District Court to "[o]rder . . . appropriate equitable relief to the Plan and its participants and beneficiaries," App. 60, and ERISA explicitly identifies "removal of [the] fiduciary" as a form of inherently plan-wide relief that a "court may deem appropriate" in a breach of fiduciary duty case, 29 U.S.C. § 1109(a). And even if Henry's complaint is not properly construed as seeking removal of the fiduciary, it unmistakably seeks other forms of relief (such as restitution) that are both expressly authorized by statute and necessarily plan-wide.

The defendants finally argue that the class action waiver does not entirely eviscerate the possibility of plan-wide equitable remedies under ERISA, because even if a plan participant may not seek those remedies, the Department of Labor is not similarly constrained by the class action waiver and is statutorily authorized to bring suit against the ESOP for plan-wide relief. While ERISA does authorize the Department of Labor to seek relief for breaches of fiduciary duty by ERISA plan fiduciaries, it also expressly authorizes plan "participant[s] [and] beneficiar[ies]" to seek the remedies enumerated in § 1109(a). 29 U.S.C. § 1132(a)(2). The class action waiver requires ESOP participants to waive their statutory right

to pursue statutorily authorized remedies. It is therefore unenforceable even if it permits the Department of Labor to pursue those remedies on behalf of the ESOP's participants.

B.

Having concluded that the class action waiver clause of the arbitration provision is an unenforceable prospective waiver of Henry's ERISA rights, we also must determine whether the remaining portion of the arbitration provision is enforceable in the absence of the class action waiver. It is not. The class action waiver is explicitly nonseverable from the rest of the arbitration provision, and the defendants have conceded that the entire arbitration provision must fall with the class action waiver. Oral Argument at 16:10. Because the arbitration provision is void in its entirety, we will affirm the District Court's order declining to enforce it.

IV.

For the foregoing reasons, we will affirm the order of the District Court.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED SEPTEMBER 10, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 19-1925 (MN)

MARLOW HENRY, ON BEHALF OF THE BSC VENTURES HOLDINGS, INC. EMPLOYEE STOCK OWNERSHIP PLAN, AND ON BEHALF OF A CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiff,

v.

WILMINGTON TRUST, N.A., BRIAN C. SASS, AND E. STOCKTON CROFT IV,

Defendants.

MEMORANDUM OPINION

September 10, 2021
Wilmington, Delaware

/s/ Maryellen Noreika
NOREIKA, U.S. DISTRICT JUDGE

Appendix B

On October 10, 2019, Plaintiff Marlow Henry ("Plaintiff")[1] filed this action under Sections 404, 406, 409, 410, and 502(a) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1104, 1106, 1109, 1110, and 1132(a), for purported losses suffered by the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan ("the Plan")[2] and its participants caused by Wilmington Trust when it caused the Plan to buy shares of BSC Ventures Holdings, Inc. ("BSC") for more than fair market value in 2016 and other relief. (D.I. 1). On December 20, 2019, Defendants Wilmington Trust, N.A, Brian C. Sass and E. Stockton Croft IV (collectively "Defendants") moved to dismiss Plaintiff's complaint pursuant to a mandatory arbitration clause. (D.I. 11). The motion has been fully briefed. (D.I. 12, 13, 19, 20, 26, 28, 31, 32). On October 23, 2020, the Court heard argument. For the following reasons, Defendants' motion will be DENIED.

I. BACKGROUND

Plaintiff was an employee of BSC from January 2012 through January 2019. (D.I. 1 ¶ 13). In 2015, BSC adopted the Plan. (D.I. 1 ¶ 24). Since that time, Plaintiff has been a participant in the Plan. (D.I. 1 ¶ 13). On January 14, 2016,

1. The action was filed by Plaintiff on behalf of the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan, and on behalf of a class of all other persons similarly situated. Plaintiff has not moved for class certification.

