No. 17-55550

# United States Court of Appeals for the Ninth Circuit

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*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES IN CASE NO. 2:16-CV-06191-VAP-E, VIRGINIA A. PHILLIPS, CHIEF DISTRICT JUDGE

## BRIEF FOR *AMICUS CURIAE* THE CHARLES SCHWAB CORPORATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR REHEARING *EN BANC*

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*Plaintiffs-Appellees,*

– v. –

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

*Defendants-Appellants.*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, *amicus* the Charles Schwab Corporation states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Charles Schwab Corporation ("Schwab") is one of the leading financial services companies in the United States. It employs nearly 19,000 workers and holds more than $3.4 trillion in client assets. Like many employers, Schwab offers its employees the opportunity to invest their pre-tax earnings into a 401(k) retirement savings plan (the "Plan"). Plan participants choose how much of their earnings to invest in the Plan and allocate those earnings among the Plan's investment options.

Schwab has an interest in this appeal because it is one of the many financial services companies targeted by claims like the one asserted here. *See Dorman v. Charles Schwab Corp.*, No. 18-15281 (9th Cir.).[2] In Schwab's case, a former Plan participant brought a claim under ERISA § 502(a)(2) alleging that Plan fiduciaries failed to act with prudence and loyalty when they included Schwab-affiliated investment funds among the many investment options available to participants.

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[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any other person contributed money to fund the preparation or submission of this brief.

[2] Since 2015, nearly two dozen financial services companies have been sued by their employees for allegedly including imprudent proprietary funds in their company 401(k) plans. *See* Carmen Castro-Pagan, *Employee Benefit Class Settlements Gleaned Over $500M in 2017*, BNA Pens. & Ben. Daily (Jan. 22, 2018), *available at* https://bnanews.bna.com/employee-benefits/employee-benefit-class-settlements-gleaned-over-500m-in-2017.

That same participant had agreed to arbitrate any claim arising out of either his employment or his Plan participation.

Schwab is concerned that the Panel's decision could mean that parties can *never* agree to arbitrate ERISA § 502(a)(2) claims—and thus that the arbitration agreements in Schwab's case would not be enforced. This is a critical issue for Schwab and other employers. Section 502(a)(2) claims have been asserted with increasing frequency in recent years, and they are expensive and time-consuming for companies like Schwab and their employees to litigate. They are thus precisely the type of claim that Congress had in mind when it enacted the Federal Arbitration Act ("FAA").

Schwab submits this brief to explain how the Panel's decision, which effectively invalidates agreements to arbitrate § 502(a)(2) claims, conflicts with Supreme Court and Circuit precedent interpreting the FAA and ERISA. Schwab also seeks to emphasize that the Panel's decision implicates a question of exceptional importance. The arbitrability issue decided by the Panel arises frequently—indeed, it arises in Schwab's appeal pending at this Court—and the Panel's decision imperils not only arbitration agreements covering ERISA claims but also potentially agreements to arbitrate other types of claims brought by a plaintiff in a representative capacity.

Schwab respectfully submits that its brief is desirable and relevant to the disposition of the case because it provides further insight into why rehearing is warranted. *See* Fed. R. App. P. 29. Schwab has the authority to file this brief pursuant to Fed. R. App. P. 29(b)(2) and Ninth Circuit Local Rule 29-2(a) if the Court grants its accompanying motion for leave.

## SUMMARY OF THE ARGUMENT

Rehearing is warranted because the Panel's holding conflicts with precedent from the Supreme Court and this Court. The Panel held, in effect, that employers and employees can never agree to arbitrate ERISA § 502(a)(2) claims without the plan's consent. That holding contradicts Supreme Court precedent concerning arbitrability—including *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which three months ago overturned this Court's decision in *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016). *Epic* held that arbitration agreements are always enforceable except in two narrow circumstances, neither of which is present here. The Panel effectively created a third exception to arbitrability in cases where a party to an arbitration agreement brings a claim in a representative capacity. *Epic*, however, does not allow for additional exceptions to the rule that courts must enforce arbitration agreements as they are written.

