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

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.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES...iv
OPINIONS BELOW 1
JURISDICTION...1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 2
A. Factual background. 2
B. Respondents' complaint. 7
C. The district court's decision. 9
D. The court of appeals' decision................................11
REASONS FOR GRANTING THE PETITION 12
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..13
A. The Ninth Circuit's decision has no foundation in ERISA law. 14
B. The court of appeals' decision undermines the enforceability of every contract into which an ERISA plan enters. 18
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.............19
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..20

TABLE OF CONTENTS—continued

Page

B. The court of appeals' decision makes it impossible for plan fiduciaries to prudently manage and control multiemployer plans and their assets. 24

CONCLUSION 25

APPENDICES

A. Court of Appeals Decision (Jan. 18, 2007) 1a

B. District Court Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment (Nov. 3, 2004) 10a

C. Transcript of Hearing on Cross-Motions for Summary Judgment (Oct. 25, 2004) 11a

D. District Court Order Granting Petitioners Motion for Attorney Fees (Feb. 1, 2005) 19a

E. Court Of Appeals Order Denying Rehearing (April 27, 2007) 26a

F. Excerpts of ERISA §§ 3, 401, 404, 29 U.S.C. §§ 1002, 1101, 1104 .... 27a

TABLE OF AUTHORITIES

Page(s)

CASES

Assocs. in Adolescent Psychiatry, S.C. v. *Home Life Ins. Co. of N.Y.*, 729 F. Supp. 1162 (N.D. Ill. 1989) 16

Beck v. *Pace Int'l Union*, 127 S. Ct. 2310 (2007) 22

Berkshire Hathaway, Inc. v. *Textile Workers Pension Fund*, 874 F.2d 53 (1st Cir. 1989) 23

Caterino v. *Barry*, 8 F.3d 878 (1st Cir. 1993) 23

Collins v. *Pension and Ins. Comm. of the S. Cal. Rock Prods. and Ready Mix Concrete Ass'n*, 144 F.3d 1279 (9th Cir. 1998) 17

Concrete Pipe & Prods. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 21, 22, 25

Ganton Techs., Inc. v. *Nat'l Indus. Group Pension Plan*, 76 F.3d 462 (2d Cir. 1996) 22, 23

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 22

IT Corp. v. *Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997) 11, 23, 24

John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) .... *passim*

Johnson v. *Georgia-Pacific Corp.,* 19 F.3d 1184 (7th Cir. 1994) 20

Local 144 Nursing Home Pension Fund v. *Demisay*, 508 U.S. 581, 594 (1993) 21, 25

Resolution Trust Corp. v. *Fin. Inst. Ret. Fund*, 71 F.3d 1553 (10th Cir. 1995) 20

RLJCS Enters., Inc. v. *Prof'l Ben. Trust, Inc.*, 438 F. Supp. 2d 903 (N.D. Ill. 2006) 17

TABLE OF AUTHORITIES—continued

Page(s)

Stinson v. *Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust*, 869 F.2d 1014 (7th Cir. 1989) 23

STATUTES AND REGULATIONS

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, ... *passim*

ERISA § 3(1), 29 U.S.C. § 1002(1).......... 2, 3

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) 1, 11

ERISA § 3(37), 29 U.S.C. § 1002(37).......... 3

ERISA § 3(37)(A), 29 U.S.C. § 1002(37)(A) 2, 3

ERISA § 3(42), 29 U.S.C. § 1002(42).......... 14

ERISA § 104, 29 U.S.C. § 1024 6

ERISA § 401(b), 29 U.S.C. § 1101(b).......... 14

ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1) 15

ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2) .... *passim*

ERISA § 401(b)(2)(A), 29 U.S.C. § 1101(b)(2)(A) 11

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) 1, 8, 11, 24

TABLE OF AUTHORITIES—continued

Page(s)

ERISA § 404(a)(1)(A),
29 U.S.C. § 1104(a)(1)(A).. 8

ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1)................ 10

Labor Management Relations Act ("LMRA")
§ 302(c)(5), 29 U.S.C. § 186(c)(5)................................. 8

Pension Protection Act of 2006, Pub. L. No. 109-280,
§ 611(f), 120 Stat. 780 (Aug. 17, 2006)........................ 14

28 U.S.C. § 1254(1).. 1

29 C.F.R. § 2510.3-101 .... 15, 16

51 Fed. Reg. 41,262, 41,263 (Nov. 13, 1986)..................... 16

MISCELLANEOUS

EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS (3d ed. 1987) 3

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 (Feb.–Mar. 2007)... 12, 19

JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW (3d ed. 2000) 3

U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 92-02A (Jan. 17, 1992), available at http://www.dol.gov/ebsa/programs/ori/advisory92/92-02a.htm 16, 17

U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 93-14A (May 5, 1993), available at http://www.dol.gov/ebsa/programs/ori/advisory93/93-14a.htm 17

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

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[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*

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[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

[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-

[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

JULY 2007

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS SECURITY FUND; DIRK GEERSEN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

NOS. 04-56982, 05-55192

Argued and Submitted Nov. 14, 2006. Filed Jan. 18, 2007.

