United States Court of Appeals

for the

Seventh Circuit

Case Nos. 26-2190, 26-2191

MATTHEW DALY,

Plaintiff-Appellee/Cross-Appellant,

– v. –

WEST MONROE PARTNERS, INC., *et al.*,

Defendants-Appellants/Cross-Appellees.

ON APPEALS FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, IN NO. 1:21-CV-06805, HONORABLE JOHN ROBERT BLAKEY, JUDGE PRESIDING

RESPONSE AND OPENING BRIEF OF PLAINTIFF-APPELLEE-CROSS-APPELLANT MATTHEW DALY

ERICA ROBERTS
SANFORD HEISLER SHARP MCKNIGHT, LLP
700 Pennsylvania Avenue SE, Suite 300
Washington, DC 20003
(202) 499-5200

KEVIN SHARP
SANFORD HEISLER SHARP MCKNIGHT, LLP
611 Commerce Street, Suite 3100
Nashville, Tennessee 37203
(615) 434-7000

MATTHEW J. SINGER
MATT SINGER LAW, LLC
77 West Wacker Drive, Suite 4500
Chicago, Illinois 60601
(312) 248-9123

CHARLES H. FIELD, JR.
MICHELLE WASSERMAN
MYOUNGHEE CHOUNG
SANFORD HEISLER SHARP MCKNIGHT, LLP
7911 Herschel Avenue, Suite 300
La Jolla, California 92037
(619) 577-4253

ALBERT POWELL
SANFORD HEISLER SHARP MCKNIGHT, LLP
17 State Street, Suite 3700
New York, New York 10004
(646) 402-5650

Attorneys for Plaintiff-Appellee-Cross-Appellant Matthew Daly

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Appellate Court No: 26-2190 and 26-2191 (Revised)

Short Caption: Daly v. West Monroe Partners, Inc

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N/A

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Charles Field Date: 06/09/2026

Attorney's Printed Name: Charles Field

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐ (Revised)

Address: 7911 Herschel Avenue, Suite 300

La Jolla, CA 92037

Phone Number: (619) 577-4252 Fax Number: (646) 402-5651

E-Mail Address: cfield@sanfordheisler.com

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Attorney's Signature: /s/ Erica Roberts Date: 06/09/2026

Attorney's Printed Name: Erica Roberts

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 700 Pennsylvania Ave SE, Suite 300

Washington, DC 20003

Phone Number: 202-499-5233 Fax Number: 202-499-5199

E-Mail Address: eroberts@sanfordheisler.com

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Attorney's Signature: /s/ Myounghee Choung Date: 06/10/2026

Attorney's Printed Name: Myounghee Choung

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 7911 Herschel Avenue, Suite 300

La Jolla, CA 92037

Phone Number: (619) 859-6801 Fax Number: (646) 402-5651

E-Mail Address: dchoung@sanfordheisler.com

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N/A

Attorney's Signature: /s/ Albert Powell Date: 06/10/2026

Attorney's Printed Name: Albert Powell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 17 State Street, 37th Floor

New York, NY 10004

Phone Number: (646) 402-5648 Fax Number: (646) 402-5651

E-Mail Address: apowell@sanfordheisler.com

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n/a

Attorney's Signature: /s/ Matthew J. Singer Date: 6/9/2026

Attorney's Printed Name: Matthew J. Singer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 77 W. Wacker Dr., Suite 4500

Chicago, IL 60601

Phone Number: (312) 248-9123 Fax Number:

E-Mail Address: matt@mattsingerlaw.com

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Attorney's Signature: /s/ Kevin Sharp Date: 7/17/2026

Attorney's Printed Name: Kevin Sharp

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 611 Commerce Street, Suite 3100

Nashville, TN

Phone Number: (619) 434-7001 Fax Number: (646) 434-7020

E-Mail Address: ksharp@sanfordheisler.com

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Attorney's Signature: /s Michelle Wasserman Date: 8/13/2026

Attorney's Printed Name: Michelle Wasserman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 7911 Herschel Avenue, Suite 300

La Jolla, CA 92037

Phone Number: (619) 914-2470 Fax Number: (646) 402-5651

E-Mail Address: mwasserman@sanfordheisler.com

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JURISDICTIONAL STATEMENT

This civil action arises under 29 U.S.C. § 1132(a)(2) and (3). The district court has subject matter jurisdiction under 29 U.S.C. § 1132(e)(1), (f) and 28 U.S.C. § 1331 because the complaint alleges violations of ERISA, 29 U.S.C. § 1001 et seq.

This Court has jurisdiction over the interlocutory appeal under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). On March 27, 2026, the District Court entered an interlocutory order granting in part and denying in part class certification under Rule 23(b)(1). On April 10, 2026, Plaintiff timely filed a petition for permission to appeal the interlocutory order under Rule 23(f), as did Defendants. This Court granted both petitions on June 1, 2026.

INTRODUCTION

In September 2021, Defendant West Monroe, Inc. ("West Monroe") knowingly and intentionally shortchanged 146 former employees by approximately $29,000,000 when it directed the West Monroe Employee Stock Ownership Plan (the "Plan") to cash-out the shares of West Monroe

stock that the Plan held in trust for them. At the time they did so, the Defendant-fiduciaries knew that this value was well below fair market value; so low that one West Monroe Board member was "stunned" by it and called the valuation "ridiculous by any measure[.]" Appx. 117.

A few weeks later and after months of secret negotiations, West Monroe agreed to sell a non-controlling interest for more than three times the value that the 146 former participants received. The Board member's earlier assessment had been correct. It is inconceivable that West Monroe's value increased threefold in such a short period of time. As a result of their breach, the West Monroe Defendants personally benefitted from the transaction. This lawsuit followed, seeking to rectify West Monroe's breach of fiduciary trust under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA").

Plaintiff asked the District Court to certify a class of "All participants in the Plan who received a distribution in an amount determined based on the 2020 Valuation of Company stock." Appx. 119. In line with prior Supreme Court and Seventh Circuit precedent, the District Court

conducted a rigorous factual analysis and correctly exercised its discretion in certifying the class of 113 participants under Federal Rule of Civil Procedure 23(b)(1). Yet the District Court erred in excluding 33 participants whose severance agreement waivers force them into bringing individual suits against individual defendants and therefore prevent them from effectively vindicating their statutory rights under ERISA.

The Plan deserves to be made whole and have all 146 proposed class members included in the certified class. This Court should affirm the District Court's order certifying the class in part, and reverse in part to allow the additional 33 proposed class members to join the class.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly held, in line with Supreme Court and Seventh Circuit precedent, that ERISA class certification does not require a threshold showing of plan-wide aggregate diminishment of assets?

2. Whether the District Court, after conducting a rigorous analysis of the facts of this case, correctly exercised its discretion in certifying 113 class members under Fed. R. Civ. P. 23(b)(1)?
3. Whether the District Court erred in excluding 33 proposed class members with waivers in their severance agreements that prevented participation in any "multi-party" action, and therefore prevented those class members from pursing ERISA statutory remedies against all breaching fiduciaries, contrary to the effective vindication doctrine?

STATEMENT OF THE CASE

I. Factual Background

Plaintiff Matthew Daly brought this action on behalf of the West Monroe Employee Stock Ownership Plan (the "Plan") and 145 other former employees of consulting firm West Monroe Partners, Inc. ("West Monroe" or the "Company"). Appx. 1. The Plan was a defined contribution plan under ERISA § 3(2), 29 U.S.C. § 1002(2). *Id.* It invested in Company stock, which it held in trust for Plan participants—current and former employees,

including the proposed class. *Id.* Defendant Argent Trust Company, as trustee, conducted annual valuations of the Company stock held in the Plan under a mandate that it calculate the stock at fair market value. *Id*. at 2, 71. Defendant West Monroe then used these valuations to cash out the shares of departing employees. *Id*. at 2.[1]

The proposed class of 146 former employees separated from the Company in 2020. *Id*. In April 2021, Defendant Argent completed an annual valuation of the Company stock held by the Plan ("2020 Valuation"). Defendants subsequently announced that Company stock was worth $515.18 per share as of December 31, 2020. *Id.* at 10.

In summer 2021, Plaintiff and the proposed class elected to take a distribution from the Plan, after pressure from the Company to do so. *Id*. at 2, 12. Collectively, these participants in the Plan held a vested beneficial interest in approximately 27,960 shares of Company stock. *Id*. at 2. The Company used the $515.18 valuation to cash out the proposed class,

[1] All Defendants in this matter are hereinafter referred to collectively as "Defendants."

redeeming their shares for $515.18 per share in September 2021. *Id*. This valuation was so low that it "stunned" a West Monroe Board member, who called the valuation "ridiculous by any measure[.]" Appx. 117.

Following months of negotiations, on October 5, 2021, West Monroe announced plans to sell 50% of the Company to MSD Partners ("the MSD Transaction"), a private equity firm, for $1,616 per share—more than triple the price paid to members of the proposed class merely three weeks earlier. *Id*. at 2-3. West Monroe finalized the sale in November 2021. *Id.* at 3. That same month, West Monroe terminated the Plan and cashed out its remaining participants (including some of the Defendant-fiduciaries) at $1,616 per share. *Id.* The Plan also held approximately 564,000 unallocated shares, which West Monroe distributed to the remaining participants. *Id*. $50 million remains in the Plan in an interest-bearing account. *Id.*

The West Monroe Defendants admit that "they did not make disclosures to Plaintiff regarding the sale, nor the results of any valuation that occurred after the 2020 Valuation, nor any offer made by a third party to buy shares of Company stock, nor the fact that the fair market value of

Company stock exceeded the 2020 Valuation." *Id*. (internal quotation marks omitted). They also conceded that "if Class members did not elect distributions and remained invested in the Plan, they were likely to receive an amount substantially higher than the $515.18 per share distributed in September 2021." *Id.* In other words, the West Monroe Defendants, fiduciaries to Plaintiff and the proposed class, admit that they did not tell Plaintiff or the proposed class about the pending sale transaction, nor that the market value of Company stock was roughly triple the price they received. *Id.* In short, Defendants cheated Plaintiff and the proposed class out of the true value of their hard-earned retirement savings and personally benefitted by reselling their stock at a premium. *See id.* at 72-73.

II. Procedural History

Plaintiff filed this lawsuit in December 2021 seeking redress for Defendants' fiduciary breaches and violations of ERISA. Appx. 40. Plaintiff's Amended Complaint alleged that Defendants (i) failed to conduct a prudent valuation of the stock in 2020, (ii) failed to ensure that participants received fair market value for the stock held in their Plan

accounts, and (iii) failed to timely disclose facts material to beneficiaries' interests—including the likely consummation of the MSD Transaction at more than three times the price per share that the fiduciaries intended to pay. *Id*. at 3-4. To remedy these alleged "breaches of fiduciary duties and prohibited transactions, Plaintiff [sought] to bring this action . . . on behalf of the Plan under ERISA § 502" as a representative of the affected class of 146 participants, and on behalf of the Plan. *Id*. at 4. The proposed class was narrowly defined to include only those 146 Plan participants whose shares were redeemed at the 2020 valuation of $515.18 per share. *Id*.

