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

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL ARBITRATION AND TO STAY PURSUANT TO SECTIONS 3 AND 4 OF THE FEDERAL ARBITRATION ACT, OR, IN THE ALTERNATIVE, TO DISMISS

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I. The Arbitration Provision and Class Action Waiver Are Valid and Enforceable

The Federal Arbitration Act "requires courts to enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). All six circuits to consider the issue, including the Third Circuit, have held that "ERISA claims are generally arbitrable" under the FAA.[1] *See Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 620 (7th Cir. 2021) (collecting cases). Likewise, arbitration provisions requiring that ERISA claims be adjudicated on an individualized basis are enforceable. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018); *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 513-14 (9th Cir. 2019) ("*Dorman II*"); *Smith*, 13 F.4th at 622.

The Plan Document here contains a valid arbitration clause that has been included since the inception of the Plan. Plaintiffs are thus required to arbitrate their claims—brought under the terms of the Plan—on an individual basis because the claims fall within the scope of the arbitration clause.[2] Plaintiffs' arguments to the contrary are unsupported and contrary to controlling authority.

A. The Plan Document Is Not a "Contract of Employment" Under the FAA

Plaintiffs assert that the arbitration clause is unenforceable under Section 1 of the FAA because "it is part of a 'contract of employment' for 'workers engaged in foreign or interstate commerce.'" D.I. 27 ("Opp.") at 1. Not so. Under the FAA, "[a]n 'employment contract' is a contract between an employer and an employee in which the terms and conditions of employment

[1] Abbreviations and capitalized terms have the same meaning as in Defendants' opening brief (D.I. 25).

[2] Plaintiffs do not dispute that their claims fall within the arbitration provision, nor that if the provision is enforceable, the Court must stay or dismiss the lawsuit.

are stated." *Awe v. I & M Rail Link, L.L.C.*, No. C04-3011, 2007 WL 2572405, at *4 (N.D. Iowa Sept. 4, 2007). Documents that do not change the employer-employee relationship or alter the pre-existing terms of employment are not "contracts of employment" under the FAA. *Id.* at *7; *Garza Nunez v. Wks. Marine, Inc.*, No. 06-3777, 2007 WL 496855, at *3 (E.D. La. Feb. 13 2007).

Here, the Plan Document does not constitute a "contract of employment." Like other ERISA plan documents, the purpose of the Plan Document is to establish the ESOP and set forth the terms of the plan and the procedures for its administration. *See* 29 U.S.C. § 1102; D.I. 26-1. The Plan Document does not state or modify the terms and conditions of Plaintiffs' employment, cover employment-related disputes, or describe Plaintiffs' employment titles or responsibilities.

Plaintiffs focus on the Plan Document's vesting provisions. D.I. 26-1 at 32-35. But the purpose of those provisions is to set forth how and when participants achieve an irrevocable right to their benefits as required by ERISA (29 U.S.C. § 1053)—not to set forth the terms and conditions of their employment. In short, the Plan Document is not a "contract of employment." In contrast, Plaintiffs' actual terms of work are supplied by their employment offers, which expressly provide that Plaintiffs are at-will, not contract, employees. *See* Exhibit A.

Plaintiffs' argument is unprecedented—they cite no case on point, and Defendants are aware of none. While Plaintiffs rely upon *New Prime Inc. v. Oliveira*, Opp. at 5-6, that case has nothing to do with whether a plan document is a "contract of employment" under the FAA. The Supreme Court held that the term "contracts of employment" included "not only agreements between employers and employees but also agreements that require independent contractors to perform work." 139 S. Ct. 532, 539 (2019). Thus, the Court was ***not*** focused on what ***types of documents*** qualified as "contracts for employment," but rather, what ***types of workers*** are covered

by that term. Likewise, *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) only dealt with the interpretation of "class of workers engaged in foreign or interstate commerce."

