No. 23-55737

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT PLATT, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

SODEXO, S.A.; SODEXO, INC.,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Central District of California
Case No. 8:22-cv-02211-DOC-ADC

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 Acting 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 Lab. 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).

Among those remedies is section 502(a)(2) of ERISA, which authorizes ERISA-plan participants (among other parties) to seek plan-wide relief for fiduciary breaches. 29 U.S.C. § 1132(a)(2). The Supreme Court has held that such claims, by their nature, are brought in a representative capacity on behalf of the plan. In this case, the document governing the ERISA plan in which Plaintiff participates contains an arbitration provision that prospectively waives participants' right to proceed in a representative capacity, thereby precluding Plaintiff from arbitrating claims under section 502(a)(2) altogether, including claims seeking plan-wide relief. The Secretary has a substantial interest in ensuring that participants are not forced to arbitrate under agreements that eliminate the right to bring claims or pursue the relief that ERISA section 502(a)(2) 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 Robert Platt is an employee of Sodexo and a participant in the Sodexo, Inc., Medical Plan ("Plan"). *See* 1-ER-2–3. The Plan requires participants who use nicotine products to pay a surcharge of $1,200 per year to maintain health insurance coverage. 1-ER-3. The Plan was amended in 2021 to include an arbitration provision that provides as follows:

> 10.13 Applicable Law.
>
> (c) Any claim under ERISA or otherwise with respect to the Plan, other than a claim for benefits under Section 502(a)(1)(B) of ERISA ("Arbitration Claims") shall be submitted to binding arbitration administered by the American Arbitration Association ("AAA"), in accordance with its rules. **Arbitration Claims shall be brought in a party's individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.** All aspects of the arbitration shall be governed by ERISA, and to the extent not preempted, the laws of the State of Maryland. The parties shall bear their own legal fees and costs for all Arbitration Claims. Except as may be required by law or to enforce an award, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the parties. No Arbitration Claims may be brought more than two years after the Arbitration Claim arises (but in no event later than any otherwise legally applicable period of limitations on such Arbitration Claim).

3-ER-306 § 10.13(c) (emphasis added). The Plan also contains a general severability clause:

> 10.9 Severability.
>
> If any of the provisions of the Plan shall be invalid or unenforceable for any reason, the remaining provisions shall nevertheless remain in full force and effect.

3-ER-305 § 10.9.

B. Proceedings Below

Plaintiff filed suit in the United States District Court for the Central District of California asserting four claims against Defendants. First, Plaintiff asserted two claims under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), alleging that Defendants violated ERISA section 702(b), 29 U.S.C. § 1182(b), by imposing a discriminatory nicotine surcharge without providing a reasonable alternative standard (Count I) or adequate notice of that standard (Count II). 3-ER-367–69 at ¶¶ 64–77. Next, Plaintiff asserted a claim under ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plan, alleging that Defendants breached their fiduciary duty by collecting the unlawful nicotine surcharge, thus reducing their own costs to fund the Plan, and are liable to make good to the Plan all resulting losses pursuant to ERISA section 409, 29 U.S.C. § 1109 (Count III). 3-ER-370–72 at ¶¶ 78–85. Finally, Plaintiff asserted a claim for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), alleging that Defendants' assessment of the nicotine surcharge in violation of the terms of the Plan deprived

participants of the benefit of not paying increased costs to maintain coverage (Count IV). 3-ER-372–75 at ¶¶ 86–97.

Plaintiff sought relief including disgorgement or restitution of payments collected through the nicotine surcharge or, alternatively, Sodexo's profits from its collection of those payments; a declaratory judgment that Defendants violated ERISA; a permanent injunction against collection of the nicotine surcharge; an accounting of all losses to the Plan; a judgment that Defendants are liable to restore to the Plan all losses resulting from the breach of fiduciary duty; removal and replacement of the fiduciary; and a constructive trust on profits related to the fiduciary breach. 3-ER-375–76 at ¶¶ A–M.

