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No.

In the Supreme Court of the United States

RICK MIDDLETON, BOB DOSS, RONN ENGLISH, PERRI NEWELL, and SOUTH BAY TEAMSTERS AND EMPLOYERS HEALTH AND WELFARE AND RELATED BENEFITS TRUST FUND,
Petitioners,

v.

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS SECURITY FUND, and DIRK GEERSEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

KATHRYN J. HALFORD
Wohlner Kaplon Phillips Young & Cutler
15456 Ventura Blvd.
Sherman Oaks, CA 91403
(818) 501-8030

KENNETH S. GELLER
DAVID M. GOSSETT
LINDA KAY SHORE
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

MICHAEL A. VANIC
Counsel of Record
JOSEPH C. FAUCHER
Reish Luftman Reicher & Cohen
11755 Wilshire Blvd., 10th Floor
Los Angeles, CA 90025
(310) 478-5656

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

In this case arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, one ERISA multiemployer employee welfare plan contracted with another ERISA multiemployer employee welfare plan to purchase death benefits for its participants. Approximately 14 years later, the purchasing plan terminated the contract, electing to purchase the death benefits from an insurance company. The purchasing plan then sued the ERISA plan that had provided the death benefits to recover the difference between the amount of money it had paid for the benefits and the amount it had cost the other plan to provide those benefits. Ignoring foundational principles of ERISA law, the Ninth Circuit held that the plan that had purchased the death benefits was entitled to recovery on the ground that the fees paid for the benefits remained "plan assets" of the purchasing plan. Two questions are presented.

The first, which has profound significance for every company that does business with an ERISA plan, is whether the Ninth Circuit correctly held that plan assets used to purchase a product or service from an independent third party may retain their characterization as plan assets after being paid to that third party pursuant to a contract.

The second, which has broad implications for all ERISA multiemployer plans, is whether, contrary to this Court's precedents, other federal courts of appeals' decisions, and fundamental principles applicable to multiemployer plans, the Ninth Circuit correctly held that contributions made to a multiemployer employee welfare plan on behalf of a particular group of plan participants may not be used for the benefit of other plan participants.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Rick Middleton, Bob Doss, Ronn English, Perri Newell and South Bay Teamsters and Employers Health and Welfare and Related Benefits Trust Fund, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–9a) is reported at 474 F.3d 642. The order of the court of appeals denying rehearing (App., *infra*, 24a) is not reported.

The district court's order denying respondents' motion for summary judgment and granting petitioners' motion for summary judgment (App., *infra*, 10a) is unreported. The transcript of the hearing on the parties' cross-motions for summary judgment, which sets forth the reasons for the court's ruling, is reproduced at App., *infra*, 11a–16a. The district court's order granting petitioners' motion for attorneys' fees (App., *infra*, 17a–23a), is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a–9a) was filed on January 18, 2007. A timely petition for rehearing was denied on April 27, 2007. App., *infra*, 24a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are involved in this case: ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2); and ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). The pertinent text of these statutes is set forth at App., *infra*, 25a–31a.

STATEMENT

This case presents two issues of profound importance to ERISA plans, including one that is also of critical significance to companies and entities that contract to provide products and services to such plans.

According to the Ninth Circuit, fees an ERISA plan pays to another entity for products or services remain plan assets, and as a result that other entity owes a fiduciary duty to the plan. This conclusion vitiates basic principles of contract law and finds no support in the text of ERISA. The result of this holding, if allowed to stand, is that ERISA plans can alter the terms of any contract after-the-fact, simply to make the contract more financially advantageous than the contract the plan in fact negotiated. The destabilizing implications of such a rule cannot be overstated.

In addition, the Ninth Circuit held that multiemployer employee welfare plans must earmark contributions made on behalf of any given group of participants for the benefit of those participants alone. Such a rule is at loggerheads with a long line of cases from this Court and other federal courts of appeals regarding multiemployer plans and their assets, which permits the use of contributions for the benefit of all plan participants. It misconstrues the very nature of multiemployer plans, which are inherently risk-sharing, and threatens to wreak havoc on all such plans.

Certiorari is warranted to avoid these untoward consequences of the Ninth Circuit's plainly erroneous decision.

A. Factual background.

Petitioner South Bay Teamsters and Employers Health and Welfare and Related Benefits Trust Fund ("South Bay Fund")[1] is a multiemployer employee welfare plan within the meaning of ERISA §§ 3(1) and 3(37)(A), 29 U.S.C.

[1] The other petitioners, Rick Middleton, Bob Doss, Ronn English and Perri Newell, are the trustees of South Bay Fund ("South Bay Trustees").

§§ 1002(1), 1002(37)(A).[2] Among the benefits that it provides to its participants are self-funded death and dismemberment benefits. The Declaration of Trust for South Bay Fund provides:

> The Trustees shall have the power to enter into agreements, arrangements or contracts with the Trustees of any other Trust Fund or with any union, for the purpose of providing benefits for the participants of this Trust and/or *those of such other fund* or Union.

IV SER 621–622; III SER 544 (emphasis added).

Respondent Southern California Bakery Drivers Security Fund ("Bakery Drivers Fund") is also a multiemployer employee welfare plan within the meaning of ERISA §§ 3(1) and 3(37)(A), 29 U.S.C. §§ 1002(1), 1002(37)(A).[3] Bakery Drivers Fund, too, provides its participants with death and dismemberment benefits.