On March 27, 2026, the District Court certified a 113-person class under Rule 23(b)(1) of "[a]ll participants in the Plan who received a distribution in an amount determined based on the 2020 Valuation of Company stock who did not sign a class action waiver" (the "Class"). *Id*. at 33. The District Court's decision excluded 33 proposed class members who signed severance agreements that included a waiver that putatively waived "any right or ability to be a class or collective action representative or to otherwise participate in any putative or certified class, collective or

multi-party action or proceeding based on such a claim in which the Company . . . is a party." *Id*. at 27.

On April 10, 2026, Plaintiff and Defendants separately filed petitions for review under Rule 23(f). Defendants seek review of the District Court's decision to certify the Class under Rule 23(b)(1), and Plaintiff seeks to expand the Class to encompass the 33 excluded Plan participants. The Court granted both petitions.

SUMMARY OF THE ARGUMENT

The District Court properly exercised its discretion in certifying 113 members of the proposed class under Fed. R. Civ. P. 23(b)(1) but erred in excluding 33 additional proposed class members whose severance agreements contained broadly worded waivers that have the effect of precluding them from vindicating their statutory rights under ERISA against all the breaching Defendants. This Court should affirm the District Court's certification of the 113-member class and reverse as to the excluded 33 proposed class members.

First, contrary to Defendants' claim, this Court does not require a threshold showing of plan-wide aggregate diminishment of assets for ERISA class certification. *Cf.* AOB 14-15.[2] As the Supreme Court recognized in *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 (2008), "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen" of ERISA. Moreover, this Court has explicitly approved of ERISA classes composed of a subset of plan participants. *See Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 812-14 (7th Cir. 2013). Defendants' argument, taken to its logical conclusion would allow an ERISA plan fiduciary to steal from one set of beneficiaries and give those assets to another set of beneficiaries and avoid liability for their fiduciary breach. But "picking and choosing among beneficiaries" is "in violation of the traditional duty imposed by trust law of impartiality among beneficiaries."

[2] "AOB" refers to Appellant's Opening Brief.

Summers v. State St. Bank & Tr. Co., 104 F.3d 105, 108 (7th Cir. 1997). This Court should reject Defendants' attempt to read in an additional threshold requirement where none exists.

Second, this Court should affirm the District Court's certification of the 113-member class. The District Court conducted a rigorous analysis of the facts of this case and concluded that the proposed class met the elements of Rule 23(b)(1) because individual adjudications would subject Defendants to incompatible standards of conduct, as required by Rule 23(b)(1)(A) and would be dispositive of the claims of other members not parties to the individual adjudications as required by Rule 23(b)(1)(B). This Court should reject Defendants' reliance on *Trauernicht v. Genworth Fin. Inc.*, 169 F.4th 459 (4th Cir. 2026). *Trauernicht* is an out-of-circuit case, distinguishable because the Fourth Circuit based its ruling on a lack of commonality where some individuals included in the class had not been injured. *Id*. at 463. *Trauernicht* is also at odds with the majority of Circuits that have held that claims by a plan beneficiary under section 502(a)(2) of ERISA for relief under section 409(a) of ERISA are representative in nature,

on behalf of the plan, rather than individualized claims for monetary damages. *See, e.g., Cedeno v. Sasson*, 100 F.4th 386, 403 (2d Cir. 2024). This Court should reject Defendants' broad claim that no ERISA class action can ever be certified under Rule 23(b)(1). Because the facts of this case properly fit within both sections of Rule 23(b)(1), this Court should affirm the District Court's exercise of its discretion in certifying the class.

Finally, this Court should reverse the District Court's decision excluding 33 proposed class members who signed class action waivers as part of severance agreements with the Company. Where a legal provision works as a prospective waiver of a party's right to pursue statutory remedies, that provision may be invalidated as a matter of law under the effective vindication doctrine. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013). Yet, the District Court held that the effective vindication doctrine did not apply, noting that the 33 proposed class members "may seek remedies for their individualized harms resulting from the alleged injury to the Plan." Appx. 33 n.9. However, the waiver in

this case goes beyond that, and adversely affects the remedies available to the Plan. *See Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 621 (7th Cir. 2021). The waiver prevents the 33 affected proposed class members from participating in any "multi-party" action or proceeding, forcing the affected beneficiaries into bringing separate individual suits against no fewer than four separate individual defendants. Because ERISA actions are fundamentally representative in nature, requiring the claims to be brought solely in an individual capacity "is to prohibit them altogether." *See Duke v. Luxottica U.S. Holdings Corp.*, 167 F.4th 16, 30 (2d Cir. 2026). The language further prevents any of the proposed class members from bringing suit against the Plan's multiple breaching fiduciaries and effectively prevents Plaintiff Matthew Daly from recovering on behalf of the Plan what it is due under ERISA §409(a). In short, this provision is unenforceable because "what the statute permits, the [waiver] precludes." *Smith*, 13 F.4th at 621. The Court should reverse the District Court's exclusion of the 33 proposed class members and allow the entire class to proceed.

STATUTORY BACKGROUND

ERISA establishes minimum standards for retirement plans in the private sector. Through ERISA, Congress sought to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by imposing disclosure requirements and standards of fiduciary conduct onto plan administrators and fiduciaries. 29 U.S.C. § 1001(b). Congress created remedies to enforce these protections, including § 502(a)(2), which allows a plan participant or beneficiary to bring a civil action "for appropriate relief under [§ 409][.]" 29 U.S.C. § 1132(a)(2) (citing 29 U.S.C. § 1109).[3] This relief includes that each breaching fiduciary "make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary[.]" § 1109(a). That is, under § 502(a)(2), a plan participant may pursue each fiduciary to vindicate injuries to the plan on behalf of the plan. *See, e.g.*, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985).

[3] Section 502(a)(2) of ERISA is codified in 29 U.S.C. § 1132(a)(2). Section 409(a) of ERISA is codified in 29 U.S.C. § 1109(a).

As the Supreme Court has recognized, this injury need not affect the entire plan, but rather ERISA §409(a) reaches even harms at the individual account level. *LaRue*, 552 U.S. at 256. ERISA claims are nonetheless always representative in nature, on behalf of the plan, and any remedies flow to the plan. *See, e.g., Cedeno,* 100 F.4th at 403 ; *Pover v. Cap. Grp. Cos., Inc.*, --- F.4th ---, No. 24-5298, 2026 WL 2196257, at *7 (9th Cir. July 30, 2026).

ARGUMENT

I. Standard of Review

This Court reviews a district court's grant of class certification for an abuse of discretion. *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 602–03 (7th Cir. 2020); *see also Abbott*, 725 at 809. (citation omitted). A district court's factual findings are reviewed for clear error. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). This Court's "review of a district court's class certification decision is deferential," and this Court gives the "district court considerable leeway to exercise its discretion unless it commits legal error or makes clearly erroneous factual findings." *Svoboda v. Amazon.com Inc.*, 168 F.4th 956, 962 (7th Cir. 2026).

Only pure legal questions at the class certification stage require the more rigorous de novo standard. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 340 (7th Cir.1997); *see Spano v. The Boeing Co.*, 633 F.3d 574, 582 (7th Cir. 2011) (reviewing ERISA class certification for abuse of discretion); *Abbott*, 725 F.3d at 809 (same).

II. The District Court Used the Correct Standard to Analyze the Proposed Class

The District Court applied the correct standard and correctly exercised its discretion in certifying the class of 113 individual members who were participants in the Plan and received a distribution in an amount determined based on the 2020 Valuation of Company stock. As the District Court correctly held, there is no threshold requirement that the entire plan suffer diminished assets before a plaintiff can bring an ERISA class action. Appx. 18. Where, as here, the plan at issue is a defined contribution plan, the Supreme Court and this Court have recognized a cognizable injury to the plan, whether the fiduciary breach and attendant loss affect one or multiple accounts. *LaRue*, 552 U.S. at 256 ("[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only

to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409."); *Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) (noting that *LaRue* "holds that § 502(a)(2), and thus §409(a), may be used by the beneficiary of a defined-contribution account that suffers a loss, even though other participants are uninjured by the acts said to constitute a breach of fiduciary duty."). The fact that this is a class action does not change this inquiry. In *Abbott*, a case that expanded upon and explained this Court's previous decision in *Spano*, this Court squarely held that so long as the class is properly defined, class treatment is appropriate for ERISA breach of fiduciary duty claims. 725 F.3d at 813-14. Defendants do not challenge the class definition; this Court may therefore reject their attempt to read in additional threshold requirements to the ERISA statute where there are none.

A. Plan-Wide Diminishment of Assets Is Not Required in ERISA Section 502(a)(2) Actions

Under ERISA, a plan participant or beneficiary may bring a civil action against "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon

fiduciaries[.]" 29 U.S.C. § 1109(a); *see also* § 1132(a)(2). Where a fiduciary breaches any of those duties, that fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach[.]" 29 U.S.C. § 1109(a). The plain statutory language therefore merely requires that a plaintiff (a plan participant or beneficiary) allege a breach of fiduciary duty by each or any fiduciary and some type of plan loss. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2).

1. A Plan Participant May Bring Suit Whether the Breach Affected Plan Assets in a Single or Multiple Accounts

The Supreme Court has found the requisite plan loss, in the defined contribution context, where that loss was confined to a single account. *See LaRue*, 552 U.S. at 255-56. In *LaRue*, the plaintiff alleged that plan fiduciaries had failed to make certain changes to the investments in his individual 401(k) account as he directed, thereby depleting both plan interests and his interest in the plan. *Id.* at 250-51. The Supreme Court held that in the defined contribution plan context, where participants have individual accounts, "fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would

otherwise receive." *Id.* at 255-56. Indeed, "[w]hether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, *or only to persons tied to particular individual accounts*, it creates the kind of harms that concerned the draftsmen of §409." *Id.* at 256 (emphasis added). The Supreme Court concluded that § 502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* The Supreme Court explicitly noted in *LaRue* that the harm to an individual account contemplated by § 502(a)(2) may include "appropriate claims for lost profits." *Id.* at 253 n.4 (citation modified).

Seventh Circuit precedent is in accord. In *Rogers*, this Court similarly analyzed a defined contribution plan where each participant exercised some control over the investments in their individual account. 521 F.3d at 703. There, the plaintiff-employees alleged that the defendants allowed plaintiffs to invest in company stock, despite knowing it was overpriced and a bad deal. *Id*. at 704. This Court found that the plaintiffs could properly bring suit under §502(a)(2) and 409(a), because under *LaRue* "the beneficiary of a defined-contribution account that suffers a loss" may bring

suit "even though other participants are uninjured by the acts said to constitute a breach of fiduciary duty." *Id.* at 705. ERISA therefore does not require a plaintiff to establish diminishment of the assets of every plan participant's account before bringing suit.

2. *Plan-Wide Diminishment of Assets Is not A Prerequisite to an ERISA Class Action*

Characterizing the suit as a class action does not change this analysis nor add an additional threshold inquiry. "To certify a class, a district court must find that each requirement of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) is satisfied as well as one subsection of Rule 23(b)." *Harper v. Sheriff of Cook Cnty.*, 581 F.3d 511, 513 (7th Cir. 2009). Nothing in this Court's case law has changed that standard in the ERISA context. To the contrary, in *Abbott* this Court found that class treatment can be appropriate in a Section 502(a)(2) case so long as the class is sufficiently and narrowly defined to avoid non-trivial intra-class conflict. 725 F.3d at 813. This Court distinguished the class in *Abbott* from the classes in *Spano*, noting that the proposed *Spano* classes were so poorly defined that they were likely to suffer from intra-class conflict, defeating both the

typicality and adequacy-of-representation requirements of Rule 23(a).[4] *Id.* at 812-14.