Plaintiffs also assert "that an agreement is a 'contract of employment'" if it "contains terms related directly to employment," citing *Modzelewski v. Resolution Tr. Corp.*, 14 F.3d 1374, 1377 (9th Cir. 1994); Opp. at 5. Putting aside that the court was not interpreting "contracts of employment" under the FAA, what the court actually noted was that "the agreements in question clearly contain terms related directly to employment, and hence are also employment contracts" before finding that documents may qualify as both employment contracts and pension plans. *Id.* But the employment terms referenced by the court, *id.* at 1376, are nowhere to be found in the Plan.[3]

In short, Plaintiffs have cited no authority finding that the arbitration clause here is unenforceable because the Plan Document is a "contract of employment" under the FAA. If Plaintiffs' theory were the law, ***no*** ERISA plan arbitration clause would be subject to arbitration under the FAA if it applied to workers in interstate commerce—defying well-settled precedents.[4]

B. The Class Action Waiver Is Valid and Requires Individualized Arbitration

Plaintiffs next assert that the Plan Document's arbitration provision is invalid because it prevents them from obtaining plan-wide relief and thereby precludes "effective vindication" of

[3] Further, that some documents may constitute both an employment contract and a retirement plan does not mean that one necessarily follows the other. *See, e.g.*, *Williams v. Wright*, 927 F.2d 1540, 1547 (11th Cir. 1991) ("[O]ur analysis of the arrangement at issue in the instant case will focus on whether it was designed primarily for the purpose of providing retirement income ***or*** whether [it] contemplated the payment of post-retirement income only incidentally to a contract for current employment.") (emphasis added). There is no serious question that the Plan Document's purpose is to provide retirement income—in fact, it ***disavows*** that it controls the employment relationship. D.I. 26-1 at 57 ("Nothing herein shall be construed to obligate any Employer to continue to employee any Employee"). The *Pritzker* decision does not suggest otherwise. Opp. at 5. Plaintiffs' quoted language merely cautioned that the decision did not create a per se rule that ERISA claims are always subject to arbitration under the FAA. 7 F.3d 1110, 1112 n.1 (3d Cir. 1993).

[4] Even if the FAA were inapplicable to the Plan, that would not mean that the arbitration provision is unenforceable. It is still valid under federal common law, which applies here, as shown below.

purportedly nonwaivable statutory rights under ERISA. Opp. at 8-14. Plaintiffs are wrong. In asserting that ERISA provides certain substantive rights that individualized arbitration precludes, Plaintiffs are asking the Court to find that ERISA and the FAA cannot be harmonized. To reach that conclusion, however, Plaintiffs must satisfy a "***heavy*** burden" to show a "***clearly expressed congressional intention***" in ERISA to displace the FAA's requirement of enforcing arbitration agreements by their terms, which they cannot do. *See Epic Sys.*, 138 S. Ct. at 1624 (emphasis added); *Henry v. Wilmington Tr. NA*, No. 19-1925, 2021 WL 4133622, at *6 n.9 (D. Del. Sept. 10, 2021) ("[V]ery little will satisfy [plaintiff's] burden. . . . The Court cannot see that ERISA §§ 409(a) and 410(a) clear this hurdle."). There is no disharmony between class action waivers and ERISA's plan-wide remedy provisions, and nothing in ERISA evinces an intent to prohibit class action waivers of ERISA claims. Plaintiffs will get the same individual remedy—whether in federal court or arbitration—limited to recovery based on their individual plan accounts. *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008). Both *Dorman II* and *Holmes* are directly on point and support enforcing the class action waiver here—even if it precludes certain plan-wide remedies. *See Dorman II*, 780 F. App'x at 514; *Holmes v. Baptist Health S. Fla., Inc.*, No. 21-22986, 2022 WL 180638, at *3 (S.D. Fla. Jan. 20, 2022).[5]

C. The Class Action Waiver Does Not Take Away Substantive Rights

Plaintiffs contend that the class action waiver is invalid because it takes away substantive rights and remedies available under ERISA. Opp. at 8-14. But there is no substantive right under

[5] Plaintiffs also assert that the class action waiver is void under ERISA § 410 because it "purports to relieve a fiduciary from responsibility or liability" under ERISA. Opp. at 10. But "[ERISA] § 410 applies only to instruments that purport to alter a fiduciary's statutory duties." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 593 (3d Cir. 2009). Arbitration clauses are not invalid exculpatory clauses under this section. *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478 (8th Cir. 1988). The arbitration clause merely identifies the forum for resolving Plaintiffs' dispute about fiduciary duties—it does not alter those duties.