Defendants moved to compel individual arbitration of all of Plaintiff's claims. Plaintiff opposed the motion on several grounds. First, Plaintiff argued that his section 502(a)(1)(B) claim (Count IV) is expressly excluded from the scope of the arbitration provision. 2-ER-101–02. Second, Plaintiff argued that the representative action waiver is unenforceable under the effective vindication doctrine because it would strip him of his right to pursue his breach of fiduciary duty claim (Count III) under section 502(a)(2) and seek remedies on behalf of the Plan as a whole. *Id.* at 103–11. Third, and as relevant to all of his claims, Plaintiff argued that he never consented to the arbitration agreement and therefore was not bound by it. *Id.* at 111–16. Fourth, and also as relevant to all claims, Plaintiff

argued that the arbitration provision is "so thoroughly permeated by unconscionability" that the court should find it unenforceable in its entirety. *Id.* at 117–19.

The district court denied Defendants' motion to compel arbitration, finding that an employer's ability to unilaterally modify an ERISA plan does not extend to adding arbitration provisions, and that Plaintiff did not consent to arbitrate because participants were never notified of the 2021 amendment to the Plan adding the arbitration provision. 1-ER-6. Because Plaintiff's lack of consent was enough to defeat arbitration by itself, the court did not reach Plaintiff's other arguments, including whether the representative action waiver is an unenforceable prospective waiver of statutory remedies under ERISA section 502(a)(2). *Id.* Defendants appealed.

SUMMARY OF THE ARGUMENT

The representative action waiver contained within the Plan's arbitration agreement precludes Plaintiff from pursuing the rights and remedies authorized by ERISA and thus cannot be enforced.

The Supreme Court and this Court have repeatedly made clear that all claims under ERISA sections 502(a)(2) and 409(a) to redress fiduciary breaches 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); *Simon v.*

Hartford Life, Inc., 546 F.3d 661, 665 (9th Cir. 2008). That is because section 409(a) authorizes various forms of relief "singularly to the plan," not to participants individually. *Russell*, 473 U.S. at 142. For example, section 409(a) requires breaching fiduciaries to "make good **to such plan**" any losses they caused the plan, and to "restore **to such plan**" any profits derived through the use of plan assets. 29 U.S.C. § 1109(a) (emphasis added). Section 409(a) also authorizes the removal of breaching fiduciaries, a remedy that necessarily has plan-wide effect. *Id.* And section 502(a)(2)—which provides the cause of action for the relief provided by section 409(a)—lists the Secretary of Labor as among the parties who can seek such plan-wide relief. 29 U.S.C. § 1132(a)(2); *Russell*, 473 U.S. at 142 n.9. In short, claimants must pursue section 502(a)(2) actions in a representative capacity on the plan's behalf.

Plaintiff here brought a section 502(a)(2) claim in a representative capacity on behalf of the Plan, seeking precisely the plan-wide remedies authorized by section 409(a). Yet, Defendants sought to force Plaintiff to abandon these statutory rights and remedies by moving to enforce the Plan's arbitration agreement that explicitly waives the right of participants to bring representative actions and requires that all claims be brought in the participant's "individual capacity." If read faithfully, the representative action waiver would bar **all** section 502(a)(2) claims, which are inherently representative. But even under Defendants' reading—which

seemingly allows for some undefined, individualized form of section 502(a)(2) claim—the representative action waiver still would bar **full** plan-wide recovery under section 502(a)(2).

In either case, the representative action waiver is invalid. The Supreme Court has made clear that a provision in an arbitration agreement that prospectively waives a party's right to pursue statutory rights and remedies is unenforceable. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). Because the representative action waiver precludes participants from pursuing the very rights and remedies authorized by ERISA sections 502(a)(2) and 409(a), it cannot be enforced.

Notwithstanding the unenforceability of the representative action waiver, the Secretary takes no position on whether arbitration ultimately may be compelled. Even if the Court were to find that the Plan permits severing the invalid representative action waiver, Plaintiff separately maintains that arbitration of all of his claims (including his fiduciary breach claim) is impermissible for reasons unrelated to the Plan's prospective waiver of statutory rights and remedies. Because the Secretary takes no position on those other arguments—which, if successful would provide an independent basis to affirm the district court's order denying arbitration—the Secretary takes no position on whether the district court correctly denied arbitration. But to the extent the Court finds both that the Plan

permits severing the representative action waiver and that the arbitration agreement is otherwise enforceable, the Court should make clear that Plaintiff (and other Plan participants) may pursue in arbitration the full rights and remedies authorized by section 502(a)(2) (including full plan-wide relief).

