Case No. 17-55550

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN L. MUNRO, DANIEL C. WHEELER, EDWARD E. VAYNMAN, JANE A. SINGLETON, SARAH GLEASON, REBECCA A. SNYDER, DION DICKMAN, COREY CLARK, and STEVEN L. OLSON,

Plaintiffs-Appellees,

v.

UNIVERSITY OF SOUTHERN CALIFORNIA, USC RETIREMENT PLAN OVERSIGHT COMMITTEE, and LISA MAZZOCCO,

Defendants-Appellants.

From the United States District Court for the
Central District Of California
The Honorable Virginia A. Phillips | Case No. 2:16-cv-06191-VAP-E

APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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FRAP 35(b) STATEMENT

Defendants University of Southern California, USC Retirement Plan Oversight Committee, and Lisa Mazzocco (collectively, "USC") respectfully request panel rehearing or rehearing en banc of the panel's decision affirming the denial of USC's motion to compel arbitration of Plaintiffs' putative class claims under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2).

The panel did not dispute that the parties entered into valid and binding arbitration agreements that cover "all claims . . . that Employee may have against" USC, including "claims for violation of any federal, state, or other governmental law, regulation, or ordinance," and claims arising out of their employment. The panel nevertheless found that Plaintiffs' claims under ERISA Section 502(a)(2) for alleged losses to their individual retirement accounts fell outside the scope of these arbitration agreements because those claims technically were brought "on behalf of" the retirement plans, and therefore are not claims that the employees "have" within the meaning of their arbitration agreements. Analogizing to claims for fraud on the government brought by *qui tam* relators under the False Claims Act, the panel concluded that employees suing for losses to their retirement accounts—one of the most important benefits of their employment—"are not seeking relief for themselves." (Op. at 10.)

The panel's decision conflicts with Supreme Court caselaw interpreting the Federal Arbitration Act ("FAA"). It also creates undeniable tension with this Court's own precedent and, in doing so, prolongs a split between this Court and five other courts of appeals.

First, the panel decision flips on its head the presumption in *favor* of arbitrability and resolves doubts concerning the scope of the parties' arbitration agreements *against* arbitration. Second, it disregards the Supreme Court's teaching that statutory claims are subject to the FAA to the same extent as any other claim absent a "contrary congressional command," instead articulating an ERISA-specific rule that prevents arbitration of Section 502(a)(2) claims unless the parties' arbitration agreements contain a clear and express statement authorizing the arbitration of those claims. Third, the panel's conclusion that Plaintiffs do not "have" Section 502(a)(2) claims because those claims are technically brought "on behalf of" the plans is in undeniable tension with this Court's prior holding that in a Section 502(a)(2) case, "the cause[] of action belong[s] to the individual plaintiff." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006). And if all this were not enough, the panel also acknowledged but failed to resolve a conflict between a 1984 decision of this Court, which held that ERISA claims are not arbitrable, and the decisions of five other courts of appeals, which have held that such claims are arbitrable.

The enforcement of arbitration agreements according to their terms is an issue of "exceptional importance." Fed. R. App. P. 35(a)(2); *see also, e.g.*, *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670 (9th Cir. 2017), *cert. granted* 138 S. Ct. 1697 (2018); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Further, there is a need for clarity and uniformity in this Court's decisions regarding arbitration of ERISA claims, and to resolve an acknowledged split from other circuits on the same topic. Accordingly, this case should be reheard by the panel or by an en banc panel of this Court, and the district court's judgment should be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are current and former employees of the University of Southern California who have individual accounts in defined-contribution retirement savings plans sponsored by the University. Plaintiffs signed arbitration agreements with USC upon commencing employment that, despite some variation (*see* 2ER28–44), all provide for "resolution by arbitration of all claims, whether or not arising out of Employee's University employment, . . . that Employee may have against the university" or any of its related entities. (2ER28, 30, 32, 34, 36, 38, 39, 41, 43.) The arbitration agreements confirm that "[t]he claims covered by this agreement include . . . claims for wages or other compensation due," and in case there were any doubt concerning their scope, further provide that they cover claims for "violation of any federal, state or other governmental law, statute, regulation, or ordinance." (*Id.*) The agreements carve out several claims that are *not* subject to arbitration, none of which are at issue here. (*Id.*)

