Appeal 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.; JOHN DOES 1-50; and XYZ CORPORATIONS 1-5,

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

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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STATEMENT RESPECTING REHEARING AND REHEARING *EN BANC*

Rehearing and rehearing *en banc* are warranted because the panel's August 20, 2019 memorandum opinion conflicts with this Court's binding precedent and the decisions of at least four other circuit courts of appeals on an issue that is elemental to the enforcement mechanism of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").[1] In particular:

(1) By holding that relief for breach of ERISA fiduciary duties under 29 U.S.C. § 1109(a), became "inherently individualized in the context of a defined contribution plan" after *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008), the decision:

   a. conflicts with this Court's holding in *Munro v. University of Southern California*, 896 F.3d 1088, 1093-94 (9th Cir. 2018) (Thomas, C.J.), *cert. denied*, 139 S. Ct. 1239 (2019), which expressly rejected the argument adopted by the panel; and

[1] The panel issued two concurrent opinions in this case: A published opinion overruling the Ninth Circuit's prior decision in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), and an unpublished memorandum opinion resolving the dispute between the parties. The published opinion does not purport to resolve the disputed issues between the parties, does not purport to provide rationale for reversing the district court, and deals only with an issue not meaningfully briefed or argued by the parties. Because the panel's published opinion is irrelevant to deciding the issues on appeal, this Petition does not seek rehearing or rehearing *en banc* regarding the published opinion.

b. conflicts with the decisions of every other federal court of appeals to consider the question, each of which reached the same conclusion as this Court in *Munro*; *see L.I. Head Start Child Dev. Servs. v. Econ. Opportunity Comm'n of Nassau Cty.*, 710 F.3d 57, 65 (2d Cir. 2013); *Smith v. Med. Benefit Administrators Grp.*, 639 F.3d 277, 283 (7th Cir. 2011); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 595 & n.9 (3d Cir. 2009); and

(2) By ruling that an arbitration provision can truncate ERISA's statutorily defined fiduciary liability and forbid plan participants from asserting the statutory right under § 1109 to seek plan-wide relief for fiduciary breach, the decision:

a. conflicts with the Supreme Court's and this Court's holdings that arbitration agreements cannot be enforced if they limit substantive statutory remedies or forbid the assertion of statutory rights, *see Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) ("a provision in an arbitration agreement forbidding the assertion of certain statutory rights" would "certainly" be invalid); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002);

b. conflicts with the Fifth Circuit's ruling in *Kramer v. Smith Barney*, 80 F.3d 1080, 1085 (5th Cir. 1996) that 29 U.S.C. § 1110, which voids any provision that would "relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty" precludes enforcement of arbitration agreements that would reduce fiduciary liability; and

c. presents an issue of extraordinary importance by allowing fiduciaries to opt out of plan-wide liability thereby upending and eviscerating ERISA's "comprehensive and reticulated" enforcement regime, which the Supreme Court has repeatedly cautioned courts against tampering with; *see, e.g.*, *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) ("We have therefore been especially reluctant to tamper with the enforcement scheme embodied in the statute[.]") (internal quotations and editing marks removed).

INTRODUCTION

This Court should grant rehearing because the panel's conclusory decision flatly contradicts this Court's recent decision in *Munro v. University of Southern California*, 896 F.3d 1088, 1093-94 (9th Cir. 2018) (Thomas, C.J.), *cert. denied*, 139 S. Ct. 1239 (2019). *Munro* held that, consistent with *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008), claims for fiduciary breach under ERISA related to defined contribution plans remain representative actions on behalf of the plan. *Munro* expressly rejected the argument—which the panel erroneously adopted—that ERISA claims in the context of defined contribution plans were transformed by *LaRue* into claims for individual relief.

Moreover, this Court in *Munro* distinguished *LaRue* on the grounds that it would not apply where the fiduciary misconduct affected the plan in its entirety. Here, as in *Munro* (but unlike *LaRue*), the alleged fiduciary breaches affected the SchwabPlan Retirement Savings and Investment Plan ("Plan") in its entirety. The panel ignored this critical holding in *Munro*. The panel's holding also conflicts with decisions from the Second, Third, Seventh, and Eighth Circuits, each of which reached the same conclusion regarding *LaRue* as this Court did in *Munro*: that post-*LaRue*, claims for fiduciary breach relating to defined contribution plans remain representative claims on behalf of the plan. The panel's departure from what had been settled law warrants rehearing.