Before: **REINHARDT** and **BYBEE**, Circuit Judges, and **BURNS**,* District Judge.

BYBEE, Circuit Judge: Plaintiffs-Appellants, Trustees of the Southern California Bakery Drivers Security Fund and Dirk Geersen ("Bakery Drivers"), appeal the district court's summary judgment in favor of Defendants-Appellees, Rick Middleton and South Bay Teamsters and Employers Health and Welfare and Related Benefits Trust Fund ("South Bay Teamsters") on claims of breach of fiduciary duty under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and breach of collective bargaining agreements under the Labor Management Relations Act

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* The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

("LMRA"), 29 U.S.C. § 301 *et seq.*, and the district court's award of attorneys' fees to South Bay Teamsters.

I

This case involves a dispute between the trustees of two employee benefit plans over an agreement in which one plan was to provide certain benefits to plan participants of the other plan. On August 1, 1987, Bakery Drivers contracted with South Bay Teamsters for certain death, accidental death, and dismemberment benefits. In a Trust-to-Trust agreement, Bakery Drivers contracted to pay $5.50 per month for each active fund participant to South Bay Teamsters in exchange for death and related benefits amounting to $10,000 in the event of death and $5,000 or $10,000 in the event of qualifying dismemberment.[1] After a series of Trust-to-Trust agreements continuing the relationship, the parties terminated their agreement as of May 31, 2001. Bakery Drivers allege that over the course of the contract, plan participants paid a total of $2,753,642.00 to South Bay Teamsters, while the total amount of claims paid to plan participants was $770,768.19 and administrative expenses totaled $220,304.92.

On January 10, 2002, Bakery Drivers sent South Bay Teamsters a letter requesting the surplus funds paid by plan participants-namely, the $1,762,568.89 difference between the amounts paid-in less benefits received and administrative expenses. South Bay Teamsters refused the request on May 31, 2002. Bakery Drivers filed a complaint in district court alleging that South Bay Teamsters had breached the fiduciary duties owed under ERISA by failing to use surplus funds for the exclusive benefit of plan participants. See 29 U.S.C. § 1104(a)(1)(A). It also alleged that South Bay Teamsters had breached the collective bargaining agreements by failing to use the contributions for the purposes enumerated in the

[1] Prior to August 1, 1987, death benefits payable to Bakery Drivers' plan participants were obtained through the purchase of a group insurance policy with an insurance carrier.

collective bargaining agreements in violation of the LMRA. See 29 U.S.C. §§ 186(c)(5), 1103(c)(1).[2]

The district court granted summary judgment for South Bay Teamsters on Bakery Drivers' claims. As to the breach of the ERISA fiduciary duty claim, the court found that South Bay Teamsters qualified under ERISA's insurer exemption. The district court explained that while "ERISA generally imposes a fiduciary duty on managers of 'plan assets[,]'" it "contains an exception for a 'guaranteed benefit policy.'" Such policies, the district court explained, "provid[e] for benefits the amount of which is guaranteed by the insurer." The court concluded that the plan at issue was a guarantee benefit policy. The court rejected Bakery Drivers' argument that South Bay Teamsters did not qualify as an "insurer." According to the district court, "[t]he argument that [South Bay Teamsters is] not an insurance company ... is covered by the broad definition that is contained in the law." The district court found that-in this case-South Bay Teamsters *acted* like an "insurer." Moreover, the district court reasoned that the parties did not explicitly provide that paid-in premiums not used to pay benefits should be refunded to plan participants and the parties' agreement could not be read to require such a refund. The district court did not explain its reasoning for granting summary judgment as to Bakery Drivers' second claim.