ARGUMENT

I. The Plan's Representative Action Waiver is Unenforceable Because it Prospectively Waives Rights and Remedies Authorized by ERISA Section 502(a)(2)

A. Fiduciary Breach Claims Under ERISA Sections 502(a)(2) and 409(a) Are Representative Actions on the Plan's Behalf

ERISA section 502(a)(2)—the cause of action invoked by Plaintiff on his fiduciary-breach claim—provides that plan participants can bring an action "for appropriate relief" under ERISA section 409. 29 U.S.C. § 1132(a)(2). 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 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).

Given section 409(a)'s repeated references to "the plan," the Supreme Court has explained that section 409(a) "provid[es] relief singularly to the plan" and seeks to "protect the entire plan" rather than "the rights of an individual

beneficiary." *Russell*, 473 U.S. at 142; *see also id.* at 140 (explaining that the recovery obtained under section 409(a) "inures to the benefit of the plan as a whole."). And with Congress including the Secretary as among the parties authorized to bring section 502(a)(2) claims, the Supreme Court further explained that such claims are "brought in a representative capacity on behalf of the plan as a whole." *Id.* at 142, n.9. It is thus impossible to pursue a section 502(a)(2) claim in one's individual capacity because "a plaintiff filing a claim under [section 502(a)(2)] is doing so in a representative capacity **and not in an individual capacity**." *Simon*, 546 F.3d at 665 (emphasis added); *accord Hawkins v. Cintas Corp.*, 32 F.4th 625, 635 (6th Cir. 2022) ("The weight of authority suggests that [section 502(a)(2)] claims should be thought of as Plan claims, not Plaintiffs' claims.").

In fact, section 502(a)(2) claims are brought on a representative basis even in the context of a defined contribution plan comprising individual participant accounts. In *LaRue v. DeWolff, Boberg & Associates, Inc.*, the Supreme Court clarified that all claims under section 502(a)(2)—including those pertaining to a breach that harms only a single participant's account—are not individual actions but remain "actions **on behalf of a plan** to recover for violations of the obligations defined in § 409(a)." 552 U.S. 248, 253 (2008) (emphasis added). This Court read *LaRue* the same way when it squarely rejected the argument that participants "may

seek individual recovery in the context of defined contribution plans." *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1093 (9th Cir. 2018). As the Court reasoned, "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." *Id.*; *see also LaRue*, 552 U.S. at 263 n.* (Thomas, J., concurring) ("[A] participant suing to recover benefits on behalf of the plan is not entitled to monetary relief payable directly to him; rather, any recovery must be paid to the plan.").

This Court's unpublished decision in *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510 (9th Cir. 2019) [hereinafter *Dorman II*], does not compel the opposite conclusion. To the extent that *Dorman II* suggests that a section 502(a)(2) claim is "inherently individualized" in the context of a defined contribution plan, and that a participant can therefore **only** seek losses sustained by their own individual account, *see id.* at 514, this suggestion cannot be reconciled with *LaRue* or *Munro*. And not surprisingly, other circuits post-*LaRue* have agreed that participants are entitled to recover—on behalf of the plan—all losses to the plan resulting from the fiduciary breach.[1] In any event, even to the extent that

[1] *See, e.g.*, *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 507 (3d Cir. 2023) (section 409(a) "does not limit restitution to the plaintiff's losses: it 'permit[s] recovery of **all** plan losses caused by a fiduciary breach.'") (quoting *LaRue*, 552 U.S. at 261 (Thomas, J.,

Dorman II is persuasive—which many courts have expressly disputed[2]—it is inapposite here where Plaintiff participated in a health insurance plan that does not hold assets in individual accounts and where any potential recovery for fiduciary breach would thus inure to the Plan in a non-individualized way.

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concurring)); *Ramos v. Banner Health*, 1 F.4th 769, 778 (10th Cir. 2021) (ERISA section 409(a) "directs courts to award damages to compensate for losses a plan sustains due to a breach"); *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) (plan participants entitled to compensation for the loss plan assets due to fiduciary breach); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 710 F.3d 57, 65 (2d Cir. 2013) ("recoupment of losses to the Plan" was an appropriate remedy "for the benefit of the Plan as a whole"); *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011) (recognizing the possibility of plan losses resulting from alleged fiduciary breaches involving excessive fees and selection of investment options).

