No. 21-2891-cv

In the U.S. Court of Appeals For the Second Circuit

RAMON DEJESUS CEDENO, individually and on behalf of a class of all other persons similarly situated,
Plaintiff-Appellee,

v.

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

On Appeal from the U.S. District Court
for the Southern District of New York
Case No. 20-cv-09987

Brief for the U.S. Secretary of Labor as Amicus Curiae Supporting Plaintiff-Appellee

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor ("Secretary") has the primary authority to interpret and enforce Title I of ERISA and is responsible for "assur[ing] the . . . uniformity of enforcement of the law under the ERISA statutes." *See Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 691–93 (7th Cir. 1986) (en banc). To that end, the Secretary has an interest in effectuating ERISA's express purpose of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" and "providing for appropriate remedies . . . and ready access to the Federal courts." *See* 29 U.S.C. § 1001(b).

In this case, the district court correctly held that arbitration agreements cannot prospectively waive participants' right to pursue ERISA's statutory remedies, including plan-wide relief for claims under section 502(a)(2), 29 U.S.C. § 1132(a)(2). The Secretary has a substantial interest in ensuring that participants are not forced to arbitrate under agreements that prohibit the plan-wide remedies that ERISA provides.

The Secretary files this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. Factual Background

Plaintiff Ramon Dejesus Cedeno is an employee of Strategic Financial Solutions, LLC ("Strategic Financial"). *Cedeno v. Argent Tr. Co.*, No. 20-CV-9987 (JGK), 2021 WL 5087898, at *1 (S.D.N.Y. Nov. 2, 2021). He is a participant in the Strategic Employee Stock Ownership Plan (the "Plan" or "ESOP"), a defined-contribution plan covered by ERISA and administered by Strategic Financial. *Id.*; A16 ¶ 19. In 2017, the Plan became the 100% owner of Strategic Family, Inc. ("Strategic Family"), the parent company of Strategic Financial, by purchasing shares of the company financed through notes payable to the selling shareholders ("ESOP Transaction"). A13 ¶ 5. Argent Trust Company ("Argent") was the trustee for the Plan at the time of the ESOP Transaction. A12 ¶ 1.

The Plan Document contains a section entitled "Mandatory and Binding Arbitration," which provides that as a condition to participating in the Plan, participants "shall be bound by the provisions of this Section 17.10 (the 'Arbitration Procedure') to resolve all Covered Claims." A105. Claims covered by the Arbitration Procedure include:

> Any claim . . . (i) that arises out of, concerns or relates to the Plan or the Trust, including without limitation, any claim for benefits, (ii) asserting a breach of, or failure to follow, the Plan or Trust; or (iii) asserting a breach of, or failure to follow, any provision of ERISA or the [Internal Revenue] Code, including without limitation claims for breach of fiduciary duty, ERISA section 510 claims, and claims for failure to provide in a timely manner notices or information required by ERISA or the Code[.]

Id. The Plan Document contains a "Waiver Provision" providing that:

> All Covered Claims must be brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis. Each arbitration shall be limited solely to 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*.

Id. (emphasis added). The Plan Document also contains a "Remedy Provision" providing that:

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

A105–06 (emphasis added).

Additionally, the Plan Document provides that the Waiver and Remedy Provisions "shall be a material and non-severable term of the Arbitration Procedure. If an arbitrator(s) or a court of competent jurisdiction finds these requirements to be unenforceable or invalid, then the entire Arbitration Procedure shall be rendered null and void in all respects." A106.

B. Proceedings Below

Plaintiff filed a class action complaint in the United States District Court for the Southern District of New York alleging that Defendants breached their fiduciary duties and caused the Plan to enter into a prohibited transaction because the Plan paid more than fair market value for its shares of Strategic Family. 2021 WL 5087898, at *1. The complaint alleges that these breaches caused losses to the Plan and seeks as relief an order (1) requiring each Defendant to make good to the Plan the losses resulting from the breaches and restore to the Plan any profits Defendants made with Plan assets, (2) declaring that Defendants breached their duties, (3) ordering an accounting for profits

and imposing a constructive trust or equitable lien on funds held by Defendants, (4) allocating additional shares to the ESOP, and (5) ordering Argent to disgorge any fees it received in conjunction with its services as trustee. *Id.*; A141–42.

