IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID BURNETT, MICHAEL PARADISE, AND DAVID NELSON as representatives of a class of similarly situated persons, and on behalf of the WESTERN GLOBAL AIRLINES, INC. EMPLOYEE STOCK OWNERSHIP PLAN, Plaintiffs, v. PRUDENT FIDUCIARY SERVICES LLC, MIGUEL PAREDES, JAMES K. NEFF, CARMIT P. NEFF, JAMES K. NEFF REVOCABLE TRUST DATED 11/15/12, CARMIT P. NEFF REVOCABLE TRUST DATED 11/15/12, WGA TRUST DATED 8/16/13, and JOHN DOES 1-10, Defendants.	C.A. No. 1:22-cv-00270-RGA

PLAINTIFFS' OPPOSITION TO MOTION TO COMPEL ARBITRATION

OF COUNSEL:

STRIS & MAHER LLP
Peter K. Stris
Rachana A. Pathak
Victor O'Connell
John Stokes
777 S. Figueroa St., Suite 3850
Los Angeles, CA 90017
(213) 995-6800
pstris@stris.com
rpathak@stris.com
voconnell@stris.com
jstokes@stris.com

COOCH AND TAYLOR, P.A.
Carmella P. Keener (#2810)
1007 N. Orange St., Suite 1120
P.O. BOX 1680
Wilmington, DE 19899-1680
(302) 984-3816
ckeener@coochtaylor.com

Attorney for Plaintiffs

June 13, 2022

COHEN MILSTEIN SELLERS & TOLL PLLC
Michelle C. Yau
Daniel R. Sutter
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
(202) 408-4600
myau@cohenmilstein.com
dsutter@cohenmilstein.com

NICHOLS KASTER, PLLP
Paul J. Lukas
Brandon T. McDonough
Brock J. Specht
Jacob T. Schutz
4700 IDS Center, 80 S 8th Street
Minneapolis, MN 55402
(612) 256-3200
lukas@nka.com
bmcdonough@nka.com
bspecht@nka.com
jschutz@nka.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

NATURE AND STAGE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS 3

ARGUMENT 5

I. Because Plaintiffs are part of a class of workers engaged in interstate commerce, the arbitration provision cannot be enforced under the FAA. 5

II. The arbitration provision eliminates statutory remedies and is thus invalid. 6

A. Arbitration provisions that purport to waive statutory rights are invalid. 6

B. ERISA offers statutory rights that cannot be waived by an arbitration clause. 8

C. The arbitration provision impermissibly prohibits multiple statutory remedies that ERISA provides and Plaintiffs seek. 10

1. The arbitration provision impermissibly eliminates equitable remedies. 11

2. The arbitration provision impermissibly eliminates plan-wide monetary relief. 13

3. Defendants' general arguments regarding arbitrability are irrelevant. 15

D. Because the arbitration provision is expressly non-severable, the whole provision falls. 16

III. The arbitration clause cannot be enforced because Plaintiffs did not consent to arbitrate. 16

A. The FAA requires mutual consent to arbitrate. 16

B. Defendants cannot use ERISA to unilaterally impose arbitration. 18

CONCLUSION 20

TABLE OF CITATIONS

Page(s)

Cases

14 Penn Plaza LLC v. Pyett,
556 U.S. 247 (2009)....7

Am. Express Co. v. Italian Colors Rest.,
570 U.S. 228 (2013)....7, 8

Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock,
861 F.2d 1406 (9th Cir. 1988) 14

Bird v. Shearson Lehman/American Exp., Inc.,
926 F.2d 116 (2d Cir. 1991)....18

Booker v. Robert Half Int'l, Inc.,
413 F.3d 77 (D.C. Cir. 2005)....7

Browe v. CTC Corp.,
15 F.4th 175 (2d Cir. 2021) 9, 13

Carnival Cruise Lines, Inc. v. Shute,
499 U.S. 585 (1991)....19

Cedeno v. Argent Trust Co.,
No. 20-cv-9987 (JGK), 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021)....13

Chappel v. Laboratory Corp. of Am.,
232 F.3d 719 (9th Cir. 2000) 16

Coady v. Nationwide Motor Sales Corp.,
No. 20-2302, 2022 WL 1207161 (4th Cir. Apr. 25, 2022)....17

Comer v. Micor, Inc.,
436 F.3d 1098 (9th Cir. 2006) 19

Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.,
919 F.3d 763 (4th Cir. 2019) 13

Cooper v. Ruane Cunniff & Goldfarb Inc.,
990 F.3d 173 (2d Cir. 2021)....9

Dorman v. Charles Schwab & Co. Inc.,
780 F. App'x 510 (9th Cir. 2019) 15, 18, 19, 20

Dorman v. Charles Schwab & Co. Inc.,
No. 17-cv-00285-CW, 2018 WL 467357 (N.D. Cal. Jan. 18, 2018)....................................15

Druco Rests., Inc. v. Steak N Shake Enters., Inc.,
765 F.3d 776 (7th Cir. 2014) 17

Dumais v. Am. Golf Corp.,
299 F.3d 1216 (10th Cir. 2002) 17

Edmonson v. Lincoln Nat'l Life Ins. Co.,
725 F.3d 406 (3d Cir. 2013)..14

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002)..6

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018)..8

Esden v. Bank of Boston,
229 F.3d 154 (2d Cir. 2000)..10

Felber v. Estate of Regan,
117 F.3d 1084 (8th Cir. 1997) 14

Fifth Third Bancorp v. Dudenhoeffer,
573 U.S. 409 (2014)..10

Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.,
617 F.3d 54 (1st Cir. 2010)..10

Gingras v. Think Finance, Inc.,
922 F.3d 112 (2d Cir. 2019)..7

Hadnot v. Bay, Ltd.,
344 F.3d 474 (5th Cir. 2003) 8

Hamilton Park Health Care Ctr., Ltd. v. 1199 SEIU United Healthcare Workers E.,
817 F.3d 857 (3d Cir. 2016)..17

Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors,
No. 21-cv-0304-RMR-NYW, 2022 WL 909394 (D. Colo. Mar. 24, 2022)......................12, 13

Henry v. Wilmington Tr. NA,
No. 19-1925, 2021 WL 4133622 (D. Del. Sept. 10, 2021)................................2, 3, 17, 18, 19

Hensiek v. Bidwell,
2021 WL 6775328 (7th Cir. Oct. 15, 2021)..13

Holmes v. Baptist Health S. Fla. Inc.,
No. 21-22986-Civ, 2022 WL 180638 (S.D. Fla. Jan 20, 2022)..18, 19

