No. 23-

IN THE

Supreme Court of the United States

ARGENT TRUST COMPANY; ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS; ENVISION MANAGEMENT HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE; DARREL CREPS, III; PAUL SHERWOOD; JEFF JONES; AARON RAMSAY AND TANWEER KHAN,

Petitioners,

v.

ROBERT HARRISON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this case is whether a participant in a plan governed by ERISA who asserts statutory claims under that statute can be compelled, pursuant to a binding arbitration provision, to submit his claims to individual arbitration.

On several past occasions, parties have asked this Court to invalidate binding arbitration provisions as contrary to various federal laws or policies. Rights enshrined in those other statutes, parties claimed, could not be vindicated if parties were required to submit to individual arbitration. But in each instance this Court has made clear that the FAA requires that arbitration clauses be enforced, unless another federal statute evinces a clear intention by Congress to override the FAA's commands. The Ninth Circuit has enforced individual arbitration of ERISA claims, while three circuits—the Seventh Circuit, the Tenth Circuit in this case, and the Third Circuit in a more recent decision—created a split by reaching the opposite conclusion.

The Court should grant this petition to review and reverse the Tenth Circuit's decision below and answer the important federal question presented here in the affirmative: Nothing in ERISA precludes individual arbitration.

PARTIES TO THE PROCEEDING

Petitioners are Argent Trust Company; Envision Management Holding, Inc. Board of Directors; Envision Management Holding, Inc. Employee Stock Ownership Plan Committee; Darrel Creps, III; Paul Sherwood; Jeff Jones; Aaron Ramsay; and Tanweer Khan.

Respondent is Robert Harrison, who purports to bring claims on behalf of himself, the Envision Management Holding, Inc. ESOP, and all other similarly situated individuals.

Grace Heath, also purportedly on behalf of herself, the Envision Management Holding, Inc. ESOP, and all other similarly situated individuals, is a plaintiff in the proceedings below who was added in an amended complaint filed on June 21, 2023, *see* D. Ct. Dkt. 91, after the Tenth Circuit issued the decision at issue in this petition. Along with Petitioners, Nicole Jones and Lori Spahn are defendants in the proceedings below. Defendants Nicole Jones and Lori Spahn were added in the same amended complaint filed on June 21, 2023.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Argent Trust Company is a private Tennessee corporation wholly owned by Argent Financial Group, Inc. No public company is an owner of 10% or more of the stock of Argent Trust Company. Origin Bancorp, Inc., a publicly traded company, owns more than 10% of the common stock of Argent Financial Group, Inc.

In addition, no public company is an owner of 10% or more of the stock of Envision Management Holding, Inc.

RELATED PROCEEDINGS

Harrison v. Envision Management Holding, Inc. et al., No. 21-304, U.S. District Court for the District of Colorado. Order entered Mar. 24, 2022.

Harrison v. Envision Management Holding, Inc. et al., No. 22-1098, U.S. Court of Appeals for the Tenth Circuit. Judgment entered Feb. 9, 2023.

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Petitioners respectfully file this petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's decision affirming the district court (Pet. App. 1a-44a) is available at 59 F.4th 1090. The district court's order denying the motion to compel arbitration (Pet. App. 45a-62a) is available at 593 F. Supp. 3d 1078.

JURISDICTION

The Tenth Circuit entered its decision February 9, 2023 (Pet. App. 1a-44a) and its Order denying a timely filed petition for rehearing or rehearing en banc April 10, 2023 (Pet. App. 63a-64a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are 9 U.S.C. § 4 (reproduced at Pet. App. 65a-66a) and 29 U.S.C. §§ 1132(a)(1)-(3), 1109(a) (reproduced at Pet. App. 67a-68a).

INTRODUCTION

For decades, this Court has held that valid arbitration provisions must be enforced, even when the provisions require arbitration of statutory claims on an individual basis. This Court has also instructed lower courts to

harmonize statutes with the Federal Arbitration Act ("FAA") in order to enforce arbitration provisions. Yet again, a lower court has declined to compel individual arbitration, based on a holding that another federal statute, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides a right to bring a representative or collective claim that cannot be modified by an individual arbitration provision. Nothing in ERISA creates a conflict with the FAA or overrides the dictates of the FAA to preclude individual arbitration.

The Ninth Circuit previously reached the correct decision, enforcing individual arbitration of ERISA claims in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019). Since then three courts of appeals—the Tenth Circuit in this case, as well as the Seventh and Third Circuits—have reached contrary holdings and created a split of authority based on conclusions that conflict with this Court's precedent.

The ERISA plan at issue here has, since its inception, required individual arbitration of statutory ERISA claims. Respondent alleged below that Petitioners breached their ERISA duties and such breaches harmed his individual plan account. He does not dispute that the very same ERISA-regulated plan under which he seeks recovery contains a binding individual arbitration requirement, or that he raises claims that fall within the scope of the arbitration requirement.

Notwithstanding that the arbitration provision is valid and requires individual arbitration, Respondent sued in federal court, asserting claims for himself, as well as claims on behalf of the plan and its participants

in a putative representative and class action capacity. Petitioners moved to enforce the plain terms of the plan and to compel arbitration, and Respondent argued in opposition that the arbitration provision in the plan is unenforceable. He relied on the judge-made "effective vindication" exception,[1] which this Court has recognized in theory but never applied, to argue that ERISA overrides both the plan language (requiring arbitration) and the clear mandate of the FAA (requiring the enforcement of valid arbitration provisions).

The Tenth Circuit agreed, holding that ERISA protects "certain statutory rights" to bring plan-wide representative claims that cannot be effectively vindicated in individual arbitration. In doing so, the court read into ERISA an inherent, substantive right by an individual participant to sue in federal court on behalf of an entire plan that cannot be modified by a provision requiring individual arbitration. ERISA provides no such right.

To reach its conclusion, the Tenth Circuit sidestepped some decisions from this Court and ignored others entirely. Each time this Court has been presented with an argument that the "effective vindication" exception prohibits individual arbitration of one federal claim or another, it has rejected that argument and compelled arbitration. *See Am. Express*, 570 U.S. at 235-36 (collecting cases). Indeed, some members of this Court suggested

1. The "effective vindication" exception is a judge-made doctrine that this Court has recognized but never applied. The exception provides that an arbitration provision may be unenforceable if it would prevent a party from pursuing substantive statutory rights. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

the doctrine is a dead letter. *DirecTV, Inc. v. Imburgia*, 577 U.S. 47, 68 n.3 (2015) ("[T]he Court's refusal to apply the principle in [*American Express*] suggests that the principle will no longer apply in any case." (Ginsburg, J., *dissenting*)).

This Court should grant certiorari to review the Tenth Circuit's decision because it opens up a split of authority on an important federal question with the Ninth Circuit, which previously enforced individual arbitration of ERISA claims. *See Dorman*, 780 F. App'x at 514. This split is deepening, with the Seventh Circuit in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613, 622 (7th Cir. 2021) and Third Circuit in *Henry v. Wilmington Tr. N.A.*, No. 21-2801, 2023 WL 4281813 (3d Cir. June 30, 2023) coming out on the side of the Tenth Circuit to reject that ERISA claims can be arbitrated on an individual basis.

Not only has the Tenth Circuit and these two other courts of appeals created a split with the Ninth Circuit, but the courts have done so based on conclusions that conflict with this Court's precedent.

The Tenth Circuit's decision subjugates the FAA to ERISA and thus sets up a conflict with this Court's decisions regarding those two federal statutes that, read properly, exist in harmony. The decision below sees conflict between, on the one hand, ERISA's purported substantive right to allow participants to seek relief as a representative of an entire ERISA plan, and on the other the FAA's mandate that courts enforce valid arbitration provisions as written, including when they require individual arbitration. Faced with that conflict, the decision below required the FAA to yield to ERISA.

The Tenth Circuit's holding that the FAA must be tossed aside in favor of ERISA cannot be squared with this Court's precedents, which require courts to harmonize other statutes with the FAA when possible. This Court has steadfastly refused to countenance prior attempts to bypass arbitration, observing that "[i]n many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes[,]" and, "[i]n fact, this Court has rejected *every* such effort to date." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018). If the Tenth Circuit's decision survives, ERISA claims will stand alone as an exception to this Court's commitment to enforcing individual arbitration provisions.

In addition, the Tenth Circuit's conclusion that ERISA claims cannot be arbitrated on an individual basis conflicts with two lines of decisions from this Court. First, in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *reh'g denied*, 143 S. Ct. 60 (2022), and *Epic Systems*, this Court enforced individual arbitration of statutory claims, even where in the absence of an arbitration provision the statutory schemes at issue would otherwise allow a plaintiff to bring representative or collective claims in court.

Second, this Court has already decided that ERISA plan participants can bring claims on an individual basis (rather than as representative of an ERISA plan). *LaRue v. DeWolff, Boberg, & Associates, Inc.*, 552 U.S. 248, 258 (2008) and *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), recognize that an ERISA plan participant has a right to bring an individual claim for relief for alleged ERISA violations. For purposes of the effective vindication

exception, that is the right that must be preserved in arbitration. Even though ERISA may *allow* a plan participant to bring representative claims, under *Viking River Cruises* and *Epic Systems*, such representative claims can be prohibited in the face of a provision that requires individual arbitration of ERISA claims. The Tenth Circuit's invalidation of this arbitration provision offends both of these lines of decisions from this Court.

This Court's intervention is required to resolve the split of authority that has grown based on lower courts' conflicts with this Court's prior decisions, and to harmonize the law to remove an ERISA-specific carve-out from the FAA that has no basis in ERISA's text.

STATEMENT OF THE CASE

A. This ERISA Plan Contains An Individual Arbitration Provision

This case involves an employee stock ownership plan ("ESOP"), which is a defined contribution plan governed by ERISA and the Internal Revenue Code "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); 26 U.S.C. § 4975(e)(7). Here, Envision Management Holding, Inc. ("Envision") established the Envision Management Holding, Inc. Employee Stock Ownership Plan (the "Plan") to provide Plan participants—Envision employees—with a retirement benefit in the form of Envision stock.

Respondent has been a participant in the Plan since it was adopted. *See* D. Ct. Dkt. 1, at 8; D. Ct. Dkt. 91, at 8.

The governing Plan document describes the duties of Plan fiduciaries and the benefits due to participants under the Plan. *See* D. Ct. Dkt. 1, at 10-11; D. Ct. Dkt. 91, at 11-12.

From the Plan's inception, it has included an "ERISA Arbitration and Class Action Waiver." D. Ct. Dkt. 34-1, § 21. That section provides that "all Covered Claims must be resolved exclusively pursuant to the provisions of this Section 21." *Id.*, § 21.1. The Plan defines "Covered Claims" to include "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 . . . ." *See id.*, § 21.1(a).

Section 21.1(b) of the Plan (titled "No Group, Class, or Representative Arbitrations") provides that 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." *Id.*, § 21.1(b). Claimants are entitled to pursue remedies only for their individual Plan accounts (as opposed to the accounts of any other Plan participants). *Id.* ("Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief" to anyone other than the Claimant.). This section is "material and non-severable," and "[a]ny dispute or issue as to the applicability or validity" of it "shall be determined by a court of competent jurisdiction," rather than an arbitrator. *Id.*

B. Despite The Arbitration Provision, Harrison Sues In Federal Court And The Courts Below Decline To Enforce Arbitration

On January 29, 2021, Respondent filed suit in the United States District Court for the District of Colorado. *See* D. Ct. Dkt. 1. All of Respondent's claims relate to a transaction in which the Plan purchased Envision stock and allege violations of ERISA, including under 29 U.S.C. § 1132(a)(2) and (a)(3). *See* D. Ct. Dkt. 1, at 28-38; D. Ct. Dkt. 91, at 31-45. Respondent alleges that Petitioners caused or allowed the Plan to pay more for the Envision stock than it was actually worth, thereby diminishing the value of the participants' Plan accounts. *See* D. Ct. Dkt. 1, at 28-38; D. Ct. Dkt. 91, at 31-45. This, Respondent alleges, rendered the Plan's stock purchase a "prohibited transaction" in violation of ERISA and constituted a breach of fiduciary duty and various other violations of ERISA. Respondent sought plan-wide and class relief, *see* D. Ct. Dkt. 1, at 23-28; D. Ct. Dkt. 91, at 26-31, and requested relief that included removal of Argent Trust Company as a trustee of the Plan, *see* D. Ct. Dkt. 1, at 39; D. Ct. Dkt. 91, at 45.

