No. 18-15281

United States Court of Appeals for the Ninth Circuit

MICHAEL F. DORMAN, individually as a participant in the SCHWAB PLAN RETIREMENT SAVINGS AND INVESTMENT PLAN and on behalf of a class of all those similarly situated,

Plaintiff-Appellee,

– v. –

THE CHARLES SCHWAB CORPORATION; CHARLES SCHWAB & CO., INC.; SCHWAB RETIREMENT PLAN SERVICES, INC.; CHARLES SCHWAB BANK; CHARLES SCHWAB INVESTMENT MANAGEMENT, INC.; WALTER W. BETTINGER III; CHARLES R. SCHWAB; JOSEPH R. MARTINETTO; MARTHA TUMA; JAY ALLEN; DAVE CALLAHAN; JOHN C. CLARK,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND IN CASE NO. 4:17-CV-00285-CW CLAUDIA WILKEN, SENIOR DISTRICT JUDGE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellants state as follows:

1. The Charles Schwab Corporation is the parent company of Defendants-Appellants Charles Schwab Bank, Charles Schwab Investment Management, Inc., and Schwab Retirement Plan Services, Inc.

2. The Charles Schwab Corporation is also the parent company of Schwab Holdings, Inc., which is the parent company of Defendant-Appellant Charles Schwab & Co., Inc.

3. There are no publicly held corporations that own 10% or more of the stock of The Charles Schwab Corporation.

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PRELIMINARY STATEMENT

In his compensation agreement, appellee Michael Dorman agreed to arbitrate "[a]ny controversy, dispute, or claim arising out of or relating to [his] employment." He also participated in his employer's retirement plan; the plan document states that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration." By their plain terms, both of those arbitration provisions encompass claims that plan fiduciaries breached their duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). Yet when Dorman brought fiduciary-breach claims against plan fiduciaries under ERISA § 502(a)(2) and (3), the district court refused to order arbitration.

In the court's view, neither of the two arbitration provisions encompasses the claims in Dorman's Complaint. The court held that the arbitration provision in the plan document was inapplicable because the provision was supposedly enacted after Dorman ceased participating in the plan, and it thus did not bind him. That is clearly erroneous as a factual matter: The record shows that Dorman participated in the plan for nearly a year while the arbitration provision was in effect. And in any event, this Court recently held that ERISA § 502(a)(2) claims belong to a plan—not an individual. Accordingly, the critical question is whether the *plan*

agreed to arbitration—which it plainly did by adding the arbitration provision to the plan document years before the filing of the Complaint.

The court also held that the arbitration agreement in Dorman's compensation plan was inapplicable because it carves out "claims for benefits." But the fiduciary-breach claims asserted in the Complaint are not "claims for benefits." Under ERISA, a "claim for benefits" is a term of art with specific statutory meaning: It encompasses claims alleging that a plan failed to pay out benefits that were expressly promised. The claims asserted here do not allege a failure to pay promised benefits. Instead, they allege that plan fiduciaries acted imprudently and disloyally when they selected the plan's investment funds. The carve-out is irrelevant.

The district court went on to hold that both arbitration agreements were unenforceable on two grounds. However, one ground was later expressly rejected by the Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and the other turned on the court's finding that arbitration places plan participants at a disadvantage—a statement of judicial resistance to arbitration that is anathema to the Federal Arbitration Act.

The bottom line is that the plan agreed to arbitrate ERISA claims in the plan document, and Dorman agreed to arbitrate ERISA claims both in his compensation agreement and by participating in the plan while the plan document's arbitration

provision was in effect. Regardless of whether Dorman's or the plan's consent controls, the district court was required to compel arbitration.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1) because Dorman's claims arise under ERISA, 29 U.S.C. § 1001 *et seq.*

This Court has appellate jurisdiction pursuant to 9 U.S.C. § 16(a)(1) to review on an interlocutory basis the district court's January 18, 2018 order denying the motion to compel arbitration (ER1–14) and the district court's July 9, 2018 order denying the motion for leave to move for reconsideration of the January 18 order (ER15–16).

Defendants timely filed a Notice of Appeal on February 20, 2018, appealing the January 18 order (ER17–20)[1] and timely amended the Notice of Appeal on July 13, 2018, to additionally appeal the July 9 order denying reconsideration (ER21–24).

[1] Pursuant to Federal Rule of Appellate Procedure 4(a), Defendants had thirty days to file their Notice of Appeal. Thirty days from the January 18 order was Saturday, February 17. Under Federal Rule of Appellate Procedure 26(a)(1)(C), Defendants' time to file their Notice of Appeal was extended through February 20—the first subsequent day that was not a Saturday, Sunday, or legal holiday.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Does a broad arbitration provision in an ERISA plan document stating that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration" mandate arbitration of a claim for breach of fiduciary duty brought on behalf of the plan under ERISA § 502(a)(2) and (a)(3)?

2) Does appellee's agreement to arbitrate "[a]ny controversy, dispute, or claim arising out of or relating to [his] employment" encompass claims brought under ERISA § 502(a)(2) and (a)(3) alleging that the fiduciaries of his employer's 401(k) retirement plan breached their duties to the plan?

3) Did the district court err when it held that it would be "inequitable" to enforce a provision in a plan document requiring arbitration of all ERISA claims because, in the court's view, arbitration places plan participants at a "disadvantage"?

4) Did the Supreme Court's recent decision overturning *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), abrogate the district court's holding, which relied on *Morris*, that an agreement to arbitrate ERISA claims on an individual basis is unenforceable under the National Labor Relations Act?

5) Given that arbitration is a matter of contract, is a contractual provision requiring arbitration to be conducted on an individualized basis enforceable?

PERTINENT STATUTES AND REGULATIONS

All relevant statutory authorities appear in the Addendum to this brief.

STATEMENT OF THE CASE

A. The Schwab Retirement Savings and Investment Plan

Like many employers, Schwab offers its employees the opportunity to contribute pre-tax earnings to a 401(k) retirement savings plan (the "Plan"). ER49; ER54–142. Participation in the Plan is optional. ER150; ER203–208. Plan participants are given the choice to allocate their earnings among a menu of investment funds, and they may alter their investment mix at any time. During the relevant period, the Plan offered as many as 17 different investment funds in which participants could choose to invest, including both Schwab-affiliated and unaffiliated funds. ER155–159. The funds were selected for inclusion in the Plan by the Employee Benefits Administrative Committee. ER114–115. Schwab matches each employee's contribution to the Plan dollar-for-dollar up to 5% of the employee's eligible compensation. ER152.