Ingle v. Circuit City Stores, Inc.,
328 F.3d 1165 (9th Cir. 2003) 8

Kristian v. Comcast Corp.,
446 F.3d 25 (1st Cir. 2006)..7

Lamps Plus Inc. v. Varela,
139 S. Ct. 1407 (2019)..2, 6, 16

LaRue v. DeWolff, Boberg & Assocs., Inc.,
552 U.S. 248 (2008)...9

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 14

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985)...9, 10, 11, 12, 20

Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.,
473 U.S. 613 (1985)...7

Modzelewski v. ADR Tr. Corp.,
14 F.3d 1374 (9th Cir. 1994) 5

Morrison v. Amway Corp.,
517 F.3d 248 (5th Cir. 2008) 17

Munro v. University of Southern California,
896 F.3d 1088 (9th Cir. 2018) 15

Neil v. Zell,
767 F. Supp. 2d 933 (N.D. Ill. 2011) 5

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019)...1, 5, 6

Ortiz v. Am. Airlines, Inc.,
5 F.4th 622 (5th Cir. 2021) 13

Paladino v. Avnet Computer Techs., Inc.,
134 F.3d 1054 (11th Cir. 1998) 8

Pegram v. Herdrich,
530 U.S. 211 (2000)...20

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987)....................10, 20

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
7 F.3d 1110 (3d Cir. 1993)....................1, 5, 11, 12, 13, 15

Reich v. Valley Nat. Bank of Ariz.,
837 F. Supp. 1259 (S.D.N.Y. 1993)....................6

In re Schering Plough Corp. ERISA Litig.,
589 F.3d 585 (3d Cir. 2009)....................9

Schoemann v. Excellus Health Plan, Inc.,
447 F. Supp. 2d 1000 (D. Minn. 2006)....................18

Sec'y U.S. Dep't of Labor v. Koresko,
646 F. App'x 230 (3d Cir. 2016) 14

Skinner v. Peninsula Healthcare Servs., LLC,
2021 WL 778324 (Del. Super. Ct. Mar. 1, 2021) 17

Smith v. Aegon Cos. Pension Plan,
769 F.3d 922 (6th Cir. 2014) 19

Smith v. Bd. of Directors of Triad Mfg., Inc.,
13 F.4th 613 (7th Cir. 2021) 2, 6, 7, 11, 12, 15

Smith v. Greatbanc Tr. Co.,
No. 20-C-2350, 2020 WL 4926560 (N.D. Ill. Aug. 21, 2020) 20

Spinetti v. Service Corp. Int'l,
324 F.3d 212 (3d Cir. 2003)....................7

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010)....................17, 18

Sw. Airlines Co. v. Saxon,
No. 21-309, 2022 WL 1914099 (U.S. June 6, 2022) 5

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.,
484 U.S. 29 (1987)....................8

Williams v. Medley Opportunity Fund II LP,
965 F.3d 229 (3d Cir. 2020)....................2, 7, 8, 12, 13

Williams v. Rohm & Haas Pension Plan,
497 F.3d 710 (7th Cir. 2007) 10

Statutes

9 U.S.C. § 1 ....1, 2, 5, 6

9 U.S.C. § 4 6

29 U.S.C. § 1104(a)(1)(D) 10

29 U.S.C. § 1106(b) 4

29 U.S.C. § 1108(b)(17)(A) 4

29 U.S.C. § 1108(e)(1) 4

29 U.S.C. § 1109 .... *passim*

29 U.S.C. § 1132(a) 4, 20

29 U.S.C. § 1132(a)(2) .... *passim*

29 U.S.C. § 1132(a)(3) 1, 11

29 U.S.C. § 1132(e) 16

Other Authorities

Br. of U.S. Sec'y of Labor, *Cedeno v. Argent Tr. Co.*, No. 21-2891 (2d Cir. June 10, 2022) 2, 9, 14, 15

Plaintiffs, as representatives of a class of similarly situated persons, and on behalf of the Western Global Airlines, Inc. Employee Stock Ownership Plan ("ESOP" or "Plan"), hereby oppose Defendants' Motion to Compel Arbitration, and ask the Court to deny the motion.

NATURE AND STAGE OF PROCEEDINGS

This case involves an arrangement whereby Defendants saddled Western Global Airlines, Inc. (the "Company") with debt, then used that debt to pay themselves hundreds of millions of dollars—all under the guise of providing a benefit to employees. That benefit: through the ESOP, the employees now own part of a massively indebted company that they overpaid for but have no control over. This scheme violates the Employee Retirement Income Security Act ("ERISA"). Plaintiffs thus bring this action under ERISA's remedial provisions and seek restoration of losses to the ESOP, disgorgement of Defendants' ill-gotten gains, and, among other equitable relief, removal of the offending fiduciaries and rescission. 29 U.S.C. §§ 1132(a)(2), (a)(3), 1109.

Defendants have now moved to compel arbitration. But their motion does not come on a clean slate. It is based on an arbitration provision virtually identical to those that courts across the country have uniformly rejected in similar ERISA cases. This case should be no different.

SUMMARY OF ARGUMENT

1. As a threshold matter, the arbitration clause cannot be enforced under the Federal Arbitration Act ("FAA") because it is part of a "contract of employment" for "workers engaged in foreign or interstate commerce"—an express carveout from the FAA's reach. 9 U.S.C. § 1. Plaintiffs are pilots for an air cargo company; they are clearly engaged in interstate commerce. And courts have construed "'contracts of employment' in a broad sense to capture any contract for the performance of work by workers." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The ESOP here—which expressly requires employees to work 1,000 hours per year to receive compensation under the Plan—falls well within that broad scope. *See Pritzker v. Merrill Lynch,*

Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 n.1 (3d Cir. 1993) (noting that ERISA plans may fall within FAA § 1). Defendants' motion thus cannot even get out of the starting gate.

2. Even if the arbitration clause did fall within the FAA's ambit, it would be unenforceable here because it impermissibly eliminates remedies that ERISA expressly provides. "[W]hile arbitration may be a forum to resolve disputes, an agreement to resolve disputes in that forum will be enforced only when a litigant can pursue his statutory rights there." *Williams v. Medley Opportunity Fund II LP*, 965 F.3d 229, 238 (3d Cir. 2020) (citations omitted). Applying this rule in a case asserting identical claims and seeking identical relief, the Seventh Circuit found an identical arbitration provision invalid. *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 621 (7th Cir. 2021). The reason is simple: ERISA expressly permits certain relief that "would go beyond just [the plaintiff] and extend to the entire plan," but that relief "fall[s] exactly within the ambit of relief forbidden" by the arbitration provision. *Id.* The non-severable arbitration clause was therefore invalid. The U.S. government just filed an amicus brief telling the Second Circuit the same thing as to another identical arbitration clause. Br. of U.S. Sec'y of Labor, *Cedeno v. Argent Tr. Co.*, No. 21-2891 (2d Cir. June 10, 2022) ("U.S. Br."). The same is true here too.