2. The parties agree that the Plan is a pension benefit plan within the meaning of ERISA (D.I. 1 ¶¶ 13, 25; D.I. 12 at 2).

the Plan purchased BSC common stock from Defendants Sass and Cross and others ("the ESOP[3] Transaction") (D.I. 1 ¶¶ 5-9). Wilmington Trust served as Trustee to the Plan in connection with the ESOP Transaction. (D.I. 1 ¶ 6). It is the ESOP Transaction that is the basis for this litigation. Plaintiff alleges that the Plan overpaid for the stock and that the ESOP Transaction was prohibited by ERISA §§ 406(a)(1)(A) and 406(a)(1)(D).

The Plan is administered pursuant to a document called the "Amendment and Restatement of the BSC Acquisition Sub, LLC Profit Sharing Plan to Become A Part of the BSC Ventures Holdings, Inc. Employee Stock Ownership Plan" ("the Plan Document"). (D.I. 13-1). Since the ESOP Transaction, BSC has amended the Plan twice. (D.I. 12 at 2). On April 21, 2017, BSC adopted Amendment Number One to the Plan Document, which added Section 14 titled "ERISA Arbitration and Class Action Waiver" ("the 2017 Arbitration Provision"). (*Id.*; D.I. 13-2). Section 14 begins:

> **Section 14.01 Arbitration Requirement and Procedure**. Subject to and without waiver of full compliance with the Plan's claims procedures as described in Section 8.10, which to the extent applicable, must be exhausted with respect to any claim before any arbitration pursuant to this Section 14.01, all Covered Claims must be resolved exclusively pursuant to the provisions of this Section 14.01 (the "Arbitration Procedure").

3. "ESOP" refers to an Employee Stock Ownership Plan.

D.I. 13-2, § 14.01. It then continues:

> Any claim made by or on behalf of a Covered Employee, Participant or Beneficiary (a 'Claimant') which arises out of, relates to, or concerns this Plan, the Trust Agreement, or the Trust, including without limitation, any claim for benefits under the Plan, Trust Agreement, or Trust; any claim asserting a breach of, or failure to follow, the Plan or Trust; and any claim asserting a breach of, or failure to follow, any provision of ERISA or the Code, including without limitation claims for breach of fiduciary duty, ERISA § 510 claims, and claims for failure to timely provide notices or information required by ERISA or the Code (collectively, 'Covered Claims') shall be resolved exclusively by binding arbitration[.]

(D.I. 13-2, § 14.01(a)).

On January 1, 2019, the Plan adopted "Amendment Number Two to the Plan Document" ("the 2019 Arbitration Provision). The 2019 Arbitration Provision is substantially similar to the 2017 Arbitration Provision and modified the "Covered Claims" language of the 2017 Arbitration Provision as follows (language that was deleted is shown in italics, language that was added is shown as underlined):

> Any claim made by or on behalf of a *Covered Employee* current or former employee, a current or former Participant or current or

> former Beneficiary or by or on behalf of the Plan, the Trust or under the Trust Agreement (a "Claimant") which arises out of, relates to, or concerns this Plan, the Trust Agreement, or the Trust, including without limitation, any claim for benefits under the Plan, Trust Agreement or Trust; any claim asserting a breach of, or failure to follow, the terms of the Plan or Trust Agreement or Trust.[4]

The 2017 and the 2019 Arbitration Provisions also contain a waiver of the Plan participants' right to bring a representative action ("Class Action Waiver"). The waiver in the 2017 Arbitration Provision states:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to one Claimant's Covered Claims, and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Covered Employee, Participant or Beneficiary other than the Claimant.

4. Under the 2017 and 2019 Arbitration Provisions, "arbitration proceedings shall be held in Roanoke, Virginia, or at such other place as may be selected by mutual agreement of the parties."

(D.I. 13-2, § 14.01(b)).[5]

The Class Action Waiver in both Arbitration Provisions also states: "Any dispute or issue as to the applicability or validity of this [section] (the 'Class Action Waiver') shall be determined by a court of competent jurisdiction." (*Id.*).