Notwithstanding the unambiguous terms of their arbitration agreements, Plaintiffs filed this putative class action seeking to represent a class of "[a]ll participants and beneficiaries of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax-Deferred Annuity Plan from August 17, 2010, through the date of judgment . . . ." (2ER179.) Plaintiffs allege that USC failed to "us[e] the Plans' bargaining power to reduce expenses and exercis[e] independent judgment to determine what investments to include in the Plans," and thereby breached its fiduciary duties and caused losses to Plaintiffs' retirement accounts in the plans. (2ER67 [Second Amended Complaint ¶¶ 4–5].)[1]

[1] A similar lawsuit brought by the same plaintiff's counsel against New York University recently resulted in judgment for the defendants after an eight-day bench trial. *See Sacerdote v. New York Univ.*, Case No. 16-cv-6284, 2018 WL 3629598, at *2 (S.D.N.Y. July 31, 2018) ("[P]laintiffs have not proven that the Committee acted imprudently or that the Plans suffered losses as a result.").

USC moved to compel arbitration, but the district court denied the motion. (*See* 1ER1–20). The district court did not rule that the arbitration agreements were invalid or not binding on Plaintiffs, nor did it conclude that the agreements did not purport to cover ERISA claims. Instead, the court determined that a Section 502(a)(2) claim is brought "on behalf of the Plan," and thus can be arbitrated only if the plan consents. It began by noting that, although Section 502(a)(2) plainly provides that "[a] civil action may be brought—by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under" Section 409, 29 U.S.C. § 1132(a)(2), these claims are necessarily brought "on behalf of the Plan" because Section 409 states that a fiduciary who breaches his fiduciary duties shall be liable "to make good to such plan any losses to the plan resulting from each such breach," 29 U.S.C. § 1109(a). The district court then likened an agreement to *arbitrate* Section 502(a)(2) claims with an agreement to *waive* those claims, which is only valid if the plan consents. (1ER7, 12.) Permitting plan participants to select arbitration as the forum for resolving their Section 502(a)(2) suits, the court said, "would (1) guarantee fiduciaries would essentially never be held to account for their potential wrongdoings in court and (2) give fiduciaries many procedural advantages at the outset of any § 502(a)(2) action that they would not be entitled to in a court proceeding." (1ER16) "[A]llowing such arbitration agreements to control participants' § 502(a)(2) claims would, in a sense, be allowing the fox to guard the henhouse." (*Id.*)

The panel affirmed. Although it did not employ the explicitly anti-arbitration rhetoric of the district court, the effect was the same. Plaintiffs' arbitration agreements, the panel held, did not apply by their own terms to Section 502(a)(2) claims. Those agreements provided for arbitration "of all claims . . . that *Employee* may have against the university," which, the panel reasoned, "does not extend to claims that *other entities* have against the University." (Op. at 9 (emphases added).) It reached this conclusion by analogizing to claims brought under the False Claims Act, which a prior panel had held—in a decision that itself departed from out-of-circuit caselaw—not to be encompassed by an agreement providing for arbitration of claims "[the employee] may have against the Company." *Id.* (quoting *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017)). In the panel's view, *qui tam* claims under the False Claims Act for fraud against the government are materially identical to employees' claims for their lost retirement benefits under Section 502(a)(2), because in both cases plaintiffs "are not seeking relief for themselves," and "neither the *qui tam* relator nor the ERISA § 502(a)(2) plaintiff may alone settle a claim." *Id.* at 10. Indeed, the panel said, "[i]f anything, . . . the *qui tam* relator has a stronger stake in the outcome of an FCA case" than an employee seeking to recoup losses to his individual retirement account under Section 502(a)(2). *Id.* at 13.

DISCUSSION

The panel's decision disregards—and in many cases, openly contradicts—Supreme Court and Ninth Circuit precedent interpreting the FAA and ERISA. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act therefore "embodies [a] national policy favoring arbitration and places arbitration agreements on an equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985) (declaring an "emphatic federal policy in favor of arbitral dispute resolution"). In fact, the Supreme Court's "cases place it beyond dispute that the FAA was designed to *promote* arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (emphasis added). This broad policy has translated into several discrete prescriptions that bind courts in interpreting arbitration agreements—prescriptions that the panel did not observe.