On December 8, 2014, the Plan was amended to add a broad arbitration provision. ER36–47. That provision took effect on January 1, 2015. ER42. The arbitration provision states that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration . . . ." ER42–43;

ER116. The arbitration provision further states that any arbitration would be conducted "on an individual basis only, and not on a class, collective or representative basis," and that Plan participants waive the right to be part of any class action. ER43; ER117. If that waiver of collective action were to be held unenforceable, "any claim on a class, collective or representative basis shall be filed and adjudicated in a court of competent jurisdiction, and not in arbitration." *Id*.

B. Plaintiff's Employment and Participation in the 401(k) and Compensation Plans

Appellee Michael Dorman was employed at Charles Schwab & Co., Inc. from February 17, 2009, until October 8, 2015. ER50. Through his employment, he joined the Plan in 2009, and he voluntarily contributed to his retirement account through payroll deductions until he terminated his employment. ER50–51. Pursuant to the Plan's terms, Schwab made matching contributions to Dorman's account, which totaled an additional $35,139.26 in retirement savings during the course of Dorman's employment. ER50. Following his termination, Dorman cashed out his full account balance on December 18, 2015, and ceased participating in the Plan. ER51.

In 2014, when Dorman was promoted to financial consultant, he signed onto the Schwab Investor Financial Consultant Compensation Plan (the "Compensation Plan"). ER50; ER181–201. The Compensation Plan provides enhanced

compensation for financial consultants who develop and expand client relationships. The Compensation Plan contains a broad arbitration agreement, in which Dorman agreed to arbitrate "[a]ny controversy, dispute or claim arising out of or relating to [his] employment or the termination of employment." ER193. By its terms, the arbitration agreement encompassed claims that arise out of "federal, state, or local law." *Id*. The arbitration agreement carved out "claims for benefits" under the Plan; such "claims for benefits" would be resolved pursuant to the procedures prescribed by the Plan. *Id*.[2]

The Compensation Plan further contains a "Class Action Waiver," which states:

> Any claims or disputes between [Dorman] and [Schwab] shall be brought solely on an individual basis. [Dorman] and [Schwab] agree 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 [Dorman's] employment . . . .

ER193–194.

[2] As explained below, a "claim for benefits" is different from a claim for breach of fiduciary duty. *See* Point I.B, *infra*.

C. Procedural History

1. The Complaint

Dorman filed his First Amended Complaint (the "Complaint") in June 2017. ER209–244.[3] The Complaint alleges that various Defendants breached their fiduciary duties of loyalty and prudence and violated ERISA's prohibited transaction rules by selecting for inclusion in the Plan investment funds that are affiliated with Schwab. ER237–243. According to the Complaint, the Schwab-affiliated funds supposedly performed poorly but were kept in the Plan solely to generate fees for Schwab and its affiliates. ER210. The Complaint also alleges that members of the Board of Directors of Charles Schwab & Co. breached their duty to monitor the Plan fiduciaries who selected the investment funds for inclusion in the Plan. ER240–241. The Complaint further asserts claims for co-fiduciary breach and knowing participation in a breach against various Defendants. ER241–243.

Dorman brought his claims under ERISA § 502(a)(2) and (a)(3) and sought plan-wide relief. Section 502(a)(2) provides that "[a] civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief

[3] The original complaint was filed by a different former Plan participant, Christopher Severson. ER256. Dorman was substituted for Severson after Defendants moved to compel individual arbitration of Severson's claims based on, among other agreements, a severance agreement signed by Severson containing an arbitration clause. ER260.

under" ERISA § 409. 29 U.S.C. § 1132(a)(2). Section 409, in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary . . . ." *Id.* § 1109(a). Section 502(a)(3) authorizes a participant to sue for equitable relief to enforce a provision of ERISA. *Id.* § 1132(a)(3).

Dorman purports to bring his claims on behalf of a class comprising all participants in, and beneficiaries of, the Plan at any time within six years of the filing of the Complaint. ER234. He has yet to file a motion to certify the putative class.

2. The Motion to Compel Arbitration and the Decisions under Review

On August 15, 2017, Defendants moved to compel individual arbitration of the asserted claims pursuant to two arbitration agreements: (1) the arbitration provision contained in the Plan document; and (2) the arbitration agreement contained in Dorman's Compensation Plan.[4]

[4] Defendants argued below that arbitration was also required under a third agreement—Dorman's Form U4. Defendants do not pursue that argument on appeal.

The district court denied the motion on January 18, 2018, holding that neither agreement required the claims asserted in the Complaint to be arbitrated. ER1–14. *First*, with respect to the Plan's arbitration provision, the court held that the provision did not take effect until after Dorman ceased his participation in the Plan, and therefore the arbitration provision did not apply to "his claims." ER6–8. *Second*, with respect to the Compensation Plan's arbitration agreement, the court concluded that "it was not clear" that the asserted ERISA claims arose out of Dorman's employment at Schwab as required by that agreement. ER8–9. And in any event, the court held that the claims were "claims for benefits" that were expressly carved out of the Compensation Plan's arbitration agreement. ER9.

As an alternative basis for denying Defendants' motion, the court held that even if the claims asserted in Dorman's Complaint did fall within the ambit of one or more of the arbitration agreements, the agreements would be unenforceable. ER9–11. According to the court, Dorman's claims were brought "on behalf of the Plan"—not on his own behalf—and without the Plan's consent he "cannot waive rights that belong to the Plan, such as the right to file this action in court." ER9. The court acknowledged that the Plan *did* consent to arbitration "by virtue of its Plan Document's arbitration provision," but it held that consent invalid because the Plan fiduciaries supposedly added the arbitration provision to the Plan document after they were sued. ER10–11. In the court's view, allowing Plan fiduciaries to

amend the Plan document to consent to arbitration would "in a sense, be allowing the fox to guard the henhouse." ER11.