The panel's other errors stem from its erroneous reading of *LaRue*. Accordingly, the panel's memorandum both upends the "uniformity of the court's decisions" and "directly conflicts with an existing opinion by another court of appeals" in an area—ERISA remedies—that requires uniformity. *En banc* review is therefore warranted. *See* Fed. R. App. P. 35(a)(1); Circuit Rule 35-1.

BACKGROUND

Plaintiff-Appellee Michael F. Dorman, a former employee of Charles Schwab and Plan participant, alleges that the fiduciaries of the Plan breached their fiduciary duties of prudence and loyalty to the Plan in violation of ERISA. Dorman brings his suit on behalf of the Plan, seeking to obtain for the Plan the relief provided by 29 U.S.C. §§ 1109(a) and 1132(a)(2), in particular, recovery of "any losses" suffered by the Plan resulting from Defendants-Appellants' (collectively, "Schwab") fiduciary breaches and prohibited transactions.[2] (ER 210, 243-44).[3] Dorman also seeks equitable and injunctive relief for the Plan under § 1132(a)(3). *Id.* Dorman does not bring any individual claims or seek any individual relief. *Id.*

The Plan is a "defined contribution" and "individual account" plan that

[2] Defendants-Appellants are Plan fiduciaries including Charles Schwab Corporation, certain of its affiliates, and individual fiduciary committee members.

[3] Citations to "ER" refer to the Excerpts of Record (Docket No. 23-1). Citations to "Supp. ER" refer to Plaintiff-Appellee's Supplemental Excerpts of Record (Docket No. 32).

provides retirement benefits "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses… which may be allocated to such participant's account." 29 U.S.C. § 1002(34). (ER 2).

Dorman alleges that Defendants breached their fiduciary duties to the Plan by causing the Plan to invest heavily in various investment funds that were managed by Schwab and its affiliates, and to purchase services from Schwab and its affiliates, for which they received excessive and unreasonable compensation. (ER 210-11).

Schwab filed a motion to compel *individual* arbitration (Supp. ER 9), even though Dorman brought claims only as a representative of the Plan, and sought only relief for the Plan. Schwab argued that the arbitration provisions in question do not permit arbitration on a representative basis to recover the Plan's losses. Thus, Schwab argued, if "the Court nevertheless conclude[s] that Dorman cannot be limited to pursuing individual claims for relief in arbitration, the Court must deny the Motion to Compel and adjudicate Dorman's claims in court." (Supp. ER at 23).

The panel's decision references only one of the two arbitration provisions Schwab cited in its appeal, a provision contained in the Plan Document (ER 116-17). The provision states:

> (a) Any claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration…
>
> …
>
> (d) The Participant must bring any dispute in arbitration on an individual basis only, and not on a class collective or representative

> basis… 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.

The district court denied Schwab's motion to compel arbitration (ER 1-14), Schwab appealed, and the appellate panel reversed. The panel issued two decisions simultaneously; a published opinion, --- F.3d ---, 2019 WL 3926990, and an unpublished memorandum, --- Fed. Appx. ---, 2019 WL 3939644 (the "Op."). The published decision reversed the longstanding rule in this Circuit that ERISA claims are not generally arbitrable, overruling *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). However, Dorman has never taken the position in this case that *all* ERISA claims are inappropriate for arbitration. Rather, Dorman argues that arbitration agreements cannot forbid the assertion of a statutory right or reduce the substantive liability provided by § 1109. As explained above, *supra* n.1, because the published opinion is irrelevant to the issues on appeal, Dorman does not seek rehearing as to that opinion.

In its unpublished decision, the panel went on to explain why it held that Dorman's claims are subject to individual arbitration under the provisions in the Plan Document. Despite citing *Munro*, the panel concluded that Dorman's claims, brought in a representative capacity on behalf of the Plan, "are inherently individualized when brought in the context of a defined contribution plan" and concluded that Dorman's claims must be arbitrated on an individual basis. Op. 5-6.

REASONS FOR GRANTING REHEARING AND REHEARING *EN BANC*

I. The Panel Decision Directly Conflicts with this Court's Prior Ruling in *Munro* and Similar Holdings in Other Circuits.

Rehearing is warranted because the panel's decision directly conflicts with this Court's prior ruling in *Munro*, as well as the ruling of every other court of appeals to consider the question whether, after *LaRue*, breach of fiduciary duty claims in the defined contribution plan context are individual claims or claims belonging to the plan. *Munro* held that ERISA breach of fiduciary duty claims, even in defined contribution plans, alleging "fiduciary misconduct as to the Plans in their entireties" are claims brought on behalf of the plan, and not brought on behalf of any individual plan participant. *Munro*, 896 F.3d at 1093-94. In reaching that conclusion, *Munro* carefully examined the text of ERISA and decades of Supreme Court precedent. *Id*. The panel's holding here, which concluded that fiduciary breach claims regarding defined contribution plans are "inherently individualized," upsets what had been settled law and will create confusion if left to stand.