ERISA to sue on behalf of a plan or obtain plan-wide relief, and neither ERISA section 502(a) nor section 409 contains the "clearly expressed congressional intention" required to displace the FAA—in fact, neither provision references arbitration at all. These provisions work in tandem: "Section 502(a)(2) provides for suits to enforce the liability-creating provisions of § 409, concerning breaches of fiduciary duties that harm plans." *LaRue*, 552 U.S. at 251. Neither provision creates a right to conduct a collective action, much less an unwaivable one. Further, section 502(a)(2) does not say what relief is "appropriate" under section 409 or what the scope of such relief should be, nor does it say that participants can always bring actions for "plan-wide relief." As to section 409, it does not speak in terms of a plan participant's rights at all. Instead, it describes consequences to a breaching fiduciary: a fiduciary is liable to the plan for the losses the plan suffered as a result of the fiduciary's breach, as well as the gain that the fiduciary improperly obtained through the misuse of plan assets. 29 U.S.C. § 1109(a). Merely creating this liability does not address whether, or when, one participant may obtain recovery of the fiduciary's full liability to the plan.[6]

Even if these sections did create a statutory mechanism for participants to obtain recovery for the plan, the sections still would not establish that such plan-wide procedures could not be waived by a plan document's arbitration provision. Even where statutes provide a "right" to collective litigation, a consistent line of Supreme Court decisions has allowed plaintiffs to waive that right.[7] And, as shown above, courts have found that ERISA claims are individually arbitrable

[6] Plaintiffs' reliance on *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), and Justice Thomas' concurrence in *LaRue*, is misplaced. Opp. at 9. *LaRue* specifically explained that *Russell*'s earlier observations about sections 502(a)(2) and 409(a) should not be extended to *defined contribution* plans with individual accounts—like the Plan here. *See* 552 U.S. at 256.

[7] For example, the Age Discrimination in Employment Act ("ADEA") "expressly permitted collective actions." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 237 (2013) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). The relevant provision states that it provides a "right" to bring a collective action on behalf of "similarly situated" employees. 29

and class action waivers are valid, regardless of the procedural provisions in sections 502(a)(2) and 409. *See Dorman II*, 780 F. App'x at 513-14; *Holmes*, 2022 WL 180638, at *3.

Notwithstanding this, Plaintiffs invoke the effective vindication doctrine as applied by the Seventh Circuit in *Smith.* Opp. at 8-14. That doctrine, however, is a rare and "judge-made exception to the FAA," *Italian Colors*, 570 U.S. at 235-36, and *Smith* erred in applying it.[8] As explained in Defendants' opening brief, both the Supreme Court and Third Circuit have made clear that the effective vindication doctrine is narrow and only applies where a class action waiver removes entire statutory claims or bodies of federal law, which clearly is not the case here. *See id.* at 235-236; *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 242 (3d Cir. 2020).[9]

Smith incorrectly applied the effective vindication doctrine, concluding that the arbitration provision at issue effected a "prospective waiver" of the plaintiff's right to pursue some of the statutory remedies in ERISA. 13 F.4th at 620-23. But an arbitration provision's bar on class action relief does not create an irreconcilable conflict between a federal statute and the FAA. *See Gilmer*, 500 U.S. at 32 ("[E]ven if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be

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U.S.C. § 216(b). Even so, the Supreme Court found that the existence of this statutory "right" did not preclude waiver of the right. *Gilmer*, 500 U.S. at 32; *see also Epic Sys.*, 138 S. Ct. at 1626.

[8] Plaintiffs selectively quote from *Penn Plaza* and *Mitsubishi Motors*, Opp. at 7, but fail to acknowledge the relevant context. Both cases were referring to situations where parties could not "effectively vindicate" statutory claims in any forum, and, in fact, ultimately upheld the arbitration provisions at issue. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009); *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth*, 473 U.S. 614, 637 n.19, 640 (1985).