Thus, in *Abbott*, this Court approved of a narrowly defined class of participants in the plan who held units of one particular fund during a particular date range, and whose units had underperformed relative to a particular index. *Id.* at 807. This Court did not require that the plaintiffs establish plan-wide aggregate diminishment of assets as part of the class definition. *See id.*; *cf.* AOB 14. Having approved the class definition, this Court then remanded to the district court to decide whether the class met the remaining requirements of Rule 23. *Abbott*, 725 F.3d at 813-14. The *Abbott* Court acknowledged that "we may have offered some guidance for how to approach class certification in actions under Section 502(a)(2) [in *Spano*]" but noted that ultimately, "we emphasized that we were deciding only the cases before us." *Id.* at 813; *see also Spano*, 633 F.3d at 588 ("Nothing

[4] Defendants argue that the District Court improperly emphasized this case's distinctions from *Spano* in its decision. But that argument ignores this Court's reliance on the same reasoning in *Abbott*. *Compare* AOB 14, *with Abbott*, 725 F.3d at 813.

we have said should be understood as ruling out the possibility of class treatment for one or more better-defined and more-targeted classes.").[5]

3. *Defendants Improperly Rely on Dicta from Spano and Ignore Abbott Entirely*

Ignoring *Abbott* entirely, Defendants claim that dicta from *Spano* required the District Court to first find plan-wide diminishment of assets before analyzing the proposed class under Rule 23. AOB 14-15.[6] But *Abbott* effectively disposes of this argument. In *Abbott*, this Court approved of a narrow class whose plan assets were harmed as a result of an alleged breach of fiduciary duty, without requiring that the entire plan suffer aggregate diminished assets. 725 F.3d at 807, 813-14. In so doing, this Court found that the appropriateness of class treatment in Section 502(a)(2) cases, as with all class actions, "depends on the claims for which certification is sought"—in other words, a case-specific inquiry. *Id.* at 813.

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[5] In fact, on remand, the district court in *Spano* ultimately certified the class. *Spano v. Boeing Co.*, 294 F.R.D. 114, 127 (S.D. Ill. 2013).

[6] Over nine pages of argument, Defendants fail to cite *Abbott* at all, even though Defendants are clearly aware of the case and it is the controlling precedent in this Circuit on the very issue Defendants raise. *See* AOB 13-22.

The District Court correctly rejected Defendants' arguments to the contrary, noting their *Spano* argument "misinterprets the Seventh Circuit's holding in that case" and "would run afoul of the Supreme Court's holding in *LaRue*." Appx. 19. This Court should similarly reject Defendants' misreading of *Spano* and reject their attempt to superimpose a threshold inquiry on the District Court that would run afoul of *LaRue, Rogers,* and *Abbott*.

B. There Was Plan Injury Due to Defendants' Breach of Fiduciary Duty

Contrary to Defendants' argument, ERISA does not require aggregate plan diminishment of assets at all, but rather, allows a plaintiff to recover from each fiduciary "any losses to the plan" due to their breach of fiduciary duty. 29 U.S.C. § 1109(a). And regardless of whether those plan losses are localized in one account or affect only a subset of the beneficiaries, they are still cognizable injuries under §§ 502(a)(2) and 1109. *See LaRue*, 552 U.S. at 253 ("[T]he legal issue under § 502(a)(2) is the same whether [a participant's] account includes 1% or 99% of the total assets in the Plan."); *Rogers*, 521 F.3d at 705 ("[P]articipants in defined-contribution

plans may use § 502(a)(2), and thus § 409(a), to obtain relief if losses to an account are attributable to a pension plan fiduciary's breach of a duty owed to the plan.").

The fact that Defendants are former employees or have been cashed out of their retirement plans does not change this analysis. To the contrary, as this Court has recognized, the definition of a plan participant under ERISA includes "former employees who have cashed out their plan benefits . . . if they 'may become eligible to receive a benefit of any type [from the plan].'" *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (quoting 29 U.S.C. § 1002(7)) (plan benefit includes recovering a monetary judgment against a fiduciary for breach under ERISA); *see also LaRue*, 552 U.S. at 256 n.6 (plan participant may include a former employee with a colorable claim for benefit under the plan). Injuries to former employees who have suffered as a result of fiduciary breaches remain plan injuries, and their recoveries under Section 502(a)(2) remain recoveries on behalf of the plan. *See Harzewski*, 489 F.3d at 804; *see also Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 296-97 (3d Cir. 2007) (finding former participant in

retirement plan had standing to bring a claim for breach of fiduciary duty, and noting that "the very premise of the suit is that the plan itself improperly lost money, [plaintiff] sued the person liable to make good on the loss [, and] [i]f successful, this suit will restore assets to the plan that are allocable to [plaintiff's] account, and he will then get a distribution from that restored account").

1. *In Undervaluing the Shares Belonging to the Proposed Class, Defendants Breached Their Fiduciary Duty and Caused Plan Injury*

Defendants admit "that the fair market value of Company stock" at the time they cashed out Plaintiff and the proposed class "exceeded the 2020 valuation." Appx. 3. They further admit that "they did not make disclosures to Plaintiff" regarding various salient pieces of information including the sale of the company, "the results of any valuation that occurred after the 2020 valuation nor any offer made by a third party to buy shares of Company stock." *Id.* Defendants concede that they failed to inform Plaintiff and the proposed class that if they had remained invested in the plan, rather than electing to receive distributions "they were likely

to receive an amount substantially higher than the $515.18 per share distributed in September 2021." *Id.*[7] In short, Defendants, multiple fiduciaries with a duty of loyalty and care to *all* plan participants, including Plaintiff and the proposed class, misled them as to the true value of their shares in the ESOP. *See id.*

Against that backdrop, Defendants inexplicably and repeatedly assert that there was no plan injury. AOB 16-22. Yet, at the moment that Defendants valued the shares in the ESOP at $515.18, a valuation so low that one fiduciary called it "ridiculous by any measure," Appx. 117, they knowingly undervalued the *entire plan* by tens of millions of dollars. Defendants' breach therefore had an adverse impact not only on the value of the Plan assets as a whole but on every participant's individual account. Plaintiff and the proposed class were the only ones who suffered losses to their retirement accounts (plan accounts) due to the breach of fiduciary

[7] Defendants do not contest the District Court's factual findings. They have therefore waived any argument that the District Court clearly erred. *See Duncan v. State of Wis. Dep't of Health & Fam. Servs.*, 166 F.3d 930, 934 (7th Cir. 1999); Fed. R. App. P. 28(a)(6).

duty, however, because Defendants cashed out their retirement plans at the "ridiculous" valuation. Those losses clearly constitute plan injury within the purview of ERISA. *See LaRue* 552 U.S. at 255-56; *Rogers*, 521 F.3d at 705; *Abbott*, 725 F.3d at 807, 813-14; *Harzewski*, 489 F.3d at 804.

2. *Requiring Aggregate Plan-Wide Diminishment of Assets Would Allow Fiduciary Favoritism Among Beneficiaries*

Defendants' argument, taken to its logical conclusion would allow an ERISA fiduciary to take retirement assets from one set of plan beneficiaries and give those assets to another set of plan beneficiaries, and so long as the overall plan assets stayed the same, absolve those fiduciaries of any liability for their breach of fiduciary duty to the first set of beneficiaries. *See* AOB 16-18. But "robbing Peter to pay Paul"[8] is inconsistent with the fiduciary standard under ERISA, one this Court has recognized as the "highest known to the law." *Halperin v. Richards*, 7 F.4th 534, 546 (7th Cir. 2021) (citation modified). Indeed, "[a] trustee has a duty to administer the trust

[8] *See rob Peter to pay Paul*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/rob%20peter%20to%20pay%20paul (last visited on Aug. 19, 2026).

in a manner that is impartial with respect to the various beneficiaries of the trust[.]" Restatement (Third) of Trusts § 79(1) (2007); *see also Summers*, 104 F.3d at 108 (analyzing an ESOP and finding that "as employees retire, the participants come to consist of both active and retired employees; and to favor the former would violate the trustee's duty to the latter" because "picking and choosing among beneficiaries" is "in violation of the traditional duty imposed by trust law of impartiality among beneficiaries").

Defendants' brief tries to spin a story very different from the actual facts. According to Defendants, the class members are market players who cashed out, watched the price climb, and now demand to "share in the proceeds" of the MSD Transaction. *See* AOB 2–3. That story inverts a half-century of trust law. These Class members are not investors. They owned no shares, directed no sales, and established no prices. Defendant Argent held legal title and Defendant West Monroe pulled every lever. When the people holding those levers moved trust assets to themselves at a "ridiculous" price knowing their true value, they resorted to self-dealing.

Defendants further falsely claim that their factual assertion before the District Court, that other Plan members may have benefitted from their breach of fiduciary duty, is an argument that Plaintiff "never contested below." AOB 16-17; *see also* Defs.' Opp'n to Class Certification at 6, *Daly v. West Monroe Partners, Inc.*, No. 1:21-cv-6805 (N.D. Ill. May 22, 2024), Dkt. 192. Not so. A factual assertion is not an argument, and Plaintiff consistently argued below that Defendants' breach of fiduciary duty caused plan injury as required by ERISA. *Id.* at Dkt. 159 at 6. The fact that Defendants took from one set of beneficiaries to benefit others (and themselves) hardly absolves them of a breach of fiduciary duty claim under ERISA or the concomitant ability of Plaintiff to bring a class action for their injuries as a result.

Allowing Plaintiff and the proposed class to bring suit will similarly not harm the remaining plan participants as Defendants claim. AOB 17-18. Defendants presume that Plaintiff will seek rescission and/or restitution from the other plan participants who received the proceeds from the MSD Transaction. *See id.* But Plaintiff's Complaint only seeks rescission or

restitution from Defendants. *See* Appx. 114-15. Therefore, these other participants will not be harmed. *Defendants* are liable to Plaintiff and the proposed class for their breach of fiduciary duty, and not anyone else. 29 U.S.C. § 1109(a); *cf.* AOB 18.

3. Plaintiff Can Only Vindicate the Breach Under Section 502(a)(2)

Defendants attempt to escape the natural consequences of their argument by disingenuously claiming that Plaintiff can vindicate the breach of fiduciary duty under numerous other provisions of ERISA. AOB 19. Not so. Although Defendants claim that Plaintiff may bring suit under "eleven different categories," eight of those categories do not provide a vehicle for Plaintiff to bring suit at all. *See id.*; 29 U.S.C. § 1132(a)(4) (permitting suits for violations of 29 U.S.C. § 1025(c) or 29 U.S.C. § 1032(a), neither of which applies to the present matter), (a)(5) (permitting suits brought by the Secretary of Labor), (a)(6) (same), (a)(7) (permitting suits brought by a State), (a)(8) (permitting suits brought by the Secretary of Labor), (a)(9) (permitting suits in situations inapplicable to the present matter), (a)(10) (same), (a)(11) (same).