II. LEGAL STANDARD

A. Standing

To bring an ERISA lawsuit a plan participant must meet the standing requirements of the statute as well as those of Article III. *See Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455 (3d Cir. 2003) (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)) "A motion to dismiss for want of standing is . . . properly brought pursuant to Rule 12(b)(1), because standing is a jurisdictional matter." *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 357 (3d Cir. 2014) (internal quotations omitted); *see also Acrisure Holdings, Inc. v. Frey*, No. CV 18-1514-RGA-MPT, 2019 U.S. Dist. LEXIS 48639, 2019 WL 1324943, at *5 (D. Del. Mar. 25, 2019) (quoting *In re Schering Plough Corp. Intron/ Temodar Consumer Class Action*, 678 F.3d 235, 243 (3d Cir. 2012)).

5. The 2019 Arbitration Provision modified the Class Action Waiver to refer to an "individual or entity" instead of "Covered Employee, Participant, or Beneficiary." (D.I. 13-3, §14.01(b)).

Here, the parties agree that the challenge is a facial challenge to standing,[6] which "attacks the complaint on its face without contesting its alleged facts" and "is like a 12(b)(6) motion in requiring the court to consider the allegations of the complaint as true." *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 268 (3d Cir. 2016); *Aichele*, 757 F.3d at 358. Thus, the Court must "accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party." *In re Schering Plough*, 678 F.3d at 243 (quoting *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)). The Third Circuit has set forth a three-step approach for this analysis:

> "First, the court must take note of the elements a plaintiff must plead to state a claim. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

In re Schering Plough Corp. Intron/Temodar Consumer Class Action, 678 F.3d 235, 243 (3d Cir. 2012) (internal quotation marks and alterations omitted) (quoting *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir.2010)).

6. *See* D.I. 12 at 6, D.I. 19 at 6.

Appendix B

To meet the constitutional minimum of Article III standing, a plaintiff must establish three elements: "a concrete and particularized invasion of a legally protected interest," a "causal connection between the injury and the conduct complained of," and "a likelihood that the injury will be redressed by a favorable decision." *Hartig*, 836 F.3d at 269 (internal quotation marks omitted) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Article III's injury requirement "is not Mount Everest." *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017). Rather, the constitution affords a "generous" understanding of injury, "requiring only that [a] claimant allege some specific, identifiable trifle of injury." *Id.*

In the context of ERISA claims, a plaintiff bringing an action on behalf of a plan must allege injury to his own plan account. *See Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608 (6th Cir. 2007) ("Merely because Plaintiffs claim that they are suing on behalf of their respective ERISA plans does not change the fact that they must also establish individual standing."), *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) ("Braden has satisfied the requirements of Article III because he has alleged actual injury to his own Plan account . . . fairly traceable to [defendants'] conduct . . . [and] likely to be redressed by a favorable judgment."

B. Federal Arbitration Act

It is settled in the Third Circuit that "statutory ERISA claims are subject to arbitration under the [Federal Arbitration Act ("FAA")] when the parties have executed a valid arbitration agreement encompassing the claims at issue." *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 n.1 (3d Cir. 1993). With the FAA, "Congress has instructed federal courts to enforce arbitration agreements according to their terms — including terms provided for individualized proceedings." *Epic Sys. Corp. v. Lewis*, - U.S.--, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018)). This ensures that arbitration agreements "are enforceable to the same extent as other contracts." *Puleo v. Chase Bank USA, NA.*, 605 F .3d 172, 178 (3d Cir. 2010).

When presented with an arbitration provision, this Court's task is to determine whether "a valid agreement to arbitrate exists between the parties and [whether] the specific dispute falls within the substantive scope of that agreement." *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137 (3d Cir. 1998). When conducting this analysis, courts in the Third Circuit apply the standard for failure to state a claim under Rule 12(b)(6). *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 519 (3d Cir. 2019) ("*Remicade*") (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415, 203 L. Ed. 2d 636 (2019)). Although the Third Circuit has held that a district court lacks the authority to compel arbitration outside of its district, *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1394, 11 V.I. 258 (3d Cir. 1974), district

courts may dismiss actions that are subject to arbitration elsewhere. *See, e.g.*, *Sanum Inv. Ltd. v. San Marco Capital Partners LLC*, 263 F. Supp. 3d 491, 496-97 (D. Del. 2017).

