No.

In the Supreme Court of the United States

LUXOTTICA U.S. HOLDINGS CORPORATION, ET AL.,
PETITIONERS

v.

JANET DUKE

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

The Federal Arbitration Act (FAA) protects the right to "traditional individualized arbitration." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 509 (2018). In this case, the court of appeals held that agreements for individualized arbitration are unenforceable for claims under Section 502(a)(2) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a)(2). It invalidated the parties' arbitration agreement "on public policy grounds," invoking an atextual, judge-made exception to the FAA, which this Court has never applied to invalidate an arbitration agreement. App., *infra*, 20a (citation omitted).

The question presented is:

Whether the FAA requires courts to enforce agreements for individualized arbitration of claims under ERISA Section 502(a)(2), 29 U.S.C. 1132(a)(2).

PARTIES TO THE PROCEEDING

Petitioners Luxottica U.S. Holdings Corp., Oakley Inc., Luxottica Group ERISA Plans Compliance & Investment Committee, and Luxottica Group Pension Plan were defendants in the district court and appellants in the court of appeals.

Respondent Janet Duke was plaintiff in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to an internal restructuring, the assets and liabilities of Luxottica U.S. Holding Corp. have been assumed by EssilorLuxottica USA, an indirect wholly owned subsidiary of Luxottica Group, S.p.A., and Essilor International S.A.S. Luxottica Group S.p.A. is a wholly owned subsidiary of EssilorLuxottica S.A., a French-Italian corporation, which is publicly traded on the Euronext Paris stock exchange.

Oakley, Inc. is an indirect, wholly owned subsidiary of Luxottica Group, S.p.A. and Essilor International S.A.S. and no U.S. publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

Duke v. *Luxottica U.S. Holdings Corp.*, No. 21-cv-6072 (Nov. 27, 2024)

United States Court of Appeals (2d Cir.):

Duke v. *Luxottica U.S. Holdings Corp.*, No. 24-3207 (Feb. 5, 2026)

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INTRODUCTION

This Court has held time and again that the Federal Arbitration Act (FAA) protects the right to arbitrate using "individualized rather than class or collective action procedures." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 506 (2018). Even when other laws create representative procedures for plaintiffs to seek redress for others' injuries, "the FAA licenses contracting parties to depart from standard rules 'in favor of individualized arbitration procedures of their own design.'" *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 660 (2022) (quoting *Epic Systems*, 584 U.S. at 514). So if another statute "condition[s] the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration," that statute conflicts with the FAA. *Ibid.* This Court has consistently rejected "efforts to conjure [such] conflicts between the [FAA] and other federal statutes." *Epic Systems*, 584 U.S. at 516.

Courts of appeals, on the other hand, exempt the Employee Retirement Income Security Act (ERISA) from the usual FAA rule—even after *Epic Systems* and *Viking River*. For a common category of ERISA claim, and maybe no other claim in all of federal law, "arbitration provisions requiring individual litigation * * * are unenforceable." App., *infra*, 20a.

This conclusion derives from a purported "judge-made exception" to the FAA, which "originated as dictum" in one of this Court's decisions decades ago. *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228, 235 (2013). In *Italian Colors*, Justice Scalia's majority opinion explained that this Court has occasionally

"asserted the existence of an 'effective vindication' exception" to the FAA but has uniformly "declined to apply it to invalidate the arbitration agreement at issue." *Ibid.*

Eight courts of appeals, however, cite *Italian Colors* as support for invalidating ERISA arbitration agreements under the "effective vindication" exception. As one court recently put it: "whether we think judge-made doctrines are generally appropriate or wise is of little importance when the United States Supreme Court repeatedly acknowledges a doctrine's existence." *Williams* v. *Shapiro*, 161 F.4th 1313, 1319 (11th Cir. 2025).

The Court should correct this clear misapplication of its precedents. An "effective vindication" exception "conflicts with 'the plain meaning of the Federal Arbitration Act.'" *Cedeno* v. *Sasson*, 100 F.4th 386, 411 (2d Cir. 2024) (Menashi, J., dissenting) (quoting *Italian Colors*, 570 U.S. at 229 (Thomas, J., concurring)). And no decision of the Court supports using the exception to invalidate agreements for individualized arbitration. On the contrary, the Court has repeatedly held that similar "aggregation devices * * * cannot be imposed on a party to an arbitration agreement." *Viking River*, 596 U.S. at 664 (Barrett, J., concurring in part and in the judgment). Yet despite the FAA's text and this Court's holdings, courts of appeals have wrongly drawn the opposite conclusion for this common category of ERISA claims.

This case is an ideal vehicle to resolve this important issue. The court of appeals denied arbitration based solely on its application of the effective vindication doctrine. And while a few prior petitions

have asked the Court to address this question, they were unsuitable vehicles. The arbitration provisions in those cases went beyond a simple class-action waiver and arguably foreclosed relief necessary to fully redress the plaintiffs' *individual* injuries. No such problem exists here. The sole question is whether, despite the FAA and her agreement for individualized arbitration, ERISA entitles respondent to seek relief for injuries purportedly suffered by other participants in her retirement plan. The answer to that question is no. Because the decision of the court of appeals violates statutory text and conflicts with this Court's precedent, the Court should grant certiorari and reverse.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 167 F.4th 16. The opinion of the district court on reconsideration (App., *infra*, 28a-89a) is available at 2024 WL 4904509. A prior opinion of the district court (App., *infra*, 90a-115a) is available at 2023 WL 6385389.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 116a-118a.

STATEMENT

A. Legal background

1. The FAA generally makes arbitration agreements "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. This statutory provision "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And it establishes a clear "enforcement mandate." *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 650-651 (2022). The "primary purpose" of the FAA, in fact, is "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

One of arbitration's "fundamental attributes" is its "traditionally individualized and informal nature." *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 508 (2018). The FAA would not protect "a right to *arbitrate* in any meaningful sense" unless it protected against laws that would "transform 'traditiona[l] individualized * * * arbitration' into the 'litigation it was meant to displace' through the imposition of procedures at odds with arbitration's informal nature." *Viking River*, 596 U.S. at 651 (citation omitted). And any statute that would hold a contract "unenforceable *just because it requires bilateral arbitration*" conflicts with the FAA because it "impermissibly disfavors arbitration." *Epic Systems*, 584 U.S. at 509-510.

2. ERISA is "a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004). ERISA plans

provide benefits to employees, former employees, and their designees (like family members), known as the plan's "participants" and "beneficiaries." 29 U.S.C. 1002(7) and (8).

The statute imposes numerous substantive requirements on such plans and on those who administer the plan as its fiduciaries. For example, fiduciaries must act prudently and solely in the interest of participants and beneficiaries. 29 U.S.C. 1104(a)(1). Under ERISA Section 409(a), fiduciaries who breach their statutory duties "shall be personally liable to make good to [the] plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." 29 U.S.C. 1109(a).

Beyond its substantive provisions, ERISA has a set of "carefully integrated civil enforcement provisions." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252 (1993) (citation omitted). A participant or beneficiary can sue under ERISA Section 502(a)(1)(B) to "recover benefits due to him under the terms of his plan." 29 U.S.C. 1132(a)(1)(B). A participant, beneficiary, or fiduciary can sue under ERISA Section 502(a)(3) "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). And the same set of actors, plus the Secretary of Labor, can sue under Section 502(a)(2) "for appropriate relief under [29 U.S.C.] 1109." 29 U.S.C. 1132(a)(2).

B. Facts and procedural history

1. The Luxottica Group Pension Plan provides employee retirement benefits as a defined benefit plan. App., *infra*, 3a. 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." *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). The plan here offers participants a choice about how to receive their benefits. They can choose a "single life annuity," which is a monthly benefit for the life of the participant. App., *infra*, 3a. Or they can choose a lump sum or certain other benefit forms, including a joint and survivor annuity. A "joint and survivor annuity" provides the participant a fixed monthly benefit for life plus a monthly fraction of that benefit to any surviving beneficiary for the life of the beneficiary. *Ibid.* For married participants who elect a specific form of "qualified joint and survivor annuity," the benefit must be the "actuarial equivalent" of the participant's "accrued benefit." 29 U.S.C. 1055(a)(1), (d)(1)(B). Calculating actuarially equivalent benefits can require actuarial assumptions, such as assumptions about plan participants' life expectancy. App., *infra*, 3a-4a.

Respondent filed this putative class action lawsuit to challenge the actuarial assumptions that the Plan used until April 2021 to determine actuarially equivalent qualified joint and survivor annuity benefits. App., *infra*, 4a-5a. She alleged that those actuarial assumptions violate four of ERISA's substantive requirements. *Id.* at 5a (citing 29 U.S.C. 1053, 1054, 1055, 1104(a)(1)). She invoked two of ERISA's causes

of action, Section 502(a)(2) and (3), 29 U.S.C. 1132(a)(2) and (3), to pursue relief for all four alleged violations.

2. Respondent signed a Dispute Resolution Agreement during her employment. App., *infra*, 5a. It broadly requires arbitrating employment-related disputes, including "claims arising under the * * * Employee Retirement Income Security Act." *Id.* at 6a (citing C.A. App. 144-145). The Agreement also includes a "Class Action Waiver" that permits only individualized arbitration:

> **The Agreement affects your ability to participate in class, collective or private attorney general representative action.** Both the Company and you agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective or private attorney general representative basis on behalf of others. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or private attorney general representative action or as a member in any such class, collective or representative proceeding ("Class Action Waiver").

C.A. App. 145-146. If a court holds the Class Action Waiver unenforceable, the Agreement provides that "the class, collective, or representative action, to that extent, must be litigated in a civil court of competent jurisdiction." *Id.* at 146. But "the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration." *Ibid.*

3. Petitioners moved to compel individual arbitration and enforce the Class Action Waiver. App., *infra*, 6a. They also challenged respondent's Article III standing to assert her Section 502(a)(2) claims. *Ibid.*

The district court originally granted petitioners' motion in substantial part. App., *infra*, 90a-114a. The court agreed with petitioners that respondent lacked Article III standing to assert her Section 502(a)(2) claims, *id.* at 99a-104a, and further agreed that respondent was obliged to arbitrate her Section 502(a)(3) claims, *id.* at 105a-114a. But after the case was reassigned to a different district judge, respondent moved for reconsideration.

The district court then granted the motion for reconsideration in substantial part. App., *infra*, 28a-89a. In particular, the court held that respondent sufficiently pleaded Article III standing for her Section 502(a)(2) claims. *Id.* at 41a-65a. Having held that dismissing those claims was improper, the court then considered whether they should be compelled to arbitration with the Section 502(a)(3) claims. *Id.* at 65a-67a. It ruled that the parties' Agreement is unenforceable insofar as it would require individualized arbitration of the Section 502(a)(2) claims. *Id.* at 69a-82a. But the court declined to reconsider the order compelling respondents' Section 502(a)(3) claims to individualized arbitration. *Id.* at 67a-68a. Finally, the court declined to stay litigation of the Section 502(a)(2) claims, even though it recognized that respondent sought the same remedies under both Section 502(a)(2) and Section 502(a)(3). *Id.* at 87a. The court found that a stay would prejudice "[respondent] and other Plan joint and survivor annuity recipients who

stand to benefit from Plan-wide remedies that may be unavailable under arbitration of [her] Section 502(a)(3) claims on an individual basis." *Ibid.*

4. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-27a. It reversed the district court's finding of standing to pursue monetary recovery for the Plan. *Id.* at 17a-19a (citing *Thole* v. *U.S. Bank N.A.*, 590 U.S. 538, 543 (2020)). The court held, however, that respondent otherwise had standing to seek to have the plan terms reformed to provide increased benefits under Section 502(a)(2). It determined that petitioners' contrary arguments targeted the merits of her claims, not her standing to pursue them. *Id.* at 14a-15a.

The court affirmed denial of the motion to compel individualized arbitration of the Section 502(a)(2) claims. App., *infra*, 19a-23a. It reasoned that under Second Circuit precedent, "arbitration provisions requiring individual litigation of Section 502(a)(2) claims are unenforceable because they prospectively waive a plaintiff's right under that provision to bring a representative action to secure remedies on behalf of an ERISA plan." *Id.* at 20a (citing *Cedeno* v. *Sasson*, 100 F.4th 386, 400 (2d Cir. 2024)).

REASONS FOR GRANTING THE PETITION

Eight circuits have invoked a judge-made "effective vindication" exception to the FAA—which this Court has never used to invalidate an arbitration agreement—to invalidate agreements to arbitrate ERISA claims on an individual basis. Here, the Second Circuit categorically foreclosed individualized

arbitration of claims under ERISA Section 502(a)(2), 29 U.S.C. 1132(a)(2). This Court has "warned that '[judges] must be alert to new devices and formulas' by which litigants seek to revive the old 'judicial antagonism toward arbitration.'" *Cedeno* v. *Sasson*, 100 F.4th 386, 409 (2d Cir. 2024) (Menashi, J., dissenting) (quoting *Epic Systems*, 584 U.S. at 509). A "manufactured conflict" between ERISA and agreements for individualized arbitration "is just such a device." *Ibid.*

Refusing to enforce such agreements for Section 502(a)(2) claims conflicts with both the text of the FAA and this Court's precedents. Yet such refusals are standard practice now. Courts have turned this Court's discussion in *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 235 (2013) on its head to justify a rule that conflicts with numerous Supreme Court holdings. Given such widespread confusion about this Court's precedent, only this Court can correct the problem. The Court should do so here.

True, this Court has rejected several petitions on this subject. But they had obvious vehicle problems that do not exist here. Most notably, the arbitration provisions in those cases had particular language that arguably limited plaintiffs' ability to obtain full relief even for their own individual injuries. And prior briefs in opposition highlighted that language and assured the Court that the courts of appeals did not categorically prohibit individualized arbitration of Section 502(a)(2) claims. That was a fair characterization of some early rulings, but not the latest ones. Now, "arbitration provisions requiring individual

litigation of Section 502(a)(2) claims are unenforceable," and a participant "may not be compelled to individually arbitrate her Section 502(a)(2) claim on behalf of the Plan." App., *infra*, 20a. Full stop. The only question, then, is whether ERISA—unlike every other statute this Court has encountered—entitles a plaintiff to seek relief for others' asserted injuries despite the FAA. ERISA does nothing of the sort, and the contrary holding of the court of appeals warrants review and reversal.

A. The decision of the court of appeals is incorrect.

The Second Circuit held that "courts may, under the 'effective vindication exception' to Section 2, 'invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies.'" App., *infra*, 201a (quoting *Italian Colors*, 570 U.S. at 235). And "arbitration provisions requiring individual litigation of Section 502(a)(2) claims are unenforceable because they prospectively waive a plaintiff's right under that provision to bring a representative action to secure remedies on behalf of an ERISA plan." *Ibid.* (citing *Cedeno*, 100 F.4th at 400). This conclusion conflicts with this Court's precedent in multiple ways.

1. As an initial matter, it was error to embrace an "'effective vindication exception' to Section 2." App., *infra*, 20a. This purported exception to the FAA "originated as dictum" in a footnote forty years ago, when the Court "expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] * * * as a prospective waiver of a party's right to pursue statutory remedies.'" *Italian Colors*,

570 U.S. at 235 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). Since that footnote, some of this Court's decisions have "asserted the existence of an 'effective vindication' exception"; but in every such decision, the Court has "declined to apply it to invalidate the arbitration agreement at issue." *Ibid.*

Given this Court's unbroken refusal to invalidate arbitration agreements based on this principle, lower courts should be reluctant to take such a step. And they should be doubly reluctant given the statute's text. That text, especially 9 U.S.C. 2, requires courts to "'rigorously enforce' arbitration agreements according to their terms." *Italian Colors*, 570 U.S. at 233 (citation omitted). The "effective vindication" exception purports to be "a judge-made exception" to this enforcement mandate. *Id.* at 235. But with the FAA, as with other statutes, courts "may not engraft [their] own exceptions onto the statutory text." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 70 (2019). And even beyond the FAA, the firmly settled general rule is that courts should not "add unwritten limits onto [statutes'] rigorous textual requirements." *Ross* v. *Blake*, 578 U.S. 632, 639 (2016).

Unsurprisingly, several jurists (including a Member of this Court) have recognized that an effective-vindication exception would conflict with the plain meaning of 9 U.S.C. 2. See, *e.g.*, *Italian Colors*, 570 U.S. at 239 (Thomas, J., concurring) (reasoning that effective-vindication arguments do not implicate whether the agreement was properly made and therefore do not implicate "grounds * * * for the revocation of any contract" under 9 U.S.C. 2); *Cedeno*, 100 F.4th

at 411 (Menashi, J., dissenting) (expressing agreement with Justice Thomas's reasoning on this point); *Parker* v. *Tenneco, Inc.*, 114 F.4th 786, 802 (6th Cir. 2024) (McKeague, J., concurring) (same).

2. But even if an effective vindication exception were defensible in principle, it would still be wrong to apply that exception here. *Italian Colors* squarely rejected the theory that an "individual suit" is inadequate to ensure "'effective vindication' of a federal right." 570 U.S. at 236-237. On the contrary, the FAA "pretty absolutely" protects contracting parties' decision "to use individualized rather than class or collective action procedures." *Epic Systems*, 584 U.S. at 506 (citing *Italian Colors*, as well as *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), and *DirecTV, Inc.* v. *Imburgia*, 577 U.S. 47 (2015)).

Most recently, the Court applied these principles to hold that "state law cannot condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate." *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 660 (2022). Even when state law gives litigating parties a right to assert additional claims for relief beyond themselves, "the FAA licenses contracting parties to depart from standard rules 'in favor of individualized arbitration procedures of their own design.'" *Ibid.* (quoting *Epic Systems*, 584 U.S. at 514). No Member of the *Viking River* Court disputed that principle. See *id.* at 664 (Barrett, J., concurring in part and concurring in the judgment) (joining this part of

the Court's opinion and agreeing that such "aggregation devices * * * cannot be imposed on a party to an arbitration agreement"); cf. *id.* at 665 (Thomas, J., dissenting) (dissenting on the unrelated ground that the FAA does not apply to state court proceedings).

Viking River controls this case. There, California's Private Attorneys General Act (PAGA) entitled an aggrieved employee to assert the State's own claims for civil penalties for violations of state employment laws. 596 U.S. at 643-644. And it further entitled the employee to pursue recovery of penalties based on violations involving *other* employees, beyond the litigating employee herself. *Id.* at 646-647. This Court acknowledged that the FAA did not protect wholesale waivers of the right to assert PAGA claims. *Id.* at 662. After all, "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies" because an arbitration agreement does not "alter or abridge substantive rights" but "merely changes how those rights will be processed." *Id.* at 653. But the FAA *did* prohibit California's rule that PAGA litigants be able to seek recovery beyond the statutory violations that they themselves suffered. *Id.* at 659-662.

That rule violated the FAA because it "defeat[ed] the ability of parties to control which claims are subject to arbitration." *Viking River*, 596 U.S. at 660. To agree to arbitrate "*one* of an employee's PAGA claims," California's rule required contracting parties "to also 'agree' to arbitrate *all other* PAGA claims in the same arbitral proceeding." *Id.* at 661. By empowering "plaintiffs to unite a massive number of claims in a single-package suit," the California rule effectively

"coerce[d] parties into withholding PAGA claims from arbitration"—a result that was "incompatible with the FAA." *Id.* at 661-662.

3. The court of appeals construed ERISA to produce the very outcome that *Viking River* rejected for PAGA. It reasoned that ERISA plaintiffs have a "right under [Section 502(a)(2)] to bring a representative action to secure remedies on behalf of [the] ERISA plan." App., *infra*, 20a. And respondent here seeks to do that: she alleges that ERISA violations "harm[] the Plan * * * as well as participants." *Id.* at 22a. In individualized arbitration, of course, respondent "will not be able to remedy the Plan's harm on her own, as only a representative action can resolve the allegedly detrimental effects of widespread violations of federal law." *Ibid.* Individualized arbitration instead allows respondent to remedy only the alleged ERISA violations that affect her personally. The Second Circuit concluded, however, that ERISA entitles respondent to assert Section 502(a)(2) claims to fully remedy the alleged injuries of the Plan and its participants and beneficiaries, the FAA notwithstanding. In its view, respondent merely "seeks relief for an 'absent principal,'" namely the Plan itself. *Id.* at 23a (quoting *Cedeno*, 100 F.4th at 402). This reasoning has at least three problems.

First, as *Viking River* makes plain, the FAA does not yield to laws that entitle individual litigants to assert claims of an absent principal that sweep beyond the individual's injury. PAGA does just that, and it clearly "involve[s] litigation or arbitration on behalf of an absent principal." *Viking River*, 596 U.S. at 656. But that state-law entitlement to seek full relief for

the State still violates the FAA. It does so by raising the stakes of arbitration so that parties are effectively coerced into simply withholding PAGA claims from arbitration altogether. *Id.* at 661-662.

So too here. Under the Second Circuit's rule, ERISA gives respondent a right not only to seek relief to redress her asserted injuries, but also to seek "*plan-wide* relief that would either benefit other participants or bind the Plan's administrator and trustee as to other participants." *Cedeno*, 100 F.4th at 407 (emphasis added). In other words, for petitioners to arbitrate respondent's Section 502(a)(2) claims, they must "also 'agree' to arbitrate *all other* [Section 502(a)(2)] claims in the same arbitral proceeding." *Viking River*, 596 U.S. at 661. That coercion is just as inconsistent with the FAA as California's PAGA rule in *Viking River*.

The second problem with the Second Circuit's view is that the conflict with the FAA is even clearer here than in *Viking River*. In the Second Circuit, it is settled that "seeking relief under Section 502(a)(2)" requires non-individualized *procedures*. *Cedeno*, 100 F.4th at 403. An individual plaintiff must "take adequate steps under the circumstances properly to act in a 'representative capacity on behalf of the plan.'" *Ibid.* (quoting *Coan* v. *Kaufman*, 457 F.3d 250, 261 (2d Cir. 2006)). What that means is that "participants must employ procedures to protect effectively the interests they purport to represent." *Coan*, 457 F.3d at 259. Class certification under Rule 23 is the paradigmatic example of this sort of procedural safeguard. *Id.* at 261; see also *Cedeno*, 100 F.4th at 403-404. And, not surprisingly, respondent's complaint seeks Rule 23

certification to proceed on behalf of Plan participants and beneficiaries. C.A. App. 39. This essential connection between representative Section 502(a)(2) *claims* and representative *procedures* like class certification makes this case much easier than *Viking River*. "PAGA suits exhibit virtually none of the procedural characteristics of class actions," including Rule 23's safeguards, because such suits truly are for a "single principal." 596 U.S. at 655. ERISA Section 502(a)(2) suits, in contrast, necessarily include those procedural characteristics. So this case can be resolved by a "straightforward application of [the Court's] precedents invalidating prohibitions on class-action waivers." *Id.* at 654.

The third problem with the Second Circuit's view, in all events, is that ERISA does not actually deputize participants to assert claims of the plan. This Court drew that very conclusion in *Thole* v. *U.S. Bank N.A.*, 590 U.S. 538 (2020). In rejecting those plaintiffs' Article III standing to assert Section 502(a)(2) claims (among others), this Court recognized that "the plan's claims ha[d] not been legally or contractually assigned" to the plaintiffs. *Id.* at 543. Nor had the plaintiffs "been legally or contractually appointed to represent the plan." *Id.* at 544. The argument that ERISA "legally assigned pension-plan participants and beneficiaries the right to represent their plan" was advanced by the *Thole* dissent. *Id.* at 567 (Sotomayor, J., dissenting). But the Court did not agree. It rejected attempts to analogize ERISA cases under Section 502(a)(2) to "cases involving guardians, receivers, and executors." *Id.* at 544 (majority opinion).

Yet the Second Circuit uses those same analogies—to "wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons"—to invalidate agreements for individualized arbitration of Section 502(a)(2) claims. *Cedeno*, 100 F.4th at 402 (citation omitted). That reasoning conflicts with this Court's understanding of ERISA. See *id.* at 413 (Menashi, J., dissenting) ("ERISA does not authorize, much less require, an action in a representative capacity on behalf of the plan.").

The Court has already clarified the relationship between individual and plan injuries. To be sure, the text of ERISA Section 409(a), 29 U.S.C. 1109(a)—which Section 502(a)(2) enforces—shows that Section 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries." *LaRue* v. *DeWolff, Boberg & Assocs.*, 552 U.S. 248, 256 (2008). But Section 502(a)(2) "does authorize recovery for fiduciary breaches that impair the value of plan assets" *and* injure the plaintiff individually. *Ibid.* Under *LaRue*, then, there is no question that ERISA already permits participants to vindicate their own substantive rights and obtain redress for their ERISA violations that injure them individually, as long as the plan is injured and obtains redress as well. But nothing in the statute implies that for individual participants to assert claims for ERISA violations that injure both them and the plan, they must more broadly seek, in the same proceeding, to remedy ERISA violations beyond those that injure them personally.