Defendants moved to compel individual arbitration and stay the case, asserting that Plaintiff was bound by the arbitration provision in the Plan Document. ECF No. 60 at 8–13. Defendants requested that the court compel arbitration "on an individual, non-class, and non-representative basis," citing Supreme Court cases enforcing class-arbitration waivers. *Id.* at 17. Moreover, Defendants argued that the Remedy Provision "would not affect the remedy that Plaintiff could personally achieve under ERISA section 502(a)(2)" because, under *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008), Plaintiff could only recover the amount of losses within his individual Plan account even if he proceeded in federal court. *Id.* at 18–19.

Plaintiff opposed the motion, arguing that the arbitration provision was unenforceable on several grounds: (1) the Remedy Provision precluded substantive remedies provided by ERISA and was an exculpatory provision prohibited under ERISA section 410(a); (2)

Plaintiff did not consent to the arbitration provision; (3) the arbitration provision improperly provided for arbitrary-and-capricious review of fiduciary breach claims; and (4) the arbitration provision improperly allowed for fee-shifting in violation of ERISA. ECF No. 65, at 7–20.

The district court denied the motion to compel individual arbitration. The court observed that ERISA section 409(a) "provides for restitution of the entire loss (or disgorgement of the entire gain) to the plan," and that ERISA section 502(a)(2) authorizes a participant to "bring a civil action to obtain restitution of the entire loss to the plan." 2021 WL 5087898, at *3. The court disagreed with Defendants' reading of *LaRue*, instead finding that that case "makes clear that relief is available wherever it would advance the protection of the entire plan." *Id*. at *4. Because the Remedy Provision would limit the availability of plan-wide remedies explicitly provided in ERISA sections 409(a) and 502(a)(2), it was invalid and unenforceable. *Id*. at *5. And because the Plan Document provided that the Remedy Provision was not severable from the remainder of the arbitration provision, the entire arbitration provision was unenforceable. *Id*. at * 6. Defendants appealed.

SUMMARY OF THE ARGUMENT

ERISA sections 502(a)(2) and 409(a) authorize participants to bring an action to recover “any losses to the plan” resulting from a fiduciary breach. 29 U.S.C. §§ 1132(a)(2), 1109(a). As the Supreme Court and this Court have recognized, claims under these sections are “brought in a representative capacity on behalf of the plan as a whole.” *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142, n.9 (1985); *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006) (same). This is true even in the context of defined-contribution plans comprising individual participant accounts. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008). In short, a participant bringing a claim under section 502(a)(2) does so on the plan’s behalf and may recover all losses to the plan (among other forms of redress) stemming from the fiduciary breach.

Agreements to arbitrate section 502(a)(2) claims may not prospectively waive these statutory remedies. Although the Federal Arbitration Act generally requires courts to enforce valid arbitration agreements, the Supreme Court and this Court have made clear that such agreements are unenforceable when they prospectively waive a

party's right to pursue statutory remedies. Because the Remedy Provision in the arbitration agreements here precludes participants from seeking the very plan-wide relief that ERISA explicitly authorizes in sections 502(a)(2) and 409(a), the district court correctly determined that this provision was invalid and denied the motion to compel arbitration.

ARGUMENT

An Arbitration Agreement That Prospectively Waives a Participant's Right to Pursue Plan-wide Relief Is Not Enforceable

A. ERISA Sections 502(a)(2) and 409(a) Authorize Participants in Defined-Contribution Plans to Seek Plan-wide Relief for Fiduciary Breach Claims

The district court correctly recognized that ERISA authorizes participants in a defined-contribution plan to seek plan-wide relief for fiduciary breach claims brought on behalf of the plan. 2021 WL 5087898, at *3. ERISA section 502(a)(2) provides that a participant such as Plaintiff, just like the Secretary or a plan fiduciary, can bring an action "for appropriate relief" under section 409. 29 U.S.C. § 1132(a)(2). ERISA section 409(a), in turn, provides that a fiduciary who breaches their duties "shall be personally liable to make good to such *plan* any losses to *the plan* resulting from each such breach . . . 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).

Section 409(a)'s focus on redressing plan losses "makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets" and therefore authorized various forms of "plan-related" relief. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (emphasis added). Thus, the recovery obtained under section 502(a)(2) for fiduciary breaches, whether brought by a participant or by the Secretary or a fiduciary, "inures to the benefit of the plan as a whole." *Id.* at 140. And given their plan-based character, claims under section 502(a)(2) are "brought in a representative capacity on behalf of the plan as a whole." *Id.* at 142 n.9; *L.I. Head Start*, 710 F.3d at 65.

