APPENDIX

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APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY POVER, individually and on behalf of all others similarly situated, *Plaintiff - Appellee*, v. THE CAPITAL GROUP COMPANIES, INC.; THE BOARD OF DIRECTORS OF THE CAPITAL GROUP COMPANIES, INC., and its members; and THE U.S. RETIREMENT BENEFITS COMMITTEE OF THE CAPITAL GROUP COMPANIES INC., and its members, Does 1–30, *Defendants - Appellants*.	No. 24-5298 D.C. No. 2:23-cv-09657-GW-PVC OPINION

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted August 11, 2025
Pasadena, California

Filed July 30, 2026

Before: Jacqueline H. Nguyen, Danielle J. Forrest, and Lawrence VanDyke, Circuit Judges.

Opinion by Judge Forrest;
Dissent by Judge VanDyke

SUMMARY*

ERISA/ARBITRATION

The panel affirmed the district court's denial of defendants' motion to compel arbitration in a case in which Cathy Pover sued her former employer, The Capital Group Companies, Inc., and its fiduciaries on behalf of her employer's retirement-savings plan, The Capital Retirement Savings Plan (the Plan), alleging that the fiduciaries mismanaged the Plan's investments.

The Plan is covered by the Employee Retirement Income Security Act of 1974 (ERISA), which permits plan participants to seek relief on a plan's behalf for breach of the duties owed by the plan's fiduciaries. The Plan contract included an arbitration requirement and a waiver by plan participants of any claims brought on "a class, collective, or representative basis."

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel considered the interaction between ERISA, which entitles plan participants to sue for mismanagement of their retirement plan, and the Federal Arbitration Act (FAA), which requires courts to enforce valid agreements to arbitrate. At the intersection of these statutes is the judicially created effective-vindication doctrine that renders unenforceable arbitration agreements that prevent the vindication of statutorily protected rights and remedies.

Because the Plan's waiver provision forbids Pover from asserting her rights under ERISA to sue as a representative of the Plan for Plan-wide relief, the panel agreed with the district court that the waiver is unenforceable under the effective-vindication doctrine. Pover alleges fiduciary breaches that fall squarely within the category of duties that ERISA § 409 imposes on plan fiduciaries, and under ERISA § 502(a)(2), Pover is entitled to bring an action on behalf of the Plan to recover any resulting losses as well as such other equitable or remedial relief as the court may deem appropriate. The Plan's representative-action waiver prevents Pover from enforcing her substantive rights under ERISA because her breach-of-fiduciary-duty claims can only be brought in a representative capacity. Accordingly, the waiver is unenforceable under the effective-vindication doctrine.

Addressing the severability of the waiver and arbitration provisions, the panel concluded that Pover's breach-of-fiduciary duty claims must be adjudicated in court rather than arbitration because the Plan's waiver provision expressly provides that if it "is found to be unenforceable by a court of competent

jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration."

Dissenting, Judge VanDyke wrote that the majority errs twice over in finding the arbitration clause unenforceable. On the merits, he would hold that the bar on "representative" suits in the arbitration clause's class-action waiver does not refer to third-party suits on behalf of the Plan. When read in context, that phrase refers to class action or collective "representative" suits only, not principal-agent representative suits like section 502(a)(2) ERISA claims.

But the panel should not have even reached the issue of arbitrability because the parties expressly agreed to allow an arbitrator to decide threshold questions of arbitrability, expressing their desire to keep courts out of this dispute. Although Capital failed to make that argument before the district court, its failure to do so falls squarely within the exceptions to waiver. Judge VanDyke would have waived waiver and sent the question of arbitrability to the arbitrator.

COUNSEL

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OPINION

FORREST, Circuit Judge:

Cathy Pover sued her former employer, The Capital Group Companies, Inc., and its fiduciaries on behalf of her employer's retirement-savings plan for the fiduciaries' mismanagement of the plan's investments. The plan is covered by the Employee Retirement Income Security Act of 1974 (ERISA), which permits plan participants to seek relief on a plan's behalf for breach of the duties owed by the plan's fiduciaries. However, the plan contract included an arbitration requirement and a waiver by plan participants of any claims brought on "a class, collective, or representative basis." Because this waiver provision forbids Pover from asserting her rights under ERISA to sue as a representative of the plan for plan-wide relief, we agree with the district

court that the waiver is unenforceable under the effective-vindication doctrine, and we affirm the district court's denial of defendants' motion to compel arbitration.

BACKGROUND

A. The Plan

Capital Group is a global asset manager that sponsors a retirement plan for its current and former employees known as The Capital Retirement Savings Plan (Plan). The Plan allows each participant to maintain an individual account funded by contributions from each participant and Capital Group, as well as the participant's investment earnings. The participants may direct how their individual accounts are invested by selecting from a menu of investment options provided by the Plan. Capital Group collects a transaction fee from the investment funds included in the Plan's menu.

The Plan is a "defined contribution plan." The Supreme Court has explained that "a 'defined contribution plan' or 'individual account plan' promises the participant the value of an individual account at retirement, which is largely a function of the amounts contributed to that account and the investment performance of those contributions." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 250 n.1 (2008). A "defined benefit plan," in contrast, "promises the participant a fixed level of retirement income, which is typically based on the employee's years of service and compensation." *Id.* While defined-benefit plans were once "the norm," defined-contribution plans have become the leading form of private retirement-plan offerings. *See id.* at 255 (citation omitted).

The Plan is governed by ERISA and the terms of its Plan Document. According to the Plan Document, the Administrative Committee serves as the Plan's fiduciary and may amend or modify the Plan. As relevant here, the Committee amended the Plan before this litigation by adding two provisions related to dispute resolution: (1) an arbitration requirement and (2) a waiver of class, collective, and representative actions. The arbitration requirement dictates that "[a]ny claim, controversy or alleged breach or violation of law that arises out of or relates in any way to the Plan or a claimant's participation in the Plan and seeks a remedy, ruling or judgment of any kind against the Plan" must be resolved in arbitration. And the waiver provision states:

> A Participant, former Participant, or Beneficiary must bring any dispute in arbitration on an individual basis only, and not on a class, collective or representative basis and must waive the right to commence, be a party to, or be an actual or putative class member of any class, collective, or representative action arising out of or relating to the Plan, including, but not limited to, any claims related to the Plan.

The waiver also specifies that if it "is found to be unenforceable by a court of competent jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration."

B. The Lawsuit

Pover sued Capital Group, the Committee, Capital Group's Board of Directors, and other fiduciaries responsible for controlling and managing

the Plan's investments (hereinafter, collectively, Capital Group). She alleged that Capital Group breached its fiduciary duties to the Plan by retaining certain investment options for participants despite their poor performance. Pover further alleged that Capital Group knew certain investment funds were underperforming but retained them in its offerings to collect the substantial transaction fees generated by the funds. She asserted that Capital Group's failure to remove these funds from the Plan's investment menu violated its duties of prudence and loyalty to the Plan, and that Capital Group failed to monitor its delegees, further harming the Plan.

Pover sued Capital Group "in a representative capacity on behalf of the Plan . . . , seeking appropriate relief . . . to protect the interests of the entire Plan." She sought several forms of plan-wide monetary and equitable relief provided under ERISA. Among these, declarations that the Capital Group fiduciaries breached their duties owed to the Plan and "are personally liable to make good to the Plan"; "restitution and disgorgement"; and an order (1) requiring the Capital Group's fiduciaries to pay "the losses resulting from each breach of fiduciary duty and to restore to the Plan" any lost profits, (2) removing Plan fiduciaries found to have breached their duties and enjoining them from future violations, (3) "reform[ing] the Plan to include only prudent investments," and (4) granting all "other equitable or remedial relief the Court deems appropriate."

Capital Group moved to compel arbitration under the Federal Arbitration Act (FAA), asserting that Pover is bound by the Plan's arbitration requirement.

Pover opposed Capital Group's motion, arguing that the Plan's representative-action waiver was unenforceable under the effective-vindication doctrine, and arbitration was thus not required, because the waiver foreclosed her ability to represent the Plan and pursue plan-wide relief on its behalf, undermining her rights under ERISA. Pover also argued that neither she nor the Plan had agreed to arbitrate future claims against Capital Group. Finally, Pover contended that the arbitration provision is unconscionable and non-severable.

The district court denied Capital Group's motion to compel arbitration. It agreed that the Plan's representative-action waiver could not be enforced because it prospectively waived Pover's substantive rights and remedies under ERISA. The district court explained that ERISA creates a statutory cause of action allowing plan participants to sue on behalf of their plan and recover plan-wide monetary and equitable relief. The court reasoned that Pover's action was "necessarily a representative action seeking plan-wide recovery" and that enforcing the representative-action waiver would prevent her from "bring[ing] any of her claims in a representative capacity on behalf of the Plan." Therefore, it held that the waiver was unenforceable. It also held that the waiver was expressly non-severable because it required any collective or representative claim to proceed in court if found unenforceable. Capital Group appealed.

DISCUSSION

We have jurisdiction to review the district court's denial of a motion to compel arbitration under 9 U.S.C. § 16(a)(1). We review the district court's

decision and its interpretation of ERISA de novo. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 824 (9th Cir. 2019); *Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1158 (9th Cir. 2020). To promote uniformity, we interpret the language of ERISA documents as a matter of federal common law rather than state law. *Mull v. Motion Picture Indus. Health Plan*, 41 F.4th 1120, 1130 n.8 (9th Cir. 2022).

This case requires us to consider the interaction between two federal statutes: ERISA, which entitles plan participants to sue for mismanagement of their retirement plan, and the FAA, which requires courts to enforce valid agreements to arbitrate. At the intersection of these statutes is the judicially created effective-vindication doctrine that renders unenforceable arbitration agreements that prevent the vindication of statutorily protected rights and remedies. We begin our analysis by explaining these background legal principles. We then apply them to determine whether the Plan's representative-action waiver is enforceable. Because we conclude that the waiver is not enforceable under the effective-vindication doctrine, we need not address Pover's remaining challenges to arbitration.

A. Legal Principles

1. ERISA

"ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks and citation omitted). In this expansive statutory system, two ERISA sections work together to provide participants in ERISA-governed plans with a federal cause of

action to enforce the duties owed to the plan by its fiduciaries. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139–40, 142 & n.9 (1985); *Platt v. Sodexo, S.A.*, 148 F.4th 709, 721 (9th Cir. 2025).