4. ERISA thus does not set up "single absent principal" representative litigation as the Second Circuit believed. But if it did, ERISA would then be no

different than PAGA. A rule requiring or entitling ERISA plaintiffs to pursue plan-wide recoveries would still be "incompatible with the FAA." *Viking River*, 596 U.S. at 662. And the question would simply be which statute controls.

That is an easy question. No one seriously contends that ERISA overrides the FAA. Under this Court's precedent, a federal statute needs to include "a clear and manifest congressional command to displace the Arbitration Act." *Epic Systems*, 584 U.S. at 511. And far from giving such a command, ERISA's unambiguous terms say the opposite: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. 1144(d).

Correctly interpreted, there is no conflict between ERISA and the FAA. But if there were such a conflict, the FAA would prevail.

B. The question presented warrants the Court's review.

1. Although the Court's prior decisions should make this a "straightforward case," *Cedeno*, 100 F.4th at 409 (Menashi, J., dissenting), the courts of appeals do not see it that way. All eight circuits to consider the issue have held that the "effective vindication" exception imposes substantially limits agreements to individually arbitrate ERISA Section 502(a)(2) claims. See, *e.g.*, App., *infra*, 20a; *Cedeno*, 100 F.4th at 407; *Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan* v. *Wilmington Tr. NA*, 72 F.4th 499, 507 (3d Cir. 2023); *Parrott* v. *Int'l Bancshares Corp.*, 167 F.4th 728, 740 (5th Cir. 2026); *Parker*, 114 F.4th at 801; *Fleming* v. *Kellogg Co.*, No. 23-1966, 2024 WL

4534677, at *8 (6th Cir. Oct. 21, 2024); *Smith* v. *Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 623 (7th Cir. 2021); *Platt* v. *Sodexo, S.A.*, 148 F.4th 709, 721-722 (9th Cir. 2025); *Harrison* v. *Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1101 (10th Cir. 2023); *Williams* v. *Shapiro*, 161 F.4th 1313, 1323 (11th Cir. 2025).

As this large volume of appellate decisions suggests, the enforceability of agreements to arbitrate this type of ERISA claim is a frequently recurring issue of substantial importance. ERISA governs over 800,000 private pension plans, which collectively implicate over 155 million plan participants and $12 trillion in plan assets. Employee Benefits Sec. Admin., U.S. Dep't of Labor, *Private Pension Plan Bulletin: Abstract of 2023 Form 5500 Annual Reports* 1-2 (Jan. 2026), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2023.pdf. ERISA pension plans thus constitute an enormous part of the national economy.

And with so much money involved, ERISA plans naturally generate much litigation. The number of ERISA class-action filings has exploded in recent years to record levels. See, *e.g.*, Chubb, *ERISA Class Action Trends in 2025* (Feb. 2026), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability/pdfs/0226_chubb2025fiduciaryinfographic_ada.pdf; Encore Fiduciary, Fid Guru Blog, *ERISA Fiduciary Litigation in 2025: Plaintiff Law Firms Continue the Frenetic Pace, with Broader Allegations Against Both Retirement Plans and Health Plans* (Feb. 9, 2026),

https://encorefiduciary.com/erisa-fiduciary-litigation-in-2025-plaintiff-law-firms-continuefrenetic-pace/.

Section 502(a)(2) claims are a ubiquitous component of ERISA class-action litigation. This provision is one of the statute's central enforcement mechanisms. And it is the one that enables plan participants to recover legal relief, like money damages, for breaches of fiduciaries' statutory duties. See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 252-253 (1993). Otherwise, Section 502(a)(1)(B) limits participants to enforcing the "terms of [their] plan," 29 U.S.C. 1132(a)(1)(B), and Section 502(a)(3) limits participants to enforcing the statute's substantive provisions via "equitable relief," 29 U.S.C. 1132(a)(3); see *Mertens*, 508 U.S. at 255-259. So the question whether Section 502(a)(2) claims are individually arbitrable has enormous practical importance. This Court should answer it.

2. The Court's usual practice, of course, is to await a conflict between circuits before deciding an important federal issue. Here, however, the Court should make an exception to its usual practice.

To start, the courts of appeals decisions turn on a misunderstanding of this Court's precedent—especially *Italian Colors*. As noted, the refusal to compel individual arbitration of Section 502(a)(2) claims rests on this Court's past statements about the theoretical availability of an "effective vindication" exception to the FAA. Courts of appeals, however, apparently understand *Italian Colors* to have "acknowledged" that effective vindication is a legitimate "exception to the FAA's general policy in favor of arbitration." *Parrott*, 167 F.4th at 738; see also, *e.g.*, *Platt*, 148 F.4th at 721.

In this case, too, the Second Circuit read *Italian Colors* broadly to authorize courts to use the effective vindication exception to "invalidate" arbitration agreements "on public policy grounds." App., *infra*, 20a (quoting *Italian Colors*, 570 U.S. at 235).

That is not a plausible reading of Justice Scalia's opinion for the Court in *Italian Colors*. Nowhere does the opinion give a green light to invalidating arbitration agreements on atextual public policy grounds. Instead, it stresses that the Court has *always* declined to apply the exception to invalidate the arbitration agreement at issue and would "do so again" in *Italian Colors* itself. 570 U.S. at 236. The opinion was "disparaging" of the exception. *Id.* at 246 (Kagan, J., dissenting). So, "[a]lthough the Court in *Italian Colors* did not expressly reject th[e] 'effective vindication' principle, the Court's refusal to apply the principle in that case suggests that the principle will no longer apply in any case." *DirecTV*, 577 U.S. at 68 n.3 (Ginsburg, J., dissenting).

The courts of appeals have somehow taken the opposite message from *Italian Colors*. As one panel expressed the point: "whether we think judge-made doctrines are generally appropriate or wise is of little importance when the United States Supreme Court repeatedly acknowledges a doctrine's existence." *Williams*, 161 F.4th at 1319; see also *Parker*, 114 F.4th at 802 (McKeague, J., concurring) (suggesting that courts of appeals must apply the effective vindication doctrine because they "generally must follow" this Court's "dicta"). When lower courts declare themselves bound by an atextual exception to statutory text—based entirely on this Court's comments in

refusing to apply such an exception—only this Court can solve the problem.

The Court, moreover, has not treated a split in appellate authority as a necessary condition for certiorari in FAA cases. In *Viking River*, for example, the Ninth Circuit and California Supreme Court had both upheld the California law. See *Sakkab* v. *Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015). And in other cases, too, the Court has reviewed state courts' misunderstandings of the FAA even without a traditional split among appellate courts. See, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 251 (2017); *Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 17 (2012) (per curiam); *Concepcion*, 563 U.S. 333. And in those cases, the issues that prompted certiorari arose in the context of a *single state's* law. The question here, on the other hand, implicates the arbitrability of an important category of federal claims nationwide. The importance of this issue and failure of the courts of appeals to follow this Court's precedents amply justify certiorari.

Nor, in any event, will there be much opportunity for a traditional split to develop. Eight circuits have already staked out their position. The Federal Circuit does not hear ERISA appeals. See 28 U.S.C. 1291, 1292(c) & (d), 1295. State courts cannot weigh in either because federal courts have exclusive jurisdiction over Section 502(a)(2) claims. See 29 U.S.C. 1132(e)(1). That leaves only the First, Fourth, Eighth, and D.C. Circuits as *possible* sources of a circuit split. Petitioners are aware of no pending appeals on this issue in those courts. And to add to the challenges, appellate jurisdiction to even consider this question is

restricted. When a district court compels arbitration, it generally must stay the litigation in a non-appealable interlocutory order. See *Smith* v. *Spizzirri*, 601 U.S. 472, 478 (2024). So for a circuit split to emerge, a district court in one of the four circuits without circuit precedent would have to *deny* a motion to compel arbitration, and an appellate panel would then have to *reject* the unanimous perspective of eight sister circuits. That could happen; but the odds are not good, and it would take a long time.

In the meanwhile, countless individual arbitration agreements that should be enforced under the FAA and this Court's precedent will be invalidated because of erroneous circuit precedent. The Court should step in without delay and should end this disregard for a federal statutory right.

C. This case is an ideal vehicle.

1. Petitioners acknowledge that this Court denied certiorari in *Parker*, *Cedeno*, *Henry*, and *Harrison*. See *Tenneco, Inc.* v. *Parker*, 145 S. Ct. 1060 (2025); *Argent Tr. Co.* v. *Cedeno*, 145 S. Ct. 447 (2024); *Wilmington Tr., N.A.* v. *Henry*, 144 S. Ct. 328 (2023); *Argent Tr. Co.* v. *Harrison*, 144 S. Ct. 280 (2023). But those petitions had glaring vehicle problems that are not present here.

The arbitration provision in all four of those cases had a unique restriction on the arbitrator's authority to award certain remedies. In arbitration, a claimant could not receive "'any remedy which has the purpose or effect of providing additional benefits or monetary or other relief' to anyone other than the claimant." *Henry*, 72 F.4th at 503; accord *Parker*, 114 F.4th at 790; *Cedeno*, 100 F.4th at 392; *Harrison*, 59 F.4th at

1105. This language was problematic because certain equitable relief that an arbitrator may want to award to redress a participant's *individual* injuries would arguably have the "effect of providing * * * relief" to other participants besides that claimant. Multiple courts noted, for example, that this provision might bar an arbitrator from issuing an order removing a plan fiduciary who has breached his or her statutory duties—even though ERISA Section 409, 29 U.S.C. 1109, identifies that as a potential remedy. "Because removal of a fiduciary—a statutory remedy guaranteed by § 409—would provide relief to other participants in addition to the individual claimant, the plain text of § 409 and the arbitration provision conflicted." *Parker*, 114 F.4th at 799; see also, *e.g.*, *Harrison*, 59 F.4th at 1106-1107; *Henry*, 72 F.4th at 507.

The briefs in opposition in *Harrison* and *Henry* identified this contract language as their leading reason to deny certiorari. In *Harrison*, for example, the respondent contended that the Tenth Circuit's holding was not that the agreement improperly required individualized arbitration, but that it "eliminated 'the statutory remedies' plaintiff sought," like "removal of a breaching fiduciary." Br. in Opp. at 12, *Harrison*, *supra* (No. 23-30). The respondent argued that the Tenth Circuit actually *agreed* that "ERISA claims are arbitrable on an individual basis," but "[t]he problem" in that case "was entirely based on the specific, non-severable arbitration clause that petitioners chose to write." *Id.* at 13. The respondent in *Henry* made similar arguments: "No circuit has held that ERISA claims cannot be arbitrated on an individual basis." Br. in Opp. at 8, *Henry*, *supra* (No. 23-122). "The problem, rather, is that the (non-severable) arbitration

clause eliminated 'the statutory remedies' plaintiff sought in his complaint," including "removal of a breaching fiduciary." *Ibid.*

In fairness, several early decisions did suggest an openness to individualized arbitration of ERISA claims if the arbitration provision avoided the language quoted above. See, *e.g.*, *Smith*, 13 F.4th at 622 (rejecting suggestion that "individualized arbitration [is] inherently incompatible with ERISA"); *Dorman* v. *Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019) (reversing and remanding with instructions "to order arbitration of individual claims" under Section 502(a)(2)). But more recent decisions have shut the door to individualized arbitration of ERISA claims. Again, the court of appeals in this case was categorical: "arbitration provisions requiring individual litigation of Section 502(a)(2) claims are unenforceable." App., *infra*, 20a.

2. This case lacks the contract language that prior briefs in opposition identified as reason to deny review. The provision here is a standard "Class Action Waiver" that merely requires that any dispute in arbitration be brought "on an individual basis" and bars arbitration of "a class, collective or private attorney general representative action." App., *infra*, 33a-34a (citation and emphasis omitted. It also includes severability language requiring that the Class Action Waiver be enforced in arbitration to the extent it lawfully can be. *Id.* at 34a; cf. *Viking River*, 596 U.S. at 639 (discussing similar severability clause).

Nothing in the agreement prevents respondent from obtaining remedies in arbitration needed to redress her alleged individual injuries. In fact, as the

district court noted, respondent seeks the same remedies through her Section 1132(a)(3) claims, which were compelled to arbitration. App., *infra*, 87a. And her complaint does not even request fiduciary removal—the issue that drove several of the other decisions mentioned above. See C.A. App. 50-53. The relief she seeks is an order requiring the plan to recalculate (increase) her benefits and the benefits of some, but not all, other plan participants. This case thus turns not on the availability of remedies for respondent's individual injuries, but on whether she has a right to "seek[] relief 'on behalf of others,' including the Plan itself and other [participants]" affected by the same challenged conduct. *Ibid.* In other words, this case turns on whether ERISA precludes individual arbitration of Section 502(a)(2) claims.

Indeed, the Second Circuit gave no other reason to deny petitioners' motion to compel arbitration. It refused to "reach" respondent's argument that "the Agreement does not cover her ERISA claims." App., *infra*, 19a-20a. It even found that it lacked "appellate jurisdiction" to revisit the district court's holding that respondent's "Section 502(a)(3) claim falls within the Agreement's arbitration provision." *Id.* at 23a.

The Second Circuit's arbitration ruling thus rests exclusively on its view that "arbitration provisions requiring individual litigation of Section 502(a)(2) claims are unenforceable." App., *infra*, 20a. This petition cleanly tees up that question and that question only. The Court should answer it, and this is an ideal vehicle to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-3207

JANET DUKE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF-APPELLEE

v.

LUXOTTICA U.S. HOLDINGS CORP., OAKLEY INC., LUXOTTICA GROUP ERISA PLANS COMPLIANCE AND INVESTMENT COMMITTEE, LUXOTTICA GROUP PENSION PLAN,
DEFENDANTS-APPELLANTS

August Term 2025
Argued: January 13, 2026
Decided: February 5, 2026

Appeal from the United States District Court
for the Eastern District of New York
No. 1:21-cv-00256, Choudhury, *Judge.*

OPINION

Before: ROBINSON, NATHAN, and KAHN, *Circuit Judges.*

NATHAN, *Circuit Judge*:

When Janet Duke retired, she elected to receive retirement benefits for herself and any surviving spouse. Federal law, pursuant to the Employee Retirement Income Security Act (ERISA), requires those benefits to be equivalent to what Duke would receive if she were unmarried. She also signed a dispute resolution agreement with her former employer subjecting various disputes between them to individual arbitration. Duke now seeks to represent herself and a class of similarly situated retirees, arguing that her pension plan calculated her benefits using unreasonably outdated actuarial assumptions, decreasing her monthly payments relative to what she would have received if she were unmarried at the time of her retirement in violation of ERISA. She also seeks, on behalf of her pension plan, reformation of the plan and repayment from its fiduciaries. Below, the district court held Duke has standing to assert these claims, compelled arbitration of Duke's individual claims, and concluded that the "effective vindication" doctrine precludes individual arbitration of her claims on behalf of the pension plan. The district court also denied Defendants' motion for a mandatory stay of litigation while Duke's individual claims proceed in arbitration. We hold that Duke has standing to seek reformation of the pension plan but not monetary payments to it, that her representative claim is not subject to individual arbitration, and that the district court properly exercised its discretion to deny Defendants' motion for a stay.

BACKGROUND

A. Factual Background

Janet Duke worked as a regional manager for Luxottica U.S. Holdings Corp. (Luxottica) for nearly 21 years.[1] That job entitled her to a pension upon retirement, to be paid out of the Luxottica Group Pension Plan (the Plan), managed by the Luxottica Group ERISA Plans Compliance and Investment Committee (the Committee). Because the Plan pays a fixed retirement benefit to participants regardless of the market value of the Plan's assets, it is a "defined benefit plan." *See* 29 U.S.C. § 1002(34)–(35); *see also Hirt v. Equitable Ret. Plan for Emps., Managers, & Agents*, 533 F.3d 102, 104–05 (2d Cir. 2008).

When Duke retired, she had the choice of two types of pension benefits. The first, a single life annuity (SLA), would entitle her—and only her—to a fixed monthly benefit for the rest of her life. The alternative, a joint and survivor annuity (JSA), would entitle her to a fixed monthly benefit for the rest of her life, plus a monthly fraction (i.e., 50% to 100%) of that benefit paid to any surviving spouse for the rest of the spouse's life. The JSA option is the default form of pension benefit for married retirees, and ERISA requires it be the "actuarial equivalent" of a hypothetical SLA that the employee would receive instead. *See* 29 U.S.C. § 1055(d)(1)(B). To comply with ERISA's JSA actuarial equivalence requirement, the Committee employs "actuarial assumptions" to convert the SLA benefit into a JSA benefit. Those assumptions

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[1] The facts are drawn from Duke's complaint and presumed true for purposes of resolving this interlocutory appeal.

include an interest rate—to measure the changing value of monetary benefits over time—and the anticipated longevity of a plan participant and her spouse.

On November 1, 2016, Duke elected to receive a JSA that would pay 100% of her monthly benefit to any surviving spouse. At the time, the Committee (as fiduciary of the Plan) converted SLAs into JSAs using a 7% annual interest rate and life expectancy values published in 1971. On April 1, 2021, the Committee updated the longevity assumptions it used to perform SLA-JSA conversions.[2] But for JSA participants like Duke whose benefits were calculated before April 1, 2021, the Committee continues to pay benefits based on the SLA-JSA conversion that assumed life expectancy values published in 1971. According to Duke, these outdated assumptions decrease her monthly benefit by roughly $54. She contends, also, that using the outdated assumptions means the Plan is perpetually out of compliance with ERISA and may suffer follow-on tax consequences as a result.

B. Procedural History

On November 1, 2021, Duke filed a putative class action complaint against Luxottica, Oakley, Inc. (a subsidiary of Luxottica), the Committee, and the Plan (collectively, Defendants or Appellants), seeking to represent herself and other Plan participants and beneficiaries receiving JSA benefits calculated before April 1, 2021. The complaint asserts four claims: first,

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[2] The Committee made this change by guaranteeing to participants whose benefits were calculated after April 1, 2021 that they would receive no less than if the SLA-JSA conversion were performed using updated actuarial assumptions published at 26 U.S.C. § 417.

a violation of ERISA's JSA equivalence requirement, 29 U.S.C. § 1055(a)–(d); second, a violation of ERISA's equivalence requirement for accrued benefits, *id.* § 1054(c)(3); third, a violation of ERISA's rules prohibiting forfeiture of retirement benefits, *id.* § 1053(a); and fourth, a breach of ERISA's fiduciary duty obligations, *id.* § 1104(a)(1)(A), (B), (D). The purported violation underlying all claims is the same—the Committee's use, before April 1, 2021, of allegedly outdated actuarial assumptions in converting SLAs into JSAs. And for all claims, Duke seeks relief under two of ERISA's remedial provisions—relief on behalf of the Plan, under Section 502(a)(2), *codified at* 29 U.S.C. § 1132(a)(2); and relief on behalf of herself and other Plan participants, under Section 502(a)(3), *codified at* 29 U.S.C. § 1132(a)(3). Most important for present purposes, Duke seeks both reformation of the Plan to update its actuarial assumptions used to convert SLAs into JSAs, as well as monetary restitution to the Plan in the form of loss restoration and disgorgement of profits.[3]

Defendants moved to compel arbitration, citing a provision of a Dispute Resolution Agreement (the Agreement) that Duke signed in 2015. In relevant part, the Agreement purports to require arbitration of

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[3] The complaint seeks 15 categories of relief, including declaratory relief, injunctive relief, plan reformation, restitution, attorney's fees, and "any other appropriate equitable relief[.]" Joint App'x 53. On appeal, the parties categorize Duke's requested remedies under Section 502(a)(2) as either plan reformation (via injunction) or repayment to the plan (via restoration of losses or disgorgement of profits). We adopt these conventions in this opinion.

"disputes . . . arising out of or related to the employment relationship or the termination of that relationship (including post-employment defamation or retaliation), trade secrets, . . . discrimination or harassment and claims arising under the . . . Employee Retirement Income Security Act []except for claims for employee benefits under any benefit plan[.]" Joint App'x 144–45. In particular, Defendants moved to compel *individual* arbitration of Duke's claims, citing the Agreement's class action waiver, which requires that Duke "bring any dispute in arbitration on an individual basis only, and not on a class, collective or private attorney general representative basis on behalf of others." *Id.* 145. Defendants also moved in the alternative to dismiss Duke's claims for lack of standing and for failure to state a claim.

The district court originally granted Defendants' motions in part, concluding that Duke lacks standing to seek relief on behalf of the Plan under Section 502(a)(2), pursuant to *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), and that the parties' Agreement requires individual arbitration of her claims for relief under Section 502(a)(3). *Duke v. Luxottica U.S. Holdings Corp.* (*Duke I*), No. 21-cv-6072, 2023 WL 6385389, at *5–6, 11 (E.D.N.Y. Sept. 30, 2023).[4] But

[4] The district court deferred ruling on Defendants' argument that Duke lacks standing because, as a factual matter, she stands to lose benefits if the Committee updates the Plan's actuarial assumptions for pre-April 1, 2021 SLA-JSA conversions. *See Duke I*, 2023 WL 6385389, at *7. No party asks us to review this decision, nor must we, in part because a district court "has leeway as to the procedure it wishes to follow" to adjudicate a

after the case was reassigned to a different district court judge and Duke moved for reconsideration, the district court issued a new opinion concluding that Duke has standing to press a claim under Section 502(a)(2) on behalf of the Plan for both reformation and monetary payments to the Plan, and further that the "effective vindication" doctrine precludes mandatory individual arbitration of that claim. *Duke v. Luxottica U.S. Holdings Corp.* (*Duke II*), No. 21-cv-6072, 2024 WL 4904509, at *1, *16 (E.D.N.Y. Nov. 27, 2024). The district court also denied Defendants' alternative request to stay litigation of the claims under Section 502(a)(2) pending arbitration of the claims under Section 502(a)(3), rejecting the argument that such a stay is mandatory under the Federal Arbitration Act (FAA) and finding that its discretion counseled in favor of permitting the claims to proceed simultaneously. *See id.* at *20–22. Defendants timely filed a notice of interlocutory appeal of the denial of the motion to compel arbitration and of the motion to stay. *Cf.* 9 U.S.C. § 16(a)(1)(A)–(B).

DISCUSSION

We review *de novo* facial challenges to a plaintiff's standing—i.e., challenges "based solely on the allegations of the complaint and exhibits attached to it." *Sonterra Cap. Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 533 (2d Cir. 2020) (cleaned up). We also review *de novo* the district court's disposition of the motions to compel arbitration and for a mandatory stay under

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factual issue underlying a plaintiff's standing. *All. For Env. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 (2d Cir. 2006).

the FAA. *See Katz v. Cellco P'Ship*, 794 F.3d 341, 344 n.4 (2d Cir. 2015).

A. Appellate Jurisdiction

We must begin by assuring ourselves of the Court's jurisdiction over this appeal. *See Marquez v. Silver*, 96 F.4th 579, 582 (2d Cir. 2024). In general, our appellate jurisdiction is limited to reviewing final judgments. *See* 28 U.S.C. § 1291. Limited exceptions to this rule, however, permit review of certain interlocutory orders, including a district court's denial of motions to compel arbitration and to stay litigation under the FAA. *See* 9 U.S.C. § 16(a)(1)(A)–(B). Our jurisdiction to review those aspects of the district court's order is thus plain. But Appellants ask us to review also the district court's determination that Duke has standing under Article III to seek relief on behalf of the Plan under Section 502(a)(2)—a determination of the district court's subject matter jurisdiction that is not ordinarily immediately appealable. *Cf. Ashmore v. CGI Grp., Inc.*, 860 F.3d 80, 85 (2d Cir. 2017). They argue that the FAA's grant of interlocutory appellate jurisdiction extends to this issue, as well.

In general, interlocutory appellate review is limited to the particular decision of the district court that forms the basis for immediate appeal. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 38 (1995). That requires we assess the scope of an "order" denying a motion to compel arbitration or for a stay. *Cf.* 9 U.SC. § 16(a)(1)(A)–(B). We hold today that such an order includes a district court's determination that it has subject matter jurisdiction over the controversy to be

litigated rather than stayed or arbitrated—including a plaintiff's Article III standing.

Several of our precedents support this result. To begin, it is routine practice to review a district court's exercise of subject matter jurisdiction on interlocutory appeal, as "[t]he existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration." *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999). Such is the case for interlocutory appeals of grants or denials of preliminary injunctions, *San Filippo v. United Bhd. of Carpenters & Joiners of Am.*, 525 F.2d 508, 512–13 (1975); of denials of sovereign and qualified immunity defenses, *Merritt*, 187 F.3d at 268–69; *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liability Litig.*, 488 F.3d 112, 121–24 (2d Cir. 2007); and of adjudications of civil contempt, *U.S. Cath. Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988).