Prior to August 1, 1987, Bakery Drivers Fund provided death benefits to its participants through the purchase of a group insurance policy from an insurance carrier. See App., *infra*, 2a n.1. In 1987, Bakery Drivers Fund entered into a written agreement with South Bay Fund (the "Trust-to-Trust

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[2] ERISA § 3(37), 29 U.S.C. § 1002(37), defines a multiemployer plan as a plan "maintained pursuant to one or more collective bargaining agreements" between a union or unions and employers, "to which more than one employer is required to contribute." Multiemployer plans "are common in industries with many small companies, each too small to justify an individual plan. They are also found in industries where, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company's plan (if one were established)." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 62-63 (3d ed. 2000) (quoting EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987)).

[3] Respondent Dirk Geersen is a participant in the Bakery Drivers Fund.

Agreement"). Pursuant to the Trust-to-Trust Agreement, South Bay Fund agreed to provide death benefits in the amount of $10,000 and dismemberment benefits in the amount of $5,000 or $10,000 (collectively, the "death benefits") to the so-called "Common Participants" (*i.e.*, Bakery Drivers Fund participants on whose behalf Bakery Drivers Fund contracted with South Bay Fund for the purposes of the death benefits). *Ibid.*[4] Bakery Drivers Fund agreed to pay the South Bay Fund the amount of $5.50 per Common Participant per month in exchange for the death benefits (the "fees"). *Ibid.*

The term of the initial Trust-to-Trust Agreement was for three years, commencing on August 1, 1987 and ending on July 31, 1990. Thereafter, the parties renegotiated the Agreement in 1990, 1993 and 1996, and then renewed it annually in 1997, 1998, 1999, and 2000. These subsequent Agreements did not materially differ from the original agreement,[5] and in particular all continued to require fees of $5.50 per Common Participant per month in exchange for the death benefits provided. This arrangement continued for almost 14 years, until Bakery Drivers Fund terminated the Trust-to-Trust Agreement effective May 31, 2001. See App., *infra*, at 2a. Thereafter, Bakery Drivers Fund again provided death benefits to the former Common Participants by contracting with an insurance carrier. See IV SER 632–633; III SER 559.

As is typical of multiemployer welfare plans, throughout the nearly 14 years of the Common Participants' participation

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[4] "Common Participants" is the designation given these participants by Bakery Drivers Fund in its complaint in this action. See I ER 1–9.

[5] The 1993 Agreement added a spouse-and-dependent-child benefit; the 1996 Agreement was for a one-year term instead of a three-year term, was subject to automatic one year renewals, and provided for termination, after the first year, by either party on 120 days notice.

in South Bay Fund, the fees paid on their behalf were deposited by South Bay Fund, along with the contributions made for all other participants, into South Bay Fund's pooled accounts, and they were accounted for all purposes and treated as the assets of South Bay Fund. III SER 459. South Bay Fund made investment decisions concerning its assets based on the fund's experience with regard to plan benefits, including the death benefits. *Ibid.* The benefits payable to the Common Participants and administrative costs related thereto were paid by South Bay Fund from its pooled accounts. IV SER 629–630, 638; III SER 555–556, 567.

No reserves were transferred by Bakery Drivers Fund to South Bay Fund to fund the benefits for the Common Participants. There were no provisions in the Trust-to-Trust Agreements by which South Bay Fund could compel Bakery Drivers Fund to contribute more than the $5.50 fee per participant per month if benefits paid exceeded the contributions received for the Common Participants. In short, South Bay Fund bore the full funding risk with regard to the death benefits and had to fund those benefits out of its pooled assets. See IV SER 615–616; III SER 536.

In particular, the Trust-to-Trust Agreements contained no provisions requiring South Bay Fund to:

- segregate the fees for the Common Participants or the investment of those fees separately from other assets of South Bay Fund;
- separately account to Bakery Drivers Fund for, or maintain a reserve or surplus in connection with, (i) the fees made for the Common Participants, (ii) the investment of those fees, or (iii) the payment of benefits to the Common Participants;
- account to Bakery Drivers Fund for the amount of the difference, if any, calculated by subtracting the total of benefits paid to Common Participants (plus administrative costs related thereto)

from the fees paid for the Common Participants; or

- refund, reimburse or pay over to Bakery Drivers Fund, at the end of the Trust-to-Trust Agreement or at any other time, the amount of the difference, if any, calculated by subtracting the total of benefits paid to Common Participants (plus administrative costs related thereto) from the fees paid for the Common Participants.

Consistent with the Trust-to-Trust Agreements, during the many years the Common Participants participated in the South Bay Fund, Bakery Drivers Fund never asserted that South Bay Fund was required to segregate the fees or the investment of those fees. Bakery Drivers Fund never claimed that South Bay Fund was required to account separately for, or maintain a reserve or surplus in connection with, (i) the fees, (ii) the investment of those fees, or (iii) the payment of benefits to the Common Participants. And, during the 14 year term of the Agreements, Bakery Drivers Fund never asserted that South Bay Fund was required to refund, reimburse or pay over to Bakery Drivers Fund at any time the amount of the difference, if any, calculated by subtracting the total of benefits paid to Common Participants (plus administrative costs related thereto) from the fees paid for the Common Participants. See App., *infra*, 3a, 16a.