The district court also granted South Bay Teamsters' motion for attorneys' fees. The district court discussed the five factors for considering whether fees should be awarded

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[2] Bakery Drivers' original complaint included an additional claim that South Bay Teamsters violated the " exclusive benefit rule" of 29 U.S.C. § 1104(a)(1)(A), for failing to use surplus funds for the exclusive benefit of the intended beneficiaries. The district court granted summary judgment for South Bay Teamsters on this claim because Bakery Drivers could not establish standing as co-fiduciaries or participants. Bakery Drivers' subsequent complaint omitted this claim, but reserved the right to appeal.

under ERISA. See 29 U.S.C. § 1132(g); *Hummell* v. *S.E. Rykoff & Co*., 634 F.2d 446 (9th Cir.1980). The court found that two of the five *Hummell* factors " weigh[ed] strongly in favor of awarding fees" -first, Bakery Drivers acted in bad faith by pursuing unsupported assertions, adopting inconsistent positions, rescinding its earlier acknowledgment that the arrangement resembled a standard insurance purchase, and misrepresenting material facts and, second, the relative merits favored South Bay Teamsters because Bakery Drivers pursued a meritless position. Also in its analysis, the district court explained that it had granted summary judgments on Appellant's breach of collective bargaining agreements claim because " [t]he Trust-to-Trust agreements simply do not contain any provision incorporating [Bakery Drivers' collective bargaining agreements]." This appeal followed.

II

We review a district court's grant of summary judgment de novo. See *Metro. Life Ins. Co.* v. *Parker*, 436 F.3d 1109, 1113 (9th Cir.2006). Because we conclude that South Bay Teamsters does not qualify as an ERISA exempt "insurer" under 29 U.S.C. § 1101(b)(2) and that South Bay Teamsters breached its ERISA fiduciary duty to the participants in the Bakery Drivers Security Fund, we reverse the district court's order granting summary judgment on Bakery Drivers' breach of the ERISA fiduciary duty claim.

Under ERISA, a person is a fiduciary with respect to an ERISA-qualified plan to the extent he "exercises any authority or control respecting management or disposition of its assets." See 29 § U.S.C. 1002(21)(A). ERISA, however, provides for a limitation on the fiduciary duty of insurers issuing certain kinds of policies or contracts: "[T]he assets [of a plan to which a guaranteed benefit policy is issued by an insurer] shall be deemed to include such policy" but do not "include any assets of such insurer." 29 U.S.C. § 1101(b)(2). ERISA defines "guaranteed benefit policy" as benefits in an "amount ... guaranteed by [an] insurer." 29 U.S.C.

§1101(b)(2)(B). It defines an "insurer" as "an insurance company, insurance service, or insurance organization, qualified to do business in a State." 29 U.S.C. § 1101(b)(2)(A). In other words, an "insurer" who has issued a "guaranteed benefit policy" is a fiduciary with respect to an ERISA plan, but only to the extent of the funds pledged under the insurance policy or contract. See 29 U.S.C. § 1101(b)(2); see also *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993).

South Bay Teamsters contends that because it offered a guaranteed death benefit to members of the Bakery Drivers Security Fund, it is liable to Bakery Drivers for the death benefits alone, and not for any monies paid into the South Bay Teamsters Trust Fund. South Bay Teamsters asserts that its fiduciary duty is independent of the money paid in by South Bay Teamsters. According to South Bay Teamsters, it assumed the risk that the monthly premiums would not cover the death benefits it was obligated to pay out over the course of the contract between the two funds. South Bay Teamsters asserts that it, in turn, has no fiduciary responsibility to Bakery Drivers for the monthly premiums it collected in excess of the death benefits it paid and the administrative expenses it incurred. For its part, Bakery Drivers claims that South Bay Teamsters accepted no risk and that South Bay Teamsters received all monies as a fiduciary for the participants in the Bakery Drivers Security Fund.

Despite the fact that South Bay Teamsters plainly provided insurance-like benefits, and likely accepted the risks it describes, it does not qualify under ERISA's insurer exemption. South Bay Teamsters is not an "insurer" because it is not "an insurance company, insurance service, or insurance organization, qualified to do business in a State." 29 U.S.C. § 1101(b)(2). Indeed, South Bay Teamsters does not purport to constitute such an organization, and nothing in the record indicates that it is "qualified to do business in a State."

Although the district court reasoned that South Bay Teamsters' provision of death and disability benefits in an insurance-like scheme meant that it *acted* like an "insurer" based on the benefits it offered, we reject such a broad reading of the insurer exemption. The Supreme Court has stressed strict adherence to ERISA's text in interpreting its provisions, explaining its inclination toward a "tight reading of exemptions from comprehensive schemes of this kind." *John Hancock*, 510 U.S. at 97. In particular, the Court has admonished that "Congress has specifically instructed, by the words of limitation it used, that we closely contain the guaranteed benefit policy exclusion." *Id*. Moreover, the policy behind the exemption reflects ERISA's historic deference to state insurance law.[3] It leaves the regulation of an insurer's assets-and assurance of the insurer's solvency and ability to deliver benefits-to the states. See *Cate* v. *Blue Cross & Blue Shield of Ala*., 434 F. Supp. 1187, 1190 (N.D. Tenn. 1977). The exemption applies to companies otherwise subject to state insurance law, and consequently, it does not apply to companies outside the insurance industry. ERISA's insurer exemption simply is not written-or envisioned-to cover companies that offer insurance-like plans but who are not "insurer[s]" as strictly defined. As a result, we reject the district court's conclusion that South Bay Teamsters qualifies under the insurer exemption.

