No. 24-

IN THE

Supreme Court of the United States

ARGENT TRUST COMPANY,

Petitioner,

v.

RAMON DEJESUS CEDENO, *et al.*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents two questions: (1) whether a plan participant can only bring a lawsuit under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), as a representative of his or her entire ERISA-governed benefit plan, and (2) whether a participant in an ERISA-governed benefit plan who asserts statutory ERISA claims can be compelled, pursuant to a binding arbitration provision, to submit his or her claims to individual arbitration.

On multiple 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 Federal Arbitration Act ("FAA") requires that arbitration clauses be enforced, unless another federal statute evinces a clear intention by Congress to override the FAA's commands. Two Circuits—the Ninth Circuit and Seventh Circuit (the latter of which ultimately invalidated an arbitration provision on other grounds)—have concluded that there is nothing in ERISA that would preclude individual arbitration of ERISA claims. But the Third, Sixth, and Tenth Circuits, as well as the Second Circuit in the instant matter, have reached the opposite conclusion in invalidating ERISA plan arbitration provisions. A split thus exists between Circuits that recognize the availability of individual arbitration for ERISA claims and Circuits that do not.

This Court should grant this petition to review and reverse the Second Circuit's decision below and answer the important federal questions presented here as follows: ERISA does not require participants to bring claims on behalf of their entire benefit plans, and nothing in ERISA precludes individual arbitration.

PARTIES TO THE PROCEEDING

Petitioner is Argent Trust Company ("Argent").

Respondent Ramon Dejesus Cedeno, named plaintiff in the proceedings below, purports to bring claims on behalf of himself, the Strategic ESOP, and all other similarly situated individuals.

Respondents Ryan Sasson, Daniel Blumkin, Ian Behar, Duke Enterprises LLC, Twist Financial LLC, Blaise Investments LLC, and Strategic Financial Solutions, LLC are named as defendants in the proceedings below, along with Argent. These individuals and entities are not participating with Argent as petitioners with respect to the instant Petition.

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 owns 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.

RELATED PROCEEDINGS

Cedeno v. Argent Trust Co., No. 20-9987, U.S. District Court for the Southern District of New York. Memorandum Opinion & Order entered Nov. 2, 2021.

Cedeno v. Sasson, No. 21-2891, U.S. Court of Appeals for the Second Circuit. Judgment entered May 1, 2024.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Statutes and Other Authorities

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's decision affirming the district court (Pet. App. 1a-46a), as well as the dissent by Circuit Judge Steven J. Menashi to the decision below (Pet. App. 47a-71a) (the "Dissent"), are available at 100 F.4th 386 (2d Cir. 2024). The district court's order denying the motion to compel arbitration (Pet. App. 72a-86a) is available at No. 20-9987, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021).

JURISDICTION

The Second Circuit entered its decision on May 1, 2024 (Pet. App. 1a-46a). The Second Circuit entered its Order denying a timely filed petition for rehearing or rehearing *en banc* on July 9, 2024 (Pet. App. 87a-88a). 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. 89a-90a) and 29 U.S.C. §§ 1132(a)(1)-(3), 1109(a) (reproduced at Pet. App. 91a-95a).

INTRODUCTION

For decades, this Court has held that valid arbitration provisions must be enforced, including 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") wherever possible so that arbitration provisions may be enforced. This case presents yet another instance where a lower court has declined to compel individual arbitration; this time 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 or overrides the dictates of the FAA as would be necessary 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). The Seventh Circuit in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613, 622 (7th Cir. 2021), also acknowledged that nothing in ERISA precludes individual arbitration of statutory claims, though the court affirmed the denial of a motion to compel arbitration on other grounds. Since then, four other courts of appeals—the Second Circuit in this case, as well as the Third, Sixth, and Tenth Circuits—have invalidated arbitration provisions that required individual arbitration of ERISA claims. And the Second Circuit has gone furthest of all, in concluding that ERISA claims *must* be litigated on a plan-wide basis rather than an individual basis. These courts of appeals have created a split of authority about the arbitrability of ERISA claims 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 Cedeno alleged that Petitioner (and other named defendants) breached ERISA duties, harming 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 provision, or that his claims fall within the scope of that provision.

Notwithstanding that the arbitration provision is valid and requires individual arbitration, Respondent Cedeno sued in federal court, asserting claims on behalf of himself as well as the plan and its participants in a putative class action. Petitioner (with the other named defendants) moved to enforce the plain terms of the plan and to compel individual arbitration. Respondent Cedeno argued in opposition that the plan's arbitration provision 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 Second Circuit agreed, holding that the plan's arbitration provisions "are unenforceable because they amount to prospective waivers of participants' substantive statutory rights and remedies under ERISA." *See* Pet.

1. The "effective vindication" exception provides that an arbitration provision may be unenforceable if it would prevent a party from vindicating substantive statutory rights. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

App. 5a-6a. In doing so, the Second Circuit read into ERISA a *requirement* that an individual participant *must* bring ERISA claims as a representative of an entire ERISA plan and concluded that this requirement cannot be modified by a provision requiring individual arbitration. *See* Pet. App. 15a-16a. ERISA contains no such requirement.

To reach its conclusion, the Second Circuit (like the district court) relied on the "effective vindication" exception, but such reliance is misplaced. Each time this Court has been presented with an argument that the "effective vindication" exception prohibits individual arbitration of one federal claim or another, this Court has rejected that argument and compelled arbitration. *See Am. Express*, 570 U.S. at 235-36 (collecting cases). Indeed, some members of this Court have previously suggested the exception 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*)); Dissent, Pet. App. 53a-54a ("In his concurrence in [*American Express*], Justice Thomas observed that the purported [effective vindication] exception conflicts with 'the plain meaning of the Federal Arbitration Act.'") (quoting *Am. Express*, 570 U.S. at 229 (Thomas, J., *concurring*)). Five courts of appeals now have embraced this wholly judge-made effective vindication exception, ignoring that "judge-made doctrines are being scaled back" by this Court. *See Parker v. Tenneco, Inc.*, 114 F.4th 786, 802 (6th Cir. 2024) (McKeague, C.J., *concurring*) (citing *Egbert v. Boule*, 596 U.S. 482, 490-92 (2022), and *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024)).

This Court should grant certiorari to review the Second Circuit's decision below because, to begin, it opens up a split of authority on an important federal question with the Ninth and Seventh Circuits, which previously recognized that individual arbitration is compatible with ERISA. *See Dorman*, 780 F. App'x at 514; *Smith*, 13 F.4th at 622. This split is deepening, with three other courts of appeals—the Third Circuit in *Henry v. Wilmington Tr. N.A.*, 72 F.4th 499 (3d Cir. 2023), the Sixth Circuit in *Parker v. Tenneco, Inc.*, 114 F.4th 786 (6th Cir. 2024), and the Tenth Circuit in *Harrison v. Envision Management Holding, Inc. Board of Directors*, 59 F.4th 1090 (10th Cir. 2023)—siding with the Second Circuit to reject arbitration of ERISA claims on an individual basis.[2]

Not only have the Second Circuit and these three other courts of appeals created a split with the Ninth and Seventh Circuits on the threshold question of whether individual arbitration is compatible with ERISA, but those courts have done so based on reasoning that conflicts with this Court's precedent.

The Second Circuit's decision below subjugates the FAA to ERISA and sees conflict between, on the one hand, ERISA's purported substantive requirement that a participant seek relief as a representative of an entire

2. This Court denied petitions for writs of certiorari in *Harrison* and *Henry*. *See Argent Trust Co. v. Harrison*, 144 S. Ct. 280 (2023); *Wilmington Trust, N.A. v. Henry*, 144 S. Ct. 328 (2023). Nonetheless, this Court should grant the instant Petition because, unlike in *Harrison* or *Henry*, the Second Circuit addressed and misapplied this Court's precedents in *Viking River Cruises* and *Thole*, as discussed further in Section B of the Reasons for Granting the Petition below.

ERISA plan, and on the other hand the FAA's mandate that courts enforce valid arbitration provisions as written, including those that require individual arbitration. Faced with that conflict, the decision below caused the FAA to yield to ERISA and its purported requirement that all ERISA claims *must* be plan-wide and seek plan-wide remedies. No such requirement exists in ERISA.

The Second Circuit's holding that the FAA must give way to ERISA cannot be squared with this Court's precedents, which require courts to harmonize other statutes with the FAA whenever 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*, 584 U.S. 497, 516 (2018). This Court has also warned that lower courts "must be alert to new devices and formulas" to bypass binding arbitration provisions, *see id.* at 509, and the Second Circuit's "manufactured conflict between ERISA and the arbitration clause here is just such a device," Dissent, Pet. App. 48a. If the Second 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 Second Circuit's conclusion that ERISA claims cannot be arbitrated on an individual basis conflicts not only with the FAA, and this Court's constant reminders of its importance, but also with two other lines of this Court's decisions.

First, in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), *reh'g denied*, 143 S. Ct. 60 (2022), and *Epic Systems*, this Court enforced individual arbitration of statutory claims, even where the statutory schemes at issue would otherwise allow a plaintiff to bring representative or collective claims in court.

Second, this Court's decisions already recognize that ERISA plan participants can bring claims on an individual basis (rather than as representatives of an ERISA plan). The Second Circuit misapplied these decisions. As provided in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248, 258 (2008), and *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), an ERISA plan participant has a right to bring an individual claim for relief for alleged ERISA violations, and is *not* automatically a representative of an entire plan.

If the Second Circuit had read these four decisions together correctly (*Viking River Cruises*, *Epic Systems*, *LaRue*, and *Thole*), it would have recognized that even though ERISA may *allow* a plan participant to bring representative claims on behalf of a plan, representative claims can be foreclosed by a provision that requires individual arbitration of ERISA claims. The Second Circuit's invalidation of the plan arbitration provision here offends all of these prior decisions from this Court.

The Second Circuit's decision also is problematic and requires this Court's review because it effectively concludes that ERISA does not permit individual arbitration of statutory claims—a decision that will have far-reaching unintended effects, even beyond arbitration matters. According to the Second Circuit, if an ERISA

plan participant's individual plan account experienced a loss from an alleged fiduciary breach that also affected any other plan participant's account, the *only* way for the individual participant to seek relief would be to bring an ERISA claim on behalf of *all* affected participants. The participant *could not* bring a claim only for his or her individual plan account, even if he or she wanted to. Worse yet, by concluding that individual participants automatically have an unwaivable right to bring plan-wide ERISA claims, the Second Circuit has unwittingly created a potential end-run around the important protections that courts require when one individual seeks to resolve the claims of others. The Second Circuit's decision would allow one participant plaintiff to represent—and legally bind—all participants in an ERISA plan without even having first to provide notice to absent participants or demonstrate the plaintiff's adequacy and typicality as a representative. Precedent conflicts with and does not support this interpretation of ERISA.

Finally, the Second Circuit's conclusion that the Plan's arbitration provision would prevent participants from seeking plan-wide equitable remedies is speculative and premature at best. Petitioner and the other named defendants in this matter expressly disclaimed that the provision should be interpreted to prevent such remedies, and the Second Circuit ignored their disclaimer. By invalidating the Plan's arbitration provision based on mere suspicion that certain remedies could ultimately be unavailable in individual arbitration, the Second Circuit exhibited the judicial hostility to arbitration that directly contravenes this Court's consistent guidance.

This Court's intervention is required to resolve the split of authority that has grown based on some lower courts' disregard of 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 an individual account 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, Strategic Financial Solutions, LLC ("Strategic Financial") established the Strategic ESOP (the "Plan") to provide Plan participants—Strategic Financial employees—with a retirement benefit in the form of stock of Strategic Family, Inc. ("Strategic Family").

Respondent Cedeno has been a participant in the Plan since it was adopted. *See* D. Ct. Dkt. 1, at 5. The governing Plan document describes the benefits due to participants under the Plan. *See generally* D. Ct. Dkt. 61-1.

From the Plan's inception, the Plan document has included a section titled "Mandatory and Binding Arbitration." D. Ct. Dkt. 61-1, § 17.10. That section provides that every "Employee, Participant, or Beneficiary shall be bound by the provisions of this Section 17.10 . . . to

resolve all Covered Claims." *Id.* § 17.10(a). The Plan defines "Covered Claims" to include "[a]ny claim by a Claimant . . . asserting a breach of, or failure to follow, any provision of ERISA or the Code, including without limitation claims for breach of fiduciary duty . . . ." *Id.* § 17.10(b).

Section 17.10(f) of the Plan provides that "[a]ll 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." *Id.* § 17.10(f). 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.); *see also id.* § 17.10(g) (describing remedies available to a Claimant in arbitration). Sections 17.10(f) and (g) are "material and non-severable," and "[a]ny dispute or issue as to the applicability or validity" of these sections must be determined by a federal court as specified in the Plan, rather than an arbitrator. *Id.* § 17.10(h).

B. Despite The Arbitration Provision, Respondent Cedeno Sues In Federal Court And The Courts Below Decline To Compel Arbitration

On November 27, 2020, Respondent Cedeno filed suit in the United States District Court for the Southern District of New York. *See* D. Ct. Dkt. 1. All of his alleged violations of ERISA related to a transaction in which the Plan purchased Strategic Family stock. *See* D. Ct. Dkt. 1, at 2-3, 12 (bringing claims under 29 U.S.C. § 1132(a)(2) and (a)(3)). He alleges that Petitioner caused the Plan

to pay more for the Strategic Family stock than it was worth, thereby diminishing the value of participants' Plan accounts. *See* D. Ct. Dkt. 1, at 13-15. This, Respondent Cedeno 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. *See* D. Ct. Dkt. 1, at 19-27. He sought plan-wide and class relief, including plan-wide equitable remedies. *See* D. Ct. Dkt. 1, at 27-31.

Petitioner, with the other named defendants, 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. 59, 60. The district court denied the motion on November 2, 2021. *See* Pet. App. 72a-86a. The district court applied the "effective vindication" exception and held that the Plan's individual arbitration was "invalid and unenforceable because it purports to limit the available remedies that ERISA explicitly provides." Pet. App. 81a. In particular, the district court concluded that "the provision in section 17.10(g) of the Plan that precludes an individual participant from seeking Plan-wide relief is invalid because it seeks to waive prospectively the statutory remedies in ERISA § 409(a) that a Plan participant is entitled to seek under ERISA § 502(a)(2)." Pet. App. 82a-83a.

The Second Circuit affirmed. Pet. App. 1a-46a. The decision below went further than prior decisions by other courts of appeals in concluding that "ERISA contemplates plan-wide remedies, *and only plan-wide remedies*, to address certain breaches of fiduciary duties by plan fiduciaries." Pet. App. 20a (emphasis added). Based on this conclusion, the Second Circuit applied the

effective vindication exception (even while acknowledging that this Court "has never invalidated a provision in an arbitration agreement on this basis") and held that, "[b]ecause Cedeno's avenue for relief under ERISA is to seek a plan-wide remedy, and the specific terms of the arbitration agreement seek to prevent Cedeno from doing so, the agreement is unenforceable." Pet. App. 15a, 18a. To reach that erroneous result, the Second Circuit misapplied this Court's decisions in *LaRue*, *Viking River Cruises*, and *Thole*, and incorrectly deemed *Epic Systems* inapplicable to ERISA claims.

Circuit Judge Menashi issued a dissenting opinion in which he explained the multiple ways in which the decision below conflicts with this Court's precedent, Pet. App. 47a-71a, as discussed further below. Ultimately, Circuit Judge Menashi concluded, contrary to the decision below, that the effective vindication exception is "not implicated here" because "[a] participant in a defined-contribution pension plan, such as Cedeno, may proceed under Sections 502(a)(2) and 409(a) to seek relief that benefits only his or her individual account within the plan," and [r]equiring Cedeno to pursue relief in an arbitral forum does not alter that substantive right." Pet. App. 52a.

Petitioner filed a timely petition for rehearing or rehearing *en banc*, which the Second Circuit denied on July 9, 2024. Pet. App. 87a-88a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to review and reverse the Second Circuit's decision because it conflicts with decisions of other courts of appeals and this Court's precedents in multiple ways.

The decision below creates a split with the Ninth and Seventh Circuits on the important federal question of whether ERISA is compatible with individual arbitration. *See* Section A *infra*. The Third, Sixth, and Tenth Circuits have also contributed to the split by, like the Second Circuit, invalidating ERISA plan provisions that required individual arbitration of ERISA claims.

In addition, the holding in the decision below—that ERISA claims alone cannot be arbitrated individually—conflicts with multiple lines of precedent set by this Court. 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 the more significant damages available in federal court (and the concomitant pressure to reach "blackmail settlements," *see Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023)). Past parties repeatedly have alleged that various federal statutory rights are too important to be arbitrated individually. This Court has never validated that argument, and it should grant this petition to make clear that this Court means what it says (this time, in the context of ERISA). *See* Dissent, Pet. App. 47a (noting that "parties who have agreed to arbitrate sometimes try to avoid arbitration later by 'conjur[ing] conflicts between the Arbitration Act and other federal statutes,'" and this Court "'has rejected *every* such effort to date'") (brackets in original) (quoting *Epic Sys.*, 584 U.S. at 516). If the decision below survives, ERISA will stand alone among federal statutes as providing the only type of claim for which individual arbitration is unavailable, even though there is no clearly expressed Congressional intent for such a result.

The decision below conflicts with this Court's precedents because it fails to harmonize ERISA and the FAA, as it must. *See* Section B *infra*. Instead, the decision to invalidate an arbitration provision in an ERISA plan 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.

