Appeal No. 17–80213

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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MARLON H. CRYER, individually and on behalf of a class of all others similarly situated, and on behalf of the Franklin Templeton 401(k) Retirement Plan
*Plaintiff-Respondent,*

v.

FRANKLIN RESOURCES, INC., and THE FRANKLIN TEMPLETON 401(K) RETIREMENT PLAN INVESTMENT COMMITTEE,
*Defendants-Petitioners*.

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INTERLOCUTORY APPEAL SOUGHT FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
THE HONORABLE CLAUDIA WILKEN, JUDGE
CASE NO. 4:16-CV-04265-CW

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# REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL FROM ORDER GRANTING CLASS CERTIFICATION

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## PRELIMINARY STATEMENT

The district court's holding—that an individual 401(k) plan participant cannot, under ERISA, voluntarily agree to accept valuable, post-employment benefits in exchange for his agreement not to participate in class litigation—relies on an untenable interpretation of ERISA § 502(a)(2) that directly conflicts with Supreme Court precedent. Pet. at 8–14. It is manifest error, warranting immediate review. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005) (interlocutory review is "warranted when the district court's decision is manifestly erroneous—even absent a showing of another factor"). Review of FRI's Petition is merited for the additional reasons that the trial court ruling would fundamentally alter the landscape of class litigation, including outside of the ERISA context, Pet. at 14–16, and that it would be efficient for the Court to review the issues presented here with those currently pending in the *Munro v. University of Southern California* appeal, No. 17-55550, Pet. at 16–17.

Plaintiff's answer is to double down on the district court's erroneous reasoning while offering no authority to support it. Plaintiff insists that actions under § 502(a)(2) must always be brought on behalf of an entire 401(k) plan and all of its participants, such that his "personal, individual Severance Agreement" cannot affect his rights as "plan representative" to proceed on behalf of the plan for recovery to all participants. That is a non sequitur. There is no question that

Plaintiff can proceed in an *individual* action under § 502(a)(2) to recover purported plan losses experienced in his *individual* account. *See LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 255–56 (2008). And neither § 502(a)(2) nor any case construing it holds that a § 502(a)(2) claim brought on behalf of a plan must always be asserted on behalf of all plan participants and seek plan-wide relief. In other words, it is fully consistent with § 502(a)(2) for Plaintiff to bring a claim on behalf of the Plan solely for recovery of alleged losses in his individual account. Because Plaintiff's class waiver does not preclude his participation in such an individual action, it does not conflict with § 502(a)(2).[1]

Plaintiff also argues, in passing, that the Court need not resolve the issues in this Petition because, even if his class waiver is enforceable, he may proceed on behalf of all Plan participants for plan-wide relief in his individual action. *See* Opp. at 1 ("[T]he action will move forward as a representative action regardless of

[1] Plaintiff similarly confuses the issues when he argues FRI has conceded that "Plaintiff's claims on behalf of the Plan under Section 502(a)(2) are not covered by the Severance Agreement." Opp. at 10. FRI has made no such concession. First, FRI argued before the district court that the covenant not to sue contained in Plaintiff's Severance Agreement barred him from bringing *any* action under § 502(a)(2). The district court disagreed, and FRI reserves all rights with respect to that ruling. Second, FRI argued, and has consistently maintained, that the class waiver contained in the Severance Agreement precludes Plaintiff from participating in class litigation against FRI. That Plaintiff may bring an *individual action* under § 502(a)(2) does not somehow operate as a concession that the class waiver does not apply.

whether the class is certified."). But he offers no authority for the proposition that he could proceed as a "representative" of the Plan and its thousands of participants and seek recovery for losses to all Plan accounts—even after his May 2016 exit from the Plan—without taking affirmative steps to invoke and satisfy the requirements of Rule 23. Nor does he point to a single case where an individual plan participant was allowed to recover plan losses beyond his individual account absent class certification, and FRI is aware of no such case. Indeed, as explained below, the case law is to the contrary. *See, e.g.*, *Coan v. Kaufmann*, 457 F.3d 250, 260 (2d Cir. 2006) ("Congress [did not] intend[ ] to allow individual participants and beneficiaries to bring suit on behalf of an employee benefit plan without observing *any* procedural safeguards for other interested parties.").

Finally, Plaintiff argues that, while the Petition raises substantial issues of ERISA law, it raises no substantial issues of class action law, and thus cannot satisfy the second *Chamberlan* factor. Opp. at 12–13. Nonsense. The question presented is about the enforceability of a *class action waiver*—a question of obvious and fundamental importance to class action practice, both within the ERISA context and beyond. Pet. at 15–16; *see Chamberlan*, 42 F.3d at 959. For this additional reason, FRI's Petition should be granted.