In *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008), the Supreme Court held that although defined-contribution plans, unlike defined-benefit plans, comprise individual participant accounts, losses to those accounts still qualify as plan losses. The plaintiff there alleged that his employer failed to implement the changes he requested

to his individual account, and in so doing caused his account to decline in value; the breach, and the resulting harm, was thus localized to the plaintiff's account. *LaRue*, 552 U.S. at 251. As the Court explained, "fiduciary misconduct need not threaten the solvency of the entire plan" to cause plan losses implicating section 409(a). *Id.* at 255. Indeed, a plan may experience losses redressable under section 409(a) "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts." *Id*. at 256.

In Defendants' telling, *LaRue* means that "Plaintiff can fully vindicate his statutory rights in an individualized proceeding" that limits his recovery to his individual account and precludes recovery for the plan more broadly. *See* Appellant Br. at 3, 39. The Court in *LaRue* suggested no such thing. Rather, it simply clarified that a claim under section 502(a)(2) does not lose its plan-based character merely because the fiduciary breach diminishes only some (but not all) participant accounts, as was the case in *LaRue*. In that way, *LaRue* "broadens, rather than limits, the relief available under § 502(a)(2) in holding that a derivative fiduciary claim may be brought on behalf of a 'plan,' even if

the ultimate relief may be individualized." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 595 n.9 (3d Cir. 2009). Indeed, the Court reiterated in *LaRue* that *all claims* under section 502(a)(2)—including those seeking redress for losses to particular participant accounts—are not individual actions, but instead are "actions *on behalf of a plan* to recover for violations of the obligations defined in § 409(a)." *LaRue*, 552 U.S. at 253 (emphasis added). Because participants pressing 502(a)(2) claims act on the plan's behalf, it follows that they should be permitted to recover (for the plan's benefit) *all* plan losses, not just those that pertain or may be passed through to their particular individual account. Defendants' argument that these representative actions may be fully vindicated by recovering a fraction of the plan's losses is thus antithetical to *LaRue*.

And this Court too has consistently emphasized that claims brought under sections 409(a) and 502(a)(2), including those involving defined-contribution plans, "may not be made for individual relief, but instead are brought in a representative capacity on behalf of the plan.'" *Coan v. Kaufman*, 457 F.3d 250, 257 (2d Cir. 2006) (quoting *Russell*, 473 U.S. at 142 n.9); *see also Browe v. CTC Corp.*, 15 F.4th 175, 205–06

(2d Cir. 2021); *Seneca Beverage Corp. v. Healthnow New York, Inc.*, 200 F. App'x 25, 27 (2d Cir. 2006). To limit the remedy available under section 502(a)(2) only to losses incurred by a participant's individual account, regardless of the nature of the alleged fiduciary breach, runs directly contrary to the proposition that section 502(a)(2) claims "are intended to provide relief to the subject plan as a whole, as opposed to any individual participant." *Browe*, 15 F.4th at 205–06.

Indeed, the relief available to participants in defined-contribution plans includes the central remedy sought here: "restitution of the entire loss to the plan." 2021 WL 5087898, at *3; *see Milgram v. Orthopedic Assocs. Defined Contribution Pension Plan*, 666 F.3d 68, 74 (2d Cir. 2011) ("'A defined contribution plan is not merely a collection of unrelated accounts.'") (quoting *LaRue*, 552 U.S. at 262 (Thomas, J., concurring)). Recoupment of losses to a defined-contribution plan is appropriate relief under sections 409(a) and 502(a)(2) even if "that recovery inuring to the Plan may ultimately benefit particular participants" through allocation to their individual accounts. *L.I. Head Start*, 710 F.3d at 66.

Defendants' citations to two out-of-circuit holdings fail to support their misreading of *LaRue*. The Ninth Circuit's unpublished decision in *Dorman v. Charles Schwab Corp.* ("*Dorman II*") misconstrued *LaRue* in positing that participants in a defined-contribution plan can *only* bring a claim for the losses in their own individual account. *See* 780 F. App'x 510, 514 (9th Cir. 2019). In fact, the Ninth Circuit's own precedent makes clear that plaintiffs bringing fiduciary duty claims under section 502(a)(2) do not "seek[] relief for themselves" but instead "seek[] recovery only for injury done to the plan." *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092 (9th Cir. 2018) (citing *LaRue*, 552 U.S. at 256).