First, § 409(a) imposes liability on fiduciaries who breach their duties to the plan and outlines the remedies available. *See* 29 U.S.C. § 1109(a). The statute provides:

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

Id. "[T]he principal statutory duties imposed on [fiduciaries] relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specific information, and the avoidance of conflicts of interest." *Russell*, 473 U.S. at 142–43.

Second, § 502(a)(2) creates the enforcement mechanism. *See* 29 U.S.C. § 1132(a)(2). It provides that "[a] civil action may be brought . . . by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under" § 409(a). *Id.* "Section 502(a)(2) thus acts as the vehicle for plan

participants to obtain the relief made available by § 409(a)." *Platt*, 148 F.4th at 721.

The Supreme Court has examined how these ERISA sections operate for breach-of-fiduciary-duty claims brought by both defined-benefit and defined-contribution plan participants. *Russell*, 473 U.S. at 136; *LaRue*, 552 U.S. at 252–56. And it has made clear that, in both contexts, plaintiffs bringing a claim under § 502(a)(2) proceed on the plan's behalf. *Russell*, 473 U.S. at 142 n.9 ("[A]ctions for breach of fiduciary duty [under § 502(a)(2) are] brought in a representative capacity on behalf of the plan as a whole."); *LaRue*, 552 U.S. at 253 (explaining that § 502(a)(2) "authorizes the Secretary of Labor as well as plan participants, beneficiaries, and fiduciaries, to bring actions on behalf of a plan").

Massachusetts Mutual Life Insurance Co. v. Russell dealt with a defined-benefit plan. There, a participant in an ERISA-backed employee-benefits plan sued a plan fiduciary under § 502(a)(2) and sought "extra-contractual compensatory or punitive damages caused by improper or untimely processing" of her medical-benefit claim. 473 U.S. at 136. The plan participant contended that the fiduciaries' delayed processing of her individual claim caused actionable harm. *See id.* at 136–38. The Supreme Court held that § 502(a)(2) precluded such individualized relief: "A fair contextual reading of the statute 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*, rather than with the rights of an individual beneficiary." *Id.* at 142 (emphasis added). The Court further noted that "the principal statutory duties"

that § 409(a) imposes on fiduciaries are those "relate[d] to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Id.* at 142–43. Thus, "the entire text of § 409(a)" persuaded the Court "that Congress did not intend that section to authorize relief except for the plan itself." *Id.* at 144.

Thirty years later, the Supreme Court revisited § 502(a)(2) in the context of a defined-contribution plan. *LaRue*, 552 U.S. at 250–51. In *LaRue v. DeWolff, Boberg & Associates, Inc.*, a retirement-plan participant alleged that a fiduciary had failed to make changes that he directed to his individual investment portfolio, "'deplet[ing]' his interest in the [p]lan" and "amount[ing] to a breach of fiduciary duty under ERISA." *Id.* at 251. The plan participant sued seeking "make-whole" monetary recovery for the alleged breach. *Id.*

The Supreme Court held that the misconduct the plan participant alleged concerning the fiduciary's failure to maximize the value of his investment account "f[ell] squarely within th[e] category" of fiduciary duties owed to the plan that are addressed in § 409(a), *id.* at 253, because "trustees are chargeable with any profit which would have accrued to the trust estate if there had been no breach of trust," *id.* at 253 n.4 (citation modified). In doing so, the Court distinguished its previous language in *Russell*, which had recognized that ERISA's "draftsmen were primarily concerned . . . with remedies that would protect the entire plan." *Id.* at 254 (quoting *Russell*, 473 U.S. at 142). The Court explained that "*Russell*'s emphasis on protecting the

'entire plan' from fiduciary misconduct reflect[ed] the former landscape of employee benefit plans," which was dominated by defined-benefit plans under which participants' individual entitlement to benefits was not threatened unless fiduciary misconduct "risk[s] . . . default by the entire plan." *Id.* at 254–55.

The Court also clarified that in the defined-contribution-plan context, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce [individual] benefits below the amount that participants would otherwise receive." *Id.* at 255–56. For defined-contribution plans, "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned" ERISA's draftsmen, making a § 502(a)(2) claim appropriate. *Id.* at 256. That is, *LaRue* "recognized that Section 409(a) protects against breaches of fiduciary duty involving the management of assets within defined contribution plans," regardless of whether the injury is felt at the plan level or at the individual-account level. *Cedeno v. Sasson*, 100 F.4th 386, 399 (2d Cir. 2024). In either scenario, the plaintiff-participant proceeds on behalf of the plan and the remedies afforded by ERISA benefit the plan. *LaRue*, 552 U.S. at 253–56; *see also Russell*, 473 U.S. at 142 n.9; *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1093 (9th Cir. 2018) ("[T]he [*LaRue*] Court made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan.").

2. FAA

Congress enacted the FAA in 1925 as a "response to widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013). The FAA established "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Consistent with its underlying purpose, the FAA's "mandate is to enforce arbitration agreements," *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022) (citation modified), and to protect parties' choices for where and under what procedures to resolve their disputes, *id.* ("[A]n arbitration agreement is 'a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.'" (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974))). But there is an exception for arbitration agreements that purport to waive substantive rights and remedies. *See id.* This exception is known as the effective-vindication doctrine. *Italian Colors*, 570 U.S. at 235.

3. Effective-Vindication Doctrine

An arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Viking River Cruises*,

596 U.S. at 653. Indeed, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, where "a provision in an arbitration agreement forbid[s] the assertion of certain statutory rights," preventing the vindication of those rights, courts will invalidate the provision "on 'public policy' grounds."[1] *Italian Colors*, 570 U.S. at 235–36.

We recently joined several of our sister circuits in holding that "arbitration provisions preventing individuals from obtaining the plan-wide relief available under § 409(a) violate the effective-vindication doctrine." *Platt*, 148 F.4th at 721; *see id.* at 721–22 (collecting cases). *Platt v. Sodexo, S.A.* involved an arbitration provision in an ERISA-governed health-insurance plan that "prohibit[ed] claims brought 'as a plaintiff or class member in any purported class or representative proceeding.'" *Id.* at 715. The plaintiff-employee sued his employer for breach of fiduciary duties in violation of § 409(a), and we considered whether the plan's arbitration provision violated the effective-vindication doctrine by

[1] The Supreme Court has discussed with approval the effective-vindication doctrine and repeatedly recognized that arbitration provisions may not prevent a party from effectively vindicating statutory rights and securing statutory remedies. *See, e.g.*, *Italian Colors*, 570 U.S. at 235–36; *see also Cedeno*, 100 F.4th at 396 (collecting cases); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1098 (10th Cir. 2023) ("[T]he Supreme Court has repeatedly recognized the existence of the effective vindication exception."). But the Court has yet to invalidate an arbitration provision based on this doctrine.

preventing the employee from obtaining the only relief afforded by § 409(a)—relief for the plan. *Id.* at 714– 15.

We began our analysis by explaining that the effective-vindication doctrine prevents enforcement of an arbitration provision "if it 'operate[s] as a prospective waiver of a party's *right to pursue* statutory remedies,' including a prohibition on 'the assertion of certain statutory rights.'" *Id.* at 721 (alteration in original) (quoting *Italian Colors*, 570 U.S. at 235–36). We then addressed the same two ERISA sections at play here, confirming that because § 409(a) "provides relief 'singularly to the plan' rather than an individual plaintiff, § 502(a)(2) claims asserting breach of fiduciary duty actionable under § 409(a) are understood as claims 'brought in a representative capacity on behalf of the plan as a whole.'" *Id.* (quoting *Russell*, 473 U.S. at 142 & n.9). And we concluded that because the arbitration provision prohibited claims brought "in any . . . representative proceeding," it was unenforceable because it precluded the plaintiff "from bringing claims in a representative capacity on the Plan's behalf" and "from obtaining the plan-wide relief available under § 409(a)." *Id.* at 715, 721.

B. Application

With this legal backdrop, we consider whether the Plan's representative-action waiver violates the effective-vindication doctrine.[2]

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[2] Capital Group argues, for the first time on appeal, that the parties delegated questions of arbitrability to the arbitrator. Pover contends that Capital Group forfeited this argument by not raising it in the district court. While we have discretion to ignore a party's forfeiture in certain circumstances, *see Ruiz v. Affinity*

1. Representative-Action Waiver

Pover's complaint makes clear that she seeks to represent the Plan and to pursue the full extent of plan-wide relief available under ERISA. The complaint cites § 502(a)(2), noting that the statute "authorizes any participant or beneficiary of the Plan to bring an action individually on behalf of the Plan to enforce a breaching fiduciary's liability to the plan" under § 409(a). And it states that Pover seeks to "act[] in this representative capacity."

The complaint also outlines a spectrum of both monetary recovery and equitable remedies sought that would necessarily affect the entire Plan. For example, Pover seeks a court order requiring that the breaching fiduciaries "make good to the Plan as a whole the losses resulting from each breach of fiduciary duty and to restore to the Plan any profits resulting from each breach." And as equitable remedies, Pover requests restitution, disgorgement, removal of breaching fiduciaries, reformation of the Plan, and "such other equitable or remedial relief as the Court deems appropriate." The requested relief can only be interpreted as seeking recovery that would "inure[] to the benefit of the [P]lan as a whole." *See Russell*, 473 U.S. at 140; *see also LaRue*, 552 U.S. at 253–54.

To determine whether the representative-action waiver bars Pover's claims, we must answer two questions: (1) whether the waiver prevents Pover from bringing claims on behalf of the Plan and (2) whether ERISA limits a participant in a defined-

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Logistics Corp., 667 F.3d 1318, 1322 (9th Cir. 2012), we decline to do so here.

contribution plan to seeking monetary recovery related only to her individual account.

i.