The Panel compounded its error by holding that an ERISA § 502(a)(2) claim brought by a participant in a defined contribution plan belongs to the plan, not the

participant—a conclusion that squarely contradicts the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), and this Court's rulings in *Comer v. Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006), and *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995).

Rehearing is further warranted because the Panel's decision implicates a question of exceptional importance. The Panel's decision imperils arbitration agreements that Schwab and many other companies rely on to limit the costs of offering its employees the opportunity to participate in a retirement plan. Under the Panel's ruling, sponsors of employee retirement plans would be forced to defend against class action § 502(a) claims—and potentially other types of claims—in court despite having agreed to arbitration with their employees. The recurring nature of the question raised in this appeal is evidenced by the fact that a similar question arises in an appeal brought by Schwab currently pending at this Court.

## ARGUMENT

### I. THE PANEL'S DECISION CONFLICTS WITH PRECEDENT FROM THE SUPREME COURT AND THIS CIRCUIT.

#### A. The Decision Conflicts with Precedent Requiring the Enforcement of Arbitration Agreements.

Appellee Allen Munro agreed to arbitrate "all" claims that he might have against his employer, including claims for violations of federal law. Slip op. at

6.[3] Yet when Munro brought a claim against his employer under ERISA § 502(a)(2), the Panel refused to order arbitration. In the Panel's view, Munro's agreement to arbitrate "all" of his claims against his employer did not encompass his ERISA § 502(a)(2) claim because such a claim is supposedly brought on behalf of a plan and thus belongs to the plan, not the plaintiff who asserts it. In effect, the Panel handed down a rule that employers and employees can *never* agree to arbitrate claims brought by an employee under ERISA § 502(a)(2) without the plan's consent.[4] The Panel further suggested that it likewise would not enforce agreements to arbitrate other types of claims brought in a representative capacity—including *qui tam* claims—because they, too, supposedly do not really belong to the plaintiff who asserts them.

The Panel's holding cannot be squared with Supreme Court precedent. In *Epic*, the Court held that arbitration agreements must be enforced as written except for two narrow exceptions: (1) if the agreement is invalid on a ground that would render any contract unenforceable; or (2) if Congress evinced a "clear and manifest" intent to preclude arbitration in another statute. *Epic*, 138 S. Ct. at

[3] For ease of exposition, this brief focuses on the claim brought by Munro. The same analysis applies to the other plaintiffs-appellees.

[4] The question of whether the plan itself can agree to arbitration was not raised in the Panel's decision.

1621–24; *see also Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (explaining that "arbitration is a matter of contract" and that the court's job is to "'rigorously enforce' arbitration agreements according to their terms"). The Panel effectively created a third exception to the enforceability of arbitration agreements for when a claim is brought in a representative capacity. In the Panel's view, even if a plaintiff has agreed to arbitrate "all" of his claims, that agreement cannot be enforced when the plaintiff asserts a claim brought on a derivative basis. That exception has no footing in the FAA or any other statute, and it directly contradicts the Supreme Court's mandate that arbitration agreements be enforced except in the two narrow situations identified in *Epic*. Munro agreed to arbitrate "all" of his claims, and the Panel should have ordered him to arbitrate the § 502(a)(2) claim that he asserts here.

To be sure, the Panel did not say that it was refusing to enforce Munro's arbitration agreement. Instead, it read the agreement narrowly to carve out claims brought by Munro in a representative capacity. But that is a distinction without a difference. By construing an agreement to arbitrate "all" claims to exclude ERISA § 502(a) claims (and potentially other claims, such as *qui tam* claims), the Panel

declined to enforce Munro's agreement as written, in violation of *Epic* and related decisions from the Supreme Court.[5]

### B. The Decision Conflicts with Precedent Concerning ERISA.

The Panel committed a second fundamental error by concluding that Munro's § 502(a)(2) claim belongs to the plan, not Munro himself, and thus that his claim is a representative claim. That holding creates a further conflict with governing law. Even if the Panel were correct that Munro's arbitration agreement excludes claims brought on behalf of others, his § 502(a)(2) claim is an individualized claim that belongs to him under governing Supreme Court and Ninth Circuit precedent.