As for the Seventh Circuit's decision in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, as discussed below, that court actually *rejected* the argument that participants in defined-contribution plans are restricted to individualized relief. *See* 13 F.4th 613, 621 (7th Cir. 2021). Although the opinion provided an example of removal or appointment of a fiduciary as a form of plan-wide relief the plaintiff was authorized to seek, the court did not expressly hold that the plaintiff was barred from seeking any other form of plan-wide remedies; any alternative reading conflicts with the prevailing views in other circuits.

Id.; see also, e.g., L.I. Head Start, 710 F.3d at 65 (in claims involving a defined-contribution plan, "recoupment of losses to the Plan" was an appropriate remedy "for the benefit of the Plan as a whole"); *Brundle on behalf of Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 782 (4th Cir. 2019), as amended (Mar. 22, 2019) (ESOP participants entitled "to compensation for the loss from the overpayment" for ESOP assets); *Munro*, 896 F.3d at 1094 (participants in defined-contribution plans entitled to "seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries"); *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (recognizing the possibility of "plan losses in a defined-contribution setting" resulting from alleged fiduciary breaches involving excessive fees and selection of investment options).

The notion that plaintiffs bringing section 502(a)(2) claims within the context of a defined-contribution plan are restricted to seeking relief that inures only to their individual accounts is further undermined by the fact that not all plan losses caused by a fiduciary breach may be easily allocated to individual participant accounts. For example, in *L.I. Head Start*, participants successfully asserted a claim under sections

502(a)(2) and 409(a) based on the trustees' failure to make contributions to a plan to ensure it had adequate reserves. 710 F.3d at 69. And in *Sacerdote v. New York University*, participants stated a fiduciary breach claim by alleging the plan sponsor offered funds charging excessive retail-share fees instead of offering lower-cost institutional shares. 9 F.4th 95, 108 (2d Cir. 2021). It would be impractical to restrict each participant to pursuing relief for these types of plan losses through a separate proceeding focused solely on some calculation of the subset of plan losses tied to each participant's individual account, as Defendants' reading of *Smith* would seem to require. Moreover, individualized arbitration of plan-wide fiduciary breach claims under these restrictions could lead to conflicting results across near-identical cases and "an unsatisfactory resolution of the dispute as a whole," thus undermining ERISA's goal of uniform enforcement of fiduciary duty claims.[1] *Coan*, 457 F.3d at 262.

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[1] Amici the ESOP Association and American Benefits Council advance a policy argument that arbitration of fiduciary breach claims furthers Congress' careful balancing between "ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." Brief of Amici Curiae the ESOP Association and

Plaintiff here alleges that Defendants breached their fiduciary duties by causing the Plan to overpay for its Strategic Family shares, and he seeks to recover the resulting losses to the Plan.[2] 2021 WL 5087898, at *1. The district court correctly determined that sections 502(a)(2) and 409(a) authorize Plaintiff to seek this form of plan-wide relief to redress the alleged breaches.

B. An Arbitration Agreement That Waives a Party's Right to Pursue a Statutory Remedy May Not Be Enforced

The district court also correctly applied Supreme Court precedent under the Federal Arbitration Act ("FAA") establishing the parameters for when arbitration agreements may be enforced. The FAA expresses

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American Benefits Council in Support of Appellants at 24 (quoting *Conkright v. Frommert*, 559 U.S. 506, 517 (2010)). But forcing participants into arbitration proceedings that categorically limit the availability of those very rights Congress provided in ERISA plainly upsets, rather than furthers, the balance Congress struck.

[2] In addition to recovering losses to the Plan, Plaintiff also seeks additional forms of relief that would benefit the plan as a whole, including declaratory relief, accounting for profits, allocation of additional shares to participants, and disgorgement of Argent's fees. Even under Defendants' reading of *Smith*, therefore, this case would reach the same result as that one: Plaintiff cannot be compelled to arbitrate under an agreement that would bar him from seeking these additional equitable and declaratory remedies.

the general policy that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Although the Supreme Court has not addressed the arbitrability of ERISA claims, it has upheld arbitration agreements involving claims under other federal remedial statutes. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing arbitration agreement for claims under the Sherman Act); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (enforcing arbitration agreement for claims under the Securities Exchange Act of 1934 and RICO Act). The circuit courts that have considered the arbitrability of ERISA claims, including this Court, are in agreement that ERISA claims are generally arbitrable. *See Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991) (because "Congress did not intend to preclude a waiver of a judicial forum for statutory ERISA claims . . . the FAA requires courts to enforce agreements to arbitrate such claims"); *Smith*, 13 F.4th at 620 (collecting cases holding that ERISA claims are generally arbitrable).