We discern no reason that FAA appeals should work any differently, especially because "a district court must determine if there exists a case or controversy in order for it to exercise its jurisdiction over [a] motion to compel [arbitration]." *Doe v. Trump Corp.*, 6 F.4th 400, 416 (2d Cir. 2021) (quoting *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1110 n.19 (11th Cir. 2004)). The same is true for a district court's denial of a motion for a stay of litigation, which is necessarily premised upon its having jurisdiction to preside over the litigation in the first place. Indeed, we have before reviewed a district court's exercise of subject matter jurisdiction in a Section 16(a)(1) appeal of the denial of a motion for an FAA stay, though concededly with-

out stopping to ask whether such an approach comported with *Swint*. *See Adams v. Suozzi*, 433 F.3d 220, 223–26 (2d Cir. 2005).[5]

The crux of Duke's response is that standing is different. We are unpersuaded. A plaintiff's standing, just like the existence of diversity among the parties or a federal-law issue, bears directly on the district court's subject matter jurisdiction. That is because "Article III . . . limits the subject-matter jurisdiction of the federal courts to 'Cases' and 'Controversies.'" *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020). No principled reason exists for treating these two limitations on a district court's power to entertain an action differently in the context of an interlocutory appeal. A defect in either would have required the district court to dismiss the action, and thus "we have an obligation to determine whether the district court

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[5] The courts of appeals appear divided on this question. The Fifth, Seventh, Eighth, and Ninth Circuits permit reviewing (at least) subject matter jurisdiction on Section 16(a)(1) appeal. *See Hines v. Stamos*, 111 F.4th 551, 558–62 (5th Cir. 2024) (personal jurisdiction); *Nettles v. Midland Funding LLC*, 983 F.3d 896, 899 (7th Cir. 2020) (Article III standing); *Benchmark Ins. Co. v. SUNZ Ins. Co.*, 36 F.4th 766, 770 (8th Cir. 2022) (subject matter jurisdiction); *Namisnak v. Uber Techs., Inc.*, 971 F.3d 1088, 1091–92 (9th Cir. 2020) (Article III standing). The Third Circuit permits interlocutory review of a district court's statutory basis for exercising subject matter jurisdiction but not of a plaintiff's Article III standing. *See O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 762–66 (3d Cir. 2021). The Sixth Circuit has not formally weighed in but has cited *O'Hanlon*'s rule with approval. *See Schnatter v. 247 Grp., LLC*, 155 F.4th 543, 553 (6th Cir. 2025). For the reasons given above, we respectfully disagree with the Third Circuit's approach and hold instead that we may review a plaintiff's standing to assert a claim at issue in a Section 16(a)(1) interlocutory appeal.

has subject matter jurisdiction to go forward." *MTBE*, 488 F.3d at 124.

Finally, were we unsure whether a plaintiff's standing is always reviewable on a Section 16(a)(1) interlocutory appeal, we would nevertheless hold in this case that such review is appropriate because it concerns an issue "inextricably intertwined" with an appealable order. *Cf. Swint*, 514 U.S. at 51. We sometimes refer to this as the doctrine of pendent appellate jurisdiction. *See Freeman v. Complex Computing Co., Inc.*, 119 F.3d 1044, 1049–50 (2d Cir. 1997). We have thus already suggested that, in an interlocutory FAA appeal, we may review a decision that falls outside of Section 16(a)(1) so long it is "inextricably intertwined" with a decision that falls within Section 16(a)(1). *See Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 152 n.5 (2d Cir. 2019). Though the exercise of pendent appellate jurisdiction is discretionary and reserved for "exceptional circumstances," *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 117 (2d Cir. 2016) (quotation marks omitted), it is warranted here. Duke's standing to seek Section 502(a)(2) remedies bears directly on the arbitrability of her claim under that provision. This is because the district court based its denial of the motion to compel arbitration on the effective vindication doctrine, which precludes enforcing arbitration clauses that "operate as a prospective waiver of a party's right to pursue statutory remedies." *Am. Exp. Co. v. Ital. Colors Rest.*, 570 U.S. 228, 235 (2013) (cleaned up and emphasis altered). To determine whether the district court properly applied that doctrine—as we will have to in reviewing its interlocutory decision denying the

motion to compel—we must ask which statutory remedies Duke could hope to pursue in federal court. As her Article III standing is central to that inquiry, it is "inextricably intertwined"—even more so than in the typical case—with the district court's immediately appealable order denying the motion to compel arbitration. *Cf. MTBE*, 488 F.3d at 123.

Assured that our jurisdiction permits review of Duke's standing to seek Section 502(a)(2) remedies on behalf of the Plan, we turn next to the requirements of Article III.

B. Article III Standing

As we have already intimated, Article III "limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" and by extension requires a plaintiff to satisfy "the irreducible constitutional minimum of standing[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992). Accordingly, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Though a plaintiff's claimed injury must be redressable, a plaintiff need not state a meritorious or even plausible claim for relief under existing law in order to have standing to pursue a claim. *See Soule v. Conn. Ass'n of Schools, Inc.*, 90 F.4th 34, 45 (2d Cir. 2023). Indeed, unless a requested form of relief that would redress a plaintiff's injury "is so insubstantial, implausible, foreclosed by prior decisions . . . , or otherwise completely devoid of merit as not to involve a federal controversy," *Steel Co. v. Citizens for a Better*

Env., 523 U.S. 83, 89 (1998) (quotation marks omitted), that it may be legally unavailable is irrelevant for assessing a plaintiff's Article III standing, *Soule*, 90 F.4th at 51. That said, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021).

The Supreme Court distilled the application of these requirements to ERISA actions in *Thole*. There, two vested participants in a retirement plan sued the plan's fiduciaries under Sections 502(a)(2) and (a)(3), alleging mismanagement and seeking repayment to the plan, injunctive relief, and removal of the fiduciaries. 590 U.S. at 540–41. Like Duke, the *Thole* plaintiffs were participants in a defined benefit plan, meaning their legal entitlement to monthly benefits did not vary based on the plan's performance or assets; indeed, neither plaintiff alleged that he had received a dollar less than he was owed. *See id.* at 540. The Supreme Court, applying traditional Article III principles, held that the plaintiffs lacked standing to represent the plan, as they suffered no injury that would be redressed by any form of relief they sought on behalf of the plan. *See id.* at 541. The Court rejected various theories of trust-specific standing, holding instead that an ERISA plaintiff—just like any other—must stand to personally benefit from the litigation in order to have standing. *See id.* at 542–43. The Court left open, however, the possibility of standing for plaintiffs who allege mismanagement that "substantially increase[s] the risk that the plan and the employer [will] fail and be unable to pay the participants' future . . .

benefits," thereby generating a redressable injury. *See id.* at 546. But the *Thole* plaintiffs made no such allegation, and so they faced no credible chance of future injury. *Id.* Nor did they possess a credible chance at a future benefit, since any surplus in a defined benefit plan's assets return to the employer rather than the participants. *See id.* at 543. Without any hope of financial gain from a successful lawsuit on behalf of the plan, the plaintiffs lacked Article III standing to represent it. *Id.* at 547.

Armed with these principles, Appellants argue that Duke lacks standing to pursue any remedy on behalf of the plan under Section 502(a)(2). We agree in part.

1. Standing to Seek Plan Reformation

First, Appellants argue that Duke lacks standing to pursue plan reformation under Section 502(a)(2). They do not contest, nor could they, that Duke's receipt of decreased benefits constitutes a "classic pocketbook injury" cognizable under Article III. *See Tyler v. Hennepin County*, 598 U.S. 631, 636 (2023); *see also Thole*, 590 U.S. at 542. Appellants also acknowledge that this injury is at least plausibly caused by the Committee's use of allegedly outdated actuarial assumptions, and that it would be remedied by an order requiring the Committee to update those assumptions. *See* Appellants' Br. 24 ("[S]he can seek to change the terms of the Plan and order Defendants to pay Plaintiff higher benefits in accordance with those changed terms."). Instead, Appellants argue that such a remedy is categorically unavailable under Section 502(a)(2)—which authorizes relief only to a plan—and thus Duke's injury is not redressable under

that provision. But this argument targets the merits of Duke's claims, not her standing to pursue them. Without deciding whether the reformation Duke seeks is an available remedy under Section 502(a)(2), we hold that Duke has standing to seek plan reformation under the provision.

Appellants are generally correct that Section 502(a)(2) authorizes relief to a plan, rather than to participants themselves. *See L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 65–66 (2d Cir. 2013). That limitation flows from the text of ERISA Section 409—incorporated into Section 502(a)(2)—which imposes personal liability on fiduciaries to restore "to the plan" losses caused by and profits made from breaches of fiduciary duty. *See* 29 U.S.C. § 1109(a). And though the same provision also authorizes "other equitable or remedial relief as the court may deem appropriate," *id.*, the Supreme Court soon interpreted that phrase to require the relief sought "protect the entire plan, rather than . . . the rights of an individual beneficiary," *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 (1985). The Supreme Court has since walked back the "entire plan" requirement, permitting Section 502(a)(2) claims that are likely to benefit even a single participant, so long as the relief sought would remedy a "plan injur[y]," rather than a purely "individual injur[y]." *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008). But as we have explained, though *LaRue* clarified that the availability of Section 502(a)(2) relief does not turn on how widespread a plan injury is, it must nevertheless be to the plan *itself*. *See Cedeno v. Sasson*, 100 F.4th 386, 399 (2d Cir. 2024); *see also Cooper v. Ruane Cunniff &*

Goldfarb Inc., 990 F.3d 173, 180 (2d Cir. 2021). For relief from genuinely personal injuries, participants must instead turn to Section 502(a)(3), which authorizes individual equitable relief regardless of the whether the plan has also suffered. *See Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

Appellants take these requirements to mean that Section 502(a)(2) offers Duke no remedy, as her Article III injury—reduced benefits—does not harm the Plan. But Duke does not contend that her receipt of reduced benefits harms the Plan. Instead, she argues that the Plan is harmed because its use of allegedly outdated actuarial assumptions renders the Plan in constant noncompliance with ERISA and jeopardizes its favorable tax status as a result.[6] And though the reformation she seeks will allegedly increase her benefits—which is why she has Article III standing—"[i]t is of no moment that recovery inuring to the Plan may ultimately benefit particular participants." *L.I. Head Start*, 710 F.3d at 66. Nor does it matter that "a desire to ensure a defendant's compliance with regulatory law is an insufficient injury for Article III standing," Appellants' Br. 32 (quotation marks omitted), because the Plan's alleged noncompliance is its *own* injury

[6] At argument, Appellants suggested that this type of plan harm is not cognizable because Duke did not allege it in her complaint. The complaint, however, contains several allegations suggesting that the Plan jeopardizes its favorable tax status by failing to comply with ERISA's actuarial equivalence requirement and parallel requirements in the Tax Code. *See* Joint App'x 30–31 ¶¶ 33, 37, 41. Nonetheless, the Court may resolve contested jurisdictional issues by referencing materials outside the pleadings, including the parties' briefs. *See Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 211 (2d Cir. 2016).

that Duke seeks to remedy with Section 502(a)(2), rather than her receipt of decreased benefits, which *is* sufficient for standing, *see Thole*, 590 U.S. at 542.

Stepping back, whether ERISA noncompliance and attendant tax consequences really do constitute "plan injuries" within Section 502(a)(2)'s remedial scope is an undecided question properly reserved for the merits. We know this in part because Appellants muster no authority foreclosing remedying plan-compliance injuries of this sort under Section 502(a)(2). Instead, Appellants lament that permitting such a remedy "would remove any limit on the relief available under this part of ERISA's carefully crafted enforcement provision." Reply Br. 14. Maybe, but that does not render Duke's position "so insubstantial, implausible, foreclosed by prior decisions . . . , or otherwise completely devoid of merit as not to involve a federal controversy." *Cf. Steel Co.*, 523 U.S. at 89 (quotation marks omitted). Instead, this back-and-forth demonstrates merely that both parties have arguments to make about "the legal availability" of Section 502(a)(2) relief in this case—a dispute that "goes to the merits, not jurisdiction." *Soule*, 90 F.4th at 51. Today, we do not decide whether Duke has adequately alleged a Plan injury that falls within the remedial scope of Section 502(a)(2). We hold only that she has Article III standing to try.

2. Standing to Seek Monetary Payments

Appellants argue next that, whether or not Duke has standing to seek reformation of the Plan, she lacks standing to seek monetary payments to the Plan. Specifically, she seeks repayment of losses to the Plan and disgorgement of profits (which would also go to the

Plan). Appellants argue that Duke does not have standing to seek those remedies because only the Plan would benefit from such relief, and Duke herself would not. They argue that *Thole* precludes participants from seeking general monetary recoveries on behalf of a defined benefit plan, so long as the participants have not plausibly alleged a substantial risk of plan and employer failure. *Cf.* 590 U.S. at 546. Here, we agree with Appellants.

Duke attempts to distinguish *Thole* along two lines. First, she argues that the case is different because, unlike her, the *Thole* plaintiffs had received all of their previous benefits. *See* 590 U.S. at 540. But the Supreme Court also explained that, because the plaintiffs were participants in a defined benefit plan, they possessed "no equitable or property interest" in the plan's assets, and so monetary repayment to the plan would not benefit the plaintiffs personally. *See id.* at 543. And though Duke claims to have received decreased benefits in the past, her benefits were allegedly decreased not for a lack of Plan funds, but because of the Plan's use of outdated actuarial assumptions. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107.

Second, Duke argues that the forms of relief she seeks will "work in tandem" by increasing Plan funding commensurate with the reformation she hopes to obtain. *See* Appellee's Br. 35. But here again, her argument is foreclosed by *Thole*. Because Duke is a participant in a defined benefit plan, "the employer . . . is on the hook for plan shortfalls." *Thole*, 590 U.S. at

543. Likewise, "the employer, not plan participants, receives any surplus left over after all of the benefits are paid[.]" *Id.* So it may be that the forms of relief she seeks will work together, but nothing suggests monetary payments to the Plan will be *necessary* to effectuate any eventual reformation. In other words, if Duke is successful in seeking reformation, she will be made whole regardless of whether the Plan receives additional funds; and if Duke is unsuccessful in seeking reformation, she will not be made whole regardless of whether the Plan receives those funds. A "favorable decision" on this form of relief will thus not "relieve a discrete injury," *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982), and therefore fails Article III's redressability requirement.[7] We accordingly reverse the district court's determination that Duke has standing to pursue monetary remedies on behalf of the Plan.

C. Arbitrability Under the Effective-Vindication Doctrine

Appellants' fallback position is that Duke's Section 502(a)(2) claim belongs in individual arbitration pursuant to the Dispute Resolution Agreement Duke signed. Duke responds that the effective vindication doctrine precludes mandatory individual arbitration of her Section 502(a)(2) claim, and even if it did not, the Agreement does not cover her ERISA claims. We

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[7] Duke offered a new theory at argument: that a judgment ordering monetary payments would compel the Committee to adjust its actuarial assumptions on its own. But that would be true of any judgment, and the Supreme Court has made clear that "plaintiffs must demonstrate standing . . . for each form of relief that they seek[.]" *TransUnion*, 594 U.S. at 431.

agree with Duke's first argument and do not reach her second.

The FAA provides that "a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" 9 U.S.C. § 2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements[.]" *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). But it is not absolute. Instead, courts may, under the "effective vindication exception" to Section 2, "invalidate, on public policy grounds, arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies." *Am. Exp.*, 570 U.S. at 235 (cleaned up). We have thus held that arbitration provisions requiring individual litigation of Section 502(a)(2) claims are unenforceable because they prospectively waive a plaintiff's right under that provision to bring a representative action to secure remedies on behalf of an ERISA plan. *See Cedeno*, 100 F.4th at 400. This is so in part because Section 502(a)(2) actions must be brought in some form of representative capacity because the claim "is inherently representational." *Id.* at 403; *see also Coan v. Kaufman*, 457 F.3d 250, 262 (2d Cir. 2006). To require such claims be brought solely in an individual capacity is to prohibit them altogether. *See Cooper*, 990 F.3d at 184. Our cases, especially *Cedeno*, have straightforward application to this case: Duke may not be compelled to individually arbitrate her Section 502(a)(2) claim on behalf of the Plan.

Appellants strain for ways around these cases. None succeed.

First, Appellants return to Article III standing to argue that *Cedeno* precludes Duke's quest to remedy her supposedly "individual injuries" under Section 502(a)(2). Appellants' Br. 42. Not so. Though we reaffirmed in *Cedeno* the rule that Section 502(a)(2) actions are available only to remedy plan injuries, here Duke has alleged one: systematic noncompliance with ERISA and follow-on tax consequences. *Cedeno* said nothing about whether that theory of plan injury is actionable or not under ERISA, and neither do we on this preliminary posture. Instead, the arbitration provision in that case was unenforceable because it would have, if enforced, deprived the plaintiff of even her "right to *pursue* statutory remedies." *Cedeno*, 100 F.4th at 401 (emphasis added) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). Because individual arbitration would "materially interfere with [Duke's] ability to seek relief under" Section 502(a)(2), the effective vindication doctrine precludes its enforcement. *Cf. State Farm Mut. Auto. Ins. Co. v. Tri-Borough NY Med. Prac. P.C.*, 120 F.4th 59, 91 (2d Cir. 2024).

Next, Appellants suggest that *Cedeno* is different because the plaintiff in that case was a participant in a defined contribution plan, rather than defined benefit plan. According to Appellants, this distinction matters because the alleged fiduciary mismanagement in *Cedeno* would harm "both participants and the plan itself by 'saddling the Plan with millions of dollars of debt to the substantial detriment of the Plan and its participants[.]'" Appellants' Br. 43 (alteration

adopted). But again, Duke has alleged the same problem—that the Plan's use of outdated actuarial assumptions harms the Plan (through systemic ERISA noncompliance and jeopardy of its favorable tax status) as well as participants (through underpayment of benefits). And Duke will not be able to remedy the Plan's harm on her own, as only a representative action can resolve the allegedly detrimental effects of widespread violations of federal law. "It is of no moment that recovery inuring to the Plan may ultimately benefit particular participants." *L.I. Head Start*, 710 F.3d at 66.

Finally, Appellants argue that reading *Cedeno* to protect Duke's statutory right to pursue a representative Section 502(a)(2) action would run afoul of Supreme Court cases invalidating state laws that provide "a free-floating right to proceed through collective action for its own sake[.]" Appellants' Br. 46 (quoting *Cedeno*, 100 F.4th at 401). It is true that, as a general matter, the mere availability of a representative or class-action procedure is not a substantive right that a plaintiff may invoke to avoid individual arbitration. *See Estle v. Int'l Bus. Machs. Corp.*, 23 F.4th 210, 213–14 (2d Cir. 2022). Accordingly, even if a state purports to require genuinely individual claims be brought in a representative capacity, the Supreme Court has held that such a scheme is a procedural device overridden by the FAA's policy favoring the enforcement of arbitration agreements. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 659–62 (2022). But as we explained in *Cedeno*, the Supreme Court in that case "recognized a qualitative difference between waivers of collective-action procedures like class ac-

tions, and waivers that preclude a party from arbitrating in a representational capacity *on behalf of a single absent principal*[.]" 100 F.4th at 402 (citing *Viking River*, 596 U.S. at 656–58). Thus, Appellants' argument that Duke seeks to escape individual arbitration through the invocation of a representative procedure, like their other arguments, proceeds on the flawed assumption that Duke seeks a personal remedy under Section 502(a)(2). She does not. Instead, she seeks relief for an "absent principal," *Cedeno*, 100 F.4th at 402, that "may ultimately benefit" her, as well, *L.I. Head Start*, 710 F.3d at 66. Whether she succeeds, including whether the alleged systemic ERISA noncompliance and jeopardy to its favorable tax status are plan injuries that can be remedied through Section 502(a)(2), are merits questions beyond the scope of this appeal.

Because Appellants present no persuasive reason for distinguishing *Cedeno*, we hold that it precludes compelling Duke to individually arbitrate her claims under Section 502(a)(2). We do not reach the question whether the Section 502(a)(3) claim falls within the Agreement's arbitration provision, as the FAA removes from our appellate jurisdiction review of a district court's interlocutory order compelling arbitration. *See* 9 U.S.C. § 16(b)(2).

D. Section 3 Stay of Litigation

Appellants' final challenge is to the district court's denial of their motion to stay litigation on Section 502(a)(2) pending the parties' arbitration. The district court exercised its discretion to deny the motion, reasoning that Appellants had not demonstrated the ex-

tent of factual overlap between arbitrable and nonarbitrable claims or that substantial prejudice would result absent a stay. Appellants do not now contest these conclusions. Instead, they argue only that the district court was without discretion to deny the motion because the stay they sought was mandatory under Section 3 of the FAA. We disagree.

Section 3 of the FAA provides in relevant part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]

9 U.S.C. § 3.

Section 3 stays are mandatory, not discretionary. *Smith v. Spizzirri*, 601 U.S. 472, 478 (2024). But Section 3 does not extend to claims not subject to arbitration; whether a district court stays those is "a matter of its discretion to control its docket." *Moses H. Cone*, 460 U.S. at 20 n.23. That is so even for "claims arising out of the same series of events[.]" *Chang v. Lin*, 824 F.2d 219, 222 (2d Cir. 1987), *overruled on other grounds*, *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989). True enough, "stay orders are particularly appropriate if the arbitrable claims predominate the lawsuit and the nonarbitrable claims

are of questionable merit." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 856 (2d Cir. 1987) (citing *NPS Commc'ns v. Cont'l Grp., Inc.*, 760 F.2d 463, 465 (2d Cir. 1985)). But weighing those considerations is still "within the district court's discretion to control its docket." *Id.*

For their part, Appellants offer *McCowan v. Sears, Roebuck & Co.*, which concerned consolidated actions asserting federal and state securities claims against a brokerage firm (Dean Witter) and a "controlling person" under Viriginia law (Sears). 908 F.2d 1099, 1100–01 (2d Cir. 1990). Dean Witter and the plaintiffs had formed an arbitration agreement; Sears and the plaintiffs had not. *Id.* at 1105. After the federal claims were either referred to arbitration or dismissed, Dean Witter and Sears both moved for Section 3 stays of the remaining state law claims, arguing that they fell within the scope of the plaintiffs' arbitration agreement with Dean Witter and that Sears was a third-party beneficiary of that agreement. *Id.* at 1101–02. We held that Dean Witter enjoyed a right to a mandatory stay because the claims against it were within the scope of the parties' agreement. *Id.* at 1107. But we explained that we did "need not determine whether Sears also [had] such a right," because "[t]he practical effect of the stay as to Dean Witter, an indispensable party . . . , [was] that the suit against Sears, which [was] wholly dependent on the claim against Dean Witter, [could not] proceed." *Id.* at 1108.

Unlike Appellants, we do not read *McCowan* to compel a Section 3 stay any time arbitrable and nonarbitrable claims share issues of law or fact. For one thing, it was decided after *Genesco* and *Chang*,

which the *McCowan* panel had no authority to overrule. For another, *McCowan*'s holding stemmed from the fact that Dean Witter was an indispensable party in the litigation against Sears but also entitled to a mandatory stay of litigation. *Id.* at 1101. The litigation could thus "[not] proceed" because Dean Witter enjoyed a mandatory right to await the conclusion of arbitration before continuing, and it was indispensable to the litigation going forward. The result had nothing to do with the scope of Section 3. But even if it did, any lesson from that case is confined to its narrow context of a nonarbitrable claim that is *entirely* derivative of an arbitrable one and is stayed as a result. Whatever *McCowan* says about that situation, it would not mandate a stay here, as Duke's requested relief under Section 502(a)(2) is much broader than, and therefore not derivative of, her request under Section 502(a)(3).

Finally, Appellants ask us to overlook *Chang* and *Genesco* and rely instead on the word "issue" in Section 3 to hold that the provision mandates a stay any time a litigated claim shares a question of law or fact with a claim to be arbitrated. Even on its own terms, the textual argument faces problems. First, Section 3 says more than the word "issue"; it mandates a stay of an "issue *referable to arbitration*." *See* 9 U.S.C. § 3 (emphasis added). In context, that plainly refers to the claims that the district court orders arbitrated, rather than any discrete legal or factual issues that may one day arise in arbitration. Second, as we have already explained, the issue referred to arbitration in this case was Duke's individual entitlement to Section 502(a)(3) relief, *not* the distinct question whether the Plan suffered a qualifying injury redressable under

Section 502(a)(2). So even if we could overrule our precedents—which we cannot, *see Garcia Pinach v. Bondi*, 147 F.4th 117, 129 (2d Cir. 2025)—we would not be inclined to adopt Appellants' drastic reading of Section 3.

Because Appellants do not make any other argument that the district court abused its discretion, we affirm its denial of the stay motion.