[2] *See, e.g., Burnett v. Prudent Fiduciary Servs. LLC*, No. CV 22-270-RGA-JLH, 2023 WL 387586, at *7 n.7 (D. Del. Jan. 25, 2023) ("I disagree with *Dorman* [*II*], and other courts have too."), *report and recommendation adopted*, No. CV 22-270-RGA, 2023 WL 2401707 (D. Del. Mar. 8, 2023), *aff'd*, No. 23-1527, 2023 WL 6374192 (3d Cir. Aug. 15, 2023); *Cedeno v. Argent Tr. Co.*, No. 20-CV-9987 (JGK), 2021 WL 5087898, at *5 n.5 (S.D.N.Y. Nov. 2, 2021) (rejecting *Dorman II*'s interpretation of *LaRue*); *Smith v. Greatbanc Tr. Co.*, No. 20-2350, 2020 WL 4926560, at *4 (N.D. Ill. Aug. 21, 2020) ("This Court respectfully disagrees with [*Dorman II*'s] interpretation of *LaRue*."), *aff'd*, 13 F.4th 613 (7th Cir. 2021); *cf. Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, No. 19-1925-MN, 2021 WL 4133622, at *5 (D. Del. Sept. 10, 2021) (declining to follow a different aspect of *Dorman II*, noting that it "provided no reasoning for its decision"), *aff'd sub nom. Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499 (3d Cir. 2023), *cert. denied sub nom. Wilmington Tr., N.A. v. Henry on Behalf of BSC Ventures Holding, Inc.*, 144 S. Ct. 328 (2023).

Accordingly, in bringing a fiduciary-breach claim under sections 502(a)(2) and 409(a), Plaintiff is acting—indeed, can **only** act—in a representative capacity on the Plan's behalf.

B. A Provision in an Arbitration Agreement That Waives a Party's Right to Pursue a Statutory Right or Remedy Is Unenforceable

The Federal Arbitration Act ("FAA") expresses 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 Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1112 (9th Cir. 2019) ("*Dorman I*"); *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021) (collecting cases holding that ERISA claims are generally arbitrable).

But a unanimous Supreme Court recently clarified that 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.*, 596 U.S. 411, 418 (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. *Italian Colors*, 570 U.S. at 236 (quoting *Mitsubishi*, 473 U.S. at 637 n.19) (emphasis added)*; see also, e.g.*, *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016) (discussing effective vindication doctrine). 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. The Court wrote in *Italian Colors* that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." 570 U.S. at 236.

The Court recently reiterated these principles in *Viking River Cruises, Inc. v. Moriana*, explaining that the FAA "requires only the enforcement of 'provision[s]' to settle a controversy 'by arbitration,' . . . and not any provision that happens to appear in a contract that features an arbitration clause." 596 U.S. 639, 653 n.5 (2022) (quoting 9 U.S.C. § 2). As an example, the Court invoked the effective

vindication doctrine to make clear yet again that "the FAA does not require courts to enforce contractual waivers of substantive rights and remedies." 596 U.S. at 653.

In contrast, provisions that do not limit a party's right to pursue a statutory right or remedy but merely "submit[] to their resolution in an arbitral . . . forum" will generally stand. *See id.* at 653 (quoting *Preston v. Ferrer,* 552 U.S. 346, 359 (2008)). Thus, 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*, 584 U.S. 497, 509 (2018); *Italian Colors*, 570 U.S. at 236–39; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–32 (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.

But the Supreme Court recently confirmed that the right to bring a representative action on behalf of a single principal—unlike the right to bring a class action—is a substantive rather than procedural right that cannot be prospectively waived. *Viking River*, 596 U.S. at 657 (finding that "[n]on-class

representative actions in which a single agent litigates on behalf of a single principal are part of the basic architecture of much of substantive law").

C. The Representative Action Waiver Is Unenforceable Because it Purports to Bar Rights and Remedies Available Under ERISA

Because participants bringing claims under ERISA section 502(a)(2) must act in a representative capacity on the plan's behalf, and because the Plan's representative action waiver prohibits Plaintiff from doing exactly that, the representative action waiver cannot be enforced.