3. Finally, while Plaintiffs bring this action on behalf of the Plan, they cannot be compelled to arbitrate because they have not personally agreed to do so, and mutual consent is foundational to the Federal Arbitration Act. *Lamps Plus Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) ("Arbitration is strictly a matter of consent.") (cleaned up). As this Court found in yet another case declining to enforce an identical arbitration provision, Plaintiffs could not have assented here because Defendants never even gave them notice of the provision. *Henry v. Wilmington Tr. NA*, No. 19-1925, 2021 WL 4133622, at *6 (D. Del. Sept. 10, 2021). The motion should be denied.

STATEMENT OF FACTS

Plaintiffs are pilots who are or were employed by the Company, and they are Plan participants. Until October 2020, Defendants James K. Neff and Carmit P. Neff owned the Company through trusts they controlled. D.I. 1 at 2, 12-13. But then, the Neffs sold 37.5% of the Company to the ESOP. *Id*. They received $510 million, and the Company's employees received the stock through the ESOP. *Id*. The stock, however, was not worth $510 million. D.I. 1 at 8.

The Company's historical earnings did not support even half of the $1.3 billion total valuation that Defendants placed on the Company. And the Company's future prospects were no better. Its planes faced major maintenance issues, creating "significant operating volatility" that led ratings agencies to have a negative outlook, with Fitch rating the Company only a B+. *Id.*

To pay the Neffs for the stock, the Company—controlled by the Neffs—went to the Street to find loans. The Company initially offered bonds at 8.25-8.5% interest to finance the transaction—*beyond junk bond rates*. D.I. 1 at 24. Indeed, B-rated corporate bonds issued at the time yielded 5.5-5.8%. D.I. 1 at 25. But the Street did not take the debt on until the Company further increased the rates, ultimately selling $410 million in bonds at 10.375%. D.I. 1 at 11-12.

Given the faults with Defendants' valuation of the Company, it is unsurprising that the Company's value declined after the ESOP transaction. In May 2021, the Trustee Defendants told federal regulators that, just two months after paying $510 million for the shares, the shares were worth only $328 million—a 37% difference of $182 million. D.I. 1 at 8.

The Trustee owed fiduciary duties to the Plan and its participants to protect them from a lopsided transaction. D.I. 1 at 10. Yet the Trustee was so beholden to the Neffs that this was essentially the fox guarding the hen house: the Neffs hired the Trustee, D.I. 1 at 9, could fire the Trustee, D.I. 1 at 11, and could complain to other business owners considering their own ESOP transaction if the Trustee did not fulfill the Neffs' wishes (threatening the Trustee's ability to be

hired in the future), *see* D.I. 1 at 9. The Trustee even obtained a provision purportedly indemnifying it from suits for breach of its fiduciary duties to the Plan. D.I. 1 at 10.

The Trustee and the Neffs tried to insulate themselves from liability by agreeing to the arbitration provision at issue here. D.I. 26-1 at 61-65. Sweeping in scope, the provision bars a participant from acting in a "representative capacity," and bars any remedy that "has the purpose or effect of providing additional benefits or monetary or other relief to any Employee, Participant or Beneficiary other than the Claimant." D.I. 26-1 at 62. The Trustee and the Neffs then tried to further insulate themselves by never showing the Plan Document, and thus the arbitration clause, to the very people it now claims are bound by the provision. Nowhere do the Defendants assert that they ever provided the Plan Document, or the arbitration agreement separately, to the Plan participants before this dispute arose. They only assert that one plaintiff obtained the document well after the fact when his lawyers investigating these claims demanded it. D.I. 25 at 16 n.5.

Notably, the arbitration provision at issue contains an express non-severability provision, rendering the entire arbitration provision "null and void" if any part of the subsection barring suits in a representative capacity and barring plan-wide relief "were to be found unenforceable or invalid" by a court. D.I. 26-1 at 63.

In light of ERISA's prohibition of self-dealing transactions unless the defendant proves the plan paid no more than market value for the company, 29 U.S.C. §§ 1106(b), 1108(b)(17)(A), 1108(e)(1), and ERISA's provisions allowing beneficiaries to redress such transactions through litigation as a Plan representative, 29 U.S.C. § 1132(a), Plaintiffs filed this suit. Plaintiffs seek recovery for the entire Plan of the Plan's overpayment and disgorgement of Defendants' ill-gotten gains. D.I. 1 at 32. Plaintiffs also seek removal of trustees, rescission, invalidation of the indemnification clause, and other relief on behalf of the Plan. D.I. 1 at 46-48.

ARGUMENT

I. Because Plaintiffs are part of a class of workers engaged in interstate commerce, the arbitration provision cannot be enforced under the FAA.

As a threshold matter, Defendants' motion should be denied because Plaintiffs—air cargo pilots engaged in interstate commerce—are exempt from the FAA. Under 9 U.S.C. § 1, arbitration provisions in "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce" cannot be enforced under the FAA. Just last week, the Supreme Court held that this exemption applies to "[a]irplane cargo loaders." *Sw. Airlines Co. v. Saxon*, No. 21-309, 2022 WL 1914099, at *5 (U.S. June 6, 2022). As pilots for an air cargo transport company (D.I. 1 ¶ 18), Plaintiffs fall within the exemption as well. *See id.* ("[A]ny class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption.").

So too is the ESOP a "contract of employment" within the meaning of § 1. The phrase "contracts of employment" in § 1 is not a "term of art." *New Prime*, 139 S. Ct. at 539. Congress, rather, "used the term 'contracts of employment' in a broad sense to capture any contract for the performance of work by workers." *Id.* at 541 (emphasis omitted). Consistent with this broad view, the Ninth Circuit holds that an agreement is a "contract of employment" if it "contains terms related directly to employment." *Modzelewski v. ADR Tr. Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994). And the Third Circuit has made clear that "certain types of statutory ERISA claims may arise in such a fashion or may so implicate employees' rights that they come within the provision of the FAA which precludes arbitration of contracts of employment." *Pritzker*, 7 F.3d at 1112 n.1.