By its terms, § 502(a)(2) authorizes a plan participant to bring a civil action for the relief listed in ERISA § 409. 29 U.S.C. § 1132(a)(2). Section 409, in turn, states that any fiduciary who breaches a duty shall be liable for any resulting losses suffered by the plan. 29 U.S.C. § 1109(a). Together, those provisions authorize an *individual plan participant* to sue so long as he seeks relief to cover losses of plan assets. A plan itself is not authorized to bring a § 502(a)(2) claim under the statute.

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[5] The Panel's decision also conflicts with decisions from district courts, which have required plaintiffs to arbitrate their ERISA § 502(a)(2) claims. *See, e.g.*, *Cooper v. Ruane Cunniff & Goldfarb, Inc.*, No. 16-cv-1900, 2017 WL 3524682, at *2–8 (S.D.N.Y. Aug. 15, 2017); *Ducharme v. DST Sys., Inc.*, No. 17-cv-00022, ECF No. 57, at 2 (W.D. Mo. June 23, 2017).

*Bowles v. Reade,* 198 F.3d 752, 761 (9th Cir. 1999) (explaining that an ERISA plan "itself does not have standing to sue under 29 U.S.C. § 1132(a), which limits eligibility for civil enforcement of ERISA to ERISA plan participants, beneficiaries, and fiduciaries, and the Secretary of Labor").

Accordingly, this Court has twice effectively held that ERISA § 502(a)(2) claims belong to the individual asserting the claim—not, as the Panel held, the plan whose losses are the subject of the claim. In *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995), the issue was whether the statute of limitations began to run on a § 502(a)(2) claim when the plan learned about the claim or when the plaintiff asserting the § 502(a)(2) claim learned about it. *Id.* at 731–32. The Court held that the knowledge of the individual plaintiff controlled because "[t]he plaintiff in such actions [] is not the plan itself but the fiduciary, beneficiary, or participant bringing suit." *Id.* at 732. Similarly, in *Comer*, this Court held that an ERISA § 502(a)(2) claimant "sues in a non-derivative capacity" and that "[e]ven though money recovered on the ERISA claim would go to the plan, . . . the cause of action belonged to the individual plaintiff." 436 F.3d at 1103. The holdings in *Landwehr* and *Comer* cannot be squared with the Panel's holding that ERISA § 502(a)(2) claims belong to a plan and not to the individual plaintiff who asserts the claim.

Furthermore, the Panel's holding that a § 502(a)(2) claim belongs to the plan cannot be reconciled with the Supreme Court's decision in *LaRue*. There, the

Supreme Court recognized a distinction between defined benefit ERISA plans (which used to be the norm) and defined contribution ERISA plans, which "dominate the retirement plan scene today." *LaRue*, 552 U.S. at 255. In a defined benefit plan, participants receive fixed benefit payments from a single trust. *Id.* In that arrangement, the only way that plan fiduciaries can harm a participant is by taking actions that threaten the solvency of the entire trust, leaving it unable to make the required benefit payments. *Id.* That harm would necessarily be borne by every plan participant because if the trust becomes insolvent, no participant would receive his or her full benefits.

Defined contribution plans are completely different. In those plans, each participant holds plan assets in an individual account and invests those assets in different ways. *Id.* at 255–56; *see also* 29 U.S.C. § 1002(34) (defining "defined contribution plan"). In that arrangement, a breach of fiduciary duty typically causes individualized harm. *LaRue*, 552 U.S. at 255–56. For instance, a fiduciary may breach a duty by including an imprudent investment fund among the menu of plan investment options. If only two participants allocate contributions to that fund, however, only those two participants would be harmed by the fiduciary breach. Other participants are not harmed because they did not invest in the fund at issue. And the two participants would be harmed to different degrees depending on the amount of money they invested and lost in the imprudent fund.

Recognizing that defined contribution plans are different from defined benefit plans, *LaRue* held that a participant in a defined contribution plan need not demonstrate harm to the entire plan to bring an ERISA § 502(a)(2) claim. 552 U.S. at 256. Instead, the participant need only show that the fiduciary breaches "impair the value of plan assets in a participant's individual account." *Id.* *LaRue* thus stands for the proposition that a defined contribution plan participant brings a § 502(a)(2) claim for individualized losses to his own account, not for losses that the plan as a whole may have sustained. *Id.* Indeed, the plaintiff in *LaRue* sought relief for a mistake that affected only him and his account—which is proof positive that in a defined contribution plan, a § 502(a)(2) claim is individualized.