But a unanimous Supreme Court recently clarified that the effect of the FAA's "policy favoring arbitration" should not be overstated: this "federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, No. 21-328, 2022 WL 1611788, at *4 (U.S. May 23, 2022). In that regard, the Supreme Court has recognized an "effective vindication" doctrine, which serves to prevent the "prospective waiver of a party's *right to pursue* statutory remedies" in an arbitration agreement. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (quoting *Mitsubishi*, 473 U.S. at 637 n.19). As the Court explained in *Mitsubishi,* a party that agrees to arbitration "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. Although the Supreme Court did not apply this doctrine in *Italian Colors* or *Mitsubishi*, the Court wrote that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.*

Accordingly, this Court has declined to enforce arbitration agreements that would preclude a party from effectively vindicating

statutory claims. For example, in *Gingras v. Think Finance, Inc.*, this Court examined a set of loan agreements that required arbitration of any disputes solely "in accordance with Chippewa Cree tribal law," such that "no other state or federal law or regulation shall apply." 922 F.3d 112, 118 (2d Cir. 2019). The Court noted that arbitration according to only tribal law "appear[ed] wholly to foreclose [the borrowers] from vindicating rights granted by federal and state law." *Id.* at 127. Because they prospectively waived borrowers' right to pursue claims under federal and state consumer protection laws, the agreements were unenforceable. *Id.* In two additional cases, this Court approved the enforcement of arbitration agreements that would have prospectively waived employees' right to pursue statutory remedies only after the employers represented they would waive the application of those provisions. *See Am. Fam. Life Assurance Co. of New York v. Baker*, 848 F. App'x 11, 13 (2d Cir. 2021) (involving arbitration agreement that "would completely bar [former associates] from raising the claims they wish to bring against the company under ERISA and other federal statutes"); *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125 (2d Cir. 2010) (involving arbitration agreement containing statute-of-

limitations and fee-shifting provisions that "would significantly diminish a litigant's rights under Title VII").

These cases thus focus on provisions that would "eliminate[] . . . parties' right to pursue their statutory remedy" through arbitration. *Italian Colors*, 570 U.S. at 236. In contrast, provisions that do not limit a statutory remedy but merely affect the *manner* of arbitration will generally stand. For example, courts will typically enforce arbitration agreements containing waivers of class or collective actions, even if the statute giving rise to the claim expressly permits such actions. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Italian Colors*, 570 U.S. 228; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Class-arbitration waivers that leave the party with the right to pursue their statutory remedies through an individual action generally do not provide a basis for courts to invalidate these provisions. *See Italian Colors*, 570 U.S. at 236; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013). Similarly, the arbitration agreement in *Parisi v. Goldman, Sachs & Company* precluding a party from bringing a "pattern-or-practice" Title VII claim limited only a "method of proof," not a distinct cause of

action or "access to statutorily authorized damages," so this Court held that the arbitration agreement must be enforced. 710 F.3d 483, 487 (2d Cir. 2013). But an agreement waiving these procedural protections can be enforced "only if it is clear that 'the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.'" *Ragone*, 595 F.3d at 125 (quoting *Mitsubishi*, 473 U.S. at 637).

C. The District Court Correctly Found the Arbitration Agreement Unenforceable

Because ERISA sections 502(a)(2) and 409(a) provide a cause of action that may be invoked by participants, as well as a plan fiduciary and the Secretary, to bring an action on the plan's behalf for plan-based relief, and because the arbitration provision here prohibits Plaintiff from doing just that, the district court correctly denied the motion to compel individual arbitration. Again, the Secretary is not here contending that ERISA claims are categorically non-arbitrable, and the district court did not so hold. But the district court correctly found that a participant cannot be compelled to arbitrate if they are deprived of the full range of ERISA remedies that would be available had they brought the same claim in federal court.