The ESOP Plan at issue here falls within § 1's wide ambit. Courts have long recognized that an "ESOP's assets [are] part of the overall benefits and compensation package offered to employees who participate[] in the Plan," and that "[e]mployee benefits are not a mere gratuity, but a form of deferred wages." *Neil v. Zell*, 767 F. Supp. 2d 933, 943 (N.D. Ill. 2011) (quoting

Reich v. Valley Nat. Bank of Ariz., 837 F. Supp. 1259, 1286-87 (S.D.N.Y. 1993)). The ESOP, in other words, is an agreement to compensate an employee for her work, and it specifies the terms and conditions for receiving that compensation. The Plan indeed expressly states how many hours an employee must work in a given year to receive compensation under the Plan. D.I. 26-1 at 16 (Plan § 3.1: "[A] Participant will share in the allocation of Employer Contributions . . . only if the Participant has accrued a Year of Service during the Plan Year."); *id.* at 13 (Plan § 1.64: "'YEAR OF SERVICE' means . . . an Employee has at least 1,000 Hours of Service"). That makes the ESOP a "contract for the performance of work by workers." *New Prime*, 139 S. Ct. at 541.

Because this case involves a "contract of employment" of "workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, the arbitration provision cannot be enforced under the FAA.

II. The arbitration provision eliminates statutory remedies and is thus invalid.

Even if the arbitration provision fell within the FAA's reach, it is invalid because it eliminates remedies that ERISA provides. The Supreme Court, Third Circuit, and this Court (among others) have repeatedly explained that arbitration clauses are unenforceable if they waive remedies that a federal statute permits. The Seventh Circuit recently held that an arbitration provision identical in all relevant parts was invalid because it eliminated ERISA remedies that necessarily have "a plan-wide effect" and provide "relief' to someone other than" the plaintiff. *Smith*, 13 F.4th at 615, 620-23. This Court should do the same.

A. Arbitration provisions that purport to waive statutory rights are invalid.

The FAA does not permit parties to prospectively waive statutory rights and remedies. The Act allows parties to specify only the "manner" in which their disputes are resolved. 9 U.S.C. § 4. That means they can set the procedures governing a statutory claim's adjudication—"with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus*, 139 S. Ct. at 1416; *see EEOC v. Waffle*

House, Inc., 534 U.S. 279, 295 n.10 (2002) ("[F]ederal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum.").

The FAA does not, however, empower parties to change the substantive rights and remedies that Congress established. As the Supreme Court has explained, an arbitration provision is invalid if it acts as a "'prospective waiver of a party's *right to pursue* statutory remedies.'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (quoting *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 613, 637 n.19 (1985)) (emphasis in original). And "[t]hat would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Id.*; *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld."). The plaintiff must be able to "effectively . . . vindicate its statutory cause of action," so "the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637.

"Put differently, while arbitration may be a forum to resolve disputes, an agreement to resolve disputes in that forum will be enforced only when a litigant can pursue his statutory rights there." *Williams*, 965 F.3d at 238 (citations omitted). Numerous federal appellate courts, including the Third Circuit, have followed this rule and held that arbitration agreements that eliminate statutory rights or the ability to pursue statutory remedies are unenforceable.[1]

[1] *See, e.g.*, *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 127 (2d Cir. 2019) ("[A]rbitration agreements that waive a party's right to pursue federal statutory remedies are prohibited."); *Smith*, 13 F.4th at 618-23; *Williams*, 965 F.3d at 238-43 (holding that the arbitration clause impermissibly prevented bringing a RICO claim); *Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 216 (3d Cir. 2003) (impermissible waiver of attorney's fees); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (arbitration provision could not eliminate treble damages authorized by antitrust statute); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77,79 (D.C. Cir. 2005) (Roberts, J.) ("Statutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant

This prohibition reflects the bedrock principle that parties cannot contract to violate public policy. *See, e.g.*, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (discussing the "general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy"); *Williams*, 965 F.3d at 238. Accordingly, while the FAA generally requires courts to "enforce the parties' chosen arbitration *procedures*" in the face of contrary law, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (emphasis added), nothing in the FAA authorizes parties to rewrite statutory rights and remedies.

Ignoring the arbitration clause's restriction of substantive rights and remedies, Defendants misdirect the Court's attention with a lengthy—but ultimately irrelevant—discussion of individualized arbitration. Individualized arbitration is a procedural restriction; waiving class or collective action procedures "no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief." *Am. Express*, 570 U.S. at 236. As explained in the sections that follow, the problem here is instead that the arbitration provision eliminates substantive remedies provided by ERISA.

B. ERISA offers statutory rights that cannot be waived by an arbitration clause.

ERISA provides participants broad remedies for fiduciary and party-in-interest violations, including the right to seek a variety of remedies on behalf of the entire plan. Under 29 U.S.C. § 1109, fiduciaries are "personally liable to make good to [the] plan *any* losses to the plan" resulting from a fiduciary breach, and to "restore to [the] plan *any* profits of such fiduciary which

---

to forgo substantive rights afforded under the statute."); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 & n.14 (5th Cir. 2003) (arbitration clause that eliminated punitive damages provided for under Title VII was unenforceable); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178 (9th Cir. 2003) (holding "unenforceable" an arbitration agreement that "fail[ed] to provide for all the types of relief that would otherwise be available in court") (citation omitted); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that an arbitration agreement's prohibition on damages and equitable relief under Title VII was unenforceable).

have been made through use of assets of the plan." 29 U.S.C. § 1109(a) (emphases added). Section 1109 also broadly authorizes "other equitable or remedial relief as the court may deem appropriate" to redress a fiduciary breach. *Id*. And Section 1132(a)(3)'s catchall provision similarly provides for "appropriate equitable relief."

The Supreme Court has explained, moreover, that when a participant seeks relief under § 1132(a)(2), the claim is necessarily "brought in a representative capacity on behalf of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 594 (3d Cir. 2009) ("Section 502(a)(2) claims are, by their nature, plan claims."); *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 180 (2d Cir. 2021) ("[A] plaintiff suing for breach of fiduciary duty under § [1132](a)(2) may seek recovery only for injury done to the wronged plan.").