[9] Plaintiffs' quote from *Williams* is irrelevant here. Opp. at 12-13. In *Williams*, the arbitration clause ***completely removed*** the ability to pursue remedies under federal law—not merely limited the available remedies. 965 F.3d at 241-42 ("Thus, the question is whether a party can bring and effectively pursue the federal claim—not whether some other law is a sufficient substitute.").

barred.").[10] *Gilmer* provides that an arbitration provision precluding class-wide relief is not invalid where the claimant can vindicate his or her individual claim made available under the relevant federal statute. *Smith*'s holding that an arbitration provision is invalid if it forbids plan-wide equitable relief that ERISA permits thus is incorrect. A participant may seek remedies for plan losses that only affect the participant's individual account. *LaRue*, 552 U.S. at 256. Although it is possible that a participant may also seek remedies on behalf of a plan (and its participants), nothing in ERISA provides that a participant cannot waive the right to seek that wider remedy.[11]

D. Plan-Wide Remedies Are Still Available

Plaintiffs also object that certain plan-wide relief under ERISA, such as "fiduciary removal, rescission, [] invalidating the indemnification agreement, [and] monetary relief to make the Plan whole," would be unavailable. Opp. at 10. But, ERISA's enforcement regime renders their concern unwarranted. First, each of Plaintiffs' claims can be asserted in individual arbitration—just as each could be pursued in court. This is also true for other Plan participants and beneficiaries. Regardless of where Plaintiffs or other participants proceeded, their personal recovery would be limited to the alleged impacts on their individual Plan accounts.[12] *See LaRue*, 552 U.S. at 256.

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[10] The relevant statute in *Gilmer* states that it provides a "right" to bring a collective action on behalf of "similarly situated" employees. 29 U.S.C. § 216(b). Even so, the Supreme Court concluded that the existence of a statutory "right" to collective proceedings does not preclude such a right from being waived. *Gilmer*, 500 U.S. at 32; *see also Epic Sys.*, 138 S. Ct. at 1626.

[11] If Congress wanted to "clearly express" an intention to preclude arbitration of ERISA claims, it certainly knows how to do so. Currently, the "Employee and Retiree Access to Justice Act of 2022," H.R. 7740, 117th Cong. (2022), is under consideration by the House Education and Labor Committee. This legislation would amend ERISA "to provide that any mandatory predispute or coerced postdispute arbitration clause, class action waiver, representation waiver, or discretionary clause with respect to a plan is unenforceable, to prohibit any such clause or waiver from being included in a plan document or other agreement with plan participants, and for other purposes." No such legislation would be necessary if ERISA already barred arbitration.

[12] Indeed, because of the way in which relief is provided to individual plan accounts, *each and every one* of these individual actions is seeking to remedy "losses to the plan," *see* 29 U.S.C. §

Second, the Department of Labor ("DOL") is able to bring an enforcement action for plan-wide remedies where appropriate. The Supreme Court has specifically enforced individual arbitration provisions regarding other federal statutory claims where an agency remained free to seek collective remedies. *See Gilmer*, 500 U.S. at 23 (rejecting argument that arbitration proceedings were incompatible with the ADEA because, in part, "arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief"); *see also Williams v. Dearborn Motors 1, LLC*, No. 20-1351, 2021 WL 3854805, at *6 (6th Cir. Aug. 30, 2021) (affirming enforcement of class action waiver, reasoning that because "the government could seek the injunctive relief itself," the "class waiver is valid and enforceable under the FAA").

The class action waiver here, which allows for participants to seek individual monetary relief to their Plan accounts, as well as the enforcement of plan-wide remedies by the DOL, is thus distinguishable from waivers in other cases that entirely precluded statutory rights.[13]

II. Plaintiffs' Participation in the Plan Constitutes Consent to Arbitrate

Plaintiffs contend that the arbitration clause is invalid because they did not have notice of it and did not consent, relying on *Henry*. Opp. at 17. *Henry* was wrongly decided, however, insofar as it applied state law contract principles to an arbitration clause in an ERISA plan. 2021

1109(a), because financial relief, if appropriate, is payable through the plan to a participant's plan account, not to him or her directly, *see LaRue*, 552 U.S. at 263 (Thomas, J., concurring).

[13] Finally, the Plan does not necessarily foreclose the Plan-wide equitable remedies Plaintiffs purportedly seek. The Plan broadly authorizes "such other remedial and equitable relief as the arbitrator deems proper" so long as that relief "does not include or result in the provision of additional benefits or monetary relief to any Employee Participant or Beneficiary other than the Claimant." D.I. 26-1 at 59. The forms of Plan-wide equitable relief Plaintiffs supposedly seek (e.g., rescission, invalidating an indemnification clause, fiduciary removal, and an independent fiduciary) do not provide "additional benefits or monetary relief." As *Holmes* found in enforcing an arbitration provision, although such remedies have "a Plan-wide effect, [they] do[] not provide additional benefits or monetary relief as prohibited" by an individualized arbitration provision. 2022 WL 180638, at *3.