Additionally, the Second Circuit's interpretation of ERISA—as *requiring* a plan participant to seek relief as a representative of an *entire* plan—cannot stand with this Court's precedents. *See* Section C *infra*. This Court has reached the *opposite* conclusion, that a plan participant *does not* (and need not) automatically represent an entire ERISA plan. This Court's decisions demonstrate that ERISA claims, like all other federal statutory claims, can be pursued on an individual basis and thus 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.

Finally, to comply with this Court's guidance, the Second Circuit should have compelled this matter to individual arbitration and deferred resolving questions of whether specific remedies might be available in arbitration. *See* Section D *infra*. The Second Circuit's decision was premature and short-circuited the arbitration process, in a hostile act that this Court has forbidden.

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, in order 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 other courts of appeals, and this conflict is only deepening in the absence of this Court's instruction.

Addressing precisely the questions in this petition, the Ninth Circuit has affirmed that ERISA claims can be arbitrated on an individual basis. In *Dorman* (a decision that is unpublished but carries strong persuasive value because it applied this Court's precedent correctly), 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.*

ERISA 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 of 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 Seventh Circuit agreed in *Smith*. 13 F.4th at 616-19, 622. Although the Seventh Circuit affirmed an order denying a motion to compel arbitration for another reason, the court agreed with *Dorman*'s reading of this Court's decision in *LaRue*, holding that "individualized arbitration" is not "inherently incompatible with ERISA." *Id.* at 622. The Seventh Circuit also recognized *LaRue* "made clear" that ERISA "'authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's *individual* account.'" *Id.*

The Second Circuit's decision below—to invalidate an individual arbitration provision for ERISA claims—splits from the Ninth Circuit's decision in *Dorman* and the Seventh Circuit's interpretation of ERISA in *Smith*. Three other courts of appeals have contributed to this split by reaching conclusions similar to (but not going as far as) the Second Circuit.[3] *See Harrison*, 59 F.4th at 1107 (holding that "the effective vindication exception applies" where an arbitration provision "purports to foreclose a number of remedies that were specifically authorized by Congress in [ERISA]"); *Henry*, 72 F.4th at 507 & n.9 (invoking *Harrison* and *Smith* to invalidate individual arbitration provision in an ERISA plan); *Parker*, 114 F.4th at 798-801 (discussing *Harrison*, *Smith*, *Henry*, and *Cedeno* as support for decision to strike down plan provision requiring individual arbitration of ERISA

3. Pending before another Circuit is an appeal of a decision to deny a motion to compel individual arbitration of ERISA claims that was based on *Smith*, *Harrison*, and *Henry*. *See Williams v. Shapiro*, No. 1:23-cv-03236, 2024 WL 1208297 (N.D. Ga. Mar. 20, 2024), *appeal docketed*, No. 24-11192 (11th Cir. Apr. 15, 2024). This Court should grant certiorari, notwithstanding this pending appeal, because a circuit split and conflicts with this Court's precedents already exist and should be corrected.

claims). These decisions split from the Ninth and Seventh Circuits because they do not allow ERISA claims to be arbitrated on an individual basis at all.[4]

There is nothing in the plain text of ERISA or the precedent of this Court that supports the outcome dictated by these courts of appeals. 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*, 599 U.S. at 743. Therefore, 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 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 is contrary to this Court's decisions on the scope of the FAA (*i.e.*, requiring enforcement of valid arbitration provisions) *and* on the meaning of ERISA (*i.e.*, requiring enforcement of plan terms).

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4. The Second Circuit in *Cedeno*, as well as the Third Circuit in *Henry*, Sixth Circuit in *Parker*, and Tenth Circuit in *Harrison*, all concluded that ERISA plan participants must be able to seek plan-wide relief in individual arbitration proceedings. *See Cedeno*, Pet. App. 37a-41a; *Henry*, 72 F.4th at 507; *Parker*, 114 F.4th at 798; *Harrison*, 59 F.4th at 1108-09. 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*, 596 U.S. at 652-53. This Court has made clear that "[p]utting parties to that choice is inconsistent with the FAA." *Id.*

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.*, 584 U.S. at 516-17.

Importantly, this Court has held that other statutes must be harmonized with the FAA, except in a narrow circumstance that is not applicable here. *Id.* at 510. 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 502. And 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 510. The Second Circuit eschewed this Court's instruction to find harmony between the FAA and ERISA and instead subordinated 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.

This Court has held repeatedly that 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.*, 584 U.S. at 510-11. 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 516-17. 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 502. Referencing this Court's FAA precedents, the Dissent in this case observed that "parties who have agreed to arbitrate sometimes try to avoid arbitration later by 'conjur[ing] conflicts between the [FAA] and other federal statutes,'" and this Court "'has rejected *every* such effort to date.'" Dissent, Pet. App. 47a.

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 Second 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 this Court's settled precedent.

2. The decision below also is inconsistent with this Court's decisions that require courts to enforce the terms of ERISA plan documents as written. *See 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, *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).

In sum, there is no dispute that the arbitration provision that the Second Circuit excised here was in a validly adopted ERISA plan or that the claims at issue fell within its scope. The Second 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 decision below creates disharmony between the FAA and ERISA and conflict with this Court's relevant decisions regarding both statutes.

C. The Decision Below—That A Participant *Must* Bring ERISA Claims As A Representative On Behalf Of An Entire ERISA Plan—Misapplies This Court's Precedents And Will Have Adverse Consequences

The Second Circuit is similar to the other courts of appeals that have invalidated ERISA plan arbitration provisions, in that all of these courts have deviated from this Court's precedent. For instance, to varying degrees these courts have misinterpreted *LaRue* and improperly minimized the applicability of *Epic Systems*. But the Second Circuit is unique among the other courts of appeals, in that the Second Circuit is the only one that analyzed this Court's precedent in *Viking River Cruises* and *Thole*. The Second Circuit misapplied both of these decisions in concluding that the Plan's individual arbitration provision is unenforceable because plan participants *must* bring ERISA claims as representatives on behalf of their entire plan. There will be adverse consequences from the Second Circuit's mistake.

1. The Second Circuit's novel interpretation of ERISA as *requiring* participants to bring ERISA claims on a plan-wide representative basis introduces a host of unforeseen complications, both within and beyond the context of arbitration. For instance, according to the Second Circuit, a plan participant who was only interested in being made whole through a less expensive and quicker individual ERISA claim in arbitration *could not do so* if the ERISA violation in question also harmed any other participant's account. This Court frequently extolls the "asserted benefits of arbitration"—such as "efficiency, less expense, less intrusive discovery, and the like," *see Coinbase*, 599 U.S. at 743—which are now unavailable to individual plan participants in the Second Circuit. Instead, any participant hoping to pursue his or her own ERISA claim must initiate a sweeping action on behalf of an entire plan and all of its participants, with all that entails—such as lengthier proceedings, intrusive discovery as required of a putative representative, and sizeable contingent fees to plaintiffs' class action firms.

In addition, consider the impact of the Second Circuit's interpretation of ERISA (as requiring participants to bring claims on a plan-wide basis) by a permutation of the facts in *LaRue*. In that case, the plaintiff brought an ERISA claim to remedy an alleged fiduciary breach that affected the value of the plaintiff's account only. *See LaRue*, 552 U.S. at 250-51. Applying the Second Circuit's reasoning, if that breach affected *two* participants' accounts, then *neither* participant could bring an individual ERISA claim. To recover, either participant would have to bring a representative suit on behalf of the other participant's account as well.

More broadly, whether in arbitration or federal court, the Second Circuit's interpretation of ERISA claims would allow a single plan participant to resolve the rights of fellow participants while bypassing procedural safeguards under Federal Rule of Civil Procedure 23. If a participant has an automatic right—indeed, a *requirement*—to bring only a plan-wide representative claim, as the Second Circuit has held, a participant could bring such a claim without first demonstrating adequacy as a representative or providing court-approved notices to unnamed participants whose interests would be impacted by the lawsuit. *See* Fed. R. Civ. P. 23(a)(4); (c)(2); (d); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) ("Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate."). Or if a court did impose Rule 23-like requirements but found the plaintiff participant to be an inadequate representative, then that participant would have no redress for her claims because she could not bring claims on an individual basis.

As an illustration, imagine an individual participant exercised her supposed automatic right to bring a plan-wide representative ERISA claim, and shortly after filing she agreed to a settlement that disproportionately enriched her while providing paltry awards to all other participants. Should that unfair settlement have preclusive effect on future claims the absent participants might bring? In prior precedent, the Second Circuit *prevented* a participant from bringing a plan-wide representative claim because it would "complicate any subsequent litigation," given that "the issue of collateral estoppel (issue preclusion) would likely arise." *Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006). Essentially, the automatic right to represent an entire plan absent class action procedural requirements

creates a form of "virtual representation" that this Court has rejected because it would "circumvent[] . . . Rule 23's protections" and "allow[] courts to create *de facto* class actions at will." *See Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011).

2. In addition to the negative consequences highlighted above, the Second Circuit's decision should be reviewed and reversed because it conflicts with this Court's past decisions enforcing individual arbitration provisions even in the context of statutes that would otherwise allow for representative actions.

This Court recognized in *Viking River Cruises* that a statute allowing for "representative" claims can be harmonized with the FAA. The Second Circuit addressed this opinion and concluded that it supported invalidating the Plan's individual arbitration provision. *Viking River Cruises* should have led to the opposite result: 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*, 596 U.S. at 647 (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 645-50. *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 656-58. 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. ERISA representative claims are analogous to representative "claim joinder" actions under PAGA, meaning that representative ERISA claims can be made subject to a requirement for 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 seeking to vindicate ERISA rights individually—notwithstanding the Second Circuit's erroneous holding to the contrary—and it is that individual right that must be preserved in arbitration. In *LaRue*, this Court established the contours of that individual right, addressing the question of whether an individual in a defined contribution plan can seek recovery under ERISA 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 an ERISA claim on an individual basis to remedy alleged harm that affects only that participant's individual account. *Id.* at 256. In turn, the fact that each plan participant has an individual claim under ERISA clearly 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*, 596 U.S. at 646-47.

Applying this Court's analysis of "claim joinder" representative claims to ERISA claims leads to the conclusion that, 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 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. *See* Section B *supra*.

The Second Circuit in its decision below recognized that *Viking River Cruises* described two types of representational claims. *See* Pet. App. 35a (noting that *Viking River Cruises* described "a qualitative difference between arbitrating on behalf of an absent principal and arbitrating on behalf of a class of individuals . . . ."). But the Second Circuit erred in applying *Viking River Cruises* when it construed an ERISA claim as a "single absent principal" representational claim rather than as a form of "claim joinder." *See id.* The Second Circuit's misapplication of *Viking River Cruises* creates disharmony between

ERISA and the FAA—*i.e.*, by interpreting ERISA claims in a way that leads to the nonenforcement of an arbitration provision, contrary to the FAA's dictates—without anything in ERISA indicating Congress intended such a result.

The Dissent demonstrates why the decision below erred in concluding that an ERISA claim is a "single absent principal" form of representative claim. The Dissent provided examples of "established forms" of "single absent principal" representative claims—including "a shareholder derivative suit, a trustee's suit on behalf of a trust, or an action by a guardian *ad litem*"—to show why an ERISA claim is unlike those examples. Dissent, Pet. App. 57a-60a.

As the Dissent explained, a shareholder derivative claim is brought by an individual shareholder standing in the shoes of a corporation, and in such action "the right claimed by the shareholder is one the corporation could itself have enforced in court." *Id.*, Pet. App. 59a. The Dissent quoted the Second Circuit's decision in *Coan v. Kaufman* and noted an ERISA claim is "'not derivative'" because "'ERISA plans cannot bring suit against fiduciaries on the plans' own behalf'" under ERISA. *Id.* (quoting *Coan*, 457 F.3d at 258); *see also* 29 U.S.C. § 1132(a)(2) (authorizing suits by "the Secretary, or by a participant, beneficiary or fiduciary" and not by a plan).

Nor is a participant's ERISA claim like a trustee's common law claim on a trust's behalf. A participant (like Respondent Cedeno) is a *beneficiary* of the plan's trust—*not* a trustee—and "a trust beneficiary sues a trustee for breach of trust in his individual capacity as a beneficiary,"

not "on behalf of the trust." *Id.* Ultimately, as the Dissent concluded, "[t]his lawsuit does not resemble any of the traditional types of representative actions" in the nature of a "single absent principal" representative claim. *Id.*

3. The Second Circuit's interpretation—that ERISA claims are "single absent principal" representative claims—cannot be reconciled 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 seek to vindicate an individual interest beyond the plan's interest. *See Thole*, 590 U.S. at 543-44. This Court held (consistent with analysis by the Dissent) that an ERISA claim is *not* like "cases involving guardians, receivers, and executors" (*i.e.*, "agent or proxy" representative claims) because participants "have not been legally or contractually appointed to represent the plan," and "the plan's claims have not been legally or contractually assigned" to participants. *Id.* This Court went on to hold that participants cannot "assert standing as representatives of the plan"—instead, participants must demonstrate individual Article III constitutional standing (including individual injury-in-fact) to bring an ERISA claim. *See id.*; Dissent, Pet. App. 57a.

The Second Circuit's interpretation of an ERISA claim as a "single absent principal" claim, *see* Pet. App. 32a-35a, conflicts with *Thole*'s conclusion that ERISA participants do not stand in the shoes of their plans. The Second Circuit *should* have concluded based on *Thole* that

an ERISA claim is *not* a "single absent principal" claim, but rather a form of "claim joinder," a representative claim that *can* be arbitrated on an individual basis. This makes sense because, under *LaRue*, a participant has a right to be made whole by recovering alleged losses with respect to a participant's individual account—not to personally recover amounts for other participants' accounts. If this Court corrected the Second Circuit's erroneous interpretation, the Plan's individual arbitration provision would be enforceable.

4. The decision below also errs by concluding that *Epic Systems* is not applicable to ERISA claims or the Plan's individual arbitration provision. In *Epic Systems*, 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.*, 584 U.S. at 516. 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 506. 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 509. And as the Dissent noted, "[t]he manufactured conflict between ERISA and the arbitration clause here is just such a device." Dissent, Pet. App. 48a.

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*, 570 U.S. at 235-36, and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 & n.19 (1985). *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.*, 584 U.S. at 511 (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.* at 510. 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.* This Court emphasized that "when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so." *Id.* at 514. Because NLRA Section 7 "does not express approval or disapproval of arbitration," this 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 511.

Epic Systems clearly stated 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 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 Second Circuit acknowledges that ERISA contains no clearly expressed congressional intent to prohibit individual arbitration. *See* Pet. App. 30a-31a, 37a-38a. Given this fact, the Second 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 concluded that a participant in an ERISA plan must bring an ERISA statutory claim on behalf of the entire plan. The court should have followed *Epic Systems* and concluded that the Plan's individual arbitration provision must be enforced. This Court should grant certiorari to apply its precedent and reverse the Second Circuit's conflicting decision.

D. The Decision Below Speculates In Assuming That The Plan's Arbitration Provision Would Preclude Plan-Wide Equitable Remedies, In Conflict With This Court's Precedents

The Second Circuit's conclusion that the Plan's arbitration provision precludes plan-wide equitable remedies also exhibits hostility to arbitration, in conflict with this Court's precedent, for reasons the Dissent explained and the decision below ignored.

As the Dissent pointed out, "Cedeno has not shown—*and [Defendants] deny*—that any equitable relief available under ERISA would be unavailable to Cedeno in an individualized arbitration." Dissent, Pet. App. 65a. The Dissent was referring to the waiver by Defendants (which includes Petitioner)—in briefing and at oral argument—of the argument that the terms of the Plan's arbitration provision would prevent a participant from seeking plan-wide equitable relief in individual arbitration. Not only did Defendants waive any argument that any forms of equitable relief would be unavailable in arbitration, but the Plan's provisions make clear that is so. The Dissent appropriately credited Defendants' interpretation of the Plan's provision—*i.e.*, that it "only prohibits providing money to other people" and "does not prevent Cedeno from seeking any equitable relief that may be necessary to make him whole," even if such relief impacts other participants—as "the most sensible reading" of the provision. *Id.*, Pet. App. 65a-66a. The decision below dismisses Defendants' waiver, and a reasonable interpretation of the Plan's arbitration provision, and invalidates the Plan's provision anyway.

Even if the Second Circuit had a lingering doubt about whether the Plan's arbitration provision might preclude certain remedies, and thus potentially implicate the effective vindication exception, under this Court's precedent the Second Circuit should have stayed its hand and reserved judgment on the provision's enforceability until after arbitration proceedings concluded. By acting before any concern about the availability of a remedy became ripe, the Second Circuit's decision runs afoul of this Court's opinion in *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

In *PacifiCare*, this Court was presented with an argument that arbitration provisions were unenforceable because they supposedly precluded a potential remedy—specifically, an award of statutory treble damages. *Id.* at 403. It was not "clear," however, that the provisions actually did prohibit the plaintiffs' desired remedy: the language in question prohibited "punitive" damages, which did not necessarily include treble damages. *Id.* at 405-06. Because of the "doubt" and "uncertainty" over whether the contract language precluded the desired remedy, this Court concluded that "*the proper course [was] to compel arbitration*." *Id.* at 406-07 (emphasis added); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995) (explaining that courts in these circumstances should compel arbitration and address any effective vindication concerns at the award-enforcement stage). The same is true here.