29 U.S.C. § 1132(a)(2), empowers plan participants to bring suit for relief under § 1109. Section 1109(a), in turn, makes plan fiduciaries "liable to make good *to such plan* any losses *to the plan* resulting from" a breach of their fiduciary duties. (Emphasis added). The Supreme Court has made clear that, taken together, §§ 1132(a)(2) and 1109(a) enable a plan participant to bring breach of fiduciary duty suits *only* in "a representative capacity" and "on behalf of the plan," and *only* to

recover losses suffered by the plan. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) ("*Mass. Mutual*").

LaRue did not purport to alter the representative nature of participant enforcement under § 1132(a)(2). *LaRue* concerned a fiduciary breach that affected only one participant. The Supreme Court held that if a fiduciary breach affects only one defined contribution plan participant, that participant can still bring a claim for "plan injuries" that "impair the value of plan assets in a participant's individual account." *LaRue*, 522 U.S. at 256.

In the wake of *LaRue*, five circuit courts of appeal, including this one, have addressed and rejected the argument that *LaRue* means a participant in a defined-contribution plan may *only* bring claims for losses to his or her individual account. Before the panel's decision in this case, every court of appeals, including this one, had agreed: Defined-contribution plan participants may still bring claims in their representative capacity on behalf of the plan alleging mismanagement as to the plan.[4]

[4] *See L.I. Head Start Child Dev. Servs. v. Econ. Opportunity Comm'n of Nassau Cty.*, 710 F.3d 57, 65 (2d Cir. 2013) (citing *LaRue*) ("[C]laims [pursuant to § 1109(a)] may not be made for individual relief, but instead are 'brought in a representative capacity on behalf of the plan.'"); *Smith v. Med. Benefit Administrators Grp.*, 639 F.3d 277, 283 (7th Cir. 2011) ("*LaRue* simply holds that in the context of a defined contribution pension plan… malfeasance by a plan fiduciary that adversely affects the value of the assets held in such an account will support a suit under sections [1109] and [1132](a)(2) regardless of whether the wrongdoing affects one account or all accounts in the plan."); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 593 (8th Cir. 2009) ("It is well settled, moreover, that suit under § 1132(a)(2) is 'brought in a representative capacity on behalf of the plan as a whole' and that remedies under

In addressing this question in *Munro*, this Court explained that *LaRue* "made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefits from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan." *Munro*, 896 F.3d at 1093. *Munro* went on to distinguish the claims in that case—which, just like Dorman's claims here, were brought by plan participants in their representative capacity on behalf of the plan and seeking plan-wide relief—from the claims in *LaRue*, which dealt only with mismanagement of the plaintiff's individual account. *Id.* at 1094. *Munro* concluded that the claims at issue belonged to the plan, not the individual plaintiffs, and were not within the scope of an arbitration clause covering claims an "Employee may have." *Id.*

The panel decision in this case is contrary to *Munro*. Here, just as in *Munro*, Dorman brought fiduciary breach claims in his representative capacity on behalf of the Plan, seeking only plan-wide relief. Dorman makes no allegations regarding his individual account and seeks no individual relief. (ER 210, 243-44). Nevertheless—and despite citing *Munro* in the same paragraph—the panel stated that, after *LaRue*, breach of fiduciary duty claims brought in the context of defined-contribution plans

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§ 1109 'protect the entire plan.'") (quoting *LaRue*); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 595 & n.9 (3d Cir. 2009) ("Defined contribution ERISA plan claims are no different in this regard from defined benefit ERISA plan claims. In both cases, the ERISA § [1132](a)(2) claim is brought on behalf of the plan…. Contrary to defendants' argument, [*LaRue*], does not suggest otherwise.").

are categorically "inherently individualized." Op. 5. But *Munro* unequivocally rejected the position adopted by the panel; *Munro* made clear that allegations regarding plan-wide mismanagement brought on behalf of the plan remain plan-wide claims, and are not individualized. *Munro*, 896 F.3d at 1093-94. The panel here made no attempt to reconcile its decision with *Munro*. *See* Op. 5-6.

