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:	Attorneys Present for Defendants:
Charles H. Field, Jr. Richard D. Carter	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.

: 15

Initials of Preparer JG

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	CV 23-09657-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:	Attorneys Present for Defendants:
Not Present	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.

00 : 00

Initials of Preparer pg

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 plan-wide 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:

> <u>Arbitration</u>. 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.

[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.

> Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

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 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

[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).

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. <u>Conclusion</u>

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