WL 4133622, at *5. It is federal common law and ERISA's plan formation and amendment doctrines that control the interpretation of a plan document's arbitration clause, not state law. *See Matthews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) (In interpreting an ERISA plan, "the relevant principles of contract interpretation are not those of any particular state's contract law, but rather are a body of federal common law tailored to the policies of ERISA."); *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 573 (3d Cir. 2006) (rejecting a "contract-based construct" that "just does not fit within the ERISA structure"); 29 U.S.C. § 1144(a) (preempting state law).

When considering consent under the FAA ***and*** within the context of an ERISA plan provision, and applying ***both*** the FAA's and ERISA's principles, the arbitration provision here plainly is enforceable. Under ERISA's well-established framework, participation in a plan is all that is needed to effectuate consent to be bound by an ERISA plan provision, and arbitration provisions are no different. 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." *Dorman II*, 780 F. App'x at 512-13. Plan participants like Plaintiffs are automatically enrolled in the Plan with no opportunity to negotiate any terms, opt-out, or choose which provisions will bind them. *See* D.I. 26-1 at 15, 56. That is precisely what happened here—Plaintiffs chose to accept the benefits of their automatic participation in the Plan upon commencement of their employment when the Plan Document expressly contained a valid arbitration clause. *Id.* at 58-62. Other Plan terms confirm that no express consent is required. For example, the plan sponsor is able to "amend the Plan at any time . . . without limitation," subject to limited exceptions not applicable here. *Id.* at 57; *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442 (1999). Indeed, if the arbitration provision were invalid because Plaintiffs did not manifest consent, then any other Plan provision or

amendment could be invalidated for each participant for lack of prior consent. This outcome would contravene ERISA's statutory scheme and the ability of ERISA plans to function.[14]

Plaintiffs try to discount *Dorman II* as an "unpublished summary disposition" that is "cursory, unpersuasive, and contrary" to *Comer v. Micor, Inc.*, which Plaintiffs cite for the proposition that while "the participant sues on behalf of the plan, she maintains a personal stake" in an ERISA section 502(a)(2) claim. Opp. at 19. To start, Plaintiffs ignore that *Dorman II* did cite a published Ninth Circuit decision supporting its holding—*Chappel v. Laboratory Corp. of America*, 232 F.3d 719 (9th Cir. 2000). 780 F. App'x at 512-13. In *Chappel*, the court upheld an arbitration clause in an ERISA plan that the plaintiff did not know about until the litigation. 232 F.3d at 723-26. That holding equally applies here, and Plaintiffs offer no rebuttal.[15]

Moreover, it is no surprise that *Dorman II* does not "acknowledge *Comer*'s precedential holding," Opp. at 20, because, in *Comer*, the arbitration clause was in an investment management agreement between the plan's trustee and a third-party investment adviser, not in an ERISA plan. 436 F.3d 1098, 1100-01 (9th Cir. 2006). Here, the arbitration provision is in the Plan Document and Plaintiffs are participants in the Plan and, as such, bound by the terms of the Plan.

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[14] ERISA carefully articulates the subject and content of notices to participants, and prior notice of plan terms or amendments is not required. *See* 29 C.F.R. § 2520.104b–3 (requiring plan administrator to issue "[s]ummary of material modification[]" regarding plan amendments in the first 210 days of year *after* the year in which plan was amended); 29 U.S.C. § 104 (requiring distribution of summary plan description to participant within 90 days *after* he or she becomes a participant). Plaintiffs' citation to *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014) is unavailing because, unlike that case, there was no amendment to the Plan here. Even if there were, Plaintiffs' interpretation of *Smith* is incorrect—nowhere did the court find that notice was required to enforce the forum selection clause against the plaintiff. *See id.* at 930.

[15] That *Dorman II*'s analysis was short does not mean it was "cursory"—it reflects that the ruling was straightforward based on the Ninth Circuit's precedents in *Chappel* and *Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018). Plaintiffs' assertion that *Munro* is inconsistent with *Dorman II* is incorrect. Opp. at 15. The arbitration provisions at issue in *Munro* were in the plaintiffs' ***employment contracts***—not the plan document. *Munro*, 896 F.3d at 1091-92.

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