It is at most "ambiguous" whether the Plan's provision allows plan-wide equitable relief. *See PacifiCare*, 538 U.S. at 406-07. As noted above, Defendants waived the potential argument that the Plan's provision does not allow plan-

wide equitable relief in arbitration; and, as the Dissent noted, the provision is reasonably read to allow such relief. At this time, it is utterly speculative whether an arbitrator would even award a plan-wide equitable remedy. Thus, under *PacifiCare*, "the 'proper course' would be to compel arbitration despite Cedeno's speculation that the arbitrator might construe the agreement in a way that would call its enforceability into question." Dissent, Pet. App. 68a.

To comply with this Court's guidance, the Second Circuit should have limited its decision to the question of whether the Plan's arbitration provision is valid and enforceable, and deferred weighing in on the hypothetical consideration of whether Respondent Cedeno may be able to receive a plan-wide equitable remedy that an arbitrator might or might not award in the first place. By invalidating the Plan's provision before an arbitrator awarded a plan-wide equitable remedy, the decision below conflicts with *PacifiCare* and demonstrates judicial hostility to arbitration such as this Court has spent decades attempting to eradicate.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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Dated: October 7, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 1, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 21-2891-cv

RAMON DEJESUS CEDENO,

Plaintiff-Appellee,

v.

RYAN SASSON, ARGENT TRUST CO.,
DANIEL BLUMKIN, IAN BEHAR,
STRATEGIC FINANCIAL SOLUTIONS, LLC,
DUKE ENTERPRISES LLC,
TWIST FINANCIAL LLC,
BLAISE INVESTMENTS LLC,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York
No. 20-cv-9987-JGK
John G. Koeltl, District Judge, Presiding.

February 2, 2023, Argued; May 1, 2024, Decided

Appendix A

Before: LOHIER, MENASHI, and ROBINSON, *Circuit Judges*.

Defendants-Appellants Argent Trust Company, Ryan Sasson, Daniel Blumkin, Ian Behar, Strategic Financial Solutions, LLC, Duke Enterprises LLC, Twist Financial LLC, and Blaise Investments LLC appeal from an order of the District Court denying their motion to compel arbitration.

Plaintiff Ramon Dejesus Cedeno was an employee of Strategic Financial Solutions, LLC, and a participant in its Strategic Employee Stock Ownership Plan, a defined contribution retirement plan. Argent, the trustee for the Plan, represented the Plan in the purchase of Strategic Family, Inc. from selling shareholders Sasson, Blumkin, Behar, and their wholly owned LLCs. Cedeno sued in the United States District Court for the Southern District of New York under the Employee Retirement Income Security Act (ERISA), alleging the transaction caused the Plan to incur substantial losses and that Argent breached fiduciary duties owed to Plan participants and beneficiaries under ERISA. Cedeno brought claims under ERISA Section 502(a)(2) on behalf of the Plan, and sought relief including restoration of Plan-wide losses, a surcharge, accounting, constructive trust on wrongfully held funds, disgorgement of profits from the transaction, and further equitable relief as the court deemed just.

Appendix A

Defendants moved to compel arbitration under the Federal Arbitration Act (FAA), pointing to a provision in the Plan's governing document that required Plan participants to resolve any claims related to the Plan in arbitration, and specifically limiting the relief available in the arbitration proceeding to remedies impacting the participant's own account and forbidding any relief that would benefit any other employee, participant, or beneficiary. The District Court (Koeltl, *J.*) denied the motion, reasoning that the agreement was unenforceable because it would prevent Cedeno from effectuating rights guaranteed by Congress through ERISA, namely, the plan-wide relief available under Section 502(a)(2) to enforce the rights established in ERISA Section 409(a). We agree that the arbitration provision is unenforceable because it would prevent Cedeno from pursuing the Plan-wide remedies Sections 409(a) and 502(a)(2) unequivocally provide. Accordingly, we **AFFIRM** the decision of the district court.

Judge Menashi dissents in a separate opinion.

Appendix A

ROBINSON, Circuit Judge:

This case requires us to consider the enforceability under the Federal Arbitration Act (FAA) of certain provisions in an arbitration agreement that limit the remedies an employee benefit plan participant or beneficiary can pursue under Section 502(a)(2) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(2). Sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. § 1109(a), allow employee benefit plan participants and beneficiaries to seek equitable relief on behalf of the plan against plan fiduciaries for various statutory violations and breaches of fiduciary duties, and do not include a distinct set of remedies directed solely at individuals. The provisions within the parties' arbitration agreement at issue here, on the other hand, purport to limit participants or beneficiaries to seeking relief in arbitration solely for the benefit of their own individual plan accounts, and preclude relief that would benefit other account holders. At issue is whether those provisions are enforceable under the FAA.

Plaintiff-Appellee Ramon Dejesus Cedeno sued his former employer, Defendant-Appellant Strategic Financial Solutions, LLC, along with Defendant-Appellant Argent Trust Company—the trustee of his Strategic Employee Stock Ownership Plan (the "Plan")—and the selling shareholders of Strategic Family, Inc.: Defendants-Appellants Ryan Sasson, Daniel Blumkin, Ian Behar, and their wholly owned LLCs Duke Enterprises LLC, Twist Financial LLC, and Blaise Investments LLC (collectively "Defendants"). Cedeno's primary allegation is that Argent

breached fiduciary duties owed to the Plan in connection with the Plan's purchase of shares of Strategic Family for more than fair market value. Cedeno's complaint seeks several forms of relief under Section 502(a)(2) of ERISA, including restoration of Plan-wide losses, surcharge, accounting, constructive trust on wrongfully held funds, disgorgement of profits gained from the transaction, and further equitable relief as the court deems necessary.

Defendants moved to compel arbitration, citing a provision in the Plan's governing document that required Plan participants to resolve any legal claims arising out of or relating to the Plan in individualized arbitration. Two provisions within the arbitration agreement explicitly limited any relief sought under Section 502(a)(2) of ERISA to the restoration of losses within the participant's individual account, and they prohibited any relief that would benefit any other employee, participant, or beneficiary, or otherwise bind the Plan, its trustee, or administrators.

The United States District Court for the Southern District of New York (Koeltl, *J.*) denied the motion. *See Cedeno v. Argent Trust Co.*, No. 20-cv-9987, 2021 U.S. Dist. LEXIS 212926, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021). The district court concluded that the agreement was unenforceable because it would prevent Cedeno from pursuing remedies under Section 502(a)(2) that were, by their nature, Plan-wide. For the reasons explained below, we agree with the district court that the contested provisions within the arbitration agreement are unenforceable because they amount to prospective

waivers of participants' substantive statutory rights and remedies under ERISA. Accordingly, we AFFIRM the district court's denial of the Defendants' motion to compel arbitration.

BACKGROUND

I. Facts[1]

Ramon Dejesus Cedeno worked as a senior customer service representative at Strategic Financial Solutions, LLC—a financial services firm—from 2016 to 2019. He has participated in the Plan since May 1, 2017, the date the Plan was adopted. An employee stock ownership plan is "a type of pension plan that invests primarily in the stock of the company that employs the plan participants." *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 412, 134 S. Ct. 2459, 189 L. Ed. 2d 457 (2014). The Plan is subject to ERISA, a federal statute that sets certain minimum standards, including fiduciary duties, for voluntarily established retirement plans in private industry. *See* 29 U.S.C. § 1001.

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1. The facts are drawn from the record before the district court when it adjudicated the Defendants' motion to compel arbitration, chiefly Cedeno's complaint and the exhibits to the Defendants' motion. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) ("In deciding motions to compel, courts . . . consider all relevant, admissible, evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits.") (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002)) (internal quotation marks omitted). Although the truth of Cedeno's allegations may be disputed, the content of his allegations and most relevant facts are not.

Appendix A

This case arises from Defendants' alleged violations of ERISA in connection with the management of the Plan and implicates several specific Plan provisions.

A. Defendants' Alleged Breaches

Because the details of Defendants' alleged breaches are ancillary to the issues in this appeal, we include only a general overview. Cedeno's primary allegations under Sections 409(a) and 502(a)(2) are that Argent violated its fiduciary obligations under ERISA in connection with the Plan's purchase of shares in Strategic Family (the "Transaction").

The Transaction involved the following players. As noted above, Defendant Strategic Financial, LLC is a financial services firm that employed Cedeno and the Plan's administrator. Strategic Family, Inc. is Strategic Financial's parent company. It is a private company with no public market for its stock. Defendant Argent Trust Company is an investment management firm that was the trustee of the Plan through October 31, 2019, when it was replaced as trustee. As trustee, it had "exclusive authority to manage and control the assets of the Plan and had sole and exclusive discretion to authorize and negotiate the . . . Transaction on the Plan's behalf." App'x 17. Defendants Ryan Sasson, Daniel Blumkin, and Ian Behar were selling shareholders in the Transaction via their wholly owned LLCs, Defendants Duke Enterprises LLC, Twist Financial LLC, and Blaise Investments LLC. These selling shareholders, who controlled Strategic Family at the time of the Transaction, retained control

afterward by controlling the board of directors and holding leadership positions, including CEO, President, and Chief Sales Officer.

The Plan's purchase of the Strategic Family shares was financed through notes payable by the Plan to the selling shareholders. Cedeno alleges that the Plan overpaid for the shares by well over one hundred million dollars, allowing the selling shareholders to "unload their interests in Strategic Family above fair market value . . . and saddle the Plan with tens of millions of dollars of debt." App'x 14-15. As a result, the value of the Plan to its beneficiaries and participants, including Cedeno, suffered "substantial[ly]." App'x 31.

Argent, as trustee of the Plan, negotiated the Transaction. Cedeno alleges that Argent violated its fiduciary duties to Plan participants like him by causing the Plan to overpay for the Strategic Family shares. Argent allegedly accepted unreasonably optimistic financial projections by Strategic Family; conducted poor due diligence; improperly included a control premium in valuing the shares rather than applying a control discount, even though the Plan did not assume control of Strategic Family upon its purchase of the company; and improperly approved a term that caused the Plan, subsequent to the initial purchase, to assume an additional obligation of over $100 million for the Strategic Family stock. Cedeno further alleges that Argent received fees from and an indemnification agreement with Strategic Family and Strategic Financial, and that these benefits provided a motive for Argent to accept an inflated value for Strategic Family's shares.

B. The Plan

Several features of the Plan are relevant to the issues in this case.

First, the Plan is a "defined contribution plan," with a separate individual account for each participant. App'x 21. A defined contribution plan "promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008). In contrast, a "defined benefit plan" "generally promises the participant a fixed level of retirement income, which is typically based on the employee's years of service and compensation." *Id.* The defined contribution framework has overtaken the defined benefit paradigm as the more common type of employee retirement plan. *See*, *e.g.*, James F. Parker, *Revival of Substantive Equity: Increased Household Risk, Safety Valve Litigation, and Availability of the Stock Drop Jury*, 21 WASH. & LEE J. OF C.R. & SOC. JUST. 425, 433 (2015) (citing Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 471 (2004)).

The Plan, adopted in 2017, is governed by the terms of the Plan Document, subject to the requirements of ERISA. Section 17.10 of the Plan Document is titled "Mandatory and Binding Arbitration." App'x 105. The relevant provisions of Section 17.10 are as follows:

(b) Any claim by a Claimant[2] (i) that arises out of, concerns or relates to the Plan or the Trust, including without limitation, any claim for benefits, (ii) asserting a breach of, or failure to follow, the Plan or Trust; or (iii) asserting a breach of, or failure to follow, any provision of ERISA . . . including without limitation claims for breach of fiduciary duty . . . (collectively, "Covered Claims"), shall be settled by binding arbitration. . . .

(f) 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 that has the purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant.

(g) If a Covered Claim is brought under ERISA section 502(a)(2) to seek relief under ERISA section 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's Accounts resulting from the alleged

2. A "claimant" under the Plan is defined as a "Participant, Beneficiary, or any other person" who claims entitlement to benefits under the Plan or has unresolved questions about benefits under the Plan. App'x 104.

> 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 for the benefit of the Claimant's accounts, or (iii) such other remedial or equitable relief as the arbitrator 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 Employee, Participant or Beneficiary other than the Claimant, and is not binding on the Administrator or the Trustee with respect to any Employee, Participant or Beneficiary other than the Claimant.

App'x 105-06.

Additionally, Section 17.10(h) includes a non-severability clause which provides that if a court finds the requirements of Sections 17.10(f) or 17.10(g) "unenforceable or invalid, then the entire Arbitration Procedure shall be rendered null and void in all respects." App'x 106.

II. District Court Proceedings

In 2020, Cedeno filed a class action complaint. In it, he alleged that Argent breached its fiduciary duties by causing the Plan to enter into the Transaction and pay more than fair market value for the Strategic Family shares. Among other provisions of ERISA, Cedeno brought claims for relief under Sections 409 and 502(a)(2) based on Argent's alleged breach of its fiduciary duties. He sought various forms of relief, including:

- A declaration that Argent breached its fiduciary duties to the Plan under ERISA;

- An order requiring that each Defendant found to have violated ERISA make good to the Plan the losses resulting from the breaches of ERISA and restore any profits made through use of the Plan assets;

- An order requiring Defendants to provide "other appropriate equitable relief to the Plan and its participants and beneficiaries, including but not limited to surcharge, providing an accounting for profits, and imposing a constructive trust and/or equitable lien on any funds wrongfully held by Defendants;"

- An order requiring that Argent "disgorge any fees it received in conjunction with its services as Trustee for the Plan" in the Transaction in addition to any earnings or profits made; and

- "[S]uch other and further relief as the Court deems equitable and just."

App'x 41-42.

Defendants moved to compel arbitration pursuant to the FAA. They asserted that Cedeno was bound by the mandatory arbitration provision in Section 17.10 of the Plan Document. Defendants specifically requested that the district court compel arbitration "on an individual basis, rather than in a representative capacity or class, collective,

or group basis." D. Ct. Dkt. No. 60 (Memorandum in Support of Motion to Compel) at 2. Defendants argued that compelling individual arbitration would "not affect the remedy that [Cedeno] could personally achieve under ERISA section 502(a)(2)," asserting that Cedeno could, in any event, recover losses only within his individual plan account. *See id.* at 18-19 (citing *LaRue*, 552 U.S. at 256).

The district court denied the Defendants' motion to compel arbitration. *See Cedeno v. Argent Trust Co.*, No. 20-cv-9987, 2021 U.S. Dist. LEXIS 212926, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021). The court concluded that the arbitration provision acted as a "prospective waiver[] of [a] statutory right[]," and thus was unenforceable. 2021 U.S. Dist. LEXIS 212926, [WL] at *5. The district court explained that ERISA Section 409(a) provides for restitution to the entire plan and ERISA Section 502(a)(2) authorizes a plan participant to bring a civil action to obtain "restitution of the entirety of the loss to the plan." 2021 U.S. Dist. LEXIS 212926, [WL] at *3. Because the arbitration provision limited Cedeno to recovering losses within his individual plan account, the provision would impermissibly limit the availability of Plan-wide remedies explicitly authorized by ERISA, and thus was unenforceable. 2021 U.S. Dist. LEXIS 212926, [WL] at *3-5. The district court further concluded that because the Plan Document provided that the remedy section of the arbitration provision was non-severable, the entire arbitration provision was unenforceable. 2021 U.S. Dist. LEXIS 212926, [WL] at *6. Accordingly, the district court denied the Defendants' motion. Defendants appealed.

Appendix A

DISCUSSION

We have appellate jurisdiction because the FAA "permits interlocutory appeals from the denial of a motion to compel arbitration." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 72 (2d Cir. 2017) (citing 9 U.S.C. § 16). We review the district court's denial of Defendants' motion to compel arbitration without deference. *See*, *e.g.*, *id.* And the proper interpretation of ERISA and the FAA are questions of law that we also review without deference. *Coan v. Kaufman*, 457 F.3d 250, 254 (2d Cir. 2006) (ERISA); *Wash. Nat'l Ins. Co. v. OBEX Group LLC*, 958 F.3d 126, 136 (2d Cir. 2020) (FAA).

On appeal, Defendants argue that the district court erred by not enforcing the arbitration agreement. Specifically, they argue that the FAA "requires courts to enforce arbitration agreements rigorously according to their terms," including agreements for individualized arbitration, and that the district court erred in applying a "theoretical exception to the FAA" in concluding the arbitration provision here would result in a prospective waiver of participants' statutory rights under ERISA. Appellant's Br. at 16 (citing *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 138 S. Ct. 1612, 1623, 200 L. Ed. 2d 889 (2018)). They further argue that the district court "manufactured a . . . conflict by misreading ERISA [Sections] 502(a)(2) and 409(a) as giving participants an unwaivable right to pursue recovery on behalf of all other plan participants as well as themselves," and that because Section 502(a)(2) claims can be pursued on a "purely individualized basis," a plan participant's right to "seek remedies on behalf of

other participants' accounts . . . is waivable." *Id.* at 16-17 (citing *LaRue*, 552 U.S. at 250).

We disagree. Because Cedeno's avenue for relief under ERISA is to seek a plan-wide remedy, and the specific terms of the arbitration agreement seek to prevent Cedeno from doing so, the agreement is unenforceable.[3] To explain our conclusion, we consider the Supreme Court's guidance and our own caselaw concerning the reach of the

3. We briefly note what is *not* in dispute on this appeal. Defendants do not dispute the Plan is subject to ERISA, that Argent is a plan fiduciary under ERISA, and that Cedeno is a plan participant for purposes of ERISA and therefore can properly bring a Section 502(a)(2) claim. Nor do Defendants dispute that the relief Cedeno seeks is available under Section 502(a)(2). Cedeno does not dispute that the arbitration agreement applies to the claims he brings against the Defendants. He contends only that the challenged provisions are unenforceable. Nor does Cedeno contend that mandatory binding arbitration provisions cannot be enforced with respect to ERISA claims in general; this Court has long held that ERISA claims for breach of fiduciary duty may be remanded to arbitration. *See Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 119 (2d Cir. 1991). Cedeno challenges the enforceability of Sections 17.10(f) and 17.10(g) of the Plan, not the arbitration requirement itself. And finally, neither party disputes that if this Court concludes that either Section 17.10(f) or 17.10(g) is unenforceable, the entire arbitration provision would be unenforceable due to the non-severability clause.