III. DISCUSSION

A. Plaintiff's Constitutional Standing

To have standing, Plaintiff "must assert facts that affirmatively and plausibly suggest" that he "has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right." *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012). That is, Plaintiff must identify a concrete and particularized injury with adequate specificity.

Defendants argue that Plaintiff lacks standing because he does not allege sufficient facts to support a plausible inference of harm. They assert that Plaintiff alleges that the ESOP "paid too much," but offers no facts to support that conclusion. The Court disagrees. Broadly read, Plaintiff's Complaint alleges sufficient facts. Specifically, Plaintiff alleges that he held BSC stock in his individual account in the Plan, has a vested interest in that stock, and the value of the stock in his account was diminished due to Defendants' ERISA violations in the stock purchase transaction that caused the Plan to pay too much for the stock and caused fewer shares to be allocated to Plaintiff. (*See* D.I. 2 ¶¶ 2, 3, 9, 10, 13, 37, 39, 45, 50, 70, 78, 99). These allegations, taken together and accepted as true, are sufficient to establish Plaintiff's standing.

B. The Plan's Arbitration Provisions

The Plan does not speak to whether a court or arbitrator should decide the scope of the Arbitration Provisions. Absent a clear delegation clause reserving scope determinations to the arbitrator, the Court must decide whether the claims in the Complaint are covered by an agreement to arbitrate. *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 215 (3d Cir. 2019). In doing so, the Court must consider two questions: "(1) 'whether the parties have a valid arbitration agreement at all' (i.e., its enforceability), and (2) 'whether a concededly binding arbitration clause applies to a certain type of controversy' (i.e., its scope)." *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515, 519 (3d Cir. 2019).

Here, Plaintiff does not dispute the second prong — that his claims are within the scope of the Arbitration Provisions. That leaves the first prong — whether the Arbitration Provisions are valid. As to that issue, there are two disputes (1) whether the Arbitration Provisions are invalid because Plaintiff did not agree to them and (2) whether the Class Action Waiver is invalid because it disallows plan-wide relief for claims under ERISA §502(a)(2) (29 U.S.C. §1132(a)(2)) and thus is "contrary congressional command."

1. Consent to the Arbitration Provisions

Henry argues that the arbitration provision is not valid because he never gave voluntary and knowing

consent.[7] (D.I. 19 at 19). Under the FAA, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). Defendants assert that Henry consented to the arbitration provision by continuing to remain employed at the Company after the provision was adopted. (D.I. 12 at 8-9).

The Court is mindful that an ERISA plan is a bilateral contract whereby participants agree to be bound by the terms of the plan document in exchange for receiving employer provided benefits and that "[t]he plan, in short, is at the center of ERISA." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013). It is "the administrator's duty is to see that the plan is 'maintained pursuant to [that] written instrument.'" *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 108, 134 S. Ct. 604, 187 L. Ed. 2d 529 (2013) (quoting 29 U.S.C. § 1102(a)(1)). "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995) (citing *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir. 1990); *see also* 29 U.S.C. §§ 1102(a), (b). That being said, in the Third Circuit "[f]or a court to enter an order compelling arbitration there must be sufficient

7. There is no dispute that ERISA claims are properly the subject of arbitration upon proper consent.

evidence that the parties consented to arbitration in an express agreement." *Medtronic AVE, Inc. v. Advanced Cardiovascular Sys., Inc.*, 247 F.3d 44, 54 (3d Cir. 2001). The Court is unaware of (and the parties have not cited to) any exception to this requirement in the context of arbitration of ERISA claims. Thus, absent Third Circuit authority, the Court is unwilling to conclude that the traditional contract analysis that governs whether there is an arbitration agreement is displaced in the context of ERISA plans.[8]

Defendants rely on the Ninth Circuit decision in *Dorman v. Charles Schwab* for its statement that "[a] plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect." 780 F. App'x 510, 512 (9th Cir. 2019). *Dorman*, however, provided no reasoning for its decision. Moreover, courts in the Third Circuit look to state law when determining whether the parties have a valid arbitration agreement. *Jaludi v. Citigroup*, 933 F.3d 246, 254 (3d Cir. 2019). Defendants assert that the Plan