Finally, the district court held that this Court's decision in *Morris* further precludes arbitration. ER11–13. According to the district court, *Morris* holds that class-action waivers that are required as a condition of employment violate the National Labor Relations Act and are therefore unenforceable. *Id*. After the district court rendered its decision, *Morris* was reversed by the Supreme Court. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

Defendants timely appealed the district court's January 18 order denying the motion to compel arbitration. ER21–24.

On February 16, 2018, Defendants sought leave to file a motion for partial reconsideration of the January 18 order. ER25–26. Defendants asked the district court to reconsider its ruling that the Plan document's arbitration provision did not take effect until after Dorman ceased participating in the Plan. ER28–34. The motion demonstrated that the Plan document's arbitration provision took effect in January 2015, nearly a year before Dorman terminated his participation in the Plan. ER31.

After Defendants moved for leave to seek reconsideration, this Court held the appeal of the January 18 order in abeyance pursuant to Federal Rule of Appellate Procedure 4(a)(4) pending resolution of the reconsideration motion. On

July 9, 2018, the district court denied the reconsideration motion. ER15–16. Defendants timely amended their Notice of Appeal to include both the January 18 order denying the motion to compel arbitration and the July 9 order denying leave to move for reconsideration. ER17–20. The appeal was subsequently restored to this Court's active calendar.

On September 20, 2018, the district court dismissed much of Dorman's Complaint with leave to re-plead. Dkt. No. 104. In its decision, the court held that Dorman failed to plausibly allege that Plan fiduciaries breached their duties of loyalty and prudence when they included Schwab-affiliated funds among the investment options available to Plan participants. *Id.* at 5-11. According to the court, there is nothing improper about offering affiliated funds, and Dorman's mere allegation that a single unaffiliated fund performed slightly better and charged slightly lower fees than the Schwab funds did not raise the specter of impropriety. *Id.* Thus, "[i]t is not reasonable to infer from Dorman's allegations that Defendants acted disloyally and the process by which they managed the Plan was flawed." *Id.* at 7. The court did not dismiss the claim alleging that the inclusion of Schwab funds violates ERISA's prohibited transaction rule; that claim, like the others, is brought under ERISA § 502(a)(2) and (3). Beyond dismissing much of the Complaint without prejudice and resolving the arbitration issue that is the

subject of this appeal, the district court has not resolved any other issues in this case.

SUMMARY OF THE ARGUMENT

I. A court must order arbitration when there is a valid agreement to arbitrate that encompasses the dispute before it. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008). The district court erred by refusing to compel arbitration of the ERISA breach-of-fiduciary-duty claims asserted in Dorman's Complaint even though those claims fall squarely within the ambit of at least two valid arbitration agreements.

First, the Plan document's arbitration provision states that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration." ER116. The fiduciary-breach claims asserted in the Complaint arise out of and relate to the Plan because the claims are asserted under ERISA—a statute that governs retirement plans—and allege that Plan fiduciaries breached their duties to the Plan. The claims therefore fall within the scope of the Plan document's arbitration provision.

The district court found that Dorman was not bound by the Plan document's arbitration provision because the provision was supposedly enacted after he ceased participating in the Plan. That finding was clearly erroneous as a factual matter because the record shows that the Plan document's arbitration provision took effect

before Dorman cashed out of the Plan. In any event, it is legally irrelevant whether Dorman is bound by the Plan document's arbitration provision. In *Munro v. University of Southern California*, this Court held that ERISA § 502(a) claims like the ones asserted here belong to a plan, not a participant who brings the claims on behalf of a plan. 896 F.3d 1088, 1092 (9th Cir. 2018). Accordingly, the relevant question is not whether Dorman agreed to arbitrate the § 502(a)(2) claims asserted in the Complaint but whether *the Plan* did. And here, the Plan expressly agreed in the Plan document to arbitrate all ERISA claims.

Second, to the extent that Dorman's consent is relevant, he agreed as part of his compensation plan to arbitrate the claims asserted here. In connection with his compensation plan, Dorman agreed to arbitrate "[a]ny controversy, dispute or claim arising out of or relating to [his] employment," including claims under federal law. ER193. ERISA claims necessarily arise out of a participant's employment because employment is a prerequisite for participating in an ERISA-governed retirement plan. *Williams v. Imhoff*, 203 F.3d 758, 766 (10th Cir. 2000). Accordingly, Dorman—like the Plan—agreed to arbitrate the ERISA claims asserted in the Complaint.

The district court held that the arbitration agreement in Dorman's compensation plan did not encompass the asserted ERISA claims because it expressly carves out "claims for benefits." That carve-out is irrelevant, however,

because the Complaint does not assert a "claim for benefits." A "claim for benefits" is a term of art under ERISA that encompasses claims that a plan failed to pay out certain benefits promised by the plan's express terms. The Complaint does not allege that any promised benefits were withheld; instead, it alleges that Plan fiduciaries breached their duties of loyalty and prudence when selecting investments funds for the Plan. Because the claims asserted in the Complaint are not "claims for benefits," the carve-out in the compensation plan's arbitration agreement does not apply.

II. The two arbitration agreements that encompass the ERISA claims asserted in the Complaint are valid and enforceable. As a general matter, claims alleging a violation of a federal statute such as ERISA are arbitrable absent a "contrary congressional command." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). As every Circuit to consider the question has held, ERISA contains no congressional command against arbitration, and therefore an agreement to arbitrate ERISA claims is generally enforceable. *See* page 35, *infra* (collecting cases).

The district court nevertheless held that the arbitration agreements at issue are unenforceable under *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999), which held that a plan participant cannot settle an ERISA § 502(a)(2) claim without the plan's consent. In the district court's view, *Bowles* dictates that a plan participant

cannot agree to arbitrate a § 502(a)(2) claim without the plan's consent. But here, the Plan *did* consent in the Plan document to arbitrate all ERISA claims, including § 502(a)(2) claims. Accordingly, *Bowles* does not apply in this case. In any event, the rule in *Bowles* does not extend to arbitration agreements because—unlike the settlement agreement in *Bowles*—an arbitration agreement does not affect the substantive rights of other Plan participants.

Finally, the district court's holding that the arbitration agreements in this case are unenforceable under the National Labor Relations Act ("NLRA") is foreclosed by the Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In *Epic*, the Supreme Court expressly rejected the district court's holding that provisions requiring individual arbitration as a condition of employment violate the NLRA's guarantee of workers' rights to engage in collective action. *Id.* at 1624–29.