Additionally, we note that Cedeno presents an alternate ground for affirmance, namely, that the arbitration provision is unenforceable because he did not consent to arbitration. *See* Appellee's Br. at 44-49. Because we affirm on the basis that the arbitration provision is unenforceable insofar as it would prevent Cedeno from vindicating certain statutory remedies under ERISA, we do not reach this argument.

FAA, controlling Supreme Court caselaw establishing the framework that applies to claims under Sections 409(a) and 502(a)(2) of ERISA, and the application of these legal principles to the arbitration provisions at issue in this case.

I. The Federal Arbitration Act

Under the FAA, "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute was enacted "in response to widespread judicial hostility to arbitration." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 232, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). To correct this impulse, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Id.* at 233 (internal citations, quotation marks, and alterations omitted).

A core concern of the FAA is protecting the enforceability of agreements to vindicate substantive rights through an arbitral *forum* using arbitral *procedures*. *See*, *e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). But the FAA does not purport to reach agreements to waive *substantive rights and remedies*, and courts will invalidate provisions that prevent parties from effectively vindicating their

statutory rights. *See*, *e.g.*, *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); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009).

The Supreme Court recently reemphasized that the FAA "does not require courts to enforce contractual waivers of substantive rights and remedies" in *Viking River Cruises, Inc. v. Moriana*. 596 U.S. 639, 653, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022). The Court explained:

> The FAA's mandate is to enforce *arbitration agreements*. And as we have described it, an arbitration agreement is a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed. And so we have said that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.

Id. (internal quotation marks, brackets, and citations omitted) (emphasis and alterations in original).

The Court also made it clear that the policy favoring enforcement of agreements *to arbitrate* does not automatically extend to enforcement of *any* provision

within an arbitration agreement. *Id.* at 1919 n.5. The Court explained that the basis of the principle that the FAA does not mandate enforcement of waivers of substantive rights is "that the FAA requires only the enforcement of 'provisions' to settle a controversy 'by arbitration,' and not any provision that happens to appear in a contract that features an arbitration clause." *Id.* (internal citation omitted); *see also Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

For that reason, terms in an arbitration agreement that have the effect of prospectively waiving a party's statutory remedies are not enforceable. As the Court noted in considering an arbitration agreement in *Mitsubishi*, "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637 n.19.

Although the Supreme Court has never invalidated a provision in an arbitration agreement on this basis, it has repeatedly recognized the general principle that provisions within an arbitration agreement that prevent a party from effectively vindicating statutory rights are not enforceable. *See, e.g.*, *Italian Colors*, 570 U.S. at 235-36, 238 (declining to apply "effective-vindication exception" to invalidate contractual waiver of class arbitration merely

because plaintiff's cost of individually arbitrating a federal statutory claim exceeded the potential recovery); *14 Penn Plaza LLC*, 556 U.S. at 273-74 ("[A]lthough a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the [collective bargaining agreement] allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'" (internal citations omitted)); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) ("[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." (internal quotation marks and brackets omitted)); *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) ("So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." (citing *Mitsubishi*, 473 U.S. at 637) (internal quotation marks and brackets omitted)).

This Court has recognized the effective vindication doctrine and applied it to invalidate arbitration agreements that purport to waive enforcement of federal statutory rights. *See*, *e.g.*, *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 127 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 856, 205 L. Ed. 2d 458 (2020). In *Gingras*, we considered an arbitration provision in a "payday loan" agreement that

provided for application of Chippewa Cree tribal law to any disputes and that disclaimed the applicability of any state or federal laws. *Id.* at 126-27. We noted that "the Supreme Court has made clear that arbitration agreements that waive a party's right to pursue federal statutory remedies are prohibited." *Id.* at 127. Recognizing that the provisions appeared wholly to foreclose the borrowers from vindicating rights granted by federal and state law, we held that "the just and efficient system of arbitration intended by Congress when it passed the FAA may not play host to this sort of farce." *Id.* (citing *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674 (4th Cir. 2016)) (internal quotation marks and brackets omitted). We accordingly declined to enforce the arbitration agreements because they sought to prevent borrowers from "pursu[ing], much less vindicat[ing]," federal and state statutory rights provided by consumer protection laws. *Id.*

The lesson from these binding decisions—that courts will not enforce provisions in arbitration agreements that prevent a party from effectively vindicating their statutory rights and securing their statutory remedies—critically informs our analysis here.

II. ERISA Section 502(a)(2) Claims

At issue in this case is how this lesson applies to Cedeno's claims under ERISA Section 502(a)(2). The text of the statute and two Supreme Court decisions establish a framework for our analysis and inform our conclusion that ERISA contemplates plan-wide remedies, and only plan-wide remedies, to address certain breaches of fiduciary duties by plan fiduciaries.

Appendix A

A. *ERISA*

ERISA Sections 409(a) and 502(a)(2) work in tandem to allow plan participants to bring civil actions against plan fiduciaries who breach their duties to the plan. Section 409(a), titled "Liability for breach of fiduciary duty," provides:

> 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.

29 U.S.C. § 1109(a) (emphases added). Section 502(a)(2), titled "Civil enforcement," is essentially the enforcement mechanism of Section 409(a). It enables the Secretary of Labor or participants, beneficiaries, or fiduciaries of a plan to bring civil actions to seek "appropriate relief" under Section 409. 29 U.S.C. § 1132(a)(2).

These two provisions together establish the vehicle for individual plan participants to pursue claims based on a plan fiduciary's breach of its duties pursuant to Section 409(a). ERISA provides avenues for individual

participants to pursue claims for *other kinds* of violations by plan fiduciaries. *See*, *e.g.*, 29 U.S.C. § 1132(a)(1) (allowing civil actions by a participant or beneficiary to recover benefits due under the plan, to enforce rights under terms of plan, to clarify rights to future benefits under the plan, or to address plan administrator's refusal to supply certain information); *id.* § 1132(a)(4) (allowing civil actions for appropriate relief by the Secretary or a participant or beneficiary arising from violations of plan's statutory reporting obligations). But the Supreme Court has repeatedly recognized that Section 502(a)(2) is the enforcement mechanism for violations of Section 409(a). *See*, *e.g.*, *LaRue*, 552 U.S. at 253 (explaining that statutory duties imposed on fiduciaries pursuant to Section 409(a) relating to "the proper management, administration, and investment of fund assets" are enforceable through Section 502(a)(2) (citation and internal quotation marks omitted)); *see also Varity Corp. v. Howe*, 516 U.S. 489, 511, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) (suggesting that Section 409(a), which is enforceable by participants and beneficiaries through Section 502(a)(2), reflects "a special congressional concern about plan asset management").

B. Massachusetts Mutual Life Insurance Company v. Russell

The foundational case for purposes of the issue here is *Massachusetts Mutual Life Insurance Company v. Russell*. 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985). In *Russell*, the Supreme Court concluded that Section 502(a)(2) claims can only be brought to pursue relief on behalf of a plan, and cannot be used as a

mechanism to seek individual equitable relief for losses arising from the mismanagement of a plan. Russell, a beneficiary of an ERISA-backed insurance plan, sought to recoup damages arising from the delayed processing of a medical claim via a Section 502(a)(2) claim. *Id.* at 136. She specifically argued that the defendants had violated the fiduciary duties outlined in Section 409(a) when they failed to timely process her claim, giving her an individual cause of action under Section 502(a)(2). *Id.* at 138.

The Supreme Court disagreed, holding that although Section 502(a)(2) authorized a beneficiary to bring an action against a fiduciary who violated Section 409, any recovery for such an action "inures to the benefit of the plan as a whole." *Id.* at 140. Justice Stevens, writing for the Court, explained that the text of Section 409 emphasized that the fiduciary was liable "to make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*." *Id.* at 140 (quoting 29 U.S.C. § 1109(a)) (alterations and emphases in original). Justice Stevens continued, "[a] fair contextual reading of the statute makes it abundantly clear that its [drafters] 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.* at 142. Thus, Russell could not use Section 502(a)(2) to recoup her personal losses caused by the delayed processing of her claim, because such losses would benefit her individually, and not the entire plan. *See also Coan*, 457 F.3d at 259 (recognizing that section 502(a)(2) contemplates litigation in a "representative capacity on

behalf of the plan," and requiring a plaintiff take adequate steps to properly act in such a representative capacity (quoting *Russell*, 473 U.S. at 142 n.9)).

C. LaRue v. DeWolff, Boberg & Associates, Inc.

One issue in this case is whether and to what extent the Supreme Court's subsequent decision in *LaRue* casts doubt on the Court's conclusion that Sections 502(a)(2) and 409(a) together establish a framework pursuant to which a plan participant aggrieved by a breach of duty by a plan fiduciary may seek remedies only on behalf of and for *the plan*.

In *LaRue*, the Supreme Court allowed a plaintiff to use a Section 502(a)(2) claim to recover for losses sustained in his individual account within a defined contribution plan. 552 U.S. at 250. The plaintiff was a participant in a defined contribution plan that allowed him to "direct the investment of [his] contributions." *Id.* LaRue alleged that defendants failed to make certain changes to *his* investments as he directed and that, as a result, *his interest* in the plan was depleted by approximately $150,000. *Id.* at 251. He sought to recoup those losses through a Section 502(a)(2) claim. *Id.* The question was whether he could do so.

Justice Stevens—again writing for the Court—held that he could, and that this result directly flowed from the rationale of *Russell*. *Id.* at 250. The Court explained that the misconduct LaRue alleged fell "squarely" within the category of breached fiduciary obligations to the plan

addressed in Section 409(a), and thus that LaRue could pursue his claim under Section 502(a)(2). *Id.* at 253. The Court distinguished *Russell*, explaining that the plaintiff there had "received all the benefits to which she was contractually entitled, but sought consequential damages arising from a delay in the processing of her claim"—a remedy unavailable under Section 409(a) because such relief would not benefit the plan. *Id.* at 254. In short, a critical distinction between *Russell* and *LaRue* was that Russell did not allege a breach of fiduciary duties as defined in Section 409(a)—that is, fiduciary duties "*with respect to a plan*"—but LaRue did. 29 U.S.C. § 1109(a) (emphasis added). Consequently, LaRue could pursue a claim through Section 502(a)(2), whereas Russell could not.

In its discussion, the *LaRue* court walked back some of the broad language in *Russell* that suggested that the only violations cognizable under Section 409(a) are those that impact the "entire plan." *LaRue*, 552 U.S. at 254-55. The Court explained that "*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans." *Id.* at 254. By the time of *LaRue*, the "landscape [had] changed," as defined contribution plans had come to "dominate the retirement plan scene." *Id.* at 254-55. "Unlike the defined contribution plan in this case, 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.* at 255 (citing *Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 486 (9th Cir. 1983)). The Court recognized that in contrast to defined benefit plans, where mismanagement by plan administrators affects an *individual's* entitlement

to a defined benefit only if it creates or enhances the risk of default by *the entire plan*, in the context of defined contribution plans, mismanagement of plan assets by plan administrators *can* injure participants at the individual account level. *Id.* The Court continued:

> Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the [drafters] of § 409. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

Id. at 256. The Court reinforced its conclusion by pointing to other provisions of ERISA that indicate that fiduciaries can be liable for losses experienced only at the individual account level. *Id.* The Court then concluded: "We therefore hold that *although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries*, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* (emphasis added).

The *LaRue* Court thus recognized that Section 409(a) protects against breaches of fiduciary duty involving the management of assets within defined contribution plans, *whether the injury is felt at the plan level or directly at the individual account level*, and that such breaches are

thus actionable under Section 502(a)(2). But the Court also held firm to its conclusion in *Russell* that even in such cases, Section 502(a)(2) provides no remedy for "individual injuries distinct from plan injuries." *Id.*

The dissent's suggestion that *LaRue* in any way abrogated *Russell*'s holding that section 502(a)(2) provides a remedy only for injuries to *the plan*, dissent at 8 and 15 n.14, is thus squarely at odds with the Supreme Court's own holding. At most, *LaRue* recognized that Section 502(a)(2) provides a remedy for injuries to the plan that are felt only at an individual account level; the Court did not suggest that Section 502(a)(2) allows individualized relief for injuries that *are* felt at *the plan* level.[4]

We recently affirmed this view in a post-*LaRue* decision, explaining, "Sections 502(a)(2) and 409, read together, mean that a plaintiff suing for breach of fiduciary duty under [Section] 502(a)(2) . . . *may seek recovery only for injury done to the wronged plan*." *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 180 (2d Cir. 2021) (citing *LaRue*, 552 U.S. at 256) (emphasis added); *see also Munro v. Univ. of Southern Cal.*, 896 F.3d 1088, 1093 (9th Cir. 2018) ("[In *LaRue*], the [Supreme] Court made clear that it had not reconsidered its longstanding recognition

4. Defendants' alleged breach of fiduciary duties here had plan-wide impact; in contrast to *LaRue*, the impact of the breach was not felt only at the individual account level. The Plan's purchase of Strategic Family shares at above-market rates, saddling the Plan with millions of dollars of debt, allegedly undermined the value of the Plan "to the substantial detriment of the Plan and its participants and beneficiaries," including Cedeno. App'x 31.

that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan."). In sum, nothing about *LaRue* alters *Russell's* holding that remedies under Section 502(a)(2) are limited to providing relief *to the plan*.

III. Application

In light of this legal framework, we conclude that Sections 17.10(f) and (g) of the arbitration agreement, which waive Cedeno's statutory remedies under Sections 409(a) and 502(a)(2), are unenforceable. We are not swayed by Defendants' arguments to the contrary, and find support for our view in the persuasive decisions of sister circuits. Because these provisions within the arbitration agreement are unenforceable, and in light of the non-severability provision, we conclude that the arbitration agreement itself is unenforceable.

A. Enforceability of Sections 17.10(f) and (g)

On their face, Sections 17.10(f) and (g) prevent claimants like Cedeno from pursuing the substantive statutory remedies available to them under Sections 409(a) and 502(a)(2) of ERISA, leaving them without effective avenues for vindicating their substantive rights under Section 409(a). Because the provisions operate as a prospective waiver of claimants' statutory rights and remedies, they are unenforceable.

Sections 17.10(f) and (g) prevent Cedeno from pursuing remedies on behalf of the Plan. In particular, Section 17.10(f) requires claimants like Cedeno to bring their claims solely in their "individual capacity and not in a representative capacity," and prohibits them from seeking or receiving "any remedy that has the purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant." App'x 105. Section 17.10(g) limits a claimant's remedy to recovering for the alleged losses *to the claimant's accounts*, a *pro-rated* portion of the profits allegedly made by a fiduciary through the use of Plan assets, and other remedial or equitable relief as long as it "does not include or result in the provision of additional benefits or monetary relief to any Employee, Participant, or Beneficiary other than the Claimant, and is not binding on the Administrator or the Trustee with respect to any Employee, Participant or Beneficiary other than the Claimant." *Id.* at 105-06.

These restrictions effectively preclude Cedeno from pursuing the remedies available to him under Section 502(a)(2) for Defendants' violations of their obligations under Section 409(a). As explained above, this Court recognized in *Russell*, and reaffirmed in *LaRue*, that the statutory remedies available to claimants like Cedeno under Section 502(a)(2) run only to *the Plan*. *See* Section II, above. Though Section 409(a) codifies fiduciary duties that protect a plan as a whole, as well as holders of individual accounts within the plan, the Section 502(a)(2) vehicle for enforcing Section 409(a) provides for only plan-wide remedies. *Russell*, 473 U.S. at 142; *LaRue*, 552

U.S. at 256. If Sections 17.10(f) and (g) prevent Cedeno from pursuing the statutory plan-wide remedies available under Section 502(a)(2), then they effectively prevent him from vindicating his substantive statutory rights under Section 409(a) and remedies under Section 502(a)(2).

And, for the reasons set forth above, if the provisions within the arbitration agreement operate as a "prospective waiver of [Cedeno's] right to pursue statutory remedies" under Sections 409(a) and 502(a)(2), then it follows that they are unenforceable. *Mitsubishi*, 473 U.S. at 637 n.19.

B. Response to Defendants' Arguments

Relying on a line of cases upholding provisions requiring individualized arbitration rather than proceedings in which claims are aggregated, Defendants argue that Cedeno has no unwaivable statutory right to pursue collective, as opposed to individualized, arbitration. They contend that ERISA contains no "clearly expressed congressional intention" to displace the FAA and create a right to engage in legal proceedings on a group basis. Appellant's Br. at 26-35. And they argue that, like the plaintiff in *LaRue*, Cedeno can effectively vindicate his statutory rights by pursuing individualized claims for relief that make him whole without impacting the rights of other participants and beneficiaries. Defendants' arguments are unavailing.

1. *Waivers of Collective-Action Procedures*

Defendants argue that "[a] long series of Supreme Court rulings, involving a variety of statutory rights,

recognizes that agreements to waive the ability to pursue claims in an aggregated manner—such as through a representative, class or collective action—must be enforced under the FAA." Appellant's Br. at 24 (citing *Epic Systems v. Lewis*, 584 U.S. 497, 138 S. Ct. 1612, 1627-28, 200 L. Ed. 2d 889 (2018); *Italian Colors*, 570 U.S. at 233; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *Gilmer*, 500 U.S. at 35). They contend that the same result is warranted here, as there is no unwaivable right to proceed through collective action.