Petitioners moved to enforce the binding arbitration provisions in the Plan and to stay litigation under sections 3 and 4 of the FAA. *See* D. Ct. Dkt. 34. The district court denied the motion on March 24, 2022, *see* Pet. App. 45a-62a. The district court applied the "effective vindication" exception, which it acknowledged is a "rare" exception to the FAA that has never been applied by this Court. Pet. App. 56a. The district court held that the Plan's individual arbitration provision impermissibly conflicted with ERISA because the provision would prevent Respondent

from exercising a purported substantive right to bring a representative ERISA claim on behalf of the entire Plan. Pet. App. 59a-60a. The district court concluded that because ERISA permits plaintiffs who bring a lawsuit on behalf of an ERISA plan to seek plan-wide remedies (including removal of the plan's fiduciary), the arbitration provision does not allow Plaintiff to vindicate his ERISA rights effectively in arbitration. Pet. App. 50a, 59a-61a.

The Tenth Circuit affirmed, Pet. App. 1a-44a, holding that the Plan's individual arbitration provision ran afoul of the effective vindication doctrine because it prohibited Respondent from bringing a representative ERISA claim and from seeking "any form of relief that would benefit anyone other than [Respondent]," Pet. App. 36a-37a, 40a-41a. To reach that erroneous result, the Tenth Circuit ignored this Court's decision in *Viking River Cruises* (which is nowhere mentioned), failed to attempt to square its conclusion with *Thole*, and incorrectly deemed *Epic Systems* inapplicable to ERISA claims, even though the court acknowledged it is "true" that there is no "clearly expressed congressional intent" in ERISA to prohibit individual arbitration. Petitioners filed a timely petition for rehearing or rehearing en banc, which the Tenth Circuit denied on April 10, 2023. Pet. App. 63a-64a.

REASONS FOR GRANTING THE PETITION

The decision below creates a split with the Ninth Circuit on the important federal question whether ERISA claims must be arbitrated on an individual basis where there is a valid provision requiring such a proceeding. The Seventh and Third Circuits have deepened the split by, like the Tenth Circuit, invalidating ERISA plan provisions that required individual arbitration of ERISA claims.

Not only does the Tenth Circuit's decision split from the Ninth Circuit, but the court reached its contrary conclusion against individual arbitration for ERISA claims in conflict with this Court's precedent. The decision below holds that ERISA claims alone cannot be arbitrated individually. But there is nothing special about ERISA, and this case is just the latest in a long line in which plaintiffs have attempted to avoid individual arbitration in favor of more significant damages available in federal court (and concordant pressure to reach "blackmail settlements," *see Coinbase, Inc. v. Bielski*, No. 22-105, 2023 WL 4138983, at *4 (U.S. June 23, 2023)). Past parties repeatedly have alleged that a federal right is too important to be arbitrated individually. This Court has never adopted that argument, and it should grant this petition to make clear it means what it says (this time, in the context of ERISA). If the decision below survives, ERISA will stand alone among federal statutes as the only type of claim for which individual arbitration is unavailable absent clear congressional intent for such a result.

The decision below also conflicts with this Court's precedents in other ways, because it fails to harmonize ERISA and the FAA, as it must. Instead the decision below does the opposite by creating a conflict with this Court's decisions that (1) the FAA requires enforcement of the terms of individual arbitration provisions, even for claims under a statute that would otherwise allow for representative actions, and (2) ERISA allows for individual claims and requires enforcement of the terms of written plans. This Court's past decisions demonstrate that ERISA claims, like all other federal statutory claims, can be arbitrated on an individual basis, despite the fact that ERISA would allow for representative claims if not for a binding individual arbitration provision.

Certiorari is warranted to resolve the split in the courts of appeals and apply this Court's precedents on an important question of federal law to enforce the clear dictates of the FAA for ERISA claims.

A. The Decision Below Creates A Split Among Courts Of Appeals That Continues To Deepen

This Court should grant review because the decision below opens a split with another court of appeals, and this conflict is only deepening in the absence of this Court's instruction.

Addressing precisely the question in this petition, the Ninth Circuit has affirmed that ERISA claims can be arbitrated on an individual basis. In *Dorman*, the Ninth Circuit reversed a district court's refusal to compel individual arbitration. 780 F. App'x at 514. There, the plaintiff brought ERISA claims and the court concluded that these claims could be arbitrated individually. *Id.*

Claims brought under 29 U.S.C. § 1132(a)(2), the Ninth Circuit explained, "are inherently individualized when brought in the context of a defined contribution plan," regardless whether the claims "seek relief on behalf of a plan[.]" *Id.* (citing *LaRue*, 552 U.S. at 256). The Ninth Circuit correctly applied *LaRue*, a case discussed further below, "for the proposition that a defined contribution plan participant can bring a § [1132](a)(2) claim for the plan losses in her own individual account." *Id.*

The Tenth Circuit's decision below to invalidate an individual arbitration provision for ERISA claims splits from the Ninth Circuit's decision in *Dorman*. This split

has deepened, with two other courts of appeals reaching the same conclusion as the Tenth Circuit.[2] *See Smith*, 13 F.4th at 616-19, 621-22 (acknowledging that "individualized arbitration" is not "inherently incompatible with ERISA," but concluding that plan's individual arbitration provision that prohibited participant from removing allegedly breaching fiduciary under 29 U.S.C. § 1109(a) was invalid under the effective vindication exception); *Henry*, 2023 WL 4281813, at *4 & n.9 (invoking *Harrison* and *Smith* to invalidate individual arbitration provision in an ERISA plan). These decisions split from the Ninth Circuit because these courts reached conclusions hostile to arbitration and in conflict with this Court's decisions, all while exhibiting the same unjustified disharmony between the FAA and ERISA that contravenes this Court's prior instruction.[3]

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2. Pending before the Second Circuit are two appeals of decisions to deny motions to compel individual arbitration of ERISA claims that were based on *Smith* and *Harrison*. *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. 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)).

3. The Tenth Circuit in *Harrison*, Seventh Circuit in *Smith*, and Third Circuit in *Henry* all concluded that ERISA plan participants must be able to seek plan-wide relief in individual arbitration proceedings. *See Harrison*, 59 F.4th at 1108-09; *Smith*, 13 F.4th at 621-22; *Henry*, 2023 WL 4281813, at *4. This conclusion would force parties to make the "same impermissible choice" identified in *Viking River Cruises* between either arbitrating on a plan-wide basis or not arbitrating at all. *See Viking River Cruises*, 142 S. Ct. at 1918. This Court maintains that "[p]utting parties to that choice is inconsistent with the FAA." *Id.*

There is nothing in the plain text of ERISA or the precedent of this Court that supports such an outcome. Without this Court's intervention, the "asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like)" will be "irretrievably lost." *See Coinbase*, 2023 WL 4138983, at *4. The question of the arbitrability of ERISA claims on an individual basis is primed for this Court's review now.

B. The Decision Below Conflicts With This Court's Relevant Decisions Regarding The FAA (Requiring Enforcement Of Arbitration Provisions) And ERISA (Requiring Enforcement Of ERISA Plan Terms And Allowing For Individual Claims)

The decision below splits from the Ninth Circuit based on reasoning that is contrary to this Court's past decisions on the scope of the FAA *and* on the meaning of ERISA.

1. "Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Am. Express*, 570 U.S. at 232. This Court has consistently held that the FAA means what it says, and that parties to an arbitration provision must comply with that provision's terms. For example, this Court has "held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, (2011) (citations omitted). And this Court has enforced provisions requiring individual arbitration where claims were made under statutes explicitly allowing for collective actions on behalf of others. *Epic Sys.*, 138 S. Ct. at 1627.

Importantly, this Court has held that other statutes must be harmonized with the FAA whenever possible. *Id.* at 1624. As this Court has recognized, "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Id.* at 1619. Further, "[a] party seeking to suggest that two statutes 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." *Id.* at 1624. The Tenth Circuit eschewed this Court's instruction to find harmony between the FAA and ERISA, instead subordinating the FAA to ERISA by concluding that ERISA claims cannot be brought in individual arbitration, even though there is no express indication in ERISA that Congress intended such an outcome.

As consistently interpreted by this Court, the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms." *Am. Express*, 570 U.S. at 233. "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).

Enforcement of arbitration provision terms under the FAA extends to terms requiring individual proceedings. *Epic Sys.*, 138 S. Ct. at 1624. This Court in *Epic Systems* went out of its way to catalogue cases holding as much with respect to collective actions brought under the Sherman and Clayton Acts, the Age Discrimination in Employment Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *See id.* at 1627. In the context of each

of these federal statutes, this Court concluded that the FAA mandates enforcement of arbitration provisions that require claimants to assert claims on an individual basis in arbitration, rather than on a collective basis in federal court, because in none of these statutes did Congress express a clear intent to prohibit individual arbitration. *See id.* at 1619.

The decision below turns this precedent on its head, treating ERISA claims differently from every other federal right of action. By invalidating the individual arbitration provision in the Plan, the Tenth Circuit failed to enforce an arbitration provision according to its terms, ignored this Court's decisions mandating adherence with the FAA and created a conflict with settled precedent.

2. The decision below also is inconsistent with Court's decisions that require courts to enforce the terms of ERISA plan documents as written. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 108 (2013). Under ERISA, the expectations of the parties are governed by a written instrument known as the plan document. *See* 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").

The terms of an ERISA plan document must be enforced as written, *see Heimeshoff*, 571 U.S. at 108, for good reason. When Congress enacted ERISA, a primary goal was to encourage the voluntary formation of employee benefit plans. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Plan sponsors (typically employers) have

"large leeway to design [employee benefit plans] as they see fit." *Heimeshoff*, 571 U.S. at 108. If employers cannot be confident that their benefit plans will be enforced as written, they are likely to be dissuaded from offering benefits at all, to the detriment of their employees and in contravention of Congress's express goals. *See id.* (noting that courts' "focus on the written terms of the plan" furthers Congress's goal in ERISA to not "unduly discourage employers from offering [ERISA] plans in the first place") (alteration in original).

There is no dispute that the arbitration provision the decision below excised here was in a validly adopted ERISA plan or that the claims at issue were within its scope. The Tenth Circuit could have harmonized the FAA and ERISA by enforcing the Plan's individual arbitration provision. Instead, by refusing to enforce the provision by its terms, the Tenth Circuit's decision creates disharmony between the FAA and ERISA and conflict with this Court's relevant decisions regarding both statutes.

3. In addition, the decision below conflicts with this Court's past decisions enforcing individual arbitration provisions even in the context of statutes that would otherwise allow for representative action.

Last year, in *Viking River Cruises*, this Court recognized that a statute allowing for "representative" claims can be harmonized with the FAA. The Tenth Circuit ignored *Viking River Cruises*, not mentioning the decision at all. That may be because considering *Viking River Cruises* would have led to the opposite result from the one reached below: namely, that ERISA claims can be arbitrated on an individual basis, even though ERISA would otherwise allow for representative claims.

In *Viking River Cruises*, this Court considered whether an arbitration provision requiring individual arbitration under the California Private Attorneys General Act ("PAGA") was enforceable. The arbitration provision at issue prohibited bringing in arbitration "any dispute as a class, collective, *or representative* PAGA action." *Viking River Cruises*, 142 S. Ct. at 1915-16 (emphasis added).

This Court observed that there were two ways in which PAGA allowed for "representative" claims: (1) where the plaintiff's claims "are predicated on code violations sustained by other employees," which this Court described as a form of "claim joinder," and (2) where "the employee plaintiff sues as an 'agent or proxy' of the State" (*i.e.*, the plaintiff stands in the shoes of a *singular* entity, the State). *Id.* at 1914-16. *Viking River Cruises* held that an arbitration provision's prohibition on "representative" PAGA claims in arbitration *was* enforceable with respect to the "claim joinder" form of representative PAGA claim. *See id.* at 1922-24. In other words, *notwithstanding that PAGA allowed for representative actions on behalf of others who are injured*, this Court enforced a provision requiring individual arbitration for PAGA claims.

What worked for PAGA should work for ERISA. Even though ERISA may allow for representative claims, such claims are analogous to representative "claim joinder" actions under PAGA, meaning that representative ERISA claims can be modified by provisions that require arbitration on an individual basis. So long as a participant can vindicate individual rights in arbitration, *Viking River Cruises* dictates that arbitration should be enforced.

There is no question that a participant has a right to litigate ERISA claims individually, and it is that such individual right that must be preserved in arbitration. In *LaRue*, this Court established the contours of that individual right, addressing the question whether an individual in a defined contribution plan can seek recovery under 29 U.S.C. § 1132(a)(2) for a breach that harmed only that participant's individual account, namely, whether an ERISA claim could be brought solely by one plan participant rather than by the plan as a whole. *LaRue*, 552 U.S. at 256.

This Court answered that question in the affirmative: a participant in a defined contribution plan can bring a claim on an individual basis under § 1132(a)(2) to remedy alleged harm that only affects that participant's individual account. *Id.* at 256. In turn, the fact that each plan participant has an individual claim under ERISA supports the conclusion that a representative ERISA action merely joins together these individual claims, like the "claim joinder" representative claim at issue in *Viking River Cruises*. *See Viking River Cruises*, 142 S. Ct. at 1915.