Similarly, during the Trust-to-Trust Agreements, Bakery Drivers Fund did not treat all, or any portion, of the fees paid to South Bay Fund as assets of Bakery Drivers Fund on its books and records or in its required IRS Form 5500 Annual Return/Report of Employee Benefit Plan, mandated by ERISA § 104, 29 U.S.C. § 1024. On the contrary, in its trust accounting, Bakery Drivers Fund treated the fees paid to South Bay Fund as expenses, and Bakery Drivers Fund did not track the amount of the difference, if any, calculated by subtracting the total of benefits paid to Common Participants

(plus administrative costs) from the fees paid on behalf of Common Participants. See IV SER 624; III SER 548–549.

When Bakery Drivers Fund gave notice on January 29, 2001, that it was terminating the Trust-to-Trust Agreement, it made no demand on South Bay Fund to refund or reimburse to Bakery Drivers Fund any portion of the fees paid during the tenure of the Trust-to-Trust Agreements. In fact, it was not until January 10, 2002, nearly a year after giving notice, that Bakery Drivers Fund for the first time asserted that it was entitled to reimbursement of the amount calculated by subtracting the total benefits paid to Common Participants (plus administrative costs) from the fees made for the Common Participants during the term of the Trust-to-Trust Agreements, and demanded payment thereof. South Bay Fund rejected Bakery Drivers Fund's demand. This action ensued.

B. Respondents' complaint.

Bakery Drivers Fund filed its initial complaint on August 4, 2003. Following the district court's order granting in part and denying in part South Bay Fund's motion to dismiss, Bakery Drivers Fund filed its first amended complaint on December 2, 2003.

In its amended complaint, Bakery Drivers Fund alleged that it and South Bay Fund entered into the Trust-to-Trust Agreements, pursuant to which the Bakery Drivers Fund "participants [would] participate in the death benefit plan maintained by South Bay." II SER 356. The "participants of the [Bakery Drivers Fund, including respondent Geersen] for whom payments were made to the South Bay Fund under the * * * Agreement thereby became participants of the South Bay Fund" and would thereafter be referred to as the Common Participants. I ER 5. "In all respects, the South Bay Fund treated the Common Participants as its own participants." *Ibid.*

The complaint further alleged that during the tenure of the Trust-to-Trust Agreements, over $2,700,000 was paid in

fees to South Bay Fund for the Common Participants, approximately $815,000 was paid in death benefits by South Bay Fund for the Common Participants, and the expenses of administering the death benefits did not exceed $250,000. App., *infra*, 2a, 18a. The complaint referred to the amount by which the fees exceeded benefits paid plus expenses as the "Surplus Funds." *Ibid.*

In the second claim for relief,[6] Bakery Drivers Fund alleged that the "Surplus Funds" were assets *of Bakery Drivers Fund*, that the South Bay Trustees exercised control and management over the disposition of the Surplus Funds, and that the South Bay Trustees breached a fiduciary duty owed *to Bakery Drivers Fund* under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),[7] by "failing to apply the Surplus Funds exclusively for the benefit of the Common Participants." I ER 9–10.

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[6] The first claim for relief in the original complaint alleged that the Trustees of South Bay Fund breached their fiduciary duty owed *to South Bay Fund* under ERISA § 404(a)(1)(A) by failing to hold and use the contributions "solely for the purpose of providing benefits to the Common Participants." This claim was dismissed, and Bakery Drivers Fund did not appeal that dismissal. Bakery Drivers Fund's third claim for relief alleged that the South Bay Fund breached certain collective bargaining agreements by failing to use the contributions for the exclusive benefit of the Common Participants in violation of Section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5). The court of appeals affirmed the district court's order granting South Bay Fund summary judgment on that claim. App., *infra*, 9a.

[7] ERISA § 404(a)(1) states in relevant part: "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and (ii) defraying reasonable expenses of administering the plan; * * *."

C. The district court's decision.

South Bay Fund and Bakery Drivers Fund filed cross-motions for summary judgment.

South Bay Fund moved for summary judgment on Bakery Drivers Fund's second claim for relief on the grounds that (i) the Trust-to-Trust Agreements established the rights and duties of the parties, (ii) the Trustees of South Bay Fund are fiduciaries of South Bay Fund under ERISA—not fiduciaries of Bakery Drivers Fund, (iii) once received, the fees paid by Bakery Drivers Fund to South Bay Fund on behalf of the Common Participants became the assets of South Bay Fund, and (iv) as a multiemployer employee welfare plan, the assets of South Bay Fund originally derived from fees for the Common Participants could be used by South Bay Fund for the benefit of any of its participants, and accordingly, the use of its assets in that manner did not violate ERISA's exclusive benefit rule. App., *infra*, 2a–3a.

Bakery Drivers Fund contended that the fees paid by Bakery Drivers Fund to South Bay Fund for the benefit of the Common Participants remained assets of Bakery Drivers Fund because the payments did not fall within the scope of ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2), which exempts the assets of insurers who issue "guaranteed benefit polic[ies]" from the definition of "plan assets." Bakery Drivers Fund also relied on the "free funds" holding of this Court in *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 510 U.S. 86 (1993), to claim that these fees remained plan assets.