III. The arbitration in this case must be conducted on an individual basis—not on a Plan-wide or class-wide basis. Because arbitration is a matter of contract, no party can be compelled to arbitrate on a class-wide or collective basis unless it agrees to do so by contract. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Here, the parties did *not* agree to class-wide or collective arbitration; to the contrary, they specifically agreed that any arbitration would be conducted on an individual basis. ER117; ER193–194. Accordingly, the

case should be remanded with instructions for the district court to order arbitration on an individualized basis, with Dorman seeking recovery for harm allegedly caused to his individual account balance from the fiduciary breaches alleged in the Complaint.

STANDARD OF REVIEW

A district court's decision to deny a motion to compel arbitration is reviewed de novo. *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207 (9th Cir. 2016). This Court also "review[s] de novo district court decisions about the arbitrability of claims" and "[t]he interpretation and meaning of contract provisions," *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016), as well as the "district court's interpretation and construction of . . . federal law," *Cmty. Bank of Ariz. v. G.V.M. Trust*, 366 F.3d 982, 984 (9th Cir. 2004). A denial of a motion for reconsideration is reviewed for abuse of discretion. *Fiester v. Turner*, 783 F.2d 1474, 1476 (9th Cir. 1986).

ARGUMENT

Under the Federal Arbitration Act ("FAA"), a district court must order arbitration if there is a valid agreement to arbitrate that encompasses the dispute at issue. 9 U.S.C. § 4; *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 766 (9th Cir. 2002); *see also Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) ("Because the FAA mandates that district courts *shall* direct the parties

to proceed to arbitration on issues as to which an arbitration agreement has been signed, the FAA limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (emendation and quotation marks omitted)).

Both criteria are satisfied here. Two arbitration agreements encompass the ERISA fiduciary-breach claims asserted in Dorman's complaint. *First*, the fiduciary-breach claims are claims "arising out of or in any way related to the Plan" and thus must be arbitrated under the Plan document's arbitration provision. ER116. *Second*, as part of his Compensation Plan, Dorman broadly agreed to arbitrate "any controversy, dispute, or claim" arising out of his employment with Schwab, including claims brought under federal law. ER193. Courts construing arbitration agreements with language similar to the Compensation Plan have held that ERISA claims concerning an employer's retirement plan arise out of the employment relationship and are thus arbitrable.

Both of those arbitration agreements are valid. Contrary to the district court's holding, nothing in the ERISA statute or the case law precludes arbitration of claims brought under ERISA § 502(a)(2) or (a)(3). And the district court's holding that the arbitration agreements violate the National Labor Relations Act is foreclosed by the Supreme Court's recent decision in *Epic*.

Because there are valid arbitration agreements that encompass the ERISA claims asserted in the Complaint, the district court was required to order arbitration. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) ("By its terms, the Act 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."). The district court's refusal to order arbitration was error and should be reversed.

I. THERE IS AN AGREEMENT TO ARBITRATE THE ASSERTED CLAIMS.

The district court's fundamental error was holding that the two arbitration agreements do not encompass the claims asserted in the Complaint. Arbitration agreements—like any other contracts—must be enforced according to their terms. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337–38 (2011). The FAA embodies a strong federal policy favoring arbitration. *Dean Witter*, 470 U.S. at 217 ("strong federal policy"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("national policy"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("liberal federal policy"). Pursuant to that policy, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999) (quoting *Moses H. Cone*, 460 U.S. at 24–25); *see also Wynn Resorts, Ltd. v. Atl.-Pac. Cap., Inc.*, 497 F. App'x 740, 742 (9th Cir. 2012) (describing "presumption in

favor of arbitrability"). That is to say, arbitration must be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Here, there are two arbitration agreements that encompass the claims asserted in the Complaint.

A. The Plan Document's Arbitration Provision Encompasses the Claims in the Complaint.

The Plan document's arbitration provision states that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration." ER116. Arbitration clauses containing the phrases "any claim" and "arising out of or relating to" are "broad and far reaching." *Chiron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000). "Arising out of" means "originating from, having its origin in, growing out of or flowing from." *Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) (quotation marks omitted); *see also Williams v. Imhoff*, 203 F.3d 758, 765–66 (10th Cir. 2000) (broadly construing "arising out of" in arbitration agreement). "Related to" is even broader and encompasses any claim that has a "significant relationship" with the Plan. *See DW Indus., Inc. v. Dentsply Int'l, Inc.*, 171 F. App'x 92, 92–93 (9th Cir. 2006).

There can be little doubt that the claims asserted in the Complaint have a significant and direct relationship with the Plan and thus fall within the scope of

the Plan document's arbitration agreement. For one thing, the claims are brought under ERISA, a statute that governs retirement plans. Moreover, the claims assert that Plan fiduciaries breached their duties to the Plan, and they seek Plan-wide relief. ER210. The claims therefore "arise out of" and "relate to" the Plan, bringing them within the ambit of the Plan's arbitration provision.

The district court did not hold otherwise. Instead, it held that the Plan document's arbitration provision is inapplicable because the provision supposedly was not in effect when Dorman participated in the Plan, and therefore Dorman did not agree to arbitrate his Plan-related claims. ER6–8. That holding regarding the timing of the arbitration provision's enactment is both factually inaccurate and legally irrelevant.

As a legal matter, it is irrelevant whether the arbitration provision was in effect while Dorman participated in the Plan. In *Munro v. University of Southern California*, this Court held that an ERISA § 502(a)(2) claim belongs to a plan, not the participant who brings the claim on behalf of a plan. 896 F.3d at 1092. Accordingly, the critical question is whether the *Plan* agreed to arbitrate the § 502(a)(2) claim asserted here—not whether Dorman agreed to arbitration while he was a Plan participant. And there is no dispute that the Plan here *did* agree to arbitration.

As a factual matter, the district court's holding was clearly erroneous because the Plan document's arbitration provision was in effect while Dorman participated in the Plan. The arbitration provision took effect on January 1, 2015. ER46. Dorman did not cease participating in the Plan until nearly a year later. ER51. Accordingly, even if Dorman's consent were relevant, he agreed to arbitrate any Plan-related claims by voluntarily participating in the Plan while the Plan document's arbitration provision was in effect.[5]

1. The Plan Agreed to Arbitrate the Asserted Claims.

The district court refused to enforce the Plan document's arbitration provision because, in the court's view, the provision does not bind Dorman. ER6–8. But that is the wrong way to analyze the issue. The claims asserted in the Complaint belong to the Plan—not to Dorman—and therefore the relevant inquiry is whether the *Plan* agreed to their arbitration, not whether Dorman agreed.