## ARGUMENT

In arguing that there is no manifest error warranting immediate review, Plaintiff contends that the district court correctly held his class waiver to be unenforceable under ERISA because (i) the statute provides plan participants with a "substantive right"—indeed, a substantive *obligation*—to litigate fiduciary breach claims "on behalf of the Plan, and all of the participants in the Plan," and (ii) such a right cannot voluntarily be bargained away by the plan participant. Opp. at 7. Although framed differently than the district court's holding, *see* Pet., Ex. B at 9 (reasoning that waiver was unenforceable because it limited a *plan* right to have claims brought as class actions), both the district court's holding and Plaintiff's argument lead to the same conclusion: that claims under § 502(a)(2) must always be brought on behalf of all plan participants. That holding is manifestly erroneous, as explained further below.

**1. The law is clear that individual participants in defined contribution plans need not bring a § 502(a)(2) claim on behalf of all participants.**

Although § 502(a)(2) requires claims to be brought "on behalf of the plan" for recovery to the plan, *see LaRue*, 552 U.S. at 253 (§ 502(a)(2) claims are brought "on behalf of a plan" to recover losses to the plan); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (same), that does not mean that such claims must always proceed on behalf of all other plan participants in pursuit of plan-wide

relief. *See* Pet. 8–14. Plaintiff's argument to the contrary fails to appreciate, among other things, the distinction between defined benefit and defined contribution plans.

Defined benefit plans "consist of a general pool of assets" from which "fixed periodic payment[s]" are made to all plan participants. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999). Because there is a single pool of assets to fund defined benefits payments to *all participants*, plan participants share a common interest in ensuring that any alleged breach by a plan fiduciary does not undermine the shared pool of assets. As a result, it makes sense that a breach of fiduciary duty claim in that context must be brought on behalf of the entire plan.

In contrast, this case involves a *defined contribution* plan, in which plan participants have individual accounts that accrue "benefits based solely upon the amount contributed to the participant's account." 29 U.S.C. § 1002(34). Because benefits are based on plan assets contained in an individual participant's account, rather than a common pool of assets, *Hughes Aircraft*, 525 U.S. at 439, the Supreme Court has held that § 502(a)(2) permits participants to institute individual actions "on behalf of the plan" for recovery of losses to plan assets in an individual account. *See LaRue*, 552 U.S. at 254–56. In other words, where, as here, a defined contribution plan is involved, a plan participant need not institute a class action or

seek relief beyond the plan losses experienced in his account in order to bring a claim under § 502(a)(2).

The district court concluded that Plaintiff's class waiver was unenforceable based on *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999), in which this Court held that an individual plan participant cannot settle a § 502(a)(2) breach of fiduciary duty claim without the plan's consent. Pet., Ex. B at 7–10. But both *Bowles* and *Russell*, the Supreme Court decision upon which this Court relied in resolving *Bowles*, dealt with *defined benefit* plans. It was error for the district court to rely on those cases in invalidating Plaintiff's waiver.[2]

**2. Litigants can bring § 502(a)(2) claims on behalf of similarly-situated plan participants, but *only* if they can satisfy the preconditions of Rule 23 and proceed as a class action.** *See, e.g.*, *Coan*, 457 F.3d at 259 ("[W]e do not see how an action can be brought in a 'representative capacity on behalf of the plan' if the plaintiff does not take any steps to become a *bona fide* representative of other interested parties. . . . [T]he representative nature of the section 502(a)(2) right of

[2] The Supreme Court expressly disavowed *Russell*'s admonition that fiduciary breach claims under § 502(a)(2) must be brought on behalf of the "plan as a whole," reasoning that, while it applied to *defined benefit* plans, the language "does not apply to defined contribution plans." *LaRue*, 552 U.S. at 256; *see also id.* at 254 ("*Russell*'s emphasis on protecting the 'entire plan' . . . reflects the former landscape of employee benefits plans. That landscape has changed.").

action implies that plan participants must employ procedures to protect effectively the interests they purport to represent.") (affirming dismissal of § 502(a)(2) representative claim for failure to comply with any procedural safeguards); *Fish v. Greatbanc Trust Co.*, 667 F. Supp. 2d 949, 951–52 (N.D. Ill. 2009) (in a § 502(a)(2) claim seeking plan-wide relief, "to permit the action to go forward without the type of protections provided by [Rule 23 or 23.1] or their equivalent would be overly myopic."). Thus, if a litigant does not take such steps or secure procedural protections for plan participants, the case will be adjudicated *as an individual action* with relief limited to losses in the plaintiff's account. *See id.*

**3. Because Plaintiff can bring an individual claim for Plan losses to his individual account, his class waiver does not conflict with § 502(a)(2).** Plaintiff's position is that § 502(a)(2) actions are necessarily collective actions on behalf of all plan participants, such that class action waivers effectively conflict with § 502(a)(2). But following *LaRue*, there is no question that a plan participant can elect to bring an individual action under § 502(a)(2) claim without seeking class treatment. *See* Pet. at 13–14. Thus, there is no conflict between a class action waiver and § 502(a); Plaintiff's waiver in no way precludes him from bringing the type of individual action that statute allows.