First, the Supreme Court has time and again admonished that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). But the panel's decision flipped this presumption on its head by holding that when employees agree to arbitrate the claims they "may have," that agreement should not be interpreted to cover claims they can bring under Section 502(a)(2) for losses to their individual retirement accounts—even though this Court has held that Section 502(a)(2) claims "belong to" the employees.

A straightforward reading of the arbitration agreements at issue here confirms that they apply to Plaintiffs' claims. Those agreements broadly encompass "*all claims*, whether or not arising out of Employee's University employment, . . . that Employee *may have* against the university," including "claims for violation of any federal, state or other governmental law, statute, regulation, or ordinance." (2ER28, 30, 32, 34, 36, 38, 39, 41, 43 (emphases added).) Plainly the parties would have regarded ERISA claims for losses to their individual retirement accounts as claims the employees "may have"—or more to the point, there is reason to "doubt[]" that the parties would have regarded such claims as *not* covered by their arbitration agreements. This is especially so considering that this Court has held that, because "the 'real plaintiff'" in a Section 502(a)(2) action is the employee, and not the plan, "the cause[] of action belong[s] to th[at] individual plaintiff" for purposes of determining whether it is covered by an arbitration agreement. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir.

2006). That ruling—which referred to the "*plaintiff's* claim" and "*his* ERISA claim," and not the *plan's* claim, *id.* at 1103–04 (emphases added)—relied on an earlier decision of this Court which likewise explained that the "plaintiff in such actions [under Section 502(a)(2)] is not the plan itself but the fiduciary, beneficiary, or *participant* bringing suit." *Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995) (emphasis added).

The panel acknowledged *Comer*'s statement that for purposes of determining coverage by an arbitration agreement, "the cause of action belong[s] to the individual plaintiff." But the panel brushed this point aside, reasoning that "the same is true of a *qui tam* suit under the FCA where the government declines to intervene" (Op. at 11)—referring to this Court's decision in *Welch*, which declined to compel arbitration of a relator's False Claims Act claim on the ground that an employee does not "have" a claim under the False Claims Act. Even if *Welch* is correct, however, it is beside the point.[2] A court's role under the FAA is limited to interpreting the *arbitration agreement* in order to determine whether the parties intended to submit a given dispute to arbitration, while resolving any doubts in favor of arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

[2] Other courts have disagreed with this conclusion—a conflict that itself merits rehearing. *See, e.g.*, *Hicks v. Evercase Hosp.*, No. 1:12-cv-00887, 2015 WL 4498744 (S.D. Ohio July 23, 2015); *Deck v. Miami Jacobs Business College Co.*, No. 3:12-cv-00063, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013).

943 (1995) ("[A]rbitration is simply a matter of contract between the parties."). Yet the panel never explained how—applying the deferential standard with which courts are to read arbitration agreements—there is *no* "doubt" that in referring to the claims Plaintiffs "may have," the parties meant to exclude from their employment arbitration agreements the very type of employment retirement claim this court has characterized as "belong[ing] to" the employee.

Analogizing to the False Claims Act, as the panel did, is an artificial and inadequate means of resolving this important issue with respect to ERISA. The question whether there are any "doubts" as to whether an *employment* arbitration agreement was intended to exclude claims regarding *employment retirement benefits* is a very different question from whether there are any "doubts" as to whether the same agreement was intended to cover claims alleging fraud against the government. *Cf. Welch*, 871 F.3d at 799 (noting that plaintiff "Welch could have just as easily discovered the factual predicate of her claims" if she were not an employee, "Defendants could have engaged in the same fraudulent conduct absent any [employment] relationship with Welch," and "the legal basis of this FCA case would exist regardless of where Welch worked or observed the fraud").

For this reason, the panel's observation that "there is no principled distinction to be drawn between this case and *Welch*" is completely unfounded. (Op. at 13.) But to the extent an earlier panel decision about the FCA compelled this panel's (mistaken) ruling as to ERISA, that is further reason for attention by the en banc court.