Applying this Court's analysis of "claim joinder" representative claims, although ERISA may *allow* participants to bring a representative action that joins together other participants' individual claims, in the face of an individual arbitration provision, that ability is modified and all other participants must bring their individual claims in separate arbitrations. Reading *LaRue* and *Viking River Cruises* together makes clear that ERISA is easily harmonized with the FAA. The Tenth Circuit's holding creates disharmony between the two statutes without anything in ERISA indicating Congress intended such a result.

Respondent is likely to argue in opposition that an ERISA claim is like an "agent or proxy" type of representative claim as described in *Viking River Cruises*, in order to assert that the Plan's arbitration provision cannot be enforced. Such an argument and interpretation of representative ERISA claims cannot stand with this Court's decision in *Thole v. U.S. Bank*.

In *Thole*, this Court established that ERISA claims are entirely different from the "agent or proxy" type of representative claim in *Viking River Cruises*, because under ERISA, a participant must have an individual interest separate from the plan's interest. *See Thole*, 140 S. Ct. at 1620. This requirement evinces that a plan participant does not "stand in the shoes" of an ERISA plan, and thus a participant *cannot* automatically bring suit as an "agent or proxy" on behalf of an entire plan. This Court's reasoning in *Thole* demonstrates that Respondent's interpretation of the nature of participant ERISA claims, and the incompatibility of such claims with individual arbitration, is incorrect.

The Tenth Circuit's decision to split from the Ninth Circuit and invalidate the Plan's provision requiring individual arbitration of ERISA claims is based on conflicts with this Court's precedent in *Viking River Cruises*, *LaRue*, and *Thole*.

4. The decision below also misapplies *Epic Systems*, a case in which this Court reiterated that rights to collective action set forth in various federal statutes do not justify disregarding the FAA's instruction to enforce individual arbitration. This Court underscored that, "[i]n many cases over many years," the "Court has heard

and rejected efforts to conjure conflicts between the [FAA] and other federal statutes." *Epic Sys.*, 138 S. Ct. at 1627. Not a single effort of this sort has succeeded before this Court. *Id.* Precedent shows that an agreement "to use individualized rather than class or collective action procedures" is something that the FAA "seems to protect pretty absolutely." *Id.* at 1621. This Court even warned that lower courts "must be alert to new devices and formulas" that would undercut this FAA protection by "declar[ing] individualized arbitration proceedings off limits." *Id.* at 1623.

The *Epic Systems* plaintiffs argued that enforcing an individualized arbitration agreement was an impermissible "prospective waiver" of a federal statutory right under the effective vindication exception discussed in *American Express* and *Mitsubishi Motors*. *See, e.g.*, Br. for the Respondent at 8, 35, 44-47, *Epic Sys. Corp. v. Lewis*, No. 16-285, 2017 WL 3475520 (U.S. Aug. 9, 2017). The federal statutory right in *Epic Systems* was found in Section 7 of the National Labor Relations Act ("NLRA"), which protects workers' right "to engage in . . . concerted activities for . . . mutual aid or protection." *Epic Sys.*, 138 S. Ct. at 1624 (quoting 29 U.S.C. § 157). The plaintiffs contended that this provision created an unwaivable substantive right to engage in representative litigation on behalf of other similarly situated parties.

This Court disagreed. It emphasized that demonstrating that another federal statute "overrides" the FAA's usual enforcement scheme is an argument that always faces "a stout uphill climb." *Id.* This Court explained further that the other statutory language could "displace" the FAA's rigorous enforcement of arbitration provisions (including

those requiring individual arbitration) according to their terms *only if* that language constituted "a clearly expressed congressional intention" to do so. *Id.* The Court emphasized that "when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so." *Id.* at 1626. Because NLRA Section 7 "does not express approval or disapproval of arbitration," the Court saw no evidence—much less "clear and manifest" evidence—that Congress intended the NLRA to override the FAA's requirement to enforce class and collective action waivers. *Id.* at 1624.

Epic Systems clarifies the standard that a court must find has been satisfied before refusing to enforce an individual arbitration provision, and the decision emphasizes how difficult that standard is to meet. Because the FAA requires enforcing arbitration provisions according to their terms, any argument that rights under a later statute are unsuited for individual arbitration effectively requires a plaintiff to prove that the later statute *repealed* the FAA with respect to claims under that later statute. *Id. Epic Systems* requires evidence that Congress intended such a repeal be "clear and manifest," given the "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* (cleaned up).

The Tenth Circuit acknowledged, correctly, it is "true" that "ERISA contains no clearly expressed congressional intent to prohibit individual arbitrations." Pet. App. 41a. After its acknowledgement, the Tenth Circuit should have gone on to evaluate whether there was sufficient reason to overcome the "strong presumption" against finding

the FAA repealed by implication. The court did not do so, but instead focused on an unrelated issue to conclude that a participant of an ERISA plan has a substantive right to bring an ERISA statutory claim on behalf of the entire plan. The Tenth Circuit should have followed *Epic Systems* and concluded that the Plan's individual arbitration provision must be enforced.

The Tenth Circuit's decision conflicts with this Court's prior case law, which leads to the clear conclusion that ERISA claims can be arbitrated on an individual basis. The Ninth Circuit reached such a conclusion, and the split in authority between the Ninth Circuit on the one hand and the Tenth, Seventh, and Third Circuits on the other should not be allowed to stand. This Court should grant certiorari to apply its precedent and reverse the Tenth Circuit's conflicting decision.

CONCLUSION

This Court should grant the petition.

Dated: July 7, 2023

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 9, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1098

ROBERT HARRISON, ON BEHALF OF HIMSELF, THE ENVISION MANAGEMENT HOLDING, INC. ESOP, AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiff-Appellee,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS; ENVISION MANAGEMENT HOLDING, INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE; ARGENT TRUST COMPANY; DARREL CREPS, III; PAUL SHERWOOD; JEFF JONES; AARON RAMSAY; TANWEER KAHN,

Defendants-Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; THE ESOP ASSOCIATION; SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; PUBLIC JUSTICE,

Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:21-CV-00304-RMR-NYW)

Appendix A

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff Robert Harrison, a participant in a defined contribution retirement plan established by his former employer, filed suit under the Employee Retirement Income Security Act (ERISA) against the fiduciaries of the plan alleging that they breached their duties towards, and caused damages to, the plan. Harrison's complaint sought various forms of relief, including a declaration that Defendants breached their fiduciary duties, the removal of the current plan trustee, the appointment of a new fiduciary to manage the plan, an order directing the current trustee to restore all losses to the plan that resulted from the fiduciary breaches, and an order directing Defendants to disgorge the profits they obtained from their fiduciary breaches. In response, Defendants moved to compel arbitration, citing a provision of the plan document. The district court denied that motion, concluding that enforcing the arbitration provision of the plan would prevent Harrison from effectively vindicating the statutory remedies sought in his complaint. Defendants now appeal from that ruling. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's decision.

Appendix A

I

FACTUAL HISTORY

Defendant Envision Management Holding, Inc. (Envision) is a privately-owned shell corporation, based in Colorado Springs, Colorado, that was founded in approximately 2000 by defendants Darrel Creps II, Paul Sherwood, and Jeff Jones (collectively the Seller Defendants). Envision owns Envision Management, LLC, which provides diagnostic imaging services in several states, including Colorado, Oklahoma, Louisiana, and Texas. Envision and Envision Management, LLC collectively employ approximately 1,000 individuals.

Envision had in place a Board of Directors (the Board). The Seller Defendants were members of the Board, as were defendants Aaron Ramsay and Tanweer Kahn.

Plaintiff Harrison, who is a resident of Colorado, was employed by Envision for approximately four years between 2016 and August 2020. Harrison left his employment with Envision in August 2020.

In 2017, the Seller Defendants created the Envision Employee Stock Ownership Plan (the ESOP). The ESOP is an ERISA-protected, defined contribution plan under which the employer makes contributions on behalf of employee-participants and the contributions are invested in the employer's stock.[1] Under the terms of the Plan

1. "A defined contribution plan allows the employee or the employer (or both) to contribute to the employee's individual account (e.g., a 401(k) plan). By contrast, a defined benefit plan provides a

Document that governed the ESOP, "each Eligible Employee . . . bec[a]me a Participant" of the ESOP "as of the date the Eligible Employee first perform[ed] an Hour of Service in 2017." Aplt. App., Vol. I at 85. Because Harrison worked for Envision in 2017 and, under the terms of the Plan Document, qualified as an "Eligible Employee," he automatically became a plan participant. By December 31, 2019, Harrison had three years of service in the ESOP which, under the terms of the Plan Document, meant that he was 40% vested.

Envision was the primary sponsor of the ESOP. The ESOP was administered and managed by the Envision Management Holding, Inc. Employee Stock Ownership Plan Committee (ESOP Committee). Harrison alleges that at all relevant periods, the ESOP Committee's members included the Seller Defendants and other unidentified individuals. Under the terms of the Plan Document, the named fiduciaries to the ESOP included the ESOP Committee (both in its own capacity and as plan administrator), the Board, the named trustee to the ESOP, and the ESOP's investment manager.

Harrison alleges that the Seller Defendants created the ESOP so that the ESOP could purchase 100% of the Seller Defendants' private Envision stock for $163.7 million (the ESOP Transaction). Harrison further alleges that the Seller Defendants selected Argent Trust Company (Argent) to serve as Trustee of the ESOP. Harrison alleges that, even though the sale occurred, the Seller

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fixed monthly benefit based on a general pool of assets (e.g., a pension plan)." *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 615 (7th Cir. 2021).

Defendants retained control over both Argent and the ESOP by (a) receiving assurance from Argent that they would remain on the Board, (b) granting themselves the right to unilaterally fire Argent from its role as Trustee of the ESOP in the event that Argent did not carry out their directions, and (c) exculpating Argent from liability stemming from the ESOP Transaction, with any damages to be paid from Envision's corporate assets.

Harrison alleges that the ESOP did not have enough money to complete the ESOP Transaction and, as a result, borrowed $103,537,461 directly from the Seller Defendants, as well as $50,822,524 from the company itself, in order to purchase the Seller Defendants' stock. Harrison alleges that the Seller Defendants charged an interest rate of approximately 12% for the loan they gave to the ESOP.

The ESOP Transaction, which was approved by Argent, allegedly required the ESOP to pay two different share prices for the same Envision stock. Approximately 63,807 shares were purchased by the ESOP for a price of $1,770 per share. According to Harrison, the ESOP used cash to pay for 5,311 of those 63,807 shares, and in turn used the $103,537,471 loan from the Seller Defendants to purchase the remaining 58,496 of those 63,807 shares. The ESOP also allegedly purchased approximately 36,194.52 shares of stock for $1,404 per share and used the $50,822,524 loan from Envision to make this purchase.

Harrison alleges that "[t]here is no clear reason why the ESOP would pay two different prices for the same stock, particularly when the Articles of Incorporation for

Envision . . . indicate that there is only one class of common stock which has the same par value." *Id.* at 32. Harrison also alleges "that on December 31, 2017—just a few weeks after the ESOP" purchased the stock—"all 100,000 shares the ESOP bought were independently valued at $349 per share." *Id.* Further, Harrison alleges that, following the stock purchase, the retirement contributions that Envision made to the ESOP's employee-participants' accounts were used to first pay the interest due on the $154.4 million in debt the ESOP owed.

In sum, Harrison alleges that the Seller Defendants, with the effective assistance of Argent, were able to financially benefit by selling Envision to the ESOP for significantly more than it was worth, while at the same time leaving the ESOP with a $154.4 million debt. Harrison further alleges that the Seller Defendants, notwithstanding the sale, were able, with the assistance of Argent, to retain control of Envision.

PROCEDURAL HISTORY

On January 29, 2021, Harrison initiated these proceedings by filing a complaint in the United States District Court for the District of Colorado against Envision, Envision's Board of Directors (the Board), the ESOP Committee, Argent, the Seller Defendants, Aaron Ramsay (a Board member), Tanweer Kahn (a Board member), and John and Jane Does 1 to 15. The complaint alleges generally that Harrison's claims are brought pursuant to ERISA and are "seeking plan-wide relief on behalf of the" ESOP. *Id.* at 13. In support, the complaint

alleges that the ESOP Transaction "caused Plaintiff and all other ESOP participants to suffer significant losses to their ESOP retirement savings." *Id.* at 18. The complaint alleges six specific causes of action arising under various provisions of ERISA.

On May 10, 2021, Defendants filed a motion to compel arbitration and to stay the proceedings. In support, Defendants argued that Section 21 of the Plan Document, entitled "ERISA ARBITRATION AND CLASS ACTION WAIVER," "require[d] arbitration of" Harrison's claims and that Harrison, "[b]y filing his complaint in federal court," was "seek[ing] to circumvent two federal laws—the Federal Arbitration Act [(FAA)] . . . , which mandates enforcing arbitration provisions, and ERISA, which dictates enforcing the terms of governing plan documents." *Id.* at 55. Defendants asserted that the district court "should compel Plaintiff to arbitrate all of his claims on an individual basis pursuant to the FAA, and either stay th[e] lawsuit or, in the alternative, dismiss the case (and close it administratively) under Rule 12(b)(1)." *Id.* at 56. Defendants also asked the district court to award them "their attorneys' fees and costs incurred in seeking this relief." *Id.* at 69.