The district court ruled on the cross-motions by means of a one-paragraph order, stating that it denied Bakery Drivers Fund's motion and granted South Bay Fund's motion "[f]or the reasons stated in open court on October 25, 2004." App., *infra*, 10a. At that hearing, the district court had rejected Bakery Drivers Fund's contention that this case was governed by *John Hancock*:

> The court cannot agree with this contention. The act of holding and investing [another's] money, as it existed in the *John Hancock* case, has always been understood to give rise to fiduciary duties. *No such relationship existed here.*

App., *infra*, 13a (emphasis added). The district court also concluded that the Trust-to-Trust Agreements were subject to the guaranteed benefit exception of ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2). See *id.* at 12a.

Thereafter, the district court granted South Bay Fund's motion for attorneys' fees under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). In the course of ruling on that motion, the court further clarified the reasoning behind its summary judgment decision:

> [T]here simply is no support in the record for Plaintiffs' assertion that the Trust-to-Trust agreements contemplate the return of any surplus funds. The concise and unambiguous agreements state only that, in exchange for a fee of $5.50 per month per participant, South Bay will provide $10,000 death and AD&D benefits (or $2,500 for retirees). No provision creates a reserve fund for any surplus. No provision discusses the return of any, or all, surplus funds. No provision provides for the accounting of funds. There is no discussion of any administrative fee (for South Bay or otherwise). There is no provision that would protect South Bay, which bore the full funding risk, in the event that an unexpectedly big number of deaths created a deficit of funds for providing benefits. Outside the terms of the agreements themselves, there is also no evidence that either of the parties ever contemplated the return of any surplus funds at any point during the course of the agreements.

App., *infra*, 19a.

D. The court of appeals' decision.

The court of appeals reversed the decision of the district court with respect to Bakery Drivers Fund's second claim for relief.[8] Disregarding the district court's finding that South Bay Fund was *not* holding and investing Bakery Drivers Fund's assets, as well as the undisputed fact that South Bay Fund is a multiemployer plan, the Ninth Circuit concluded that "South Bay Teamsters"—it is unclear whether the Ninth Circuit meant the South Bay Fund or the South Bay Trustees—"was an ERISA fiduciary *of the plan assets of [Bakery Drivers Fund]*," App., *infra*, 7a (emphasis added), and that it "breached its [fiduciary] duties under ERISA by failing to apply the surplus funds for the benefit of the [Bakery Drivers Fund] participants." *Ibid.* (citing ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)).

In particular, relying on *IT Corp.* v. *General American Life Insurance Co.*, 107 F.3d 1415 (9th Cir. 1997)—a case involving the issue of when a third party administrator functions as an ERISA fiduciary—the Ninth Circuit held that "South Bay Teamsters exercised 'control respecting management or disposition of [the Bakery Drivers Fund] assets,' by receiving payment or assets from Bakery Drivers that were contributed on behalf of plan participants and then placing those assets into its fund over which it had authority, *inter alia*, to write checks." App., *infra*, 7a (quoting 29 U.S.C. § 1002(21)(A)). The court of appeals reasoned that "where * * * the exclusion in [29 U.S.C.] § 1101(b)(2) [governing guaranteed benefit policies] is inapplicable,"—as it is here, because South Bay Fund does not meet the definition of an "insurer" contained in 29 U.S.C. § 1101(b)(2)(A)—"all assets paid-in are treated as 'plan assets' and an entity that takes 'actions in regard to their management and disposition

[8] In light of its decision with respect to the ERISA claim, the court of appeals also reversed the district court's award of attorneys' fees. See App., *infra*, 8a.

must be judged against ERISA's fiduciary standards.'" *Ibid.* (quoting *John Hancock*, 510 U.S. at 106).[9]

The Ninth Circuit failed to explain how, consistent with settled legal principles governing ERISA, payments received by the South Bay Fund, an ERISA multiemployer plan, either could have remained assets of the Bakery Drivers Fund throughout the 14 years of the Trust-to-Trust Agreements or could have metamorphosed into Bakery Drivers Fund assets after the termination of the final Trust-to-Trust Agreement.

Petitioner filed a petition for rehearing, which was denied without comment. See App., *infra*, 24a.

REASONS FOR GRANTING THE PETITION

There can be no question that the Ninth Circuit's decision in this case is flatly incorrect; Robert Eccles and David Gordon, two leading ERISA commentators, have gone so far as to write that the court's analysis is "fall[acious]" and that the decision "escapes * * * comprehension." See R. Eccles & D. Gordon, *Ninth Circuit Rules that Businesses Doing Business with Multiemployer Plans Must Return Profits from Such Business Dealings to the Plans*, 15(1) ERISA LITIG. RPTR. 12, 12–14 (Feb.–Mar. 2007). The decision below flouts the terms of the parties' agreement, the statutory ERISA text, and foundational principles of ERISA law.

Of course, mere legal error, even egregious legal error, is not a sufficient basis to warrant the exercise of this Court's certiorari jurisdiction. Certiorari is warranted in this case because the Ninth Circuit's decision is not just wrong but threatens to wreak havoc on ERISA plans and the companies

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[9] The Ninth Circuit also suggested that the Trust-to-Trust Agreements somehow "created" a *separate* ERISA plan, whose assets could only be used for the benefit of the Common Participants. App., *infra*, 7a. That proposition is inconsistent not only with respondents' complaint, see App., *infra*, 13a but also with the court of appeals' actual *holding*—that South Bay Fund is liable to *Bakery Drivers Fund.* See App., *infra*, at 8a.

that do business with ERISA plans. *First*, the logical implication of the court of appeals' holding is that ERISA plans are entitled to ignore the terms of contracts into which they enter, and to seek recoupment of funds paid to third parties pursuant to valid contracts, in *any* instance in which the ERISA plan asserts that it entered into a less-than-perfect deal.