CONCLUSION

The district court's November 27, 2024 order is **REVERSED** as to Duke's Article III standing to seek monetary payments on behalf of the Plan and **AFFIRMED** in all other respects.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

2:21-cv-6072 (NJC) (AYS)

JANET DUKE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF,

v.

LUXOTTICA U.S. HOLDINGS CORP., OAKLEY, INC., LUXOTTICA GROUP ERISA PLANS COMPLIANCE & INVESTMENT COMMITTEE, AND LUXOTTICA GROUP PENSION PLAN,
DEFENDANTS.

Filed: Nov. 27, 2024

OPINION AND ORDER

NUSRAT J. CHOUDHURY, District Judge:

Plaintiff Janet Duke ("Duke") brings this action on behalf of herself and other similarly situated individuals against Defendants Luxottica U.S. Holdings Corp. ("Luxottica"); Oakley, Inc. ("Oakley"); Luxottica Group ERISA Plans Compliance & Investment Committee ("Plans Committee"); and Luxottica Group Pension Plan (the "Plan" and collectively, "Defendants") under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2) and

(a)(3) ("Section 502(a)(2)" and "Section 502(a)(3)"). (Compl., ECF No. 1.) The Complaint alleges that Defendants have violated, and continue to violate, ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor annuity requirements with respect to the Plan. (*Id.* ¶ 1.) On September 30, 2023, this Court dismissed without prejudice Duke's Section 502(a)(2) claims under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), denied without prejudice Defendants' factual challenge to Duke's individual Article III standing to pursue Section 502(a)(2) and 502(a)(3) claims, granted the motion to compel arbitration of Duke's Section 502(a)(3) claims, stayed the case pending arbitration, and did not address Defendants' motion to dismiss under Rule 12(b)(6). (Mem. & Order ("Order"), ECF No. 59.)

Duke filed a Motion for Reconsideration under Local Civil Rule 6.3. Before me is the fully-briefed Motion. (*See* ECF Nos. 60, 60-1, 62–63, 65–66, 70–71.)

For the reasons set forth below, I grant in part and deny in part Duke's Motion. First, I grant reconsideration of the Order's Rule 12(b)(1) dismissal without prejudice of Duke's claims under Section 502(a)(2) and find that Duke has standing to pursue these claims on behalf of the Plan for Plan-wide remedies under 29 U.S.C. § 1109 ("Section 409"). Second, I deny reconsideration of the Order's grant of Defendants' motion to compel arbitration of Duke's Section 502(a)(3) claims. Third, because I conclude that Duke has standing to pursue the Section 502(a)(2) claims, I reach Defendants' motion to compel arbitration of these claims and deny the motion, concluding that Duke's agreement

with Luxottica to pursue some claims through arbitration on an individual basis is unenforceable with respect to her Section 502(a)(2) claims, which she brings in a representative capacity on behalf of the Plan to seek Plan-wide remedies. Fourth, I deny Defendants' request to stay the adjudication of the Section 502(a)(2) claims pending arbitration of the Section 502(a)(3) claims because Defendants fail to argue, much less demonstrate, that they have met their heavy burden to secure such a stay. Duke's Section 502(a)(2) claims will proceed in this action while her Section 502(a)(3) claims will proceed in arbitration on an individual basis.

FACTUAL BACKGROUND

This Opinion and Order assumes the parties' familiarity with the factual and procedural background of this case, as addressed in the Order. (*See* Order at 2–5.)

The Complaint alleges that Duke is a former employee of a Luxottica subsidiary and vested participant in the Plan, which is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35). (Compl. ¶¶ 1–2, 30.) Duke receives a joint and survivor annuity—a benefit that pays an annuity both to the participant for their lifetime and to the participant's surviving spouse for their lifetime. (*Id.* ¶¶ 1–2.) The Complaint alleges that Defendants improperly relied on outdated and unreasonable actuarial assumptions—namely, a mortality table that is "50 years out of date" and a 7% interest rate—in calculating Duke's pension benefits in violation of Sections 502(a)(2) and 502(a)(3). (*Id.* ¶¶ 2, 57–61.) On April 1, 2021, Defendants allegedly amended the Plan to use

updated and reasonable mortality assumptions when calculating joint and survivor annuities. (*Id.* ¶ 14.) The Complaint alleges, however, that Defendants continue to employ the out-of-date mortality table and 7% interest rate to determine the value of joint and survivor annuities paid to Duke and members of the putative class—hundreds, if not thousands, of Plan participants and beneficiaries whose joint and survivor annuity benefits were calculated before April 1, 2021[1]—with the result that they receive pension payments that are lower than what is required under ERISA. (*Id.* ¶¶ 14, 86.) The Complaint alleges that if Defendants use the proper, updated mortality assumptions, Duke and other members of the putative class would receive larger monthly pension payments. (*Id.* ¶¶ 16, 60–63.)

Duke signed a Dispute Resolution Agreement ("Agreement") during her employment with Luxottica in 2015. (Hoffman Decl. ¶¶ 4, 6–8; Agreement, Hoffman Decl. Ex. 1, ECF No. 41-2.) There is no dispute

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[1] The Complaint estimates that there are "thousands" of Plan participants and beneficiaries whose joint and survivor annuities were calculated using the pre-amendment approach because, as of "January 1, 2019, there were 3,385 participants and beneficiaries receiving benefits under the Plan." (Compl. ¶ 87.) At oral argument, Duke's counsel explained that "[n]ot all of those would be people who elected joint and survivor annuities, but likely a large chunk of those people [did so]." (Aug. 22, 2024 Hr'g Tr. 8:9–14.) While it is not clear pre-discovery the exact number of joint and survivor annuity recipients who stand to receive increased monthly payments if Duke is granted the equitable relief she seeks, it is sufficient for present purposes to conclude that the Complaint has adequately pled that there are hundreds, if not thousands, of such recipients.

that Duke had the opportunity to opt out of the Agreement but did not opt out and instead electronically signed the Agreement. (*Id.* ¶ 7; Defs.' Mem. Supp. Mot. Compel Arb. or Mot. Dismiss ("Defs.' Arb. or MTD Mem.") at 7–8, ECF No. 41; *see generally* Pl.'s Suppl. Br. Opp'n Defs.' Mot. Compel Arb. ("Pl.'s Opp'n Arb. Mem."), ECF No. 40.) The Agreement encourages employees to "express[] job-related concerns" to the company through an "Open Door Policy" of discussing these issues with managers and the human resources department. (Agreement at 5.) Although employees "are not required to use the Open Door Policy prior to initiating arbitration," they are "encouraged to do so." (*Id.* at 6.) "If the dispute isn't resolved through the Open Door Process, the next step is Arbitration." (*Id.*)

The Agreement provides that "[t]he arbitration portion of this . . . Agreement covers virtually all legal claims ***arising out of or related to your employment with Luxottica*** . . . ." (*Id.* at 5 (emphasis added).) The arbitration provision describes the claims subject to arbitration as follows:

> Except as it otherwise provides, ***this Agreement applies, without limitation, to disputes*** with any individual (including Luxottica's employees, agents, supervisors, officers or directors) or entity (including any company affiliated with Luxottica, its parent(s) or subsidiaries, if any) ***arising out of or related to the employment relationship or the termination of that relationship*** (including post-employment defamation or retaliation), trade secrets, unfair competition, compensation, classification, minimum wage,

> seating, expense reimbursement, overtime, breaks and rest periods, termination, discrimination or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and (a) covered by the Employee Retirement Income Security Act of 1974 or (b) funded by insurance), Affordable Care Act, Genetic Information Non-Discrimination Act, state statutes or regulations addressing the same or similar subject matters, ***and all other federal or state legal claims arising out of or relating to Employee's employment or the termination of employment.***

(*Id.* at 6–7 (emphasis added).)

The Agreement's arbitration provision also contains a "Class Action Waiver," which provides the following:

> ***This Agreement affects your ability to participate in class, collective or private attorney general representative action***. Both the Company and you agree to bring any dispute in arbitration on an individual basis only, ***and not on a class, collective or private attorney general representative basis on behalf of others. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class,***

> ***collective or private attorney general representative action or as a member in any such class, collective or representative proceeding ("Class Action Waiver")***. The Class Action Waiver does not apply to any claim you bring in arbitration as a private attorney general solely on your own behalf not on behalf of others. Notwithstanding any other provision of this Agreement or the AAA Rules, ***disputes regarding the validity, enforceability or breach of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator***. In any case in which (1) the dispute is filed as a class, collective or private attorney general representative action and (2) there is a final judicial determination that all or part of the Class Action Waiver is unenforceable, the class, collective, or representative action, to that extent, must be litigated in a civil court of competent jurisdiction. However, the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration.

(*Id.* at 7–8 (emphasis added).) The Agreement further provides that "[a]ny disputes about the enforceability of the [arbitration provision] shall be decided by a court." (*Id.* at 7.)

PROCEDURAL HISTORY

Duke filed this action on November 1, 2021, bringing claims under Section 502(a)(2) and Section 502(a)(3) on behalf of herself and a putative class of Plan participants and their beneficiaries who receive

joint and survivor annuity benefits calculated using the actuarial assumptions in effect before the April 1, 2021 amendment. (*See generally* Compl.) The Complaint alleges that Defendants breached their fiduciary duties of prudence and loyalty and violated ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor annuity requirements by failing to provide actuarially equivalent benefits to Duke and others whose joint and survivor annuity payments were calculated using the pre-amendment approach. (*Id.* ¶ 131.)[2] The Complaint seeks Plan-wide remedies under Section 409, which allows relief in the form of restoration of losses experienced by the Plan, disgorgement of profits, and "such other equitable or remedial relief as the court may deem appropriate" to remedy the breach of fiduciary duties. 29 U.S.C. § 1109; *see also* Compl. ¶¶ 106, 115, 124, 134.

Defendants filed a motion to compel arbitration or, in the alternative, dismiss the Amended Complaint pursuant to Rule 12(b)(1) and (b)(6). (Defs.' Mot. Compel Arb., ECF No. 23.) The motion was fully briefed on September 29, 2022. (*See* Defs.' Reply Supp. Mot. Dismiss, ECF No. 50.)

On September 30, 2023, Judge Joan M. Azrack, to whom this action was previously assigned, issued the Order, granting in part and denying in part Defendants' motion to compel arbitration or, in the alternative, dismiss the Amended Complaint pursuant to

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[2] ERISA's actuarial equivalence requirement is set forth in 29 U.S.C. § 1054(c)(3) ("Section 204(c)(3)"). The anti-forfeiture provision is set forth in 29 U.S.C. § 1053(a) ("Section 203(a)"). And ERISA's joint and survivor annuity requirement is set forth in 29 U.S.C. § 1055(a)–(d) ("Section 205(a)–(d)").

Rule 12(b)(1) and (b)(6). (*See generally* Order.) First, the Order dismissed Duke's claims on behalf of the Plan without prejudice for lack of subject matter jurisdiction on the basis that the Complaint "has not adequately alleged that [Duke] has Article III standing to assert her class claims pursuant to ERISA §§ 409 and 502(a)(2)." (*Id.* at 12, 19.) Second, the Order denied without prejudice Defendants' factual challenge to Duke's Article III standing to bring claims under Sections 409 and 502(a)(2) and under Section 502(a)(3). (*Id.* at 12.) Third, the Order granted Defendants' motion to compel arbitration of Duke's Section 502(a)(3) claims but did not reach Duke's argument that the Class Action Waiver in the Agreement's arbitration provision is unenforceable because it forbids the assertion of certain statutory rights, in light of the Order's dismissal of the Section 409 and 502(a)(2) claims under Rule 12(b)(1). (*Id.* at 15–19.) The Order stayed the case pending arbitration and did not address Defendants' motion to dismiss Duke's claims of alleged violations of the ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor annuity requirements under Rule 12(b)(6). (*Id.* at 19–20.)

On October 16, 2023, Duke moved for reconsideration of the Order. (Mot. Reconsid., ECF No. 60; Mem. Supp. Mot. Reconsid., ECF. No. 60-1) Defendants opposed on November 13, 2023, and Duke replied on November 20, 2023. (Opp'n Mot. Reconsid., ECF No. 62; Reply Supp. Mot. Reconsid., ECF No. 63.) On March 1, 2024, Duke filed a notice of supplemental authority, attaching the district court's decision in *Franklin v. Duke University*, 721 F. Supp. 3d 386 (M.D.N.C. 2024), *appeal filed*, 24-1205 (4th Cir. Mar. 11, 2024).

(Pl.'s First Not. Suppl. Auth., ECF No. 65.) Defendants responded on March 18, 2024. (Defs.' Resp. Pl.'s Not. Suppl. Auth., ECF No. 66.) On August 19, 2024, Defendants filed a notice of supplemental authority, attaching the Second Circuit's decision in *Cedeno v. Sasson*, 100 F.4th 386 (2d Cir. 2024). (Defs.' Not. Suppl. Auth., ECF No. 68.)

On August 22, 2024, the Court heard oral argument on Duke's Motion for Reconsideration. (Elec. Order, August 22, 2024.) At oral argument, Defendants requested—for the first time—the opportunity to provide additional briefing in support of their motion to compel arbitration, despite having failed to address in their opposition to the Motion for Reconsideration Duke's argument that the arbitration provision in the parties' Agreement is unenforceable as to the Section 502(a)(2) claims under *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006), and *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021). (Aug. 22, 2024 Hr'g Tr. 53:1–11, ECF No. 69; Mem. Supp. Mot. Reconsid. at 4 n.3.) I granted both parties the opportunity to provide supplemental briefs addressing this issue, among other things. Specifically, I ordered the parties to address: (1) "the impact of the Second Circuit's decision in *Cedeno v. Sasson*, 100 F.4th 386 (2d Cir. 2024) and *Laurent v. PricewaterhouseCoopers LLP*, 945 F.3d 739 (2d Cir. 2019), on the Court's analysis of the motion for reconsideration of the Order's dismissal of Duke's Section 502(a)(2) claim for lack of Article III standing"; (2) "whether, if the Court were to grant reconsideration of the dismissal of the Section 502(a)(2) claim, the Court should address the enforceability of the arbitration agreement as to that claim"; (3) "whether the arbitration agreement is enforceable

as to the Section 502(a)(2) claim in light of [the] agreement's representative/class action waiver and *Cedeno*, 100 F.4th 386"; and (4) "any impact of a finding that the arbitration agreement is unenforceable against the Section 502(a)(2) claim on the arbitrability of the Section 502(a)(3) claim." (Elec. Order, Aug. 22, 2024.)

The parties filed their supplemental briefs. (Pl.'s Suppl. Br. Supp. Mot. Reconsid., ECF No. 70; Defs.' Suppl. Br. Opp'n Mot. Reconsid., ECF No. 71.) On November 12, 2024, Duke filed another notice of supplemental authority, attaching the Sixth Circuit's decision in *Fleming v. Kellogg Co.*, No. 23-cv-1966, 2024 WL 4534677 (6th Cir. Oct. 21, 2024). (Pl.'s Second Not. Suppl. Auth., ECF No. 73). Defendants responded on November 19, 2024. (Defs.' Resp. Pl.'s Second Not. Suppl. Auth., ECF No. 74.)

STANDARD OF REVIEW

The standard for granting a motion for reconsideration is "strict." *Cho v. Blackberry Ltd.*, 991 F.3d 155, 170 (2d Cir. 2021) (citation omitted). The decision to grant or deny the motion for reconsideration rests within "the sound discretion of the district court." *Aczel v. Labonia*, 584 F.3d 52, 61 (2d Cir. 2009). "A motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (quotation marks omitted). It is "not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Analytical*

Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012) (quotation marks and alterations omitted). A party's "disagreement" with the court's "explication of the relevant legal standards and application of the standards to the facts of [the] case" does not justify the grant of a motion for reconsideration. *McGraw-Hill Glob. Educ. Holdings, LLC v. Mathrani*, 293 F. Supp. 3d 394, 398 (S.D.N.Y. 2018). The "manifest injustice" standard affords the district court substantial discretion and is rarely met. *See Chitkara v. N.Y. Tel. Co.*, 45 F. App'x 53, 55 (2d Cir. 2002).

DISCUSSION

For the reasons set forth below, I grant in part and deny in part Duke's Motion for Reconsideration (ECF No. 60) of the Order resolving Defendants' Motion to Dismiss and Motion to Compel Arbitration (ECF No. 59).

First, I grant reconsideration as to the Order's holding that Duke does not have Article III standing to pursue her claims for Plan-wide relief under Sections 409 and 502(a)(2). (Order at 10.) The Complaint plausibly alleges that Duke suffers from the concrete, particularized, and actual injury of receiving joint and survivor annuity payments that are less than what is legally required due to Defendants' use of outdated actuarial assumptions to calculate joint and survivor annuity benefits for her and others whose benefits were calculated before April 1, 2021. It also plausibly alleges that Defendants' same conduct has caused, and continues to cause, injuries to the Plan, and that the relief Duke seeks would plausibly redress the alleged injuries to the Plan and Duke. The Order committed three clear errors in its reasoning finding otherwise.

Accordingly, I hold that the Complaint withstands Defendants' facial challenge to Duke's standing to pursue Section 502(a)(2) claims on behalf of the Plan for relief afforded by Section 409.

Second, I deny reconsideration as to the Order's holding that Duke's claims under Section 502(a)(3) should be compelled to arbitration on an individual basis. (Order at 18–19.) The Order did *not*, as Duke contends, erroneously hold that Duke was required to administratively exhaust her Section 502(a)(3) claims before bringing them in federal court. Rather, the Order held that the Summary Plan Description's statement that Plan participants "may file suit in federal court" for ERISA fiduciary violations "does not . . . have any contractual force such that it could displace the parties' separate agreement to arbitrate." (*Id.*) Duke does not identify any clear error or manifest injustice in the Order's ruling that she is compelled to arbitrate her individual Section 502(a)(3) claims, and I deny reconsideration of that portion of the Order.

Third, because Duke has standing to pursue her Section 502(a)(2) claims for Plan-wide relief, I address whether the arbitration provision in Duke's agreement with Luxottica, which requires Duke to pursue any disputes only through arbitration on an individual basis and bars any class or representative action, is enforceable as to those claims. The arbitration provision requires Duke to waive her statutory rights under Sections 409 and 502(a)(2) to bring representative claims on behalf of the Plan and to seek Plan-wide remedies. It is therefore unenforceable as to Duke's Section 502(a)(2) claims.

Finally, Defendants have not met their heavy burden to show the necessity of a stay of the litigation of Duke's Section 502(a)(2) claims pending the resolution of the arbitration of the Section 502(a)(3) claims. Thus, Duke's Section 502(a)(2) claims on behalf of the Plan will proceed in this Court in parallel with arbitration of the Section 502(a)(3) claims.

I. Duke's Article III Standing to Pursue Section 502(a)(2) Claims on Behalf of the Plan

The Order dismissed Duke's Section 502(a)(2) claims on behalf of the Plan for two main reasons. First, the Order found that the Supreme Court's decision in *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020), "controls and mandates dismissal" of the Section 502(a)(2) claims because Duke, like the *Thole* plaintiffs, is "a participant in a defined benefit plan." (Order at 9–10.) The Order reasoned that Duke, as a participant in a defined benefit plan, would not experience any change in her monthly annuity payments were she to prevail on the Section 502(a)(2) claims and therefore "lacks a concrete stake in the outcome of this lawsuit." (*Id.* at 10.) Second, the Order rejected Duke's argument that, unlike the *Thole* plaintiffs, her monthly annuity payments would be larger if she were to prevail on her Section 502(a)(2) claims on behalf of the Plan. (*Id.*) The Order reasoned that Duke "nowhere alleges how [Defendants'] conduct caused any 'losses to the plan[]' or how any remedy requiring Defendants 'to make good to such plan any losses[]' would impact her benefits under the Plan." (*Id.* (quoting 29 U.S.C. § 1109(a)).)

Duke argues that reconsideration of the Order is warranted to prevent manifest injustice and to correct

errors in the Order's analysis of her standing to bring Section 502(a)(2) claims for Plan-wide relief. (Mem. Supp. Mot. Reconsid. at 4.)[3] Duke contends that the Order committed legal error because it "overlooked that the Complaint seeks remedies other than loss restoration under § 502(a)(2)," including "reformation of the Plan and an injunction ordering Defendants to fix the illegal Plan terms under § 502(a)(2)," as well as recalculation of joint and survivor annuity payments for Duke and putative class members and the distribution of "additional pension payments owed to them under the *reformed* plan." (*Id.*) Duke argues that she suffers from the concrete, particularized, and actual injury of being deprived of these additional payments due to Defendants' use of outdated actuarial assumptions, and that she therefore has standing to bring Section 502(a)(2) claims on behalf of the Plan. (*Id.* at 3–4.)

Duke also argues that *Cedeno v. Sasson*, 100 F.4th 386 (2d Cir. 2024), which held that an arbitration provision preventing an individual plaintiff from seeking plan-wide relief under Section 502(a)(2) was unenforceable, further supports her standing arguments

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[3] Duke does not seek reconsideration of the Order's denial without prejudice of Defendants' "factual challenge" to her standing to pursue Section 502(a)(2) and 502(a)(3) claims. (*See* Order at 12; *see generally* Mot.) Duke's expert attests by declaration that Duke is receiving approximately $53.62 (6.2%) less per month because of the Plan's use of outdated actuarial assumptions. (Altman Decl. ¶¶ 8–9, ECF No. 47-1.) By contrast, Defendants' expert attests that reformation of the Plan to use updated actuarial assumptions would cause Duke to receive a lower monthly amount. (Sher Decl. ¶¶ 11–14, ECF No. 41-3.) I do not rely on any of these facts in resolving this Motion.

for three reasons. First, Duke contends that although *Cedeno* did not directly address standing, the Second Circuit's decision to allow an individual plaintiff to bring claims alleging injury to the plan at issue implies that the plaintiff in that case had standing and, accordingly, that Duke has standing here as well. (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 1–2.) Second, Duke points to *Cedeno*'s holding that although "the remedies available under Section 502(a)(2) for fiduciary breaches that violate Section 409(a) inure to the benefit of *the plan*," they also "provid[e] . . . indirect relief to individual plan participants and beneficiaries." (*Id.* at 3 (citing *Cedeno*, 100 F.4th at 404 (emphasis in original)).) Third, Duke claims that *Cedeno* affirms her view that Section 502(a)(2) is a proper vehicle for seeking plan-wide remedies for plan-wide misconduct. (*Id.* at 4.)

Further, Duke argues that Defendants' reliance on *Laurent*, 945 F.3d 739, and *Varity Corporation*, 516 U.S. 489 (1996), is misplaced because those cases do not address remedies for fiduciary violations available under Sections 409 and 502(a)(2), but rather address remedies available under Section 502(a)(3). (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 5.)

A. The Order's Dismissal of the Section 502(a)(2) Claims for Lack of Article III Standing Was Based on Three Clear Errors.

The Order made three clear errors in dismissing Duke's claims under Sections 409 and 502(a)(2) on behalf of the Plan for lack of standing. Once these three errors are corrected, it is clear that Duke has standing to pursue Section 502(a)(2) claims for Plan-wide relief

because she has alleged injuries-in-fact that are concrete, particularized, and actual and that such injuries are traceable to Defendants' alleged conduct and redressable through the specific relief requested in the Complaint.

First, the Order incorrectly reasoned that Duke "nowhere alleges how [Defendants'] conduct caused any losses to the plan or how any remedy requiring Defendants to make good to such plan any losses would impact her benefits under the Plan." (Order at 10.) This reasoning overlooks the Complaint's well-pled allegations that Defendants' use of outdated actuarial assumptions to calculate joint and survivor annuity benefits causes harm to the Plan as a whole. The Complaint alleges "[o]n information and belief" that Defendant Luxottica and/or Defendant Oakley "is the 'plan sponsor'" as defined by 29 U.S.C. § 1002(16)(B),[4]

[4] Allegations made "upon information and belief" "will [only] . . . make otherwise unsupported claims plausible when 'the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.'" *Evergreen E. Coop. v. Whole Foods Mkt., Inc.*, No. 21-2827-CV, 2023 WL 545075, at *2 (2d Cir. Jan. 27, 2023) (citing *Citizens United v. Schneiderman*, 882 F.3d 374, 384–85 (2d Cir. 2018)). Here, I find that the allegations that Defendants Luxottica and Oakley are Plan sponsors—allegations that are made "upon information and belief" in paragraphs 28 and 29 of the Complaint—are also supported by numerous factual allegations giving rise to the inference that Defendants are "plan sponsors" under 29 U.S.C. § 1002(16)(B) ("Section 1002(16)(B)"). Section 1002(16)(B) defines "plan sponsor" to mean, in relevant part, "the employer in the case of an employee benefit plan established or maintained by a single employer." 29 U.S.C. § 1002(16)(B)(i). The Complaint alleges, in turn, that Duke was employed by Luxottica and that Luxottica maintained the Plan at issue. (*See* Compl. ¶¶ 27, 30–31.)

and that "the Plan sponsor(s) and various companies affiliated with [them] make contributions to the Plan to fund retirement benefits promised under the Plan" and are collectively referred to as "Luxottica North America" in the Summary Plan Descriptions. (Compl. ¶¶ 28–29.) It further alleges that the Plans Committee breached its fiduciary duties by using outdated actuarial assumptions to calculate joint and survivor annuities, which "in turn allowed Luxottica North America and/or plan sponsor(s) to save money *by reducing the amount contributed to the Plan to fund benefits*." (*Id.* ¶ 66 (emphasis added).) The Complaint also alleges that "Luxottica North America and/or plan sponsor(s) in fact received and continues to receive direct financial benefits from paying participants joint and survivor annuities that are less than the law allows, *which improperly reduces the funding obligations to the Plan*." (*Id.* ¶ 84 (emphasis added).)