Read faithfully, the representative action waiver bars all section 502(a)(2) claims. As noted, all claims under section 502(a)(2) are brought in a representative capacity on behalf of the plan. *See* section I(A), *supra.* Plaintiff even made explicitly clear in his Complaint that his section 502(a)(2) claim for breach of fiduciary duty is brought "not in his own individual capacity, but rather on behalf of the [P]lan itself." *See* 3-ER-366 at ¶ 63(a). Yet according to the Sodexo Plan, Plaintiff may not bring this claim in arbitration. The Plan provides that "Arbitration Claims shall be brought in a party's **individual capacity**, and not as a plaintiff or class member in any purported class or **representative proceeding**." 3-ER-306 § 10.13(c) (emphasis added).

The representative action waiver is thus an unenforceable prospective waiver of statutory rights under the effective vindication doctrine. *See, e.g.*, *Italian Colors*, 570 U.S. at 236 (finding that the effective vindication exception "would certainly

cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."). As the Tenth Circuit explained, a "prohibition on a claimant proceeding in a representative capacity is inconsistent with, and prevents a claimant from effectively vindicating the remedies afforded by, § 1132(a)(2)." *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1106 (10th Cir. 2023); *see also Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 184–85 (2d Cir. 2021) (recognizing that an arbitration agreement that would in effect make a section 502(a)(2) claim unavailable would be "potentially . . . unenforceable" under *Italian Colors*); *Harris v. Paredes*, No. 3:23-CV-50231, 2024 WL 774874, at *6 (N.D. Ill. Feb. 26, 2024) (explaining that "a claimant's right to effectively vindicate the remedies available under ERISA would be frustrated" by an arbitration provision precluding assertion of a representative claim under section 502(a)(2)).

But even if the representative action waiver did not bar section 502(a)(2) claims altogether, instead permitting some type of individualized section 502(a)(2) claims (as Defendants seemingly would have it), it would still impermissibly limit the remedies otherwise available under section 502(a)(2). Namely, it would prevent Plaintiff from fully recovering for the Plan "**any** losses" and restoring to the Plan "**any** [ill-gotten] profits," *see* 29 U.S.C. § 1109(a) (emphasis added), instead limiting him to recover for the Plan some individualized slice of those

amounts. Again, section 409(a) "does not limit restitution to the plaintiff's losses," but rather, due to the representative nature of section 502(a)(2) claims, permits recovery of "'**all** plan losses caused by a fiduciary breach,'" which "necessarily result[s] in monetary relief to non-party plan participants."[3] *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 507 (3d Cir. 2023) (quoting *LaRue*, 552 U.S. at 261 (Thomas, J., concurring)). Three circuits have now agreed that arbitration provisions prohibiting this plan-wide relief—and restricting participants to obtaining only individualized relief—are unenforceable. *See Henry*, 72 F.4th at 507; *Harrison*, 59 F.4th at 1107; *Smith*, 13 F.4th at 621.

D. Defendants' Contrary Arguments Lack Merit

Defendants argue that there is no effective vindication problem because (1) class action waivers are enforceable; (2) the Plan here does not contain language expressly precluding plan-wide relief; and (3) to find the representative action waiver unenforceable would imply a disharmony between the FAA and ERISA. The first two propositions are irrelevant, while the third is flatly incorrect.

[3] In contrast, ERISA's other remedial provisions empower participants to pursue non-representative claims; for example, section 502(a)(1)(B) authorizes individual claims for benefits that "run[] directly to the injured beneficiary," and section 502(a)(3) authorizes "individual relief for breach of a fiduciary obligation." *Varity Corp. v. Howe*, 516 U.S. 489, 510, 512 (1996). Only section 502(a)(2), through its cross-reference to section 409, authorizes a representative claim through which a participant can fully redress the plan's losses resulting from a fiduciary breach.