Of the remaining three subsections—(a)(1), (a)(2), and (a)(3)—Section 502(a)(2) is the only one that focuses on breach of fiduciary duty with regard to plan asset management. *Spano*, 633 F.3d at 578 (explaining that, among §§ 502(a)(1), (a)(2), and (a)(3), "only section 502(a)(2) . . . gives a participant a right to sue for a breach of fiduciary duty"). In contrast, §502(a)(1) provides remedies for wrongful denial of contractual benefits and information, which is not at issue here. *See* 29 U.S.C. § 1132(a)(1)(A); *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996) (explaining that §502(a)(1) provides remedies for "wrongful denial of benefits and information"). And Section 502(a)(1)(B) "is designed to protect contractually defined benefits" and generally provides "traditional forms of contract relief," such as recovery of benefits accrued under the plan's terms. *Dean v. Nat'l Prod. Workers Union Severance Tr. Plan*, 46 F.4th 535, 543 (7th Cir. 2022) (citation modified). Relief under Section 502(a)(1)(B) is therefore limited to individual benefits owed, whereas § 502(a)(2) provides a vehicle for plan-wide remedies for breach of fiduciary duty. *See Peabody v. Davis*, 636 F.3d 368, 373 (7th Cir. 2011) (contrasting §502(a)(1)(B), which provides for

individual standing to recover benefits accrued under the plan terms, with § 502(a)(2), which provides for recovery on behalf of an entire plan for plan-wide remedy) (citing *Russell*, 473 U.S.at 146-47).

Section 502(a)(3) is similarly unavailable. That section is a catchall that provides only equitable relief and therefore cannot remedy Defendants' breach of fiduciary duty as to plan assets. *See Howe*, 516 U.S. at 512 (stating that § 502(a)(3) provides "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy"); *Smith v. Med. Benefit Adm'rs Grp., Inc.*, 639 F.3d 277, 283 (7th Cir. 2011) (explaining that § 502(a)(3) permits a participant to seek relief for breach of fiduciary duty "on behalf of himself as opposed to the plan" but not monetary relief different from equitable relief).

Only § 502(a)(2) provides the remedy Plaintiff Daly and the Class seek: plan-wide relief for fiduciary breaches, including monetary losses and other equitable or remedial relief, through § 409. *See Med. Benefit Adm'rs*, 639 F.3d at 282. This Court should reject Defendants' attempts to eviscerate

the primary method for holding them accountable for their fiduciary breach.

4. Other Circuits Do Not Require Aggregate Plan Diminishment

Finally, Defendants incorrectly claim that "numerous other courts" have adopted their unsupported view of plan injury. AOB 21. But the out-of-circuit cases relied upon by Defendants are inapposite. *See id*. For example, in *Peters v. Aetna Inc.*, the Fourth Circuit analyzed a district court's grant of summary judgment against a health care plan beneficiary who claimed she was entitled to restitution from her health care plan because a provider had imposed a hidden administrative fee on some of her claims. 2 F.4th 199, 221-22 (4th Cir. 2021). The Fourth Circuit affirmed the district court's judgment on Peters's personal claim for restitution under § 502(a)(1) and (3) in part because the Court looked at the entirety of her health care costs for each year to see if she was actually harmed and she was not. *Id.*

at 222-23, 225.[9] Here, there is no question that Plaintiff was individually harmed by Defendants' breach of fiduciary duty: Defendants cashed out his stock at $515.18 per share when in fact it was worth $1,616 per share, which Defendants knew. Appx. 2-3.[10]

In addition, the *Peters* employee health plan is more analogous to a defined benefits plan where all assets are pooled collectively, rather than the defined contribution plan at issue here, where all assets are owned by the Plan but kept in individual accounts. *See Dean*, 46 F.4th at 548 (explaining welfare plans "hold the assets in a single pile," and finding these plans "incomparable [to] . . . a defined-contribution plan that holds

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[9] In fact due to the complexities of the health care plan, the plaintiff actually saved money despite the administrative fees. *Peters*, 2 F.4th at 226-27. Defendants seem to cherry pick the word "aggregate" without considering the context of *Peters*, namely that health care benefits pay out over an entire year and over each year, the fees did not actually harm the plaintiff given the fact that she would have met the coinsurance maximum regardless. *See* AOB 21; *cf. Peters*, 2 F.4th at 226.

[10] In *Peters*, the Fourth Circuit actually *vacated* the district court's denial of class certification and noted that "the Plan's entitlement to a remedy of restitution has yet to be determined." 2 F.4th at 242, 244. Thus, in *Peters*, notwithstanding the plaintiff's lack of injury, the Fourth Circuit still left open the possibility that an identifiable class experienced harm from the alleged fiduciary breach. *Id.*

assets separately for each participant"). Nothing in *Peters* addresses the issue squarely before this Court.

Defendants' reliance on *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915 (8th Cir. 1994) similarly fails. *See* AOB 21. *Roth* is not only out of Circuit, but the *Roth* Court did not determine what constituted plan loss. Instead, it declined to review whether the plan suffered loss or not because the defendants failed to properly raise the issue before the district court. *See Roth*, 16 F.3d at 920. It therefore does not provide support for Defendants' claim. *See id.* This Court should thus reject Defendants' unfounded warnings about creating a Circuit split. *See* AOB 22.

In contrast, numerous other Courts have found that plan harm felt at the individual level is actionable under Sections 409 and 502(a)(2). *See, e.g.*, *Cedeno*, 100 F.4th at 399 ("The *LaRue* Court thus recognized that Section 409(a) protects against breaches of fiduciary duty involving the management of assets within defined contribution plans, whether the injury is felt at the plan level or directly at the individual account level[.]" (emphasis omitted)); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59

F.4th 1090, 1104 (10th Cir. 2023) (discussing how *LaRue* permitted individualized relief under §502(a) and that fiduciary misconduct subject to §502(a) in a defined contribution plan "need not threaten the solvency of the entire plan") (citation modified)); *Hawkins v. Cintas Corp.*, 32 F.4th 625, 631 (6th Cir. 2022) ("*LaRue* therefore means that while any claims properly brought under § 502(a)(2) must be for injuries to the plan itself, § 502(a)(2) authorizes suits on behalf of a defined-contribution plan even if the harm is inherently individualized."); *In re Mut. Funds Inv. Litig.*, 529 F.3d 207, 215 (4th Cir. 2008) ("In short, we conclude that participants in defined contribution plans controlled by ERISA have colorable claims against the fiduciaries of their plans when they allege that their individual accounts in the plans were diminished by fraud or fiduciary breaches and that the amounts by which their accounts were diminished constitute part of the participants' benefits under the plans.").[11]

[11] This Court may therefore reject Defendants' extremely narrow reading of *LaRue*. *Cf.* AOB 20. Harm felt in an individual plan account is plan injury. *See LaRue* 552 U.S. at 256; *Harzewski*, 489 F.3d at 804-05.

The District Court properly rejected Defendants' claim that ERISA class actions require a threshold inquiry that finds plan-wide diminishment of assets, and this Court should do the same.

III. The District Court Properly Exercised Its Discretion In Certifying the Class Under Rule 23(b)(1)

The District Court carefully and rigorously considered the facts of this case, and, in line with the plain language of the rule, the Advisory Committee Notes, and decades of ERISA case law, properly exercised its discretion in certifying the proposed class under Rule 23(b)(1). "To certify a class, a district court must find that each requirement of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) is satisfied as well as one subsection of Rule 23(b)." *Harper*, 581 F.3d at 513. "Rule 23 gives the district courts broad discretion to determine whether certification of a class-action lawsuit is appropriate," and thus this Court "reviews such decisions deferentially." *Riffey v. Rauner*, 910 F.3d 314, 318 (7th Cir. 2018) (citation modified).

On appeal, Defendants do not challenge any of the District Court's rulings under Rule 23(a), AOB 22-37,[12] nor do they challenge any of the District Court's factual findings.[13] Rather, Defendants ignore the facts of this case and ask that this Court render a sweeping decision that Rule 23(b)(1) is categorically unavailable for *all* actions brought under Section 502(a)(2). AOB 22-23 (relying on *Trauernicht*, 169 F.4th at 459). But the issue squarely before this Court is not whether, as an abstract matter, numerous cases not before this Court should be certified under Rule 23(b)(1), but rather whether, based on the facts and circumstances as alleged in *this case*, the District Court properly exercised its discretion in certifying *this* proposed class under Rule 23(b)(1).[14] Because class certification is

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[12] Notably, Defendants did not challenge numerosity, commonality, or typicality before the District Court. Appx. 6-10. Defendants have not challenged the adequacy of representation on appeal. *See Wachovia Sec., LLC v. Banco Panamericano, Inc.*, 674 F.3d 743, 758 (7th Cir. 2012) (arguments not raised in opening brief deemed waived).

[13] As noted above, Defendants have therefore waived any argument that the District Court's findings were clearly erroneous. *See Duncan*, 166 F.3d at 934.

[14] The Court of course can only decide the issues presented in this case, as "[i]t is an elementary maxim of our legal system that a court decides only the case before it, and can not render advisory opinions disposing of other issues not presented for decision." *Matter of Chicago, Rock Island & Pac. R. Co.*, 772 F.2d 299, 303 (7th Cir. 1985).

appropriate given the facts of this case, this Court may reject Defendants' attempts to distract from the actual issue before this Court.

More importantly, the facts of *Trauernicht* are so different from those of the present matter, so as to render its holding inapposite. *Compare Trauernicht*, 169 F.4th at 463, 474 (describing a class lacking in commonality where some participants were financially injured while others came out ahead), *with* Appx. 1-3 (describing class where all class members were financially injured). And *Trauernicht*'s holding runs squarely against decades of ERISA case law that has consistently found that ERISA matters are *not* individualized claims for monetary damages, but rather representative actions in equity on behalf of the plan, for recovery to the plan. *See LaRue*, 552 U.S. at 253-56; *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1093 (9th Cir. 2018) ("[T]he [*LaRue*] 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."); *Cedeno*, 100 F.4th at 399-400 (reiterating that Section 502(a)(2)

provides no remedy for individual injuries distinct from plan injuries); *see also Harzewski*, 489 F.3d at 804 (ERISA does not give participants a right to sue a plan fiduciary for damages, but rather to recover plan benefits). This Court should reject Defendants' reliance on *Trauernicht* and affirm the District Court.

A. The District Court's Class Certification Decision Was an Appropriate Exercise of Discretion In Light of the Facts of This Case

The Plan at issue in the present matter, was an ESOP, "designed to invest primarily in Company stock and hold that stock in a trust for the benefit of plan participants – current and former employees." Appx. 1-2. Because West Monroe was privately held, the value of the employee retirement funds held in trust depended *entirely* upon the valuation approved by Defendants. *See id.* at 2. Relying upon representations by Defendants, Plaintiff and the proposed class members all elected to take a distribution of the balance of their retirement plan. *Id.* That distribution occurred for all class members in September 2021. *Id.* Defendants set the per share value of that distribution at $515.18 per share. *Id.* Each of the

class members received the same amount per share for the shares of Company stock in their retirement plan. *Id.* Defendants purchased a total of 27,960 shares of stock from Plaintiff and the proposed class. *Id.* Defendants have admitted that this amount was below the fair market value of the stock. *Id.* at 2-3.[15] The proposed class therefore includes "All participants in the Plan who received a distribution in an amount determined based on the 2020 Valuation of Company stock," i.e., all of the plan members injured by Defendants' under-market valuation of the stock and the subsequent distribution based on that below market value. *See* Appx. 4. In bringing this suit, Plaintiff seeks relief on behalf of the Plan, including surcharge, restitution, constructive trust, and accounting from each of the multiple fiduciaries who breached their duties. *See* Appx. 114-

[15] Plaintiff alleges that Defendants enabled themselves and other Company management to profit from the upcoming sale of the company at the same time they were deflating the value of the stock for Plaintiff and the proposed class. Appx. 72.