In *Munro*, this Court explained that an ERISA § 502(a)(2) claim belongs to a plan, not an individual participant. There, an employee agreed to arbitrate any claim that "the Employee may have against [his employer]." 896 F.3d at 1092. The Court held that the agreement did not encompass ERISA § 502(a)(2) claims because those claims belong to a plan, not an employee. *Id.* As the Court

[5] Dorman also consented to arbitrate ERISA claims in the arbitration agreement contained in his Compensation Plan. *See* Point I.B, *infra*.

explained, an employee's agreement to arbitrate his own claims does not "cover claims belonging to other entities"—*i.e.*, claims belonging to a plan. *Id.*

The district court's analysis cannot be reconciled with *Munro*. According to the district court, Dorman was not bound by the Plan's arbitration provision and therefore he did not agree to arbitrate *his* ERISA § 502(a) claims. ER7 ("The Plan Document . . . cannot apply to *his* claims." (emphasis added)). The § 502(a) claims are not his claims, however. Under *Munro*, they are the Plan's claims. The relevant question is thus whether *the Plan* agreed to arbitration—which it did undisputedly in the Plan document prior to the filing of the Complaint. ER42–43 ("Any claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration."). Dorman's consent to arbitration is irrelevant because the claims are not his.[6]

The district court recognized that the Plan consented to arbitrate the claims asserted in the Complaint, but it held that consent was invalid. ER11. In so ruling, the district court misapplied a decision by this Court holding that plan fiduciaries cannot insulate themselves from fiduciary responsibility by amending a plan document. *Id.* (citing *Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir. 2009)).

[6] Even if his consent were relevant, Dorman did consent to arbitrate all ERISA claims, both in his Compensation Plan, *see* Point I.B, *infra*, and by participating in the Plan while the Plan document's arbitration provision was in effect, *see* Point I.A.2, *infra*.

According to the district court, the Plan's fiduciaries were trying to protect themselves from fiduciary liability when they amended the Plan document to add the arbitration provision. ER11. In the court's view, allowing fiduciaries to consent to arbitration on behalf of the Plan would be akin to "allowing the fox to guard the henhouse." *Id.*

The district court's reliance on *Johnson* is misplaced because here the amendment was not an effort to insulate fiduciaries from ERISA liability; the amendment merely provides for arbitration of ERISA claims. Instead of blocking liability, a forum was selected for litigating fiduciary-breach claims that offered "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic*, 138 S. Ct. at 1621. To the extent that the district court believed that an arbitrator would be less equipped than a court to resolve ERISA claims or less willing to find against Plan fiduciaries, the court was expressing precisely the type of "judicial hostility" towards arbitration that the FAA was designed to eliminate. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000). The Supreme Court has held that there is nothing unfair about arbitration—even arbitration on an individual basis—as long as individuals can vindicate their statutory rights in the arbitral forum. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2309.

The district court's holding that it would be "inequitable" to enforce the Plan document's arbitration provision is likewise off-base. ER7. The court was

concerned about plan defendants amending plan documents to require arbitration after they are sued, putting participants "at a disadvantage." *Id.* But that is not what occurred here; the arbitration provision here was added to the Plan document well before this Complaint was filed. ER42–43. Moreover, there is no inherent "disadvantage" to participants if they are required to pursue claims in arbitration rather than in court. *See e.g., Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988) (rejecting argument that arbitration is an unsuitable forum for resolving ERISA claims and noting that as "long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"). The district court's view of arbitration as a "disadvantage" for participants underscores its hostility toward arbitration—which is precisely what the FAA forbids.

The bottom line is that the Plan agreed that all ERISA claims should be arbitrated. The claims asserted in the Complaint belong to the Plan, and the Plan's agreement to arbitrate mandates arbitration.

2. The Plan's Arbitration Provision Binds Dorman in Any Event.

Even if Dorman's consent were relevant, he did consent to arbitrate the claims asserted in the Complaint by voluntarily participating in the Plan after the

Plan's arbitration provision was enacted.[7] Contrary to the district court's finding, the Plan document's arbitration provision took effect while Dorman was still a Plan participant. The record shows that the Plan document's arbitration provision was adopted on December 8, 2014, and became effective on January 1, 2015—eight months before Dorman ended his employment at Schwab and almost eleven months before he cashed out of the Plan. ER36–43. The district court's contrary factual finding that the arbitration provision did not take effect until after Dorman ceased participating in the Plan cannot be squared with the record and is clearly erroneous.[8]

A plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect. *See, e.g.*, *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723–24 (9th Cir. 2000) (enforcing arbitration provision in an ERISA plan document); *Pratt v. Petroleum Prod. Mgmt. Inc. Emp. Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990) ("A pension plan is a

[7] Dorman additionally agreed in his Compensation Plan to arbitrate the claims asserted in the Complaint. See Point I.B, *infra*.

[8] When the district court decided the motion to compel arbitration, the record did not contain documentation showing that the Plan document's arbitration provision was enacted in December 2014. In seeking leave to move for reconsideration, Schwab presented the court with indisputable evidence that the arbitration provision took effect while Dorman was a Plan participant. The district court denied leave to move for reconsideration. ER15–16.

unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." (quotation marks omitted)). An ERISA plan sponsor may modify the terms of a plan document at any time without the consent of plan participants as long as vested benefits are not reduced. *Smith v. AEGON Cos. Pension Plan,* 769 F.3d 922, 930 (6th Cir. 2014). A plan modification takes effect immediately and binds a participant, even if the participant "had not previously known about the clause." *Chappel*, 232 F.3d at 723.

By continuing to participate in the Plan after the arbitration provision took effect in January 2015, Dorman consented to all Plan terms, including the Plan's arbitration provision. Accordingly, to the extent that Dorman's consent to arbitration is relevant, he became bound by the Plan's arbitration provision when it took effect in January 2015 and thus consented to arbitrate the claims asserted in the Complaint.