This conclusion mirrors the Seventh Circuit's recent holding in *Smith* that an ERISA plan's arbitration provision was unenforceable because it precluded relief that extended to other participants or beneficiaries. 13 F.4th at 620–21. That court held that the provision could not be reconciled with "the plain text of § 1109(a)," which provides for relief that would extend to the entire plan. *Id.* at 621. Because the provision would act as a prospective waiver of the right to pursue a statutory remedy, the provision was unenforceable. *Id.* Following *Smith*, at least one other district court in addition to the court below has refused to compel arbitration of fiduciary breach claims pursuant to an arbitration agreement that similarly purported to bar participants from seeking plan-wide relief. *See Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, No. 21-CV-0304-RMR-NYW, 2022 WL 909394, at *6 (D. Colo. Mar. 24, 2022), *appeal docketed*, No. 22-1098 (10th Cir. Apr. 6, 2022) ("ERISA specifically provides a right to pursue plan-wide remedies. The arbitration provision disallows a litigant from seeking plan-wide remedies. Therefore . . . [participant] is unable to effectively vindicate his statutory cause of action in the arbitral forum.").

The district court's conclusion also aligns with this Court's recent discussion of arbitration of fiduciary breach claims in *Cooper v. Ruane Cunniff & Goldfarb Inc.* The *Cooper* decision principally held that the claim at issue fell outside the scope of the arbitration agreement contained in the plaintiff's employee handbook. 990 F.3d 173, 184 (2d Cir. 2021). But the Court went on to observe that the arbitration agreement might also be unenforceable because "'an arbitration agreement forbidding the assertion of certain statutory rights' cannot be enforced." *Id.* (quoting *Italian Colors*, 570 U.S. at 236). The arbitration agreement in *Cooper* required that all arbitration claims "be asserted, heard and resolved on a single Associate basis." *Id.* This limitation conflicted with the Court's instruction in *Coan* that "the representative nature of the section 502(a)(2) right of action" requires plaintiffs asserting fiduciary breach claims on behalf of the plan to "employ procedures to protect effectively the interests they purport to represent." *Coan*, 457 F.3d at 259. Accordingly, the agreement would "make it impossible to bring an ERISA fiduciary action that satisfies both the Agreement and the *Coan* representative adequacy

requirement, potentially rendering at least this part of the Agreement unenforceable."[3] 990 F.3d at 185.

The Remedy Provision here presents the same tension even more overtly: by prohibiting Plaintiff from seeking plan-wide relief, the provision directly bars Plaintiff from asserting his statutory right to recover, on the plan's behalf, "any losses to the plan" resulting from a fiduciary breach. 29 U.S.C. § 1109(a). This Court should not enforce an agreement that plainly constitutes a "prospective waiver of a party's *right to pursue* statutory remedies." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

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[3] As *Coan* and *Cooper* suggest, this Court's "representative adequacy requirement" may provide a separate basis for finding the Waiver and Remedy Provisions unenforceable. In the specific context of a claim alleging a plan-wide fiduciary breach under sections 502(a)(2) and 409(a), some form of representative action may be necessary to protect other affected participants and vindicate the plan interests reflected in ERISA's statutory text. This issue is distinct from the general question of class arbitration, which courts have treated as a waivable procedural mechanism of aggregating discrete individual claims. The Court need not reach this issue in this case, though, because the district court correctly concluded that the non-severable provision prohibiting claimants from pursuing plan-wide relief renders the entire arbitration agreement unenforceable.

The district court also properly rejected Defendants' attempt—which Defendants repeat in their brief on appeal—to conflate the Remedy Provision with the type of class-arbitration waiver that the Supreme Court has determined to be enforceable. *See* Appellant Br. at 25–26 (asserting that the effective vindication doctrine does not reach "arbitration agreements that limit prospective plaintiffs to individualized arbitration"). As Defendants acknowledge, *Epic Systems* involved an agreement "to use individualized rather than class or collective action procedures"—not one that prohibited statutory remedies—and held that courts should generally "enforce the parties' chosen arbitration procedures." 138 S. Ct. at 1621. But the district court here rested its decision not on the arbitration agreement's failure to allow collective or class arbitration *procedures*, but on its preclusion of a statutory remedy guaranteed under ERISA. 2021 WL 5087898, at *6 ("The defect in the parties' arbitration agreement in this case is not that it does not provide for a collective or class action—an issue of the manner of arbitration protected by the FAA—but that it precludes a statutory remedy provided for by ERISA."). Thus, the district court correctly found that the Remedy Provision restricts the *remedies*

available to participants rather than simply the *manner* of arbitration, as in *Epic Systems*. 2021 WL 5087898, at *5. Defendants' citations to cases like *Epic Systems* are misplaced. *See* Appellant Br. at 26–28.