115. The Plan will then allocate any recovery to the accounts of Plaintiff and the proposed class. *See id.*

The District Court certified the class under both Rule 23(b)(1)(A) and 23(b)(1)(B). Appx. 25-27. As the Supreme Court has recognized, "[c]lasses certified under [Rule 23](b)(1) . . . share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable. . . ." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). The District Court rigorously laid out and analyzed the facts of this case, *see* Appx. 1-4, and concluded based on those facts that individual adjudications would be impossible or unworkable, and therefore the class should be certified under both subsections of Rule 23(b)(1). Appx. 25-27; *see Wal-Mart*, 564 U.S. at 351, 361; *see also Riffey*, 910 F.3d at 318 ("The decision whether to certify a class is one that depends on a careful assessment of the facts, of potential differences among class members, of management challenges, and of the overall importance of the common issues of law or fact to the ultimate outcome.")

1. The District Court Properly Certified the Class Under Rule 23(b)(1)(A)

A district court may certify a class action under Rule 23(b)(1)(A) where "prosecuting separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class . . . ." Fed. R. Civ. P. 23(b)(1)(A); *see also Moyle v. Liberty Mut. Ret. Ben. Plan*, 823 F.3d 948, 965 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016) (affirming class certification for ERISA case under Rule 23(b)(1)(A) because "[p]rosecuting separate actions in this case would have the result of subjecting [defendant] to incompatible standards of conduct"). "This portion of the rule . . . clearly embraces cases in which the party is obliged by law to treat the class members alike. . . ." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1773 (3d ed. 2005 & Supp. 2026).

Here, the District Court found that "Plaintiff and the proposed Class bring the same claim against Defendants alleging they breached their

fiduciary duties in the same course of conduct…." Appx. 26. The District Court laid out that course of conduct at length in its opinion. Appx. 1-3. The District Court concluded, based on the unique facts and circumstances of this case, that conflicting decisions as to whether Defendants breached their fiduciary duties would create incompatible standards of conduct for Defendants. *See* Fed. R. Civ. P. 23(b)(1)(A). Certification under Rule 23(b)(1)(A) was therefore appropriate. *See Moyle*, 823 F.3d at 965; *see also Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1352 (11th Cir. 2001) (abuse of discretion to certify §502(a)(2) claim under Rule 23(b)(3) where claim met the elements of Rule 23(b)(1)(A), and defendants claimed prejudice from a Rule 23(b)(3) class action because inconsistent or varying adjudications would establish incompatible standards of conduct).

2. The District Court Properly Certified the Class Under Rule 23(b)(1)(B)

The District Court also properly certified the class under Rule 23(b)(1)(B). *See In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604-05 (3d Cir. 2009) (affirming Rule 23(b)(1)(B) certification of defined-contribution-plan participants alleging breach-of-fiduciary-duty claims

under § 502(a)(2)); *Boley v. Universal Health Servs., Inc.*, 36 F.4th 124, 136 (3d Cir. 2022) (same). A class action may be certified under Rule 23(b)(1)(B) if the prosecution of separate actions by individual class members would create the risk of "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. . . ." Fed. R. Civ. P. 23(b)(1)(B). The Advisory Committee Notes to the Rule provide several prototypical examples of such matters, including, "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment; *see also* 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1774, n.24 (noting "an action charging breach of trust by a fiduciary and demanding an accounting to restore the subject of the trust is a situation that the Advisory

Committee felt merited class treatment under Rule 23(b)(1)(B)" and citing a number of ERISA breach-of-fiduciary-duty cases as examples).

Thus, in *Schering Plough*, the Third Circuit analyzed a suit by a former employee who alleged breach of fiduciary duty based on the drop in the value of company stock, one of the investment options in their retirement plans. 589 F.3d at 592. The Third Circuit found that the district court properly certified the class under Rule 23(b)(1)(B) because the plaintiff's "proofs regarding defendants' conduct will, as a practical matter, significantly impact the claims of other Plan participants and of employees who invested in the Stock Fund . . . [because plaintiff's] claims are based on defendants' conduct, not . . . on unique facts and individual relationships." *Id.* at 604.

The District Court in this case similarly found that "should Plaintiff succeed in showing that Defendants breached their fiduciary duties in cashing out Plan participant shares at the 2020 Valuation in September 2021, that determination 'would be dispositive of the interests of the other members not parties to the individual adjudications,'" making certification

appropriate under Rule 23(b)(1)(B). Appx. 27 (quoting Fed. R. Civ. P. 23(b)(1)(B)). In short, the District Court concluded based on its factual analysis that a decision that Defendants breached their fiduciary duty as to one member of the class would effectively decide the issue for the rest of the class, as Defendants cashed out the entire class during the same time period, at the same below-market price, and during the same course of conduct. *See* Fed. R. Civ. P. 23(b)(1)(B); Appx. 1-3. The District Court therefore properly concluded that certification under Rule 23(b)(1)(B) was also appropriate. *See Schering Plough*, 589 F.3d at 604; *Boley*, 36 F.4th at 136.

3. Decades of ERISA Case Law Supports Certification Under Rule 23(b)(1)

Courts have more generally recognized class actions under ERISA as paradigmatic Rule 23(b)(1) classes. "[Section] 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries. . . ." *LaRue*, 552 U.S. at 256. A claim under §502(a)(2) is always a representative action brought "on behalf of a plan to recover for violations of the obligations defined in §409(a)." *Id.* at 253; *see also Pover*, 2026 WL 2196257, at *7 ("We have held that § 502(a)(2) claims asserting breach of fiduciary duty are

always 'representative' . . . because the participant-plaintiff 'seeks recovery only for injury done to the plan.'" (quoting *Munro*, 896 F.3d at 1092-93); *Cedeno*, 100 F.4th at 404 ("remedies available under Section 502(a)(2) for fiduciary breaches that violate Section 409(a) inure to the benefit of *the plan*, thereby providing only indirect relief to individual plan participants and beneficiaries.") (emphasis in the original). As the Third Circuit has recognized, "[i]n light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *Schering Plough*, 589 F.3d at 604 (collecting district court cases); *see also Boley*, 36 F.4th at 136 (affirming Rule 23(b)(1) class); *Moyle*, 823 F.3d at 965 (same); *Piazza*, 273 F.3d at 1352 (suggesting that Rule 23(b)(1) class was appropriate for ERISA class action).

a. The Supreme Court's Holding in Wal-Mart Regarding Class Certification Under Rule 23(b)(2) Did Not Change this Analysis

Wal-Mart did not change this analysis. There, the Supreme Court analyzed whether a district court properly certified a nationwide Title VII

class action challenging millions of individual compensation decisions under Fed. R. Civ. P. 23(b)(2), a different section of Rule 23(b) that applies when injunctive or declaratory relief is appropriate for the class. 564 U.S. at 360-361. The Supreme Court explicitly noted that the applicability of Rule 23(b)(1) to the plaintiff class was not an issue before the Court. *Id.* at 346 n.2.

In *Wal-Mart*, the Supreme Court identified limited fund cases, i.e., where numerous people make claims against a fund insufficient to satisfy all of their claims, as one example of a prototypical 23(b)(1) case. *Id.* at 361 n.11. But a limited fund case necessarily involves claims for individualized monetary relief, it just so happens that the pool of money to provide that relief is limited. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834-37 (1999) (describing various types of limited fund cases).

b. This Court Has Found Individual Claims For Monetary Relief Appropriate in the Rule 23(b)(2) Context Post-Wal-Mart

But even in the Rule 23(b)(2) context, this Court has recognized certification of claims for monetary relief may be appropriate so long as

they do not implicate any of the Supreme Court's concerns in *Wal-Mart.*[16] *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Thus in *Johnson* this Court found that where "the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program, so that there is no need for notice and the concerns expressed in the *Wal–Mart* opinion are thus not engaged, the district court can award that relief without terminating the class action and leaving the class members to their own devices and also without converting this (b)(2) class action to a (b)(3) class action." 702 F.3d at 372.[17]

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[16] In *Wal-Mart*, the Supreme Court found the mandatory class provisions of 23(b)(2) inapplicable where each class member had a different claim for back pay that depended upon their individual circumstances and it was therefore unclear if class issues predominated, or whether a class action was a superior method of adjudicating the matter. 564 U.S. at 362-63. In that situation, the Supreme Court also noted the absence of notice and opt out provisions in the mandatory class provisions, which deprived the individual members of the class with the ability to decide for themselves if they wanted to join the class or adjudicate their issues individually. *Id.* at 363-64.

[17] Defendants' cited cases to support that individualized monetary claims cannot be certified under Rule 23(b)(1) are not even (b)(1) cases. *See* AOB 24; *Bishop v. Gainer*, 272 F.3d 1009, 1017 (7th Cir. 2001) (Rule 23(b)(2) case); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 448 (7th Cir. 2020) (Rule 23(b)(3) case). Amicus Chamber of Commerce's case law is also inapposite, and their arguments similarly fail. *See, e.g., Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999) (Rule 23(b)(2) case); 1 McLaughlin on Class Actions § 5:14 (22nd ed.) ("As a matter of law, money damages recovered under ERISA § 502(a)(2) go to the plan as an entity, not to the individual plaintiff or plaintiffs personally.").

c. The District Court's Decision Was In Line With Wal-Mart and Johnson

The District Court acknowledged that class actions under ERISA are "commonly certified under either or both subsections of 23(b)(1) because recovery for a breach of fiduciary duty owed to an ERISA plan, as is the predominant claim here, will inure to the plan as a whole, and because defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan." Appx. 25 (quoting *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011)). The District Court, however, did not rely solely on that common practice for its conclusions regarding class certification here. Rather, as laid out above, after acknowledging the common practice, the District Court engaged in a fact-based inquiry focused on the unique circumstances of this case and found based on those facts and circumstances, that certification under both subsections of Rule 23(b)(1) was appropriate. *See* Appx. 1-4; 25-27; *see also Wal-Mart*, 564 U.S. at 351 (district court must engage in "rigorous" analysis).

Significantly, the determination of individual harm in this matter will be formulaic: because Defendants cashed out the entire proposed class at

the same below-market valuation, the Court need only determine the number of shares belonging to each individual class member, multiply that by the correct valuation, and subtract the value of the incorrect valuation to determine the monetary harm for each individual member of the class. That fits squarely into the "formulaic" rubric that this Court explicitly found did not run afoul of *Wal-Mart* in the Rule 23(b)(2) context. *See Johnson*, 702 F.3d at 372.