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[3] The McCarran-Ferguson Act requires that the business of insurance be subject to state regulation and generally mandates that "[n]o Act of Congress shall be construed to invalidate ... any law enacted by any State for the purpose of regulating the business of insurance...." 15 U.S.C. § 1012(b). Although ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a), to avoid conflict with the McCarran-Ferguson Act, a savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities," 29 U.S.C. § 1144(b)(2)(A). See also *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 364 (2002).

Instead, we conclude that South Bay Teamsters was an ERISA fiduciary of the plan assets of Bakery Drivers, and that it breached its fiduciary duties with respect to those assets. South Bay Teamsters exercised "control respecting management or disposition of [the Bakery Drivers Security Fund] assets," 29 U.S.C. § 1002(21)(A), 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. See *IT Corp.* v. *Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1421 (9th Cir.1997) ("The right to write checks on plan funds is authority or control respecting management or disposition of its assets." (internal quotation marks omitted)). Moreover, where, as here, the exclusion in § 1101(b)(2) is inapplicable, all assets paid-in are treated as "plan assets" and an entity that takes "actions in regard to their management and disposition must be judged against ERISA's fiduciary standards." *John Hancock*, 510 U.S. at 106; see also 29 C.F.R. § 2510.3-101(a), (j)(12). Finally, the agreements providing that "a plan of death benefits is hereby established for [Bakery Drivers] Security Fund participants" also created an ERISA plan, whose summary plan descriptions characterized both Bakery Drivers and South Bay Teamsters as "Trustees of the Plan." See 29 U.S.C. §1102(a)(1). Nothing in the agreements or the summary plan descriptions suggests that South Bay Teamsters were authorized to use the plan assets for anything other than "to fund the payment of death benefits to [Bakery Drivers] Security Fund participants...."

Given that South Bay Teamsters had a fiduciary duty over plan assets, we conclude that it breached its duties under ERISA by failing to apply the surplus funds for the benefit of Bakery Drivers Security Fund participants. See 29 U.S.C. § 1104(a)(1) (stating that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries"). We hold that South Bay Teamsters is liable to Bakery Drivers for breaching its fiduciary duties

under ERISA. Counsel for the participants has suggested that certain remedies other than the return of the surplus funds may be appropriate. Accordingly, we remand to the district court so that it may determine the appropriate remedy.

III

We affirm the grant of summary judgment as to Bakery Drivers' breach of the collective bargaining agreements claim. The LMRA provides that breaches of collective bargaining agreements are actionable in federal court. See 29 U.S.C. § 185(a). However, as the district court found, the parties' Trust-to-Trust agreements did not contain any provision incorporating Bakery Drivers' collective bargaining agreements. South Bay Teamsters was not bound by Bakery Drivers' collective bargaining agreements merely because it agreed to provide benefits to Bakery Drivers' plan participants, and consequently, South Bay Teamsters has no duty under those agreements.

IV

Lastly, we reverse the district court's award of attorneys' fees to South Bay Teamsters pursuant to 29 U.S.C. § 1132(g)(1). We review such awards for abuse of discretion. See *Cline* v. *Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1235-36 (9th Cir.2000). To overturn an award of attorneys' fees, "we must have 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Estate of Shockley* v. *Alyeska Pipeline Serv. Co.*, 130 F.3d 403, 407-08 (9th Cir.1997) (quoting *Smith* v. *Jackson*, 84 F.3d 1213, 1221 (9th Cir.1996)). Here, the district court found that Bakery Drivers acted in bad faith and in pursuit of a meritless position and awarded attorneys' fees on that basis. In light of our reversal of summary judgment as to the ERISA fiduciary duty claim, we find that the district court's determination was clearly erroneous.

V

For the foregoing reasons, we reverse the district court's decision granting summary judgment as to the ERISA fiduciary claim, affirm summary judgment as to the breach of collective bargaining agreements claim, reverse the award of attorneys' fees to South Bay Teamsters, and remand to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS SECURITY FUND, et al.,

Plaintiffs,

v.

RICK MIDDLETON, et al.,

Defendants.