8. Defendants argue that requiring notice and consent would deprive plan sponsors of the freedom to make necessary modifications and make impossible efficient administration of plans because it would risk creating innumerable individual benefit plans with distinct terms for each individual participant. Although the Court agrees that such out an outcome would be inconsistent with the goal of uniformity that Congress sought to implement with ERISA, Defendants argument seems overstated. Indeed the Court has little doubt that plan sponsors have found and will continue to find ways to provide some notice and obtain sufficient consent for arbitration provisions from those who wish to continue to participate in a particular plan.

is governed by Virginia state law and thus Virginia state law governs. (D.I. 12 at 7-8).

"[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration." Restatement (Second) of Contracts § 17 (1981); *see also Phillips v. Mazyck*, 273 Va. 630, 643 S.E.2d 172, 175 (Va. 2007) (quoting *Valjar, Inc. v. Maritime Terminals, Inc.*, 220 Va. 1015, 265 S.E.2d 734, 737 (Va. 1980) ("A contract cannot exist if the parties never mutually assented to terms proposed by either."). A manifestation of mutual assent may be made by words or conduct. Restatement (Second) of Contracts § 17 (1981). But "[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents." Restatement (Second) of Contracts § 19 (1981); *see also Lacey v. Cardwell*, 216 Va. 212, 217 S.E.2d 835, 843 (Va. 1975) ("'Both the offer and acceptance may be by word, act or conduct which evince the intention of the parties to contract.'" (quoting *Green's Ex'rs v. Smith*, 146 Va. 442, 452, 131 S.E. 846, 848 (Va. 1926)). Thus, Virginia state law requires that the party intend for his conduct to manifest assent. *See Lacey*, 217 S.E.2d at 843.

Here, Henry started employment at BSC in January 2012, before BSC adopted the ERISA plan in January 2015. (D.I. 15-1 ¶¶ 3, 13). It is unclear whether notice was provided to any of the Plan participants when the Plan later adopted the arbitration provision in 2017. Henry, however, asserts that the first time he learned of the

arbitration clause was "after [he] filed this lawsuit." (D.I. 15-1 ¶ 6). He asserts that he was never asked to sign an agreement with BSC or anyone else regarding the arbitration clause. (D.I. 15-1 ¶ 6). He contends he also never received any notice about the arbitration clause around the time it was adopted (or ever). (*Id.* ¶ 5). The facts at this stage of proceedings plausibly support Henry's assertion that he did not have notice and therefore did not have the necessary intent to manifest assent.

2. Class Action Waiver

Having found that the Court cannot dismiss in favor of arbitration pending determination as to whether Plaintiff provided the requisite consent, the Class Action Waiver (which is part of the Arbitration Provision) also cannot be enforced at this time.[9]

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9. That being said, were consent established for the Arbitration Provision, Henry, as the party seeking a determination that the FAA enforcing the Class Action Waiver and ERISA "cannot be harmonized and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic*, 138 S. Ct. at 1614 (quoting *Vimar Seguros y Reaseguros, S.A., v. M/V Sky Reefer*, 515 U.S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995) (internal quotation marks omitted)). Indeed, in *Epic*, the Supreme Court identified "many cases over many years" where it failed to find "a congressional command sufficient to displace the Arbitration Act" even in statutes that "expressly permitted collective legal actions" and "declared 'any waiver' of the rights provided to be 'void.'" *Id.* at 1628 (punctuation omitted). This suggests that very little will satisfy Henry's burden, except a clear and express command by Congress that an arbitration provision requiring a class action waiver is void. The Court cannot see that ERISA §§ 409(a) and 410(a) clear this hurdle.

IV CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss pursuant to a mandatory arbitration clause (D.I. 11) is DENIED. An appropriate order will follow.

ORDER

At Wilmington, this 10th day of September 2021, for the reasons set forth in the Memorandum Opinion issued on this date, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff's Complaint (D.I. 11) is DENIED.

/s/ Maryellen Noreika
The Honorable Maryellen Noreika
United States District Judge