The Plan's waiver provision prohibits current and former plan participants, including Pover, from "bring[ing] any dispute . . . on a class, collective or representative basis." Participants may bring disputes "on an individual basis only." Capital Group argues that "representative," as used in this provision, refers only to collective actions, not to actions brought by a plan participant on behalf of the Plan. Capital Group is correct that the Supreme Court has recognized that the word "representative" has two different meanings: one referring to a plaintiff's statutory authority to sue on behalf of an absent principal, and the other referring to a plaintiff's representation of a group of potential claimants. *Viking River Cruises*, 596 U.S. at 648. We have held that § 502(a)(2) claims asserting breach of fiduciary duty are always "representative" in the first sense because the participant-plaintiff "seeks recovery only for injury done to the plan." *Munro*, 896 F.3d at 1092–93 (citing *LaRue*, 552 U.S. at 256). Consistent with the Supreme Court's guidance, *Munro* recognized that even though "the cause of action" under § 502(a)(2) "belong[s] to the individual plaintiff," *id.* at 1093 (alteration in original) (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006)), the relief afforded by ERISA benefits the plan, *id.* at 1094; *see also Hawkins v. Cintas Corp.*, 32 F.4th 625, 632 (6th Cir. 2022) (following *Munro*); *Williams v. Shapiro*, 161 F.4th 1313, 1322 (11th Cir. 2025).

Thus, the representative nature of Pover's claim is clear. The remaining question is simply how to

interpret "representative," as used in the waiver. On this, our decision in *Platt* controls. The arbitration provision there prohibited "any purported class or representative proceeding." *Platt*, 148 F.4th at 715. We held that language to be a "representative action waiver" that prevented the plaintiff "from bringing claims in a representative capacity on the Plan's behalf." *Id.* at 721. There is no meaningful difference between the prohibition against "any purported class or representative proceeding" in *Platt*, and the prohibition against any claim brought on a "class, collective or representative basis" here. *See id.* at 715. If the former prevents a plaintiff from pursuing those "remedies that were specifically authorized by Congress," in violation of the effective-vindication doctrine, then so does the latter.[3] *See id.* at 721 (quoting *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1107 (10th Cir. 2023)).

ii.

Relying on *LaRue*, Capital Group argues that a defined-contribution plan participant may nevertheless recover only those monetary losses suffered by her individual account, plus other appropriate equitable relief, which is all recoverable in individual arbitration under the Plan's arbitration provisions. Capital Group misunderstands both *LaRue* and ERISA.

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[3] We agree with our dissenting colleague that *Platt* does not "hold that every arbitration agreement provision with somewhat comparable language necessarily bars ERISA suits on behalf of a plan and is therefore invalid under the effective-vindication doctrine." Dissent at 31. But we disagree that the difference between the words of the waiver provisions at issue in *Platt* and here is sufficient to warrant a different outcome.

LaRue held that a participant in a defined-contribution plan can bring a claim under § 502(a)(2) even when the alleged fiduciary breach impacted only her individual account. 552 U.S. at 256. But *LaRue* did not, as Capital Group suggests, *limit* plaintiffs participating in defined-contribution plans to recovering losses suffered only by their individual accounts. Nor did *LaRue* "suggest that Section 502(a)(2) allows individualized relief for injuries that *are* felt at *the plan* level." *Cedeno*, 100 F.4th at 399. Just the opposite. *LaRue* explained, consistent with § 409(a)'s plan-oriented protections, that participants in defined-contribution plans can bring a § 502(a)(2) claim to recover for financial harm suffered plan-wide or by individual accounts because both are plan injuries. *See* 552 U.S. at 255–56; *see also Munro*, 896 F.3d at 1093; *Cedeno*, 100 F.4th at 399. What § 502(a)(2) does not allow is for a participant seeking to recover "for individual injuries distinct from plan injuries." *LaRue*, 552 U.S. at 256.

Capital Group's interpretation of *LaRue* "rests on the fiction" that because Pover seeks relief related to a defined-contribution plan, § 502(a)(2) authorizes her to pursue only her individualized *pro rata* share of monetary recovery owed to the Plan while simultaneously obtaining equitable relief that would affect the entire Plan. *See Cedeno*, 100 F.4th at 405. ERISA does not allow "a court or arbitral forum to slice and dice individual plan participants' and beneficiaries' injuries resulting from mismanagement by fiduciaries in the way" that Capital Group suggests. *See id.* Nor do § 409(a) or § 502(a)(2) differentiate between monetary and equitable relief in a way that can be reconciled with Capital Group's proposed approach. *See id.* As such, we join those of

our sister circuits that have rejected the reading of *LaRue* that Capital Group advances. *See, e.g., id.* at 399, 404–06; *Parker v. Tenneco, Inc.*, 114 F.4th 786, 794–96 (6th Cir. 2024); *Williams*, 161 F.4th at 1321–22.

Additionally, while the difference between defined-benefit and defined-contribution plans motivated *LaRue*'s narrowing of *Russell*'s "entire plan" language, this difference mattered because an account-level injury is only possible in defined-contribution plans. *See LaRue*, 552 U.S. at 255. Recall that in *LaRue*, the former employee claimed that the plan fiduciary did not make certain investment changes to *the participant's* account. *Id.* at 251. Because a defined-benefit plan does not allow for individualized investment decisions, neither the breach alleged in *LaRue* nor the consequential injury would have been possible. *See id.* at 254–56. The analytical difference between *Russell* and *LaRue* thus turned on the nature of the injury suffered on account of the plan type, not on the plan type itself. *See LaRue*, 552 U.S. at 254–56; *Cedeno*, 100 F.4th at 399.

Here, Pover alleges fiduciary breaches that harmed the Plan as a whole. For example, she alleges that Capital Group retained a set of five mutual funds among its menu of investment options despite knowing they were underperforming because they generated millions in "fee income" instead of replacing those funds "with any one of the many prudent alternatives." This alleged breach "falls squarely within th[e] category" of duties that § 409(a) imposes on plan fiduciaries. *See LaRue*, 552 U.S. at 253; *see also Varity Corp. v. Howe*, 516 U.S. 489, 511–12 (1996) (noting that § 409(a)'s fiduciary obligations "reflect[] a

special congressional concern about plan asset management" and "relate[] to the plan's financial integrity"). And under § 502(a)(2), Pover is entitled to bring an action on behalf of the Plan to recover any resulting losses, as well as "such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. §§ 1109(a), 1132(a)(2).

For these reasons, we conclude that the Plan's representative-action waiver prevents Pover from enforcing her substantive rights under ERISA because her breach-of-fiduciary-duty claims can only be brought in a representative capacity. Accordingly, the waiver is unenforceable under the effective-vindication doctrine.

2. Severability

Having concluded that the representative-action waiver is unenforceable, our last question is whether this provision may be severed from the Plan's arbitration provision. *See Viking River Cruises*, 596 U.S. at 662. This answer is easy. The waiver provision expressly provides that if it "is found to be unenforceable by a court of competent jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration." Here, where there is no illegality in the severance clause itself, we enforce the Plan as written. *See Mull*, 41 F.4th at 1132. Pover's breach-of-fiduciary duty claims must be adjudicated in court rather than arbitration.

AFFIRMED.

VANDYKE, Circuit Judge, dissenting:

The majority errs twice over in finding the arbitration clause unenforceable. On the merits, I would hold that the bar on "representative" suits in the arbitration clause's class-action waiver does not refer to third-party suits on behalf of the Plan. When read in context, that phrase refers to class action or collective "representative" suits only, not principal-agent representative suits like section 502(a)(2) ERISA claims. That means it does not prevent Pover from bringing claims on behalf of the Plan in arbitration and therefore does not interfere with Pover's substantive rights to bring section 502(a)(2) ERISA claims.

But we should not have even reached the issue of arbitrability. The parties expressly agreed to allow an arbitrator to decide threshold questions of arbitrability, expressing their desire to keep courts out of this dispute. Although Capital failed to make that argument before the district court, its failure to do so falls squarely within our exceptions to waiver. Consistent with the parties' express intent, I would have waived waiver and sent the question of arbitrability to the arbitrator.

I. The majority errs by holding the class-action waiver unenforceable.

The majority explains (1) that in a section 502(a)(2) ERISA claim, the plaintiff proceeds on behalf of the plan and the remedies afforded by ERISA benefit the plan, Majority Op. at 14; (2) that Pover "seeks to represent the Plan" and pursues "plan-wide relief," *id.* at 17; (3) that Pover seeks "monetary recovery and equitable remedies ... that would

necessarily affect the entire Plan," *id.* at 17; and (4) that Pover can bring a section 502(a)(2) claim to recover for both "financial harm suffered plan-wide" and harm to her "individual account[]," *id.* at 19, as well as "such other equitable or remedial relief as the court may deem appropriate," *id.* at 22 (quoting 29 U.S.C. § 1109(a)). I agree with the majority on all four points.

The critical question here, though, is whether the Plan's ban on "class, collective or representative" suits prevents Pover from bringing section 502(a)(2) claims on behalf of the Plan. If it did, then the majority's bottom-line conclusion would be right: the arbitration agreement would prevent Pover from exercising her statutory right to bring section 502(a)(2) claims on behalf of the Plan in arbitration, and we would need to allow this lawsuit to proceed.

The majority devotes little attention to this crucial question. In context, the most sensible reading of what the arbitration agreement calls a "class action waiver" is that it bars class or collective "representative" actions, not "representative" suits on behalf of the Plan. Because there is nothing in the arbitration agreement that prevents Pover from arbitrating her claim on behalf of the Plan, we should have enforced that agreement and directed the district court to compel arbitration.

A. The class-action waiver does not foreclose suits on behalf of the Plan.

To understand the interpretive dispute here, it's important to grasp that not all "representative" suits are the same. The Supreme Court conceives of two different categories of "representative" suits in the arbitration context: (1) collective-action suits where a

putative plaintiff "represents" a class of similarly situated individuals, and (2) principal-agent suits where the putative plaintiff "represents" a wholly different entity separate from the plaintiff. *See Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 648 (2022). Rule 23 class actions provide the most obvious example of the first category, where a plaintiff sues not just on his own behalf but also on behalf of other, similarly situated plaintiffs.

But the second, "principal-agent" category encompasses actions brought by an individual on behalf of a different entity altogether, like a qui tam action, shareholder-derivative suit, or private-attorney-general action. *See id.* at 657. In these types of "representative" suits, the plaintiff stands in the shoes of some third party, effectively bringing claims on that third party's behalf. See, e.g., *Stoner v. Santa Clara Cnty. Off. of Educ.*, 502 F.3d 1116, 1126 (9th Cir. 2007) (describing qui tam relators as "representing the interests of the government and prosecuting the action on its behalf"). The Supreme Court has observed that, unlike collective action representative suits that "adjudicate the individual claims of multiple absent third parties," "single-agent, single-principal representative suits" are consistent with "the norm of bilateral arbitration as [the Court's] precedents conceive of it." *Viking River*, 596 U.S. at 655, 657. Suits that are "representative" in the principal-agent sense are thus fully compatible with a law requiring that arbitration be "representative." *See id.* at 656– 57.