1. Defendants wrongly conflate the Plan's ban on representative actions with a class action waiver.

Defendants first contend that "arbitration provisions including class action waivers may not be invalidated simply because they include class action waivers." Appellants' Br. at 31. But the problem with the Plan's arbitration provision is not that it waives **class** actions, but that it waives **representative** actions. As explained *supra*, the Supreme Court recently confirmed that the right to bring a representative action on behalf of a single principal—unlike the right to aggregate claims with other litigants through a class action—is a substantive rather than procedural right that cannot be prospectively waived. *Viking River*, 596 U.S. at 657. Again, that precisely describes a section 502(a)(2) claim: one brought by a single agent (here, a Plan participant) on behalf of a single principal (here, the Plan itself). *See Russell*, 473 U.S. at 142, n.9 (section 502(a)(2) claims are "brought in a representative capacity on behalf of the plan as a whole"); *Munro*, 896 F.3d at 1092–93 ("ERISA § 502(a)(2) plaintiffs are not seeking relief for themselves" but "only for injury done to the plan"); *Hawkins*, 32 F.4th at 630 ("Section 502(a)(2) suits are 'brought in a representative capacity on behalf of the plan as a whole.'") (quoting *Russell*, 473 U.S. at 142, n.9); *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999) (section 502(a)(2) claims are "not truly individual"). Defendants thus obfuscate controlling precedent by conflating class and representative actions.

This distinction between class action waivers and representative action waivers also renders inapposite Defendants' reliance on this Court's unpublished decision in *Dorman II*. *See* Appellants' Br. at 33. The Court there merely held that the arbitration provision's "waiver of **class-wide** and **collective** arbitration must be enforced according to its terms." *See Dorman II*, 780 F. App'x at 514 (emphasis added). But *Dorman II* did not consider a prospective waiver of **representative** actions. Because the right to bring a representative action is a matter of substantive law, and because an arbitration agreement cannot "alter or abridge substantive rights" but "merely changes how those rights will be processed," *Viking River*, 596 U.S. at 653, the Plan's representative action waiver cannot be enforced. The cases Defendants invoke upholding class action waivers are thus entirely beside the point.

2. The fact that the Plan does not explicitly preclude plan-wide relief is immaterial because the representative action waiver has precisely that effect.

Defendants next contend that the arbitration provision here "does not contain any of the language found problematic in other cases," because the Sodexo Plan contains no explicit prohibition on plan-wide recovery. Appellants' Br. at 33. However, this claim lacks any credibility because Defendants have essentially conceded at every stage of this case that the representative action waiver precludes plan-wide relief. For example, before the district court, Defendants argued that "it

is not clear" that participants have a right to recover "'**any**' losses or profits" in the first place, 2-ER-83 (citations omitted) (emphasis added), and asked the district court to "direct that the arbitration should be limited to **individual** claims." 3-ER-345 (emphasis added). To this Court, they similarly contend that the representative action waiver is valid because it will not affect a participant's "**individual** recovery," which they say is good enough because participants do not have "an unqualified right to bring a collective action to recoup **all** of a fiduciary's losses and gains at once." Appellants' Br. at 35 (citations omitted) (emphasis added). In short, Defendants admit that the representative action waiver is not only designed to, but will in fact, bar participants from pursuing all relief for the Plan.

Defendants' concessions are not surprising, as the Plan's ban on representative actions—and its concomitant requirement that all arbitration claims "be brought in a party's individual capacity"—is more than sufficient to prospectively waive plan-wide relief. Again, section 502(a)(2) claims are inherently representative actions, *see Russell*, 473 U.S. at 142, n.9, and so the Plan's representative action waiver precludes section 502(a)(2) claims altogether, including the plan-wide remedies such claims provide. There is simply no statutory mechanism for participants to assert section 502(a)(2) claims in their "individual capacity," as this Court has made explicitly clear. *Simon,* 546 F.3d at 665 (explaining that "a plaintiff filing a claim under [section 502(a)(2)] is doing so in a

representative capacity **and not in an individual capacity**.") (emphasis added). Indeed, while several courts have applied the effective vindication doctrine to invalidate provisions explicitly waiving plan-wide remedies—without ruling on similar representative action waivers[4]—"the prohibition on a claimant proceeding in a representative capacity is potentially more problematic, at least where . . . the claimant alleges that the named defendants violated fiduciary duties that resulted in plan-wide harm and not just harm to the claimant's own account and the claimant seeks relief under § 1132(a)(2)." *Harrison*, 59 F.4th at 1106.