Harrison filed a memorandum in opposition to Defendants' motion to compel arbitration and to stay the proceedings. Harrison argued that Defendants were "ask[ing] the Court to endorse a severe limitation of the substantive relief Congress made available to [him] under ERISA, including his right to seek relief on behalf of the Plan as a whole," and that "[n]either the Federal

Arbitration Act . . . nor ERISA permit[ted] that result." *Id.* at 136-37. Harrison noted that "[t]he statutory rights at issue derive[d] from ERISA § 502(a)(2), which gives a participant the right to sue 'for appropriate relief under section 1109 of this title.'" *Id.* at 140 (quoting 29 U.S.C. § 1132(a)(2)). "Section 1109," Harrison noted, "expressly authorizes removal of a breaching fiduciary and any 'such other equitable or remedial relief as the court may deem appropriate.'" *Id.* at 140-41 (quoting 29 U.S.C. § 1109(a)). "Simply put," Harrison argued, "§ 502(a)(2) is a unique provision of ERISA that allows plan participants to sue plan fiduciaries and recover *all* losses suffered by *all* plan participants, not only individual losses." *Id.* (emphasis in original). Harrison argued that "[t]he arbitration provision here cannot be enforced because it would strip [him] of substantive rights conferred by ERISA: namely, the right to proceed under § 1132(a)(2) and seek multiple remedies on behalf of the Plan as a whole."[2] *Id.* at 141.

On March 24, 2022, the district court issued an order denying defendants' motion to compel arbitration and to stay. The district court concluded, in pertinent part, that "the arbitration provision in the Plan [wa]s invalid because

2. Harrison also argued that "[t]he Court should deny Defendants' motion for the further reason that [he] did not consent to arbitrate his fiduciary breach claims," and in fact "had no notice of the arbitration provision." Aplt. App., Vol. I at 137. Harrison noted in support that he was "never given" a copy of the Plan Document "during his employment with Envision," and that, "[i]nstead, participants only received the Summary Plan Description ('SPD') which advised that ESOP participants could file fiduciary breach claims in federal court but *said nothing about arbitration*." *Id.* (emphasis in original).

it conflicts with ERISA." *Id.* at 179. More specifically, the district court, invoking what is known as the effective vindication exception, concluded "that the arbitration provision acts as a prospective waiver" of Harrison's right to pursue statutory remedies under ERISA "because it disallows plan-wide relief, which is expressly contemplated by [sections 1132(a)(2) and 1109 of] ERISA." *Id.* at 180.

Defendants filed a notice of appeal on April 4, 2022.

II

Defendants argue in their appeal that the district court erred in denying their motion to compel arbitration. In particular, Defendants argue that the district court's order circumvented the FAA by invoking the effective vindication exception to invalidate the arbitration provisions of the Plan Document, which otherwise required Harrison to individually arbitrate his ERISA claims. For the reasons that follow, we reject Defendants' arguments and conclude that the district court properly invoked the effective vindication exception to invalidate the arbitration provisions of the Plan Document.

STANDARD OF REVIEW

"We review a district court's denial of a motion to compel arbitration de novo and apply the same legal standard as the district court." *Ragab v. Howard*, 841 F.3d 1134, 1136 (10th Cir. 2016).

Appendix A

ARBITRATION AGREEMENTS — GENERAL VALIDITY

The FAA was "enacted in 1925 as a response to judicial hostility to arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). The FAA provides, in relevant part:

> 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 . . . 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. "The Supreme Court has long recognized and enforced" § 2 of the FAA as "a liberal federal policy favoring arbitration agreements." *Ragab*, 841 F.3d at 1137 (internal quotation marks omitted) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)). "Therefore, all doubts must be resolved in favor of arbitration." *Id.* at 1136 (internal quotation marks omitted). "That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 565 U.S. at 98 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)).

"However, whether a party agreed to arbitration is a contract issue, meaning arbitration clauses are only valid

if the parties intended to arbitrate." *Ragab*, 841 F.3d at 1137. "No party can be compelled to submit a dispute to arbitration without having previously agreed to so submit." *Id.* "Accordingly, the first task of a court asked to compel arbitration of a dispute is [typically] to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). That is generally a matter of state law contract principles.[3] *Ragab*, 841 F.3d at 1137.

THE EFFECTIVE VINDICATION EXCEPTION

Also relevant to the validity of an arbitration agreement is what the Supreme Court has termed the "'effective vindication' exception." *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). This exception, which rests on public policy grounds, "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 236 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19). The key question is whether "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.* at 235 (internal quotation marks omitted). Thus, for example, "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" would run afoul of,

3. Harrison argues that he did not agree to arbitrate his claims and that the SPD conflicts with the Plan Document regarding a claimant's right to file suit. The district court, however, did not address that argument in denying Defendants' motion to compel and, because we agree with the district court's disposition, we need not address the argument either.

and be invalidated by, the effective vindication exception. *Id.* at 236. The Supreme Court has also suggested that the existence of "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable" might fall within the scope of the effective vindication exception. *Id.*

Although the Supreme Court has repeatedly recognized the existence of the effective vindication exception, it has, to date, declined to actually apply the exception in any case before it. For example, in *CompuCredit*, the Supreme Court granted certiorari to "consider whether the Credit Repair Organizations Act (CROA or Act), 15 U.S.C. § 1679 *et seq.*, preclude[d] enforcement of an arbitration agreement in a lawsuit alleging violations of that Act." 565 U.S. at 96. The plaintiffs/respondents in the case were "individuals who applied for and received a[] . . . credit card marketed by petitioner[/defendant] CompuCredit." *Id.* at 97. "In their applications," plaintiffs/respondents "agreed to be bound by a provision" that purported to require "[a]ny claim, dispute or controversy . . . at any time arising from or relating to your Account, any transferred balances or this Agreement" to "be resolved by binding arbitration." *Id.* (internal quotation marks omitted). The plaintiffs/respondents "filed a class-action complaint against CompuCredit . . . alleging . . . violations of the CROA" arising out of CompuCredit's "allegedly misleading representation that the credit card could be used to rebuild poor credit and the[] assessment of multiple fees upon opening of the accounts, which greatly reduced the advertised credit limit." *Id.* CompuCredit moved to compel

arbitration of the claims. The district court denied the motion to compel and the Ninth Circuit affirmed.

The Supreme Court began its review by noting that the CROA "regulates the practices of credit repair organizations," and that "[i]n its principal substantive provisions, the CROA prohibits certain practices, § 1679b, establishes certain requirements for contracts with consumers, § 1679d, and gives consumers a right to cancel, § 1679e." *Id.* at 98. The Court also noted that "[e]nforcement is achieved through the Act's provision of a private cause of action for violation, § 1679g, as well as through federal and state administrative enforcement, § 1679h." *Id.* In opposing arbitration, the plaintiffs/respondents "focus[ed] on the CROA's disclosure and nonwaiver provisions." *Id.* The disclosure provision requires credit repair organizations to provide consumers with a statement, prior to the execution of any contract, that reads, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." *Id.* at 99 (internal quotation marks omitted).

Although the Ninth Circuit concluded that "[t]he disclosure provision gives consumers the 'right to sue,' which 'clearly involves the right to bring an action in a court of law,'" the Supreme Court rejected this reasoning. *Id.* (quoting *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1208 (9th Cir. 2010)). The Court explained:

> The flaw in this argument is its premise: that the disclosure provision provides consumers with a right to bring an action in a court of law.

> It does not. Rather, it imposes an obligation on credit repair organizations to supply consumers with a specific statement set forth (in quotation marks) in the statute. The only consumer right it *creates* is the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides.

Id. (emphasis in original). The Court also rejected plaintiffs/respondents' arguments "that the CROA's civil-liability provision, § 1679g . . . , demonstrates that the Act provides consumers with a 'right' to bring an action in court." *Id.* at 100. Although the Court acknowledged that § 1679g repeatedly uses "the terms 'action,' 'class action,' and 'court,'" the Court noted that "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit." *Id.* Lastly, the Court rejected plaintiffs/respondents' argument "that if the CROA does not create a right to a judicial forum, then the disclosure provision effectively requires that credit repair organizations mislead consumers." *Id.* at 102. The Court explained that "[t]he disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman—which necessarily means that it will be imprecise." *Id.* The Court further explained that "with respect to the statement's description of a 'right to sue, . . . [t]his is a colloquial method of communicating to consumers that they have the legal right, enforceable in a court, to recover damages from credit repair organizations that violate the CROA," and that "most consumers would understand it this way,

without regard to whether the suit in court has to be preceded by an arbitration proceeding." *Id.* at 103.

In *American Express*, the Supreme Court rejected a different argument that attempted to avoid arbitration. There, a group of merchants "brought a class action against" American Express and a wholly owned subsidiary "for violations of the federal antitrust laws." *Am. Exp. Co.*, 570 U.S. at 231. The merchants alleged that "American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards," and thereby "violated § 1 of the Sherman Act." *Id.* American Express "moved to compel individual arbitration under the" FAA, citing "a clause" in the agreement it entered into with the merchants "that require[d] all disputes between the parties to be resolved by arbitration." *Id.* "The agreement also provide[d] that '[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.'" *Id.* (quoting *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 209 (2d Cir. 2012)). The district court granted American Express's motion to compel individual arbitration, but the Second Circuit "reversed and remanded for further proceedings," concluding that "the waiver was unenforceable" because the merchants "had established that they would incur prohibitive costs if compelled to arbitrate under the class action waiver." *Id.* at 232 (internal quotation marks omitted).

The Supreme Court granted certiorari to consider "whether a contractual waiver of class arbitration [wa]s

enforceable under the [FAA] when the plaintiff's cost of individually arbitrating a federal statutory claim exceed[ed] the potential recovery." *Id.* at 231. In considering this question, the Court addressed the merchants' invocation of the effective vindication exception. The merchants argued that "[e]nforcing the waiver of class arbitration bar[red] effective vindication . . . because," due to the prohibitive costs associated with arbitrating their claims on an individual basis, "they ha[d] no economic incentive to pursue their antitrust claims individually in arbitration." *Id.* at 235. The Supreme Court rejected this argument, noting that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 236 (emphasis in original). The Supreme Court emphasized that "[t]he class-action waiver merely limit[ed] arbitration to the two contracting parties," and did not "eliminate[] those parties' right to pursue their statutory remedy." *Id.* The Court also emphasized that statutory permission of collective actions does not necessarily bar "individual attempts at conciliation." *Id.* at 237.

DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE EFFECTIVE VINDICATION EXCEPTION APPLIES IN THIS CASE?

Defendants argue that the effective vindication exception does not apply in this case and that the district court erred in concluding otherwise. More specifically, Defendants argue that "the arbitration clause here does not foreclose the availability of all claims under ERISA."