The panel's split with *Munro* sows confusion in an area that had been well-settled. Prior to this decision, the circuits had unanimously held that *LaRue* did not eliminate plan-wide claims for defined-contribution plans and did not eliminate representative actions. *See* Circuit Rule 35-1 (prospect of opening a circuit split warrants rehearing *en banc*). Rather, where a fiduciary breach affected only an individual's account, *LaRue* held those claims may *also* go forward. This Court should grant rehearing to make clear that *Munro* is the law, that plan-wide claims continue to be viable in the context of defined-contribution plans, and that claims brought on behalf of a plan are not and cannot be transformed into individual claims.

II. The Panel's Ruling Presents a Host of Additional Reasons for Rehearing.

a. The Panel Holding Ignores the Supreme Court's and this Court's Repeated Admonitions that Arbitration Clauses May Not Eliminate the Right to Pursue Statutory Remedies.

The panel's decision is inconsistent with the Supreme Court's directive that the Federal Arbitration Act ("FAA") does not permit enforcement of arbitration clauses that purport to prospectively waive "a party's *right to pursue* statutory

remedies." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19) (emphasis added by *American Express*). As explained above, §§ 1132(a)(2) and 1109 create the right for plan participants to sue on behalf of their plans to recover losses suffered by the plan. *Supra*, Part I. The Plan Document's arbitration clause's prohibition on representative actions, *i.e.*, actions brought on behalf of the plan, purports to prospectively waive the right to bring actions on behalf of a plan. As such, under *American Express* and its predecessors, the FAA prohibits enforcement of that aspect of the arbitration clause.

The arbitration provision at issue in this case requires that the plan-wide, representative claims authorized by the statute be heard in Court (and not arbitrated). Because the prohibition on representative claims is not enforceable, Dorman's statutorily authorized claims should be heard in Court.[5]

[5] *Epic Systems Corp. v. Lewis* does not alter the impact of *American Express* on this case. First, *Epic Systems* dealt with attempts to bring individual claims collectively or as a class, rather than, as here, a derivative action on behalf of a retirement plan. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018). As such, *Epic Systems* was also subject to concerns that class and collective actions are too unwieldy to be managed in arbitration, concerns that do not apply here, where an adjudicator need not address questions about, for example, the adequacy and typicality of a class representative or what kind of notice to absent class members would be required. *See id.* at 1623. Second, *Epic Systems* addressed whether the National Labor Relations Act or Fair Labor Standards Act created a right to sue collectively or as a class. *Id. Epic Systems* did not address whether ERISA, an entirely different statute, creates a right to bring a representative action. *Mass. Mutual*, *LaRue* and *Munro*, by

In short, the panel's decision crashes head-on with the Supreme Court's concern about arbitration-related waivers eliminating the enforcement of federal rights; namely, when they purport to eliminate the right to pursue a remedy guaranteed by a statute. When faced with similar attempts to use arbitration to curtail statutory rights and liabilities, this Court and other circuits have rejected such attempts. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998). The panel here, however, permitted enforcement of an arbitration clause that eliminates statutory rights and remedies proscribed by ERISA. Rehearing is warranted to bring this Court back in line with the Supreme Court and other circuits.

b. The Decision Is Contrary to ERISA's Prohibition on Limiting Fiduciary Liability.

Rehearing is also warranted because the panel's decision is contrary to 29 U.S.C. § 1110(a), which provides that any document that purports to relieve a plan fiduciary of liability is void. In this case, if Dorman were limited to individual relief as the panel held, Defendants would be relieved of virtually all of their liability under

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contrast, have all ruled that fiduciary breach claims under ERISA are inherently representative.

§ 1109, except to the extent that liability relates to Dorman's account. Section 1110(a) is a critically important part of ERISA's protection of employee retirement savings, and this Court had not previously hesitated to apply § 1110(a) to strike down agreements that would reduce fiduciary liability. *See Johnson v. Couturier*, 572 F.3d 1067, 1080 (9th Cir. 2009) ("[I]f an ERISA fiduciary writes words in an instrument exonerating itself of fiduciary responsibility, the words, even if agreed upon, are generally without effect.").

Moreover, the panel's decision conflicts with *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996). *Kramer* held that arbitration is only permissible for ERISA fiduciary claims to the extent arbitration does not conflict with § 1110(a). In *Kramer*, the arbitration provision included a shorter limitations period than ERISA's own limitations period, and if enforced would have eliminated some or all of the fiduciary's liability. The Fifth Circuit accordingly struck the shorter limitations period because § 1110(a) rendered it void. *Id.* at 1085.