The parties do not dispute, and this court's case law recognizes, that section 502(a)(2) ERISA claims are "representative" in the second, "principal-agent"

sense. *See Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092–93 (9th Cir. 2018). So the important question here is whether the term "representative" in the Plan's class-action waiver bars such suits.

A contextual reading of the Plan's class-action waiver confirms that when it refers to "representative" suits, it means *collective-action* representative suits (like class actions) rather than principal-agent representative suits on behalf of the Plan. A phrase is given more precise content by its association with neighboring words. *See Fischer v. United States*, 603 U.S. 480, 487 (2024). And when a word is placed at the end of a list, it "is typically 'controlled and defined by reference to the specific classes ... that precede it.'" *Id.* (internal quotation marks omitted) (quoting *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)). A classic example of this principle comes from *Yates v. United States*, 574 U.S. 528 (2015) (plurality opinion). There, the Supreme Court considered whether the Sarbanes–Oxley Act's prohibition on tampering with any "tangible object" applied to fish. *Id.* at 532. The dissenting justices concluded that the phrase "tangible object" covered "any object capable of being touched," including a fish. *Id.* at 553 (Kagan, J., dissenting). But the Yates plurality and Justice Alito rightly rejected that unnatural reading and looked to the full prohibition against tampering with "any record, document, or tangible object." *See id.* at 544–45; *id.* at 549–50 (Alito, J., concurring in judgment). In context, it was clear that "tangible object" referred "not to any tangible object, but specifically to the subset of tangible objects involving records and documents." *Id.* at 544; accord *id.* at 549–50 (Alito, J., concurring in judgment).

Applying this interpretive approach to the Plan's prohibition on "class, collective, or representative" suits shows that it bars collective-action representative suits only, and not principal-agent suits on behalf of the Plan. Just like the phrase "tangible object" in *Yates*, the class-action waiver's use of "representative" comes at the end of a list—"class, collective or representative." The words surrounding "representative" in the waiver—"class" and "collective"—confirm that the waiver refers to the types of representative suits brought on behalf of other similarly situated individuals, not to principal-agent "representative" suits where an individual effectively steps into the shoes of the Plan. Accordingly, we should read "representative suits" to refer not to any representative suits, but only to the subset of representative suits that involve "class" or "collective" suits.

Pover responds that reading the class-action waiver this way violates the canon against surplusage by making the term "representative" "duplicative of the [preceding] terms 'class' and 'collective.'" But this argument is not persuasive. For one thing, Pover's reading wouldn't solve all the redundancy problems: if the waiver used "representative" in the principal-agent sense, it still also uses the words "class" and "collective," which mean the same thing and would also be redundant. It wouldn't make sense to apply the surplusage canon to one word in this list, but not the others. As the Supreme Court recently explained, "[t]he canon against surplusage can be meaningful when a competing interpretation would avoid superfluity. But, when both interpretations involve the same redundancy, the canon against surplusage simply does not apply." *Bufkin v. Collins*, 604 U.S.

369, 387 (2025) (citations omitted); see also *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013) (declining to apply the canon against surplusage when no interpretation would give effect to every word). "[E]ven excellent writers do not always trim every unnecessary word," *Mullin v. Al Otro Lado*, 609 U.S. ----, ----, 2026 WL 1825741, at *8 (U.S. June 25, 2026), and it appears that the Plan's drafters simply included a three-word list to refer exhaustively to the same type of collective representative action.

To be sure, there's some overlap in the terms "class, collective or representative," but legal documents are often overinclusive and use repetitive phrases to get the same point across. This is "a perhaps regrettable but not uncommon sort of lawyerly iteration." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). As Justice Scalia observed, the canon against surplusage "cannot always be dispositive" because "[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach. Doublets and triplets abound in legalese: *Execute and perform*—what satisfies one but not the other? *Rest, residue, and remainder*—could a judge interpret these as referring to three distinct things? *Peace and quiet*—when is peace not quiet?" Antonin Scalia & Bryan Garner, *Reading Law* 176–77 (2012). "Sometimes," as here, "the better overall reading of [a document] contains some redundancy." *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019); *accord Freeman*, 566 U.S. at 635 (adopting interpretation of statute under which "portion, split, or percentage" in the same clause "all mean the same thing").

Pover's reading would also render an important part of the Plan's arbitration provision meaningless. The arbitration provision specifies that it seeks "to make mandatory individual arbitration apply ... to the maximum extent *permissible under ERISA*." Interpreting "representative" as banning section 502(a)(2) claims on behalf of a plan would essentially foreclose arbitration of *any* ERISA claims because—as the majority correctly observes—*all* section 502(a)(2) claims are representative in the principal-agent sense. So if this interpretation were right, the class-action waiver would bar *every* representative action filed on behalf of a plan. Such a reading puts the arbitration provision and the class-action waiver in direct conflict—the latter takes away most or all of what the former purports to give. Since both provisions were added to the Plan at the same time, it's implausible this is what the drafters meant. Reading the Plan's class-action waiver as applying only to collective actions where the plaintiff seeks to represent a class of similarly situated individuals is most consistent with the Plan's express statement that arbitration "shall remain required with the minimum change necessary to allow the arbitration requirement to be permissible under ERISA."[1]

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[1] The Summary Plan Description ("SPD") supports this understanding. The SPD provides that plan participants may not "participate in a class action involving the plan" and instead "must arbitrate any claim involving the plan, including ... a claim based on allegations of breach of fiduciary responsibility"—in other words, section 502(a)(2) claims. The SPD thus confirms that the arbitration provisions were intended to *allow* arbitration of principal-agent representative claims on behalf of the Plan, while foreclosing only class- or collective-action representative claims.

At bottom, the best reading of the Plan's class-action waiver is that it uses the word "representative" in its collective-action sense, not its principal-agent sense. This means that the waiver does not bar Pover from arbitrating section 502(a)(2) claims on behalf of the Plan.

B. The majority misapplies *Platt*.

Eliding any analysis of the Plan's language, the majority simply asserts that, on the crucial interpretive question here: "our decision in *Platt* controls." Majority Op. at 19. This is the loadbearing move in the majority opinion. But it is a misstep.

In *Platt v. Sodexo, S.A.*, a three-judge panel held that the effective-vindication doctrine prevented us from compelling arbitration because the arbitration clause in that case prohibited claims brought "as a plaintiff or class member in any purported class or representative proceeding." 148 F.4th 709, 715, 721 (9th Cir. 2025) (emphasis added). The *Platt* panel described that clause as "a representative action waiver, which expressly preclude[d] Platt from bringing claims in a representative capacity on the Plan's behalf." *Id.* at 721. And, the *Platt* panel held, this waiver was unenforceable because it "prevent[ed]" plan participants from seeking the "plan-wide relief" that section 502(a)(2) entitles them to seek. *Id.*

It's hard to tell exactly why the *Platt* panel was so confident that a clause barring claims "as a plaintiff or class member in any purported class or representative proceeding" prevented individuals from bringing "plan-wide" section 502(a)(2) claims. *Cf. id.* at 715, 721. *Platt* did not acknowledge the different types of representative actions. Nor did it inspect the

language of the arbitration clause at issue there to determine whether it barred principal-agent "representative" actions on behalf of a third party—like qui tam and shareholder-derivative suits—or merely barred class-action-style "representative" actions. The *Platt* panel opinion quotes the relevant waiver language only once, in the "background" section, *id.* at 715, and simply concludes—six pages later, without any analysis—that this language is "a representative action waiver, which expressly preclude[d] *Platt* from bringing claims in a representative capacity on the Plan's behalf," *id.* at 721. *Platt* appears to be nothing but a fact-bound decision with essentially no analysis.

It's also not clear why the majority is so confident that *Platt* "controls" here. Majority Op. at 19. The language in the *Platt* agreement—barring claims brought "as a plaintiff or class member in *any* purported class or representative proceeding"—is different from the language in the class-action waiver here. *Id.* at 715 (emphasis added). I don't read *Platt* to hold that every arbitration agreement provision with somewhat comparable language necessarily bars ERISA suits on behalf of a plan and is therefore invalid under the effective-vindication doctrine. And I would not extend *Platt*'s cursory holding about the specific agreement in that case—which, again, involved no analysis of the relevant language or the different types of representative suits—to this case, which involves a different Plan, with different language.

Platt is thus no bar to properly construing the actual language before us. And, as I've explained, the best interpretation of *this* Plan's class-action waiver is

that it does not ban principal-agent representative suits on behalf of the Plan. Because the waiver does not ban those suits, it does not prevent Pover from vindicating her rights under ERISA, and the severability clause does not take effect. *Cf.* Majority Op. at 22.

II. We should have applied well-established exceptions to waiver and allowed the arbitrator to decide the threshold issues of arbitrability.

Although the majority errs in extending Platt's holding to misinterpret the class-action waiver, we did not even need to reach that question. That's because the Plan delegates threshold arbitrability questions to the arbitrator. The Federal Arbitration Act ("FAA") tasks courts with a limited role when reviewing a motion to compel arbitration. *See Rent–A–Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010); 9 U.S.C. § 2. Because arbitration is a matter of contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The freedom to contract includes the freedom to keep courts out of disputes altogether by dictating that threshold arbitrability questions—such as whether an arbitration agreement applies to a particular dispute and whether the agreement is voided by operation of law—will be decided by an arbitrator and not the courts. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019); *Rent–A–Ctr.*, 561 U.S. at 68–70; *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). When parties "*clearly and unmistakably*" demonstrate their intention to arbitrate arbitrability, we must enforce that agreement. *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015) (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

Here, the Plan Committee added an arbitration clause and the class-action waiver to the Plan by formal amendment on January 27, 2020. The clause applied broadly to "[a]ny claim, controversy or alleged breach or violation of law that arises out of or relates in any way to the Plan," and was binding on both current and former participants.