This argument misses the mark for at least two reasons. For one thing, Cedeno is not asserting a free-floating right to proceed through collective action for its own sake; he is asserting a right to pursue the full range of statutory remedies to enforce his *substantive* statutory rights under Section 409(a). Sections 17.10(f) and (g) do not simply take off the table the means to secure a claimant's statutory rights and remedies through collective action, while leaving intact an alternative path through individual arbitration. As we've explained, these provisions, if enforced, would leave claimants like Cedeno without *any* means of securing the full range of statutory remedies available to him.

That fact distinguishes this case from the line of authority Defendants rely upon. For example, in *Epic Systems*, in the context of claims against employers under the Fair Labor Standards Act, the Supreme Court upheld an arbitration agreement that required "individualized arbitration." 138 S. Ct. at 1620. Nothing in the *Epic*

Systems decision suggests that the "individualized arbitration" provision had the effect of waiving any party's substantive statutory rights and remedies. *Id.* at 1628. Similarly, in *Italian Colors*, the Court enforced a contractual waiver of class arbitration in the context of a merchant's antitrust action against American Express. 570 U.S. at 239. The merchant argued that the high cost of pursuing such a claim on an individualized basis precluded it from vindicating its rights. *Id.* at 231. The Supreme Court disagreed, emphasizing that the class-action waiver "no more eliminates [the] parties' right[s] to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Id.* at 236 (citations omitted). As in *Epic Systems* and the other cases Defendants rely on, in *Italian Colors* the restrictive arbitration provisions did not effectively eliminate the merchant's substantive rights and remedies.

Defendants' argument misses a second critical point: in considering the enforceability of provisions in arbitration agreements that prohibit "representational" arbitration of various sorts, the Supreme Court has not adopted a one-size-fits-all approach because not all "representational" arbitration is the same. The Court has recognized a qualitative difference between waivers of collective-action procedures like class actions, and waivers that preclude a party from arbitrating in a representational capacity *on behalf of a single absent principal*, a point it recently drove home in *Viking River*. *See* 596 U.S. at 656-58.

In *Viking River*, the Court considered whether, and to what extent, the FAA preempts a California law that

invalidates contractual waivers of the right to assert representative claims as provided for in California's Labor Code Private Attorneys General Act of 2004 (PAGA). *Id.* at 643. In doing so, the Court distinguished between two kinds of "representational" claims: those in which a plaintiff is authorized by statute to act as an agent or proxy of a single principal—the State, in the case of PAGA—and those in which a representative plaintiff's individual claims are a basis to "adjudicate claims of multiple parties at once, instead of in separate suits." *Id.* at 654 (quoting *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)) (internal quotation marks omitted).

The Court explained that in the latter category of representative claims, including class-action claims, "the changes brought about by the shift from bilateral arbitration to *class-action arbitration* are too fundamental to be imposed on parties without their consent." *Id.* at 657 (citation and internal quotation marks omitted) (emphasis in original). But claims in which a single agent arbitrates in a representative capacity on behalf of a single principal are a different matter. The Court explained,

> Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law. Familiar examples include shareholder-derivative suits, wrongful-

> death actions, trustee actions, and suits on behalf of infants or incompetent persons. Single-agent, single-principal suits of this kind necessarily deviate from the strict ideal of bilateral dispute resolution posited by Viking [River Cruises]. But we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract. Nor have we suggested that single-agent, single-principal representative suits are inconsistent [with] the norm of bilateral arbitration as our precedents conceive of it.

Id. at 641.

The Court explained that in contrast to class-action arbitration, arbitration between one party and a single agent acting in a representative capacity on behalf of an absent principal does not involve a "degree of deviation from bilateral norms" that is "alien to traditional arbitral practice." *Id.* at 658. Thus, PAGA's restriction on the enforceability of waivers of representative capacity litigation on behalf of a single principal—namely, the State of California—was not preempted by the FAA. *Id.* at 662-63.

The aspect of PAGA that *did* run afoul of the FAA was the statute's built-in mechanism of claim joinder, which allowed an aggrieved employee to use the Labor Code violations the employee personally suffered as a basis to join to the action any claims that could have been raised by the State in an enforcement proceeding,

whether or not those claims were related to the aggrieved employee's own grievances. *Id.* at 659. The Court reasoned that such a rule would leave parties to choose between an arbitration "in which the range of issues under consideration is determined by coercion rather than consent" and forgoing arbitration altogether. *Id.* at 661. To the extent that California law provided that PAGA actions could not be divided into individual and non-individual claims, the Court concluded that rule was preempted and Viking River Cruises was entitled to compel arbitration of the plaintiff's individual claims. *Id.* at 662. Having so concluded, and because PAGA provided no mechanism to enable a court to adjudicate non-individual claims once the individual claim has been sent to arbitration, the Court concluded that the non-individual claims should be dismissed. *Id.* at 663.

Although *Viking River* explored the reach of the FAA's preemption of state laws prohibiting parties from waiving representational arbitration—a context distinct from this case—its core insight that from the perspective of the FAA there is a qualitative difference between arbitrating on behalf of an absent principal and arbitrating on behalf of a class of individuals is instructive. The line of cases upholding "individualized arbitration" provisions all deal with the latter scenario. This case involves the former.

The dissent's challenges to the analogy between a plaintiff seeking relief for the plan under Section 502(a)(2) for fiduciary breaches that violate Section 409(a) and specific other kinds of representative litigants miss the point. Dissent at 10-11. The common thread is that, as in

those other cases, a plaintiff seeking relief under Section 502(a)(2) acts in a representative capacity seeking relief for a single entity—the plan—as opposed to a collection of individuals. That an individual must have a personal stake in the relief sought on behalf of the plan to have Article III standing for a suit under Section 502(a)(2) does not mean the plaintiff therefore litigates in an individual capacity to recover for the plaintiff's own individual injuries rather than in a representative capacity to secure relief for the plan. Dissent at 8-9 (citing *Thole v. U.S. Bank*, 590 U.S. 538, 543, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020)). Neither *Thole nor* logic suggests otherwise. *See id.*; 590 U.S. at 546 (noting that plaintiff participants in a defined-benefit plan did not assert that mismanagement of the plan put their future pension benefits at risk).

Moreover, the fact that this Court requires that a participant seeking relief under Section 502(a)(2) "take adequate steps under the circumstances properly to act in a 'representative capacity on behalf of the plan,'" reinforces that a Section 502(a)(2) claim is inherently representational. *Coan*, 457 F.3d at 261 (citation omitted). It thus makes sense that Cedeno invoked Federal Rule of Civil Procedure 23 in his complaint even though this is not actually a class action; we recognized in *Coan* that compliance with the requirements of Rule 23 is likely sufficient to properly act in a representative capacity for purposes of a Section 502(a)(2) claims. *Id.* The dissent asserts that *Coan*'s holding that a participant bringing a Section 502(a)(2) claim acts in a representative capacity did not survive *LaRue*. Dissent at 15, n.14. That assertion

is flatly contradicted by the Supreme Court's own holding in *LaRue*. *See* pages 27-28, above.

2. *Clear Statement of Congressional Intent*

In arguing that *ERISA* contains no "clearly expressed Congressional intention" to prohibit agreements to engage in individualized arbitration, Appellant's Br. at 29, Defendants likewise respond to an argument Cedeno has not made.

In *Epic Systems*, the Supreme Court considered an argument that the National Labor Relations Act (NLRA) overrides the FAA's ordinary guidance that provisions in arbitration agreements, including provisions requiring individualized arbitration, should be enforced according to their terms. 138 S. Ct. at 1623-30. The Court explained that a party suggesting 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 (internal quotation marks omitted). It discerned no such clearly expressed intent in the NLRA. *Id.* at 1624-27. Rather, the Court explained the NLRA was silent about any class or collective action procedures required in litigation or arbitration. *Id.* at 1628.

The problem for Defendants, and for the dissent, is that Cedeno does not argue that ERISA and the FAA conflict such that ERISA overrides the FAA. Instead, he argues that specific provisions in the arbitration agreement prevent him from vindicating statutory

remedies provided by ERISA, making those provisions unenforceable. *See* Appellee's Br. at 13-15 (summarizing argument). As the Supreme Court explained in *Italian Colors*, after considering whether any clear congressional command required it to reject the contested waiver of class arbitration, "Our finding of no 'contrary congressional command' does not end the case." *Id.* at 235. The Court went on to consider separately whether the waiver at issue prevented the aggrieved merchant from effectively vindicating its statutory rights. *Id.* at 235-38.

In short, Defendants' contention that ERISA reflects "no clear congressional intent" to displace the FAA with respect to matters involving individualized arbitration is inapposite to Cedeno's arguments and our analysis.

3. *Cedeno's Individualized Rights and Remedies*

Finally, with respect to Defendants' argument that *LaRue* suggests that Cedeno *can* effectively vindicate his substantive rights if Sections 17.10(f) and (g) are enforceable, we reiterate that *LaRue* reinforced, rather than undermined, the Supreme Court's holding in *Russell* that the remedies available under Section 502(a)(2) for fiduciary breaches that violate Section 409(a) inure to the benefit of *the plan*, thereby providing only indirect relief to individual plan participants and beneficiaries. *See* Section II.C, above. In *LaRue*, the defendant's alleged breach under Section 409(a) caused a loss solely within LaRue's individual account. Accordingly, the remedy available to him, while directed at the plan, impacted only LaRue's individual account within the plan. 552 U.S. at 256. But

nothing in *LaRue* suggests that an individual claimant like Cedeno who is aggrieved by a breach of fiduciary duty that has a plan-wide impact can seek a remedy under Section 502(a)(2) that benefits solely that individual's account. That notion is inconsistent with the plain language of Section 409(a), which speaks solely of injuries *to the plan*, and flies in the face of the Supreme Court's reading of the statute in *Russell* and *LaRue. See* 29 U.S.C. § 1109(a); *Russell*, 473 U.S. at 140-42; *LaRue*, 552 U.S. at 256 ("[Section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries.").

Moreover, contrary to Defendants' argument, Cedeno cannot vindicate his substantive statutory rights if Sections 17.10(f) and (g) are enforceable. Those provisions take the only available statutory vehicle for vindicating Cedeno's rights under Section 409(a)—a suit under Section 502(a)(2) seeking remedies directed at the Plan—off the table. The alternative enforcement framework spelled out in the arbitration agreement, which contemplates relief directed solely at Cedeno's account within the plan and allows recovery only of Cedeno's *pro rata* shares of a fiduciary's misbegotten gains, implicitly rests on the fiction that such a statutory enforcement mechanism exists. It doesn't. Nothing in Section 409(a) or 502(a)(2) allows a court or arbitral forum to slice and dice individual plan participants' and beneficiaries' injuries resulting from mismanagement by fiduciaries in the way Sections 17.10(g) and (f) suggest.

And even if there were a mechanism for making Cedeno financially whole through adjustments only

to his individual account within the Plan, contrary to Defendants' claims, there is no legal way to provide many of the equitable remedies allowed by statute and sought by Cedeno without impacting the accounts of other plan participants and beneficiaries or binding the Plan Administrator and Trustee vis-à-vis other participants. In addition to seeking restoration of *plan-wide losses*, Cedeno is also seeking relief that is by definition plan-wide, including a surcharge, accounting for profits, the imposition of a constructive trust on any funds wrongfully held by Defendants, and disgorgement of fees, earnings, or profits Argent received from the Transaction. These are plan-wide remedies that fall squarely within the scope of the relief Sections 409(a) and 502(a)(2) make available to plan participants. *See* 29 U.S.C. § 1109(a); *see also Munro*, 896 F.3d at 1093-94 (holding *LaRue* could not allow defendants to limit plan participant plaintiffs to individualized relief in arbitration because "claims brought by the [plaintiffs] arise from alleged fiduciary misconduct as to the Plans in their entireties and are not, as in *LaRue*, limited to mismanagement of individual accounts.").

The dissent's suggestion that Cedeno could, in fact, secure these kinds of plan-wide equitable relief in an individualized arbitration makes no sense. Dissent at 16-17. Echoing the Defendants, the dissent suggests that a plan participant like Cedeno could secure equitable relief such as replacement of the plan administrator (relief Cedeno does not seek in this case). But the Defendants argue (and the dissent suggests) that even an arbitral order for that relief would not be binding on the administrator or

trustee "with respect to someone other than him." Oral Argument Transcript at 4; *see* dissent at 17-18. Whether Defendants would be precluded from declining to replace the plan administrator in the context of challenges by *other* participants would be another question for another court on another day. Oral Argument Transcript at 7. But ERISA doesn't contemplate different plan administrators for different participants within the same group; "plan administrator" is a unitary position. *See* 29 U.S.C. § 1002(16)(A) (defining the term "administrator" to mean "the person" specifically designated by the plan, "the plan sponsor" if no administrator is designated, or "such other person as the Secretary may by regulation prescribe"). Defendants' position that Cedeno could secure through individual arbitration equitable relief that is plan-wide in nature, but that is not binding on any other participant, is thus incoherent.

C. Sister Circuit Decisions

Our conclusion that the challenged provisions in the arbitration agreement operate as an impermissible prospective waiver of Cedeno's substantive statutory rights is bolstered by three decisions from our sister circuits in closely analogous cases. Each case involved provisions in arbitration agreements seeking to compel individualized arbitration of Section 502(a)(2) claims and limiting the remedies available in such arbitrations. Two of those cases involved language nearly identical to the contested arbitration provisions here.

First, in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, the Seventh Circuit held that a

nearly identical individual arbitration provision could not be enforced because it would prevent a plaintiff from vindicating statutory rights guaranteed by ERISA under Section 502(a)(2). 13 F.4th 613, 615 (7th Cir. 2021). The provision restricted each arbitration solely to a claimant's claims, and prohibited claimants from seeking or receiving "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. Smith, an employee and beneficiary of his employer's benefit plan who alleged fiduciary violations, sought "wide-ranging" relief under Section 502(a)(2), including removal of the plan's trustee, appointment of an independent fiduciary, and "such other and further relief . . . that is equitable and just." *Id.* at 617 (internal quotation marks omitted).

The *Smith* court, noting that the effective vindication doctrine applies where "a provision in an arbitration provision forbid[s] the assertion of certain statutory rights," concluded that the arbitration provision at issue had done just that. *Id.* at 621 (quoting *Italian Colors*, 570 U.S. at 236) (internal quotation marks omitted). The court explained:

> Recall that Smith invokes § [502](a)(2)'s cause of action to seek relief for (alleged) fiduciary breaches under § [409](a). That relief, by statute, includes "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 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 § [409](a)—would go beyond just Smith and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan.

Id. at 621 (quoting 29 U.S.C. § 1109(a)). Thus, the arbitration provision acted as a waiver of Smith's right to pursue statutory remedies, and the provision could not be enforced. *Id.* The Seventh Circuit rejected the defendants' suggestion that it must "harmonize" the FAA and ERISA in light of the strong federal policy favoring arbitration, observing, "the conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision, which precludes certain remedies that [Sections 502(a)(2) and 409(a)] expressly permit." *Id.* at 622-23.

It is true that *Smith* is distinguishable insofar as Cedeno does not seek removal of the plan fiduciary—Argent has already been replaced as the Plan's trustee. But Cedeno seeks other forms of plan-wide relief that would either benefit other participants or bind the Plan's administrator and trustee as to other participants, *see* App'x 41-42, so the reasoning in *Smith* is on point.

Similarly, in *Harrison v. Envision Management Holding, Inc.*, the Tenth Circuit held a nearly identical provision within an arbitration agreement was unenforceable when applied to a Section 502(a)(2) claim. 59 F.4th 1090, 1094 (10th Cir. 2023).[5] Harrison, like Cedeno, was a participant in a defined contribution retirement plan established by his former employer, for which Argent also served as trustee. *Id.* at 1093-94. Harrison alleged that the defendants, assisted by Argent, financially benefitted from the sale of their company to their employee benefit plan for "significantly more than it was worth, while at the same time leaving the [plan] with a $154.4 million debt." *Id.* at 1095. Harrison sued under Section 502(a)(2), seeking "plan-wide relief on behalf of the [plan]." *Id.* at 1095. He specifically sought, among other things, to enjoin the defendants from future violations of their fiduciary duties, to require them to disgorge their profits, and to remove Argent and appoint a new trustee. *Id.* at 1102. The defendants moved to compel arbitration, again on the basis of a nearly identical set of arbitration provisions. *See id.* at 1104-05.

The Tenth Circuit upheld the district court's denial of the defendants' motion to compel arbitration. The court explained that the arbitration provision's "prohibition on class or collective actions" standing alone did not invalidate the arbitration agreement, *id.* at 1106, but it concluded that the contested arbitration provision effectively prevented Harrison from vindicating many

5. *Harrison* was issued after briefing and argument in this case, but the parties addressed its impact in Rule 28(j) letters before this Court.

of the statutory remedies that he sought under [Section] 502(a)(2). *Id.* at 1101. The court further observed that it was "not clear what remedies Harrison would be left with" if the arbitration provision was enforced as written. *Id.* at 1107.

Finally, in *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, the Third Circuit likewise declined to enforce a provision in an arbitration agreement requiring individual arbitration where a plan participant sought plan-wide remedies under Section 502(a)(2). 72 F.4th 499, 505-07 (3d Cir. 2023).