The panel's analogy to the False Claims Act also goes astray given the important structural differences between an action for fraud against the government by a *qui tam* plaintiff and a Section 502(a)(2) claim brought by a plan participant. Indeed, unlike the False Claims Act relator—who has no direct interest in the underlying claim, and collects only a portion of the Government's recovery "depending upon the extent to which the person substantially contributed to the prosecution of the action," 31 U.S.C. § 3730(d)(1)—the ERISA participant is the *beneficial owner* of the assets in the plans on whose behalf the Section 502(a)(2) action is nominally brought. Although any recovery is technically paid to the plan, the plan holds the funds in trust for participants and their beneficiaries, and the plan has no interest apart from the constituent interest of the participants and beneficiaries.

A participant's interest is particularly acute in the case of a defined-contribution plan, like those at issue here, in which any recovery would be apportioned to Plaintiffs' individual plan accounts. The Supreme Court held in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), that a participant in a defined-*benefit* plan could not bring an action under Section 502(a)(2) for a harm that affected only her individual interest, reasoning that "recovery for a violation of § 409 [must] inure[] to the benefit of the plan as a whole." *Id.* at 140. But it subsequently determined that a defined-*contribution* plan presented a different situation. Because "[f]or defined contribution plans, . . . fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive," the "references to the 'entire plan' in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 255–56 (2008). The panel noted ambiguous language in *LaRue*, stating that "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." (Op. at 12 (quoting *LaRue*, 552 U.S. at 256).) But that purported ambiguity simply *confirms* that there is at most "doubt[]" whether the parties' arbitration agreements encompass Section 502(a)(2) claims, such that the panel should have compelled arbitration.

In short, it was entirely reasonable to interpret Plaintiffs' agreements to arbitrate any claim they "have" against their employer to include claims regarding their ERISA retirement accounts, which are among the most important incidents of employment (and among the most frequently litigated). "Any doubts" on that question were to have been "resolved in favor of arbitration." *Moses H. Cone*, 460

U.S. at 24–25. Yet, in ruling that ERISA claims are not claims Plaintiffs "may have" within the meaning of their arbitration agreements, the panel failed even to mention that applicable standard requiring that any doubts on the question be resolved in favor of arbitration. *Id*. And the Court's excessive reliance on *Welch* introduced not merely tension, but cognitive dissonance to this Court's jurisprudence regarding the arbitration of ERISA claims, under which Section 502(a)(2) claims "belong to" the employee (*Comer*), yet are not among the claims the employee "may have" (Op. at 9).

Second, in violating the well-established rule that doubts concerning the scope of an arbitration agreement must be resolved in favor of arbitration, the panel *also* violated the equally well-established rule that statutory claims are subject to the FAA to the same extent as any other claim unless the statute in question contains "a contrary congressional command." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012). The panel found no contrary congressional command here, yet it created an ERISA-specific clear-statement rule that severely limits the arbitrability of Section 502(a)(2) claims. Under the panel's decision, employment arbitration agreements will not cover at least certain ERISA claims unless the agreements specifically provide for them. That is flatly contrary to Supreme Court caselaw. *See Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1426 (2017) (invalidating Kentucky rule that required a power of attorney to clearly authorize the designee to enter into arbitration agreements on the principal's behalf).

There is no basis in law for the panel's halfway approach to enforcing the FAA: Either ERISA contains a contrary congressional command, in which case Section 502(a)(2) claims cannot be arbitrated at all, or it does not, in which case those claims are arbitrable to the same extent as every other claim that the parties agreed to arbitrate.

In this respect, the panel's decision perpetuates a conflict between this circuit and every other circuit to address the issue—a conflict that further counsels en banc review. More than thirty years ago, this Court held that ERISA claims are not arbitrable. *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). In the ensuing years, every other federal appellate court to consider the matter has, unlike *Amaro*, held that ERISA claims are arbitrable. *See, e.g.*, *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 122 (2d Cir. 1991); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1118 (3d Cir. 1993); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 479 (8th Cir. 1988); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000). Subsequent panels of this Court have opined that *Amaro* has not survived intervening Supreme Court precedent, but they have stopped short of overruling that decision. *See Comer*, 436 F.3d at 1100 ("We have, in the past, expressed skepticism about the arbitrability of ERISA claims, but those doubts seem to have been put to rest by the Supreme Court's opinions" in later cases). Similarly, although the panel here acknowledged these cases questioning *Amaro*'s continued validity, it "le[ft] the issue of *Amaro's* viability for another day" (*see* Op. at 13 n.1)—leaving this Court on the short end of a 5-1 circuit split. The Court should grant rehearing to resolve that split as it vacates the panel's decision, which reflects the same superannuated hostility to arbitration of ERISA claims as the Court's decision in *Amaro*.