The clause explicitly incorporated the American Arbitration Association ("AAA") Rules, stating: "[a]ny claim, controversy or alleged breach or violation of the law that arises out of or related in any way to the Plan ... shall be settled in binding arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures." Under Ninth Circuit precedent, this incorporation constitutes "clear and unmistakable" evidence that the Plan delegated threshold arbitrability questions to the arbitrator. *Brennan*, 796 F.3d at 1130; *Caremark, LLC v. Choctaw Nation*, 104 F.4th 81, 87 n.5 (9th Cir. 2024). Threshold issues delegated to the arbitrator include defenses like unconscionability and effective vindication. *Fli-Lo Falcon, LLC v. Amazon.com, Inc.*, 97 F.4th 1190, 1194 (9th Cir. 2024). The Plan's "clear and unmistakable" delegation of threshold issues to an arbitrator, deprives us of the authority to decide

threshold arbitrability questions and directs these questions to the arbitrator.[2]

The majority refuses to resolve the case on these clear legal grounds because Capital failed to argue the issue before the district court. Majority Op. at 17 n.2. But the arbitrability of the Plan falls squarely within our recognized waiver exceptions. We may, and often do, consider arguments not raised below where the issue is purely legal, the record is fully developed, and there is no prejudice. *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006); *Bolker v. Comm'r*, 760 F.3d 1039, 1042 (9th Cir. 1985).

Whether incorporation of AAA Rules in the Plan governs delegation is a purely legal question. *Brennan*, 796 F.3d at 1130. The record is also complete since nobody disputes that the language of the valid amendment to the Plan explicitly incorporates the AAA Rules. And factual disputes about *Pover's* sophistication or receipt of amendments to the Plan are irrelevant to whether the *Plan* agreed to arbitration (which it clearly did). Pover is suing here on behalf of the Plan—she cannot rely on her individual level of sophistication in asking us to ignore the Plan's delegation of arbitrability questions to an

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[2] The amendment complied with ERISA's procedural requirements. The Plan expressly authorizes the Committee to amend the Plan. The amendment was disclosed in both the Summary Plan Description and quarterly materials. The record establishes that the Plan followed its own amendment procedures and satisfied ERISA's disclosure obligations. The Supreme Court has explained that employers may freely amend ERISA plans if they follow the procedures outlined in the plan's documents. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Pover does not dispute that the Committee had authority to adopt the amendment.

arbitrator. The Plan is not prejudiced by arbitrating according to the Plan's own terms, which the Plan itself approved. I see no reason to avoid enforcing the arbitration clause's delegation of arbitrability questions to an arbitrator.

* * *

We should not have even decided the issue of arbitrability, but the majority nonetheless reaches that issue to find that the class-action waiver bans more than class actions. In doing so, the majority transplants the ipse-dixit holding from *Platt* to hold in this case, again without analysis, that the Plan language here bars Pover from bringing claims on behalf of the Plan. That isn't the best reading of the Plan's class-action waiver. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-9657-GW-PVCx	Date	August 12, 2024
Title	*Cathy Pover v. The Capital Group Companies, Inc., et al.,*		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	April Lassiter-Benson	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:

Charles H. Field, Jr.
Richard D. Carter

Attorneys Present for Defendants:

Michael S. Hines

PROCEEDINGS: DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE AMENDED COMPLAINT [27]

The Court's Tentative Ruling on Defendants' Motion [27] was issued on August 9, 2024 [45]. Oral argument is held. The Tentative Ruling is adopted as the Court's Final Ruling. Defendants' Motion is DENIED.

The Court sets a scheduling conference for September 16, 2024 at 8:30 a.m. The parties are to file a joint scheduling report by noon on September 11, 2024.

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Initials of Preparer JG

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 23-9657-GW-PVC	Date	August 9, 2024
Title	Cathy Pover v. The Capital Group Companies Inc. et al		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Patricia Gomez for Javier Gonzalez	Not Reported
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Plaintiff:

Not Present

Attorneys Present for Defendants:

Not Present

Proceeding: (In Chambers) Tentative Ruling on Motion to Compel Arbitration and Dismiss the Amended Complaint [27]

Attached hereto is the Court's Tentative Ruling on Plaintiffs' Motion to Compel Arbitration and Dismiss the Amended Complaint set for hearing August 12, 2024, at 8:30 a.m. The parties are instructed to read the tentative ruling before Monday's hearing.

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Cathy Pover v. The Capital Group Companies Inc. et al.; Case No. 2:23-cv-09657-GW-(PVCx) Tentative Ruling on Motion to Compel Arbitration

Before the Court is Defendants' motion to compel arbitration (the "Motion") in this putative class action arising under Section 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 28 U.S.C. § 1132(a)(2). *See* Motion, Docket No. 27. The Court has considered the Motion, Plaintiff's opposition ("Opp."), Docket No. 39, Defendants' reply ("Reply"), Docket No. 42, with oral arguments scheduled on August 12, 2024.

The Motion asks the Court to determine the enforceability of an arbitration agreement that commands participants in an ERISA-governed plan who are pursuing breach of fiduciary duty claims in a representative capacity on behalf of the entire plan to instead bring only individualized claims in arbitration. ERISA statutorily permits plan participants to recover plan-wide relief for breaches of fiduciary duties owed to the plan. But the arbitration provision at issue in this case limits participants to bringing claims in individualized arbitration, where they can recover for the plan only their individualized *pro rata* share of restitution and may be unable to recover other forms of plan-wide equitable relief. Because the arbitration provision at issue in this case works as a prospective waiver of the rights and remedies ERISA statutorily establishes, the Court would **DENY** the Motion.

I. Background

Plaintiff Cathy Pover ("Pover") is a former employee of The Capital Group Companies Inc. ("Capital

Group"). *See* Declaration of Cathy Pover ("Pover Decl."), Docket No. 39-4, ¶ 1. Capital Group is a global asset manager with $2.2 trillion in assets under management as of December 31, 2022. *See* First Amended Complaint ("FAC"), Docket No. 24, ¶ 11; Motion at 7. Capital Group sponsors The Capital Retirement Savings Plan (the "Plan"), which is a defined contribution plan composed of a Master Retirement Plan and a 401(k) Tax Advantage Plan. *See* Declaration of Michael S. Hines ("Hines Decl."), Docket No. 27-1, Ex. 1, at 9 of 186; Motion at 7. The Plan provides retirement income for approximately 11,000 Capital Group employees, former employees, and their beneficiaries (the "Plan Participants"). *See* FAC ¶ 27. Pover has been a participant in the Plan since 1992. *See* Pover Decl. ¶ 2.

The Plan is comprised of various 401(k) participant accounts, company contribution accounts, and personal contributions accounts. *See* Motion at 7-8; *see generally* Hines Decl., Ex. 1, at 3-86 of 186. Each Plan Participant may choose to allocate her respective account into any of the investment options the Plan offers. *See id*. Each Plan Participant maintains an account comprised of the value of the participant's contributions, Capital Group's contributions, and earnings from the investment options selected by the participant. *See* FAC § 27.

On November 14, 2023, Pover filed suit against Capital Group, The Board of Directors of Capital Group and its members (the "Board of Directors"), and the U.S. Retirement Benefits Committee of Capital Group (the "Committee") (collectively, "Defendants"). *See generally* Complaint, Docket No. 1. The parties jointly stipulated to extend Defendants' time to

respond to the Complaint to March 4, 2024 and to allow Pover until May 1, 2024 to file an amended complaint. *See* Docket Nos. 12-13. On March 4, 2024, Defendants timely filed a motion to compel arbitration. *See* Docket No. 23. On May 1, 2024, Pover timely filed the FAC, which remains the operative complaint in this matter and mooted Defendants' initial motion to compel arbitration of the original complaint. *See* generally FAC.

The FAC alleges three causes of action arising under ERISA: (1) Breach of the Duty of Prudence; (2) Breach of the Duty of Loyalty; and (3) Failure to Monitor. *See generally* FAC. Pover brings these claims on behalf of the Plan in a representative capacity of a putative class of Plan Participants. *See* FAC ¶ 8. Because the details of Pover's allegations are ancillary to determining the instant Motion, the Court will recite only the general premise of Pover's case. Pover alleges that Defendants breached their fiduciary duties by retaining certain investment products in the Plan for the purpose of generating fee income for Capital Group. *See generally* FAC.

Pover seeks to make good to the Plan as a whole all the losses that resulted from these alleged breaches of fiduciary duties during the time period of July 1, 2019 through the date of judgment in this lawsuit (the "Class Period"). *See id.* ¶ 8, 16. As a representative of the entire plan, Pover seeks planwide recovery. *See, e.g.*, *id.* ¶ 205 ("Each of the Capital Group Defendants is liable to make good to the Plan as a whole the losses resulting from the aforementioned breaches and to restore to the Plan any profits resulting from the breaches of fiduciary duties alleged in this Count. The Capital Group Defendants are

subject to other plan-wide equitable or remedial relief as appropriate."), ¶ 211 ("the Defendants . . . are liable to disgorge to the Plan all profits made as a result of these Defendants' breaches of the duty of loyalty."). In the FAC's Prayer for Relief, Pover specifically requests, *inter alia*: (1) a declaration that Defendants breached their fiduciary duties; (2) an order that Defendants "make good to the Plan as a whole for the losses" and "restore to the Plan any profits" that resulted from each breach of fiduciary duty; (3) an order that Defendants "are liable to the Plan for appropriate plan-wide equitable relief, including but not limited to restitution and disgorgement"; (4) removal of the fiduciaries who breached their fiduciary duties; and (5) reformation of the Plan to include only prudent investments. *See* FAC, Prayer for Relief.

On May 15, 2024, Defendants filed the instant Motion seeking to dismiss the case and compel Pover to bring the claims asserted in the FAC in individual arbitration. *See generally* Motion. Defendants contend that Pover is bound by a mandatory arbitration agreement in the Plan's terms that require her to bring her claims in binding individualized arbitration. *See generally id*. The arbitration agreement that Defendants contend binds Pover is a relatively new amendment to the Plan's terms. Pover first started participating in the Plan in 1992, at which time the Plan did not contain an arbitration provision nor a class action waiver. *See* Pover Decl. ¶ 2; Hines Decl. at 76 of 186. On January 27, 2020, the Committee unilaterally amended the Plan's terms to modify its claims procedure, adding both a binding arbitration provision and a waiver

of class, collective, and representative actions.[1] *See* Hines Decl. at 88-90 of 186.