These decisions of our sister circuits reinforce our conclusion that Sections 17.10(f) and (g) are unenforceable with respect to Cedeno's Section 502(a)(2) claims.[6]

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6. The parties spend much time in their briefing sparring over the significance of a pair of Ninth Circuit cases—one published, one not—that seem to point in opposite directions as to the arbitrability of Section 502(a)(2) claims. Neither case relies on the principle that provisions preventing a party from effectively vindicating statutory rights and remedies are unenforceable, but the reasoning in these cases also supports our holding.

In *Munro v. University of Southern California*, the Ninth Circuit concluded that an arbitration agreement could not be enforced as to a Section 502(a)(2) claim brought by plaintiffs seeking to recover plan losses caused by alleged mismanagement of retirement savings plans. 896 F.3d at 1090. The employer-defendant, USC, moved to compel arbitration on an individual basis, arguing among other things that its *employee agreements*—not, as here, the plan document—barred employees from litigating claims on behalf of the plan. *Id.* at 1091. The *Munro* court, analogizing to

CONCLUSION

For the reasons stated above, we conclude that Sections 17.10(f) and (g) are unenforceable. Section 17.10(h) of the Plan contains a non-severability clause providing that if a court finds the requirements of Sections 17.10(f) or 17.10(g) "unenforceable or invalid, then the entire Arbitration Procedure shall be rendered null and void in all respects." App'x 106. Accordingly, we conclude the entire arbitration provision is null and void, and we **AFFIRM** the district court's order denying the motion to compel arbitration.

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qui tam suits brought on behalf of the government, held that the employment agreement limiting employees to arbitrating their own individual claims did not cover the Section 502(a)(2) claims, which are brought for recovery "only for injury done for the plan." 896 F.3d at 1093. Accordingly, it held the arbitration agreement did not apply to the claims at issue. *See also Hawkins v. Cintas Corp.*, 32 F.4th 625, 634 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 564, 214 L. Ed. 2d 335 (2023) (employee agreement containing individualized arbitration agreement did not apply to Section 502(a)(2) claims brought on behalf of employee benefit plan). To the extent *Munro* recognizes that Section 502(a)(2) claims brought *on behalf of the plan* as a whole cannot be remanded to individualized arbitration, we find it persuasive but not as closely analogous as *Smith, Harrison*, and *Henry*.

In contrast, in *Dorman v. Charles Schwab Corporation*, the Ninth Circuit concluded that a district court erred in refusing to compel arbitration of a Section 502(a)(2) claim. 780 F. App'x 510, 512 (9th Cir. 2019). The arbitration provision at issue was within a plan document, and the *Dorman* court did not consider an argument invoking the effective vindication doctrine. *See* 780 F. App'x at 513-14 (finding arbitration agreement enforceable under the FAA because plan consented to arbitration based on plan document). Because it does not address the primary argument at issue here, *Dorman* is not persuasive.

Appendix A

MENASHI, *Circuit Judge*, dissenting:

The Federal Arbitration Act ("FAA") provides that 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. Through the FAA, Congress established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). Nonetheless, parties who have agreed to arbitrate sometimes try to avoid arbitration later by "conjur[ing] conflicts between the Arbitration Act and other federal statutes." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 516, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018). The Supreme Court "has rejected *every* such effort to date." *Id.*; *see id.* at 502 (National Labor Relations Act); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (Sherman Antitrust Act); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 27, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) (Age Discrimination in Employment Act).

And here we are again. This time, the purported conflict is with the Employee Retirement Income Security Act ("ERISA"). Petitioner Ramon DeJesus Cedeno argues that the arbitration clause in the documents governing his ERISA plan prevents him from effectively vindicating his statutory rights under Section 409(a) of ERISA, which makes plan fiduciaries liable for the mismanagement of plan assets. The arbitration clause prohibits Cedeno from bringing a claim in arbitration "in a representative

capacity or on a class, collective, or group basis," and it limits his relief under Section 409(a) to remedies that neither "result in the provision of additional benefits or monetary relief" to other plan participants nor bind the plan fiduciaries with respect to other participants. J. App'x 105-06. The court concludes that, because Cedeno's only "avenue for relief under ERISA is to seek a plan-wide remedy, and the specific terms of the arbitration agreement seek to prevent Cedeno from doing so, the agreement is unenforceable." *Ante* at 15.

I disagree. Enforcing the arbitration agreement would not diminish Cedeno's ability to vindicate his statutory rights. The court's holding depends on its acceptance of Cedeno's tendentious reading of ERISA. The Supreme Court has warned that "we must be alert to new devices and formulas" by which litigants seek to revive the old "judicial antagonism toward arbitration." *Epic Sys.*, 584 U.S. at 509 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)). The manufactured conflict between ERISA and the arbitration clause here is just such a device. I would reject it, and therefore I dissent.

I

This is a straightforward case. The documents governing Cedeno's ERISA plan provide that any claim for a breach of fiduciary duty is to be resolved through binding arbitration. The arbitration clause requires Cedeno to bring any claims "solely in [his] individual capacity and not in a representative capacity or on a class, collective

or group basis," and it limits him to the remedies that are necessary to redress his individual injuries. J. App'x 105-06. Cedeno nevertheless brought a lawsuit in federal court—a class-action lawsuit, no less—asserting a breach of fiduciary duty by Argent, the trustee of the plan. The district court should have granted the motion to compel arbitration.

When it enacted the FAA, Congress directed the courts to "respect and enforce" not only "agreements to arbitrate" but also "the parties' chosen arbitration procedures." *Epic Sys.*, 584 U.S. at 506. We must respect the parties' choice "to use individualized [arbitration] rather than class or collective action procedures." *Id.*; *see also Concepcion*, 563 U.S. at 348 ("[C]lass arbitration, to the extent it is [imposed] rather than consensual, is inconsistent with the FAA.").

Had the district court respected and enforced the arbitration clause, Cedeno would have been able to seek whatever legal or equitable relief was necessary to make him whole; he simply would have been required to seek that relief in an individualized arbitration proceeding. The arbitration clause would have prohibited Cedeno from pursuing money damages on behalf of other plan participants, but the Supreme Court has repeatedly held that, pursuant to the FAA, parties may waive the right to pursue relief on behalf of others through class arbitration. *See Epic Sys.*, 584 U.S. at 506; *Concepcion*, 563 U.S. at 348. Under those precedents, the arbitration clause in this case is enforceable.

Cedeno, however, insists that there is a conflict with ERISA, and the court agrees. Section 502(a)(2) of ERISA provides that "[a] civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under" Section 409(a). 29 U.S.C. § 1132(a)(2). The court understands Sections 502(a)(2) and 409(a) to require Cedeno to act in a "representative capacity" on behalf of the plan itself and to seek a "plan-wide remedy" on its behalf, effectively making Cedeno a guardian *ad litem* for the plan (much as a shareholder would represent a corporation in a derivative suit). *Ante* at 24.[1] Because the arbitration clause prohibits Cedeno from asserting claims in a representative capacity, the court concludes that, in this case, the FAA's mandate to enforce arbitration agreements conflicts with ERISA, which purportedly does not allow Cedeno to make claims on his own behalf.[2] The court also interprets the

1. *See Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 122 (2d Cir. 2022) (explaining that, in a derivative suit, "the plaintiff-shareholder does not sue for his own direct benefit or in his own direct right but rather as a guardian *ad litem* for the corporation") (quoting Harry G. Henn, Handbook of the Law of Corporations and Other Business Enterprises 560 (1961)).

2. The court insists that the relevant conflict is "not between the FAA and ERISA" but "between ERISA and the plan's arbitration provision." *Ante* at 46 (quoting *Smith v. Bd. of Dirs. of Triad Mfg.*, 13 F.4th 613, 622-23 (7th Cir. 2021)). But the FAA requires a court to "'rigorously enforce' arbitration agreements according to their terms." *Italian Colors*, 570 U.S. at 232 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)). So if ERISA somehow prevents the enforcement of the arbitration clause, it conflicts with the FAA. Indeed, the court seeks to avoid applying the FAA by relying on

arbitration clause to prohibit Cedeno from seeking relief that affects other plan participants *in any way*, including equitable relief contemplated by ERISA. The court therefore holds that the arbitration agreement is "not enforceable" because it "ha[s] the effect of prospectively waiving [Cedeno's] statutory remedies." *Ante* at 18.

In reaching this conclusion, the court relies on "the 'effective vindication' exception," a "judge-made exception to the FAA" that "originated as dictum in *Mitsubishi Motors*." *Italian Colors*, 570 U.S. at 235.[3] As today's decision describes it, the effective vindication exception to the FAA means that "terms in an arbitration agreement that have the effect of prospectively waiving a party's statutory remedies are not enforceable." *Ante* at 18. The court concludes that the arbitration clause prevents Cedeno from vindicating his statutory rights because it prohibits him from acting in a representative capacity on behalf of the plan, and it operates as a waiver of statutory

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"the 'effective vindication' exception," a "judge-made *exception* to the FAA." *Id.* at 235 (emphasis added).

3. The Supreme Court in *Mitsubishi Motors* remarked that if an arbitration agreement "operated . . . as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as against public policy." *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). However, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function," and public policy would not prevent the enforcement of the arbitration agreement. *Id.* at 637.

remedies because it prohibits him from seeking equitable relief that would incidentally benefit other participants.

That is incorrect. Even assuming that there is an "effective vindication" exception to the FAA—notwithstanding that the Supreme Court has never applied it—the exception is not implicated here. A participant in a defined-contribution pension plan, such as Cedeno, may proceed under Sections 502(a)(2) and 409(a) to seek relief that benefits only his or her individual account within the plan. Requiring Cedeno to pursue relief in an arbitral forum does not alter that substantive right. The court ruminates over the abstract question of whether Sections 502(a)(2) and 409(a) of ERISA transform an individual claimant into a representative of the plan. ERISA does no such thing. But even if it did, nothing would prevent the claimant from waiving the right to bring a claim as the plan representative and agreeing to individualized arbitration. In the individualized procedure contemplated by the arbitration clause, Cedeno could obtain any legal or equitable remedy that is necessary to make him whole. Accordingly, I would reverse the district court's denial of the motion to compel arbitration.

II

There are three problems with the court's analysis. First, the effective vindication exception is a questionable principle of uncertain legal status. Second, neither Section 502(a)(2) nor Section 409(a) of ERISA requires Cedeno to act in a representative capacity on behalf of the plan. To the contrary, an ERISA plaintiff represents his own individual

interest. Third, the arbitration clause allows Cedeno to obtain any legal or equitable relief that is necessary to make him whole. There is no reason to interpret the clause to prohibit such relief, even if an equitable remedy would incidentally benefit other plan participants. Ultimately, there is no conflict between ERISA and the mandate of the FAA to enforce arbitration agreements.

A

While the Supreme Court has acknowledged the theoretical possibility of an effective vindication exception to the FAA, it has always declined to apply the exception whenever litigants have asked it to do so. *See Italian Colors*, 570 U.S. at 235-36; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000); *Gilmer*, 500 U.S. at 28; *Mitsubishi Motors*, 473 U.S. at 636-37. In his concurrence in *Italian Colors*, Justice Thomas observed that the purported exception conflicts with "the plain meaning of the Federal Arbitration Act." 570 U.S. at 229 (Thomas, J., concurring). It does so because "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id.* (quoting *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring)); *see* 9 U.S.C. § 2 (providing that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). And Justice Ginsburg concluded that the Court's decision in *Italian*

Colors meant that the effective vindication exception was no longer relevant. "Although the Court in *Italian Colors* did not expressly reject this 'effective vindication' principle," she wrote, "the Court's refusal to apply the principle in that case suggests that the principle will no longer apply in any case." *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 68 n.3, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) (Ginsburg, J., dissenting).

To be sure, the Supreme Court appears to have referenced the exception in a recent case. The Court stated that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653, 142 S. Ct. 1906, 213 L. Ed. 2d 179 (2022). But the Court emphasized that "[a]n arbitration agreement . . . does *not* alter or abridge substantive rights; it merely changes how those rights will be processed." *Id.* (emphasis added). Thus, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum." *Id.* (alterations omitted) (quoting *Preston v. Ferrer*, 552 U.S. 346, 359, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)). In this way, the Court clarified that an agreement to arbitrate, by itself, *never* involves an impermissible waiver of substantive rights. Rather, what had previously been described as the effective vindication "exception" really refers to the principle that "the FAA requires only the enforcement of provisions to settle a controversy by arbitration, and not any [substantive] provision that happens to appear in a contract that features an arbitration clause." *Id.* at 653 n.5 (internal

quotation marks, alteration, and citation omitted). In other words, a court must always enforce agreements to arbitrate; it may decline to enforce agreements that go beyond arbitration to alter substantive rights.

Given this latest authoritative statement from the Supreme Court, we should pause before embracing the argument the court adopts today: that the agreement to proceed by individualized arbitration would *itself* so distort the statutory claim as to implicate the effective vindication exception. *Cf. Estle v. IBM Corp.*, 23 F.4th 210, 214 (2d Cir. 2022) ("[C]ollective action, like arbitration, is a 'procedural mechanism,' not a substantive right.") (quoting *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.6 (2d Cir. 2013)).

B

In this case, the effective vindication exception is a solution in search of a problem. Both the arbitration clause and ERISA afford Cedeno the right to seek remedies for harm to himself. Section 502(a)(2) authorizes Cedeno to seek "appropriate relief" for a breach of fiduciary duty. 29 U.S.C. § 1132(a)(2). Section 409(a) makes the fiduciary liable "to make good to such plan" any losses resulting from its breach and for any "other equitable or remedial relief" that a court "may deem appropriate." 29 U.S.C. § 1109(a). While Section 409(a) establishes a fiduciary duty owed to the plan, it does not follow that the specific parties authorized to sue for breach of that duty—the Secretary of Labor or "a participant, beneficiary or fiduciary," *id.*

§ 1132(a)(2)—must seek relief for the plan as a whole rather than to remedy their own distinct harms.

In fact, the Supreme Court has specifically held that a participant in a defined-contribution plan—such as Cedeno—may sue under Sections 502(a)(2) and 409(a) to recover losses to his own individual account, without any recovery for other accounts. *See LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008).[4] Even in the defined-benefit context, the Court has held that a plan participant who sues under Section 502(a)(2) must establish his own concrete "injury in fact." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 543, 140 S. Ct. 1615, 207 L. Ed. 2d 85 (2020). Plan participants do not have "standing as representatives of the plan." *Id.*[5] They must seek recovery for their own injuries. If ERISA

4. *See also Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019) (explaining that "the Supreme Court has recognized that [Section 502(a)(2)] claims are inherently individualized when brought in the context of a defined contribution plan" and that "*LaRue* stands for the proposition that a defined contribution plan participant can bring a 502(a)(2) claim for the plan losses in her own individual account"); *Robertson v. Argent Tr. Co.*, No. CV-21-01711, 2022 U.S. Dist. LEXIS 133578, 2022 WL 2967710, at *10 (D. Ariz. July 27, 2022) ("*LaRue* . . . authorizes defined contribution plan participants to recover losses from their individual accounts using § 502(a)(2) of ERISA. That is exactly what Plaintiff is allowed to do under the Plan.").

5. The dissenters in *Thole* argued that plan participants should be able to maintain a "representational suit" to "sue on their plan's behalf." *Thole*, 590 U.S. at 564-65 (Sotomayor, J., dissenting). But that view did not prevail.

prohibited a participant from seeking to remedy his own distinct injuries, this requirement would make little sense.

As the court notes, there are established forms of "[n]on-class representative actions in which a single agent litigates on behalf of a single principal," such as a shareholder derivative suit, a trustee's suit on behalf of a trust, or an action by a guardian *ad litem*. *Ante* at 35 (quoting *Viking River Cruises*, 596 U.S. at 657). Many representative actions are recognized by statutes or procedural rules.[6] Others, such as trustee actions against third parties for injuries to the trust or trust property, are recognized by the common law.[7] But an ERISA suit is not a representative action. ERISA does not authorize, much less require, an action in a representative capacity on behalf of the plan. *See Thole*, 590 U.S. at 543-44 (explaining that participants have not "been legally or contractually appointed to represent the plan" and cannot "assert standing as representatives of the plan itself" but must seek recovery for individual injuries in fact). To the contrary, *LaRue* and *Thole* make clear that an ERISA plaintiff sues in his own individual capacity to recover for his own injuries. Courts should be "'reluctant to tamper

6. *See*, *e.g.*, Fed. R. Civ. P. 23.1 (shareholder derivative suit); N.Y. C.P.L.R. § 1202 (guardian *ad litem*); Cal. Lab. Code § 2698 *et seq.* (California Labor Code Private Attorneys General Act of 2004).

7. *See* Restatement (Third) of Trusts § 107 cmt. b (Am. L. Inst. 2012) ("As holder of the title to trust property . . . [and] representative of the trust and its beneficiaries, the trustee is normally the appropriate person to bring . . . an action against a third party on behalf of the trust.").

with the enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text," *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)), and the notion that Cedeno must recover only plan-wide remedies is such an extension.

This lawsuit does not resemble any of the traditional types of representative actions that the court references. A trustee, for example, may sue on behalf of a trust. But here, Cedeno is *not* the trustee of the plan; at the time of the alleged misconduct, Argent was the trustee, and Cedeno is suing Argent. Cedeno is effectively a trust beneficiary, not a trustee, and a trust beneficiary sues a trustee for breach of trust in his individual capacity as a beneficiary; he does not do so on behalf of the trust.[8] That is true even when the beneficiary seeks equitable remedies that affect the administration of the trust.[9]

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8. *See* Restatement (Third) of Trusts § 94 ("A suit against a trustee . . . to enjoin or redress a breach of trust . . . may be maintained *only by a beneficiary* or by a co-trustee, successor trustee, or other person acting *on behalf of one or more beneficiaries*.") (emphasis added); *id.* § 94 cmt. b ("A suit to enforce a private trust ordinarily . . . may be maintained by any beneficiary whose rights are or may be adversely affected by the matter(s) at issue.").