Aplt. Br. at 10. Defendants note in support that the Department of Labor (the DOL) "can file suit in federal court to seek plan-wide relief if appropriate and, of course, other participants in this Plan remain free to bring their own individual claims for financial relief in arbitration." *Id.* at 12. Thus, Defendants argue, "[e]nforcing individual arbitration, as this Plan requires, will not foreclose plan-wide relief," but instead "simply cabins the claims that can be arbitrated (as many arbitration provisions in other contexts do)." *Id.*

Harrison argues, in contrast, that the effective vindication exception applies because "[t]he arbitration provision here is a textbook example of a clause that impermissibly restricts remedies and abridges substantive rights." Aple. Br. at 17-18. He argues that the arbitration provision "explicitly forbids remedies that 29 U.S.C. § 1132(a)(2) and (a)(3) authorize." *Id.* at 18. More specifically, he notes that these provisions of "ERISA expressly authorize[] suits by participants for plan-wide relief, including injunctive relief and removal and replacement of plan fiduciaries." *Id.* He also notes that "claims under § 1132(a)(2) can *only* be brought in a representative capacity." *Id.* (emphasis in original). "Indeed," he asserts, "plan-wide remedies are the core purpose of claims under § 1132(a)(2)." *Id.* Yet, he argues, the arbitration clause at issue here "purports to bar participants from seeking relief that the statute allows them to pursue" because it bars "any claim brought in a 'representative capacity' and any remedy that 'has the purpose or effect of providing additional benefits or monetary or other relief to [anyone] other than the Claimant.'" *Id.*

The DOL has filed an amicus brief in support of Harrison and argues that "ERISA sections 502(a)(2) and 409(a) authorize participants to bring an action to recover, among other things, 'any losses to the plan' resulting from a fiduciary breach, and to seek 'removal of such fiduciary.'" DOL Br. at 6 (quoting 29 U.S.C. §§ 1132(a)(2), 1109(a)). The DOL further notes that both the Supreme Court and this court "have recognized" that "claims under these sections are 'brought in a representative capacity on behalf of the plan as a whole.'" *Id.* (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)). "This is true," the DOL notes, "even in the context of defined contribution plans comprising individual participant accounts." *Id.* (citing *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008)). "In short," the DOL argues, "a participant bringing a claim under section 502(a)(2) does so on the plan's behalf and thus may recover, for the plan's benefit, all losses sustained by the plan (among other forms of redress) stemming from the fiduciary breach." *Id.* The DOL asserts that Harrison "here sought precisely the remedies authorized by section 502(a)(2) to redress the overpayment he alleges Defendants caused the Plan, including all Plan losses and removal of Argent as Plan trustee." *Id.* at 7. "Yet," the DOL argues, "Defendants sought to force [Harrison] to abandon these statutory remedies by moving to compel arbitration under an agreement that restricts him to obtaining only individualized relief." *Id.*

To resolve these arguments and determine whether the effective vindication exception applies in this case, we

must first identify the statutory remedies that Harrison is seeking in his complaint. We must then determine whether the arbitration provisions contained in the Plan Document effectively prevent Harrison from obtaining those statutory remedies in the arbitral forum. As we shall discuss, we conclude that the arbitration provisions of the Plan Document effectively prevent Harrison from vindicating many of the statutory remedies that he seeks in his complaint under ERISA § 502(a)(2).

a) The statutory remedies sought by Harrison in his complaint

Harrison's complaint, in a section entitled "PLAINTIFF SEEKS PLAN-WIDE RELIEF," states, in pertinent part, that Harrison "brings these claims for plan-wide relief pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)." Aplt. App., Vol. I at 35. The complaint in turn alleges six specific causes of action and accompanying claims for relief.

Count I alleges that Argent and the ESOP Committee Defendants engaged in a "[p]rohibited [t]ransaction in [v]iolation of ERISA § 406(a), 29 U.S.C. § 1106(a)" by "caus[ing] the ESOP to purchase 100,000 shares of the Company from the Sellers" and "to borrow hundreds of millions of dollars from the Sellers." *Id.* at 40, 41, 42. Count I, in turn, alleges that "[t]he ESOP Committee Defendants and Argent are liable for appropriate relief under ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3), for causing the prohibited transactions set forth herein." *Id.* at 42.

Count II alleges that the Seller Defendants, in their non-fiduciary capacities, engaged in a "[p]rohibited [t]ransaction in [v]iolation of ERISA § 406(a), 29 U.S.C. § 1106(a)" by arranging and carrying out the sale of their common stock to the ESOP, while continuing to maintain control of the company. *Id.* at 42. Count II, in turn, alleges, in pertinent part, that the Seller Defendants are "liable for appropriate equitable relief as nonfiduciary parties in interest, including the disgorgement of any ill-gotten gains they received." *Id.* at 43.

Count III alleges that Argent and the ESOP Committee Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), by failing to conduct "a prudent and loyal investigation of all the relevant ESOP Transaction terms, financial projections, and assumptions in connection with the ESOP Transaction," all of which "would have revealed that the price the ESOP paid was greater than fair market value of the Envision stock at the time of the Transaction," "that it was imprudent to approve the ESOP's purchase of Envision stock . . . because th[e] share [purchase] prices did not adequately reflect the fact that the ESOP gained no control over the Company," "that the enormous debt burden taken on by the ESOP to complete the Transaction was imprudent," and "that the ESOP Transaction terms, taken together, were not in the best interest of the ESOP participants." *Id.* at 45. Count III, in turn, alleges that "[t]he ESOP Committee and Argent, as fiduciaries to the ESOP, are liable for appropriate relief under ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3), and ERISA § 409, 29 U.S.C. § 1109, for these violations." *Id.* at 46.

Count IV of the complaint alleges that the Board Defendants violated ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B), by failing to monitor and evaluate the performance and fiduciary processes of Argent, failing to correct the fact that Argent was acting based on unrealistic and unreliable financial projections for Envision's future revenues, cash flows and earnings, failing to ensure that Argent conducted due diligence regarding the financial projections underlying the Envision stock valuation at the time of the Transaction, failing to ensure that ESOP participants did not pay an excess amount for the stock, failing to implement a system to avoid conflicts of interest, failing to remove Argent when they knew that its performance was inadequate, and failing to ensure that Argent took appropriate remedial action after the ESOP Transaction. *Id.* at 47-48. Count IV, in turn, alleges that the Board Defendants "are liable for appropriate relief under ERISA § 409, 29 U.S.C. § 1109, and ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3)." *Id.* at 48.

Count V alleges that the Board Defendants were, pursuant to ERISA § 405(a)(1) and (a)(3), 29 U.S.C. § 1105(a)(1) and (a)(3), "liable as co-fiduciaries for the ESOP's losses as a result of Argent's fiduciary violations." *Id.* at 49.

Count VI alleges that all of the Defendants violated ERISA §§ 410(a) and 502(a)(2) and (a)(3), 29 U.S.C. §§ 1110(a) and 1132(a)(2) and (a)(3), by (a) adopting terms of the ESOP Plan Document that purported to indemnify the ESOP Committee Defendants, Argent and all of its affiliates" for any costs or expenses associated with violating their

fiduciary duties, and (b) entering into an agreement with Argent to indemnify Argent and its affiliates for any costs or expenses associated with violating their fiduciary duties. *Id.* at 49-50. Count VI, in turn, alleges that "[t]his attempt to relieve Defendants of their liability for losses caused by their fiduciary violations is void as against public policy and should be declared as such pursuant to ERISA § 502(a)(2) and (a)(3), 29 U.S.C. § 1132(a)(2) and (a)(3). *Id.* at 50.

Lastly, the complaint's "PRAYER FOR RELIEF" section asks the district court, in pertinent part, to (a) declare that all Defendants "breached their fiduciary duties under ERISA," (b) enjoin all Defendants from further violations of their fiduciary duties, (c) remove Argent as the Trustee of the Envision ESOP or bar it from serving as a fiduciary of the ESOP in the future, (d) appoint a new independent fiduciary to manage the Envision ESOP and order the costs of such independent fiduciary to be paid for by defendants, (e) order Argent to restore all the losses resulting from the fiduciary breaches and to disgorge all profits made through use of assets of the ESOP, and (f) order Defendants to provide other appropriate equitable relief to the ESOP, including disgorgement of profits. *Id.* at 51.

In sum, Harrison's complaint in general, and four of the six causes of action in particular, seek relief under ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3). These two subsections of ERISA provide as follows:

Appendix A

> A civil action may be brought—
>
> * * *
>
> (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 . . . .

29 U.S.C. §§ 1132(a)(2), (a)(3).

Section 1109, which is expressly referenced in § 1132(a)(2), and which is also cited by Harrison in his complaint, is entitled "Liability for breach of fiduciary duty," and provides as follows:

> (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. § 1109. As the Seventh Circuit has noted, "[t]aken together, § 1109(a) creates fiduciary liability, and § 1132(a)(2) allows for its enforcement." *Smith*, 13 F.4th at 618.

Notably, the Supreme Court has "examined these [statutory] provisions" in the context of both a defined benefit plan (e.g., a pension plan) and a defined contribution plan (e.g., a 401(k) plan). *Id.* In the defined benefit plan case, *Russell*, a participant "sued a fiduciary under § 1132(a) 'for extra-contractual compensatory or punitive damages caused by improper or untimely processing' of her plan benefit claims, in violation of § 1109(a)." *Id.* (citing *Russell*, 473 U.S. at 136). "The [Supreme] Court held that § 1132(a) precluded such individualized relief." *Id.* (citing *Russell*, 473 U.S. at 139-44). "Recovery under § 1132(a) for a violation of § 1109, the Court explained, benefits the whole defined benefit plan." *Id.* (citing *Russell*, 473 U.S. at 140). "This was because the 'principal statutory

duties' under § 1109(a) are those that 'relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.'" *Id.* (quoting *Russell*, 473 U.S. at 143-44). "In addition, '[a] fair contextual reading of the statute ma[de] it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.'" *Id.* (quoting *Russell*, 473 U.S. at 144). "So for the Court, 'the entire text of § [1109] persuade[d] [it] that Congress did not intend that section to authorize any relief except for the plan itself.'" *Id.* (quoting *Russell*, 473 U.S. at 142). "Because the plan participant alleged an individualized, and not plan-wide, harm, § 1132(a) provided no viable cause of action." *Id.* at 618-19.

In the defined contribution plan case, *LaRue*, "a plan participant alleged that a fiduciary's misconduct—failing to make certain changes to his 401(k) account—had '"depleted" his interest in the [defined contribution plan] by approximately $150,000, and amounted to a breach of fiduciary duty under ERISA.'" *Id.* at 619 (quoting *LaRue*, 552 U.S. at 251). "The [Supreme] Court held that § 1132(a) permitted such individualized relief, distinguishing *Russell* in the process." *Id.* (citing *LaRue*, 552 U.S. at 253-56). "'Unlike the defined contribution plan' in *LaRue*, 'the disability plan at issue in *Russell* did not have individual accounts; it paid a fixed benefit based on a percentage of the employee's salary.'" *Id.* (quoting *LaRue*, 552 U.S. at 255). "And so '[t]he "entire plan" language in *Russell*,' the

Court noted, 'speaks to the impact of § 409 on plans that pay defined benefits.'" *Id.* (quoting *LaRue*, 552 U.S. at 255). "Put another way, '*Russell*'s emphasis on protecting the "entire plan" from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.'" *Id.* (quoting *LaRue*, 552 U.S. at 254). "The difference between a defined benefit plan and a defined contribution plan was dispositive in *LaRue*." *Id.* at 254-55. "As the [Supreme] Court explained, '[m]isconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan.'" *Id.* (quoting *LaRue*, 552 U.S. at 255). "But '[f]or defined contribution plans,' misconduct by a fiduciary 'need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive.'" *Id.* (quoting *LaRue*, 552 U.S. at 255-56). "The defined contribution plan participant in *LaRue*—unlike the defined benefit plan participant *Russell*—alleged fiduciary misconduct that fell 'squarely within' § 1109, so the Court permitted his claim under § 1132(a)." *Id.* (quoting *LaRue*, 552 U.S. at 253). "With *Russell* cabined to defined benefit plans, *LaRue* concluded 'that although § [1132(a)] 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.'" *Id.* (quoting *LaRue*, 552 U.S. at 256).

b) Does the arbitration provision prevent Harrison from obtaining the statutory remedies identified in his complaint?

Having outlined the statutory remedies that Harrison seeks in his complaint, the question then becomes whether the arbitration provisions contained in the Plan Document effectively prevent Harrison from vindicating those statutory remedies. Section 21 of the Plan Document is entitled "ERISA ARBITRATION AND CLASS ACTION WAIVER." Aplt. App., Vol. I at 118. Section 21 provides, in pertinent part, as follows:

> 21.1 **Arbitration Requirement and Procedure.** Subject to and without waiver of full compliance with the Plan's claims procedures as described in Section 14 which, to the extent applicable, must be exhausted with respect to any claim before any arbitration pursuant to this Section 21, *all Covered Claims must be resolved exclusively pursuant to the provisions of this Section 21* (the "Arbitration Procedure").
>
> (a) **Covered Claims**. *Any claim made by or on behalf of an Eligible 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 administered in accordance with the National Rules for the Resolution of Employment Disputes (the "Rules") of the American Arbitration Association ("AAA") then in effect. * * **

(b) **No Group, Class, or Representative Arbitrations**. *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 Eligible employee, Participant or Beneficiary other than the Claimant. For instance, with respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a*

fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant, and is not binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant. The requirement that (x) all Covered Claims be brought solely in a Claimant's individual capacity and not in a purported group, class, collective, or representative capacity, and (y) that no Claimant shall be entitled to receive, and shall not be awarded, any relief other than individual relief, shall govern irrespective of any AAA rule or decision to the contrary and is a material and non-severable term of this Section 21. The arbitrator(s) shall consequently have no jurisdiction or authority to compel or permit any class, collective, or representative action in arbitration, to consolidate different arbitration proceedings, or to join any other party to any arbitration. Any dispute or issue as to the applicability or validity of this Section 21(b) (the "Class Action Waiver") shall be determined by a court of competent jurisdiction. * * * *In the event a court of*

> *competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure (i.e., all of this Section 14) shall be rendered null and void in all respects.*
>
> * * *
>
> (l) **Covered Claims Against Non-Fiduciaries**. *This Arbitration Procedure shall apply to all Covered Claims asserted by a Claimant, whether such Covered Claims are asserted solely against one or more of the Plan's fiduciaries or are also asserted against the Primary Sponsor or any other non-fiduciary (e.g., a Plan service provider).*

Id. at 118-21 (emphasis added).