This change amended the entirety of Section 15.6 of the Plan, which previously delineated a claims procedure but did not include a mandatory arbitration provision or a class action waiver. *See* Hines Decl. at 76 of 186. Section 15.6(b) of the amended Plan terms now provides a mandatory arbitration provision:

> Arbitration. Any claim, controversy or alleged breach or violation of law that arises out of or relates in any way to the Plan or a claimant's participation in the Plan and seeks a remedy, ruling or judgment of any kind against the Plan, a Plan fiduciary, or a party in interest shall be settled by binding arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures. Such arbitration shall be conducted in Los Angeles, California (or such other major city that is nearest to the workplace of the Participant) before a neutral arbitrator with substantial experience in ERISA matters. In any such arbitration, the arbitrator will issue a written award/opinion and the Company will pay the arbitrator's fee and arbitration forum fees. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

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[1] For convenience, the Court will hereinafter refer to the waiver of class, collective, and representative actions simply as a "class action waiver." Unless indicated otherwise, the Court intends such use of the term "class action waiver" to encompass the provision's waiver of representative actions.

See Hines Decl., Ex. 1, at 89 of 186. Section 15.6(c) of the amended Plan terms now provides a mandatory Class Action Waiver:

> Waiver of Class, Collective, and Representative Actions. A Participant, former Participant, or Beneficiary must bring any dispute in arbitration on an individual basis only, and not on a class, collective or representative basis and must waive the right to commence, be a party to, or be an actual or putative class member of any class, collective, or representative action arising out of or relating to the Plan, including, but not limited to, any claims related to the Plan ("class action waiver"). However, if this class action waiver is found to be unenforceable by a court of competent jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration. Except as provided in the preceding sentence, this Section 15.6(c) is intended to make mandatory individual arbitration apply, as described above, to the maximum extent permissible under ERISA; if any feature of this arbitration requirement is impermissible under ERISA, arbitration as described above shall remain required with the minimum change necessary to allow the arbitration requirement to be permissible under ERISA.

See Hines Decl., Ex. 1, at 89 of 186.

Capital Group argues that these terms are binding upon Pover and compel her to bring her individualized claims in arbitration and not on a

representative basis. *See generally* Motion. Pover argues that the arbitration provision and class action waiver together foreclose her ability to pursue plan-wide relief under ERISA and are therefore unenforceable under the effective vindication doctrine. *See generally* Opp. Even so, Pover argues there was no agreement to arbitrate in the first place because Defendants unilaterally amended the Plan's terms without her consent, and that the arbitration agreement is nonetheless unconscionable. *See generally id*.

II. Legal Standard

The Federal Arbitration Act ("FAA") "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The FAA reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Id*. (internal quotation marks and citations omitted); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (internal citations omitted).

A party aggrieved by the refusal of another party to arbitrate under a written arbitration agreement may petition the court for an order compelling arbitration as provided for in the parties' agreement. *See* 9 U.S.C. § 4. Under the FAA, a court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v.*

Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000). If the answer to both inquires is yes, then "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds*, 470 U.S. at 218 (emphasis in original).

However, the FAA provides that arbitration agreements may be found unenforceable on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

"While the Court may not review the merits of the underlying case '[i]n deciding a motion to compel arbitration, [it] may consider the pleadings, documents of uncontested validity, and affidavits submitted by either party.'" *Macias v. Excel Bldg. Servs. LLC*, 767 F. Supp. 2d 1002, 1007 (N.D. Cal. 2011) (quoting *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 540 (E.D. Pa. 2006)).

III. Discussion

Defendants' principal argument here is that the outcome of this Motion is open-and-shut by the Ninth Circuit's unpublished memorandum disposition in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019) ("*Dorman II*"). *See* Motion at 11-15 ("The Ninth Circuit's decision in *Dorman* is dispositive"); Reply at 6-10 ("The Ninth Circuit has already decided this issue"). Defendants position is that: (1) the Plan includes an arbitration agreement that encompasses Pover's claims, (2) Pover is bound by the arbitration agreement because she participated in the Plan while the arbitration agreement was in effect, (3) the agreement is nearly identical to that the arbitration agreement the Ninth Circuit compelled to arbitration in *Dorman II*, and (4) the arbitration agreement is enforceable because it does not waive any substantive ERISA rights. *See generally* Motion; Reply.

Pover's primary contention is that the Plan's arbitration clause and class action waiver effectively foreclose her from achieving the plan-wide relief that ERISA statutorily establishes, rendering the agreement unenforceable under the effective vindication exception. *See* Opp. at 18-22. In any event, Pover also argues, no agreement to arbitrate was formed when the Committee unilaterally amended the Plan's terms to include an arbitration provision to which she was never notified nor consented. *See* Opp. at 22-29. Pover also argues that the arbitration agreement is unconscionable. *See* Opp. at 29-31.

For the reasons explained below, the Court would find that the arbitration agreement at issue in this case serves as a prospective waiver of the substantive

rights and remedies ERISA establishes and is therefore unenforceable under the effective vindication exception. Because the class action waiver is expressly nonseverable, the Court would find that the entire arbitration agreement is void. And because resolution of Pover's primary contention is dispositive of the instant Motion, the Court does not reach Pover's other arguments regarding unilateral amendment, formation, and unconscionability.

A. The Plan and ERISA

Before addressing the various arguments, the Court will first demarcate some background about the Plan and the statutory framework of the ERISA provisions relevant to Pover's claims.

a. The Plan

The Plan at issue in this case is a profit-sharing plan as defined in Section 401(k) of the Internal Revenue Code, which is a type of defined contribution plan. *See* FAC ¶ 26. "Defined contribution plans dominate the retirement plan scene today. In contrast, when ERISA was enacted, . . . the defined benefit plan was the norm of American pension practice." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255 (2008) (cleaned up). The Plan is comprised of various 401(k) participant accounts, company contribution accounts, and personal contribution accounts. *See* Motion at 7-8; *see generally* Hines Decl, Ex. 1, at 3-86 of 186. Pover – like all other Plan Participants composing the putative class – maintains an individual plan account and may choose to allocate her account into any of the investment options the Plan offers. *See* Motion at 7-8; FAC § 27; *see generally* Hines Decl., Ex. 1, at 3-86 of 186. Pover's individual plan account is comprised of the value of her contributions, Capital

Group's contributions, and earnings from the investment options she selected. *See* FAC § 27. Unlike a defined benefit plan that would promise a specified monthly benefit at retirement, the value of Pover's account will fluctuate due to the changes in the value of the investments she selects.

b. ERISA

Pover's claims arise from two provisions of ERISA. Sections 409(a) and 502(a)(2) of ERISA work together to permit participants in an ERISA-governed plan to bring civil lawsuits on behalf of the plan to recover from fiduciaries who breach their fiduciary duties owed to the plan. Section 409(a) establishes personal liability for fiduciaries who breach their fiduciary duties to the plan:

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

29 U.S.C. § 1109(a) (emphasis added). "The principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance

of conflicts of interest." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985).

Section 502(a)(2) is the civil enforcement mechanism of Section 409(a). It authorizes civil lawsuits to be brought "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under [Section 409] of this title." 29 U.S.C. § 1132(a)(2); *see also LaRue*, 552 U.S. at 253 (observing that Section 502(a) "identifies six types of civil actions that may be brought by various parties. The second . . . authorizes . . . plan participants . . . to bring actions on behalf of a plan to recover for violations of the obligations defined in § 409(a).").

"These two provisions together establish the vehicle for individual plan participants to pursue claims based on a plan fiduciary's breach of its duties pursuant to Section 409(a)." *Cedeno v. Sasson*, 100 F.4th 386, 397 (2d Cir. 2024); *see also LaRue*, 552 U.S. at 251 ("Section 502(a)(2) provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm plans.").

B. The Plan's Arbitration Agreement Is Unenforceable

With this background in mind, the Court will now address Pover's principal argument that the Plan's arbitration agreement is unenforceable under the effective vindication exception. The FAA directs courts "to respect and enforce the parties' chosen arbitration *procedures*." *Epic Sys. Corp. v. Murphy Oil USA*, 584 U.S. 497, 506 (2018) (emphasis added). As such, arbitration agreements are "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S.

506, 519 (1974). The Supreme Court has long made clear, however, that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Supreme Court recently reiterated that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022). The Supreme Court explained:

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

Id. at 653 (internal citations, quotation marks, and brackets omitted) (emphasis in original); *see also Mitsubishi*, 473 U.S. at 637 n.19 ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."). The rule that follows is this: the FAA does not

mandate enforcement of an arbitration agreement that effectively works as a prospective waiver of substantive statutory rights or remedies.

"Although the Supreme Court has never invalidated a provision in an arbitration agreement on this basis, it has repeatedly recognized the general principle that provisions within an arbitration agreement that prevent a party from effectively vindicating statutory rights are not enforceable." *Cedeno*, 100 F.4th at 395 (collecting cases in which the Supreme Court has recognized the effective vindication doctrine). While the Supreme Court has not addressed the enforceability of an arbitration agreement that compels individualized arbitration of ERISA Section 502(a)(2) claims, every circuit court to publish an opinion on the issue (as opposed to a non-precedential memorandum) has invalided such agreements under the effective vindication exception. *See id*. at 390 ("[T]he contested provisions within the arbitration agreement are unenforceable because they amount to prospective waivers of participants' substantive statutory rights and remedies under ERISA."); *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 507 (3d Cir.), *cert. denied*, 144 S. Ct. 328 (2023) ("When a provision of an arbitration clause purports to waive rights that a statute creates, it is a prohibited prospective waiver, and the provision must give way to the statute. In short, the class action waiver in this case cannot be enforced."); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1101 (10th Cir.), *cert. denied*, 144 S. Ct. 280 (2023) ("[T]he arbitration provisions of the Plan Document effectively prevent Harrison from vindicating many of the statutory remedies that he seeks in his complaint under ERISA §

502(a)(2)."); *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 623 (7th Cir. 2021) ("[W]e hold only that the 'effective vindication' exception bars application of the plan's arbitration provision to claims under § 1132(a)(2)"); *see also Burnett v. Prudent Fiduciary Servs. LLC*, No. 22-cv-270-RGA-JLH, 2023 WL 387586, at *6 (D. Del. Jan. 25, 2023), *report and recommendation adopted*, No. 22-cv-270-RGA, 2023 WL 2401707 (D. Del. Mar. 8, 2023), *aff'd*, No. 23-1527, 2023 WL 6374192 (3d Cir. Aug. 15, 2023) ("But what the statute provides, the arbitration provision takes away: it says that beneficiaries cannot sue on behalf of the Plan and that they cannot recover plan-wide damages."). This is such a case.