The panel cited *Kramer* for the proposition that ERISA claims are generally subject to arbitration. However, the panel entirely ignored *Kramer*'s reasoning and conclusion: that, while arbitration itself does not interfere with fiduciary liability, if an aspect of an arbitration clause limits or eliminates fiduciary liability, § 1110(a) prohibits its enforcement. Here, the reduction of relief from plan-wide, as delineated in § 1109, to relief only for Dorman, would eliminate millions of dollars of fiduciary

liability. This attempt to reduce fiduciary liability is void under § 1110(a), consistent with *Kramer*.

To be clear, Dorman does not contend § 1110(a) generally precludes arbitration of all ERISA fiduciary claims. Rather, consistent with *Kramer*, Dorman argues that § 1110(a) renders void the arbitration provision's prohibition on seeking plan-wide relief under § 1109 in a representative capacity. Because the arbitration provision at issue here specifies that, absent the reduction in liability, arbitration is not permissible, the Court should reinstate the district court's ruling and deny the motion to compel individual arbitration.

Instead of applying § 1110(a) as written, the panel stated that there is no § 1110(a) problem because the arbitration provision "was not an effort to insulate fiduciaries from ERISA liability," Op. 3, but rather an attempt to achieve arbitration's efficiencies. Defendants in this case did not argue for such an intent standard, and the panel cites no authority supporting an intent-based reading of § 1110(a).

But even if some sort of intent exception existed, the panel got the result exactly backwards. The arbitration provision *expressly forbids arbitration* if the liability reduction clause is found ineffective. The intent of the arbitration provision is accordingly clear: it is designed only to reduce liability, and permits arbitration

only to the extent liability is reduced. Defendants want arbitration *if and only if* it means they can reduce their liability.

This Court should grant rehearing to make clear what the panel got wrong: that § 1110(a) voids any attempt by ERISA fiduciaries to use arbitration to achieve otherwise prohibited reductions in their liability.

c. Allowing Fiduciaries to Prospectively Eliminate Claims Disrupts ERISA's "Comprehensive and Reticulated" Enforcement Scheme.

Finally, this case presents an issue of exceptional importance because the panel's decision substantially interferes with ERISA's carefully crafted enforcement scheme. In drafting § 1132(a)(2), Congress made the deliberate choice to empower plan participants to bring suit on behalf of the plan—the same enforcement power it granted to plan fiduciaries and the Secretary of Labor. In doing so, "Congress intended that private individuals would play an important role in enforcing ERISA's fiduciary duties." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 598 (8th Cir. 2009). Moreover, the Secretary of Labor "depends in part on private litigation to ensure compliance with the statute." *Id.* at 597 n.8; *see also Pension Ben. Guar. Corp. v. Morgan Stanley Inv. Mgmt. Inc.*, 712 F.3d 705, 728 (2d Cir. 2013) ("[ERISA's fiduciary] standards are enforced in part by private litigation."); H.R. Rep. No. 533, 93d Cong., 1st Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 4639, 4655 (ERISA's "enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with

broad remedies for redressing or preventing violations of [ERISA .]")).

Congress's decision to rely on participants, like Dorman, to protect their plans was no accident. The Supreme Court has repeatedly remarked that the "remedial scheme" in § 1132(a), under which Dorman's claims arise, was drafted with "deliberate care," and is "carefully integrated … interlocking, interrelated, and interdependent." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). *Varity Corp. v. Howe*, 516 U.S. 489, 516-17 (1996), explained that "ERISA is … a comprehensive and reticulated statute," and remarked that "[n]owhere is the care with which ERISA was crafted more evident than in the Act's mechanism for the enforcement of fiduciary duties." (Internal quotation marks omitted). As such, the Supreme Court has repeatedly emphasized courts should be "especially reluctant to tamper with the enforcement scheme embodied in [ERISA]." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002).

Here, the panel's decision did not just "tamper" with ERISA's remedial scheme, it threw the one of the scheme's most important components out the window. For this reason, too, the panel's decision should not be permitted to stand.

CONCLUSION

For these reasons, rehearing and rehearing *en banc* should be granted.

September 10, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

This motion contains 4,103 words, excluding the portions exempted by Fed. R. App. P. 32(f). This motion 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 2013 in Times New Roman 14-point font.

September 10, 2019

/s/ *James A. Bloom*
James A. Bloom

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 September 10, 2019.

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.