Section 21 of the Plan Document clearly encompasses the claims asserted by Harrison in his complaint. That is because the claims asserted by Harrison satisfy the definition of "Covered Claims" contained in Section 21(a). Specifically, Harrison was a "Participant" of the Plan and is asserting claims "asserting a breach of, or failure to follow, the Plan," as well as claims "asserting a breach of, or failure to follow, any provision of ERISA . . . , including . . . claims for breach of fiduciary duty." *Id.* at 118. Section 21(a) provides that these claims "shall be resolved exclusively by binding arbitration." *Id.*

The first sentence of Section 21(b) in turn provides that "[a]ll Covered Claims," including those asserted by

Harrison in his complaint, "must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis." *Id.* at 119. The prohibition on class or collective actions, in our view, is not cause for invoking the effective vindication exception. Indeed, as the Seventh Circuit has noted, the Supreme "Court has blessed that arbitration maneuver many times, including under the National Labor Relations Act." *Smith*, 13 F.4th at 622. But the prohibition on a claimant proceeding in a representative capacity is potentially more problematic, at least where, as here, the claimant alleges that the named defendants violated fiduciary duties that resulted in plan-wide harm and not just harm to the claimant's own account and the claimant seeks relief under § 1132(a)(2). As the Sixth Circuit recently concluded, "[t]he weight of authority suggests that [such] claims should be thought of as Plan claims, not [the plaintiff's] claims."[4] *Hawkins v. Cintas Corp.*, 32 F.4th 625, 635 (6th Cir. 2022). If the Sixth Circuit is correct on that point, then Section 21(b)'s prohibition on a claimant proceeding in a representative capacity is inconsistent with, and prevents a claimant from effectively vindicating the remedies afforded by, § 1132(a)(2). We ultimately do not need to decide that question because, as we shall proceed to discuss, the second sentence of Section 21(b) prevents Harrison from effectively vindicating the statutory remedies cited in his complaint.

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4. As the Sixth Circuit noted in *Hawkins*, "*LaRue* does not . . . specifically hold that a § 502(a)(2) claim 'belongs' to either the plaintiff or the plan itself." 32 F.4th at 631. The Sixth Circuit therefore looked to other case law to decide that question.

Appendix A

The second sentence of Section 21(b) states that "[e]ach 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 Eligible employee, Participant or Beneficiary other than the Claimant*." Aplt. App., Vol. I at 119 (emphasis added). The emphasized portion of this sentence would clearly prevent Harrison from obtaining at least some of the forms of relief that he seeks in his complaint pursuant to § 1132(a)(2), including (a) the imposition of liability on the ESOP Committee Defendants and Argent for losses suffered by the Plan generally, (b) a declaration that all Defendants breached their fiduciary duties under ERISA, (c) a declaration that the terms of the ESOP Plan Document that purported to indemnify the ESOP Committee Defendants, Argent, and Argent's affiliates are void as against public policy, (d) an order enjoining all Defendants from further violating their fiduciary duties, (e) an order removing Argent as the Trustee, (f) an order appointing a new independent fiduciary to manage the Envision ESOP and directing Defendants to pay the costs of such independent fiduciary, and (g) an order directing Argent to restore all the losses resulting from the fiduciary breaches and to disgorge all profits made through use of assets of the ESOP. That is because all of these forms of relief would clearly "ha[ve] the purpose or effect of providing additional benefits or monetary or other relief to" all of the Plan participants and beneficiaries and would thus be barred by the second sentence of Section 21(b) of the Plan Document.

Indeed, this conclusion is confirmed by the third sentence of Section 21(b): "*For instance, with respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant, and is not binding on the Plan Administrator or Trustee with respect to any Eligible Employee, Participant or Beneficiary other than the Claimant.*" *Id.* (emphasis added). As noted, many of Harrison's claims are brought under § 1132(a)(2) and seek forms of relief that would benefit the Plan as a whole, rather than Harrison individually. Section 21(b), however, is written in a manner intended to foreclose any such plan-wide relief. In other words, Section 21(b) is not problematic because it requires Harrison to arbitrate his claims, but rather because it purports to foreclose a number of remedies that were specifically authorized by Congress in the ERISA provisions cited by Harrison. Because Section 21(b), if enforced, would prevent Harrison from vindicating in the required arbitral forum the statutory causes of action listed in his complaint, we conclude that the effective vindication exception applies in this case.

Indeed, it is not clear what remedies Harrison would be left with if Section 21(b) is enforced as written. And, in fact, Section 21(b) effectively prevents any claimant from pursuing the types of claims that Harrison asserts in his complaint.[5]

This conclusion is supported by the Seventh Circuit's decision in *Smith*. Notably, *Smith* involved strikingly similar underlying facts and claims. The plaintiff in the case, James Smith, "worked for Triad Manufacturing, Inc." for one year and "participated in Triad's Employee Stock Ownership Plan, a defined contribution employee retirement plan under" ERISA. 13 F.4th at 615. Triad's three shareholder-directors sold all of Triad's stock to the plan for a price of $58.05 per share and in turn appointed GreatBanc Trust Company as the plan trustee. The plan

5. Defendants suggest in their opening appellate brief that "each participant" may "pursue the losses to his or her individual account" by way of arbitration. Aplt. Br. at 35 n. 7. Even assuming that is true, the arbitration provisions in the Plan Document nevertheless prohibit the various forms of equitable relief sought by Harrison in his complaint, including (a) the imposition of liability on the ESOP Committee Defendants and Argent for losses suffered by the Plan generally, (b) a declaration that all the defendants breached their fiduciary duties under ERISA, (c) a declaration that the terms of the ESOP Plan Document that purported to indemnify the ESOP Committee Defendants, Argent, and Argent's affiliates are void as against public policy, (d) an order enjoining all defendants from further violating their fiduciary duties, (e) an order removing Argent as the Trustee, (f) an order appointing a new independent fiduciary to manage the Envision ESOP and directing defendants to pay the costs of such independent fiduciary, and (g) an order directing Argent to restore all the losses resulting from the fiduciary breaches and to disgorge all profits made through use of assets of the ESOP.

financed the purchase "through loans provided by the three [shareholder-directors]." *Id.* at 616. GreatBanc approved the transaction, "seemingly after it had already occurred." *Id.* The transaction resulted in the plan's holdings "consist[ing] entirely of Triad stock." *Id.* Approximately two weeks after the transaction, Triad's "share price . . . dropped to $1.85," causing the plan's holdings to "plummet[] in two weeks" from "over $106 million . . . to just under $4 million." *Id.* Notwithstanding the drop in stock value, the plan was required, under the terms of the stock purchase transaction, "to make retirement contributions in amounts no less than necessary to service the loan payments" to the three shareholder-directors. *Id.* Approximately six months later, Triad's board, which served as the plan's primary sponsor, "amended the plan to include an arbitration provision with a class action waiver." *Id.* One section of the arbitration provision required covered claims to be brought solely in the claimant's individual capacity and not in a representative capacity, and also prohibited any claimant from seeking or receiving any remedy which had the purpose or effect of providing additional benefits or monetary or other relief to anyone other than the claimant.

Smith subsequently filed a class action complaint against the three shareholder-directors and GreatBanc under 29 U.S.C. § 1132(a)(2) and (a)(3). In his complaint, Smith alleged that the shareholder-directors (a) "breached their fiduciary duties by failing to monitor fellow fiduciary GreatBanc as plan trustee," (b) "engaged in prohibited transactions in violation of 29 U.S.C. § 1106(a)," and (c) "knowingly participated in GreatBanc's

fiduciary violations." *Id.* at 617. In terms of relief, Smith's complaint sought the removal of GreatBanc as trustee, the appointment of a new independent fiduciary, an order directing defendants to pay for the appointment of a new fiduciary, and other available forms of relief under § 1132(a)(2).

The shareholder-director defendants moved to compel arbitration or, alternatively, to dismiss Smith's claims. The district court denied that motion concluding, in pertinent part, that the arbitration provision was "unenforceable because it prospectively waived Smith's right to statutory remedies provided by ERISA." *Id.* The shareholder-director defendants then appealed to the Seventh Circuit.

The Seventh Circuit concluded, as a threshold matter, "that ERISA claims are generally arbitrable." *Id.* at 620. But the Seventh Circuit concluded that the arbitration provision in Smith's case was not enforceable because "the plain text of § 1109(a) and the terms of the arbitration provision [could not] be reconciled: what the statute permits, the plan precludes." *Id.* at 621. The Seventh Circuit emphasized that "the problem with the plan's arbitration provision [wa]s its prohibition on certain plan-wide remedies, not plan-wide representation." *Id.*

As we have discussed, the same is true with respect to Section 21 of the Plan Document in Harrison's case. It is not Section 21's prohibition on class actions that is problematic. Rather, it is Section 21's prohibition of any form of relief that would benefit anyone other than Harrison that directly conflicts with the statutory

remedies available under 29 U.S.C. §§ 1109 and 1132(a)(2), (a)(3).

c) Defendants' remaining arguments

Defendants make several other arguments in challenging the district court's denial of their motion to compel arbitration. To begin with, Defendants argue that the district court's order "violates a core tenet of ERISA, which requires that a plan document be enforced strictly according to its terms." Aplt. Br. at 24. Defendants note in support that "ERISA flatly requires that '[e]very employee benefit plan shall be established and maintained pursuant to a written instrument.'" *Id.* (quoting 29 U.S.C. § 1102(a)(1)). Defendants also note that "any fiduciary of an ERISA plan is obligated to act 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [other parts of ERISA].'" *Id.* (quoting 29 U.S.C. § 1104(a)(1)(D)). These arguments, however, not only ignore, but fly directly in the face of, the effective vindication exception. Nothing in ERISA states that a plan document can override statutory remedies that were afforded to claimants by Congress. Further, as the DOL points out in its amicus brief, one of the ERISA sections that Defendants cite in support of their argument, § 1104(a)(1)(D), expressly states that fiduciaries are obligated to discharge their duties in accordance with the plan documents and instruments only to the extent that those documents and instruments "'are consistent with the provisions of [Title I of ERISA].'" DOL Amicus Br. at 27 (quoting 29 U.S.C. § 1104(a)(1)(D)). "Enforcing a plan provision that waives a participant's

right to seek plan-wide relief from a breaching fiduciary is inconsistent with the right to such relief conferred by sections 502(a)(2) and 409(a)," and thus "undermines Defendants' position and militates in favor of finding the Plan's Remedy Limitation invalid." *Id.*

Defendants next argue that the district court, "[i]n finding that the individualized arbitration provision violates the 'effective vindication' exception, . . . essentially concluded that an ERISA plan participant can never arbitrate an individual claim, because he can never waive the ERISA provision allowing for plan-wide remedies." Aplt. Br. at 28. That is incorrect for two related reasons. First, a review of Harrison's complaint establishes that most of his claims are not unique to himself, but instead concern Defendants' actions with respect to the Plan as a whole. Second, Harrison's complaint not only cites to ERISA provisions that allow for plan-wide remedies, but also specifically (and understandably, given the nature of his claims) requests such remedies. Thus, it would not be enough for an ERISA complainant to simply cite to the same statutory provisions that Harrison cites in his complaint. Instead, both the nature of the claims and the specific relief sought by the complainant matter. Thus, an ERISA complainant who is asserting a claim unique to himself or herself could not, simply by citing to the same ERISA provisions cited by Harrison, avoid arbitration in reliance on the effective vindication exception.

Defendants also argue that the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018), requires a clearly expressed

congressional intention to override the FAA and forbid arbitration. Aplt. Br. at 29. *Epic*, however, did not involve the effective vindication exception. Instead, it involved an alleged conflict between the FAA and the National Labor Relations Act (the NLRA). The plaintiffs in *Epic*, despite entering into agreements with their employers that provided they would arbitrate any disputes that might arise between them, argued that the agreements "violate[d] the NLRA by barring employees from engaging in the 'concerted activity' of pursuing claims as a class or collective action."[6] 138 S. Ct. at 1620 (quoting 29 U.S.C. § 157). In rejecting the plaintiffs' arguments, the Supreme Court noted, in pertinent part, that "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, [it] [wa]s not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Id.* at 1624 (internal quotation marks omitted). And, abiding by this principle, the Court refused "to infer a clear and manifest congressional command to displace the [FAA] and outlaw agreements like" those the plaintiffs entered into. *Id.* at 1624

Epic, in short, is inapposite because it involved an argument by the party opposing arbitration that a different federal statute, i.e., the NLRA, conflicted

6. Notably, the arbitration agreements that plaintiffs entered into stated, in pertinent part, "that the arbitrator could 'grant any relief that could be granted by . . . a court' in the relevant jurisdiction." 138 S. Ct. at 1619. Thus, the arbitration agreements differed in a key respect from the arbitration provision of the Plan here, which, as noted, effectively eliminated specific forms of statutory relief that had otherwise been authorized by Congress.

with and effectively overrode the FAA. That is not the argument that Harrison (or the DOL) is making here. Specifically, Harrison is not arguing that the FAA and ERISA conflict in any way. Rather, he is arguing that the specific provisions of the arbitration section of the Plan effectively prevent him from vindicating statutory remedies that are outlined in ERISA.