Pover argues that she seeks plan-wide remedies that ERISA establishes but which the Plan's arbitration agreement prevents her from recovering. *See* Opp. at 19-20. Specifically, Pover takes issue with the class action waiver's requirement that all claims be brought "on an individual basis only" and that Plan Participants must waive their right to "any class, collective, or representative action." *See id*. at 20; Hines Decl., Ex. 1, at 89 of 186. Pover contends that any plan-wide relief must necessarily be sought under Section 502(a)(2) in a representative capacity on behalf of the whole plan, not on behalf of any one individual plan participant. *See* Opp. at 19.

In the FAC, Pover seeks in a representative capacity to recover for the entire Plan all the losses and to restore to the Plan all the profits that resulted from the breaches of fiduciary duty she alleges. Additionally, Pover seeks several other forms of equitable and remedial relief, including removal of the fiduciaries, reformation of the Plan's investments, and a

declaration that the fiduciaries breached their duties. In short, Pover's claims are necessarily a representative action seeking plan-wide recovery. But the Plan's class action waiver requires Pover to bring any dispute "on an individual basis only, and not on a class, collective or representative basis" and to "waive the right to commence, be a party to, or be an actual or putative class member of any class, collective, or representative action arising out of or relating to the Plan." *See* Hines Decl., Ex. 1, at 89 of 186. A straightforward conclusion results: in individualized arbitration, Pover could not bring any of her claims in a representative capacity on behalf of the Plan, nor could she attain plan-wide relief.

Defendants disagree with this conclusion. Defendants argue that the Plan's arbitration agreement and class action waiver do not waive any ERISA remedies. *See* Reply at 12-13. Relying on a recent district court ruling from within this district, Defendants contend that even though ERISA establishes fiduciary duties owed to the plan, Pover does not have a right to pursue plan-wide monetary relief. *See* Reply at 11 (quoting *Yagy v. Tetra Tech, Inc.*, No. 24-cv-1394-JFW-(ASx), 2024 WL 2715900, at *5 (C.D. Cal. May 17, 2024) ("[N]othing in § 502(a)(2) suggests that an ERISA § 502(a)(2) plaintiff has an unqualified right to bring a collective action to recoup all of a fiduciary's losses and gains at once.") (internal quotation marks omitted)). As Defendants see it, any recovery to an individual Plan Participant's account is necessarily a recovery that benefits the plan because an increase to a part is an increase to the whole. *See id* at 8-9. This leads Defendants to argue that if Pover recovers for injuries to her individual account, she will attain relief that benefits the Plan. *See id*. That is because if

Pover is successful in arbitration, she will not personally get a check that she can cash; instead, the fiduciaries would be held personally liable for their breach and would send a check to the Plan, the proceeds of which would be attributed to Pover's individual Plan account, thereby benefiting the Plan. *See id*.

Furthermore, Defendants argue that unlike the agreements at issue in the out-of-circuit appellate cases upon which Pover relies, no language in the Plan's arbitration agreement forecloses an arbitrator from awarding relief that would widely benefit the plan, such as removal of a fiduciary. *See id*. at 12-13. To make this argument, Defendants rely on this clause from the class action waiver:

> [T]his Section 15.6(c) is intended to make mandatory individual arbitration apply . . . to the maximum extent permissible under ERISA; if any feature of this arbitration requirement is impermissible under ERISA, arbitration as described above shall remain required with the minimum change necessary to allow the arbitration requirement to be permissible under ERISA.

See id. at 12; Hines Decl., Ex. 1, at 89 of 186.

These arguments are unpersuasive for two independent reasons.[2] First, Section 502(a)(2) and Section 409(a) work together to provide a statutory right to recover plan-wide monetary relief. To arrive at this conclusion, a court need look no further than the plain

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[2] Obviously, the district court's decision in *Yagy* is not binding precedent and would have, at best, only persuasive effect (if this Court would agree with its reasoning).

text of Section 409(a), which enables participants to recover for the plan "any losses" and "any profits" that result from a fiduciary breach. *See* 29 U.S.C. § 1109(a). Congress's repeated use of "any" and "plan" leaves no doubt that Sections 409(a) and 502(a)(2) create a right to recover plan-wide relief of "any losses" and "any profits." *See LaRue*, 552 U.S. at 261 (Thomas, J., concurring) ("On their face, §§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach.") (emphasis in original); *Henry*, 72 F.4th at 507 (Section 409(a) "does not limit restitution to the plaintiff's losses").

The Supreme Court has long made clear that "§ 409's draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the *entire plan,* rather than with the rights of an individual beneficiary." *Varity Corp. v. Howe*, 516 U.S. 489, 509 (1996) (emphasis in original); *see also Russell*, 473 U.S. at 142. ("A fair contextual reading of the statute 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, rather than with the rights of an individual beneficiary.").

In *Russell*, a beneficiary of an ERISA-governed insurance plan sued under Section 502(a)(2) to recover damages arising from the delayed processing of a medical claim. *See Russell*, 473 U.S. at 136. Although Russell had been paid all the benefits she was contractually entitled to, she argued that the plan's fiduciaries violated their Section 409(a) fiduciary duties by failing to timely process her claim. *See id.* at 136-138. The Supreme Court held that Russell could not establish a Section 502(a)(2) claim to recover

personal losses caused by the delayed processing of the claim because this extra-contractual relief would not benefit the class as a whole. *See id*. at 148. *Russell* is the foundational case making clear that Section 502(a) claims can only be brought on behalf of the plan. Defendants do not contest this point. *See* Reply at 7.

Instead, Defendants contend that *LaRue* stands for the proposition that any assets tied to individual plan accounts are part of the plan's overall assets and any injury to an individual account is necessarily an injury to the plan. *See* Reply at 8. In *LaRue*, the Supreme Court permitted a plaintiff to bring a Section 502(a)(2) claim to recover losses in his individual account in a defined contribution plan stemming from the defendants' failure to make certain changes to his investments as he directed. *See LaRue*, 552 U.S. 250-251. The Court explained that "*Russell*'s emphasis on protecting the 'entire plan' from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed." *Id*. at 254. The Court detailed this changed landscape with respect to the "entire plan" language:

> The "entire plan" language in *Russell* speaks to the impact of § 409 on plans that pay defined benefits. Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements, and to make

> premium payments to the Pension Benefit Guaranty Corporation for plan termination insurance.
>
> For defined contribution plans, however, fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive. Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409. Consequently, our references to the "entire plan" in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.

See id. at 1025 (internal citation omitted). The *LaRue* Court "recognized that in contrast to defined benefit plans, where mismanagement by plan administrators affects an individual's entitlement to a defined benefit only if it creates or enhances the risk of default by the entire plan, in the context of defined contribution plans, mismanagement of plan assets by plan administrators can injure participants at the individual account level." *Cedeno*, 100 F.4th at 399. "[A] critical distinction between *Russell* and *LaRue* was that Russell did not allege a breach of fiduciary duties as defined in Section 409(a) – that is, fiduciary duties 'with respect to a plan' – but LaRue did." *Id*. at 398.

Ultimately, the Supreme Court held in *LaRue* that "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary

breaches that impair the value of plan assets in a participant's individual account." *LaRue*, 552 U.S. at 256. *LaRue* therefore stands for the proposition that breaches of fiduciary duties that impair the value of plan assets in a participant's individual account are actionable under Section 502(a)(2). *See Cedeno*, 100 F.4th at 399 ("The *LaRue* Court thus recognized that Section 409(a) protects against breaches of fiduciary duty involving the management of assets within defined contribution plans, whether the injury is felt at the plan level or directly at the individual account level, and that such breaches are thus actionable under Section 502(a)(2)."). But nothing in *LaRue* stands for the proposition that Section 502(a)(2) no longer permits a plan participant from seeking plan-wide relief. *See id.* at 399 ("At most, *LaRue* recognized that Section 502(a)(2) provides a remedy for injuries to the plan that are felt only at an individual account level; the Court did not suggest that Section 502(a)(2) allows individualized relief for injuries that are felt at the plan level.")

Defendants do not assert that Pover would be able to recover plan-wide monetary relief under the Plan's arbitration agreement. Instead, they contend that Pover's *pro rata* recovery would be the recovery to the plan that ERISA establishes. *See* Reply at 10-13. This argument is not persuasive. The putative class Pover seeks to represent consists of thousands of Plan Participants. Under the Plan's arbitration agreement, only if each of these arbitrations were successfully litigated and each arbitrator consistently valued the profits gained or losses incurred and correctly apportioned the resulting amounts to each individual account would the Plan be "ma[de] good" for "any profits" or "any losses" stemming from the breach. *See* 29

U.S.C. § 1109(a). Recovery of Pover's *pro rata* share might inure to the benefit of the plan, as Defendants suggest, but such relief is not the plan-wide restitution that ERISA codifies. *See Cedeno*, 100 F.4th at 405 ("Nothing in Section 409(a) or 502(a)(2) allows a court or arbitral forum to slice and dice individual plan participants' and beneficiaries' injuries resulting from mismanagement by fiduciaries").

Secondly, and independently, Defendants have not substantiated their assertion that the Plan's arbitration agreement would in fact permit plan-wide equitable relief or other remedial measures. Aside from plan-wide restitution, Pover seeks a declaration that the fiduciaries breached their duties, removal of said fiduciaries, and reformation of the Plan's assets. But Defendants have not even attempted to establish how an arbitrator could award plan-wide equitable relief in individualized, binding, and presumably confidential arbitration. *See Cedeno*, 100 F.4th at 405-406 (discussing the incoherence between achieving plan-wide equitable relief in individual arbitration). Would the arbitrator's declaration of liability, order to remove a fiduciary, or order requiring reformation of the Plan's assets be binding upon the entire plan, or only as to Pover's individual account? If such orders would bind the entire Plan, how would the Plan reconcile multiple reformation orders or conflicting orders to remove or not remove fiduciaries? If such orders would be binding only upon Pover and the Plan, how could the Committee reform the Plan's assets or remove a fiduciary only in relation to Pover's individual account? These are the questions that Defendants have left unanswered, asking the Court to presume that the lack of explicit language foreclosing plan-

wide relief distinguishes this case from the several appellate decisions upon which Pover relies.