Third, and finally, the panel's decision is in undeniable tension with this Court's decisions in *Comer* and *Landwehr*, discussed above. In *Comer*, an ERISA plan participant sued investment advisor Smith Barney for breaching its fiduciary duties to the plans by concentrating the plans' assets in high-tech and telecom stocks, which suffered substantial losses when the tech bubble burst in the early 2000s. 436 F.3d at 1100. Although the plaintiff did not agree to arbitrate disputes with Smith Barney, Smith Barney nonetheless sought to compel arbitration under investment-management agreements it executed with *the plans*, which did provide for arbitration. *Id.* According to Smith Barney, because the plaintiff was "suing in an entirely derivative capacity," he was bound by the arbitration agreements to the same extent as the plans. *Id.* at 1103. But the Court rejected this argument.

Although it acknowledged that the plaintiff brought his suit under Section 502(a)(2), "which provides for the making good *to the Plans*—not to Plaintiff himself—of any losses incurred as a result of [Smith Barney's] alleged breach of fiduciary duty," *id.* at 1100, the Court nevertheless declined to compel arbitration because "the cause of action belong[s] to the individual plaintiff," *id.* at 1103, and the plaintiff "[wa]s not bound by an arbitration clause," *id.* at 1103–04.

In reaching this conclusion, the Court drew upon *Landwehr*, in which plan beneficiaries alleged that the defendant engaged in transactions prohibited by ERISA. The defendant argued that the three-year statute of limitations barred the action; the plaintiffs had only learned of the prohibited transactions within the limitations period, but the defendant said this was immaterial because "the real 'plaintiff' in this case is the Plan," and *other* beneficiaries and fiduciaries of the plan had knowledge of the transactions for more than three years. 72 F.3d at 732. The Court was unpersuaded: "In this case, the plaintiffs are Landwehr and Cole and *not the Plan*." *Id.* (emphasis added); *see also id.* ("It is true that beneficiaries, participants, and fiduciaries of an ERISA plan ordinarily may bring an action for breach of fiduciary duty only on behalf of an ERISA covered plan and not in their individual capacities. . . . The plaintiff in such actions, however, is not the plan itself but the fiduciary, beneficiary, or participant bringing suit.").

What these cases mean for a plan participant who wishes to arbitrate Section 502(a)(2) claims lies at the heart of this dispute, and has produced different answers (albeit the same judgment) in the district court and before the panel. Panel rehearing or rehearing en banc would allow this Court to reconcile these divergent cases and provide valuable uniformity to this Circuit's caselaw.

CONCLUSION

The panel's decision violates well-established Supreme Court precedent and creates considerable tension with this Court's own decisions, while perpetuating a split with other circuits. Accordingly, this case should be reheard by the panel or reheard en banc to correct that decision. The panel's opinion should be withdrawn and the district court's judgment reversed.

Dated: August 7, 2018

Respectfully submitted,

/s/ Eugene Scalia

GIBSON, DUNN & CRUTCHER LLP

Attorneys for Defendant-Appellants University of Southern California, USC Retirement Plan Oversight Committee, and Lisa Mazzocco

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALLEN L. MUNRO, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; DANIEL C. WHEELER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; EDWARD E. VAYNMAN, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax

No. 17-55550

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2:16-cv-06191-VAP-E

OPINION

Deferred Annuity Plan; JANE A. SINGLETON, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; SARAH GLEASON, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; REBECCA A. SNYDER, individually and as representatives of a class of participants and beneficiaries on behalf of the University of Southern California Defined Contribution Retirement Plan and the University of Southern California Tax Deferred Annuity Plan; DION

DICKMAN; COREY CLARK;
STEVEN L. OLSON,
Plaintiffs-Appellees,

v.