B. The Claims Asserted in the Complaint Are Arbitrable under the Compensation Plan's Arbitration Agreement.

To the extent that Dorman's consent is relevant, he further agreed to arbitrate the claims asserted in the Complaint when he signed his Compensation Plan. In the Compensation Plan, Dorman agreed to arbitrate "[a]ny controversy, dispute or claim arising out of or relating to [his] employment," including claims under federal law. ER193. The claims asserted in the Complaint arise out of and

relate to Dorman's employment at Schwab because they are asserted under ERISA—the "*Employee* Retirement Income Security Act"—a federal statute designed to protect participants in "employee benefit plan[s]." 29 U.S.C. § 1003(a). By definition, then, any claim asserting an ERISA violation necessarily relates to a plaintiff's employment because employment is a precondition to participating in an ERISA plan. *See* ER67 (stating that only Schwab employees can participate in the Plan); ER213 (alleging that the Plan "is designed to provide retirement income to Defendants' employees who participate in the Plan").

The Tenth Circuit reached precisely that conclusion in *Williams*. There—like here—the question was whether the plaintiffs' ERISA claims "aris[e] out of [their] employment or termination of employment." 203 F.3d at 765. The Tenth Circuit answered that question in the affirmative in part because "Plaintiffs were entitled to purchase company stock and participate in the [] Plan solely as a result of their employment." *Id.* at 766. Similarly here, Dorman's employment was the sole reason that he was able to participate in the Plan, and therefore his ERISA claims arise out of and relate to his employment.[9]

[9] Although *Williams* found additional connections between the ERISA claims and the plaintiffs' employment in that case, there is no indication that the result would have been different absent those additional connections. 203 F.3d at 766–67.

Other courts have likewise held that ERISA claims—including fiduciary-breach claims—fall within the scope of an arbitration agreement that encompasses claims "arising out of or relating to employment." *See Cooper v. Ruane Cunniff Golfarb, Inc.*, No. 16-cv-1900, 2017 WL 3524682, at *3 (S.D.N.Y. Aug. 15, 2017) ("[C]laims arising under ERISA necessarily relate to a party's employment."); *Shappell v. Sun Life Assurance Co.*, No. 10-cv-03020, 2011 WL 2070405, at *3 (E.D. Cal. May 23, 2011) ("Here, the broad language of the arbitration provision extends to 'any claim or controversy' arising out of Plaintiff's employment, therefore, subjecting all [ERISA] claims she asserts against Employers to arbitration."); *A.G. Edwards & Son, Inc. v. Smith*, No. 88-cv-1445, 1989 U.S. Dist. LEXIS 16532, at *6 (D. Ariz. Dec. 19, 1989) (where plaintiff agreed to arbitrate claims "arising out of my employment," holding that "[plaintiff's] ERISA claim relates directly to his employment with [defendant] and thus falls within the ambit of the above-cited agreement to arbitrate"); *cf. Simon v. Pfizer Inc.*, 398 F.3d 765, 775–76 (6th Cir. 2005) (holding that ERISA claims were not arbitrable because arbitration agreement "does not contain a general arbitration provision under which the parties agreed to arbitrate all disputes arising from the employment relationship").

Against that weight of authority, the district court erroneously held that "it is not clear" that the ERISA claims asserted in the Complaint arise out of or relate to

Dorman's employment. ER009. Compounding its error, the court invoked a presumption *against* arbitration. But any "doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula*, 175 F.3d at 719. Accordingly, to the extent that it is "not clear" whether Dorman's claims fall within the ambit of the Compensation Plan's arbitration agreement, the district court was required to find in favor of arbitrability—not against it.

The district court also held that the claims asserted in the Complaint are "claims for benefits" and are therefore carved out of the Compensation Plan's arbitration agreement. ER9. That, too, is incorrect. Section 11.3 of the Compensation Plan states that the arbitration agreement does not apply to "claims for benefits under any ERISA-governed employee benefit plan(s)," which instead must be resolved according to the "claims procedures under such benefit plans." ER193. That carve-out is irrelevant, however, because the claims asserted here are not "claims for benefits."

A participant asserts a "claim for benefits" under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Such a claim seeks "to recover benefits due . . . under the terms of the plan." *Id.* The Complaint does not assert any claim under § 502(a)(1)(B), however, and it does not allege that Dorman was denied any benefits that he was owed under the terms of the Plan. The Complaint thus does not allege a "claim for benefits." Instead, the Complaint asserts claims under

§ 502(a)(2) and (a)(3) for losses allegedly suffered by the Plan as a result of fiduciaries supposedly acting imprudently and disloyally by selecting investment funds that were not in the participants' best interest. ER237–243.

That conclusion is buttressed by the language of the Plan document and the Summary Plan Description ("SPD"). The arbitration agreement's carve-out states that any "claims for benefits" must be resolved according to the "claims procedures under such benefit plans." ER193. The Plan document refers a participant bringing a "claim for benefits" to the SPD. ER116. The SPD, in turn, lays out a detailed claim-exhaustion process that a participant bringing a "claim for benefits" must follow. ER178–179. Among other things, the SPD states that any denial of a "claim for benefits" must be accompanied by a written notice with "references to the specific provisions of the official 401(k) Plan document on which the denial is based." ER178. In other words, the outcome of a "claim for benefits" turns on the specific language of the Plan. The claims asserted in the Complaint do not turn on the Plan language, however, and they thus cannot be "claims for benefits."

Moreover, the SPD precludes a claimant from bringing a "claim for benefits" in federal court unless he first exhausts his administrative remedies. ER179. Among other things, a claimant must submit a signed, written claim to the Claims Administrator and must appeal any denial to the Employee Benefits

Administrative Committee. *Id.* Dorman did not follow any of those formalities. That is proof positive that the Complaint does not assert a "claim for benefits."

Accordingly, the district court erred when it held that the claims asserted in the Complaint are "claims for benefits" that are carved out of the Compensation Plan's arbitration agreement. To the extent that Dorman's consent is relevant, he consented to arbitrate the claims asserted in the Complaint when he agreed in his Compensation Plan to arbitrate any claim that arises out of or relates to his employment.