Failing to acknowledge these allegations of harm to the Plan as a whole from Defendants' use of outdated actuarial assumptions, the Order incorrectly reasoned that Duke "nowhere alleges how [Defendants'] conduct caused any 'losses to the plan' " under Section 409. (Order at 10; *see id.* at 7–12 (not recognizing the allegations in Complaint paragraphs 28–29, 66, and 84).)[5] The Order erred by overlooking these

[5] To the extent Defendants argue that the alleged systemic underfunding of the Plan due to Defendants' use of outdated actuarial assumptions does not constitute a "loss" experienced by the Plan as that term is used in Section 409, that is a factual question to be resolved after discovery. As noted previously, Defendants brought a factual challenge to Duke's standing under

allegations and thereby failing to accept as true all material factual allegations of the Complaint and to draw all reasonable inferences in favor of Duke in considering Defendants' Rule 12(b)(1) motion. *Bohnak v. Marsh & McLennan Cos., Inc.*, 79 F.4th 276, 283 (2d Cir. 2023); *see also All. for Env't Renewal, Inc. v. Pyramid Crossgates, Co.*, 436 F.3d 82, 88 n.7 (2d Cir. 2006) ("[A] facial challenge . . . accepts the jurisdictional facts pleaded and challenges only their sufficiency.").

Second, the Order overlooked the Complaint's request for specific forms of Plan-wide equitable relief to remedy the alleged harms to the Plan and Duke. The Complaint alleges that "[h]ad Duke's benefits been determined using reasonable actuarial assumptions . . . her joint and survivor annuity would be larger . . . ." (Compl. ¶ 27.) It seeks, among other relief: (1) "[r]eformation of the Plan" to provide for proper actuarial assumptions in the calculation of joint and survivor annuity payments for Duke and members of the putative class, whose joint and survivor annuity payments were calculated before April 1, 2021; (2) an injunction requiring fiduciaries to fix the Plan's use of outdated actuarial assumptions (relief overlapping with the first form of requested relief); (3) an injunction ordering Defendants to recalculate and pay all amounts owed to Duke and other members of the putative class because their past joint and survivor annuity payments were allegedly lower than legally required due to Defendants' use of outdated actuarial assumptions;

Rule 12(b)(1), but the Order dismissed that motion without prejudice. (*See* Order at 12.) No party sought reconsideration of that ruling. (*See generally* Mem. Supp. Mot. Reconsid.).

(4) "restoration of losses to the Plan and its participants";[6] (5) "disgorgement of any benefits or profits the Plans Committee received" by using outdated actuarial assumptions;[7] and (6) "all appropriate injunctive relief, such as an order requiring the Plans Committee to pay all Plan participants fully-ERISA compliant benefits in the future." (*See* Compl. at 29–31, ¶¶ D–E, L.)[8] The Order did not recognize any of these forms of relief requested in the Complaint other than loss restoration. (*See* Order at 6–12.)

Thus, the Complaint seeks numerous forms of equitable relief that would require Plan administrators to change the way they calculate joint and survivor annuities for people whose benefits were calculated using the pre-amendment assumptions. Such Plan-

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[6] This request for loss restoration is also framed as seeking a "payment to the Plan of the amounts owed to Class members . . . so that those amounts owed can be provided to Plan participants." (Compl. ¶ L.)

[7] This request for disgorgement of profits is also framed as seeking restitution of all amounts Defendants kept in the Plan but were obliged to pay to Duke and other members of the putative class in accordance with ERISA's actuarial equivalence, anti-forfeiture, and joint-and-survivor requirements, and separately as a "surcharge" that "total[s] the amounts owed to participants and/or the amount of unjust enrichment obtained by Defendants as a result" of the use of outdated actuarial assumptions. (Compl. at 30–31, ¶¶ J, L.)

[8] The Complaint also seeks a declaration that the actuarial assumptions used to calculate joint and survivor annuities for Duke and members of the putative Class violate ERISA's actuarial equivalence requirement, 29 U.S.C. § 1054(c)(3), anti-forfeiture provision, 29 U.S.C. § 1053(a), and joint and survivor annuity requirement, 29 U.S.C. § 1055(a)–(d). (Compl. at 28–31, ¶¶ A–B.)

wide relief would plausibly remedy the alleged underpayment to Duke as well as the alleged injuries to the Plan caused by Defendants' systemic underpayment of joint and survivor annuity benefits to Duke and members of the putative class, which include: (1) systemic underfunding of the Plan by its sponsors and (2) the Plan's non-compliance with ERISA's actuarial equivalence, joint-and-survivor, and anti-forfeiture requirements. By overlooking the equitable relief sought in the Complaint, the Order incorrectly concluded that Duke lacks a concrete financial stake in the Section 502(a)(2) claims brought on behalf of the Plan to secure Plan-wide remedies under Section 409, which explicitly affords "appropriate" "equitable and remedial relief" for fiduciary violations.

Third, the Order incorrectly concluded that the Supreme Court's decision in *Thole* "mandates dismissal" of Duke's Section 502(a)(2) claims based on a misunderstanding of the distinctions between the claims in these two cases and the well-pled factual allegations in the Complaint. (Order at 9–10.) In *Thole*, the Supreme Court held that two retired participants in a defined benefit plan lacked Article III standing to sue the plan's fiduciaries for ERISA violations stemming from allegedly poor investment decisions, where the plaintiffs "would still receive the exact same monthly benefits that they are already slated to receive," whether they won or lost their ERISA claims. 590 U.S. at 541. By contrast, Duke does not challenge Defendants' poor investment decisions; she challenges Defendants' use of outdated actuarial assumptions to calculate joint and survivor annuity benefit payments for her and hundreds, if not thousands, of others and seeks equitable relief to reform the Plan so that, going

forward, benefit payments are calculated using reasonable actuarial assumptions resulting in larger payments and thereby greater funding for the Plan. This distinction is critical. The Complaint plausibly alleges that changing the way Defendants calculate joint and survivor annuity benefits for those whose benefits were calculated before April 1, 2021 would directly, concretely, and measurably increase the amount of Duke's monthly joint and survivor annuity payments. Thus, unlike the *Thole* plaintiffs, Duke has plausibly alleged that she will materially benefit from prevailing on her Section 502(a)(2) claims on behalf of the Plan.

The Order thus misapplied Thole to conclude that, because Duke "is a participant in a defined benefit plan[,] . . . . whether or not she secures recovery for the Plan . . . she will still receive the exact same monthly benefits that she is already slated to receive." (Order at 10 (citing *Thole*, 590 U.S. at 541, 543) (quotation marks and alterations omitted).) This was error. The fact that Duke is a participant in a *defined benefit plan*, rather than a defined contribution plan, is not dispositive of the Section 502(a)(2) standing question here, where the Complaint presents well-pled allegations that Duke's monthly benefit payments will *increase* if Defendants are prohibited from applying a mortality table that is "fifty years out of date" and a 7% interest rate to calculate joint and survivor annuities for Duke and many others. (Compl. ¶¶ 57–58.)

B. Standing Analysis for the Section 502(a)(2) Claims

A standing analysis that corrects the three errors identified above leads to the conclusion that Duke's

Section 502(a)(2) claims for Plan-wide relief survives Defendants' facial Rule 12(b)(1) challenge. The Complaint demonstrates that Duke meets the three requirements for Article III standing: (1) she has suffered, and will continue to suffer, "an injury in fact that is concrete, particularized, and actual or imminent"; (2) it is plausible that "the injury was caused by the defendant[s]"; and (3) it is plausible "that the injury would likely be redressed by the requested judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021); *see also Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016) (recognizing that a court must "accept[ ] as true all material factual allegations of the complaint" on a facial challenge to standing) (alterations omitted).

TransUnion requires courts to analyze standing "for each claim that [plaintiffs] press and for each form of relief that they seek (for example, injunctive relief and damages)," 594 U.S. at 431, and, accordingly, I do so here.

ERISA Sections 409 and 502(a)(2) work in tandem to provide a path for plan participants to bring civil actions against plan fiduciaries who breach their duties to the plan. Section 409(a) describes the liability that attaches for breach of fiduciary duty. 29 U.S.C. § 1109. Section 502(a)(2) permits a plan participant or beneficiary, among others, to bring a civil action on behalf of the plan and to seek "appropriate relief" under Section 409, 29 U.S.C.§ 1132(a)(2), for breach of "any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter," 29 U.S.C.

§ 1109.[9] As a threshold matter, the Complaint alleges that Defendants have breached fiduciary duties by using actuarial assumptions that violate ERISA's actuarial equivalence, anti-forfeiture, and joint-and-survivor annuity provisions set forth in 29 U.S.C. §§ 1053(a), 1054(c)(3), 1055(a)–(d). (Compl. ¶¶ 102, 107, 111, 116, 120, 122.)[10]

As previously discussed, Duke seeks, among other relief: (1) "[r]eformation of the Plan" to provide for proper actuarial assumptions in the calculation of joint and survivor annuity payments for Duke and members of the putative class; (2) an injunction requiring fiduciaries to fix the Plan's use of outdated actuarial assumptions (relief overlapping with the first form of requested relief); (3) an injunction ordering Defendants to recalculate and pay all amounts owed to Duke and other members of the putative class because their past joint and survivor annuity payments were allegedly lower than legally required due to Defendants' challenged conduct; (4) "restoration of losses to the Plan and its participants"; (5) "disgorgement of any benefits or profits the Plans Committee received"

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[9] ERISA Subchapter I, pertaining to "Protection of Employee Benefit Rights," encompasses ERISA Sections 1–734c, 29 U.S.C. §§ 1001–1191c. Accordingly, all provisions of ERISA relevant here fall under this subchapter: the actuarial equivalence requirement, 29 U.S.C. § 1054(c)(3), the anti-forfeiture provision, 29 U.S.C. § 1053(a), and the joint and survivor annuity requirement, 29 U.S.C. § 1055(a)–(d), liability for breaches of fiduciary duty, 29 U.S.C. § 1109, and civil enforcement, 29 U.S.C. § 1132.

[10] As noted above, the Order did not resolve Defendants' Rule 12(b)(6) motion to dismiss. (Order at 20.) Therefore, I make no determination at this time whether the Complaint withstands such a challenge.

by using outdated actuarial assumptions,; and (6) "all appropriate injunctive relief, such as an order requiring the Plans Committee to pay all Plan participants fully-ERISA compliant benefits in the future." (*See* Compl. at 29–31, ¶¶ D–E, L.) I address Duke's standing to pursue Section 502(a)(2) claims for each of these forms of relief in turn.

The Complaint sufficiently alleges Duke's standing to assert claims under Sections 409 and 502(a)(2) for plan reformation and overlapping injunctive relief to fix the Plan's use of outdated actuarial assumptions and ensure that Duke and putative class members receive ERISA-compliant benefits going forward. (*See* Compl. at 29, ¶¶ D–E, L (requesting such relief).) First, the Complaint's allegation that Duke has received, and will continue to receive, lower monthly joint and survivor annuity payments due to Defendants' use of the challenged actuarial assumptions alleges an injury in fact that is concrete, particularized, and actual. (*Id.* ¶¶ 27, 57–62); *see also TransUnion*, 594 U.S. at 423; *Thole*, 590 U.S. at 540. Second, the Complaint plausibly alleges that Defendants caused Duke's injury by using outdated actuarial assumptions that fail to reflect significant advances in mortality, including a mortality table that is "fifty years out of date" and a 7% interest rate. (Compl. ¶¶ 27, 59–60); *TransUnion*, 594 U.S. at 423; *Thole*, 590 U.S. at 540. Third, the remedy of reforming the plan by "eliminat[ing] and bar[ring] any future use of actuarial assumptions that result in less than the actuarial equivalent value of the participant's single life annuity at retirement" would plausibly redress this injury, as would the requested injunction requiring that future

annuity payments to Duke and members of the putative class comply with ERISA's actuarial equivalence, anti-forfeiture, and joint-and-survivor annuity requirements. (Compl. at 29, ¶ E(ii).) Unlike the *Thole* plaintiffs, if I were to grant Duke the plan reformation and overlapping injunctive relief that she seeks, Duke would receive higher monthly monetary payments going forward due to the use of updated actuarial equivalency formulas (*see* Compl. ¶ 61),[11] which would plausibly require Defendants Luxottica and Oakley and other Plan contributors to increase funding to the Plan to cover these higher payments to hundreds, if not thousands, of recipients whose benefits were calculated using pre-amendment assumptions (*see* Compl. ¶¶ 66, 84). If Duke were to lose her claim for plan reformation and related injunctive relief, she would miss out on these additional sums, and Defendants Luxottica and Oakley and other Plan contributors would not increase their funding of the Plan to cover higher payments to those whose joint and survivor annuities were calculated before April 1, 2021.

Likewise, the Complaint adequately alleges Duke's standing to bring claims under Sections 409 and 502(a)(2) seeking to restore losses to the Plan and the related recalculation and payment of all amounts owed to Duke and members of the putative class to remedy historic underpayment of their joint and sur-

[11] According to Duke's expert, Defendants' use of updated and reasonable actuarial assumptions could result in her receiving a 6.2% higher monthly payment. (Altman Decl. ¶ 8.) Defendants' expert challenged this finding (Sher Decl. ¶¶ 11–14), and the Order denied without prejudice Defendants' factual challenge to Duke's standing. (Order at 12.)

vivor annuities. (*Id.* at 29, ¶ E(iv); 31, ¶ L.) As discussed above, Duke plausibly alleges a concrete, particularized, and actual injury caused by Defendants: by failing to use the proper actuarial tables and interest rate, Defendants have allegedly deprived the Plan of funds needed to pay Duke and other Plan beneficiaries the amounts due to them had their annuities been calculated using the proper actuarial equivalency formulas. (*Id.* ¶¶ 27, 59–60); *see also TransUnion*, 594 U.S. at 423. Loss restoration and the recalculation and payment of amounts owed to Duke and members of the putative class work together to redress both Duke's alleged injury of receiving past annuity payments that are lower than what she is legally entitled to and the Plan's related injury of sustaining underfunding and related losses due to the Plan Committee's use of outdated actuarial assumptions to calculate joint and survivor annuity payments for hundreds, if not thousands of recipients. This backward-looking relief is akin to restitution and will plausibly redress Duke's financial losses by ensuring that the funds restored to the Plan are properly distributed.

Finally, the Complaint sufficiently alleges that Duke has standing to pursue claims under Sections 409 and 502(a)(2) for disgorgement of profits earned by the Plans Committee due to their use of outdated actuarial assumptions to under-calculate joint and survivor annuities for Duke and members of the putative class. Again, Duke plausibly alleges that Defendants caused her a concrete, particularized, and actual injury by using improper actuarial calculations and thus paying her reduced monetary amounts on her joint and survivor annuity. Compl. ¶¶ 27, 59–60; *see*

also TransUnion, 594 U.S. at 423. She plausibly alleges that Luxottica North America and/or the Plan sponsors "received and continue to receive direct financial benefits from paying participants joint and survivor annuities that are less than the law allows." (Compl. ¶ 84.) The Complaint seeks remedies that would redress this alleged harm, including disgorgement of the profits earned through Defendants' use of the money owed to Duke and other joint-and-survivor annuity recipients, "restitution of all amounts Defendants kept in the Plan but were obliged to pay to [Duke] and other members of the putative class in accordance with ERISA §§ 203(a), 204(c)(3), and 205(a)-(d)," and a "[s]urcharge" that "total[s] the amounts owed to participants and/or the amount of unjust enrichment obtained by Defendants as a result" of the use of outdated actuarial assumptions. (*Id.* at 30, ¶¶ H–J.).

The conclusion that Duke has standing to pursue her Section 502(a)(2) claims for various forms of Plan-wide relief is supported by *Franklin*, 721 F. Supp. 3d 386. In *Franklin*, the district court held that a participant in a defined benefit plan had standing to pursue Section 502(a)(2) claims against defendants who, like Defendants in this case, are alleged to "use . . . outdated and unreasonable actuarial equivalency formulas" for calculating joint and survivor annuity benefits, with the result that the plaintiff's monthly benefit was reduced "by $64.32." 721 F. Supp. 3d at 389, 391. The court in *Franklin* found that the plaintiff "has suffered an injury in fact—reduced monetary benefits—and that this monetary harm is causally related to the conduct she seeks to challenge on behalf of the entire Plan—the use of outdated and unreasonable actuarial equivalency formulas." *Id.* at 391. It

further found that success on the Section 502(a)(2) claims would lead to an "injunction requiring the defendant fiduciaries to recalculate benefits . . . and her monthly benefit will increase, further strengthening the causal link." *Id.* at 391–92. Finally, the court rejected the argument that the plaintiff had failed to show that the requested relief would benefit the Plan, finding that the relief sought to "bring the Plan into compliance with ERISA's actuarial equivalence requirement so it can pay fully ERISA-compliant benefits in the future," and so that "the defendants restore losses to the Plan." *Id.* at 392 (quotation marks omitted).

C. Defendants' Arguments

Defendants make four overarching arguments against granting the Motion for Reconsideration. Each of them is unpersuasive.

First, Defendants maintain that the Order correctly held that the Supreme Court's decision in *Thole* requires dismissal of the Section 502(a)(2) claims and rejected Duke's arguments to distinguish *Thole*. (Opp'n Mot. Reconsid. at 6.) Defendants fail to acknowledge the substantive distinction between the claims made in *Thole* against fiduciaries' allegedly poor investment decisions and Duke's claims against Defendants' use of outdated actuarial assumptions in calculating benefit payments, as discussed above. Whereas the success of the claims in *Thole* would not have altered the monthly benefit payments made to the plaintiffs in that case, Duke's success on her Section 502(a)(2) claims would result in reformation of the Plan and an injunction against the use of outdated

actuarial assumptions, which would cause Duke to receive larger monetary payments. To the extent that Defendants seek to argue that Duke would not actually receive more money if the Plan is reformed to use updated actuarial assumptions to calculate joint and survivor annuity payments for those whose benefits were calculated before April 1, 2021, that argument relates to Defendants' factual challenge to Duke's standing. The Order denied Defendants' fact-based standing challenge without prejudice because "the motion presents a complex question of fact that is not properly resolved on a motion to dismiss." (Order at 12.) Neither party moved to reconsider that determination, and thus I do not revisit it.

Second, Defendants invoke the Supreme Court's holding in *TransUnion* that "plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek" and argue that Duke cannot demonstrate standing with respect to each form of relief requested under Sections 409 and 502(a)(2). (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 1 (citing *TransUnion*, 594 U.S. at 431).) Concerning loss restoration, Defendants contend that Duke has no standing to pursue this remedy under Section 502(a)(2) because the Complaint does "not allege any harm *to the Plan* that also caused her a personal Article III injury in fact." (Opp'n Mot. Reconsid. at 5; *see also* Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 2–3.) Concerning plan reformation and injunctive relief, Defendants again contend that the Complaint does not allege any harm to the Plan and that, in fact, reforming the Plan to pay beneficiaries additional payments would diminish the Plan's assets. (Opp'n Mot. Reconsid. at 6.)

Defendants' argument under *TransUnion* fails. As I explained above, standing is satisfied with respect to each of the Plan-wide remedies Duke seeks under Sections 409 and 502(a)(2). *See supra* Section I.B. Indeed, the Complaint *does* allege that Defendants' use of outdated actuarial assumptions has harmed and continues to harm Duke by unlawfully reducing her monthly joint and survivor annuity payments such that they are not equivalent to the value of a single life annuity. (Compl. ¶¶ 27, 57–60, 84.) The Complaint also alleges that this harm to Duke and others whose joint and survivor annuity benefits were calculated before the 2021 amendment causes the Plan the injuries of systemic underfunding and ongoing non-compliance with ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor requirements. (*Id.* ¶¶ 68–72, 83–84.) These injuries are plausibly redressed by the requested relief of Plan reformation and related injunctive relief to correct the Plan terms and to ensure that Duke and putative class members receive ERISA-compliant payments going forward. (*Id.* at 29, ¶¶ D–E; 31, ¶ L.) Furthermore, the relief of loss restoration and an injunction requiring the recalculation and repayment of all amounts owed to Duke and members of the putative class plausibly redresses the alleged historic underpayment of joint and survivor annuities to Duke and members of the putative class and the resulting systemic underfunding of the Plan and related Plan losses. (*Id.* ¶¶ 66, 84.) Finally, the Complaint also alleges that Defendants financially benefitted from underpaying Duke and members of the putative class due to the use of the challenged actuarial

assumptions, which is plausibly redressed by the requested disgorgement of profits. (*Id.* ¶¶ 66, 84; *id.* at 30, ¶ H.)[12]

Defendants argue that "[t]he 'injunction' Plaintiff seeks requiring the Plan to be reformed and pay her additional benefits is not a remedy *to the Plan*, does not reflect an injury *to the Plan*," and would "leave fewer assets in the Plan – not more." (Opp'n Mot. Reconsid. at 6.) This argument again entirely ignores the Complaint's well-pled allegation that Defendants' use of outdated actuarial assumptions causes Defendants Luxottica and Oakley and other Plan contributors to "reduc[e] the amount contributed to the Plan to fund benefits." (Compl. ¶ 66.) It also ignores the well-pled allegation that these Defendants and other Plan contributors "in fact received and continue to receive direct financial benefits from paying participants joint and survivor annuities that are less than the law allows, *which improperly reduces the funding obligations to the Plan*." (*Id.* ¶ 84 (emphasis added).) As discussed, the Order erred by not accepting these allegations as true "and draw[ing] all reasonable inferences in favor of the plaintiff" in resolving Defendants' Rule

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[12] Thus, the Complaint "demonstrate[s] standing for each claim [Duke] seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2019). Although Defendants invoke *DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332 (2006), to challenge Duke's standing, my analysis does not hinge on the notion squarely rejected in that case that standing to pursue a claim for one form of relief automatically suffices to support standing for all claims for relief that "aris[e] from the same nucleus of operative fact," *id.* at 352. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

12(b)(1) motion. *Lacewell v. Off. of Comptroller of Currency*, 999 F.3d 130, 140 (2d Cir. 2021) (brackets omitted).

Third, Defendants argue that Sections 409 and 502(a)(2) authorize relief to the Plan alone and not any remedies to individual Plan participants and beneficiaries, and rely on *Varity Corporation*, 516 U.S. 489; *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134 (1985); *Caban v. New York City District Council of Carpenters Pension Plan*, No. 19-cv-6205, 2020 WL 5774901, at *5 (S.D.N.Y. Sept. 28, 2020); *Laurent*, 945 F.3d 739 (2d Cir. 2019); and *Cedeno*, 100 F.4th 386. (Opp'n Mot. Reconsid. at 7–8; Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 4–5.) Defendants' arguments on this score are unpersuasive. As addressed in the Order, Section 502(a)(2) authorizes a participant or beneficiary of an ERISA plan to bring an action on behalf of the plan against a fiduciary who has violated Section 409. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2). *Russell* made clear that Section 409 "inures to the benefit of the plan as a whole" and does not "authorize any relief except for the plan itself." 473 U.S. at 140, 144. The plain text of Section 409(a) permits such relief to take various forms, including: (1) loss restoration, (2) disgorgement of profits, and (3) "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a).[13] Duke seeks relief that falls into each of

[13] The full text of Section 409(a) 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

these three categories: reformation of the Plan and injunctive relief to provide for proper actuarial assumptions and to ensure that the Plan complies with ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor annuity requirements going forward (category 3); "restoration of losses to the Plan and its participants" (category 1); injunctive relief requiring the recalculation and payment of past benefits owed to Duke and other putative class members (category 3); and disgorgement of profits (category 2). (Compl., at 5, 29; *id.* at 29–31 ¶¶ D–E, L.) None of the cases cited by Defendants—*Russell*, *Varity Corporation*, *Caban*, *Laurent*, and *Cedeno*—address a Section 502(a)(2) claim seeking reformation of a plan in order to bring the plan into compliance with the ERISA's actuarial equivalence, anti-forfeiture, and joint and survivor annuity requirements in order to benefit *both* the Plan as well as individual benefit recipients.