Thus, § 1132(a)(2) permits participants to seek plan-wide relief, including restoration of *all* losses, disgorgement of *all* profits, rescission of the unlawful transaction, removal of the breaching fiduciary, and other equitable remedies that inherently operate plan-wide. *See Russell*, 473 U.S. at 140 & n.8; 29 U.S.C. § 1109(a); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 261 (2008) (Thomas, J., concurring) ("On their face, §§ 409(a) and 502(a)(2) permit recovery of *all* plan losses caused by a fiduciary breach.") (emphasis in original); *Browe v. CTC Corp.*, 15 F.4th 175, 199 (2d Cir. 2021) (reversing district court's limitation on loss restoration, explaining courts "are not entitled to disregard [Congress'] legislative judgment" requiring fiduciary to "make good *any losses* resulting from his breach," and remanding with instructions "requiring breaching fiduciaries to restore all losses") (emphasis in original) (cleaned up). In the Department of Labor's words: a person suing under § 1132(a)(2) "does so on the plan's behalf and may recover all losses to the plan (among other forms of redress) stemming from the fiduciary breach." U.S. Br. 7.

Sections 1132(a)(2), 1132(a)(3), and 1109 thus are not procedural aggregation mechanisms; they provide essential *substantive* rights and remedies. *See Russell*, 473 U.S. at 146-147 (explaining "ERISA's interlocking, interrelated, and interdependent remedial scheme" was "crafted with" "evident care") (citation omitted); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). And Congress itself confirmed that these remedies are essential to ERISA by ensuring that they cannot be bargained away. Plan terms that are "[in]consistent with" ERISA's statutory framework are void and unenforceable. 29 U.S.C. § 1104(a)(1)(D); *see also id.* § 1110(a) ("[A]ny provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."). The statute thus makes clear that plans "cannot contract around the statute." *Esden v. Bank of Boston*, 229 F.3d 154, 173 (2d Cir. 2000) (invoking Section 1104(a)(1)(D)).[2]

C. The arbitration provision impermissibly prohibits multiple statutory remedies that ERISA provides and Plaintiffs seek.

Defendants' arbitration provision does not just prevent Plaintiffs from using class action procedures. It bars multiple substantive remedies ERISA provides, including equitable remedies like fiduciary removal, rescission, and invalidating the indemnification agreement, as well as monetary relief to make the Plan whole. The clause is therefore invalid.

Plaintiffs seek precisely the plan-wide relief that ERISA guarantees. The complaint invokes § 1109 to hold the fiduciaries "personally liable to make good to the plan any losses to the plan" and to obtain "such other equitable or remedial relief as the court may deem appropriate."

---

[2] *See Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 424 (2014) ("§ 1104(a)(1)(D) requires fiduciaries to follow plan documents so long as they do not conflict with ERISA"); *Gastronomical Workers Union Local 610 v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 62 (1st Cir. 2010) ("Were the rule otherwise, parties could elude ERISA's commands by the simple expedient of sharp bargaining."); *Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710, 714 (7th Cir. 2007) ("The Plan cannot avoid that which is dictated by the terms of ERISA.").

D.I. 1 ¶ 144. The complaint requests Defendants to "make good to the Plan and/or to any successor trust(s) the losses resulting from the breaches of ERISA and restore any profits it, he, or she has made through use of assets of the Plan." D.I. 1 at Prayer for Relief ¶ E. And to ensure that Plan losses and ill-gotten profits can be returned to the Plan and distributed to participants, Plaintiffs seek a variety of equitable remedies, including constructive trust, equitable lien, injunctive relief, appointment of an independent fiduciary, and removal of the breaching fiduciaries. *See* D.I. 1 at Prayer for Relief. They likewise ask the Court to order the ESOP transactions rescinded. *Id.* ¶ G. And they request that the Trustee's indemnification agreement be invalidated. *Id.* ¶ N.

1. The arbitration provision impermissibly eliminates equitable remedies.

First, the arbitration provision is invalid because it eliminates equitable remedies that ERISA permits, as the Seventh Circuit recently held with respect to an *identically worded* arbitration provision. *See Smith*, 13 F.4th at 616, 618.

Equitable relief under Sections 1132(a)(2) and (a)(3) includes rescinding the unlawful transactions, invalidating the indemnification agreement, an injunction against dissipating or transferring assets that rightfully belong to the Plan (i.e., Defendants' ill-gotten gains and the losses that Defendants must restore to the plan), appointing an independent fiduciary, and removing any breaching fiduciary. 29 U.S.C. §§ 1109(a), 1132(a)(2), (a)(3); *see Russell*, 473 U.S. at 142; *see also* D.I. 1 at Prayer for Relief ¶¶ G-R (requesting each of these remedies). Those remedies are unavailable under the arbitration provision because they would provide "relief" to someone "other than" Plaintiffs. D.I. 26-1 at 62. The arbitration provision is therefore invalid.

The Seventh Circuit's reasoning in *Smith* is on all fours here. The plaintiff there, as here, sought relief under 29 U.S.C. § 1109—including, as here, fiduciary removal and appointment of an independent fiduciary—and the pertinent arbitration provisions were word-for-word identical to the quoted portions of Defendants' provision here. *See* 13 F.4th at 616, 618. The Seventh Circuit

explained that an arbitration clause may not "'forbid[] the assertion of certain statutory rights.'" *Id.* at 621 (quoting *Am. Express*, 570 U.S. at 236). But that is just what the arbitration clause did.

The court focused on fiduciary removal and the appointment of an independent fiduciary, which "would go beyond just Smith and extend to the entire plan, falling exactly within the ambit of relief forbidden under the plan." *Id.*; *see id.* at 622-23. Removing a fiduciary and appointing an "independent one cannot have anything *but* a plan-wide effect." *Id.* at 622; *Russell*, 473 U.S. at 142 (the phrase "removal of such fiduciary" in § 1109 is "an example of the kind of 'plan-related' relief provided by the more specific clauses it succeeds"). The provision was thus invalid. *Id.* at 623; *see Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, No. 21-cv-0304-RMR-NYW, 2022 WL 909394, at *5 (D. Colo. Mar. 24, 2022), *appeal filed*, No. 22-1098 (10th Cir. Apr. 6, 2022) (following *Smith* on "substantively identical" ERISA claims and arbitration provision).