The Court certainly acknowledges that the language of the Plan's arbitration agreement does not go as far as those in other cases to explicitly preclude plan-wide equitable relief. For instance, the arbitration agreement at issue in *Cedeno* provided in relevant part:

> Each arbitration shall be limited solely to one Claimant's Covered Claims and that Claimant may not seek or receive any remedy that has the purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant.
>
> . . .
>
> [T]the Claimant's remedy, if any, shall be limited to (i) the alleged losses to the Claimant's Accounts resulting from the alleged breach of fiduciary duty, (ii) a pro-rated portion of any profits allegedly made by a fiduciary through the use of Plan assets where such pro-rated amount is intended to provide a remedy solely for the benefit of the Claimant's accounts, or (iii) such other remedial or equitable relief as the arbitrator deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any Employee, Participant or Beneficiary other than the Claimant, and is not binding on the Administrator or the Trustee with respect to any Employee, Participant or Beneficiary other than the Claimant.

Cedeno, 100 F.4th at 392. That language is clearly more assertive in foreclosing the availability of plan-wide relief than the arbitration agreement at issue in this case. Similarly, the arbitration provision in *Smith* contained the following clause: "Each arbitration shall be limited solely to one Claimant's Covered Claims, and that Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant." *Smith*, 13 F.4th at 616. In *Smith*, the court made clear that it was this clause it took issue with and that it would have otherwise found the arbitration agreement enforceable if, like the agreement in *Dorman II*, it did not contain such "problematic language." *Id*.

This Court is not persuaded that the lack of such "problematic language" in the Plan's arbitration agreement necessarily means plan-wide relief would be available in individual arbitration. Nor do Defendants affirmatively say it would. Even though the Plan's arbitration agreement does not explicitly contain the same language as the at-issue agreements in other cases, it has the same effect. For the reasons explained above, plan-wide restitution is not available under the Plan's class action waiver and Defendants have not persuaded the Court that all plan-wide equitable relief would be available in individual arbitration. In short, the contrast Defendants identify with the Plan's arbitration agreement and those in other cases is a difference – but not a distinction.

The Court would therefore find that the specific arbitration agreement at issue in this case forecloses Pover from pursuing plan-wide relief and therefore

serves as a prospective waiver of her rights under ERISA.

C. Relevant Caselaw

Defendants argue that *Dorman II* compels a different result. The Court will turn now to addressing Defendants' principal argument that *Dorman II* controls this case, as doing so will further elucidate the developing legal landscape concerning arbitration provisions, like the one at issue in this case, that compel arbitration of Section 502(a) claim.

Defendants contend that the Plan's arbitration agreement is "nearly identical" to that which the Ninth Circuit addressed in *Dorman II*, which thereby commands Pover's claims be sent to arbitration pursuant to the agreement's terms. *See* Motion at 11-15; Reply at 6-10. As a threshold matter, the Court would note that *Dorman II* is an unpublished memorandum disposition and is therefore non-precedential. *See* 9th Cir. Rule 36-3. Accordingly, Defendants' contention that the Court is bound to apply *Dorman II* simply has no merit. The Court can, of course, look to *Dorman II* for its persuasive value, but the unpublished memorandum disposition does not create, as Defendants suggest, binding authority upon which the instant Motion must be resolved.

In any event, the Court is not persuaded that *Dorman II* was intended to, nor can it in fact, bear the weight Defendants place upon it. Most importantly, *Dorman II* did not consider an argument evaluating the effective vindication exception. The entirety of the court's discussion relevant to the enforceability of agreements requiring arbitration of Section 502(a)(2) claims is three sentences:

> Although § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue. *LaRue* stands for the proposition that a defined contribution plan participant can bring a § 502(a)(2) claim for the plan losses in her own individual account. The Plan and Dorman both agreed to arbitration on an individualized basis. This is consistent with *LaRue*.

Dorman II, 780 F. App'x at 514 (internal citations omitted). As observed earlier, this Court agrees that *LaRue* stands for the proposition that, in relation to defined contribution plans, participants have a cognizable Section 502(a)(2) claim for losses in their plan's individual account. But nothing in *LaRue* stands for the proposition that Section 502(a)(2) no longer permits an individual plan participant to seek plan-wide relief. Moreover, *Dorman II* was decided before the Supreme Court recently reiterated the effective vindication exception in *Viking River Cruises*. For these various reasons, *Dorman II* is not persuasive on the central issue presented in this Motion.

It is noted that the Second, Third, Seventh, and Tenth Circuits have each refused to enforce arbitration agreements requiring the individualized arbitration of Section 502(a)(2) claims seeking to recover for fiduciary breaches under Section 409(a). *See Cedeno*, 100 F.4th at 390; *Henry*, 72 F.4th at 507; *Harrison*, 59 F.4th at 1101; *Smith*, 13 F.4th at 623; *see also Burnett*, 2023 WL 6374192. Defendants have not

cited to, and this Court has not found, any published circuit opinion to hold to the contrary. Nor has the Supreme Court addressed the issue. This Court has reviewed these out-of-circuit appellate cases and finds the extensive reasoning set forth in *Cedeno*, *Henry*, *Harrison*, and *Smith* persuasive. Though the scope of each holding varies, the overwhelming weight of authority on this topic finds that arbitration agreements requiring plan participants to bring Section 502(a)(2) claims in individualized arbitration work as a prospective waiver of substantive rights when they foreclose plan-wide recovery.

At bottom, because the arbitration agreement at issue in the Plan's document serves as a prospective waiver of Pover's right to seek the plan-wide remedies ERISA statutorily establishes, it is unenforceable under the effective vindication exception.

D. The Class Action Waiver is Expressly Nonseverable

Having determined that the class action waiver is unenforceable, the Court must now decide whether it is severable such that the other portions of the arbitration agreement are otherwise enforceable. It is not. By its own terms, the class action waiver is expressly nonseverable. Recall that the class action waiver provides: "[I]f this class action waiver is found to be unenforceable by a court of competent jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration." *See* Hines Decl., Ex. 1, at 89 of 186. Because Pover brings her claims in a representative capacity on behalf of a purported class and the Court has determined that the class action waiver is unenforceable, the Plan's

express terms require Pover's claims to move forward in court, not in arbitration. Accordingly, the Class Action Waiver is not severable, and the entire arbitration provision is void.

IV. Conclusion

Based on the foregoing discussion, the Court would **DENY** the Motion.

APPENDIX D

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

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

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

APPENDIX E

29 U.S.C. § 1132(a). Civil enforcement.

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

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

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

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

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

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) or 1032(a) of this title;

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

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

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

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

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

(10) in the case of a multiemployer plan that has been certified by the actuary to be in

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[1] So in original. Probably should be "subtitle".

endangered or critical status under section 1085 of this title, if the plan sponsor—

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

(B) fails to update or comply with the terms of the funding improvement or rehabilitation plan in accordance with the requirements of such section,

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

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

APPENDIX F

CAPITAL RETIREMENT SAVINGS PLAN

CERTIFICATE OF COMMITTEE ACTION

The undersigned, being a duly authorized member of the United States Retirement Benefits Committee (the "Committee"), upon due consideration and consultation, does hereby certify that the Committee has adopted the following Amendment Number 1 to the Capital Retirement Savings Plan, as amended and restated July 1, 2019 (the "Plan"), and that said Amendment Number 1 be, and it hereby is, adopted effective as of the date specified below.

AMENDMENT NUMBER 1

WHEREAS, the Committee has the authority to amend the Plan;

THEREFORE, Section 15.6 of the Plan is hereby amended in its entirely to read as follows:

Section 15.6 – Claims Procedure; Arbitration; Waiver of Class, Collective, and Representative Actions

(a) Claims Procedure.

i. A Participant, former Participant, Beneficiary or any other authorized person may file a claim for benefits in writing with the claims official appointed by the Committee within the maximum time permitted by law or under the regulations

promulgated by the Secretary of Labor (or a delegate) pertaining to claims procedures. If the claim is wholly or partially denied, the Committee shall provide the claimant with a reasonable opportunity to appeal the claims official's denial of a claim to a review official (appointed by the Committee) for a full and fair review.

ii. The Committee will create a written claims procedure as part of (or which accompanies) the Plan's summary plan description. The written claims procedure will conform to the requirements of Department of Labor regulation §2560.503-1. This Section 15.6 specifically incorporates the written claims procedure as from time to time published by the Committee as part of the Plan.

iii. The claims official and the review official shall have full discretionary power and authority to construe the Plan and any procedures adopted by the Committee, to determine questions of eligibility and entitlements and to make findings of fact as under Section 15.2 and, to the extent permitted by law, the decision of the claims official (if no review is properly requested) or the decision of the review official on review, as the case may be, shall be final and binding on all parties except to the extent found by an arbitrator to constitute an abuse of discretion.

iv. Subject to exhaustion of the claims procedure described above, a claimant may

contest the decision of the review official only and exclusively by submitting the claim to arbitration under Section 15.6(b), The arbitration shall be determined based solely on the record established for the review official on review.

(b) Arbitration. Any claim, controversy or alleged breach or violation of law that arises out of or relates in any way to the Plan or a claimant's participation in the Plan and seeks a remedy, ruling or judgment of any kind against the Plan, a Plan fiduciary, or a party in interest shall be settled by binding arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures. Such arbitration shall be conducted in Los Angeles, California (or such other major city that is nearest to the workplace of the Participant) before a neutral arbitrator with substantial experience in ERISA matters. In any such arbitration, the arbitrator will issue a written award/opinion and the Company will pay the arbitrator's fee and arbitration forum fees. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

(c) Waiver of Class, Collective, and Representative Actions. A Participant, former Participant, or Beneficiary must bring any dispute in arbitration on an individual basis only, and not on a class, collective or representative basis and must waive the right to commence, be a party to, or be an actual or putative class

member of any class, collective, or representative action arising out of or relating to the Plan, including, but not limited to, any claims related to the Plan ("class action waiver"). However, if this class action waiver is found to be unenforceable by a court of competent jurisdiction, then any claim on a class, collective, or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration. Except as provided in the proceeding sentence, this Section 15.6(c) is intended to make mandatory individual arbitration apply, as described above, to the maximum extent permissible under ERISA; if any feature of this arbitration agreement is impermissible under ERISA, arbitration as described above shall remain required with the minimum change necessary to allow the arbitration requirement to be permissible under ERISA.

IN WITNESS WHEREFORE, this Certification is hereby executed, effective as of January 27, 2020.

By: _____

Name: Jason K. Bortz

Title: Senior Counsel, SVP

Date: January 27, 2020