Moreover, "[t]he central holding of *Russell* is that [S]ections 409 and 502(a)(2) of ERISA do not provide for the recovery of extra-contractual damages for breaches of fiduciary duty that affect only the individual plaintiff." *Coan v. Kaufman*, 457 F.3d 250, 259 (2006) (citing *Russell* at 136–37). By contrast, Duke's Section 502(a)(2) claims seek reformation of the Plan to benefit the Plan as a whole as well as hundreds, if

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> to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> 29 U.S.C. § 1109(a).

not thousands, of others like herself, whose joint and survivor annuity benefits were calculated using pre-2021 actuarial assumptions. Finally, *Varity Corporation* and *Caban* are both distinguishable because the plaintiffs in those cases sought only personal relief—not plan-wide relief. In *Varity Corporation*, the plaintiffs sought an injunction reinstating them into their benefit plan, rather than plan-wide relief. 516 U.S. at 495. And in *Caban*, the plaintiff sought "reinstatement of his Vesting Credits" so that he could become fully vested in a defined benefit plan after having lost the credits due to a break in his work as a carpenter. *Caban*, 2020 WL 5774901, at *2, *4.[14] [15]

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[14] Defendants also rely on *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), which is distinguishable. In *CIGNA*, the plaintiff alleged that defendants breached their fiduciary duties by underpaying her pension and requested reformation of the Plan and an injunction requiring the Plan to pay her additional benefits as required under Section 502(a)(3). 563 U.S. at 440–41. Unlike Duke, the plaintiff in *CIGNA* did not request plan-wide relief under Sections 409 and 502(a)(2), and the Supreme Court makes no mention of Sections 409 and 502(a)(2) or whether the relief sought would be appropriately requested under these ERISA provisions. *See generally* 563 U.S. 421.

[15] Defendants take issue with Duke's reliance on *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 102–03 (2d Cir. 2011), for the notion that "while loss restoration requires a showing of loss, the injunctive and other equitable relief authorized by § 502(a)(2) do not require such a showing." (Opp'n Mot. Reconsid. at 8–9; *see also* Reply Supp. Mot. Reconsid. at 5–6 (discussing *Faber*).) Relying on its earlier decision in *Century States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Car, L.L.C.*, 433 F.3d 181, 199–200 (2d. Cir. 2005), the Second Circuit noted in *Faber* that "a plaintiff may have Article III standing to obtain injunctive relief related to ERISA's fiduciary duty requirements without a showing of individual harm,

Fourth, Defendants argue that the forms of Plan-wide relief sought by Duke's Section 502(a)(2) claims, including the request for Plan reformation and "an injunction requiring the Plan to pay her additional actuarial equivalent benefits" are only available under Section 502(a)(3). (Opp'n Mot. Reconsid. at 6–7; *see also* Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 4–5.) According to Defendants, a finding that Duke has standing to bring her Section 502(a)(2) claims would render Section 502(a)(3) superfluous and "upend almost all of the Supreme Court's jurisprudence about the scope and limits of both § 1132(a)(2) and § 1132(a)(3)." (Opp'n Mot. Reconsid. at 8 n.2.) Defendants argue that *Varity Corporation* and *Laurent* held that Section 502(a)(3) only affords remedies "for injuries caused by violations that § 502 does not elsewhere adequately remedy." (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 5 (citing *Varity Corp.*, 516 U.S. at 512).) According to Defendants, because *Laurent* holds that

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whereas obtaining restitution or disgorgement under ERISA requires that a plaintiff satisfy the strictures of constitutional standing by demonstrating individual loss; to wit, that they have suffered an injury-in-fact." 648 F.3d at 102 (quotation marks and alterations omitted). Because *Faber* applied the Second Circuit's precedent in the context of a Section 502(a)(3) claim, it does not resolve the question before me of Duke's standing to bring Section 502(a)(2) claims for plan-wide equitable relief. Moreover, as required by *TransUnion*, 594 U.S. at 431, I evaluate Duke's standing to pursue each form of relief sought under her Section 502(a)(2) claims and find that the Complaint sufficiently alleges that Duke has suffered injuries-in-fact that are concrete, particularized, and actual, that the Defendants plausibly caused the injuries, and that such injuries are plausibly redressed by the requested relief. *See supra* Section I.B.

plan reformation and other injunctive relief *are* available under Section 502(a)(3), these remedies *are not* available under Section 502(a)(2). (*Id.*)

Defendants' reliance on *Laurent* and *Varity Corporation* is misplaced. In *Laurent*, 945 F.3d at 747, the Second Circuit held that Section 502(a)(3) authorizes the relief of plan reformation to correct a plan that violates ERISA, but did not address whether such equitable relief is *also* available to remedy fiduciary violations under Sections 409 and 502(a)(2). Both *Laurent* and *Varity Corporation* stand for the proposition that Section 502(a)(3) provides relief that is unavailable under other subsections of 502(a), *not* that *all forms* of relief available under Section 502(a)(3) are *categorically unavailable* under other subsections of 502(a). In other words, these cases do not hold that Section 502(a)(3) affords *only* relief unavailable under other Section 502(a) subsections. *See Laurent*, 945 F.3d at 748 ("And the Supreme Court has expressly identified § 502(a)(3) as occupying a special 'catchall' remedial role in ERISA's statutory scheme, *particularly* in instances where other remedies for violations of the statute may be unavailable.") (emphasis added); *Varity Corp.*, 516 U.S. at 512. In any event, as noted above, Section 409, which is enforced through Section 502(a)(2), expressly provides that a plaintiff may seek "such other equitable relief as the court may deem appropriate" on a plan-wide basis. 29 U.S.C. § 1109(a).

For all of these reasons, Duke has shown that the Order misapplied *Thole* and overlooked factual allegations in the Complaint concerning injuries to the Plan caused by Defendants' challenged conduct and Duke's request for various forms of Plan-wide equitable relief

that would plausibly remedy those harms and Duke's injuries. *See N. Am. Olive Oil Ass'n v. D'Avolio Inc.*, No. 16-cv-6986, 2018 WL 3973011, at * 2 (E.D.N.Y. Aug. 20, 2018) (granting reconsideration where the court "overlooked [certain] facts alleged in the complaint" relevant to plaintiff's individual standing). Reconsideration of the Order's dismissal of the Section 502(a)(2) claims is warranted "to correct a clear error" and to "prevent manifest injustice." *Kolel Beth*, 729 F.3d at 104. Duke has met the requirements for Article III standing to bring Section 502(a)(2) claims on behalf of the Plan for Plan-wide relief.

II. The Order's Rulings on the Motion to Compel Arbitration

After dismissing the Section 502(a)(2) claims, the Order ruled that the arbitration provision in the parties' Agreement applies to Duke's Section 502(a)(3) claims for three reasons. First, it noted that the parties did not dispute that Duke agreed to arbitrate some disputes with Luxottica and that "ERISA claims are generally arbitrable." (Order at 14.) Second, it relied on the text of the arbitration provision to conclude that it "unequivocally . . . applies to claims arising under ERISA" with a carveout for Section 502(a)(1) claims that does not apply to Duke. (*Id.* at 15–16.) Third, the Order found a "substantial nexus between Plaintiff's claims and her employment" and concluded that Duke's Section 502(a)(3) claims therefore "reasonably" fall within the text of the arbitration provision in the Agreement, which applies to disputes "arising out of or related to the employment relationship." (*Id.* at 4, 17.)

The Order also addressed Duke's two arguments against enforceability of the arbitration agreement. First, it acknowledged, but did not resolve, Duke's contention that the "class action waiver is unenforceable because it forbids the assertion of certain statutory rights," reasoning that "because the Court has dismissed Plaintiff's claims under § 502(a)(2) for lack of standing, those concerns do not apply." (*Id.* at 18 (alterations omitted).) Second, the Order rejected Duke's argument that the arbitration agreement is unenforceable because the Summary Plan Description informs participants that they may bring suit in federal court to challenge fiduciaries' ERISA violations. (*Id.* at 18–19.) The Order concluded that the Summary Plan Description "does not . . . have any contractual force such that it could displace the parties' separate agreement to arbitrate." (*Id.* at 19.)

Duke seeks reconsideration of the portion of the Order compelling arbitration of the Section 502(a)(3) claims, which held that the arbitration provision is enforceable even though the Summary Plan Description explicitly stated that participants "may file suit in federal court" for ERISA fiduciary violations. (Mem. Supp. Mot. Reconsid. at 5.) As discussed below, Duke does not identify any clear error or manifest injustice in the Order's ruling that she is compelled to arbitrate her Section 502(a)(3) claims on an individual basis, and I deny reconsideration of that portion of the Order.

Nevertheless, because I have found that Duke has standing to pursue Section 502(a)(2) claims and because the Order did not address the substance of

Duke's challenge to the enforceability of the arbitration provision as to these claims, I must determine whether the arbitration provision applies to Duke's Section 502(a)(2) claims on behalf of the Plan. I conclude that the Class Action Waiver is unenforceable as to these claims because it is squarely contrary to Second Circuit precedent prohibiting arbitration provisions that fail to permit individuals to pursue statutory rights, including the right to bring representative claims and secure Plan-wide relief under Sections 409 and 502(a)(2).

A. The Order Did Not Overlook Controlling Authority in Ruling that Duke's Section 502(a)(3) Claims are Subject to Arbitration.

Duke argues that the Order erred in requiring arbitration of her Section 502(a)(3) claims on an individual basis because it incorrectly reasoned that she "was required to exhaust her claims administratively with the Plan" prior to bringing suit and thereby "overlooked controlling authority holding that administrative exhaustion is not required." (Mem. Supp. Mot. Reconsid. at 2.) According to Duke, the Summary Plan Description explicitly states that participants "may file suit in federal court" to challenge ERISA violations by Plan fiduciaries, as Duke did here. (*Id.* at 5 (citing Summary Plan Description, ECF No. 40-3, at 15).) Duke asserts that the arbitration provision is unenforceable because it is contrary to the Summary Plan Description and is not located in any Plan document. (*Id.*)

Defendants argue that there was no clear error or manifest injustice in the Order's ruling that Duke's

Section 502(a)(3) claims are compelled to arbitration, which was based on its interpretation of the text of the arbitration agreement. (Opp'n Mot. Reconsid. at 10–12.) Defendants contend that the Order did not require administrative exhaustion, but "only referenced the [Summary Plan Description's] claims and appeal procedures . . . because Plaintiff used it in trying to avoid her agreement to arbitrate." (*Id.* at 10) According to Defendants, Duke does not seek reconsideration of the ruling that "the [Summary Plan Description] is not a contract and does not displace the Agreement," and does not "distinguish the case law Judge Azrack relied on in deeming the Agreement enforceable . . . ." (*Id.* at 11.)

Duke has not identified any clear error in the Order's rejection of her argument that the Agreement's arbitration provision is unenforceable based on statements made in the Summary Plan Description. Instead, Duke focuses on the Order's observation that the Complaint did not allege that Duke had "complied with the Plan's claims and appeals procedures" such that Duke "can invoke the [Summary Plan Description] here." (Order at 19; *see also* Mem. Supp. Mot. Reconsid. at 4–5.) The Order, however, clearly rejected Duke's argument not on the ground of failure to exhaust, but because the Summary Plan Description "does not . . . have any contractual force such that it could displace the parties' separate agreement to arbitrate." (*Id.* at 19.) The Order did not, as Duke contends, hold that she was required to administratively exhaust the Section 502(a)(3) claims before bringing them in federal court. (*See* Reply Supp. Mot. Reconsid. at 6.) I therefore deny reconsideration of the Order's

holding that specific text in the Summary Plan Description recognizing the right of Plan participants to bring ERISA claims in federal court does not render the Agreement's arbitration provision unenforceable. Thus, Duke's Section 502(a)(3) claims remain compelled to arbitration on an individual basis.

B. The Arbitration Provision is Unenforceable as to Duke's Section 502(a)(2) Claims on behalf of the Plan.

As noted above, the Order did not resolve Duke's challenge to the enforceability of the arbitration provision as to her Section 502(a)(2) claims on behalf of the Plan. (Order at 18.) Instead, it found that "because the Court has dismissed Plaintiff's claims under § 502(a)(2) for lack of standing," the "concerns" raised in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 184 (2d Cir. 2021), and *Coan v. Kaufman*, 457 F.3d 250, 259–60 (2d Cir. 2006), about the enforceability of the arbitration provision prohibiting representative actions "do not apply." (*Id.* at 18.) However, both parties agree that this issue is fully briefed and that, if I grant reconsideration of the Order's dismissal of the Section 502(a)(2) claims for lack of Article III standing, I should address whether the arbitration provision is enforceable as to these claims. (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 6; Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 7.) Accordingly, because I grant reconsideration of the dismissal of Duke's Section 502(a)(2) claims on behalf of the Plan and conclude that she has standing to pursue them, I proceed to resolve the question of whether the arbitration provision requires Duke to arbitrate these claims on an individual basis.

1) Legal Standards

In *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), the Supreme Court held that the relevant inquiry when determining the enforceability of the arbitration clause is whether it "operate[s] as a prospective waiver of a party's right to pursue statutory remedies." *Id.* at 235 (cleaned up). This is known as the "effective vindication" exception to the enforcement of arbitration agreements. *Id.* In *Coan*, the Second Circuit underscored that a Section 502(a)(2) claim must be "brought in a representative capacity on behalf of the plan" and that such an action requires a plaintiff to "take . . . steps to become a bona fide representative of other interested parties." *Coan*, 457 F.3d at 259 (citing *Russell*, 473 U.S. at 140, 142 n.9). "Although ERISA does not specify the procedures that a plan participant must follow," satisfying the requirements of Rule 23 to serve as a class representative is "likely" sufficient, but not always necessary, to meet this standard. *Coan*, 457 F.3d at 259, 261.

Since *Coan*, the Second Circuit has expressed skepticism of arbitration provisions requiring strictly individualized arbitration of ERISA claims. In *Cooper*, the Second Circuit explained that an arbitration clause requiring arbitration on an individual basis precludes representative actions under Section 502(a)(2) because individualized arbitration does not permit the procedural safeguards required to ensure that a plaintiff is an adequate representative to bring this claim on behalf of a plan. *Cooper*, 990 F.3d at 184 (citing *Coan*, 457 F.3d at 261). Accordingly, the Second Circuit found that an arbitration clause requiring individualized arbitration of all employment claims

would likely be unenforceable as applied to Section 502(a)(2) claims, emphasizing that the ability to bring a representative action under Section 502(a)(2) is a "statutory right" that an arbitration agreement cannot override. *Id.* (quoting *Am. Express Co.*, 570 U.S. at 236). In *Lloyd v. Argent Trust Corporation*, Judge Cote of the Southern District of New York applied *Cooper* to hold that an arbitration provision is unenforceable where it "strictly prohibit[s] collective proceedings, and sharply limit[s] equitable relief," thereby "prevent[ing] a claimant from asserting rights and pursuing remedies that ERISA expressly provides" under Sections 409 and 502(a)(2). No. 22-cv-4129, 2022 WL 17542071, at *5 (S.D.N.Y. Dec. 6, 2022).

The Second Circuit recently affirmed this approach in *Cedeno*, 100 F.4th 386. In that case, plaintiff Cedeno sued his employer for alleged breaches of fiduciary duty in connection with his employer's defined contribution plan, seeking, among other relief, restoration of plan-wide losses. *Id.* at 392–93. Defendants moved to compel arbitration, citing a provision in the plan's documents prohibiting any action brought "in a representative capacity, or class, collective, or group basis" and requiring participants to resolve any plan-related claims in an individualized arbitration that limited Cedeno's loss restoration remedy to losses suffered by his individual account (*i.e.*, not plan-wide losses). *Id.* The Second Circuit, affirming the district court's denial of the defendants' motion to compel arbitration, found the relevant arbitration provisions to be unenforceable because they "operate as a prospec-

tive waiver of claimants' statutory rights and remedies" for plan-wide relief under Sections 409(a) and 502(a)(2). *Id.* at 400.

Sister circuits addressing the same issue have reached the same conclusion. *See Fleming v. Kellogg Co.*, No. 23-1966, 2024 WL 4534677, at *6 (6th Cir. Oct.21, 2024) ("Because Section 502(a)(2) claims can only be brought in a representative capacity on behalf of the plan, an arbitration clause that eliminates a participant's ability to bring a representative claim effectively forecloses his substantive right to bring a fiduciary breach claim under that section."); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1109 (10th Cir. 2023) (holding that a Class Action Waiver's "prohibition of any form of relief that would benefit anyone other than [the plaintiff] . . . directly conflicts with the statutory remedies available under [Sections 409 and 502(a)(2)]"); *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 621 (7th Cir. 2021) ("All this is to say that the plain text of [Section 409(a)] and the terms of the arbitration provision cannot be reconciled: what the statute permits, the plan precludes. In that way, the plan's arbitration provision acts as a prospective waiver of a party's right to pursue statutory remedies, so the 'effective vindication' exception applies.").

2) The Parties' Arguments on the Motion to Compel Arbitration of Duke's Section 502(a)(2) Claims

Defendants make five arguments to support their position that the arbitration provision is enforceable against the Section 502(a)(2) claims and requires arbitration of these claims on an individual basis. (Defs.'

Arb. or MTD Mem. at 11.) First, Defendants argue that Duke's position against enforceability of the Class Action Waiver is premised on "dicta" in *Cooper*, 990 F.3d 173, because the Second Circuit had "concluded that the plaintiff's dispute did not fall within the arbitration provision at issue." (*Id.* at 12–13.) Second, Defendants contend that Cooper is distinguishable because it involved a defined contribution plan, rather than a defined benefit plan, and this "difference matters" under *Thole*, 590 U.S. 538. (*Id.* at 13.) Third, Defendants assert that Duke's Section 502(a)(3) claims under ERISA's joint and survivor, anti-forfeiture and actuarial equivalence provisions, 29 U.S.C. §§ 1053, 1054, 1055, cannot be brought "on behalf of the entire plan" because "these are all individual claims challenging the amount of [Duke's] benefits and the benefits of other putative class members she seeks to represent." (*Id.* at 12.) Fourth, Defendants contend that even if Duke's Section 502(a)(2) claims must remain in federal court, the arbitration provision requires that her Section 502(a)(3) claims be pursued on an individual basis through arbitration. (*Id.* at 12–13.) Fifth, Defendants argue that ERISA rights do not "control" over the Federal Arbitration Act ("FAA") because: (1) the ERISA itself provides that nothing in the statute "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," 29 U.S.C. § 1144(d); (2) the Supreme Court has construed this provision as preventing ERISA from causing "a disruption of the enforcement scheme contemplated by" another federal statute; and (3) *Cooper* did not mention 29 U.S.C. § 1144(d) in its analysis. (*Id.* at 13–14, 14 n.10 (citations omitted).)

In their supplemental briefing following oral argument on the Motion for Reconsideration, Defendants reiterate their position that the Class Action Waiver provision compels all of Duke's claims to arbitration on an individual basis. (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 7.) Defendants reiterate their characterization of Duke's claims not as claims on behalf of the Plan, but rather "individual claims for benefits on behalf of [Duke] and the Plan participants she seeks to represent at the expense of the Plan" that are only available under Section 502(a)(3) and thus are subject to the Class Action Waiver. (*Id.* at 8.) Defendants assert that the FAA guarantees parties the ability to enter into a contract compelling individual claims to arbitration. (*Id.* (citing *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 661 (2022).) Finally, Defendants argue that, to the extent there is any conflict between ERISA and the FAA, the FAA controls. (*Id.* (citing 29 U.S.C. § 1144(d); *Trs. of N.Y. State Nurses Ass'n Pension Plan v. White Oak Glob. Advisors, LLC*, 102 F.4th 572, 602 n.13 (2d Cir. 2024) ("ERISA does not create a different standard for enforcement or vacatur of an award than that provided for by the FAA")).)

In her Motion for Reconsideration, Duke argues that "the individual arbitration provision [of the parties' Agreement] would make it impossible for Ms. Duke to assert the § 502(a)(2) claims in a representative capacity, as she is required to do by *Coan v. Kaufman*, 457 F.3d 250, 256–62 (2d Cir. 2006)." (*Id.* (citing *Cooper*, 990 F.3d at 184–85).)[16] Duke contends

[16] Defendants' opposition brief does not address this argument in any way. (*See generally* Opp'n Mot. Reconsid.) As noted above,

that the arbitration provision in this case suffers from the same defect as the agreement considered in Cooper, where the Second Circuit raised concern that an arbitration agreement requiring claims to be asserted on an individual basis may be in tension with its requirement in *Coan* that a plaintiff bringing a Section 502(a)(2) claim on behalf of a retirement plan must demonstrate adequacy to represent other plan stakeholders. (Pl.'s Opp'n Arb. Mem. at 8 (citing *Cooper*, 990 F.3d at 184).) Duke further argues that the Class Action Waiver "invalidates the entire Arbitration Provision" because it provides that if "all or part of the Class Action Waiver is unenforceable, the . . . action, to that extent, must be litigated in a civil court" and that the "Company expressly does not agree to arbitrate any claim on a class, collective or representative basis." (Pl.'s Opp'n Arb. Mem. at 9 (citing Agreement at 2, 7).)

Duke makes two additional arguments against compelling arbitration of her Section 502(a)(2) claims in her supplemental briefing following oral argument on the Motion for Reconsideration. First, Duke argues that the arbitration provision, by its text, does not cover her Section 502(a)(2) claims, pointing to two specific portions of the provision. (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 7–8.) The first provides that "[t]he Dispute Resolution Agreement covers *Luxottica* and *you*, regardless of your hire date, unless you opt-out

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at oral argument, Defendants requested—for the first time—the opportunity to provide additional briefing in support of their motion to compel arbitration to address this point. (Aug. 22, 2024 Hr'g Tr. 53:1–11.) I granted both parties that opportunity, and both did so. (*See* Pl.'s Suppl. Br. Mot. Reconsid.; Defs.' Suppl. Br. Opp'n Mot. Reconsid.)

on the form provided herein," which Duke argues shows that the arbitration provision applies only to her individual claims, not any representative claims that she may bring on behalf of others. (Agreement at 5; Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 7 (emphasis added by Plaintiff).) The second provides that the arbitration provision applies to claims "arising out of or relating to Employee's employment or the termination of employment." (Agreement at 6.) Duke argues that, as in *Cooper*, her Section 502(a)(2) claims on behalf of the Plan do not arise out of her employment, and therefore fall outside the scope of the arbitration provision of her agreement with Luxottica. (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 8 (citing *Cooper*, 990 F.3d at 182–85).)

Second, Duke argues that the Second Circuit's recent decision in *Cedeno* further supports the conclusion that the Class Action Waiver is unenforceable as to her Section 502(a)(2) claims. (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 8–9.) Duke notes the holding in *Cedeno* that "terms in an arbitration agreement that have the effect of prospectively waiving a party's statutory remedies are not enforceable" and argues that this is precisely what the Class Action Waiver does here. (*Id.* (citing *Cedeno*, 100 F.4th at 395).)

3) Analysis

The arbitration provision in Duke's Agreement with Luxottica suffers from defects present in the agreements considered in *Cedeno*, *Cooper*, and *Lloyd*. It requires Duke to "bring any dispute in arbitration on an individual basis only, and not on a class, collective or ***private attorney general representative***

basis on behalf of others." (Agreement at 7 (emphasis added.) It also expressly provides that "[t]here will be no right or authority ***for any dispute*** to be brought, heard ***or arbitrated as a class***, collective or ***private attorney general representative action*** or as a member in any such class, collective or representative proceeding." (*Id.* at 7–8 (emphasis added).) It is unlikely that Duke can secure through individualized arbitration all of the Plan-wide remedies that she seeks through her Section 502(a)(2) claims, which include equitable remedies authorized by Section 409 that would benefit the Plan and participants other than herself. As previously discussed, this includes: (1) reformation of the Plan to provide for proper actuarial assumptions in the calculation of joint and survivor annuity benefits for Duke and members of the putative class; (2) an injunction requiring fiduciaries to fix the Plan's use of outdated actuarial assumptions; (3) an injunction ordering Defendants to recalculate and pay all amounts owed to Duke and other members of the putative class because their past joint and survivor annuity payments were lower than legally required due to Defendants' use of outdated actuarial assumptions; (4) "restoration of losses to the Plan and its participants"; (5) disgorgement of any benefits or profits the Plans Committee received by using outdated actuarial assumptions; and (6) "all appropriate injunctive relief, such as an order requiring the Plans Committee to pay all Plan participants fully ERISA-compliant benefits in the future." (*See* Compl. at 29–31, ¶¶ D–E, H–I, L.)