Second, the court of appeals' decision also requires that multiemployer plans, which are commonly understood to be inherently risk-sharing, instead earmark contributions made on behalf of any given group of participants for the benefit of those participants alone, and refund any excess contribution when those participants leave the plan. Under the Ninth Circuit's rule, contributions are no longer assets of a multiemployer plan for the benefit of *all* participants but, rather, are assets of a subgroup of participants that move with them when they leave the plan. This rule, which is directly contrary to that in other federal circuits, will interject chaos into the fiduciary management and control of multiemployer plans and their assets.

This Court's review is warranted to avoid these extraordinary results.

I. Certiorari Is Warranted To Correct The Ninth Circuit's Holding That Money An ERISA Plan Pays To Another Entity In Exchange For Products Or Services Remains "Plan Assets" Subject To Recoupment.

Bakery Drivers Fund paid South Bay Fund a contractually agreed upon fee for a contractually agreed upon product—death benefits for the Common Participants—and throughout the term of that contract both parties performed their contractual duties as agreed. According to the Ninth Circuit, Bakery Drivers Fund can now revisit this contractual arrangement many years later and revise the contract to its advantage. That result is plainly unsupportable and will create massive confusion and work a huge amount of mischief on ERISA plans and the numerous entities that do business with them. Notably, although this *particular* litigation in-

volves a contract between two ERISA plans, nothing about the court of appeals' analysis turns on the fact that petitioner South Bay Fund is itself an ERISA plan. Thus, the Ninth Circuit's decision has alarming implications for *all* entities that contract to provide products or services to ERISA plans, ranging from landlords to utility companies to janitorial services to payroll services to office supply companies to outside legal counsel.

A. The Ninth Circuit's decision has no foundation in ERISA law.

The Ninth Circuit concluded that "South Bay Teamsters was an ERISA fiduciary of the plan assets of [Bakery Drivers Fund], and that it breached its fiduciary duties with respect to those assets." App., *infra*, 7a. Implicit in this conclusion is the holding either that the fees received by South Bay Fund always remained assets of Bakery Drivers Fund or that the termination of the final Trust-to-Trust Agreement somehow transmogrified a share of South Bay Fund's assets into assets of the Bakery Drivers Fund. Neither conclusion has any plausible basis.

ERISA "contains no comprehensive definition of 'plan asset.'" *John Hancock*, 510 U.S. at 89.[10] ERISA § 401(b), 29 U.S.C. § 1101(b), however, addresses plan *investments*, and it—and the regulations implementing it—address the circumstances when plan investments remain "plan assets."

The Ninth Circuit focused on one sub-section of ERISA § 401(b)—Section 401(b)(2)—which governs "guaranteed

[10] Congress recently amended ERISA to include a definition of "plan assets." See Pension Protection Act of 2006, PUB. L. NO. 109-280, § 611(f), 120 Stat. 780, 972 (Aug. 17, 2006) (enacting ERISA § 3(42), 29 U.S.C. § 1002(42)). This new provision, however, continues not to define the term "plan assets" comprehensively, instead merely specifying in relevant part that "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe * * *." ERISA § 3(42), 29 U.S.C. § 1002(42).

benefit polic[ies]" issued "by an insurer." The court concluded that because the arrangement at issue in this case admittedly did not fit the terms of Section 401(b)(2), the fees paid by Bakery Drivers Fund to South Bay Fund remained "plan assets" of Bakery Drivers Fund. App., *infra*, 4a. The court purported to find authority for this holding in this Court's *John Hancock* decision[11] and in the "plan-asset regulation" codified at 29 C.F.R. § 2510.3-101. See *id.* at 7a

But ERISA § 401(b), *John Hancock*, and the plan-asset regulation are applicable only to plan *investments*. See ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1) ("In the case of a plan which *invests* in any security * * *, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company") (emphasis added); 29 C.F.R. § 2510.3-101(a)(1) ("'[t]his section describes what constitute assets of a plan with respect to a plan's *investment* in another entity") (emphasis added). Neither the Trust-to-Trust Agreements nor the fees paid to the South Bay Fund were plan *investments* by the Bakery Drivers Fund. As the district court correctly concluded, the relationship created by the Trust-to-Trust Agreements was not the "act of holding and investing another's money, as existed in the *John Hancock* case." App., *infra*, 14a. Instead, it was quite plainly merely a situation where fees were paid to an independent entity for products and services provided. Thus, ERISA

[11] *John Hancock* dealt with the application of ERISA § 401(b)(2) in the context of an insurance annuity contract with so-called "free funds." The Court concluded that the annuity contract did not qualify for the guaranteed benefit policy exclusion of ERISA § 401(b)(2) to the extent that "free funds" (*i.e.*, funds in excess of those necessary to provide guaranteed benefits) were subject to discretionary management of the insurer, and held that John Hancock was therefore subject to ERISA fiduciary obligations with regard to the free funds. *John Hancock*, 510 U.S. at 106.