The Panel's holding that Munro's § 502(a)(2) claim belongs to the plan cannot be reconciled with *LaRue*. Like the plan in *LaRue*, the plan here is a defined contribution plan. Moreover, like the plaintiff in *LaRue*, Munro seeks to recover losses for harm caused to his individual account balance—that is, "recovery for fiduciary breaches that impair the value of plan assets in [his] individual account." *LaRue*, 552 U.S. at 256. Accordingly, like the plaintiff in *LaRue*, Munro's claim belongs to him—not the plan—because he is seeking compensation for losses that he allegedly suffered to his own individual account.[6]

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[6] The Panel incorrectly analogized Munro's § 502(a)(2) claim to a *qui tam* claim. Slip op. 10–13. In *qui tam* cases, however, the alleged loss is to the government, not the individual bringing the claim. In defined contribution plans, by contrast, a

Granted, Munro also seeks recovery for harm allegedly inflicted on the individualized accounts of other plan members. But that does not mean that he is seeking relief on behalf of the plan or that his claim belongs to the plan. To the contrary, Munro is seeking relief on his own behalf and as a representative of other plan participants whose accounts were allegedly harmed. In that way, he is no differently situated from a Rule 23 named plaintiff who seeks to bring a claim on behalf of himself and as the representative of a Rule 23 class. In both cases, the plaintiff seeks relief for himself and a larger group of plaintiffs who have also been harmed. It is well-settled that a putative Rule 23 class representative can agree to arbitrate the claim he asserts. *See, e.g.*, *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1074 (9th Cir. 2013) (enforcing arbitration agreement and vacating order certifying class action because the class representative signed an arbitration agreement that precluded class litigation). There is thus no principled reason why the Panel should have relieved Munro—who brings a § 502(a)(2) claim on his own behalf and on behalf of a larger class of participants—from his agreement to arbitrate all employment-related claims, which would include his § 502(a)(2) claim.

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§ 502(a)(2) claim seeks relief for losses suffered by the individual bringing the claim. *See* pages 8–10, *supra*.

Other courts have recognized the parallels between a Rule 23 class representative and a participant in a defined contribution plan who seeks plan-wide relief under ERISA § 502(a)(2). In *Coan v. Kaufman*, for example, the Second Circuit held that a participant in a defined contribution plan bringing a § 502(a)(2) claim on behalf of himself and other participants needs to show that he adequately represents the interests of the other plan participants who have allegedly been harmed. 457 F.3d 250, 259 (2d Cir. 2006). Typically, a § 502(a)(2) plaintiff would satisfy that burden by establishing the elements of Rule 23 or by taking "adequate steps under the circumstances properly to act in a 'representative capacity on behalf of the plan.'" *Id.* at 261. Indeed, Munro himself recognized that his claim is indistinguishable from a class action by alleging that he is a sufficient representative for other plan participants because he satisfies the Rule 23 requirements. He should therefore be treated as any other putative Rule 23 class representative—that is, his agreement to arbitrate his claim should be enforced.

In support of its decision, the Panel relied on *Bowles*, which holds that an individual plaintiff cannot settle an ERISA § 502(a)(2) claim without the plan's consent. 198 F.3d at 760. The Panel reasoned that if a plaintiff cannot settle a § 502(a)(2) claim, the claim must not belong to the plaintiff. Slip. Op. at 10–11. *Bowles* is inapposite, however, because it involved a *defined benefit plan*, and thus the § 502(a)(2) claim there necessarily sought relief on behalf of the plan as a