The arbitration provision thus makes it impossible for Duke to bring representative claims under Sec-

tions 409 and 502(a)(2) on behalf of the Plan that "satisf[y] *Coan*'s adequacy requirement, while concurrently complying with the Agreement['s]" bar on representative actions. *Cooper*, 990 F.3d at 184. Like the agreement in *Lloyd*, the arbitration provision here "prohibit[s] representative actions seeking relief on behalf of a plan even though ERISA expressly provides for such actions" under Sections 409 and 502(a)(2). *Lloyd*, 2022 WL 17542071, at *3. And like the agreement in *Cedeno*, the Class Action Waiver here bars any claim brought in a representative capacity or on a class, collective, or group basis, and thereby very likely precludes Duke from securing forms of plan-wide relief authorized by Section 409. *Cedeno*, 100 F.4th at 392.[17] The arbitration provision

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[17] In addition to the class action waiver, the agreement in *Cedeno* expressly limited the relief that an individual could pursue in individual arbitration of a claim under Sections 409 and 502(a)(2) to only:

> (i) [t]he 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 appropriate.

Cedeno, 100 F.4th at 392. The Class Action Waiver here does not include this additional language, but the impact is likely the same. Because the Class Action Waiver prohibits any claim that is made on a "representative basis on behalf of others" (Agreement at 7), it very likely precludes Duke's ability to secure Plan-Wide equitable relief to remedy injuries to the Plan and, consequently, recipients of joint-and-survivor annuities other than herself, such as loss restoration and an injunction ordering recalculation and repayment of amounts owed to Duke and other

thus conflicts with explicit statutory rights and remedies under ERISA—specifically, a plan participant's right to bring claims to challenge the breach of a fiduciary's duties under Sections 409 and 502(a)(2) on behalf of the Plan and to seek Plan-wide remedies, including restoration of "losses to the plan resulting from each such breach," disgorgement of profits, and "such other equitable or other remedial relief as the court may deem appropriate," 29 U.S.C. § 1109(a). The arbitration provision is therefore unenforceable as to Duke's Section 502(a)(2) claims. *See Am. Express Co.*, 570 U.S. at 236.

Defendants' arguments to the contrary are unpersuasive. Defendants' contention that the relevant language in *Cooper* is "dicta" ignores the Second Circuit's express concern that agreements requiring arbitration on an individual basis make it impossible for a person to pursue claims to enforce substantive statutory rights and remedies under Sections 409 and 502(a)(2). The Second Circuit explicitly recognized this predicament in *Cooper*:

> Either [the employee] brings a claim in arbitration in some representative capacity, as [the Second Circuit's] case law requires, and the claim is dismissed for violating the Agreement's prohibition on bringing [a] claim in a representative capacity; or she brings a claim absent the required procedural safeguards, and courts in this Circuit decline to enforce

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members of the putative class due to Defendants' challenged conduct.

> any award she secures in arbitration for running afoul of *Coan*.

Cooper, 990 F.3d at 184. Moreover, Defendants fail to explain how the fact that *Cooper* concerned a defined contribution plan rather than a defined benefit plan impacts the Second Circuit's concern that an arbitration provision requiring individualized arbitration "runs afoul" of the statutory right to bring a representative action on behalf of the plan under Section 502(a)(2) for remedies under Section 409. (*See* Defs.' Arb. or MTD Mem at 12–13.) Contrary to Defendants' argument, *Thole* did not address the enforceability of an arbitration agreement or why the difference between a defined benefit plan and a defined contribution plan matters in this context. *Id.* at 13; *see generally Thole*, 590 U.S. 538.

Finally, Defendants unpersuasively argue that the arbitration provision is enforceable because Duke's claims "are all individual claims challenging the amount of her benefits and the benefits of other putative class members she seeks to represent." (*Id.* at 12; *see also* Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 8.) Defendants' argument thus boils down to the same contention they advance to challenge Duke's standing: that Duke does not seek Plan-wide relief. As discussed at length, Duke brings claims under Sections 409 and 502(a)(2) on behalf of the Plan in order to remedy systemic problems with how joint and survivor annuity benefits are calculated and to secure forward-looking Plan-wide remedies—including reformation of the Plan to require the use of updated actuarial assumptions and recalculation of benefits for those, like Duke, whose joint and survivor annuities

were calculated using outdated assumptions—and backward-looking Plan-wide remedies—including restoration of losses to the Plan, disgorgement of profits, and payments to Duke and other Plan participants who received past joint and survivor annuity payments that were lower than legally required due to Defendants' challenged conduct. Defendants' argument thus cannot withstand *Cedeno*, where the Second Circuit confirmed that an agreement requiring arbitration on an individual basis "operate[s] as an impermissible prospective waiver of . . . substantive statutory rights" and remedies under Sections 409 and 502(a)(2) and precludes the ability to secure "plan-wide equitable relief." 100 F.4th at 405.

I do not reach Duke's remaining arguments as to the enforceability of the Class Action Waiver against her Section 502(a)(2) and 502(a)(3) claims because she did not timely raise them in the Motion for Reconsideration. The Motion for Reconsideration does not argue that the Class Action Waiver invalidates the entire arbitration provision, although Duke initially raised this argument in opposition to Defendants' motion to compel arbitration. (*Compare* Mem. Supp. Mot. Reconsid. at 4–5 *with* Pl.'s Opp'n Arb. Mem. at 9 (citing Agreement at 2, 7).). Nor does the Motion for Reconsideration argue that the arbitration provision is inapplicable to Duke's Section 502(a)(2) claims based on specific text in two portions of the provision, as Duke does in her supplemental brief. (*Compare* Mem. Supp. Mot. Reconsid. *with* Pl.'s Supp. Br. Supp. Mot. Reconsid. at 7–8 (citing Agreement at 6–7).) Moreover, Duke's Motion does not identify any error in the Order's finding that the arbitration provision applies to her claims because they "aris[e] out of or relat[e] to

[her] employment," and thus I do not revisit that conclusion in the Order. (Order at 15–17; *see* Mem. Supp. Mot. Reconsid. at 4–5 (identifying no error with this portion of the Order).) Thus, Duke's claims under Sections 409 and 502(a)(2) will proceed in this Court while her Section 502(a)(3) claims will proceed in arbitration on an individual basis.

C. Defendants Have Not Met Their Burden to Show That a Stay of This Action as to Duke's Section 502(a)(2) Claims is Warranted.

As noted above, I have denied Duke's motion for reconsideration of the Order's ruling that she must pursue her Section 502(a)(3) claims in arbitration on an individual basis. The parties agree that if I were to find (as I have here) that Duke's Section 502(a)(2) claims are not arbitrable, this would have "no impact on the arbitrability of [Duke's] Section 502(a)(3) claim[s]." (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 10; see Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 9.)[18] The parties disagree over how I should handle the resulting parallel proceedings.

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[18] Defendants point to a severability clause in the Agreement, which provides in relevant part that even if "there is a final judicial determination that all or part of the Class Action Waiver is unenforceable . . . the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration." (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 9 (citing Agreement at 8).) The severability of claims subject to the arbitration provision is also supported by the express provision that if "all or part of the Class Action Waiver is unenforceable, the . . . action, ***to that extent***, must be litigated in a civil court of competent jurisdiction. (Agreement at 7 (emphasis added).)

Duke argues that I should allow her Section 502(a)(2) claims to go forward in this action while her Section 502(a)(3) claims proceed in arbitration because Duke's non-arbitrable Section 502(a)(2) claims are against only the Defendant Plans Committee and neither the Plan itself (on whose behalf Duke's 502(a)(2) claims are asserted) nor the Plans Committee were parties to the Arbitration Provision.[19] (Pl.'s Suppl. Br. Supp. Mot. Reconsid. at 10.) Defendants argue that the "substantive issues" raised in Duke's Section 502(a)(2) and Section 502(a)(3) claims are the same, and thus the FAA *requires* a stay of any federal litigation concerning the Section 502(a)(2) claim until such arbitration has concluded. (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 9–10.) Defendants rely on Section 3 of the FAA, which provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such

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[19] Despite Duke's contention that her Section 502(a)(2) claims are only against the Plans Committee, the Complaint suggests that Duke seeks relief under Section 502(a)(2) against other Defendants as well. (*See* Compl. ¶¶ 97–137). Count IV is Duke's breach of fiduciary duty claim against the Plans Committee under Section 502(a)(2). (*Id.* ¶¶ 126–37). Duke also invokes Section 502(a)(2) in Count I (violation of ERISA's joint and survivor annuity requirement), Count II (violation of ERISA's actuarial equivalence requirement), and Count III (violation of ERISA's anti-forfeiture rules). (*Id.* ¶¶ 97–125). These three claims are pled against all Defendants. (*See id.*)

> an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

The Supreme Court has made clear that "[i]f a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation." *KPMG LLP v. Cocchi*, 565 U.S. 18, 19 (2011). In such cases, the district court "must then decide whether to stay the balance of the proceedings pending arbitration." *SDJ Invs., LLC v. Collector's Coffee Inc.*, No. 21-cv-2070, 2022 WL 17097231, at *2 (2d Cir. Nov. 22, 2022) (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004)). The Second Circuit "afford[s] district courts great discretion in declining to stay non[-]arbitrable claims pending arbitration of related claims." *Id.* (citing *Chang v. Lin*, 824 F.2d 219, 222 (2d Cir. 1987)).

"The movant bears a heavy burden of showing necessity for the stay." *Id.* (citing *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991)). "This showing will depend on the relevant claim's effect on the outcome of the arbitration, whether failure to stay the action would result in substantial prejudice, and the significant expense and inconvenience of litigating and arbitrating simultaneously." *Id.* (citing *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 76 (2d Cir. 1997)). Courts in this Circuit have held that "[a] stay is usually appropriate where arbitrable and nonarbitrable

claims arise out of the same set of facts and arbitration may decide the same facts at issue in the litigation." *Louis Berger Grp., Inc. v. State Bank of India*, 802 F. Supp. 2d 482, 489 (S.D.N.Y. 2011); *see also Pierre v. Macy's Inc.*, No. 16-cv-2556, 2016 WL 11652066, at *4 (E.D.N.Y. Nov. 23, 2016). In this inquiry, the movant must establish "that there are issues common to the arbitration and the courts, and that those issues will finally be determined by the arbitration." *Louis Berger Grp., Inc.*, 802 F. Supp. 2d at 490; *see also Hitachi Constr. Mach. Co. v. Weld Holdco, LLC*, Nos. 23-cv-490, 23-cv-1396, 2023 WL 8452389, at *11 (S.D.N.Y. Dec. 6, 2023) (holding that "factual commonality between claims may supply a basis for a stay in some cases"). "If the movant meets this burden, it must then show that it will not hinder arbitration, that the arbitration will be resolved within a reasonable time, and that any delay that may occur will not cause undue hardship to the nonmoving party." *Louis Berger Grp., Inc.*, 802 F. Supp. 2d at 490 (citing *Birmingham Assocs. Ltd. v. Abbott Labs.*, 547 F. Supp. 2d 295, 302 (S.D.N.Y. 2008), *aff'd*, 329 F. App'x 42 (2d Cir. 2009)).

Here, I find that Defendants have not met their "heavy burden" to show that a stay of Duke's Section 502(a)(2) claims is necessary. *See SDJ Invs.*, 2022 WL 17097231, at *2. In fact, Defendants have not engaged at all with the factors that courts in this Circuit consider when determining whether to stay the balance of the proceedings pending arbitration of certain claims, including whether "arbitration may decide the same facts at issue in the litigation," "the relevant claim's effect on the outcome of the arbitration,"

"whether failure to stay the action would result in substantial prejudice," or "the significant expense and inconvenience of litigating and arbitrating simultaneously." *See Louis Berger Grp., Inc.*, 802 F. Supp. 2d at 489; *SDJ Invs., LLC*, 2022 WL 17097231, at *2 (citing *WorldCrisa Corp.*, 129 F.3d at 76).

While there are, no doubt, overlapping factual issues between Duke's non-arbitrable Section 502(a)(2) claims and her arbitrable Section 502(a)(3) claims, Defendants have not met their burden to demonstrate the extent or effect of the overlap. In their supplemental briefing, Defendants claim that "the same alleged ERISA violations underlie both the Section 502(a)(2) claims and the Section 502(a)(3) claims" and cite generally to the "Causes of Action" section of the Complaint. (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 10.) Aside from this general allegation, however, Defendants do not address the interplay of the factual issues underlying each claim and how parallel litigation and arbitration might affect one another.

Likewise, Defendants have not shown that "failure to stay the action would result in substantial prejudice." *SDJ Invs., LLC*, 2022 WL 17097231, at *2 (citing *WorldCrisa Corp.*, 129 F.3d at 76). In fact, staying Duke's Section 502(a)(2) claims in favor of individual arbitration of her Section 502(a)(3) claims is likely to prejudice Duke as she seeks remedies on behalf of the Plan under Section 502(a)(2). Critically, it is very likely, if not certain, that Duke would <u>not</u> be able to receive all forms of the Plan-wide relief she is entitled to seek under Section 409 by proceeding through arbitration on her Section 502(a)(3) claims on an individ-

ual basis. In enacting Section 502(a)(2), Congress created a means for individuals to seek relief on behalf of an entire plan. 29 U.S.C. § 1132(a); *Russell*, 473 U.S. at 142 ("A fair contextual reading of [Section 502(a)(2)] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan . . . ."). As discussed at length, under Section 502(a)(2), Duke seeks *Plan-wide* relief, namely, reformation of the Plan and overlapping injunctive relief to employ correct actuarial tables going forward, an injunction ordering Defendants to recalculate and pay amounts owed to Duke and other members of the putative class because of past underpayment of their joint and survivor annuity benefits due to Defendants' challenged conduct, the restoration of losses to the Plan as a whole due to these underpayments (which, if Duke prevails, would permit the Plan to fund back payments), disgorgement of any "benefits and profits" the Plans Committee received as a result of its alleged ERISA violations, and "all appropriate injunctive relief." (*See* Compl. at 29–31, ¶¶ D–E, H–I, L.) While Duke also seeks these remedies under Section 502(a)(3), arbitration of these claims on an individual basis precludes her from seeking relief "on behalf of others," including the Plan itself and other joint and survivor annuity recipients whose benefits were calculated using the pre-amendment approach. (Agreement at 7–8.) It is entirely unclear whether she could secure Plan reformation and overlapping injunctive relief, and Duke almost certainly cannot secure recalculation of benefits and back-payments for joint and survivor annuity recipients other than herself from arbitration on an individual basis. Therefore,

staying Duke's Section 502(a)(2) claims for Plan-wide relief in favor of arbitration of her Section 502(a)(3) claims on an individual basis would undermine ERISA's goal of providing private litigants a cause of action on behalf of a plan to remedy fiduciary violations. It would also prejudice Duke and other Plan joint and survivor annuity recipients who stand to benefit from Plan-wide remedies that may be unavailable under arbitration of Duke's Section 502(a)(3) claims on an individual basis. *See City of Almaty, Kazakhstan v. Sater*, No. 19-cv-2645, 2019 WL 6681560, at *14 (S.D.N.Y. Dec. 6, 2019) ("Further, [the Court] must tailor any stay so as not to unduly prejudice other parties who are not seeking a stay of the litigation.").

Defendants' argument that Section 3 of the FAA *requires* me to stay the case is incorrect. (*See* Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 9–10.) FAA Section 3 provides that, where "the issue involved in [the underlying] suit or proceeding is referable to arbitration under [an enforceable arbitration] agreement," I am required to grant a stay of the proceedings as to that "issue." 9 U.S.C. § 3; *see also Smith v. Spizzirri*, 601 U.S. 472, 478 (2024) (holding that "when a federal court finds that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration," the district court must stay the proceeding pending arbitration). Defendants' rely on a broad interpretation of the term "issue" in FAA Section 3, arguing that "[b]ecause the substantive issues for [Duke's Section 502(a)(2) and 502(a)(3) claims] are the same, if there were any surviving Section 502(a)(2) claims that were not arbitrable, they would have to be stayed 'until such arbitration has been had

[on the Section 502(a)(3) claims] in accordance with the terms of the agreement.'" (Defs.' Suppl. Br. Opp'n Mot. Reconsid. at 10 (quoting 9 U.S.C. § 3).). But as discussed above, the issue to be litigated under Duke's Section 502(a)(2) claims (*i.e.*, whether Duke is entitled to Plan-wide relief that would remedy injuries to the Plan and thereby remedy injuries also suffered by herself and others) is *not* referable to arbitration, making Section 3 inapplicable. Thus, at this time, I find that Defendants have not met their heavy burden of showing the need for a stay of this litigation.

CONCLUSION

For the reasons set forth above, Duke's motion for reconsideration (ECF No. 60) of the Memorandum & Order on Motion to Compel and Motion to Dismiss (ECF No. 59) is granted in part and denied in part. The Court grants reconsideration as to the dismissal of Duke's Section 502(a)(2) claims and finds that Duke has Article III standing to bring these claims. The Court denies reconsideration of the ruling that the parties are compelled to arbitrate Duke's Section 502(a)(3) claims on an individual basis.

The Court lifts the stay of this action. Duke's Section 502(a)(2) claims will proceed in this Court and her Section 502(a)(3) claims will proceed in arbitration.

Dated: Central Islip, New York
November 27, 2024

/s Nusrat J. Choudhury
NUSRAT J. CHOUDHURY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

21-CV-6072 (JMA) (AYS)

JANET DUKE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFF,

v.

LUXOTTICA U.S. HOLDINGS CORP., OAKLEY, INC., LUXOTTICA GROUP ERISA PLANS COMPLIANCE & INVESTMENT COMMITTEE, AND LUXOTTICA GROUP PENSION PLAN,
DEFENDANTS.

Filed: Sept. 30, 2023

MEMORANDUM & ORDER

AZRACK, United States District Judge:

Plaintiff Janet Duke, a former Luxottica employee and a participant in the Luxottica Group Pension Plan (the "Plan"), claims that Defendants rely on outdated and unreasonable mortality assumptions in calculating her benefits under the Plan, in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq. She alleges that if Defendants used proper, updated mortality assumptions, her monthly pension payments would be larger.

She brings her claims on behalf of a putative class of Plan participants and beneficiaries for violations of various provisions of ERISA, including breach of fiduciary duty, pursuant to §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3).

Currently before the Court are Defendants' motions to compel arbitration or, in the alternative, to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. (ECF No. 23.) For the following reasons, Defendants' motions are granted in part and denied in part.

I. BACKGROUND

A. Facts

1. The Parties

Plaintiff worked for a Luxottica subsidiary for approximately 21 years, leaving the company when her job as a regional manager was eliminated. (Compl. ¶ 27, ECF No. 1.)

The Luxottica Group Pension Plan is a defined benefit plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35). As of 2019, the Plan had approximately 29,000 participants and assets valued at approximately $1 billion. (Id. ¶ 53.) Defendants Luxottica U.S. Holdings Corp. and/or Oakley, Inc. are the Plan's sponsors. (Id. ¶ 28.) They, along with various companies affiliated with Luxottica, make contributions to the Plan to fund retirement benefits promised to Luxottica employees. (Id. ¶ 29.)

2. Plaintiff's Benefits Under the Plan

Under the terms of the Plan, an unmarried participant's normal pension benefit is a single life annuity ("SLA"), a monthly benefit paid to the participant beginning at retirement and continuing until their death. (Compl. ¶ 54.) For married participants, however, the default form of pension benefit is a joint and survivor annuity ("JSA"). (Id. ¶ 55.) A JSA provides the participant with a payment stream for their own life, and then, should their spouse survive them, for their spouse's life. (Id. ¶ 4.) In general, JSAs are expressed as a percentage of the benefit paid during the participant's life. For example, a 50% JSA—the Plan's default JSA option—will pay to the surviving spouse 50% of the monthly benefit amount that the participant received during their lifetime. (Id. ¶¶ 4, 54.) Plaintiff elected to receive a 100% JSA. (Id. ¶ 27.)

3. The Plan's Non-Compliance with Actuarial Equivalence Requirements

If a participant elects to receive a JSA, the Plan uses certain actuarial assumptions to convert a standard SLA into the participant's JSA. (Compl. ¶ 5.) ERISA and the Federal Tax Code require that this conversion result in a JSA that is the "actuarial equivalent" of an SLA—i.e., that the JSA has the same economic value as the SLA. (Id. ¶¶ 5–6, 37.) In making this conversion, an actuarial equivalence computation considers interest rates and makes certain assumptions regarding the expected longevity of a participant and their spouse. (Id. ¶ 6.) The interest rate accounts for the value of future pension payments, reflecting the time value of money, while the expected longevity of the participant and their spouse accounts for the

likelihood of those future payments being paid out. (Id. ¶¶ 6, 36.) Longevity assumptions are derived from published mortality tables showing the statistical life expectancy of persons at given ages. (Id. ¶ 6.)

When Plaintiff's JSA benefits were calculated—as for all Plan participants whose JSA benefits were calculated prior to April 1, 2021—the Plan relied on the 1971 Group Annual Mortality ("GAM") Table to supply the actuarial assumptions regarding expected longevity. (Id. ¶ 57.) According to Plaintiff, because the GAM Table is 50 years "out of date," it does not reflect "dramatic increases in longevity of the American public," thus rending the Plan's actuarial assumptions "outdated" and "unreasonable." (Id. ¶¶ 59–60.) She alleges that as a result, the Plan pays JSAs "that are less than the actuarial equivalent value of a participant's [SLA] benefit," in violation of ERISA. (Id. ¶ 60.) If the Plan had employed "reasonable mortality assumptions" instead, such as those set forth in 26 U.S.C. § 417(e), the calculation of Plaintiff's JSA benefits would have been "substantially more favorable[.]" (Id. ¶ 61.)

Plaintiff also alleges that by failing to properly disclose the Plan's outdated actuarial assumptions in the relevant Plan documents, Defendants prevented her "from adequately assessing what form of benefit to elect and how best to plan for [her] retirement[]." (Id. ¶ 82.) Moreover, by paying out JSAs to Plan participants and beneficiaries that fail to satisfy ERISA's actuarial equivalence requirement, Defendants' Plan funding obligations are artificially and improperly reduced. (Id. ¶¶ 83–85.)

4. The Dispute Resolution Agreement

In 2015, Plaintiff entered into a Dispute Resolution Agreement ("Agreement") with Luxottica, which contains an arbitration provision. (Hoffman Decl. Ex. 1, ECF No. 41-2.) The Agreement's introduction states that "[t]he arbitration portion of . . . [the] Agreement covers virtually all legal claims arising out of or related to [an employee's] employment with Luxottica[.]" (Agreement at 50.) The arbitration provision states as follows:

> Except as it otherwise provides, this Agreement applies, without limitation, to disputes with any individual (including Luxottica's employees, agents, supervisors, officers or directors) or entity (including any company affiliated with Luxottica, its parent(s) or subsidiaries, if any) arising out of or related to the employment relationship or the termination of that relationship (including post-employment defamation or retaliation), trade secrets, unfair competition, compensation, classification, minimum wage, seating, expense reimbursement, overtime, breaks and rest periods, termination, discrimination or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and (a) covered by the Employee Retirement Income Security Act

> of 1974 or (b) funded by insurance) Affordable Care Act, Genetic Information Non-Discrimination Act, state statutes or regulations addressing the same or similar subject matters, and all other federal or state legal claims arising out of or relating to Employee's employment or the termination of employment.

(Id. at 51–52.) The Agreement also contains the following class action waiver:

> This Agreement affects your ability to participate in class, collective or private attorney general representative action. Both the Company and you agree to bring any dispute in arbitration on an individual basis only, and not on a class, collective or private attorney general representative basis on behalf of others. There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or private attorney general representative action or as a member in any such class, collective or representative proceeding ("Class Action Waiver"). . . . The Company expressly does not agree to arbitrate any claim on a class, collective or representative basis.

(Id. at 52–53.) However, the Agreement stipulates that if a dispute is brought in court as a class or other collective action, and "there is a final judicial determination that all or part of the Class Action Waiver is unenforceable," the action "to that extent, must be litigated in a civil court of competent jurisdiction," while "the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration." (Id. at 53.)

Plaintiff did not exercise her right to opt out of the arbitration provision in the Agreement. (Hoffman Decl. ¶¶ 6–8; Agreement at 50, 56.)

B. Procedural History

Plaintiff commenced this action on November 1, 2021. Defendants subsequently filed a pre-motion conference letter regarding their proposed motions, (ECF No. 23), to which Plaintiff responded, (ECF No. 28). The Court construed Defendants' letter as a motion to compel arbitration and permitted the parties to submit additional briefing. (Electronic Order dated Feb. 4, 2022.) However, to assist the Court with its obligation to determine its subject matter jurisdiction, the Court directed the parties to submit further briefing regarding Defendants' motion to dismiss for lack of subject matter jurisdiction, as well as their motion to dismiss for failure to state a claim. (Electronic Order dated Aug. 16, 2022.) The motions became fully briefed on September 29, 2022, once the parties filed their supplemental submissions.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The Court begins, as it must, with Defendants' motion to dismiss under Rule 12(b)(1) for lack of Article III standing. See Central States SE & SW Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC, 433 F.3d 181, 198 (2d Cir. 2005) ("If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim."). Defendants raise a facial challenge to Plaintiff's standing to pursue claims for losses to the Plan via ERISA §§ 409 and

502(a)(2), as well as a factual challenge to her standing to assert her remaining ERISA claims. (Defs.' Mem. at 16, 18, ECF No. 41.)