§ 401(b)(2), 29 C.F.R. § 2510.3-101(a) and (j)(2), and *John Hancock* have no application to this case.[12]

Rather, the Department of Labor ("DOL") has clarified that, outside the context of investments, plan assets should be defined according to basic principles of property and contract law. Thus, in an Advisory Opinion on the subject, DOL has explained that:

> It is the position of the Department that, in situations outside the scope of the plan assets—plan investment regulations (29 C.F.R. § 2510.3-101), *the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under*

[12] If this fact were not entirely evident from the text of Section 401(b) and the plan-asset regulation, further evidence comes from the history of that regulation. The DOL "promulgated [29 C.F.R. § 2510.3-101] partly defining the term 'plan asset'" in the context of purchases of equity interests in entities. *Assocs. in Adolescent Psychiatry, S.C.* v. *Home Life Ins. Co. of N.Y.*, 729 F. Supp. 1162, 1183 (N.D. Ill. 1989).

> The policy animating Reg. § 2510.3-101 is to impose ERISA fiduciary obligations upon persons or entities that, practically speaking, have been entrusted with the management and investment of plan assets. The regulation thus "looks through" the form of an entity to hold it directly liable as a fiduciary with respect to plan assets that have ostensibly been used to purchase an equity interest in that enterprise.

Ibid. Thus, where, as here, there is no claim that a plan has acquired an equity interest in an entity, the "general rule" is that "a plan's acquisition of a non-equity interest in an entity will not give the plan a share of the entity's underlying assets." *Id.* at 1185 (citing 29 C.F.R. § 2510.3-101(a)(2)); see also *id.* at 1188 ("'only those investments which provide a plan with an opportunity to share in the success or failure of the entity to which the investment relates are likely to be vehicles for the indirect provision of management investment services'") (quoting 51 Fed. Reg. 41,262, 41,263 (Nov. 13, 1986)).

> *non-ERISA law*. This identification process includes consideration of any contract or other legal instrument involving the plan, including the plan documents. It also requires the consideration of the actions and representations of the parties involved.

U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 92-02A, at 3 (Jan. 17, 1992) (emphasis added), available at http://www.dol.gov/ebsa/programs/ori/advisory92/92-02a.htm.[13]

Once one analyzes this case using "ordinary notions of property rights under non-ERISA law," *ibid.*, including "consideration of any contract * * * involving the plan," *ibid.*, it is plain that the result in this case is unsupportable: Bakery Drivers Fund had three options with regard to the death benefits: (1) it could self-fund those benefits by taking the contributions from its constituent employers and providing the benefit from its own pooled assets; (2) it could insure for the benefits through an insurance company; or (3) it could contract with another plan to have that plan provide the benefits. Had Bakery Drivers Fund chosen the first option, the contributions it received from employers would have been (and would have remained) its assets. Bakery Drivers Fund would have run the risk that those contributions would have been

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[13] See also U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 93-14A, at 10–11 (May 5, 1993), available at http://www.dol.gov/ebsa/programs/ori/advisory93/93-14a.htm (same); *RLJCS Enters., Inc.* v. *Prof'l Ben. Trust, Inc.*, 438 F. Supp. 2d 903, 910 (N.D. Ill. 2006) (quoting Op. 92-02A and relying on ordinary notions of property rights to hold that demutualized stock of the insurance company providing the plan's life insurance policies was asset of multiple-employer benefits trust, not of the employer and employee participants); *Collins* v. *Pension and Ins. Comm. of the S. Cal. Rock Prods. and Ready Mix Concrete Ass'n*, 144 F.3d 1279, 1282 (9th Cir. 1998) (applying a "plain interpretation of the term" standard to determine plan assets).

insufficient to pay the Common Participants' benefits, but conversely, any surplus contributions would have remained plan assets of Bakery Drivers Fund. By choosing either the second or third option, going outside its own fund for the benefit, Bakery Drivers Fund bore no risk that the contributions were insufficient to fund the insurance or benefit, but correspondingly, any surplus contributions or payments remain those of the party agreeing to provide the insurance or benefit. Bakery Drivers Fund chose the third option and contracted with South Bay Fund for these benefits.

It is thus unsurprising that the district court not only ruled in South Bay Fund's favor but also awarded it its attorneys' fees. As the court explained,

> [Bakery Drivers Fund] pursued an action which had no basis in fact, and which was contradicted by almost every action taken by both parties during the 14-year period of the Trust-to-Trust agreements were in effect. [Its] position was, in a word, meritless.

App., *infra*, 22a.

B. The court of appeals' decision undermines the enforceability of every contract into which an ERISA plan enters.

The problematic implications of the Ninth Circuit's erroneous decision are difficult to overstate. The court's decision essentially creates a default rule by which any transaction involving a plan—or at least, every transaction that is not subject to the guaranteed benefit policy exception of ERISA § 401(b)(2)—triggers creation of a plan asset without regard to the nature of the transaction in question. That analysis is directly inconsistent with the DOL's views on what constitute plan assets. It is also contrary to common sense, as demonstrated by the remarkable alchemy through which the court of appeals' holding in this case transmuted a Bakery Drivers Fund *expense* into a Bakery Drivers Fund *asset*.

As Robert Eccles and David Gordon explain, "[t]he imprecise wording of *Middleton* make[s] it possible for future plaintiffs to argue that ERISA plans constitute some species of preferred buyer." Eccles & Gordon, *supra*, 15(1) ERISA LITIG. RPTR. at 14. Thus, the decision opens the floodgates for claims that the money paid by ERISA plans to other entities in almost any context remains a "plan asset," and that as a result the parties that enter into contracts with ERISA plans will owe those plans a fiduciary duty. Of course, "[t]his argument *should* be meritless." *Ibid.* (emphasis added). But as Eccles and Gordon note, after this decision, "a new risk may have been created for parties doing business with ERISA plans." *Ibid.* Certiorari is warranted to prevent this untoward result.