Defendants all but concede that *Smith*'s reasoning would equally invalidate the arbitration provision here. *See* D.I. 25 at 23 n.10. They wrongly argue, however, that *Smith* is inconsistent with the Third Circuit's decision in *Williams*, 965 F.3d 232. Defendants view *Williams* as limiting the prospective waiver doctrine to circumstances "where an arbitration clause strips Plaintiffs of their right to assert federal statutory claims" *altogether*. *Id.* at 23 n.10 (cleaned up). True, that was the problem with the clause in *Williams*,[3] but the court in no way suggested that this is the *only* circumstance where the prospective waiver doctrine applies. To the contrary, *Williams* emphasized that the doctrine applies not only where federal law is displaced entirely, but also where "the

[3] The *Williams* problem exists here as well, because it is well-settled that claims under § 1132(a)(2) must brought in a representative capacity, on behalf of the plan. *See supra* pp. 8-9. The arbitration provision bars *any* claim brought in a representative capacity. D.I. 25 at 5 ("All Covered Claims must be brought solely in the Claimant's individual capacity and *not in a representative capacity* or on a class, collective, or group basis.") (emphasis added). Thus, even apart from its restriction on specific remedies, the provision is invalid because it prevents participants from bringing § 1132(a)(2) claims in an arbitral forum.

contract effects an elimination of the right to pursue a *remedy*" provided by federal law. 965 F.3d at 242 (cleaned up) (emphasis added); *see also id.* (quoting *Mitsubishi Motors*' instruction that the doctrine applies to the "right to pursue statutory remedies"); *id.* at 238 (arbitration agreements "will be enforced only when a litigant can pursue his statutory rights there").

Williams is thus entirely consistent with the Seventh Circuit's decision in *Smith*. As other courts addressing identical arbitration provisions have done, this Court should follow *Smith*'s reasoning and hold that the arbitration provision here is invalid. *See Harrison*, 2022 WL 909394, at *5; *Cedeno v. Argent Trust Co.*, No. 20-cv-9987 (JGK), 2021 WL 5087898, at *5 (S.D.N.Y. Nov. 2, 2021), *appeal filed*, No. 21-2891 (2d Cir. Nov. 22, 2021); *Hensiek v. Bidwell*, 2021 WL 6775328, at *1 (7th Cir. Oct. 15, 2021) (dismissing appeal in light of *Smith*).

2. The arbitration provision impermissibly eliminates plan-wide monetary relief.

In addition to impermissibly barring equitable relief, the arbitration provision's prohibition on plan-wide monetary relief renders it invalid. ERISA permits recovery of "*any* losses *to the plan*" and disgorgement of "*any* profits . . . made through use of assets *of the plan*." 29 U.S.C. § 1109(a) (emphases added). As the Second Circuit has put it, courts "are not entitled to disregard [Congress'] legislative judgment" requiring a fiduciary to "make good *any losses* resulting from his breach." *Browe*, 15 F.4th at 199 (reversing district court's limitation on loss restoration and remanding with instructions "requiring breaching fiduciaries to restore all losses") (emphasis in original) (cleaned up). That is why courts regularly allow individual ERISA participants to restore *all* plan losses or disgorge *all* profits arising from the fiduciary breach. *See id.*; *Ortiz v. Am. Airlines, Inc.*, 5 F.4th 622, 627 & n.7 (5th Cir. 2021); *Brundle ex rel. Constellis Emp. Stock Ownership Plan v. Wilmington Tr., N.A.*, 919 F.3d 763, 781-82 (4th Cir. 2019).

These cases illustrate that § 1132(a)(2) and § 1109 are not a procedural mechanism for

combining multiple individual claims. They provide, rather, a substantive remedial right—and impose substantive fiduciary obligations—to restore the plan's losses, surrender profits made from using the plan's assets, and otherwise redress the plan's injury. 29 U.S.C. § 1109(a) (using mandatory term "shall"). And those rights cannot be abridged by an arbitration provision. *See* U.S. Br. 25 (the problem is "not . . . the arbitration agreement's failure to allow collective or class arbitration procedures, but . . . its preclusion of a statutory remedy guaranteed under ERISA").

ERISA thus does not contemplate restoration of only a *portion* of losses directly to the plaintiff's individual account (rather than to the plan as a whole). *See* U.S. Br. 12 ("the relief available to participants in defined-contribution plans includes the central remedy sought here: 'restitution of the entire loss to the plan'"). Nor does ERISA countenance a fiduciary retaining all of its ill-gotten profits except for the pro rata portion attributable to the individual plaintiff participant. "The purpose of disgorgement of profits is deterrence, which is undermined if the fiduciary is able to retain proceeds from his own wrongdoing." *Sec'y U.S. Dep't of Labor v. Koresko*, 646 F. App'x 230, 245-46 (3d Cir. 2016). And to effectuate that purpose, as multiple circuits have recognized, the statute authorizes an accounting of profits or the imposition of a constructive trust over the fiduciary's ill-gotten gains.[4]

By limiting loss restoration and disgorgement to the individual plaintiff's pro rata share, the arbitration provision impermissibly curtails these important statutory remedies.

---

[4] *See Edmonson v. Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) ("ERISA's duty of loyalty bars a fiduciary from profiting even if no loss to the plan occurs. . . . ERISA provides that plans can recover that profit whether or not the plan suffered a financial loss."); *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1414 (9th Cir. 1988) ("[T]he imposition of a constructive trust on a fiduciary's ill-gotten profits in favor of all plan participants and beneficiaries is an important, appropriate, and available form of relief under ERISA § 409(a), particularly when it is the only means of denying a fiduciary ill-gotten profits that flow from the breach of his duty of loyalty to the entire ERISA plan."); *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984); *Felber v. Estate of Regan*, 117 F.3d 1084, 1087 (8th Cir. 1997).

3. Defendants' general arguments regarding arbitrability are irrelevant.

Defendants' remaining arguments are unavailing. They mostly address broad notions of general arbitrability. D.I. 25 at 19-20. But no one disputes whether ERISA claims are arbitrable generally under Third Circuit law—they are. Here, the restrictions on *remedies* and the ability to represent the Plan are what render the arbitration provision invalid.

Defendants further misread the Supreme Court's decisions and mostly ignore the Third Circuit's and this Court's. They cite *Dorman*, 780 F. App'x 510, 513-14 (9th Cir. 2019), to claim that § 1132(a)(2) claims are subject to individual arbitration. But *Dorman* is both distinguishable and poorly reasoned. As the Seventh Circuit held in *Smith*, the *Dorman* arbitration provision is distinguishable because it did not limit the remedies the plaintiff could pursue in arbitration. *See* 13 F.4th at 623; *Dorman v. Charles Schwab & Co. Inc.*, No. 17-cv-00285-CW, 2018 WL 467357, at *2 (N.D. Cal. Jan. 18, 2018) (reciting arbitration provision). The *Dorman* plaintiff could still pursue any remedy available under the statute. Nothing in the provision purported, for example, to limit disgorgement to the plaintiff's pro rata share or preclude other remedies with plan-wide effect, such as injunctive relief or fiduciary removal. *See Dorman*, 780 F. App'x at 513-14.