4. Defendants Rely on Inapposite Case Law, Ignoring the Facts of This Case

Defendants do not dispute any of the factual findings underpinning the District Court's certification of the class. AOB 33. Rather, Defendants seemingly ignore those factual findings entirely, relying on misstatements of the District Court's rationale and inapposite case law to support their position.

a. Defendants Misstate the District Court's Rationale Under Rule 23(b)(1)(A)

Defendants argue over three pages that the risk of inconsistent monetary awards is insufficient to merit class certification under Rule

23(b)(1)(A). AOB 33-35. But the District Court did not base its class certification decision on the risk of inconsistent monetary awards. *Compare* Appx. 25-26 *with* AOB 33. Rather, the District Court concluded, based on the unique facts of this case, that separate claims could lead to inconsistent *legal* conclusions regarding whether Defendants' conduct constituted breach of their fiduciary duties to the Plan. Appx. 26. A decision that Defendants breached their fiduciary duties as to one member of the class and not another, would therefore subject Defendants to incompatible standards of conduct, as supported by Rule 23(b)(1)(A). *Id.*

This Court may therefore disregard Defendants' reliance on various cases that are inapposite to the District Court's decision. *See* AOB 33. For example, *In re Bendectin Prods. Liab. Litig*. is an out-of-circuit products liability case, in which the plaintiffs claimed that exposure to a certain prescription drug in utero led to birth defects. 749 F.2d 300, 301-02 (6th Cir. 1984). There, the Sixth Circuit found that the fact that some plaintiffs might win their lawsuits against the defendant and others might not, was an insufficient rationale for class certification under Rule 23(b)(1)(A). *Id.* at 305.

But in a products liability case where a drug may affect different people differently, or not at all, it stands to reason that some plaintiffs may prevail and others might not, without imposing the type of incompatible standards of conduct forewarned by Rule 23(b)(1)(A) or foreseen by the District Court in this case. *See* Appx. 26.

Because the District Court did not rest its decision on the potential for inconsistent monetary recovery by the class, this Court may similarly disregard Defendants' case law on that topic. *See* AOB 33-34; *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (securities litigation class action); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973) (Truth in Lending Act and Federal Aviation Act class actions finding Rule 23(b)(1) inapplicable because, unlike the present matter, "[i]n the cases before us the success or failure of the plaintiffs in their individual actions will not inescapably alter the rights of others similarly situated.").

Finally, this Court should reject Defendants' Rule 23(b)(1)(A) arguments based on *Trauernicht*, 169 F.4th at 466. As discussed in greater detail below, the facts of *Trauernicht* are simply inapposite to the present

case. *See* Section IIB1, *infra.* In *Trauernicht* the Fourth Circuit found that the class in that matter lacked commonality under Rule 23(a) because "the plaintiffs' and purported class members' individual circumstances differed dramatically and all did not suffer the same injury" and some suffered no injury at all. *Trauernicht*, 169 F.4th at 463. Without commonality, the Fourth Circuit found that class certification under Rule 23(b)(1) was inappropriate. *Id*.[18]

Defendants posit, based on *Trauernicht*, that an ERISA class can *never* be certified under Rule 23(b)(1)(A). AOB 34-35. But that is clearly not the case. *See Boley*, 36 F.4th at 137 (affirming ERISA class certified under 23(b)(1)(A) and (B)); *Moyle*, 823 F.3d at 965 (affirming class certification for ERISA case under Rule 23(b)(1)(A) because "[p]rosecuting separate actions in this case would have the result of subjecting [defendant] to incompatible

[18] Indeed, the Fourth Circuit could have disposed of the case on its Rule 23(a) ruling alone, without making any pronouncements regarding Rule 23(b). *See Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986) ("[F]ederal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground.").

standards of conduct"). Here, although the District Court cited language about the use of Rule 23(b)(1) more generally in ERISA class actions, it based its class certification decision on the specific facts of this case, which support a Rule 23(b)(1) class. *See* Appx. 25-26; *cf. Trauernicht*, 169 F.4th at 465 (district court based its decision on inherent nature of ERISA suit). This Court should reject Defendants' arguments to the contrary.

b. Defendants Similarly Misconstrue the Requirements of Rule 23(b)(1)(B)

Defendants' arguments as to 23(b)(1)(B) similarly fail. Rule 23(b)(1)(B) applies outside the limited fund context. *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment; 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1774. The District Court did not base its class certification decision on the *possibility* that the action would have stare decisis or precedential effect for some other cases at some other time. *Cf. In re Dennis Greenman*, 829 F.2d at 1546; *Tilley v. TJX Companies, Inc.*, 345 F.3d 34, 43 (1st Cir. 2003) (finding the possibility of stare decisis affecting later classes insufficient under Rule 23(b)(1)(B), but stare decisis plus could satisfy the Rule); *La Mar*, 489 F.2d

at 467 ("In the cases before us the success or failure of the plaintiffs in their individual actions will not inescapably alter the rights of others similarly situated.").

Rather, the District Court found that if Plaintiff were to succeed in establishing that Defendants breached their fiduciary duties, that determination would actually dispose of the interests of other potential members of the class. Appx. 27. In other words, in this case, a decision as to one class member conclusively decides the issue for everyone in the proposed class. That is the exact circumstance in which a Rule 23(b)(1)(B) class applies, and the District Court properly exercised its discretion in finding class certification appropriate under 23(b)(1)(B) as well.

B. Defendants' Reliance on *Trauernicht* is Flawed

Defendants spend the bulk of their brief asking this Court to find, based on *Trauernicht*, 169 F.4th at 459, that Rule 23(b)(1) class certification can *never* apply to ERISA class actions. AOB 22-32; 34-35. This Court should reject Defendants' invitation to make such a broad sweeping pronouncement, which is both unnecessary and legally incorrect. *See Allen*,

791 F.2d at 615 ("[F]ederal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground."). *Trauernicht* is distinguishable on its facts and at odds with decades of ERISA precedent. Because, as noted above, the facts of this case support Rule 23(b)(1) certification, this Court should reject Defendants' reliance on *Trauernicht* and affirm the District Court.

1. Trauernicht is Distinguishable on its Facts

The *Trauernicht* court reversed and vacated a lower court's order on class certification after finding that the proposed class in that matter lacked commonality under Rule 23(a). *Trauernicht*, 169 F.4th at 463, 473-74. In the Fourth Circuit's view, the district court had relied too heavily on the inherent nature of ERISA suits to find commonality, rather than conducting the required "rigorous" factual analysis of the proposed class. *See id.* at 465; *Wal-Mart*, 564 U.S. at 351. The Fourth Circuit noted that some of the members of the proposed class did not suffer the same injury as others, and many suffered no injury at all and actually benefited from their investment in the challenged fund. *Trauernicht*, 169 F.4th at 463.

Here, in contrast, the Plan "was designed to invest primarily in Company stock and hold that stock in a trust for the benefit of Plan participants." Appx. 1-2. Because West Monroe was privately held, the value of that stock depended entirely on the valuation adopted by Defendants. *See id.* at 2. Although the value of the entire Plan suffered at the moment of the incorrect valuation, only Plaintiff and the proposed class members suffered actual injury, because they all cashed out their retirement plans at the same below-market price. *See id.* In short, there is nothing truly "individualized" about what occurred to Plaintiff and the proposed class, as the District Court correctly recognized. *Id*. at 25-27.

Because the Fourth Circuit found that the *Trauernicht* proposed class lacked commonality, the court also found class certification inappropriate under Rule 23(b)(1). *See Trauernicht*, 169 F.4th at 474; *see also Wal-Mart*, 564 U.S. at 349, 359 (noting that "[t]he crux of this case is commonality" and finding that the proposed Title VII class lacked commonality). Defendants have not contested commonality in the present matter, and as detailed above, the facts of this case squarely fall within the types of matters that are

appropriately certified under Rule 23(b)(1). *Trauernicht* is therefore distinguishable on its facts.

2. Trauernicht is at Odds With Decades of ERISA Precedent

More importantly, *Trauernicht*'s broad holding, that claims under Section 502(a)(2) are individualized claims for monetary damages rather than representative actions on behalf of the plan, is at odds with decades of ERISA precedent. *Compare Trauernicht*, 169 F.4th at 469 *with LaRue*, 552 U.S. at 256 (Section 502(a)(2) "does not provide a remedy for individual injuries distinct from plan injuries. . . .").[19] In *Russell*, the Supreme Court exhaustively analyzed the statutory scheme as well as legislative history of

[19] Defendants' argument, taken to its natural conclusion would likely entitle ERISA plaintiffs to jury trials. *Compare Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998) (finding no right to a jury trial in an ERISA case because ERISA's antecedents are equitable in nature) *with Overwell Harvest, Ltd. v. Trading Techs. Int'l, Inc.*, 114 F.4th 852, 860 (7th Cir. 2024) ("characterizing the relief sought is more important than finding a precisely analogous common-law cause of action" in determining right to trial by jury) (quoting *Tull v. United States*, 481 U.S. 412, 421 (1987)). Thus, if this Court were to find that ERISA claims are fundamentally individualized claims for monetary damages, rather than representative actions in equity on behalf of the plan, that would also likely change decades of case law regarding an ERISA plaintiff's right to trial by jury. *See Overwell*, 114 F.4th at 862 (finding that plaintiff was entitled to trial by jury because plaintiff sought legal relief in addition to equitable relief,).

Sections 409(a) and 502(a)(2) of ERISA. 473 U.S. at 139-44. There the Court found that the statutory scheme allows a beneficiary to bring an action against a fiduciary who has violated §409 but recovery for a violation of §409 inures to the benefit of the plan as a whole, rather than the individual. *Id.* at 140. *LaRue* did not change this analysis, it simply applied *Russell* to the defined contribution context and found that even losses in a single beneficiary's account constitute plan injury, such that those injuries are recoverable in an action under section 502(a)(2). 552 U.S. at 255-56.

These holdings make sense. As the Supreme Court has recognized, ERISA is grounded in the law of trusts, which informed Congress in drafting the statute. *Howe*, 516 U.S. at 496-97. Under traditional trust law, where beneficiaries bring a claim against the trustee for breach of trust "[o]rdinarily, the trustee (or a successor) receives the amount of a recovery and retains it or distributes it, in whole or in part, as appropriate to the terms and circumstances of the trust." Restatement (Third) of Trusts § 100 (2012); *see also Peabody*, 636 F.3d at 373 ("The remedy in an action for breach

of fiduciary duty is for the fiduciary to 'make good' the loss to the plan.") (quoting ERISA §409).

Other Circuits have consistently found that claims by a plan beneficiary under section 502(a)(2) for relief under section 409(a) are representative in nature, on behalf of the plan, and that remedies flow to the plan. *See, e.g.*, *Cedeno*, 100 F.4th at 403 ("[A] plaintiff seeking relief under Section 502(a)(2) acts in a representative capacity seeking relief for a single entity—the plan—as opposed to a collection of individuals."); *Parrott v. Int'l Bancshares Corp.*, 167 F.4th 728, 736 (5th Cir. 2026) ("[A] claim under § 1132(a)(2) is always brought on behalf of a plan to recover for violations of the obligations defined in § 1109.") (citation modified); *Parker v. Tenneco, Inc.*, 114 F.4th 786, 795 (6th Cir. 2024) ("*LaRue* broadens, rather than limits, the relief available under § 502(a)(2) in holding that a derivative fiduciary claim may be brought on behalf of a plan, even if the ultimate relief may be individualized.") (citation modified) (cleaned up); *Munro*, 896 F.3d at 1093 (in *LaRue*, "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."); *see also Harzewski*, 489 F.3d at 804 ("ERISA does not say that a plan participant has the right to sue a plan fiduciary for damages. . . .")