Here, Plaintiff alleges that Defendants' actions caused plan-wide harm and seeks multiple forms of plan-wide relief that he could not recover were he to proceed in his "individual capacity." For example, Plaintiff seeks a permanent plan-wide injunction against illegal nicotine surcharges, a full accounting of all Plan losses, and an order requiring Sodexo to disgorge **to the Plan** all profits

[4] Similar representative action waivers have appeared in every recent ERISA case that has applied the effective vindication doctrine to invalidate prospective waivers of statutory remedies. *See, e.g.*, *Henry*, 2021 WL 4133622, at *2 ("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."); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 593 F. Supp. 3d 1078, 1081 (D. Colo. 2022) ("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."), *aff'd*, 59 F.4th 1090 (10th Cir. 2023), *cert. denied sub nom. Argent Tr. Co. v. Harrison*, 144 S. Ct. 280 (2023); *Smith*, 2020 WL 4926560, at *2 ("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.").

obtained through its breaches. *See* 3-ER-375–76 at ¶¶ A–M. Each of these forms of relief would necessarily affect all participants and "benefit [the] Plan[] across the board," not just Plaintiff individually. *See Munro*, 896 F.3d at 1094 (discussing similar forms of relief).

In fact, even accepting Defendants' erroneous position that the monetary recovery sought here could be broken apart into so-called individualized damages, such relief would still be relief **to the Plan**. Under Defendants' view, each participant would presumably be limited to recovering the portion of Sodexo's excess profits that derived from the nicotine surcharge they individually paid. But this recovery would nevertheless flow to the Plan rather than to each participant personally. *See Munro*, 896 F.3d at 1092–94; *Russell*, 473 U.S. at 144. Just as the representative action waiver precludes Plaintiff from seeking all losses to the Plan, it would equally preclude him from seeking an individualized portion of those Plan losses.

3. The fact that the representative action waiver is unenforceable does not imply any disharmony between ERISA and the FAA.

Finally, Defendants contend that in order for a court to deem an arbitration provision unenforceable, it must find that ERISA and the FAA "cannot be harmonized." Appellants' Br. at 34. This argument rests on a different doctrine for invalidating an arbitration provision—one that Plaintiff has not invoked—under

which another statute might override wholesale the FAA's mandate to enforce arbitration agreements. *See Epic Sys.*, 584 U.S. at 510.

But the representative action waiver is unenforceable not because of any disharmony between ERISA and the FAA (or its policy favoring enforcement of agreements to arbitrate), but rather because the waiver itself abridges substantive remedies conferred by ERISA. *See, e.g.*, *Viking River*, 596 U.S. at 653 ("[T]he FAA does not require courts to enforce contractual waivers of substantive rights and remedies."); *Smith*, 13 F.4th at 622–23 ("[T]he conflict in need of harmonization is not between the FAA and ERISA; it is between ERISA and the plan's arbitration provision, which precludes certain remedies that §§ 1132(a)(2) and 1109(a) expressly permit."). This simply means that the representative action waiver cannot be enforced in arbitration. The separate and distinct question of whether arbitration may still be compelled after striking the representative action waiver turns on (a) whether the Plan permits severing the representative action waiver and enforcing the remainder of the arbitration provision, and (b) whether there are any independent reasons (such as lack of consent) that would preclude arbitration. And as explained below, the Secretary takes no position on whether Plaintiff's claims ultimately are arbitrable.

II. The Secretary Takes No Position as to Whether Arbitration Should Ultimately Be Compelled

That the representative action waiver is unenforceable under the effective vindication doctrine does not resolve the question of whether the district court correctly denied arbitration. In the first place, arbitration would not violate the effective vindication doctrine if the Plan allows arbitration to proceed without giving effect to the invalid representative action waiver, and with participants having access to their full slate of ERISA remedies. Whether the Plan allows that turns on the application of the Plan's severability provision.

But even if the Plan permits severing the invalid representative action waiver, that would not necessarily mean arbitration may be compelled. That is because Plaintiff separately contends that arbitration is impermissible for reasons wholly independent of the effective vindication doctrine, such as lack of consent and unconscionability. Because the Secretary takes no position on the validity of Plaintiff's other arguments against arbitration, the Secretary takes no position on whether the district court correctly denied arbitration.

In the event that the Court finds both that the Plan permits severing the representative action waiver and that the arbitration agreement is otherwise enforceable, the Court should make clear that claimants may pursue in arbitration the full rights and remedies authorized by section 502(a)(2) (including full plan-wide relief).

CONCLUSION

The Secretary respectfully requests that this Court hold that the representative action waiver is an unenforceable prospective waiver of statutory rights and remedies.

Respectfully submitted,

Date: 2/29/2024

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