Defendants' broader reading of the unpublished *Dorman* disposition is also inconsistent with the Ninth Circuit's published recognition that "even when the plan is a defined contribution plan," relief under ERISA inures to "the plan, and not the individual beneficiaries and participants." *Munro v. University of Southern California*, 896 F.3d 1088, 1093 (9th Cir. 2018); *see id.* at 1094 ("recovery under ERISA § 409(a) is recovery singularly for the plan"); U.S. Br. 13 (*Dorman* "misconstrued" ERISA and is inconsistent with "the Ninth Circuit's own precedent").

The circuits, including the Third Circuit, thus take a uniform view of § 1109 that flows straight from the statutory text. A participant sues on behalf of the plan to obtain relief for the plan, and Defendants concede that is what Plaintiffs pursue here. D.I. 25 at 7. The arbitration clause

eliminates remedies that Plaintiffs could pursue in federal court. The clause is therefore invalid.

D. Because the arbitration provision is expressly non-severable, the whole provision falls.

The arbitration provision's elimination of ERISA's statutory remedies causes the entire provision to fall. By the provision's own terms, the invalidity of any of its requirements means that "the entire Arbitration Procedure (i.e. all of Section 18.7) shall be rendered null and void in all respects." D.I. 26-1 at 63. This Court should accordingly deny the motion to compel arbitration.

III. The arbitration clause cannot be enforced because Plaintiffs did not consent to arbitrate.

The Court should also deny the motion because Plaintiffs did not consent to arbitrate their claims. Consent is a fundamental requisite under the FAA, and nothing in ERISA displaces that requirement. Defendants have made no effort to demonstrate that Plaintiffs manifested their consent to arbitrate. Defendants unilaterally inserted the arbitration provision into the Plan Document and then *never* showed it to the people they claim are bound by it. Plaintiffs cannot possibly have agreed to a provision they did not even know about. And without Plaintiffs' consent, there can be no agreement to arbitrate.

A. The FAA requires mutual consent to arbitrate.

In the absence of the FAA, there is no question that ERISA claims must be heard in court. 29 U.S.C. § 1132(e) (courts "shall" have jurisdiction over ERISA claims). The FAA, however, authorizes ERISA claims to be arbitrated. *See Chappel v. Laboratory Corp. of Am.*, 232 F.3d 719, 725 n.4 (9th Cir. 2000). But a "foundational FAA principle" is mutual assent. *Lamps Plus*, 139 S. Ct. at 1415 (citations omitted). "The first principle that underscores all of [the Supreme Court's] arbitration decisions is that arbitration is strictly a matter of consent." *Id.* (cleaned up). The Supreme Court has been unwavering on this point, emphasizing that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent,

not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010).[5]

Defendants have the burden of proving Plaintiffs had notice of the arbitration clause and consented to it. *Henry v. Wilmington Trust NA*, No. 19-1925, 2021 WL 4133622 at *5-6 (D. Del. Sept. 10, 2021). They cannot meet that burden, because they make no attempt to show that any of the Plaintiffs were even aware of the arbitration provision. *See id.*

Defendants attempt to distinguish *Henry* by stating (1) the provision in that case was later added to the plan document without notice, and (2) the court there relied on Virginia law. D.I. 25 at 11-12. Neither distinction makes a difference. Regardless of when the arbitration provision was included in the Plan Document, Defendants have made no effort to show that participants had notice of it before this dispute arose. Moreover, regardless of whether Virginia law, federal law, or another state's law is applied, the requirement of consent is embedded in the FAA.[6]

---

[5] Courts nationwide have assiduously followed this rule in rejecting attempts to impose arbitration unilaterally. *See, e.g.*, *Hamilton Park Health Care Ctr., Ltd. v. 1199 SEIU United Healthcare Workers E.*, 817 F.3d 857, 865 (3d Cir. 2016) ("Our starting principle is not that parties can be forced to arbitrate unless they agree otherwise, but rather that if a party has not agreed to arbitrate, the courts have no authority to mandate that it do so.") (cleaned up); *Coady v. Nationwide Motor Sales Corp.*, No. 20-2302, 2022 WL 1207161, at *1, *3 (4th Cir. Apr. 25, 2022) (holding that an arbitration clause was "illusory" because the company reserved the right to make unilateral changes); *Druco Rests., Inc. v. Steak N Shake Enters., Inc.*, 765 F.3d 776, 782-83 (7th Cir. 2014) (where one party "retain[s] the sole, unilateral discretion" to impose or modify an arbitration provision, the provision is "illusory" and therefore invalid); *Morrison v. Amway Corp.*, 517 F.3d 248, 254-55 (5th Cir. 2008) ("[I]f the defendant-employer retained the right to 'unilaterally abolish or modify' the arbitration program, then the agreement to arbitrate was illusory and not binding on the plaintiff-employee.") (emphasis omitted); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (joining "other circuits in holding that an arbitration agreement allowing one party the unfettered right to alter the arbitration agreement's existence or its scope is illusory").

[6] "[C]ourts in the Third Circuit look to state law when determining whether the parties have a valid arbitration agreement." *Henry*, 2021 WL 4133622 at *5 (citing *Jaludi v. Citigroup*, 933 F.3d 246, 254 (3d Cir. 2019)). Defendants know they cannot meet their burden to show consent under Delaware state law, *Skinner v. Peninsula Healthcare Servs., LLC*, 2021 WL 778324, at *3 (Del. Super. Ct. Mar. 1, 2021), so they contend that federal law applies. D.I. 25 at 16 n.4. This Court need not decide whether state or federal law applies, because both require notice.

B. Defendants cannot use ERISA to unilaterally impose arbitration.

Defendants make two meritless arguments in favor of unilaterally imposing arbitration.

First, Defendants contend that ERISA plan provisions must be enforced as written, regardless of the participant's notice or consent. D.I. 25 at 15-16. According to Defendants, when the Trustee and the Company adopted the Plan Document, that settled the matter—their unilateral action decided for Defendants, the Plan, and participants suing on the Plan's behalf whether to arbitrate *claims against the Trustee and the people who control the Company*. Not the Supreme Court, the Third Circuit, nor this Court, however, has ever upheld such a collusive and unilateral arbitration provision. *See supra* p. 17 n.5. On the contrary, the FAA rejects arbitration-by-force. *E.g.*, *Stolt-Nielsen*, 559 U.S. at 681 ("arbitration 'is a matter of consent, not coercion'"); *Bird v. Shearson Lehman/American Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991) ("If such agreements are the result of unequal bargaining power between the parties, general principles of contract law will bar enforcement."); *Henry* 2021 WL 4133622, at *6. And ERISA's representative action provision is expressly designed to remedy collusion between the trustee and the people who control the company subject to an ESOP. Defendants cannot collude in secret to defeat it.