UNIVERSITY OF SOUTHERN
CALIFORNIA; USC
RETIREMENT PLAN
OVERSIGHT COMMITTEE;
LISA MAZZOCCO,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief Judge, Presiding

Argued and Submitted May 15, 2018
San Francisco, California

Filed July 24, 2018

Before: Sidney R. Thomas, Chief Circuit Judge, Michelle T. Friedland, Circuit Judge, and Thomas S. Zilly,* District Judge.

Opinion by Chief Judge Thomas

* The Honorable Thomas S. Zilly, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY**

Arbitration

The panel affirmed the district court's denial of defendants' motion to compel arbitration of collective claims for breach of fiduciary duty in the administration of two ERISA plans.

The plaintiffs, current and former employees of the University of Southern California, and participants in the two ERISA plans, were required to sign arbitration agreements as part of their employment contracts. The panel concluded that the dispute fell outside the scope of the arbitration agreements because the parties consented only to arbitrate claims brought on their own behalf, and the employees' claims were brought on behalf of the ERISA plans.

COUNSEL

Eugene Scalia (argued) and Paul Blankenstein, Gibson Dunn & Crutcher LLP, Washington, D.C.; Debra Wong Yang, Christopher Chorba, Jennafer M. Tryck, and Samuel Eckman, Gibson Dunn & Crutcher LLP, Los Angeles, California; for Defendants-Appellants.

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Andrew J. Pincus, Archis A. Parasharami, Brian D. Netter, and Travis Crum, Mayer Brown LLP, Washington, D.C.; Warren Postman and Janet Galeria, U.S. Chamber Litigation Center, Washington, D.C.; for Amicus Curiae Chamber of Commerce.

Mary Ellen Signorille and William Alvarado Rivera, AARP Foundation Litigation, Washington, D.C., for Amici Curiae AARP and AARP Foundation.

OPINION

THOMAS, Chief Judge:

We consider in this appeal whether current and former employees of the University of Southern California may be compelled to arbitrate their collective claims for breach of fiduciary responsibility against the Defendants (collectively, "USC") for the administration of two ERISA plans. Under the circumstances presented by this case, we conclude that the district court properly denied USC's motion to compel arbitration.

I

Allen Munro and eight other current and former USC employees ("Employees") participate in both the USC Retirement Savings Program and the USC Tax-Deferred Annuity Plan (collectively, the "Plans"). In this putative class action lawsuit, they allege multiple breaches of fiduciary duty in administration of the Plans.

Each of the individual Employees was required to sign an arbitration agreement as part of her employment contract. The nine Employees signed five different iterations of USC's arbitration agreement. Consistent among the various agreements is an agreement to arbitrate all claims that either the Employee or USC has against the other party to the agreement. The agreements expressly cover claims for violations of federal law.

In their putative class action lawsuit, the Employees sought financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including but not limited to: a determination as to the method of calculating losses; removal of breaching fiduciaries; a full accounting of Plan losses; reformation of the Plans; and an order regarding appropriate future investments.

USC moved to compel arbitration, arguing that the Employees' agreements bar the Employees from litigating their claims on behalf of the Plan. It also requested the district court to compel arbitration on an individual, rather than class, basis because the parties did not specifically agree to class arbitration. The district court denied USC's motion, determining that the arbitration agreements, which the Employees entered into in their individual capacities, do not bind the Plans because the Plans did not themselves consent to arbitration of the claims. USC timely appealed.

The district court had jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331. We have jurisdiction under 9 U.S.C. § 16(a)(1)(C), which authorizes the immediate appeal from an order denying an application to compel arbitration. We review the issues presented de novo. *Mohamed v. Uber Techs., Inc.*, 848 F.3d

1201, 1207 (9th Cir. 2016) (denial of a motion to compel arbitration); *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1021 (9th Cir. 2016) ("district court decisions about the arbitrability of claims" and "the interpretation and meaning of contract provisions" (citation and alteration omitted)); *Cmty. Bank of Ariz. v. G.V.M. Trust*, 366 F.3d 982, 984 (9th Cir. 2004) (a "district court's interpretation and construction of . . . federal law").

II

The Federal Arbitration Act ("FAA") "was enacted . . . in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). It "reflect[s] both a 'liberal federal policy favoring arbitration,'" *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), "and the 'fundamental principle that arbitration is a matter of contract,'" *id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). By the FAA's terms, "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

"[T]he party resisting arbitration bears the burden[s] of proving that the claims at issue are unsuitable for arbitration . . . ." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone*, 460 U.S. at 24–25.