That said, there is language in *Epic* that has some relevance to the case at hand. In discussing the FAA, the Supreme Court noted that the FAA "seems to protect pretty absolutely" contracts for arbitration that "specify the rules that w[ill] govern the[] arbitration," including any provisions that require the "use [of] individualized rather than class or collective action procedures." *Id.* at 1621. As noted, the arbitration provisions of the Plan Document in this case specify the rules that will govern arbitration and clearly indicate that there will be only individualized rather than class or collective action *procedures*. Those procedural provisions, standing alone, do not appear to implicate the effective vindication exception and, instead, are protected by the FAA. Instead, as discussed above, it is the portion of Section 21(b) that purports to prohibit a claimant from obtaining any form of relief that would benefit anyone other than himself or herself that is problematic and that implicates the effective vindication exception. In other words, the Supreme Court's rulings regarding the effective vindication exception, including its statements in *Epic*, make clear that the exception is not implicated simply because an arbitration agreement changes, or even eliminates, the otherwise applicable procedures that a claimant may use to seek relief. Instead,

the effective vindication exception applies only where an arbitration agreement alters or effectively eliminates substantive forms of relief that are afforded to a claimant by statute. And that is precisely what occurred here.

Defendants also argue that "ERISA contains no clearly expressed congressional intent to prohibit individual arbitrations." Aplt. Br. at 31. That is true. But this argument misses the key point. It is not the Plan Document's requirement that a claimant engage in the procedural mechanism of individual arbitration that is the problem here. Rather, it is the Plan's prohibition on an individual claimant seeking any form of relief that would benefit anyone other than the claimant.

Relatedly, defendants suggest that "[e]ven construing" ERISA §§ 1132(a)(2) and 1109 "to *allow* participants to obtain plan-wide relief does not prove that plan-wide remedies could not be *waived*." *Id.* at 33 (emphasis in original). In support, defendants argue that "[w]ith respect to other federal statutes that provide a 'right' to collective litigation, an unbroken line of Supreme Court cases permits plaintiffs to waive the right to proceed class-wide by agreeing to individualized arbitration." *Id.* at 34. Defendants are again mistaken. To begin with, §§ 1132(a)(2) and 1109 allow claimants to obtain certain forms of plan-wide relief. Indeed, the Supreme Court has made clear that § 1132(a) does not provide a remedy for individual injuries distinct from plan injuries.[7] *LaRue*,

7. As the Sixth Circuit noted in *Hawkins*, "*Larue* . . . means that while any claims properly brought under § 502(a)(2) must be for injuries to the plan itself, § 502(a)(2) authorizes suits on

552 U.S. at 256. As for the purported "unbroken line of Supreme Court cases" to which defendants refer, those cases simply confirm what is discussed above, i.e., that an arbitration agreement can alter or eliminate *procedures* (including eliminating class-wide arbitration) but cannot alter or eliminate *forms of relief* that are provided for by statute. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Supreme Court addressed the question of "whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application." *Id.* at 23. The plaintiff in the case argued, in pertinent part, "that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions." *Id.* at 32. The Supreme Court disagreed, noting that "arbitrators do have the power to fashion equitable relief." *Id.* The Court also emphasized that the arbitration agreement at issue did "not restrict the types of relief an arbitrator may award, but merely refer[red] to 'damages/and/or other relief.'" *Id.* Notably, the case at hand differs significantly from the agreement at issue in *Gilmer* because, in the case at hand, the arbitration provisions in the Plan Document effectively restrict the types of relief the arbitrator may award.

Lastly, Defendants assert for the first time on appeal that "ERISA specifically authorizes the Secretary of

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behalf of a defined-contribution plan even if the harm is inherently individualized." 32 F.4th at 631.

Labor to bring actions on behalf of a plan to recover plan-wide relief," and they argue that, notwithstanding the arbitration provisions of the Plan, "[t]he DOL can investigate and seek to remedy any broader breach, should it determine one has occurred, and other participants may further their own rights." Aplt. Br. at 46. It is true that § 1132(a)(2) authorizes the DOL, as well as plan participants (and beneficiaries and fiduciaries), to file suit and obtain the forms of relief outlined therein. Regardless of who brings suit under § 1132(a)(2), however, the fact remains, as the Supreme Court has made clear, that the suit is "on behalf of [the] plan" itself, and the precise same statutory remedies are available regardless of the named plaintiff.[8] *LaRue*, 552 U.S. at 253. Moreover, nothing in the statute requires the Secretary of the DOL to file any such suit, and it is unreasonable to assume that the DOL is capable of policing every employer-sponsored benefit plan in the country. Indeed, the DOL notes in its amicus brief that "there could be a host of reasons preventing the Secretary from bringing even the most meritorious of claims," including its limited resources. DOL Amicus Br. at 25. Thus, it remains true that Section 21 of the Plan, by prohibiting a claimant such as Harrison from obtaining any form of relief that would benefit anyone other than himself, prevents the effective vindication of the statutory remedies outlined in § 1132(a)(2). In other words, the effect of Section 21 of the Plan, if enforced, would be that participant/claimants such as Harrison would be left without any guarantee that a suit seeking the statutory remedies set forth in § 1132(a)(2) would ever

8. It is of course possible that, as was the case in *LaRue*, the harm to a defined contribution plan is individualized, i.e., occurring just to an individual account within the defined contribution plan.

be filed by the DOL (and, in turn, that those statutory remedies would ever be available).

THE EFFECT OF THE NON-SEVERABILITY CLAUSE IN SECTION 21.1(B)

As quoted above, Section 21.1(b) of the Plan Document includes a non-severability clause that reads as follows: "In the event a court of competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure . . . shall be rendered null and void in all respects." Aplt. App., Vol. I at 119.

Because we agree with the district court that the remedies limitation contained in Section 21.1(b) prevents Harrison from effectively vindicating his statutory remedies, that means that the entire Arbitration Procedure outlined in Section 21 of the Plan is "rendered null and void in all respects." In other words, Defendants are precluded from arguing that Harrison is required to submit his claims to arbitration without the remedy limitations outlined in Section 21.1(b).

III

The decision of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED MARCH 24, 2022

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 21-cv-0304-RMR-NYW

ROBERT HARRISON, ON BEHALF OF HIMSELF, THE ENVISION MANAGEMENT HOLDING INC. ESOP, AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiff,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS, *et al.*,

Defendants.

ORDER

This matter comes before the Court on the Defendants' Envision Management Holding, Inc. Board of Directors, et al. ("Defendants") Motion to Compel Arbitration And To Stay Pursuant To Sections 3 And 4 Of The Federal Arbitration Act Or, In The Alternative, To Dismiss For Lack Of Jurisdiction. (ECF 34). The Plaintiff, Robert Harrison, ("Plaintiff" or "Mr. Harrison") filed a response (ECF 35), and Defendants filed a reply (ECF 36). The Plaintiff filed a Notice of Supplemental Authorities

(ECF 38); the Defendants filed a response (ECF 39); and the Plaintiff filed a reply (ECF 41). The Plaintiff filed a second Notice of Supplemental Authorities (ECF 43). The Defendants filed a response (ECF 45). The Defendants filed a notice of supplemental authority (ECF 52), and the Plaintiff filed a response (ECF 53). This matter is fully briefed and is ripe for review. For the reasons that follow, the Defendants' motion is **DENIED**.

I. BACKGROUND

This case involves an employee stock ownership plan ("ESOP" or the "Plan"), that allows participating employees to acquire beneficial interest in company stock of their employer. The Plan is regulated by ERISA. The Plaintiff, a former employee of Envision Management Holding ("Envision") and a Plan Participant, filed this purported class action complaint for ERISA violations, alleging breach of fiduciary duties related to the sale of Envision to the ESOP.

The Plaintiff specifically alleges that Defendants Creps, Sherwood, and Jones ("Seller Defendants") created the ESOP for the purpose of purchasing 100% of the Seller Defendants' private Envision stock. The Plaintiff alleges that the Seller Defendants installed Defendant Argent Trust Company ("Argent") as Trustee of the ESOP, but that Seller Defendants retained control over Argent. The Plaintiff alleges that he and other employee participants in the ESOP--whose retirement accounts were used the purchase the Envision stock from the Sellers--were not given the chance to negotiate or otherwise take part in

the determination of the price that ESOP paid for the Envision stock. The Plaintiff alleges that ESOP paid an inflated price for the stock. The Plaintiff also alleges that the ESOP did not have sufficient funds to pay the purchase price for the stock, and it therefore borrowed over $100 million from the Seller Defendants, which the Plaintiff alleges was not in the best interest of the ESOP participants. The Plaintiff argues that the Defendants' actions related to the sale caused him and all other ESOP participants to suffer significant losses to their ESOP retirement savings.

The Plaintiff brings six causes of action against the various defendants and seeks plan-wide relief, including a declaration that the Defendants have breeched their fiduciary duties under ERISA, removal of Defendant Argent as the trustee of the ESOP, appointment of a new independent fiduciary to manage the ESOP, an order that Defendant Argent restore losses resulting from the alleged breach, an order that Defendants provide equitable relief to ESOP, and an order enjoining the Defendants from dissipating, transferring, or disposing of any proceeds received from the allegedly improper transaction.

The Defendants have filed this motion to compel arbitration, arguing that the Plan requires Plan participants like Mr. Harrison to bring claims only in individualized, binding arbitration, not in federal court.

II. LEGAL STANDARD

Arbitration agreements are governed by the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 1 *et seq.* Under the FAA, arbitration agreements "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. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

"The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked." *Avedone Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1287 (10th Cir. 1997). When considering a motion to compel arbitration, the Court employs a two-step process: first, the Court must determine whether there was an agreement that provides the moving party with a right to compel arbitration. Second, the Court considers whether the allegations in the complaint are within the scope of the arbitration agreement. *Cavlovic v. J.C. Penney Corp., Inc.*, 884 F.3d 1051, 1057 (10th Cir. 2018). If the Court determines that a suit is subject to an arbitration agreement, it shall "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. In its analysis of this case, the Court focuses on the first step, and it finds that the Defendants are not entitled to compel arbitration.

III. ANALYSIS

Mr. Harrison argues that the Defendants' motion to compel arbitration should be denied. First, Mr. Harrison argues that the arbitration provision in the Plan is invalid because it prospectively eliminates his statutory remedies under ERISA. Second, and in the alternative, Mr. Harrison argues that the arbitration provision is not enforceable because he was not given notice of it. For the reasons that follow, the Court finds that the arbitration provision in the Plan is invalid because it conflicts with ERISA. The Court therefore need not consider whether Mr. Harrison was properly on notice of the arbitration provision.

A. The Arbitration Provision Is Invalid Because It Acts As A Prospective Waiver Of Harrison's Right To Pursue Statutory Remedies

The Supreme Court has instructed that an arbitration provision will be determined invalid if it acts as a "prospective waiver of a party's *right to pursue* statutory remedies." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). This "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.* An arbitral forum is adequate (and an agreement to arbitrate should be upheld) "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Id.*

The Court here must thus determine whether Mr. Harrison "effectively may vindicate [his] statutory cause of action in the arbitral forum." If he cannot, the arbitration provision acts a prospective waiver of Harrison's right to pursue remedies under ERISA and is invalid. For the reasons that follow, the Court finds that the arbitration provision acts as a prospective waiver because it disallows plan-wide relief, which is expressly contemplated by ERISA.

1. Relevant Plan Language

Section 21 of the Employee Stock Ownership Plan sets forth the "ERISA Arbitration and Class Action Waiver." Section 21.1 states that "all Covered Claims must be resolved exclusively pursuant to the provisions of this section (the 'Arbitration Procedure.')". Section 21.1(b) provides that:

> 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 only 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 Eligible Employee, Participant, or Beneficiary other than the Claimant. For instance, with respect to any claim brought under ERISA § 502(a)(2) to seek appropriate relief under ERISA § 409, the

Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's individual Account resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Eligible Employee, Participant or Beneficiary other than the Claimant. The requirement that (x) all Covered Claims be brought solely in a Claimant's individual capacity and not in a purported group, class, collective, or representative capacity, and (y) that no Claimant shall be entitled to receive, and shall not be awarded, any relief other than individual relief, shall govern irrespective of an AAA rule or decision to the contrary and is a material and non-severable term of this Section 21. The arbitrator(s) shall consequently have no jurisdiction or authority to compel or permit a class, collective, or representative action in arbitration, to consolidate different arbitration proceedings, or to join any other party to any arbitration. Any dispute or issue as to the applicability or validity of this Section 21(b) (the 'Class Action Waiver') shall be determined by a court of competent jurisdiction. Moreover,

> nothing in this Arbitration Procedure shall preclude seeking interim or provisional relief or remedies in aid of arbitration from a court of competent jurisdiction. In the event a court of competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure (i.e., all of this Section 14) shall be rendered null and void in all respects.