Defendants and their supporting amici also contend that Plaintiff's remedies here are not constrained by the arbitration agreement because section 502(a)(2) allows only for "appropriate" relief, and the only relief that is "appropriate" is relief that inures to Plaintiff's individual account, not plan-wide relief. *See* Appellants' Br. at 32; Brief of Amici Curiae the ESOP Association and American Benefits Council in Support of Appellants at 13–17. As discussed above, ERISA sections 502(a)(2) and 409(a) guarantee that a participant may seek whatever relief is "appropriate" to remedy the alleged fiduciary breach, which may include requiring the defendant to "make good to [the] plan any losses" resulting from the breach, to "restore to [the] plan any profits" the fiduciary realized through use of plan assets, and "such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. § 1109(a). Here, Plaintiff alleges that Defendants caused the *entire ESOP* to enter into a prohibited transaction and overpay for its shares of the company.

Because Plaintiff alleges fiduciary breaches that caused losses to the Plan extending beyond his own account, "appropriate" relief to remedy those breaches could also extend accordingly. For example, "appropriate" relief could include disgorgement to the Plan of *all* fees Argent received in relation to the Transaction—not solely whatever portion of the fees could be specifically associated with Plaintiff's individual Plan account.

But the Remedy Provision here categorically precludes any participant from seeking recovery for the Plan beyond that which would inure to that participant's individual account. This provision would therefore cut off the arbitrator's ability to consider the full range of relief that might be "appropriate" based on the context of the alleged fiduciary breach underlying a particular claim. As the district court recognized, this provision "purports to limit the available remedies that ERISA explicitly provides" in sections 409(a) and 502(a)(2), which may not be prospectively waived.[4] 2021 WL 5087898, at **4–5 (citing *Italian*

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[4] Though the district court focused on the Remedy Provision, the Waiver Provision similarly restricts the relief available to participants by providing they "may not seek or receive any remedy that has the

Colors, 570 U.S. at 236, and *Mitsubishi*, 473 U.S. at 637 n.19); *see also Parisi*, 710 F.3d at 487 (recognizing that "a number of Circuits have altered or invalidated arbitration agreements where they interfered with the recovery of statutorily authorized damages.").

Finally, Defendants argue that the district court's refusal to compel arbitration under the FAA is contrary to ERISA's federal-law savings clause, which says that ERISA shall "not alter, amend, modify, invalidate, impair, or supersede" another federal law, 29 U.S.C. § 1144(d). Appellants' Br. at 30. But the district court's decision was not based on ERISA's conflict with the FAA, but rather its conflict with an arbitration agreement that eviscerates ERISA's remedy of plan-wide relief. As the district court put it, "there is no conflict with the FAA because there is no provision of the FAA that prevents a participant from seeking such remedies." 2021 WL 5087898, at *6. Indeed, the FAA is fully intact and enforceable; it is simply the Remedy Provision—and

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purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant," and is therefore also invalid. *See* A105.

the arbitration agreement itself by dint of its non-severability provision—that is not.

The Remedy Provision prohibits participants from seeking or receiving any relief that provides "benefits or monetary relief to any Employee, Participant or Beneficiary other than the Claimant." *Id.* at *2. This restriction plainly contradicts ERISA's remedial provisions authorizing participants to recover, on the plan's behalf, *any losses* to the plan resulting from a fiduciary breach. Plaintiff's right to pursue plan-wide relief may not be prospectively waived. Accordingly, the court properly denied the motion to compel arbitration under the effective vindication doctrine.

CONCLUSION

The Secretary respectfully requests that this Court affirm the district court's denial of Defendants' motion to compel arbitration.

Respectfully submitted,

Date: June 10, 2022

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(a)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,721 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Date: June 10, 2022

/s/ Alyssa C. George
Alyssa C. George

CERTIFICATE OF SERVICE

I hereby certify that on this day, June 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: June 10, 2022

/s/ Alyssa C. George
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