Where there is no conflict between the FAA and the substantive statutory provision, "the FAA limits courts' involvement to 'determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.'" *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). "If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Chiron Corp.*, 207 F.3d at 1130. There is no room for discretion, as the FAA "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

III

Turning to the particular arbitration agreements entered into between the Employees and USC, we must decide "whether the agreement encompasses the dispute at issue." *Cox*, 533 F.3d at 1119 (citation omitted). Because the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements.

A

We cannot, of course, compel arbitration in the absence of an agreement to arbitrate; to do so would be to defeat "the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). "[T]he 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) (quoting *Volt Info.*, 489 U.S. at 479).

B

To determine whether the agreements extend to the present controversy, we look first to the text of the agreements. *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 796 (9th Cir. 2017).

We recently considered a similar issue in another legal context—whether a standard employment arbitration agreement covered *qui tam* claims brought by the employee on behalf of the United States under the False Claims Act ("FCA"). *Welch*, 871 F.3d 791. In *Welch*, the arbitration agreement extended to any claims "either [the employee] may have against the Company . . . or the Company may have against [the employee]." *Id.* at 794. Because "the underlying fraud claims asserted in a FCA case belong to the government and not to the relator," we held that the claims were not claims that the employee had against the employer and therefore not within the scope of the arbitration agreements. *Id.* at 800 & n.3.

Here, too, the parties agreed to arbitrate "all claims . . . that Employee may have against the University or any of its related entities . . . and all claims that the University may have against Employee." As in *Welch*, this language does not extend to claims that other entities have against the University. As in *Welch*, we cannot interpret the catch-all clause agreeing to arbitrate "[a]ny claim that otherwise would have been decidable in a court . . . for violation of any federal . . . statute" to cover claims belonging to other entities. *See Welch*, 871 F.3d at 797–98 (interpreting agreement to arbitrate "all disputes" based on "any . . . federal law" as limited to disputes between the employee and the employer).

The language of the arbitration agreements here is not meaningfully distinguishable from that considered in *Welch*. The issue, then, is whether claims for breach of fiduciary duty brought under ERISA must be treated the same as *qui tam* claims brought under the FCA.

C

There is no shortage of similarities between *qui tam* suits under the FCA and suits for breach of fiduciary duty under ERISA. Most importantly, both *qui tam* relators and ERISA § 502(a)(2) plaintiffs are not seeking relief for themselves. A party filing a *qui tam* suit under the FCA seeks recovery only for injury done to the government, *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771–72 (2000), and a plaintiff bringing a suit for breach of fiduciary duty similarly seeks recovery only for injury done to the plan. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008); *accord id.* at 261 (Thomas, J., concurring).

Out of this basic similarity arises a related principle—neither the *qui tam* relator nor the ERISA § 502(a)(2) plaintiff may alone settle a claim because that claim does not exist for the individual relator or plaintiff's primary benefit. In *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999), we held that a plaintiff seeking relief under ERISA § 409(a) may not settle a claim on behalf of a plan, but rather can only settle if the plan consents to the settlement. Unsurprisingly, given the similarities between FCA and ERISA fiduciary breach claims, we reached a similar conclusion in a *qui tam* action brought under the FCA where the government had initially declined to intervene, leaving the relator to conduct the action himself. *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). But there, unlike here, the government had only a right to be heard on the validity of the settlement, not "an absolute right to block the settlement." *Id.* at 720–23.

Significantly, these principles laid the foundation for our holding in *Welch*, where we held a *qui tam* FCA claim to be outside the scope of an arbitration agreement because the claim was not one that the employee "may have against [the employer]." 871 F.3d at 800. Our holding was compelled by our recognition that the government, rather than the relator, stands to benefit most from the litigation. *Id.* And we reached our conclusion even though the relator is entitled to more than a nominal share of the government's recovery. *Id.* Moreover, we were unconcerned that the FCA provides that the relator brings suit not only "for the United States Government" but also "for the person*.*" 31 U.S.C. § 3730(b). And even though in a breach-of-fiduciary duty suit under ERISA, "the cause of action belong[s] to the individual plaintiff," *Comer v. Micor, Inc.*, 436 F.3d 1098, 1103 (9th Cir. 2006), the same is true of a *qui tam* suit under the FCA where the government declines to intervene, *see* 31 U.S.C. § 3730(b)(4)(B) (providing that, in such circumstances, the "right to conduct the action" lies with the relator). *See also Landwehr v. DuPree*, 72 F.3d 726, 732 (9th Cir. 1995) (holding in ERISA context that the statute of limitations begins to run when the individual plaintiff learns of the alleged violations); *United States ex rel. Hyatt v. Northrop*