ECF 34-1, p. 50.

Mr. Harrison argues that this provision conflicts with his rights as set forth in 29 U.S.C § 1132(a)(2). Section 1132(a)(2) provides for civil enforcement of ERISA requirements "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title." Section 1109, in turn, provides that

> 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.

Mr. Harrison argues that "§ 502(a)(2) [29 U.S.C § 1132(a)(2)] is a unique provision of ERISA that allows plan participants to sue plan fiduciaries and recover *all* losses suffered by *all* plan participants, not only individual losses." ECF 35, p. 6. Mr. Harrison further argues that "section 1109 expressly authorizes removal of a breaching fiduciary and any 'such other equitable or remedial relief as the court may deem appropriate.'" *Id.* (quoting 29 U.S.C. § 1109(a)). Harrison argues that "the arbitration provision here cannot be enforced because it would strip Mr. Harrison of substantive rights conferred by ERISA: namely, the right to proceed under § 1132(a)(2) and seek multiple remedies on behalf of the Plan as a whole. Specifically, the arbitration provision prohibits Mr. Harrison from proceeding under § 1132(a)(2) and seeking relief on behalf of the Plan by stating that claims 'must be brought solely in the Claimant's individual capacity and not in a representative capacity.'" ECF 35, p. 6.

The Defendants argue that the arbitration provision is not invalid because it is not a "prospective waiver" of Harrison's statutory rights. The Defendants argue that arbitration provisions are invalid as prospective waivers of statutory rights "if they prohibit *any federal claim whatsoever*." ECF 36, p. 2. A provision is not void, the Defendants argue, "for merely *curtailing* certain claims." *Id.* at 4.

Appendix B

The Defendants direct the Court to *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627, 200 L. Ed. 2d 889 (2018). In *Epic Systems*, the Supreme Court considered whether an employment contract providing for individualized arbitration proceedings to resolve employment disputes was invalid as a violation of the National Labor Relations Act. The employees in that case specifically asked the Court "to infer that class and collective actions are 'concerted activities' protected by § 7 of the NLRA, which guarantees employees 'the right to self-organization, to form, join, or assist labor organizations, to bargain collectively ..., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'" *Id.* at 1617.

The Court ultimately found that the provision did not violate the NLRA, and that the arbitration provision was not invalid. The Court observed that section 7 "focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures." *Id.* The Court explained "we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration. And we've 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.* (internal citations omitted).

While *Epic Systems* is instructive, it does not answer the precise question before this Court: whether an arbitration provision such as the one in Mr. Harrison's

Plan violates ERISA, which explicitly contemplates plan-wide relief. While the Tenth Circuit has found that ERISA claims are generally arbitrable, it has not specifically addressed the question pending before this Court. The Seventh Circuit, however, recently considered this exact question in *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 615 (7th Cir. 2021). In *Smith*, the plaintiff filed a class action complaint under 29 U.S.C. § 1132(a)(2) and (a)(3). Like Mr. Harrison, the plaintiff in *Smith* requested removal of the trustee that he alleged breached fiduciary duties; he asked that a new fiduciary be appointed to manage the plan; and he asked the court to award other equitable and just relief. *Id.* at 617. The defendant in *Smith* filed a motion to compel arbitration. The arbitration provision in Smith's plan provided that "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."; and "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 Eligible Employee, Participant or Beneficiary other than the Claimant." *Id.* at 616.

The Seventh Circuit upheld the district court's denial of the defendant's motion to compel arbitration, finding that the arbitration provision at issue acted as a "prospective waiver of [the plaintiff's] right to pursue statutory remedies." *Id.* (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19). The court observed that "the plain text of § 1109(a) and the terms of the arbitration provision

cannot be reconciled: what the statute permits, the plan precludes." *Id.* The court found that the arbitration provision thus made it impossible for the plaintiff to effectively vindicate his statutory causes of action in the arbitral forum. The language at issue in *Smith*, and the plaintiff's claim therein, is substantively identical to the language and claims at issue here.

The court in *Smith* acknowledged, as does this Court, that the applicability of the "effective vindication" exception is rare. The Supreme Court declined to apply the exception in both *Italian Colors* and *Epic Systems*. The Supreme Court, however, "did not entirely shut the door to the 'effective vindication' exception, explaining that 'it would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights.'" *Smith*, 13 F.4th at 621 (citing *Italian Colors*, 570 U.S. at 236).

The Seventh Circuit determined that the exception applied. Explaining:

> Recall that Smith invokes § 1132(a)(2)'s cause of action to seek relief for (alleged) fiduciary breaches under § 1109(a). That relief, by statute, includes "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). Yet the plan's arbitration provision, which also contains a class action waiver, precludes a participant from seeking or receiving relief that "has the purpose or effect of providing

> additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." Removal of a fiduciary—a remedy expressly contemplated by § 1109(a)—would go beyond just Smith and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan.
>
> All this is to say that the plain text of § 1109(a) and the terms of the arbitration provision cannot be reconciled: what the statute permits, the plan precludes. In that way, the plan's arbitration provision acts as a "prospective waiver of a party's right to pursue statutory remedies," *Mitsubishi Motors*, 473 U.S. at 637 n.19, 105 S.Ct. 3346, so the "effective vindication" exception applies. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 675 (4th Cir. 2016) (applying "effective vindication" exception when an "arbitration agreement use[d] its 'choice of law' provision to waive all of a potential claimant's federal rights.").

Smith, 13 F.4th at 621-22.

As did the Plaintiff in *Smith*, Mr. Harrison here asks the Court to remove Defendant Argent as a trustee and to appoint a new independent fiduciary to manage the ESOP. The arbitration provision in the Plan, however, prohibits Mr. Harrison from "seek[ing] or receiv[ing] any remedy which has the purpose or effect of providing

additional benefits or monetary or other relief to any Eligible Employee, Participant, or Beneficiary other than the Claimant." As the Seventh Circuit explained, "[r]emoval of a fiduciary—a remedy expressly contemplated by § 1109(a)—would go beyond just [Mr. Harrison] and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan." *Id.* Thus, under the Seventh Circuit's reasoning, the arbitration provision at issue here would be invalid.

The Defendants urge the court not to adopt the Seventh Circuit's reasoning. The Defendants argue that "*Smith* is wrong, misapplies the Supreme Court's prior cases, and conflicts with other circuit-level authority." ECF 39, p. 1. The Defendants specifically argue that *Smith* fails to address *Epic Systems* and contradicts the Supreme Court instruction that courts must make every effort to harmonize federal statutes and read them together.

The Defendants are correct that *Epic Systems* instructs that, while an irreconcilable conflict may require the court to invalidate an arbitration provision, the court must "strive to give intent to both.'" *Epic Systems*, 138 S. Ct. at 1623. Considering the NLRA, the Court in *Epic Systems* observed that "[t]his Court has never read a right to class actions in the NLRA." *Id.* at 1619. Thus "far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful." *Id.* Thus, because the NLRA was susceptible to an interpretation that it did not protect the right to proceed collectively in an arbitration, and because that

interpretation would remove any conflict with the FAA, the Court was obligated to adopt that interpretation. *Id; see also Cedeno v. Argent Tr. Co.*, No. 20-CV-9987 (JGK), 2021 U.S. Dist. LEXIS 212926, 2021 WL 5087898, at *5 (S.D.N.Y. Nov. 2, 2021).

Unlike the NLRA, however, "there is in fact a clear statutory right for a participant to seek Plan-wide relief under [ERISA] §§ 409(a) and 502(a)(2), and there is no conflict with the FAA because there is no provision of the FAA that prevents a participant from seeking such remedies." *Id.* The harmony sought by the Court in *Epic Systems* is simply not possible where, as here, section 1132(a)(2) expressly provides for relief that the arbitration provision forbids.

Smith—and courts applying *Smith*—have specifically looked to the remedies available under ERISA, not just the right to proceed collectively. The *Smith* court clarified that "the problem with the plan's arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation." *Smith*, 13 F.4th at 622; *see also Cedeno v. Argent Tr. Co.*, 2021 U.S. Dist. LEXIS 212926, 2021 WL 5087898, at *6 ("The FAA does not protect the remedies sought in arbitration... The defect in the parties' arbitration agreement in this case is not that it does not provide for a collective or class action — an issue of the manner of arbitration protected by the FAA — but that it precludes a statutory remedy provided for by ERISA.").

So too, does this Court find that the Plan's arbitration provision prohibits remedies that are explicitly provided

for by ERISA. ERISA specifically provides a right to pursue plan-wide remedies. The arbitration provision disallows a litigant from seeking plan-wide remedies. Therefore, under the terms of the arbitration provision, Mr. Harrison is unable to effectively vindicate his statutory cause of action in the arbitral forum.

The Defendants' contention that *Smith* conflicts with other circuit authority is also unpersuasive. The Defendants direct the Court to *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019) and *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020). The Defendants argue that, in those cases, "[t]he two other courts of appeals that have invalidated arbitration provisions as prospective waivers did so in the context of waivers that were drastically different from the class action waiver here." ECF 39, p. 3. In *Gingras*, the Defendants argue, "the Second Circuit invalidated an arbitration provision on the basis that it "require[d] application of tribal law *only*' which "*wholly* foreclose[d] [plaintiffs] from vindicating rights granted by federal and state law.'" ECF 39, pp. 3-4 (citing *Gingras*, 922 F.3d at 127). Likewise, in *Williams*, "the Third Circuit held that 'arbitration agreements that ... forbid federal claims... are unenforceable." *Williams*, 965 F.3d at 238. But nothing in *Gingras* or *Williams* suggests that an arbitration agreement is invalid only if it forecloses *all* causes of action. On the contrary, both the *Gingras* and *Williams* courts applied the same effective vindication exception that we apply here. *See Gingras*, 922 F.3d at 127 ("The Supreme Court has made clear that arbitration agreements that waive a party's right to pursue federal

statutory remedies are prohibited"); *see also Williams*, 965 F. 3d at 238 ("arbitration is only appropriate so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum").[1]

The arbitration provision is therefore invalid, and the Defendant's motion to compel arbitration is denied.[2]

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1. So, too, is this case distinguishable from *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986-CIV, 2022 U.S. Dist. LEXIS 10834, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022), to which the Defendants direct the Court in their Notice of Supplemental Authority, ECF 52. The Court in *Holmes* acknowledged that the arbitration provision it considered was narrower than the clause at issue in *Smith*. The court in *Holmes* explained that under the arbitration clause in *Smith* "certain relief, such as the removal of a fiduciary, was completely barred, as no claimant in an arbitration would have been able to obtain such remedy under the arbitration clause." *Id.* In contrast, the arbitration provision in *Holmes* "only prohibits relief that provides 'additional benefits or monetary relief to any person' other than the claimant. Therefore, the specific relief that the Plaintiffs argue has been barred—the ability to seek removal and appointment of the Plan's fiduciaries—is not barred by the arbitration clause. While that sought-after relief has a Plan-wide effect, it does not provide additional benefits or monetary relief as prohibited. Thus, while the arbitration clause in *Smith* completely denied some types of statute-authorized relief to the Plan, the clause here does not..." The Court acknowledges Defendants' argument that this particular statement by the Court was premised on a factual mistake. It is not the province of this Court, however, to question the findings of fact made by courts in other districts. Regardless, the Court still finds that the Seventh Circuit's reasoning in *Smith* is correct.

2. Because the Court finds that the arbitration provision is invalid, it need not address Mr. Harrison's argument that he did not receive notice of the arbitration provision.

IV. CONCLUSION

For the reasons stated herein, the Defendants' Motion to Compel Arbitration, ECF 34, is **DENIED**.

DATED: March 24, 2022

BY THE COURT:

/s/ Regina M. Rodriguez
REGINA M. RODRIGUEZ
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DATED APRIL 10, 2023

No. 22-1098

(D.C. No. 1:21-CV-00304-RMR-NYW)
(D. Colo.)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT HARRISON, ON BEHALF OF HIMSELF, THE ENVISION MANAGEMENT HOLDING, INC. ESOP, AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Plaintiff-Appellee,

v.

ENVISION MANAGEMENT HOLDING, INC. BOARD OF DIRECTORS, *et al.*,

Defendants-Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Amici Curiae.

Appendix C

ORDER

Before BACHARACH, BRISCOE, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D — STATUTES AND REGULATIONS

9 U.S.C. § 4

§ 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 thereunder, 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.

Appendix D

29 U.S.C. § 1132

§ 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;

Appendix D

29 U.S.C. § 1109

§ 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.