A. Legal Standards Under Rule 12(b)(1)

1. Motion to Dismiss Under Rule 12(b)(1)

A Rule 12(b)(1) motion challenging subject matter jurisdiction may be either facial or fact-based. Carter v. HealthPort Techs., LLC, 822 F.3d 47, 56 (2d Cir. 2016). "[A] facial challenge . . . accepts the jurisdictional facts pleaded and challenges only their sufficiency." All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co., 436 F.3d 82, 88 n.7 (2d Cir. 2006) (citation omitted). In reviewing a facial attack to the court's jurisdiction, the court must "'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" Bohnak v. Marsh & McLennan Companies, Inc., 79 F.4th 276, 283 (2d Cir. 2023) (quoting W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche, LLP, 549 F.3d 100, 106 (2d Cir. 2008)). By contrast, a fact-based challenge "place[s] jurisdictional facts in dispute," and "the district court [may] properly consider[] evidence outside the pleadings." Amidax Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011) (citations omitted). In resolving a fact-based challenge to Article III standing, "the District Court has leeway as to the procedure it wishes to follow.'" All. for Envtl. Renewal, 436 F.3d at 88 (citing Gibbs v. Buck, 307 U.S. 66, 71–72 (1939) ("As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.")).

2. Jurisdiction and Article III Standing

Article III of the Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021). And "[f]or there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case—in other words, standing." Id. (internal quotation marks and citation omitted).

To establish standing under Article III, "a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." Thole v. U. S. Bank N.A., 140 S. Ct. 1615, 1618 (2020) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

"'The party invoking federal jurisdiction bears the burden of establishing' each element of standing, which 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at successive stages of litigation.'" McMorris v. Carlos Lopez & Assocs., LLC, 995 F.3d 295, 300 (2d Cir. 2021) (quoting Lujan, 504 U.S. at 561). Importantly, "'a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.'" Town of Chester v. Laroe Ests., Inc., 581 U.S. 433, 439 (2017) (quoting Davis v. Federal Election Comm'n, 554 U.S. 724, 734 (2008)).

B. Defendants' Facial Challenge

Defendants contend that Plaintiff lacks Article III standing to pursue her claims for losses to the Plan under §§ 409(a) and 502(a)(2) because she has not alleged that she "suffered an Article III injury as to that claim that would be redressable to her." (Defs.' Mem. at 16.)[1] As explained below, the Court agrees that Plaintiff has not established standing to assert her claims pursuant to those provisions of ERISA.

The Court begins by addressing two principles that are critical to its analysis: the nature of the relief Plaintiff may seek for her claims under §§ 409(a) and 502(a)(2), and the distinction between defined benefit and defined contribution pension plans.

First, ERISA § 502(a)(2) authorizes a plan participant, among other individuals, to bring a civil action "for appropriate relief" under § 409. 29 U.S.C. § 1132(a)(2). That section, in turn, provides as follows:

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[1] Defendants do not contest, as part of their facial challenge, that Plaintiff has adequately alleged that she has standing to pursue her claims via § 502(a)(3). (Defs.' Mem. at 17 n.13.) Therefore, in resolving Defendants' motion, the Court addresses only Plaintiff's claims brought pursuant to §§ 409(a) and 502(a)(2). In any event, the Court agrees with Plaintiff that she has adequately alleged an injury-in-fact sufficient to establish her standing to assert claims under § 502(a)(3) regarding the calculation of her JSA benefits. See Belknap v. Partners Healthcare Sys., Inc., No. 19-CV-11437, 2022 WL 658653, at *5 (D. Mass. Mar. 4, 2022) ("The complaint has sufficiently alleged that plaintiff's retirement benefits were reduced because of the outdated mortality assumptions and interest rates used by [the defendant]. As a result, the complaint sufficiently pleads an injury in fact for purposes of the standing analysis.").

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . 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[.]

Id. § 1109(a). Sections 502(a)(2) and 409(a), "read together, mean that a plaintiff suing for breach of fiduciary duty under § 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 v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248, 256 (2008)). Therefore, "such claims may not be made for individual relief, but instead are 'brought in a representative capacity on behalf of the plan.'" Coan v. Kaufman, 457 F.3d 250, 257 (2d Cir. 2006) (quoting Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 142 n.9 (1985)). By contrast, claims brought under § 502(a)(3) are asserted not on behalf of the plan, but on an individual basis for individual relief. See McAlister v. Metro. Life Ins. Co., No. 18-CV-11229, 2023 WL 5769491, at *7 (S.D.N.Y. Sept. 7, 2023).

Second, the Supreme Court has explained that the difference between defined benefit plans and defined contribution plans is "[o]f decisive importance" in analyzing standing under ERISA. Thole, 140 S. Ct. at 1618. In a defined benefit plan, such as the Plan here, "retirees receive a fixed payment each month, and the payments do not fluctuate with the value of the plan

or because of the plan fiduciaries' good or bad investment decisions." Id. By contrast, "in a defined-contribution plan, such as a 401(k) plan, the retirees' benefits are typically tied to the value of their accounts, and the benefits can turn on the plan fiduciaries' particular investment decisions." Id. (citations omitted).

Defendants argue that under Thole v. U. S. Bank N.A., 140 S. Ct. 1615 (2020), Plaintiff, as a participant in a defined benefit plan, lacks standing to pursue her claims under §§ 409(a) and 502(a)(2). (Defs.' Mem. at 17.) Plaintiff attempts to distinguish Thole and argues that, for various reasons, this case and Thole "could not be more different." (Pl.'s Opp'n at 3, ECF No. 40.) However, the Court agrees with Defendants that Thole controls and mandates dismissal of her claims brought under §§ 409(a) and 502(a)(2).

In Thole, the plaintiffs were participants in their former employer's defined benefit plan, and as such, they received fixed monthly payments "regardless of the plan's value at any one moment and regardless of the investment decisions of the plan's fiduciaries[.]" 140 S. Ct. at 1618. Moreover, "they [were] legally and contractually entitled to receive those same monthly payments for the rest of their lives." Id. Although they had received all their monthly pension benefits, they brought fiduciary duty claims against the plan's sponsor and others based on the defendants' allegedly poor investment decisions. Id. at 1618–19. The Supreme Court held that they lacked Article III standing to assert their claims because, as participants in a defined benefit plan, "the outcome of this suit would not affect their future benefit payments." Id. at 1619. As the court explained, "[i]f [the plaintiffs] were to lose

this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less." Id. And "[i]f [the plaintiffs] were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more." Id. Therefore, the plaintiffs had "no concrete stake" in the lawsuit that would confer Article III standing. Id.

Here, as in Thole, Plaintiff is a participant in a defined benefit plan. (Compl. ¶¶ 30, 51.) Therefore, as in Thole, the benefits she receives through her JSA are "not tied to the value of the plan." 140 S. Ct. at 1620. So, whether or not she secures recovery for the Plan—the only form of recovery she can seek under §§ 409(a) and 502(a)(2)—she will "still receive the exact same monthly benefits that [she] [is] already slated to receive." Id. at 1619. Accordingly, she cannot show that any recovery to the Plan, such as an increase in its assets, would affect her benefits. Therefore, she, just like the Thole plaintiffs, lacks the concrete stake in the outcome of this lawsuit that is necessary to establish Article III standing.

Plaintiff's attempts to distinguish Thole are unavailing. She argues that, in contrast to the plaintiffs in Thole, who "did 'not sustain[] any monetary injury,'" she has alleged that "'her [JSA] would be larger' if it were calculated properly," and therefore, "her situation is exactly the opposite of the plaintiffs in Thole[.]" (Pl.'s Suppl. Opp'n at 3–4, ECF No. 47) But this argument appears to conflate her standing to pursue individual relief via § 502(a)(3) with the limitation that relief under §§ 409(a) and 502(a)(2) is limited to recovery for the Plan. See Cooper, 990 F.3d at

180; see also Coan, 457 F.3d at 257. And as Defendants reiterate, (Defs.' Suppl. Reply at 5, ECF No. 5), she nowhere alleges how their conduct caused "any losses to the plan," 29 U.S.C. § 1109(a), or how any remedy requiring Defendants "to make good to such plan any losses," id., would impact her benefits under the Plan.

Plaintiff also clings to Thole's remark that "[i]f [the plaintiffs] had not received their vested pension benefits, they would of course have Article III standing to sue[.]" 140 S. Ct. 1615. She maintains that Thole thus "stands for the very proposition that where a plaintiff has suffered individual loss, she 'of course' has standing to pursue plan losses under § 1132(a)(2)." (Pl.'s Suppl. Opp'n at 5.) But Plaintiff omits the remainder of that sentence, which reads in full as follows: "If [the plaintiffs] had not received their vested pension benefits, they would of course have Article III standing to sue and a cause of action under ERISA § 502(a)(1)(B) to recover the benefits due to them." Id. (emphasis added). Placed in proper context, this statement offers no support to her cause. Rather, it simply acknowledges the unremarkable proposition that an individual plan participant may bring a claim under § 502(a)(1)(B) "to recover benefits due to him under the terms of his plan[.]" 29 U.S.C. § 1132(a)(1)(B). But Plaintiff brings no such claim here, and it is irrelevant to whether she has standing to assert claims under §§ 409(a) and 502(a)(2). See Laroe Ests., 581 U.S. at 439 ("[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (internal quotation marks and citation omitted)).

Plaintiff's cited cases do not compel a different result. Some do not address the issue of Article III standing at all. See Urlaub v. CITGO Petroleum Corp., No. 21-CV-4133, 2022 WL 523129, at *10 (N.D. Ill. Feb. 22, 2022); see also Scott v. AT&T Inc., No. 20-CV-07094, 2022 WL 2342645, at *1 (N.D. Cal. June 29, 2022). The remainder are otherwise inapposite. See Hoeffner v. D'Amato, 605 F. Supp. 3d 467, 477 (E.D.N.Y. 2022) (distinguishing Thole and finding standing because the plaintiffs plausibly alleged that their benefits, unlike Plaintiff's here, "fluctuated based on the fund's overall assets"), reconsideration denied, 2023 WL 2632501 (E.D.N.Y. Mar. 24, 2023); see also Bilello v. JPMorgan Chase Retirement Plan, 592 F. Supp. 2d 654, 666 (S.D.N.Y. 2009) (pre-Thole case characterizing the plaintiff's ERISA claim "as a claim to recover benefits under Section 502(a)(1)(B)").

For these reasons, the Court concludes that Plaintiff has not carried her burden of establishing Article III standing to pursue her claims under ERISA §§ 409(a) and 502(a)(2). Accordingly, these claims will be dismissed for lack of subject matter jurisdiction.

C. Defendants' Factual Challenge

Defendants also insist, purely as a factual matter, that Plaintiff lacks Article III standing to pursue her claims because her monthly benefit would be lower if the Plan used the actuarial assumptions that she argues should be employed. (Defs.' Mem. at 18.)

Because Defendants raise a fact-based standing challenge, the "Court has leeway as to the procedure it wishes to follow," including delaying its jurisdictional ruling. Alliance for Envtl. Renewal., 436 F.3d at 88 ("[W]here the evidence concerning standing

overlaps with evidence on the merits, the Court might prefer to proceed to trial and make its jurisdictional ruling at the close of the evidence.") (citing Land v. Dollar, 330 U.S. 731, 739 (1947)). Here, given the nature of Defendants' challenge and the evidence marshaled in support thereof, the Court agrees with Plaintiff that the motion "presents a complex question of fact that is not properly resolved on a motion to dismiss." Watson v. Consol. Edison of N.Y., 594 F. Supp. 2d 399, 407 (S.D.N.Y. 2009). This is especially true where, as here, Plaintiff has not had the benefit of discovery. Accordingly, this branch of Defendants' motion is denied without prejudice.

III. MOTION TO COMPEL ARBITRATION

Because Plaintiff has adequately alleged that she has Article III standing to pursue her claims under § 502(a)(3), the Court turns next to Defendants' motion to compel individual arbitration of those claims. (Defs.' Mem. at 6.)

A. Legal Standards

The FAA provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2. The FAA thus reflects both a "federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citations omitted).

As a general matter, "'a court may order arbitration of a particular dispute only where the court is sat-

isfied that the parties agreed to arbitrate that dispute.'" Cooper, 990 F.3d at 179 (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010) (emphasis in original)); see also Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so." (internal quotation marks and citation omitted)). At the same time, however, "'federal policy requires [courts] to construe arbitration clauses as broadly as possible.'" In re Am. Exp. Fin. Advisors Sec. Litig., 672 F.3d 113, 128 (2d Cir. 2011) (quoting Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 19 (2d Cir. 1995)). As the Supreme Court has made clear, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "the problem at hand is the construction of the contract language itself." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)). This "presumption of arbitrability" can "'only [be] overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" Loc. Union 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp., 67 F.4th 107, 114 (2d Cir. 2023) (quoting Holick v. Cellular Sales of N.Y., LLC, 802 F.3d 391, 395 (2d Cir. 2015)).

In deciding a motion to compel arbitration, courts within the Second Circuit consider the following two factors: "'(1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that agreement encompasses the claims at issue.'" Cooper, 990 F.3d at

179 (quoting Holick, 802 F.3d at 394). The party seeking to compel arbitration "bears an initial burden of demonstrating that an agreement to arbitrate was made." Zachman v. Hudson Valley Fed. Credit Union, 49 F.4th 95, 101–02 (2d Cir. 2022) (citations omitted). "Once the existence of an agreement to arbitrate is established, the burden shifts to the party seeking to avoid arbitration to 'show[] the agreement to be inapplicable or invalid.'" Id. at 102 (quoting Harrington v. Atl. Sounding Co., 602 F.3d 113, 124 (2d Cir. 2010)).

Courts apply a "standard similar to that applicable for a motion for summary judgment," and they must "consider all relevant, admissible evidence submitted by the parties and contained in pleadings, depositions, answers to interrogatories, and admissions on file, together with . . . affidavits." Nicosia, 834 F.3d at 229 (internal quotation marks and citations omitted). In doing so, they must draw all reasonable inferences in favor of the non-moving party. See id. (citation omitted).

B. Analysis

1. Whether Plaintiff's Claims Are Subject to Arbitration

Plaintiff does not dispute that she agreed to arbitrate some disputes with Luxottica. (Pl.'s Opp'n at 4.) Nor does she dispute that ERISA claims are generally arbitrable. See Bird v. Shearson Lehman/Am. Express, Inc., 926 F.2d 116, 122 (2d Cir. 1991) ("Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims . . . . [T]he FAA requires courts to enforce agreements to arbitrate such claims."); see also Smith v. Bd. of Directors of Triad Mfg., Inc., 13 F.4th 613, 620 (7th Cir. 2021) ("Joining

every other circuit to consider the issue, we recognize that ERISA claims are generally arbitrable." (collecting cases)). Instead, Plaintiff insists only that her claims in this case fall outside the scope of the arbitration provision in the Agreement. (Pl.'s Opp'n at 4.) Given the parties' consensus that there was an agreement to arbitrate, the Court confines its analysis to "whether the scope of that agreement encompasses the claims at issue." Cooper, 990 F.3d at 179 (internal quotation marks and citation omitted). At this step, Plaintiff bears the burden "to show[ ] the agreement to be inapplicable or invalid." Zachman, 49 F.4th at 102 (internal quotation marks and citation omitted).

As described above, the Agreement's introduction states that "[t]he arbitration portion of this Dispute Resolution Agreement covers virtually all legal claims arising out of or related to [an employee's] employment with Luxottica[.]" (Agreement at 50.) The arbitration provision states, in relevant part, as follows:

> [T]his Agreement applies, without limitation, to disputes with any individual . . . or entity . . . arising out of or related to the employment relationship or the termination of that relationship (including post-employment defamation or retaliation), . . . and claims arising under the . . . Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and (a) covered by the Employee Retirement Income Security Act of 1974 or (b) funded by insurance) . . . , state statutes or regulations addressing the same or similar subject matters, and all other federal or state

> legal claims arising out of or relating to Employee's employment or the termination of employment.

(*Id.* at 51–52.)

Plaintiff insists that her ERISA claims are not subject to arbitration because the arbitration provision covers only claims "arising out of or relating to" her employment. (Pl.'s Opp'n at 4.) She points to Cooper, which interpreted similar language in an arbitration provision and held that the plaintiff's ERISA claims were not subject to arbitration because they did not "relate to" his employment. 990 F.3d at 184. But Plaintiff's reading of the arbitration provision—and for the same reasons, her reliance on Cooper—misses the mark.

First, the Agreement's arbitration provision states unequivocally that it applies to claims arising under ERISA. The arbitration provision in Cooper applied to "all legal claims arising out of or relating to employment, application for employment, or termination of employment, except for claims specifically excluded under the terms" of the parties' agreement. 990 F.3d at 178. Here, too, the Agreement's arbitration provision states that it "applies, without limitation, to disputes . . . arising out of or related to the employment relationship or the termination of that relationship[.]" (Agreement at 51–52.) But critically—unlike the provision in Cooper—the arbitration provision here also specifically encompasses "claims arising under the . . . Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and (a) covered by the Employee Retirement Income Security Act

of 1974 or (b) funded by insurance)[.]" (Id. at 52.)[2] Since the Agreement expressly provides that claims arising under ERISA are subject to arbitration, it is immaterial whether or not her claims also "arise out of or relate to" her employment. The Court thus concludes that her claims are subject to arbitration.

Second, even if the Court were to agree that the arbitration provision covers only disputes "arising out of or related to the employment relationship," (Pl.'s Opp'n at 5–7), Plaintiff's claims still would be subject to arbitration. Relying on Cooper, Plaintiff asserts that her claims challenging the Plan's mortality assumptions have "nothing to do with [her] employment at Luxottica." (Id. at 5.) But again, Cooper is inapposite. The plaintiff in Cooper sued a third-party investment manager, alleging breach of fiduciary duty and mismanagement of a profit-sharing fund sponsored by his employer. 990 F.3d at 175. The Second Circuit held that the plaintiff's claims did not "relate to" his employment because they "hinge[d] entirely on the investment decisions made by [the third-party investment manager]," and "none of the facts relevant to the merits of [the plaintiff]'s claims against [the defendant] relates to his employment." Id. at 183.

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[2] Plaintiff does not—and cannot—argue that her ERISA claims fall within the arbitration provision's carveout for "claims for employee benefits under any benefit plan sponsored by the Company." This exception applies only to "actions to recover benefits under a company-sponsored benefit plan under [ERISA] § 502(a)(1), 29 U.S.C. § 1132(a)(1)." Cooper, 990 F.3d at 179 (interpreting arbitration provision that exempted "ERISA-related benefits provided under a Company sponsored benefit plan"). As discussed above, she brings no such claim here.

Here, however, there is a more substantial nexus between Plaintiff's claims and her employment. For example, unlike the Cooper plaintiff, she brings her claims against her former employer directly, challenging her former employer's calculation of her retirement benefits. Additionally, according to the Plan's terms, the Plan's purpose is to "provide[ ] additional retirement income" to Luxottica employees, like Plaintiff, as compensation for services performed to the company. (Hoffman Decl. Ex. A ("Plan") at 1, 7, ECF No. 41-1.) Moreover, as Defendants note, (Defs.' Mem. at 11), Plaintiff alleges that the calculation of benefits available to her under the Plan, which she describes as the "gravamen" of her complaint, (Pl.'s Opp'n at 4), actually influenced her retirement decisions. (Compl. ¶ 15 ("When retiring or deciding whether to retire, Plan participants like Plaintiff consider information provided by Defendants about their retirement options under the Plan.").)

Taken together, these facts suggest that the phrase "arising out of or relat[ing] to the employment relationship" is, at the very least, "susceptible of an interpretation that covers" Plaintiff's claims. Int'l Bhd. of Elec. Workers, 67 F.4th at 114 (internal quotation marks and citation omitted). Thus, at best, Plaintiff has established that the arbitration provision is "'ambiguous about whether it covers the dispute at hand[.]'" Id. at 113 (quoting Granite Rock, 561 U.S. at 301). But in that case, it is well-settled that the Court should apply the "'presumption of arbitrability'" and resolve any doubts in favor of coverage. Id. at 113–14 (quoting Granite Rock, 561 U.S. at 301). Here, for the reasons explained above, the arbitration provision's language can reasonably be interpreted to

cover Plaintiff's ERISA claims, and Plaintiff has failed to offer any evidence sufficient to overcome the presumption in favor of arbitrability. As a result, the Court concludes that Plaintiff's claims are subject to arbitration.

2. Whether the Agreement Is Enforceable

Separately, Plaintiff argues that Defendants' motion to compel arbitration should be denied because the Agreement's arbitration provision is unenforceable.

First, she contends that the Agreement's class action waiver is unenforceable because it "'forbid[s] the assertion of certain statutory rights[.]'" (Pl.'s Opp'n at 8 (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013)); see also Pl.'s Not. Suppl. Auth. at 1–2 (citing Lloyd v. Argent Tr. Co., No. 22-CV-4129, 2022 WL 17542071, at *1 (S.D.N.Y. Dec. 6, 2022)), No. 55.). However, the cases on which she relies are easily distinguishable. In those cases, the courts' concerns were animated by the "representative nature of the section 502(a)(2) right of action[.]" Cooper, 990 F.3d at 184 (internal quotation marks and citation omitted); see also Coan, 457 F.3d at 259–61 (discussing reasoning behind requirement that plaintiff bringing claim under § 502(a)(2) "take adequate steps under the circumstances properly to act in a representative capacity on behalf of the plan" (internal quotation marks and citation omitted)). Here, however, because the Court has dismissed Plaintiff's claims under § 502(a)(2) for lack of standing, those concerns do not apply. The Court will enforce the Agreement's class action waiver by its terms. See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) ("In the [FAA],

Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."). Accordingly, Plaintiff must arbitrate her claims on an individual basis.

Second, Plaintiff insists that Defendants' motion should be denied "because the Summary Plan Description [("SPD")] that Defendants provided to [her] explicitly tells participants that they 'may file suit in federal court' for fiduciaries' violations of ERISA." (Pl.'s Opp'n at 9.) This argument is meritless. The complete portion of the SPD to which Plaintiff refers states that, if the Plan's fiduciaries "breach their fiduciary duties," a participant "may file suit in federal court, but only after, to the extent permitted by law, [the participant] first exhaust[s] the Plan's claims and appeals procedures . . . and bring[s] legal action within 1 year after the date the claim arose." (Stokes Decl. Ex. B at 14, ECF No. 40-3 (emphasis added).) Plaintiff nowhere alleges that she complied with the Plan's claims and appeals procedures, and therefore she has not demonstrated that she can invoke the SPD here. In any event, the SPD does not, as she argues, have any contractual force such that it could displace the parties' separate agreement to arbitrate. See CIGNA Corp. v. Amara, 563 U.S. 421, 438 (2011) (explaining that "summary documents . . . provide communication with beneficiaries about the plan," but "their statements do not themselves constitute the terms of the plan").

* * *

Having concluded that the parties agreed to arbitrate this dispute, the Court will grant Defendants'

motion to compel arbitration. At their request, the case will be stayed pending arbitration. See Katz v. Cellco P'ship, 794 F.3d 341, 347 (2d Cir. 2015) ("[The] FAA mandate[s] a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested."); see also 9 U.S.C. § 3 ("[U]pon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, [the court] shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.").

IV. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss pursuant to Rule 12(b)(1) is GRANTED in part and DENIED in part. Plaintiff has not adequately alleged that she has Article III standing to assert her claims pursuant to ERISA §§ 409 and 502(a)(2). Therefore, those claims are dismissed without prejudice for lack of subject matter jurisdiction. Defendants' factual challenge to Plaintiff's Article III standing is denied without prejudice.

The motion to compel individual arbitration of Plaintiff's remaining claims is GRANTED, and the case is STAYED pending arbitration. Accordingly, the Court does not address Defendants' motion to dismiss under Rule 12(b)(6).

SO ORDERED.

Dated: September 30, 2023
Central Islip, New York

/s/ JMA
JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE

APPENDIX D

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

2. 29 U.S.C. 1109 provides:

Liability for breach of fiduciary duty

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

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

3. 29 U.S.C. 1132(a)(1), (2), and (3) provide:

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

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

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

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

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

* * *

4. 29 U.S.C. 1144(d) provides:

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.