Corp., 91 F.3d 1211, 1217–18 (9th Cir. 1996) (holding similarly in the FCA context).

Relying on *LaRue*, USC argues that individuals may seek individual recovery in the context of defined contribution plans, such as the Plans here, because defined contribution plans comprise individual accounts. However, *LaRue* cannot bear the weight USC places on it. In *LaRue*, the Supreme Court held that an individual may bring an ERISA claim alleging breach of fiduciary duty even if the claim pertains only to her own account and seeks relief for losses limited to that account. 552 U.S. at 256. In doing so, the Court made clear that it had not reconsidered its longstanding recognition that it is the plan, and not the individual beneficiaries and participants, that benefit from a winning claim for breach of fiduciary duty, even when the plan is a defined contribution plan. *Id.* ("[A]lthough § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.").

Even if *LaRue* held the meaning USC attributes to it, it would not control this case. The claims brought by the Employees arise from alleged fiduciary misconduct as to the Plans in their entireties and are not, as in *LaRue*, limited to mismanagement of individual accounts. *Id.* at 250–51 (explaining that the lawsuit arose from the fiduciary's alleged failure to carry out the participant-plaintiff's directions). As we have noted, the Employees seek financial and equitable remedies to benefit the Plans and all affected participants and beneficiaries, including a determination as to the method of calculating losses, removal of breaching fiduciaries, a full accounting of Plan losses, reformation of the Plans, and an order regarding appropriate future investments. The relief sought demonstrates that the Employees are bringing their claims to benefit their respective Plans across the board, not just to benefit their own accounts as in *LaRue*.

In short, there is no principled distinction to be drawn between this case and *Welch*. If anything, because recovery under ERISA § 409(a) is recovery singularly for the plan, *compare* 29 U.S.C. § 1109(a), *with* 31 U.S.C. § 3730(b), the *qui tam* relator has a stronger stake in the outcome of an FCA case than does a § 502(a)(2) plaintiff in an ERISA claim. The ERISA § 409(a) claims in this suit are not claims an "Employee may have against the University or any of its related entities," and the arbitration agreements cannot be stretched to apply to them.[1]

[1] The Employees also argue that claims for breach of fiduciary duty seeking a remedy under ERISA 409(a) are inarbitrable as a matter of law, citing our decision in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). In *Amaro*, we held that ERISA's mandated "minimum standards [for] assuring the equitable character of [ERISA] plans" could not be satisfied in an arbitral proceeding. 724 F.2d at 752. As a three-judge panel, *Amaro* binds us unless we conclude that the case is "clearly irreconcilable" with intervening binding authority. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). USC contends that *Amaro* is "clearly irreconcilable" with intervening Supreme Court case law and, therefore, we should overrule it. Although the Supreme Court has never expressly held that ERISA claims are arbitrable, there is considerable force to USC's position. *See, e.g.*, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1100–01 (9th Cir. 2006) (discussing the issue in dicta). However, given our decision that the claims asserted in this case fall outside the arbitration clauses in the employee agreements, it is unnecessary to decide that question here. Therefore, we leave the issue of *Amaro*'s viability for another day.

IV

In sum, the claims asserted on behalf of the Plans in this case fall outside the scope of the arbitration clauses in individual Employees' general employment contracts. Therefore, the district court properly denied the motion to compel arbitration. We need not—and do not—reach any other issues urged by the parties.

AFFIRMED.

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 17-55550

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 3,961 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant /s/ Eugene Scalia Date 8/7/2017

("s/" plus typed name is acceptable for electronically-filed documents)

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 August 7, 2018.

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

Dated: August 7, 2018 /s/ Samuel Eckman