Against this backdrop, the *Trauernicht* court nonetheless held that when section 502(a)(2) claims are brought in the context of a defined contribution plan they are individualized monetary claims that can never be certified under Rule 23(b)(1). 169 F.4th at 469. To support this position, *Trauernicht* relied on an unpublished Ninth Circuit memorandum opinion and a case from the Central District of California while ignoring published opinions from the Second, Third, Sixth, Tenth, and Eleventh Circuits. *See id.* (citing *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 514 (9th Cir. 2019); *In re First Am. Corp. ERIS Litig.*, 258 F.R.D. 610, 622 (C.D. Cal. 2009)); *cf. Cedeno*, 100 F.4th at 404-05 (Second Circuit); *Henry on behalf of BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 507 (3d Cir. 2023) (Third Circuit); *Parker*, 114 F.4th at 798 (Sixth

Circuit); *Harrison*, 59 F.4th at 1106-07 (Tenth Circuit); *Williams v. Shapiro*, 161 F.4th 1313, 1321-22 (11th Cir. 2025) (Eleventh Circuit).

But subsequent published Ninth Circuit precedent has held, contrary to *Dorman*, that even individual losses in a defined contribution plan are plan injuries. *Pover*, 2026 WL 2196257, at *8 (noting that *LaRue* did not "suggest that Section 502(a)(2) allows individualized relief for injuries that are felt at the plan level.") (quoting *Cedeno*, 100 F.4th at 399). Rather, like the majority of Circuits, the Ninth Circuit confirmed that ERISA Section 502(a)(2) actions, even in the defined contribution context, remain representative actions on behalf of the plan, rather than individualized monetary claims. *See id.* Because *Trauernicht*'s holding is at odds with decades of ERISA case law, and the case law on which it relied to reach its holding has been subsequently discredited, this Court should decline to follow its holding.

3. The Supreme Court's Wal-Mart Opinion Does Not Require Certification of All Class Actions Seeking Monetary Relief Under Rule 23(b)(3)

This Court may similarly reject Defendants' misplaced arguments based on the Supreme Court's decision in *Wal-Mart*. AOB 24-32. *Wal-Mart* addressed whether a Title VII class action for backpay certified under Rule 23(b)(2) should have been certified under Rule 23(b)(3). 564 U.S. at 342, 362. Rule 23(b)(2) specifically refers to declaratory or injunctive relief. *See* Fed. R. Civ. P. 23(b)(2) (a class may be maintained where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."). *Wal-Mart* found that monetary relief is generally not available to a Rule (b)(2) class, "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief." 564 U.S. at 360. *Wal-Mart* expressly disclaimed any decision regarding the applicability of Rule 23(b)(1), the provision at issue in the present matter and in *Trauernicht*. *Id.* at 346 n.2.

Wal-Mart does not stand for the proposition that any time a plaintiff proposes a class that seeks monetary relief from a defendant, that class must be certified under Rule 23(b)(3). *Cf. Trauernicht*, 169 F.4th at 471-72; AOB 31. For example, *Wal-Mart* recognized as appropriately certified under Rule 23(b)(1), the "limited fund" scenario, where a plaintiff and proposed class seek monetary relief from a defendant, but where the pool of money to pay that relief is limited. *See* 564 U.S. at 361 n.11; *Ortiz*, 527 U.S. at 834 ("Classic limited fund actions include claimants to trust assets. . . .") (citation modified). And the Rule itself recognizes as appropriately certified under Rule 23(b)(1)(B) "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23, Notes of Advisory Committee on Rules—1966 Amendment. Defendants' argument taken to its logical conclusion would read out section 23(b)(1) from the Rule any time a plaintiff sought monetary relief. AOB 31.

Even in the 23(b)(2) context this Court has found that an action for monetary relief may be appropriate "[s]hould it appear that the calculation of monetary relief will be mechanical, formulaic, a task not for a trier of fact but for a computer program. . . ." *Johnson*, 702 F.3d at 372. Thus, even ignoring Defendants' incorrect reading of ERISA case law, Defendants' contention that all claims for monetary relief must be certified under Rule 23(b)(3) fails.

But more importantly, as this Circuit has recognized, "ERISA does not say that a plan participant has the right to sue a plan fiduciary for damages," rather in the § 502(a)(2) context a money judgement against a fiduciary constitutes a "benefit" under the plan rather than damages. *Harzewski*, 489 F.3d at 804, 807 ("Benefits are benefits; in a defined-contribution plan they are the value of the retirement account when the employee retires, and a breach of fiduciary duty that diminishes that value gives rise to a claim for benefits measured by the difference between what the retirement account was worth when the employee retired and cashed

it out and what it would have been worth then had it not been for the breach of fiduciary duty.").

Plaintiff and the proposed class do not seek damages. And because the present matter is a proposed class action under Rule 23(b)(1), monetary relief need not be "incidental" as required under Rule 23(b)(2), so long as the class falls within the definition of a Rule 23(b)(1) class. *Cf.* AOB 30-32. In addition, the facts of this case lend themselves to the type of formulaic determination of individual monetary recovery that this Court has previously recognized as non-problematic under *Wal-Mart* even in the Rule 23(b)(2) context. *See Johnson*, 702 F.3d at 372. This Court may therefore reject Defendants' attempts to confuse the issues and conflate the requirements for a Rule 23(b)(1) class with the requirements for a Rule 23(b)(2) class. *See* AOB 30-32.

Finally, there is no question that Plaintiff has alleged injury in fact sufficient for Article III standing. Article III standing merely requires "a plaintiff to show an injury-in-fact that is fairly traceable to the defendant's conduct and that could likely be redressed by a favorable court decision."

Abbott, 725 F.3d at 808. Plaintiff, who received less than one third the true value of his Plan account due to Defendants' breach, has satisfied this requirement. *See, e.g.*, *Harzewski*, 489 F.3d at 803 (former participants in defined-contribution plan have standing to sue in ERISA class action); *Boley*, 36 F.4th at 129, 136 (former participants have standing to sue in ERISA class action, certifying class under 23(b)(1)).

After closely analyzing the facts of this case, the District Court properly exercised its discretion in certifying the proposed class under Rule 23(b)(1). This Court should affirm.

IV. This Court Should Reverse The District Court's Order Excluding 33 Members From the Proposed Class

The District Court excluded 33 proposed class members from the proposed class as a result of class action waivers that they signed as part of severance agreements with the Company. *See* Appx. 32-33; 146. But the District Court erred in concluding that the waiver in question did not pose any restriction on the type of remedy that those individuals could seek and that the 33 excluded class members could bring individual suits to vindicate their rights. *See* Appx. 32-33. By its plain language, the waiver

prevented any participation in any "class, collective, or *multi-party* action or proceeding. . . ." Appx 146 (emphasis added). This clause therefore effectively forces each of the 33 affected class members into bringing multiple individual actions against multiple individual defendants to remedy the Defendants' breach. But ERISA Section 502(a)(2) actions are always representative actions on behalf of the plan. *See Cedeno*, 100 F.4th at 400-01, 403 (ERISA Section 502(a)(2) action is a representative action on behalf of the plan); *Henry*, 72 F.4th at 506-07 (same); *Parker*, 114 F.4th at 798 (same); *Pover*, 2026 WL 2196257, at *7 (same); *Williams*, 161 F.4th at 1321 (same).[20]

The clause at issue therefore serves as a prospective waiver of the affected participant's right to pursue statutory remedies against multiple fiduciaries in a single representative cause of action. This clause will also prevent Plaintiff Matthew Daly from fully recovering from Defendants for their fiduciary breach and making the plan whole, in direct contravention

[20] Because these are representative actions on behalf of the plan, the most obvious procedural vehicle to bring such actions is Rule 23. *Cf. Coan*, 457 F.3d at 261 (disapproving of plaintiff who did not bring her action in a representative capacity).

of both the language of section 409(a) and Congressional intent. This Court should find the waiver invalid under the effective vindication doctrine and permit the 33 proposed class members to join the class. *See Cedeno*, 100 F.4th at 405-07; *Pover*, 2026 WL 2196257, at *8.

A. Prospective Waivers of Statutory Rights Are Unenforceable Under the Effective Vindication Doctrine

The Supreme Court has recognized that where a legal provision works as a prospective waiver of a party's right to pursue statutory remedies, the provision may be invalidated as a matter of law under the effective vindication doctrine. *See Mitsubishi*, 473 U.S. at 637 n.19; *Italian Colors*, 570 U.S. at 235. As the Supreme Court explained in *Italian Colors*, the effective vindication doctrine permits courts to "invalidate agreements that prevent the 'effective vindication' of a federal statutory right." 570 U.S. at 235. This exception "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Id.* at 236 (emphasis in original) (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

Numerous appellate courts, including this Court, have applied the effective vindication doctrine to invalidate arbitration provisions in ERISA

plan documents on the basis that those provisions would prevent a party's right to pursue statutory remedies. Thus, in *Smith*, this Court invalidated an arbitration provision that prevented the plaintiff from receiving relief that had "the purpose or effect of providing additional benefits or monetary or other relief to" anyone other than the plaintiff. 13 F.4th at 621. This Court concluded that the language of the provision precluded the plaintiff from seeking removal of the plan fiduciary, as the remedy would extend to the entire plan, and therefore the provision conflicted with the statutory remedies available to the plaintiff under ERISA. *Id.* This Court concluded that the problem with the arbitration clause was "its prohibition on certain plan-wide remedies, not plan-wide representation." *Id.* at 622.

B. The Class Waiver Provision Bars The 33 Members From Pursuing Their Statutory Remedies Under ERISA

ERISA actions are representative actions seeking relief from all fiduciaries on behalf of the entire plan. The class waiver provision at issue here effectively bars the 33 affected employees from exercising their statutory remedies under ERISA and prevents Plaintiff from recovering fully on behalf of the plan.

1. The Class Waiver at Issue Forces The 33 Affected Employees To Seek Individual Relief Against Individual Defendants

The waivers at issue specifically waived "any right or ability to . . . otherwise participate in any putative or certified class, collective, or *multi-party* action or proceeding. . . ."[21] Appx. 146 (emphasis added). By its terms, this waiver not only precludes the affected individuals from participating in class or representative actions, but it would actually force them to bring actions against each Defendant individually to vindicate the Plan's rights. Where, as here, there are multiple fiduciaries, any action on behalf of the entire plan would necessarily be "multi-party," i.e., against multiple defendants. Therefore, by its plain language, the waiver prohibits the precise type of relief ERISA affords under Section 409(a), i.e., the ability to recover from *all* plan fiduciaries for fiduciary breaches. *See* 29 U.S.C.

[21] The Second Circuit noted in *Cedeno* that an ERISA Section 502(a)(2) action is "not actually a class action" even when filed following the requirements of Rule 23. 100 F.4th at 403. Moreover, ERISA actions are akin to the single agent acting on behalf of a single principal actions recognized by the Supreme Court in *Viking River Cruises v. Moriana*, 596 U.S. 639, 657 (2022).