Munro does not change that conclusion. The arbitration agreement in *Munro* was narrower than the one in the Compensation Plan because it covered only claims that the "*Employee may have* against [his employer]." 896 F.3d at 1092 (emphasis added). The Court held as a matter of contract interpretation that ERISA § 502(a)(2) claims are not claims that an "employee may have" because those claims belong to a plan, not an employee. *Id.* Here, the Compensation Plan's arbitration agreement is not limited to claims that Dorman "may have" against Schwab but instead more broadly sweeps in "[a]ny . . . claim arising out of or relating to [his] employment." ER193. Accordingly, *Munro* is inapposite. Dorman consented to arbitrate "any" ERISA claim, not just those claims he (as opposed to the Plan) "may have." To the extent that *Munro* stands for the proposition that an individual lacks the capacity to agree to arbitrate a § 502(a)

claim because the claim belongs to a plan, the claims here are still arbitrable because the Plan agreed to arbitration. *See* Point I.A, *supra*.

* * * * *

The "principal purpose" of the FAA is "ensuring that private arbitration agreements are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Here, both the Plan and Dorman agreed to arbitrate ERISA claims. Accordingly, regardless of whether the Plan's consent or Dorman's consent controls, there is a binding agreement to arbitrate that encompasses the claims asserted in the Complaint.

II. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE.

Once it is established that a dispute falls within the scope of an arbitration agreement, a court must order arbitration unless the agreement is unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Because the FAA embodies a strong policy in favor of arbitration, "parties challenging the enforceability of an arbitration agreement bear the burden of proving that the provision is unenforceable." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013); *see also Green Tree*, 531 U.S. at 91 ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."). Here, the agreements by the Plan and

Dorman to arbitrate the asserted claims are enforceable, and therefore the district court was required to compel arbitration.

A. Agreements to Arbitrate ERISA Claims are Generally Enforceable.

As a general matter, an agreement to arbitrate an ERISA claim is enforceable. The Supreme Court has repeatedly emphasized that an agreement to arbitrate claims alleging a violation of a federal statute must be enforced like any other arbitration agreement absent a "contrary congressional command." *Italian Colors*, 133 S. Ct. at 2309; *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Every Circuit to consider the question has concluded that nothing in the ERISA statute evinces a congressional intent to preclude arbitration of ERISA claims. *See, e.g.*, *Williams*, 203 F.3d at 767 ("Congress did not intend to prohibit arbitration of ERISA claims."); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) ("We agree that Congress did not intend to exempt statutory ERISA claims from the dictates of the Arbitration Act."); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 7 F.3d 1110, 1118 (3d Cir. 1993) (same); *Bird v. Shearson Lehman / Am. Express, Inc*., 926 F.2d 116, 122 (2d Cir. 1991) (same); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc*., 847 F.2d 475, 479 (8th Cir. 1988) (same).

To be sure, this Court thirty-four years ago suggested that ERISA claims might not be arbitrable because arbitrators supposedly lack the competence to

interpret federal statutes. *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 750 (9th Cir. 1984). But that ruling is irreconcilable with intervening Supreme Court authority holding that arbitrators *are* competent to interpret and apply federal statutes. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2309 (holding that agreements to arbitrate claims brought under federal statutes should be enforced absent contrary dictate by Congress); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268 (2009) (calling it a "misconception" that arbitrators lack the competence to decide legal issues); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."). In accord with that intervening authority, this Court has recognized that *Amaro* is likely no longer good law. *See Comer v. Micor, Inc.*, 436 F.3d 1098, 1100 (9th Cir. 2006) ("We have, in the past, expressed skepticism about the arbitrability of ERISA claims, but those doubts seem to have been put to rest by the Supreme Court's opinions."). In *Munro*, the Court noted that "there is considerable force" to the argument that *Amaro* has been overruled. 896 F.3d at 1094 n.1. Because *Amaro* is irreconcilable with intervening Supreme Court authority holding that federal statutory claims are generally arbitrable, the Panel should not follow it. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

B. *Bowles* Does Not Render the Arbitration Agreements Unenforceable.

Although agreements to arbitrate ERISA claims are generally enforceable, the district court held that the arbitration agreements at issue in this appeal are unenforceable under *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999). According to the district court, *Bowles* stands for the proposition that a participant "cannot waive rights that belong to the Plan, such as the right to file this action in court." ER9. Thus, according to the court, any agreement by a plan participant to arbitrate a § 502(a)(2) claim is unenforceable under *Bowles*. *Id.* There are myriad flaws in that reasoning.

First, *Bowles* by its terms does not apply where, as here, a plan agrees to arbitrate. In *Bowles*, the Court held that a plaintiff cannot settle a § 502(a) claim for plan-wide relief "without The Plans' consent." 198 F.3d at 760. The plain implication is that a plan can consent to settle a § 502(a) claim. Even if the *Bowles* rule precludes a plaintiff from agreeing to *arbitrate* a § 502(a) claim without the plan's consent, it would be inapplicable to this case because the Plan here *did* agree to arbitration. *See* Point I.A, *supra*.

Second, Dorman did not waive any rights that belong to the Plan. Instead, the Plan itself agreed to arbitration. *See* Point I.A, *supra*. Accordingly, the district court's holding that a participant cannot waive rights belonging to a plan has nothing to do with this case.

Third, *Bowles* does not apply to arbitration agreements. *Bowles* stands for the unremarkable proposition that one participant cannot release a defendant's liability to the entire plan without the plan's consent. That makes perfect sense; without such a rule, a participant would have incentive to settle a § 502(a)(2) claim on terms favorable to herself but not necessarily favorable to other plan members. Other courts have expressed similar concerns. *See, e.g., Coan v. Kaufman*, 457 F.3d 250, 261 (2d Cir. 2006) (expressing concern that there is "nothing to prevent [a participant bringing a § 502(a)(2) claim for plan-wide relief] from reaching a settlement with the defendants that would disproportionately, or even exclusively, benefit her").

The district court extrapolated from the common-sense rule in *Bowles* that a participant bringing a § 502(a)(2) claim cannot agree to *arbitrate* that claim without the plan's consent. But there is a world of difference between the release of plan claims in *Bowles* and the arbitration agreements at issue here. A release gives up substantive rights. *See* Release, Black's Law Dictionary (10th ed. 2014). Accordingly, it makes sense that an individual participant may not release a defendant from all liability to a plan because such a release would affect the substantive rights of other participants. When a participant agrees to arbitrate, by contrast, he does not give up any substantive rights that belong to other participants. As the Supreme Court has explained, "[b]y agreeing to arbitrate a

statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628; *see also Comer*, 436 F.3d at 1105 n.5 ("Unlike an exoneration clause—which has the drastic effect of extinguishing a claim entirely—an arbitration clause merely determines where, not whether, a claim will be heard.").