At a minimum, because the court of appeals misunderstood and misconstrued regulations of the Department of Labor, with substantial harmful effects on ERISA plans, the Court may wish to solicit the views of the Solicitor General as to the appropriate resolution of this case.

II. Certiorari Is Also Warranted Because The Ninth Circuit's Holding Is Based On The Erroneous Conclusion That ERISA Multiemployer Plans Must Segregate Plan Assets And May Not Use Them For The Benefit Of All Plan Participants.

The Ninth Circuit held that, "[g]iven that South Bay Teamsters had a fiduciary duty over plan assets, * * * it breached its duties under ERISA by failing to apply the surplus funds for the benefit of the [Bakery Drivers Fund] participants." App., *infra*, at 7a. This aspect of the court of appeals' decision also warrants this Court's review.

Assuming one does not characterize the Trust-to-Trust Agreement as merely being a contract by which South Bay Fund provided an insurance-like product to Bakery Drivers Fund—the most plausible characterization, but one that necessarily leads the court of appeals' decision to have the pernicious implications discussed in Part I, *supra*—the only al-

ternative credible characterization is that the Trust-to-Trust Agreement caused the participants in the Bakery Drivers Fund to become participants in the South Bay Fund for purposes of death benefits. In fact, this is, in part, what respondents' complaint alleged. See page 7, *supra*.

The Ninth Circuit's decision, however, mandates that contributions to a multiemployer plan made on behalf of any given group of participants be earmarked for the benefit of those participants alone. Such a rule conflicts with decisions of this Court and other courts of appeals, fundamentally misunderstands the nature of multiemployer plans, and would impose massive liability on the trustees of all such plans. Certiorari is therefore warranted.

A. As this Court and other courts of appeals have repeatedly held, ERISA multiemployer plans may use the contributions made for any subset of participants for the benefit of any of the plan's participants.

Bakery Drivers Fund asserted below that, because the premiums it paid on behalf of the Common Participants exceeded the benefits those participants received, there was a "surplus" to which it was entitled.[14] But the fact that the contributions made to South Bay Fund for the Common Participants may have exceeded the benefits paid out by South Bay Fund to those Common Participants over the 14 years of the Trust-to-Trust Agreements is in no way unusual; it is simply part of the nature of multiemployer plan, which are inher-

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[14] This alleged "surplus" is, of course, simply an after-the-fact accounting construct. See *Resolution Trust Corp.* v. *Fin. Inst. Ret. Fund*, 71 F.3d 1553, 1557 (10th Cir. 1995) ("In the context of an ongoing multiple-employer plan, the * * * surplus is 'not a pile of assets stacked in the corner. It is instead an accounting construct.'") (quoting *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994)). There was, and is, no separate, segregated fund or assets in the South Bay Trust representing this alleged "surplus."

ently risk-sharing. See *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

Multiemployer plans establish benefits on the basis of the *entire fund's* actuarial characteristics, and are designed to spread actuarial risks across the various contributors to the plan. See *id.* at 605, 639. As this Court observed in *Concrete Pipe*,

> A multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements and obtain an entitlement to benefits. A rational employer hopes that its employees will vest at a rate above the average for all employees of contributing employers, and that, in this way, it will pay less than it would have by creating a single-employer plan. But the rational employer also appreciates the foreseeable risk that circumstances may produce the opposite result.

Id. at 638–639.

This is not a novel or controversial proposition of law. Rather, it relates to the fundamental nature of multiemployer plans. As Justice Stevens noted in his concurring opinion in *Local 144 Nursing Home Pension Fund* v. *Demisay*,

> That some portion of respondents' contributions will go to benefit the employees of other contributors is, of course, in the *nature* of a multiemployer plan. Such plans operate * * * by pooling employer contributions for the joint benefit of all participating employees. Segregation of funds by an employer is neither feasible nor contemplated. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone.

508 U.S. 581, 594 (1993) (Stevens, J., concurring) (emphasis added; internal quotation marks and citations omitted).

It follows necessarily from the risk-sharing nature of multiemployer plans that "[t]he contributions * * * pooled in a general fund [are] *available to pay any benefit obligation of the plan.*" *Concrete Pipe*, 508 U.S. at 605 (emphasis added); see also *Beck* v. *Pace Int'l Union*, 127 S. Ct. 2310, 2319, 2320–2321 (2007); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 442 (1999) (holding that in an ERISA governed plan with pooled assets and no individual accounts, surplus returns generated by employee contributions could be applied to other participants who did not make such contributions).

Just last month, this Court relied upon these principles as one of the bases for its unanimous holding that merger with a multiemployer plan was not a permissible method of terminating a single-employer plan under ERISA. The Court explained:

> Merger is fundamentally different: it represents a *continuation* rather than a *cessation* of the ERISA regime. If Crown were to have merged its pension plans into PIUMPF, the plan assets would have been combined with the assets of the multiemployer plan, where they could then be used to satisfy the benefit liabilities of participants and beneficiaries *other than* those from the original Crown plans.

Beck, 127 S. Ct. at 2319 (emphasis in original).