Section 502(a)(2) also *permits* a defined contribution plan participant to sue for like injuries in other participants' accounts if he can satisfy Rule 23. But that

puts § 502(a)(2) plaintiffs in no different position than any other plaintiffs bringing any other action. Individual actions can always be aggregated if Rule 23 is satisfied, *see Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), however, that does not mean that prospective litigants may not decide to forego participating in class actions in advance (and in exchange for valuable benefits) by executing a waiver. Certainly, nothing in § 502(a)(2) precludes a plan member from making that choice.

**4. Plaintiff's strained reading of *LaRue* does not withstand scrutiny.** Lacking an answer, Plaintiff offers a strained reading of *LaRue*, arguing that an individual action may only be brought where losses to plan assets are experienced solely in the individual participant's account. Opp. at 8–9. He insists that where, as here, the losses resulting from a purported breach allegedly impact assets in participant accounts other than the plaintiff's, a plan participant "must" proceed on behalf of the entire plan. *Id.*

In support of this contention, Plaintiff cites *Russell*, 473 U.S. at 142–43, in which the Supreme Court held that recovery in a § 502(a)(2) action must "inure[ ] to the plan as a whole." *See id.* at 9. But the Supreme Court in *LaRue* expressly rejected that language in the defined contribution context, *see supra* n. 2. *LaRue* makes clear that an individual participant need not seek relief for the "entire plan" under § 502(a)(2), even where purported breaches impact plan assets beyond a

plaintiff's account. Instead, all a participant must show is that the alleged breach "impair[ed] the value of plan assets in [the] participant's individual account.[3] *LaRue*, 552 U.S. at 256.

Although Plaintiff implies that an individual action in such cases would amount to impermissible individual recovery rather than plan recovery, *see* Opp. at 9–10 (collecting cases holding that recovery under § 502(a)(2) must be on behalf of the plan), his argument misunderstands the nature of defined contribution plans. Because any diminishment to an individual account is necessarily a plan injury, an action seeking recovery of those losses is necessarily "on behalf of the plan," rather than individualized recovery, even if those losses relate only to an individual participant's account. As Justice Thomas explained in his concurrence in *LaRue*:

> Because a defined contribution plan is essentially the sum of its parts, losses attributable to the account of an individual participant are necessarily "losses to the plan" for purposes of § 409(a). Accordingly, when a participant sustains losses to his individual account as a result of a fiduciary breach, the plan's aggregate assets are likewise diminished by the same amount, and § 502(a)(2) permits that participant to recover such losses on behalf of the plan.

*LaRue*, 552 U.S. at 262–63 (Thomas, J., concurring).

[3] Plaintiff's position would always require an individual participant to undertake long and costly class litigation seeking recovery for plan losses experienced by *all participants* to recover any plan losses experienced in his individual account. He offers no authority to support such an extreme conclusion.

## CONCLUSION

Section 502(a)(2) provides that an individual plan participant in a defined contribution plan may bring an action "on behalf of the plan" through *either* an individual action (to recover losses in his individual account) *or* a class action (to recover plan-wide losses). ERISA does not, however, compel a participant to proceed in one form or another. Here, Plaintiff voluntarily agreed to waive his right to participate in any class action in exchange for valuable severance benefits. Enforcing such a waiver would not conflict with any "substantive right" of Plaintiff or the Plan,[4] and it would not undermine ERISA's enforcement scheme, *see* Pet. at 12–14. Plaintiff may still proceed individually, and other participants can proceed on a Plan-wide basis. The district court's conclusion to the contrary—that § 502(a)(2) always compels a participant to proceed on behalf of all plan participants, absent the Plan's waiver of class treatment, *see* Pet. at 10–14—is manifestly erroneous and ignores controlling Supreme Court authority. Immediate appeal is necessary to correct this error.

[4] Because Plaintiff may still proceed in an individual action to recover losses to plan assets in his individual account, any "substantive right" he may have is not affected by the waiver. *Cf. Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310–12 (2013) (rejecting argument that class arbitration waivers prevent "effective vindication" of substantive rights where remedies afforded by statute remain available through individual arbitration).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 5(c) and 32(c)(2) because this brief does not exceed 20 pages, excluding the parts of the brief exempted by Fed. R. App. P. 5(c).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: November 9, 2017

Respectfully submitted,

/s/ Catalina J. Vergara

CATALINA J. VERGARA