whole. Under those facts, where no individual accounts exist, it makes sense that a single plaintiff could not bind the plan by settling a claim for plan-wide relief. In a defined contribution plan like here, however, a plaintiff should be permitted to settle a § 502(a)(2) claim because the claim seeks individualized relief. The law is admittedly jumbled concerning whether a plaintiff can release a § 502(a)(2) claim involving a defined contribution plan. *Compare Halldorson v. Wilmington Trust Ret. & Institutional Servs. Co*., 182 F. Supp. 3d 531 (E.D. Va. 2016) (holding that a release in plaintiff's separation agreement barred his ERISA § 502(a)(2) claims in defined contribution plan) *with In re JDS Uniphase Corp. ERISA Litig*., No. 03-04743, 2006 U.S. Dist. LEXIS 68271 (N.D. Cal. Sep. 11, 2006) (holding that plaintiff's severance agreement releases did *not* bar § 502(a)(2) claims asserted in defined contribution plan). Rehearing would thus allow the Court to clarify the distinction between § 502(a)(2) claims in defined benefit and defined contribution plans and thereby resolve the confusion in the case law surrounding the arbitrability of § 502(a)(2) and similar claims and the circumstances under which such claims can be released by the plaintiff asserting them.

* * * * *

At bottom, *LaRue* dictates that Munro's § 502(a)(2) claim belongs to Munro because it is a claim for individualized harm to his plan account. Even if Munro seeks to act in a representative capacity for other plan participants, he is not

precluded from agreeing to arbitrate his § 502(a)(2) claim any more than a putative Rule 23 class representative is precluded from agreeing to arbitrate. Munro's agreement to arbitrate "all" of his claims therefore must be enforced. The Panel's failure to enforce his arbitration agreement runs directly counter to Supreme Court precedent requiring the enforcement of arbitration agreements except in narrow circumstances not present here.

## II. THIS APPEAL CONCERNS MATTERS OF EXCEPTIONAL IMPORTANCE.

Rehearing is further warranted because this appeal implicates questions of exceptional importance. *See* Fed. R. App. P. 35(a)(2). Although the Panel's decision on its face purports merely to construe the terms of the arbitration agreement before it, the holding has potentially far-reaching implications on ERISA plans and arbitrability in general.

Schwab is one of countless employers that have agreed with their employees to arbitrate all ERISA claims. The Panel's decision could effectively invalidate all of those arbitration agreements with respect to § 502(a)(2) claims. That is to say, under the Panel's ruling, parties might *never* be able to agree to arbitrate § 502(a)(2) claims. Those arbitration agreements are critical both to ERISA plans and participants, however. Section 502(a)(2) claims constitute a significant percentage of ERISA litigation, and litigating those claims in court is expensive and time-consuming. The effect of the Panel's ruling on Schwab and nearly every

other company that sponsors an ERISA plan could therefore be significant because it could sweep into court claims that the parties agreed to arbitrate.

Schwab is living proof that the Panel's decision will reach far beyond this one case. Schwab's appeal pending before this Court raises a similar question of whether an employee's agreement to arbitrate ERISA § 502(a)(2) claims is enforceable. If the Panel's decision stands, employers may not be able to agree with their employees to arbitrate such claims without the plan's consent.

The Panel's decision also raises important questions concerning arbitrability in general. In addition to holding that employers and employees cannot agree to arbitrate ERISA § 502(a)(2) claims without the plan's consent, the Panel suggested that *qui tam* claims and other claims brought in a representative capacity likewise cannot be the subject of an agreement to arbitrate. By that logic, the Panel's holding potentially limits the arbitrability of any claim brought in a representative capacity—including shareholder derivative suits, claims brought under California's Labor Code Private Attorneys General Act (PAGA), and even Rule 23 class actions. The import of the Panel's decision is thus not ERISA-specific; it has potentially huge ramifications for arbitration in general.

## CONCLUSION

For the foregoing reasons, the petition for rehearing or rehearing *en banc* should be granted.

August 17, 2018

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Signature of Attorney or Unrepresented Litigant: /s/ Howard Shapiro

Date: Aug 17, 2018

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

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# CERTICATE OF SERVICE

I hereby certify that on August 17, 2018, I electronically filed the foregoing Brief for Amicus Curiae The Charles Schwab Corporation in Support of Appellants' Petition for Rehearing or Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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 17, 2018

/s/ Julian Hadiz
Julian Hadiz