Fourth, the district court's premise that "the right to file this action in court" belongs to the Plan is faulty. ER9. The Plan has no right to bring the claims asserted in the Complaint in *any forum*. The claims here are brought under ERISA § 502(a)(2) and (a)(3). ER237–243. Those provisions authorize the commencement of "[a] civil action . . . by a participant, beneficiary or fiduciary." 29 U.S.C. § 1132(a)(2)–(3). A plan is not authorized to bring a § 502(a)(2) claim. *See Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 983 (9th Cir. 1999) ("ERISA plans . . . are not fiduciaries entitled to sue under ERISA."). Accordingly, the district court's concern about Dorman waiving the Plan's right to bring a § 502(a) claim in court is baseless. The Plan has no right to bring such a claim anywhere.

For all of these reasons, *Bowles* does not apply to this case. The district court's holding that the arbitration agreements are invalid under *Bowles* was erroneous.

C. The Arbitration Agreements Do Not Violate the National Labor Relations Act.

Finally, the district court's holding that the arbitration agreements are unenforceable under the National Labor Relations Act is foreclosed by the Supreme Court's recent decision in *Epic*. The district court cited *Morris* for the proposition that class-action waivers are unenforceable under the NLRA when they are required as a condition for employment. ER12 (citing *Morris*, 834 F.3d at 980–83). "Thus, *Morris* would appear to bar any provisions requiring individual arbitration of Dorman's claims that Dorman signed as a condition of his employment." *Id.*

The Supreme Court's decision in *Epic* reversed *Morris* earlier this year. 138 S. Ct. at 1632. Specifically, the Supreme Court held that the NLRA's guarantee of workers' rights to engage in collective action does not override an agreement to arbitrate employment-related claims on an individual basis. *Id.* at 1624–29. The district court's contrary holding that the arbitration agreements are invalid in light of the NLRA cannot stand under *Epic*.

* * * * *

"An arbitration agreement governed by the Federal Arbitration Act is presumed to be valid and enforceable." *Hoffman v. Citibank (S.D.), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008). The district court has provided no basis for overcoming that presumption and invalidating the arbitration agreements here.

Because the claims asserted in the Complaint are encompassed by valid arbitration agreements, the district court was required to order arbitration. *See Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004) ("[T]he district court's role is limited to determining whether a valid arbitration agreement exists and, if so, whether the agreement encompasses the dispute at issue. If the answer is yes to both questions, the court must enforce the agreement.").

III. ARBITRATION MUST BE LIMITED TO INDIVIDUAL LOSSES IN THE PARTICIPANT'S OWN ACCOUNT.

Because the district court incorrectly held that the claims asserted in the Complaint are not arbitrable, it did not have occasion to determine whether in arbitration an individual's § 502(a)(2) claim may seek recovery for plan losses in the individual accounts of other plan participants. The Court should remand with instructions to order arbitration of individual claims limited to seeking relief for the impaired value of the plan assets in the individual's own account.

The default rule is that claims are arbitrated on an individual rather than on a collective or class-wide basis. The Supreme Court has explained that because arbitration is a matter of contract, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S.A.*, 559 U.S. at 684; *see also AlixPartners, LLP v. Brewington*, 836 F.3d 543, 553 (6th Cir. 2016) ("An agreement must

expressly include the possibility of classwide arbitration for us to conclude that the parties agreed to it.").

Here, the parties did not agree to arbitration on a class-wide or collective basis; to the contrary, the arbitration agreements contain waivers of class-wide and collective arbitration. For instance, the Plan document's arbitration provision states that any arbitration must be conducted "on an individual basis only, and not on a class, collective or representative basis." ER117. Similarly, the Compensation Plan's arbitration agreement states that "[a]ny claims or disputes . . . shall be brought solely on an individual basis." ER193. Since "arbitration is a matter of contract," the provisions waiving class-wide or collective arbitration must be enforced according to their terms, and the arbitration must be conducted on an individualized basis. *See Italian Colors*, 570 U.S. at 233.

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 the Plan here. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008). In defined-contribution plans, each participant holds different plan assets in an individual account and invests those assets in different ways. *Id.* at 255–56; *see also* 29 U.S.C. § 1002(34) (defining "defined contribution plan"). Under that arrangement, a breach of fiduciary duty typically causes individualized harm to participants depending on the extent to

which the breach affects each participant's individual account balance. 552 U.S. at 255–56. Accordingly, in *LaRue*, the Supreme Court held that to bring a viable § 502(a)(2) claim, a participant in a defined-contribution plan need only show that fiduciary breaches "impair the value of plan assets in a participant's individual account." *Id.* *LaRue* thus stands for the proposition that a defined-contribution plan participant can bring a § 502(a)(2) claim for the plan losses in his own individual account.

Here, the Plan and Dorman both agreed to arbitration on an individualized basis, which is consistent with *LaRue*. In arbitration, Dorman may seek recovery for only the harm allegedly caused by a fiduciary breach to his individual account balance because that is what he and the Plan agreed to and because such an individualized recovery is cognizable under *LaRue*.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that the Court reverse the district court's decision denying the motion to compel arbitration and remand with instructions to compel arbitration on an individualized basis.

October 15, 2018

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants certify that they are not aware of any related cases pending in this Court.

/s/ *Howard Shapiro*
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CERTIFICATE OF COMPLIANCE

This brief is 9,652 words, excluding the portions exempted by Fed. R. App. P. 32(f). This brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ *Howard Shapiro*
Howard Shapiro

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 15, 2018.

I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 15, 2018

/s/ *Howard Shapiro*
Howard Shapiro

ADDENDUM

ADDENDUM

29 U.S.C. §1132 [ERISA §502]. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—
(1) by a participant or beneficiary ... (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. §1109];
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
...

29 U.S.C. §1109(a) [ERISA §409(a)]. Liability for breach of fiduciary duty.

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. § 1111].