Other federal circuits have repeatedly held that multiemployer plans need not segregate contributions from subsets of participants. For example, in *Ganton Technologies, Inc.* v. *National Industrial Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996), the Second Circuit squarely rejected the idea that an employer has a connection to its "surplus" contributions to a multiemployer plan. As the court of appeals explained, it would be "at odds with the workings of multiemployer plans" to consider excess contributions to be a refundable "surplus." *Id.* at 467. The possibility that an employer will contribute more to a multiemployer plan than its participants receive as benefits "is the risk inherent in joining [such a]

plan." *Id.* at 468 (relying on *Caterino* v. *Barry*, 8 F.3d 878 (1st Cir. 1993) (Breyer, J.)).

The First Circuit, too, has recognized that multiemployer plans need not segregate their assets and refund any surplus contributions. As that court explained, "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." *Berkshire Hathaway, Inc.* v. *Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989). The Seventh Circuit has similarly held that "[t]he advantages of a 'pooled trust' fund do not accrue to any particular employer, but rather are beneficial to all the employers contributing." *Stinson* v. *Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1022 (7th Cir. 1989) (internal quotation marks omitted).

The Ninth Circuit's decision disregards these precedents and is entirely inconsistent with this well-established principle governing multiemployer plans. The court of appeals held that the "surplus" contributed by Bakery Drivers Fund on behalf of the Common Participants could only be used for the benefit of those Common Participants. But as the foregoing authorities make clear, any surplus, during or after the pendency of the Trust-to-Trust Agreements, was an asset of South Bay Fund and could be used for the benefit of *all* participants in South Bay Fund.[15] The Ninth Circuit's decision thus cre-

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[15] *IT Corp.* v. *Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997), the only case cited by the Ninth Circuit in support of its contrary conclusion (see App., *infra*, 7a), is plainly distinguishable. *IT Corp.* did not involve assets held by a multiemployer plan, contributions to a multiemployer plan, or an alleged surplus related to those contributions. Rather, *IT Corp.* involved the quite different issue of when the functions performed by a third party administrator ("TPA") make it a fiduciary under ERISA. There was no dispute in *IT Corp.* that the bank account over which the TPA had signature power was an asset of the IT plan. Here, Bakery Drivers Fund did not establish its own bank account and delegate check

ates a circuit split and is plainly erroneous. And as we next discuss, the potential ramifications of the decision are immense.

B. The court of appeals' decision makes it impossible for plan fiduciaries to prudently manage and control multiemployer plans and their assets.

Because the decision below is inconsistent with the bedrock principles upon which multiemployer plans operate, the court of appeals' decision will have severe practical consequences not merely for South Bay Fund but for all multiemployer plans that operate in the Ninth Circuit. By requiring a multiemployer plan to engage in an arithmetic calculation of alleged "surplus assets" attributable to a subgroup of participants, the court of appeals' decision puts multiemployer plan fiduciaries in the untenable position of not knowing whether and to what extent contributions received are assets of their plan versus assets of some group of participants in that plan.

That uncertainty has manifold adverse ramifications, not the least of which being that it renders it impossible to calculate or quantify plan assets accurately. Fiduciaries cannot know with certainty if, when, and in what number participants or groups of participants may subsequently leave their plan, or how contributions received for those participants will ultimately balance against benefits paid to them. If plan fiduciaries cannot calculate plan assets, they correspondingly cannot know if the plan is actuarially sound or make prudent investment decisions. Thus, the decision below effectively makes it impossible for fiduciaries of multiemployer plans to execute the most fundamental of their fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

Moreover, practically speaking, the Ninth Circuit's ruling forces multiemployer plans to segregate funds by em-

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writing authority over that account to South Bay Fund. It made contributions to South Bay Fund that were immediately placed in South Bay Fund's *pooled* accounts. Thus, *IT Corp.* is inapposite.

ployer or employee subgroup, which is "neither feasible nor contemplated" in such plans. *Demisay*, 508 U.S. at 594 (Stevens, J., concurring). This would preclude plan trustees from utilizing the risk spreading feature identified by this Court as inherent in multiemployer plans. *Concrete Pipe*, 508 U.S. at 638–639.

The court of appeals' decision also creates hitherto unknown conflicts for fiduciaries of multiemployer plans, as well as the potential for unexpected liability, by making those fiduciaries automatic *de facto* fiduciaries of other plans simply because the contributions for a given group of participants ultimately exceeded the benefits paid to those participants. Under the Ninth Circuit's logic, fiduciaries cannot use any portion of plan assets derived from contributions for one group of participants for benefits for other participants because doing so might breach a fiduciary duty owed to a later plan by depleting assets earmarked (at least according to the Ninth Circuit) solely for the select group of participants for whom they were originally contributed.

In short, this decision turns multiemployer plans on their heads, makes their effective management a virtual impossibility, and inevitably manufactures fiduciary liability that will discourage fiduciary service. Certiorari is warranted to avoid these results.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KATHRYN J. HALFORD
Wohlner Kaplon Phillips Young & Cutler
15456 Ventura Blvd.
Sherman Oaks, CA 91403
(818) 501-8030

KENNETH S. GELLER
DAVID M. GOSSETT
LINDA KAY SHORE
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

MICHAEL A. VANIC
Counsel of Record
JOSEPH C. FAUCHER
Reish Luftman Reicher & Cohen
11755 Wilshire Blvd., 10th Floor
Los Angeles, CA 90025
(310) 478-5656

Counsel for Petitioners

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