September 10, 2019

/s/ *James A. Bloom*
James A. Bloom

NOT FOR PUBLICATION

FILED

AUG 20 2019

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U.S. COURT OF APPEALS

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; et al.,

Defendants-Appellants.

No. 18-15281

D.C. No. 4:17-cv-00285-CW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted June 14, 2019
San Francisco, California

Before: GOULD and IKUTA, Circuit Judges, and PEARSON,** District Judge.

The district court erred by refusing to compel arbitration of the ERISA

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

breach of fiduciary duty claims asserted in the First Amended Class Action Complaint even though those claims fall squarely within the ambit of at least the Schwab Retirement Savings and Investment Plan (the "Plan").[1]

1. The district court incorrectly found that Michael Dorman was not bound by the Plan document's arbitration provision (the "Provision"). Contrary to the district court's ruling, the record reflects that Dorman participated in the Plan for nearly a year while the Provision was in effect. 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).

The district court reasoned Dorman was not bound by the Provision and, therefore, he did not agree to arbitrate his ERISA § 502(a) claims. We recently held, however, that such claims belong to a plan—not an individual. *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1092 (9th Cir. 2018). The relevant question is whether the Plan agreed to arbitrate the § 502(a)(2) claims. Here, the Plan expressly agreed in the Plan document that all ERISA claims should be arbitrated.

The Provision selects an arbitral forum for resolving fiduciary breach claims and requires the arbitration to be conducted on an individual rather than collective

[1] In a published opinion filed concurrently with this memorandum, we overrule *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984), and reverse and remand.

basis. These claims "arise out of" and "relate to" the Plan because the claims are asserted under ERISA and allege that Plan fiduciaries breached their duties to the Plan. Therefore, the claims fall within the scope of the Provision.

The district court's reliance on *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009), is misplaced because, in this case, the amendment was not an effort to insulate fiduciaries from ERISA liability. Instead of obstructing liability, a forum was selected for litigating fiduciary breach claims that offered "quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

The Provision is not invalid under ERISA § 410(a), 29 U.S.C. § 1110(a). An agreement to conduct arbitration on an individual basis, as in this case, does not "relieve a fiduciary from responsibility or liability."

2. 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. The Federal Arbitration Act's ("FAA") savings clause recognizes only "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Epic*, 138 S. Ct. at 1622. The FAA's savings clause is inapplicable because Dorman does not assert any generally applicable contract defenses.

The district court held that the Provision was unenforceable on two alternative grounds. One ground, however, was later expressly rejected by the Supreme Court in *Epic*, and the other turned on the court's finding that arbitration places plan participants at a "disadvantage." To the extent 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 Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

The district court's holding that the Provision is unenforceable because it violates the National Labor Relations Act ("NLRA") is foreclosed by *Epic*, which held that an arbitration agreement in which an employee agrees to arbitrate claims against an employer on an individual basis, is enforceable and does not violate the NLRA. 138 S. Ct. at 1624–25.

Claims alleging a violation of a federal statute such as ERISA are generally arbitrable absent a "contrary congressional command." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). As every circuit to consider the question has held, ERISA contains no congressional command against arbitration, therefore an agreement to arbitrate ERISA claims is generally enforceable. *See, e.g.*, *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Kramer v. Smith Barney*,

80 F.3d 1080, 1084 (5th Cir. 1996).

In its second ground, the district court incorrectly held that the Provision is unenforceable under *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999), because a plan participant cannot agree to arbitrate a § 502(a)(2) claim without the plan's consent. Here, the Plan did consent in the Plan document to arbitrate all ERISA claims. Dorman also did not waive any rights that belong to the Plan. When an individual participant agrees to arbitrate, he does not give up any substantive rights that belong to other Plan participants.

3. No party can be compelled under the FAA 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). The Supreme Court's recent decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), confirms that the parties here should be ordered into individual arbitration, as they did not agree to class-wide or collective arbitration. Because "arbitration is a matter of contract," the Provision's waiver of class-wide and collective arbitration must be enforced according to its terms, and the arbitration must be conducted on an individualized basis. *See Am. Express Co.*, 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 that at issue. *LaRue v. DeWolff,*

Boberg & Assocs., Inc., 552 U.S. 248 (2008). *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. *Id.* at 256; *see also Munro*, 896 F.3d at 1093. The Plan and Dorman both agreed to arbitration on an individualized basis. This is consistent with *LaRue*.

REVERSED and **REMANDED** with instructions for the district court to order arbitration of individual claims limited to seeking relief for the impaired value of the plan assets in the individual's own account resulting from the alleged fiduciary breaches.