9. *See* Restatement (Third) of Trusts § 95 cmt. c (explaining that equitable remedies available in a suit by the beneficiary include "ordering the trustee to account," "directing the trustee to administer the trust" in accordance with "the terms of the trust or the powers and duties of the trusteeship," "enjoining the trustee

The shareholder derivative suit is not an apt analogy either. The Supreme Court has explained that "the term 'derivative action' . . . has long been understood to apply only to those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984). Therefore, "[b]ecause ERISA plans cannot bring suit against fiduciaries on the plans' own behalf under section 502, the lawsuits of individual participants are not derivative." *Coan v. Kaufman*, 457 F.3d 250, 258 (2d Cir. 2006).[10] The derivative suit originated as an equitable remedy that allowed individual shareholders, who lacked standing to bring an action at law, to assert a cause of action that properly belonged to the corporation. *See Ross v. Bernhard*, 396 U.S. 531, 534, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). Unlike a shareholder, a participant in an ERISA plan has individual rights as a plan participant. In a defined contribution plan, for example, a participant has the right to direct the management of the assets in

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to take or refrain from taking certain action(s) or otherwise to avoid committing a breach of trust," and "removing the trustee").

10. *See also Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.*, 700 F.2d 889, 893 (2d Cir. 1983) ("In light of the frequent references in the Act and its legislative history to 'participants, beneficiaries and fiduciaries,' th[e] conclusion [that the plan itself may sue] is untenable.") (citations omitted).

his individual account.[11] A participant in an ERISA plan does not resemble a shareholder.

I recognize that the Supreme Court stated in dicta about forty years ago that the "[i]nclusion of the Secretary of Labor [in Section 502(a)(2)] is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9. But the Court clarified in *LaRue* that its "references to the 'entire plan' in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context." *LaRue*, 552 U.S. at 256. The "entire plan" language in *Russell* described the "kind of

11. The plan in this case is an Employee Stock Ownership Plan ("ESOP"), not a traditional 401(k) plan. As an ESOP, the plan "was designed to invest primarily in the employer securities of Strategic Family," and its principal asset was Strategic Family's stock. J. App'x 20-21. In general, the beneficiaries could not choose how the plan would invest its assets. *Id.* at 17 ("As Trustee, Argent had exclusive authority to manage and control the assets of the Plan."). However, the participants in the plan had some discretionary rights. For example, participants who were still employed, were over 55 years old, and had participated in the plan for at least ten years could "elect to diversify a portion of [their] ESOP Stock Accounts" by receiving a cash distribution equal to a portion of the value of the stock in their accounts and investing the cash in other assets. *Id.* at 225. By contrast, a shareholder cannot compel the corporation to make a distribution to him. *See* 11 Fletcher Cyclopedia of the Law of Corporations § 5321 (September 2023 update) ("The shareholders have no legal right to share in the corporation's profits unless the directors declare a dividend . . . [and] cannot compel the declaration of dividends by agreement.").

harms that concerned the draftsmen of § 409"—namely, "[m]isconduct by the administrators of a defined benefit plan . . . [that] creates or enhances the risk of default by the entire plan." *Id.* at 255-56. "For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan" to create the kind of injury that Section 409(a) was intended to remedy. *Id.* at 255.

The lesson of *Russell*, which the Court clarified and reaffirmed in *LaRue*, is that Section 502(a)(2) "does not provide a remedy for individual injuries *distinct from plan injuries*." *Id.* at 256 (emphasis added). In *Russell*, the plaintiff sought damages resulting from the plan's improper delay in processing her claim and paying her the benefits to which she was entitled. 473 U.S. at 136. She alleged that the delay "forced [her] disabled husband to cash out her retirement savings which, in turn, aggravated the psychological condition that caused [her] back ailment." *Id.* at 137. The Court decided that Section 502(a)(2) does not provide a cause of action to remedy injuries unrelated to the administration of the plan. *See id.* at 142-43 ("[T]he principal statutory duties imposed on the trustees 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.").

But Section 502(a)(2) "*does* authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account" because such an individual injury is not "distinct" from an injury to the plan. *LaRue*, 552 U.S. at 256 (emphasis added); *see also*

id. at 262-63 (Thomas, J., concurring in the judgment) ("Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily 'losses to the plan' for purposes of § 409(a)."). If a participant can seek relief for his own individual injuries, ERISA does not prevent him from agreeing to arbitrate his claims on an individualized basis.

Russell's "representative capacity" language, like its references to the "entire plan," similarly reflected the distinction between injuries unrelated to plan administration, on the one hand, and injuries resulting from such administration, on the other. The very next sentence of footnote 9 in *Russell* explains that "the common interest shared by all four classes [of plaintiffs named in Section 502(a)(2)] is in the financial integrity of the plan." 473 U.S. at 142 n.9. The Court's point was that Section 502(a)(2) authorizes a remedy only for financial mismanagement by a plan fiduciary. There is no reason to believe that the footnote established a new rule requiring a participant to become a guardian *ad litem* of the plan itself to proceed under Section 502(a)(2).

Even Cedeno does not really believe that. Cedeno brought this lawsuit as a class action under Rule 23, not as a representative suit on behalf of the plan as an entity.[12]

12. The court asserts that this lawsuit "is not actually a class action." *Ante* at 38. That would appear to be news to Cedeno, who stated in his complaint that he "brings this action as a class action pursuant to Fed. R. Civ. P. 23(a) and (b), on behalf of the following class: All participants in the Strategic ESOP (the 'Plan') and the

A class action involves the aggregation of individual claims, not a single claim brought by a representative on behalf of a single principal. *See* Fed. R. Civ. P. 23(b) (providing that "[a] class action may be maintained" if, *inter alia*, "prosecuting *separate actions* by . . . *individual* class members" risks inconsistent adjudications or unfair prejudice to nonparty class members) (emphasis added).[13] No one disputes that the FAA requires a court to enforce a class-action waiver in an arbitration agreement. *See Concepcion*, 563 U.S. at 344. Cedeno's recharacterization of his attempted class action as a single-principal representative-capacity suit allows him to evade this rule. And the court, by excusing Cedeno from his arbitration agreement and allowing him to proceed in a "representative capacity," has authorized an *ersatz* class action that lacks the "procedural safeguards" we would

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beneficiaries of such participants as of the date of the December 28, 2017 ESOP Transaction or anytime thereafter." J. App'x 38.

13. By contrast, an established representative-capacity action on behalf of a single principal, such as a shareholder derivative action, cannot be brought as a class action. *See F5 Capital v. Pappas*, 856 F.3d 61, 76 (2d Cir. 2017) (holding that the shareholder plaintiffs' equity-dilution claim "*may not proceed as a class action* because the claim belongs to [the corporation], not its shareholders") (emphasis added); *see also Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 297 (S.D.N.Y. 2009) (holding that shareholder derivative suits are not "mass actions" under the Class Action Fairness Act because "[a] derivative suit is neither a claim by multiple plaintiffs consolidated by State court rules, nor a class action in disguise") (internal quotation marks omitted).

require if Cedeno were proceeding under Rule 23. *Coan*, 457 F.3d at 261.[14]

In fact, Cedeno was right the first time. Because a plan participant proceeds under Section 502(a)(2) in an individual capacity, his claim can be aggregated with similar actions by other individual plan participants under Rule 23. Cedeno's arbitration agreement preserves his right to pursue his individual claim, but he must pursue it in the arbitral forum. ERISA does not authorize a "representative capacity" action that allows Cedeno to avoid both the requirements of Rule 23 and his own agreement to arbitrate his claim.

C

Beyond its representative-capacity theory, the court worries that "there is no legal way to provide many of the equitable remedies allowed by statute and sought by Cedeno without impacting the accounts of other plan participants and beneficiaries or binding the Plan

14. In *Coan v. Kaufman*, we held that summary judgment was appropriate when an ERISA plaintiff had failed to take procedural steps to ensure that she "represent[ed] adequately the interests of other plan participants" and thus "properly proceeded in a representative capacity as required by section 502(a)(2)." 457 F.3d at 262. *Coan* predated the Supreme Court's decisions in *LaRue* and *Thole*, and to the extent that it holds a defined contribution plan participant *must* proceed in a representative capacity and seek plan-wide relief, it is no longer good law. However, to the extent that an ERISA plaintiff *chooses* to seek class-wide relief, he should proceed under Rule 23 or join necessary parties under Rule 19, as *Coan* suggested. *See id.* at 261.

Administrator and Trustee vis-à-vis other participants." *Ante* at 42. The court assumes that the arbitration clause prohibits the award to Cedeno of any relief with a "plan-wide" effect, "including a surcharge, accounting for profits, the imposition of a constructive trust on any funds wrongfully held by Defendants, and disgorgement of fees, earnings, or profits." *Id.*

But Cedeno has not shown—*and the defendants deny*—that any equitable relief available under ERISA would be unavailable to Cedeno in an individualized arbitration. The defendants maintain that the arbitration clause "does not limit Plaintiff's ability to seek any equitable remedies to which he may be entitled on his own behalf." Reply Br. 17. And the defendants agreed at oral argument that "if removal of the fiduciary [or other equitable relief] is necessary to make Mr. Cedeno whole, to provide him a remedy for his own harm, . . . [it is] available in arbitration." Oral Argument Transcript at 4-5. In the defendants' view, the arbitration agreement "only prohibits providing money to other people." *Id.* at 5. It does not prevent Cedeno from seeking any equitable relief that may be necessary to make him whole and thereby to vindicate his statutory rights—even if that equitable relief has an impact on other plan participants.[15] This is the most

15. *See Robertson*, 2022 U.S. Dist. LEXIS 133578, 2022 WL 2967710, at *10 (explaining that "invocation of the effective vindication doctrine is misplaced" when an arbitration clause requiring individualized arbitration of fiduciary duty claims under ERISA does not "preclude[ ] an individual participant from pursuing equitable remedies, such as removal of a fiduciary, that would benefit other participants").

sensible reading of the contractual language. There is no reason to conclude that any form of relief ERISA envisions would be categorically denied to Cedeno in arbitration.

The court insists that it is "incoherent" to say that Cedeno could obtain equitable relief that affects the plan and yet that the order providing such relief would not bind the plan administrator or trustee in proceedings with other plan participants. *Ante* at 44. But that is how equitable remedies work. If a litigant obtains an injunction requiring her employer to discontinue a discriminatory employment practice, for example, the injunction will affect other employees. But the employer may still argue, in a separate lawsuit by a different employee, that the second employee is not entitled to the same remedy.[16] The individualized arbitration process required in this case parallels this familiar process of case-by-case

16. *See*, *e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); 18A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 4464.1 (3d ed.) ("[N]onmutual claim preclusion continues to be denied in decisions that probably reflect a general assumption that it is not ordinarily available."). The employer is not even necessarily precluded from arguing in the second lawsuit that the employment practice is not discriminatory. *See* 18A Wright, Miller & Kane, *supra*, § 4465 ("Nonmutual issue preclusion is not available as a matter of right."); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (explaining that "a trial judge should not allow the use of offensive collateral estoppel" when the "plaintiff could easily have joined in the earlier action" or when "the application of offensive estoppel would be unfair to a defendant").

adjudication. The court's idiosyncratic view of equitable relief, by contrast, is novel.[17]

Even if it were uncertain that Cedeno could obtain equitable relief in arbitration that affects other plan participants, that would not be enough to affirm the judgment in this case. The Supreme Court has told us that "the proper course is to compel arbitration" when it is possible that the arbitration agreement might impermissibly limit a plaintiff's remedies but "we do not know how the arbitrator will construe the remedial limitations." *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407, 123 S. Ct. 1531, 155 L. Ed. 2d 578 (2003). "[W]e should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent

17. *See United States v. Texas*, 599 U.S. 670, 693, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (Gorsuch, J., concurring in the judgment) ("Traditionally, when a federal court finds a remedy merited, it provides party-specific relief, directing the defendant to take or not take some action relative to the plaintiff. If the court's remedial order affects nonparties, it does so only incidentally."); *Trump v. Hawaii*, 585 U.S. 667, 717, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018) (Thomas, J., concurring) ("[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. . . . While [some] injunctions benefited third parties, that benefit was merely a consequence of providing relief to the plaintiff."); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 420 (2017) (noting that the "American practice was that an injunction would restrain the defendant's conduct vis-à-vis the plaintiff, not vis-à-vis the world").

question of how the ambiguity is to be resolved." *Id.* at 406-07 (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995)). That approach is consistent with the longstanding "federal policy to construe liberally arbitration clauses . . . and to resolve doubts in favor of arbitration." *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 385 (2d Cir. 1961); *see also PacifiCare*, 538 U.S. at 407 n.2 ("Given our presumption in favor of arbitration, we think the preliminary question whether the remedial limitations at issue here prohibit an award of [remedies available under the statute] is not a question of arbitrability.").

Because it is ambiguous—at the very least—whether the arbitration agreement prevents Cedeno from seeking equitable relief with plan-wide consequences, the "proper course" would be to compel arbitration despite Cedeno's speculation that the arbitrator might construe the agreement in a way that would call its enforceability into question. *PacifiCare*, 538 U.S. at 407.

The case that originated the effective vindication exception, *Mitsubishi Motors*, involved a similar situation. In that case, the parties' contract provided for arbitration in Japan and specified that Swiss law would govern the contract. The United States, as amicus curiae, suggested that if the court compelled arbitration, the Japanese arbitrator might read the choice-of-law clause "not simply to govern interpretation of the contract terms, but wholly to displace American law"—in particular, the Sherman Antitrust Act—"even where it would otherwise apply." 473

U.S. at 637 n.19. As the Supreme Court noted, however, Mitsubishi's counsel conceded at oral argument that American antitrust law would apply in arbitration. So the Court enforced the arbitration agreement and declined to "speculate" as to whether the arbitrator would apply the Sherman Act "at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award." *Id.* The same reasoning should apply here.[18]

III

Even if the court were correct that a plaintiff proceeding under Section 502(a)(2) is a representative of the plan—and that the arbitration clause prohibits Cedeno from acting in that capacity—the district court still erred in refusing to compel arbitration. Pursuant to the purported effective vindication exception, "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises*, 596 U.S. at 653. Thus, for example, a party cannot waive the right to bring a claim if his civil rights have been violated. *See 14 Penn Plaza*, 556 U.S. at 273 ("[A] substantive waiver of federally protected civil rights will not be upheld."). In this case, however, Cedeno

18. For these reasons, the decisions of other courts that arbitration agreements should be invalidated because similarly ambiguous language "prohibits relief that ERISA expressly permits" are not persuasive. *Smith*, 13 F.4th at 615; *see also Henry ex rel. BSC Ventures Hldgs., Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 508 (3d Cir. 2023); *Harrison v. Envision Mgmt. Hldg., Inc.*, 59 F.4th 1090, 1109 (10th Cir. 2023).

does not argue that he has waived any of *his* substantive rights. Rather, he argues—and the court agrees—that because he agreed to arbitrate on an individual basis, he has waived the right to bring a claim on behalf of the plan to vindicate *its* substantive rights. But the effective vindication exception does not prevent such a waiver.

To the extent that the court relies on *Viking River Cruises* for the proposition that the FAA does not allow parties to waive the right to bring a representative-capacity claim on behalf of another individual or entity, that reliance is misplaced. In *Viking River Cruises*, the Court considered whether the FAA conflicted with a California statute that gave individual citizens a non-waivable right to bring civil actions as private attorneys general on behalf of the state. In holding that the California law and the FAA did not conflict, the Court noted that "[n]on-class representative actions in which a single agent litigates on behalf of a single principal"—such as "shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons"—form "part of the basic architecture of much of substantive law." 596 U.S. at 657. The Court held that such actions are not "inconsistent [with] the norm of bilateral arbitration" in the same way that class actions are. *Id.* For that reason, California could prohibit contractual waivers of "representative standing" in this context without impermissibly interfering with contracting parties' ability to choose the comparatively informal and efficient procedure of bilateral arbitration. *Id.*

But the fact that states have the authority to ban waivers of representative standing does not mean that a federal court—on its own initiative and in the absence of any statutory ban—may itself decide to prohibit such waivers by refusing to enforce arbitration agreements.

* * *

The district court should have compelled arbitration because the effective vindication exception—assuming it exists—is inapplicable. The court's opinion cannot be reconciled with our obligation to enforce an arbitration agreement according to its terms and to avoid finding conflicts between the FAA and other federal statutes when possible. I dissent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 2, 2021

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

20-cv-9987 (JGK)

RAMON DEJESUS CEDENO, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs,

- against –

ARGENT TRUST COMPANY *et al.*,

Defendants.

November 2, 2021, Decided;
November 2, 2021, Filed

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, Ramon Dejesus Cedeno, brought this putative class action alleging violations of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, ("ERISA") by the defendants: Argent Trust Co., Ryan Sasson, Daniel Blumkin, Ian Behar, Duke

Enterprises LLC, Twist Financial LC, Blaise Investments LLC, and Strategic Financial Solutions, LLC. Compl., ECF No. 17. The plaintiff sought to represent a class of the participants in his retirement plan. The defendants moved to compel individual arbitration and to stay the case. ECF No. 59. However, the arbitration agreement at issue precluded participants in the retirement plan at issue, which is governed by ERISA, from seeking relief for the plan as a whole, a form of relief that is otherwise provided for by ERISA. Because this provision is invalid and is not severable from the arbitration provision in the plan, the motion to compel arbitration is **denied**.