Second, Defendants argue that even if individual participant consent were required, a participant consents by participating in the plan. D.I. 25 at 16-17. They analogize to a non-FAA case involving a forum selection clause, an unpublished Ninth Circuit decision that conflicts with published Ninth Circuit precedent, and a Florida district court case with little analysis or reasoning. D.I. 25 at 16-17 (citing *Schoemann v. Excellus Health Plan, Inc.*, 447 F. Supp. 2d 1000, 1007 (D. Minn. 2006); *Dorman*, 780 F. App'x at 512-13; *Holmes v. Baptist Health S. Fla. Inc.*, No. 21-22986-Civ-Scola, 2022 WL 180638 at *4 (S.D. Fla. Jan 20, 2022)).

The FAA's consent requirement is critical here, and thus *Schoemann* (a non-FAA case) is simply inapplicable. For their parts, *Dorman* and *Holmes* are wrong. Consent is not automatic. It

can be inferred only where a party was "given notice of the . . . provision" and "retained the option of rejecting the contract with impunity." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *see Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 930 (6th Cir. 2014) ("The logic [set forth in *Carnival Cruise Lines*] supporting enforcement of such clauses applies equally to the venue selection clause [in an ERISA plan]."). But here Defendants have made no effort to show that Plaintiffs had notice of the arbitration provision before participating in the Plan. Without any notice before this dispute arose, their continued participation in the plan cannot signal consent.[7]

The Ninth Circuit's unpublished summary disposition in *Dorman* stated otherwise, but it is cursory, unpersuasive, and contrary to a published Ninth Circuit decision. *See Henry*, 2021 WL 4133622 ("*Dorman*, however, provided no reasoning for its decision.").[8] The Ninth Circuit panel in *Dorman* thought that participant consent was irrelevant because a claim under 29 U.S.C. § 1132(a)(2) "belong[s] to a plan—not an individual." 780 F. App'x at 513. So, in the court's view, "[t]he relevant question is whether the Plan agreed to arbitrate." *Id.* The court did not explain further or attempt to square its holding with the FAA or ERISA. The Southern District of Florida adopted the same reasoning in in *Holmes*, 2022 WL 180638 at *4.

A published Ninth Circuit decision, however, explains why that conclusion is flawed: although the participant sues on behalf of the plan, she maintains a personal stake in a § 1132(a)(2) claim—and thus cannot be forced to arbitrate—even if the plan agrees. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006) ("an ERISA claimant also sues in a non-derivative capacity"); *id.*

---

[7] Defendants imply an argument that one Plaintiff received pre-suit notice because his lawyers requested the Plan Document when investigating the claim. Even if that were relevant—and Defendants do not explain how it would be, given that the "notice" indisputably came only *after* the claims in this case had accrued—that "notice" could not bind the other Plaintiffs.

[8] This Court in *Henry* also rejected *Dorman* because of its reliance on federal law, rather than state law. 2021 WL 4133622, at *5. The Court here may do the same, but even if it concludes that federal law applies, it should reject *Dorman*.

("Even though money recovered on the ERISA claim would go to the plan, we held that the cause of action belonged to the individual plaintiff."). *Dorman* did not acknowledge *Comer*'s precedential holding. The Ninth Circuit thus *does* require the participant consent.

So should this Court. Under the statute's plain text, the cause of action is personal to Plaintiffs even though they seek relief for the Plan. *Id.*; 29 U.S.C. § 1132(a)(2). Accordingly, they seek to vindicate a *personal* statutory right while suing on the Plan's behalf. *See Russell*, 473 U.S. at 142 n.9 (noting that despite suing "in a representative capacity on behalf of the plan," participants have a "common interest shared by all four classes [of plaintiffs authorized to sue under § 1132(a)(2)] in the financial integrity of the plan"). Their consent is thus required.

Dispensing with participant consent would clash with the purpose behind empowering participants to sue to protect the plan, and it would violate public policy. As the Supreme Court has acknowledged, ERISA fiduciaries "may have financial interests adverse to beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). Although a "fiduciary" also may file suit under §§ 1132(a)(2) and (a)(3), a plan will often be unable to protect itself via a fiduciary suit because—as here—the culpable party *is* the fiduciary or an insider who controls the fiduciary. In these circumstances, the fiduciary will be unable or unwilling to sue to protect the plan, and participant suits fill the gap as an "essential tool[] for accomplishing the stated purposes of ERISA." *Pilot Life*, 481 U.S. at 52; *see Smith v. Greatbanc Tr. Co.*, No. 20-C-2350, 2020 WL 4926560, at *3 (N.D. Ill. Aug. 21, 2020) ("'Allowing the fiduciary to unilaterally require plan participants to arbitrate claims for breach of fiduciary duty would, in a sense, be allowing the fox to guard the henhouse.'") (citation omitted), *aff'd*, 13 F.4th 613. Because a participant sues to vindicate the plan's interests, requiring the participant's consent is critical. And here, that did not happen.

CONCLUSION

Plaintiffs respectfully ask the Court to deny Defendants' motion to compel arbitration.

Dated: June 13, 2022

COOCH AND TAYLOR, P.A.

/s/ Carmella P. Keener
Carmella P. Keener (#2810)
1007 N. Orange St., Suite 1120
P.O. BOX 1680
Wilmington, DE 19899-1680
(302) 984-3816
ckeener@coochtaylor.com

Attorney for Plaintiffs

OF COUNSEL:

STRIS & MAHER LLP
Peter K. Stris
Rachana A. Pathak
Victor O'Connell
John Stokes
777 S. Figueroa St., Suite 3850
Los Angeles, CA 90017
(213) 995-6800
pstris@stris.com
rpathak@stris.com
voconnell@stris.com
jstokes@stris.com

COHEN MILSTEIN SELLERS & TOLL PLLC
Michelle C. Yau
Daniel R. Sutter
1100 New York Ave. NW ● Fifth Floor
Washington, DC 20005
(202) 408-4600
myau@cohenmilstein.com
dsutter@cohenmilstein.com

NICHOLS KASTER, PLLP
Paul J. Lukas
Brandon T. McDonough
Brock J. Specht
Jacob T. Schutz
4700 IDS Center, 80 S 8th Street
Minneapolis, MN 55402
(612) 256-3200
lukas@nka.com
bmcdonough@nka.com
bspecht@nka.com
jschutz@nka.com