§1109(a); *Smith*, 13 F.4th at 621 ("[W]hat the statute permits, the [waiver] precludes.")

Moreover, because there are 33 potential plaintiffs and a minimum of four Defendants, these plaintiffs would need to prevail in no fewer than 132 individual cases to fully vindicate the Plan's ERISA statutory rights. But the multiple defendants in this case may be covered by Fed. R. Civ. P. 19, and therefore subject to mandatory joinder, *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir. 1999), thus putting the waiver in direct conflict with Rule 19. The language regarding multi-party suits in the severance agreements could therefore fully frustrate the ability of the 33 proposed class members from vindicating their statutory rights. *See* Fed. R. Civ. P. 19.

ERISA does not allow a court or arbitral forum to slice and dice individual plan participants' and beneficiaries' injuries resulting from mismanagement by fiduciaries . . . ."*Pover*, 2026 WL 2196257, at *8 (citation modified); *Cedeno*, 100 F.4th at 405. The waiver therefore prevents full vindication of any individual plaintiff's statutory rights. *See Pover*, 2026 WL 2196257, at *8; *Cedeno*, 100 F.4th at 405

2. *The Waivers Prevent Plaintiff Daly From Making The Plan Whole*

In addition, without the 33 affected plan participants, Plaintiff Matthew Daly can never make the Plan whole as a result of the breach, nor fully accomplish the equitable remedies of restitution, disgorgement, and constructive trust.[22] *See* Appx. 114-15. Each of the 33 affected proposed class members received $515.18 per share for their retirement accounts, as part of the same course of conduct by Defendants that affected the remainder of the proposed class. But these waivers prevent the affected beneficiaries from benefitting from Plaintiff's attempts to make the Plan whole. *Cf.* 29 U.S.C. § 1109(a).

In barring the 33 proposed class members from participating in any ERISA representative action, the clause effectively frustrates the very purpose of 409(a), namely forcing each of the fiduciaries to personally

[22] This is why class treatment is typically appropriate under Fed. R. Civ. P. 23(b)(1)(B) for "breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment.

make good to the plan *any* losses due to their fiduciary breach. 29 U.S.C. § 1109(a). Because the 33 class members have been excluded from the proposed class, Plaintiff cannot fully vindicate the rights of the plan in the present suit and the plan cannot be made whole. *Cf. Pover*, 2026 WL 2196257, at *8.

3. The Waivers Effectively Prevent The Affected Plan Participants from Bringing Representative Actions, Contrary to ERISA

Finally, the waivers effectively prevent the affected plan participants from bringing representative actions at all, thereby frustrating their ability to pursue their statutory remedies under ERISA. In *Pover*, the Ninth Circuit invalidated a plan arbitration provision where it found that the language functioned as a "representative action waiver." 2026 WL 2196257, at *8-*9. The Ninth Circuit did so because ERISA Section 502(a)(2) actions are always representative in nature, and therefore the court concluded that the waiver prevented the plaintiff from pursuing remedies specifically authorized by Congress. *Id.* at *8.

The provision in the present matter does not use the term "representative action" nor does it explicitly require that the beneficiary or plan participant bring any dispute on an "individual basis." *Cf. Pover*, 2026 WL 2196257, at *3. But as a practical matter, the provision requires the 33 affected participants to bring their suits on an individual basis, against each individual defendant, and seek only individualized relief, because they cannot bring any "multi-party" suit. *See* Appx. 146. The District Court seems to have recognized this fact but incorrectly concluded that there was "no practical limitation on the remedies the 33 proposed Class members may seek" on an individual basis. Appx. 33 n.9.

ERISA Section 502(a)(2) claims, however, are fundamentally *representative* in nature and "[t]o require such claims be brought solely in an individual capacity is to prohibit them altogether." *Duke*, 167 F.4th at 30. Because the remedies available under Sections 502(a)(2) and 409(a) inure to the plan, the statute only provides "indirect relief to individual plan participants and beneficiaries." *Cedeno*, 100 F.4th at 404. This makes sense given Congress's concern with "misuse and mismanagement of plan

assets by plan administrators" and ERISA's focus on protecting the plan. *LaRue*, 552 U.S. at 254. If individual plan members could recover only their personal losses as a result of a fiduciary breach, then the plan would never be made whole, because every single member would have to bring an independent action to rectify the breach of fiduciary duty. *See Pover*, 2026 WL 2196257, at *8. Moreover, separate actions on behalf of different beneficiaries could lead to inconsistent rulings regarding breach of fiduciary duty, further frustrating Congressional intent. *See generally* Fed. R. Civ. P. 23(b)(1); 29 U.S.C. § 1001(b).

LaRue is in accord. As the Second Circuit explained in *Cedeno*, the alleged breach in *LaRue* caused a loss solely in LaRue's individual account within the plan, thus the plan injury and LaRue's injury were coextensive. *See Cedeno*, 100 F.4th at 404. But "nothing in *LaRue* suggests that an individual claimant . . . who is aggrieved by a breach of fiduciary duty that has a plan-wide impact can seek a remedy under Section 502(a)(2) that benefits solely that individual's account." *Id.*

Indeed, "ERISA does not allow a court or arbitral forum to slice and dice individual plan participants' and beneficiaries' injuries resulting from mismanagement by fiduciaries . . . ." *Pover*, 2026 WL 2196257, at *8 (citation modified); *Cedeno*, 100 F.4th at 405; *see also Coan v. Kaufman*, 457 F.3d 250, 259 (2d Cir. 2006) (Section 502(a)(2) contemplates litigation in a "representative capacity on behalf of the plan."). The waiver language here, like the contested provision in *Pover*, effectively prevents the affected participants from bringing a representative action on the plan's behalf, under Section 502(a)(2). *See Pover*, 2026 WL 2196257, at *7-*8. Thus, as in *Pover*, this waiver serves to frustrate both the purpose of ERISA and the remedies that the affected plan members and Plaintiff might seek. *See id*; *see also Duke*, 167 F.4th at 30.

Although this Court suggested in a footnote in *Smith* that it placed no emphasis on *Russell*'s language that Congress intended "that actions for breach of fiduciary duty be *brought in a representative capacity* on behalf of the plan," 13 F.4th at 622 n.6 (emphasis in original), the majority of Circuits who have since considered the issue have determined that ERISA Section

502(a)(2) actions are in fact brought in a representative capacity on behalf of the plan. *See Cedeno*, 100 F.4th at 405 (Second Circuit); *Henry*, 72 F.4th at 506 (Third Circuit); *Parker*, 114 F.4th at 798 (Sixth Circuit); *Pover*, 2026 WL 2196257, at *7 (Ninth Circuit); *Harrison*, 59 F.4th at 1103-04 (Tenth Circuit); *Williams*, 161 F.4th at 1321 (Eleventh Circuit). In short, although ERISA Section 502(a)(2) reaches harms to individual accounts, it does not contemplate individual suits for individual losses separate and apart from plan losses. *See Cedeno*, 100 F.4th at 404.

Defendants have, through the severance agreements, forced the 33 class members to prospectively waive their statutory rights under ERISA and immunized themselves from full recovery for their unlawful acts. *See Pover*, 2026 WL 2196257, at *8; *Cedeno*, 100 F.4th at 405. The effective vindication doctrine exists as a public policy exception to the enforcement of contractual rights.[23] *See Italian Colors*, 570 U.S. at 235. Should the Court

[23] It is clear that Congress wanted to prevent fiduciaries from escaping liability for ERISA breaches. *See* 29 U.S.C. §§ 1109(a), 1110(a) ("any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.")

affirm the District Court's ruling excluding the 33 individuals with plan waivers, the Defendants will, as a practical matter, likely never make the Plan whole for their breach of fiduciary duty and self-dealing. Because the elements of the doctrine are met here, this Court should reverse the District Court and find the class action waivers for the 33 proposed class members unenforceable.

CONCLUSION

Defendant fiduciaries in this case cashed out a subset of Plan participants at a valuation they acknowledge was "ridiculous by any measure." Appx. 117. Plaintiff Matthew Daly has a right under ERISA to recover, on behalf of the Plan, from all Defendants for their breaches of their fiduciary duty and to make the Plan whole. Defendants seek to evade responsibility for those breaches, ignoring the facts of this case and binding precedent. But the sacred trust that ERISA places in fiduciaries is not so easily disregarded. The District Court followed this Court's clear guidance and correctly exercised its discretion in certifying the Class of 113 plan

participants affected by the breach, but erred in excluding 33 additional participants who signed waivers.

This Court should affirm the District Court's decision as to the 113 proposed class members and reverse as to the 33 participants that it excluded, thereby restoring a unified class.

Dated: August 26, 2026

Respectfully submitted,

/s/ Charles Field

Kevin Sharp
SANFORD HEISLER SHARP MCKNIGHT, LLP
611 Commerce St., Suite 3100
Nashville, TN 37203
Phone: (615) 434-7001
Facsimile: (615) 434-7020
ksharp@sanfordheisler.com

Counsel of Record: Charles Field
Michelle Wasserman
Myounghee Choung
SANFORD HEISLER SHARP MCKNIGHT, LLP
7911 Herschel Avenue, Suite 300
La Jolla, CA 92037
Telephone: (619) 577-4242
Facsimile: (619) 577-4250
cfield@sanfordheisler.com

Albert Powell
SANFORD HEISLER SHARP MCKNIGHT, LLP
17 State Street, Suite 3700
New York, NY 10004
Telephone: (646) 402-5648
Facsimile: (646) 402-5651
apowell@sanfordheisler.com

Erica Roberts
SANFORD HEISLER SHARP MCKNIGHT, LLP
700 Pennsylvania Ave., Suite 300
Washington, DC 20003
Phone: (202) 499-5233
Facsimile: (202) 499-5199
eroberts@sanfordheisler.com

Matthew J. Singer
MATT SINGER LAW, LLC
77 West Wacker Dr., Suite 4500
Chicago, IL 60601
Phone: (312) 248-9123
matt@mattsingerlaw.com

Attorneys for Plaintiff-Appellee-Cross-Appellant Matthew Daly

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Response and Opening Brief of Plaintiff-Appellee-Cross-Appellant Matthew Daly complies with the type-volume limitations of Circuit Rule 28.1 because this document contains 15,607 words, excluding the items excluded for length under Rule 32(f).

The undersigned further certifies that this petition complies with the requirements of Fed. R. App. P. 32(a)(1), the typeface requirements of Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 14-point Palatino Linotype font with 12-point footnotes.

Dated: August 26, 2026 /s/Charles Field

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2026, I electronically filed Response and Opening Brief of Plaintiff-Appellee-Cross-Appellant Matthew Daly through the CM/ECF system for the United States Court of Appeals for the Seventh Circuit consistent with Federal Rule of Appellate Procedure 25(c)(2).

Dated: August 26, 2026 /s/Charles Field

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I hereby certify that Response and Opening Brief of Plaintiff-Appellee-Cross-Appellant Matthew Daly complies with Circuit Rule 30(d) because all materials required by Circuit Rule 30(a) and (b) are included within the attached Short Appendix of Appellant's brief on Main Appeal.

Dated: August 26, 2026 /s/Charles Field