I.

"In deciding motions to compel, courts apply a standard similar to that applicable for a motion for summary judgment." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016).[1] Thus, a court should "consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits." *Id.* The Court must draw all reasonable inferences against the moving party. *Id.* In this case,

1. For clarity, unless otherwise specified, this Memorandum Opinion and Order refers directly to sections of ERISA and the FAA, rather than to provisions of the United States Code, and uses the section symbol (§) to do so. It uses the word "section" to refer to sections of the Plan Document. Unless otherwise noted, in quotations from cases, this Memorandum Opinion and Order omits all alterations, brackets, citations, emphases, and internal quotation marks.

there has been no discovery, and there is no dispute as to the following facts.

The plaintiff is an employee of Strategic Financial Solutions, LLC. Compl. ¶ 18. He is a participant in its strategic employee stock ownership plan (the "Plan"), *id.*, a type of retirement plan covered by ERISA, *see* § 407(d)(6). The Plan is a defined contribution plan which means that participants have individual accounts within the Plan from which their retirement benefits will be paid. Compl. ¶ 42.

In his complaint, the plaintiff alleges that the defendants breached their fiduciary duties under ERISA, thereby causing the Plan to suffer losses. Compl. ¶ 13. The complaint alleges that the defendant Argent Trust Co caused the Plan to buy shares of Strategic Family, Inc. for more than fair market value, thereby damaging the Plan and its participants, including the plaintiff. The complaint seeks to order each defendant to make good to the Plan the losses resulting from the breaches of ERISA and restore to the Plan any profits that the defendants made through use of the assets of the Plan. The complaint also seeks certain declaratory relief.

ERISA § 409(a) 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.

ERISA § 502(a)(2) provides that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under [§ 409].

The Plan, adopted in 2017, Compl. ¶ 18, is governed by an instrument called the Plan Document. Williams Decl. Ex. A, ECF No. 61-1. Section 17.10 of the Plan Document, entitled "Mandatory and Binding Arbitration," sets forth a procedure for resolving disputes, namely, the Arbitration Procedure, and includes three sections that are relevant to deciding this motion.

Section 17.10(b) provides that participants commit to "settl[ing] by binding arbitration" any claims arising out of the Plan, for breaches of the Plan, or for violations of ERISA. Section 17.10(g) provides that:

> If a . . . Claim is brought under ERISA section 502(a) (2) to seek relief under ERISA section 409, the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's Accounts 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 for the benefit of the Claimant's Accounts, or (iii) such other remedial or equitable relief as the arbitrator 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 Employee, Participant or Beneficiary other than the Claimant.*

(emphasis added). The effect of section 17.10(g) is to limit an arbitration to providing a remedy solely with respect to a participant's individual account and to prevent the arbitrator from awarding any relief for the benefit of the Plan that goes beyond a benefit for the individual participant's account.

Section 17.10(h) in turn provides that:

> [Section] 17.10(g) shall . . . be a material and non-several term of the Arbitration Procedure. If an arbitrator(s) or a court of competent jurisdiction finds these requirements to be unenforceable or invalid, then the entire Arbitration Procedure shall be rendered null and void in all respects. Except as to the applicability and enforceability of the requirements of Section[] . . . 17.10(g), the arbitrator(s) shall have exclusive authority to resolve any dispute or issue of arbitrability with respect to the Arbitration Procedure, including as to the jurisdiction of the arbitrator(s)

> or relating to the existence, scope, validity enforceability or performance of the Arbitration Procedure or any of its provisions. Any dispute or issue as to the applicability or validity of the requirements of Section[] . . . 17.10(g) shall be determined solely by [a court.]

The defendants now move to compel arbitration pursuant to section 17.10. In response, the plaintiff argues that section 17.10(g) is void, and that because it is not severable from section 17.10, the entire Arbitration Procedure must fail, and the motion to compel arbitration must be denied. The defendants do not dispute that section 17.10(h) renders section 17.10(g) inseverable from the arbitration requirement in the Plan, and indeed that is the best reading of that provision.

The parties also appear to agree that the Court, not the arbitrator, should decide the issue of the "applicability and enforceability" of section 17.10(g). The Plan Document expressly provides that the applicability and enforceability of section 17.10(g) is beyond the scope of the arbitration. Plan Document section 17.10(h). Thus, the Plan Document requires the Court to decide the enforceability of the clauses.

II.

The defendants argue that a participant in a defined contribution plan does not have the statutory right to seek plan-wide relief and is limited to relief for that participant's individual account. That argument is contrary to the text of ERISA as well as to well-established precedent.

Appendix B

ERISA § 409(a) provides that a fiduciary who breaches fiduciary duties "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." In other words, ERISA provides for restitution of the entire loss (or disgorgement of the entire gain) to the plan. *See also LaRue v. DeWolff, Boberg & Assocs., Inc.,* 552 U.S. 248, 261, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008) (Thomas, J., concurring in the judgment).

ERISA § 502(a)(2) in turn provides that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under [§ 409]." The "appropriate relief under [§ 409]" includes restitution of the entirety of the loss to the plan. Thus, under the plain text of ERISA, a participant has the right to bring a civil action to obtain restitution of the entire loss to the plan.

That interpretation is confirmed by the structure of § 502(a). ERISA § 502(a)(1) authorizes suits by a "participant or beneficiary" for individual relief including to recover benefits due to the participant or beneficiary under the terms of the plan. ERISA § 502(a)(2) by contrast authorizes suits by "the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief" under § 409. And reparation of losses to the plan was a core concern of the draftsmen of § 409. *LaRue,* 552 U.S. at 254; *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985).

The defendants rely on the Supreme Court's decisions in *Russell* and *LaRue* to argue that the plaintiff cannot obtain Plan-wide relief. In particular, they argue that *LaRue* stands for the proposition that an individual participant in a defined contribution plan can seek relief only for that individual's personal losses, to that person's individual account. That is an incorrect reading of *LaRue.*

Russell involved a defined benefit plan, meaning that it had no individual accounts, and paid a fixed benefit. *See LaRue,* 552 U.S. at 255. The plaintiff was temporarily denied benefits under her plan. *Russell,* 473 U.S. at 136. Suing under § 502(a)(2), the plaintiff sought consequential damages that had arisen from the delay in paying her benefits. *LaRue,* 552 U.S. at 250. The Court denied her claim. *Russell,* 473 U.S. at 148. The Court first emphasized that, under § 409(a), "the potential personal liability of the fiduciary is . . . *'to the plan.'*" *Id.* at 140. The Court noted that the "draftsmen [of ERISA] were primarily concerned with the possible misuse of plan assets, and with the remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142. And it concluded that "Congress did not intend that section to authorize any relief except for the plan itself." *Id.* at 144. Because the plaintiff's relief would accrue only to her, without any benefit to the plan, the Court found that she lacked a cause of action under § 502(a)(2). *Id.*

In *LaRue,* the plaintiff, a participant in a defined contribution plan, alleged that certain acts by the plan fiduciary had specifically depleted the plaintiff's own account within the plan. *LaRue,* 552 U.S. at 250-51.

Unlike in *Russell,* the Court found that the plaintiff did have a cause of action under § 502(a)(2):

> [A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.

Id. at 256. *LaRue* reiterated the foundations of *Russell:* the language of § 409(a) emphasizes relief *to the plan,* and the legislative purpose was to prevent "misuse and mismanagement of plan assets by plan administrators." *Id.* at 254 (quoting *Russell,* 473 U.S. at 140, 142). And the Court stressed that it drew no distinction between breaches that "diminishe[d] plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts." *Id.* at 256. Far from constraining relief under § 409(a) in a defined contribution plan, *LaRue* makes clear that relief is available wherever it would advance the protection of the entire plan.[2]

Consistent with this interpretation, courts, including the Court of Appeals for the Second Circuit, have granted

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2. The defendants point to Justice Stevens's statement in *LaRue* that "the 'entire plan' language from *Russell* which appears nowhere in § 409 or § 502(a)(2) does not apply to defined contribution plans." *LaRue,* 552 U.S. at 256. However, that statement was made in the context of a paragraph that made it clear that fiduciaries had liability for losses in an individual account in a defined contribution plan. It did not imply that a participant who suffered losses in an account in a defined contribution plan could not seek plan-wide relief for the breach of fiduciary duties that brought about the loss to the individual account.

plan-wide relief in the context of defined contribution plans such as the one at issue in this case. *See, e.g., Browe v. CTC Corp.,* No. 19-677-cv, 15 F.4th 175, 2021 U.S. App. LEXIS 29417, 2021 WL 4449878, at *14 (2d Cir. Sept. 29, 2021); *Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.,* 919 F.3d 763, 781 (4th Cir. 2019), *as amended* (Mar. 22, 2019); *Perez v. Bruister,* 823 F.3d 250, 258 (5th Cir. 2016).

In short, the defendants' contention that ERISA does not confer a right to a plan-wide remedy for a participant in a defined contribution plan who claims that fiduciaries breached their duties to the plan is without merit.[3]

III.

Despite the ERISA-conferred right to a plan-wide remedy, section 17.10(g) provides that the plaintiff cannot recover losses to the entire Plan. Section 17.10(g) purports to limit the available remedies that ERISA explicitly provides. This provision is invalid and unenforceable because it purports to limit the available remedies that ERISA explicitly provides.

The Supreme Court has stated that prospective waivers of statutory rights are impermissible. *See, e.g.,*

3. The Court of Appeals for the Second Circuit has made it clear that a plan participant in a defined contribution plan who seeks to recover benefits for the plan must proceed in a representative capacity on behalf of the plan. *See Coan v. Kaufman,* 457 F.3d 250, 261 (2d Cir. 2006). The plaintiff has done so here by bringing a purported class action.

Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (expressing a "willingness to invalidate . . . prospective waiver[s] of a party's *right to pursue* statutory remedies"); *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). The comments in *Italian Colors* and *Mitsubishi* were dicta because in neither case was the Court faced with a contractual provision that explicitly prevented the pursuit of a statutory remedy. The Supreme Court has, however, invalidated contractual provisions that purported to waive statutory rights. *See, e.g., Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (19/4) (holding that Title VII rights may not be prospectively waived).[4]

The Court of Appeals for the Seventh Circuit has explicitly held that a plaintiff's right to a plan-wide remedy under ERISA §§ 409(a) and 502(a) (2) cannot be prospectively waived. *See Smith v. Bd. of Dirs. of Triad Manufs., Inc.,* 13 F.4th 613, 621 (7th Cir. 2021). That

4. The plaintiffs also rely on *Cooper v. Ruane Cunniff & Goldfarb Inc.,* 990 F.3d 173 (2d Cir. 2021). In *Cooper,* the Court of Appeals for the Second Circuit pointed out that, under *Coan v. Kaufman,* 457 F.3d 250 (2d Cir. 2006), a claim for recovery for a plan under ERISA §§ 502(a) (2) and 409(a) must be brought in a representative capacity. *Cooper,* 990 F.3d at 184. Because the agreement in that case prevented such collective actions, the agreement made it impossible to pursue remedies provided for by the statute. *Id.* The Court of Appeals found that arbitration should not be required. *Id.* at 185. However, this was an alternative holding, because the Court had already found that the agreement to arbitrate did not cover the dispute at issue. *Id.*

decision is persuasive.[5] Therefore, the provision in section 17.10(g) of the Plan that precludes an individual participant from seeking Plan-wide relief is invalid because it seeks to waive prospectively the statutory remedies in ERISA § 409(a) that a Plan participant is entitled to seek under ERISA § 502(a)(2).

IV.

There is nothing in the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.,* ("FAA") that suggests a different result. In *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018), the Supreme Court explained that courts should attempt to reconcile provisions of the FAA with any apparently conflicting statutes. *Id.* at 1619. *Epic* involved arbitration clauses that included waivers of the right to proceed collectively in certain arbitrations, which the employees argued conflicted with the collective activities protected by the National Labor Relations Act ("NLRA"). *Id.* at 1619-20. The Supreme Court noted that Congress "specifically directed [courts] to respect and

5. In *Dorman v. Charles Schwab Corp.,* 780 F. App'x 510 (9th Cir. 2019), the Court of Appeals for the Ninth Circuit held that a waiver of class arbitration was valid because *LaRue* "recognized that [§ 502(a) (2)] claims are inherently individualized when brought in the context of a defined contribution plan." *Id.* at 514. The Court of Appeals for the Seventh Circuit in *Smith* did not find this language controlling. *Smith,* 13 F.4th at 623. *Smith* is more persuasive than *Dorman.* Simply because a participant in a defined contribution plan may only be able to recover the losses in that participant's individual account does not mean that the participant cannot seek recovery for the total losses to be reimbursed to the plan as a whole, and there is nothing in *LaRue* that would prevent such recovery.

enforce the parties' chosen arbitration procedures." *Id.* at 1621 (citing FAA §§ 3-4). Indeed, FAA § 4 specifically protects the "manner" of arbitration described in an arbitration agreement. Because collective proceedings are a "manner" of arbitration, the waiver of class or collective actions in an arbitration is a provision pertaining to the manner of arbitration, and to fail to enforce that waiver provision would be to disregard the FAA. *Id.* A very compelling reason was needed to disregard a statute. *Id.* at 1624. An irreconcilable conflict with another statute might have provided such a reason, but faced with a potential conflict, the Court had a "duty" to "strive 'to give effect to both" statutes. *Id.* at 1619, 1624 (citing *Morton v. Mancari,* 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). 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.* at 1619.

In this case, there is in fact a clear statutory right for a participant to seek Plan-wide relief under §§ 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.

The FAA does not protect the remedies sought in arbitration. Unlike the clause at issue in *Epic,* section 17.10(g) is not a clause about the "manner" of arbitration, but a clause about the remedies available to a participant in an ERISA plan. There is nothing in the FAA that directs a Court to defer to the remedies provided in an

arbitration agreement. *See Smith,* 13 F.4th at 622-23 ("[T]he conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision . . ."). 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.

FAA § 2 expressly provides that an arbitration agreement is not enforceable "upon such grounds as exist at law or in equity for the revocation of any contract." A general principle of contract law is that a clause is invalid if it is contrary to law. *Van Bergh v. Simons,* 286 F.2d 325, 326 (2d Cir. 1961). In this case, section 17.10(g) cannot be severed from the rest of the arbitration procedure, because the parties so agreed in section 17.10(h). And section 17.10(g) is clearly contrary to law, because it attempts to limit remedies that ERISA expressly provides. As such, a general principle of contract law invalidates the arbitration provision, and the FAA authorizes the Court to refuse to enforce it.

V.

While specific clauses of an arbitration agreement are sometimes excised to allow an arbitration to proceed, the parties in this case specifically provided that if the Court found that the elimination of a Plan-wide remedy was unlawful, then the entire arbitration provision should be stricken. Plan Document section 17.10(h). Neither party contends that the provision is severable. Such an

agreement must be honored. *See, e.g., Smith,* 13 F.4th at 623. Therefore, the arbitration provision must be stricken and the request to compel arbitration must be denied.

Conclusion

The Court has considered all of the arguments of the parties. To the extent not specifically addressed, the arguments are either moot or without merit. The plaintiff has the right under §§ 409(a) and 502(a)(2) to recover for the Plan as a whole. That right is not waivable. Section 17.10(g), which purports to waive that right, is therefore invalid. Under section 17.10(h), section 17.10(g) is inseverable from the Arbitration Procedure. Therefore, voiding section 17.10(g) voids the entire Arbitration Procedure. Accordingly, the motion to compel arbitration is **denied**. The Clerk is directed to close Docket Nos. 59, 67, and 69.

SO ORDERED.

Dated: New York, New York
November 2, 2021

/s/ John G. Koeltl
John G. Koeltl
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, JULY 9, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAMON DEJESUS CEDENO,

Plaintiff-Appellee,

v.

RYAN SASSON, ARGENT TRUST COMPANY, DANIEL BLUMKIN, IAN BEHAR, STRATEGIC FINANCIAL SOLUTIONS, LLC, DUKE ENTERPRISES LLC, TWIST FINANCIAL LLC, BLAISE INVESTMENTS LLC,

Defendants-Appellants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of July, two thousand twenty-four.

Appellant, Argent Trust Company, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix C

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe

APPENDIX D — RELEVANT STATUTORY PROVISIONS

9 U.S.C.A. § 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 [28 USCS §§ 1 et seq.], 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 [USCS 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 [USCS 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.A. § 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 title 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 411 of this Act [29 USCS § 1111].

Appendix D

29 U.S.C.A. § 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 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title 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 title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of section 105(c) or 113(a) [29 USCS § 1025(c) or 1032(a)];

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

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

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection;

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

participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts;

(10) in the case of a multiemployer plan that has been certified by the actuary to be in endangered or critical status under section 305 [29 USCS § 1085], if the plan sponsor—

> **(A)** has not adopted a funding improvement or rehabilitation plan under that section by the deadline established in such section, or
>
> **(B)** fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,
>
> by an employer that has an obligation to contribute with respect to the multiemployer plan or an employee organization that represents active participants in the multiemployer plan, for an order compelling the plan sponsor to adopt a funding improvement or rehabilitation plan or to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section and the funding improvement or rehabilitation plan; or

(11) in the case of a multiemployer plan, by an employee representative, or any employer that has an obligation to contribute to the plan, (A) to enjoin any act or practice which violates subsection (k) of

section 101 [29 USCS § 1021] (or, in the case of an employer, subsection (l) of such section), or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.