CASE NO. CV 03-5550 ER

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

For the reasons stated in open court on October 25, 2004, Plaintiffs' motion for summary judgment is hereby DENIED. For the same reasons, Defendants' motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel for the parties in this matter.

Dated: November 3, 2004

/s/ Edward Raffeedie
EDWARD RAFEEDIE
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRUSTEES OF THE SO. CAL. BAKERY DRIVERS SECURITY FUND,

Plaintiffs,

v.

RICK MIDDLETON, et al.,

Defendant.

NO. CV 03-5550 ER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, OCTOBER 25, 2004
10:00 A.M.

* * *

THE CLERK: Calling Calendar Item Number 4, *Trustees of Southern California Bakery Drivers Security Fund* vs. *Rick Middleton*, CV 03-5550-ER.

Counsel, Please state your appearances.

MR. VANIC: Good Morning, Your Honor.

Michael Vanic on behalf of the Defendants.

MR. SACKMAN: Good Morning, Your Honor.

David Sackman on behalf of the Plaintiffs.

THE COURT: We have a Plaintiffs' Motion for Summary Judgment or in the alternative, for an interlocutory accounting; we have a Defendants' Motion for Summary Judgment.

The Court has read and considered all of the papers that have been filed in response to the Parties' cross motions for

summary judgment, that is, in support of and in opposition to, and I've reached the following tentative:

The Court believes it should deny the Plaintiffs' Motion for Summary Judgment and grant the Defendants' Motion for Summary Judgment for the following reasons:

First, the Parties agree that the material facts are undisputed in this case, that the plaintiff security fund entered into an agreement with the Defendant South Bay Fund, in which security fund purchased $10,000 death and dismemberment benefits for its participants from the South Bay in exchange for a monthly fee of $5.50 per participant. This agreement commenced on August 1, 1987, and was renewed three times before it was terminated on May 31, 2001.

And, essentially, the Plaintiffs state that, over the course of the agreement, the premiums-paid exceeded the benefits and the administrative costs by approximately $1.7 million dollars, and that they are entitled to recover the $1.7 million dollars that was not used.

The only issue that the Court must determine is the legal characterization of this agreement. while both parties agree that, functionally, the plan is a life insurance agreement, Plaintiffs contend that it qualified as a benefit plan under ERISA; and therefore, Defendants, as fiduciaries, were required to hold the funds in trust for the benefit of the security fund participants.

And ERISA generally imposes a fiduciary duty on managers of "plan assets." However, it contains an exception for a "Guaranteed Benefit Policy." That's at 29 U.S.C. Section 1101(b)(2)(b). A guaranteed benefit policy is an insurance policy or contract that provides for benefits the amount of which is guaranteed by the insurer. This is a *John Hancock* case which has been referred to.

The *John Hancock* case involved a policy that contained two elements: a guaranteed benefit and an investment component, which is not present in this case, in which the insurer

would invest the premiums, and the benefits were dependent on the success or failure of these investments.

The Court held that the Hancock Management and disposition of the investment funds were subject to ERISA's fiduciary standards. However, the Court held that Hancock did not act as a fiduciary in administering the policy to the extent it provided for benefits guaranteed by Hancock.

There is no dispute that the insurance policy in this case is not a hybrid investment - "Guaranteed Benefit" policy, like the one in *John Hancock*.

The amount of the benefits in this case is plainly fixed by the agreement at $10,000, or $2500 for retirees.

The Plaintiff contends that the investment-guaranteed benefit distinction is neither correct nor relevant. That's what you say in your reply.

The Plaintiffs' position appears to be that, because the Defendants commingled the premiums paid by the Plaintiffs with those of other benefit plans—you've agreed that that occurs in this case?

MR. SACKMAN: Yes, we all agreed.

THE COURT: All right. That they exercised discretionary control over those assets and hence, should be deemed a fiduciary.

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

Defendants' act of commingling funds in no way affected Plaintiffs' guarantee of benefit payments or fixed rates of return. The Plaintiffs' benefits were not affected by the success or failure of any investment made by the Defendant.

In fact, the Defendant would have been liable to pay benefits to the plaintiff, even if the amount of benefits paid exceeded the amount of premiums received.

In sum, nothing the Defendant did could possibly effect plaintiff's benefits.

Therefore, the Court finds that the insurance contract at issue is subject to the guaranteed benefit exception.

The argument that South Bay is not an insurance company, the Court believes is covered by the broad definition that is contained in the law, and therefore it is the Court's intention to deny the Plaintiffs' Motion for Summary Judgment and to grant the motion of the Defendants for Summary Judgment for these reasons.

Do you wish to be heard on this, counsel? Briefly. The aggrieved party. Are you the aggrieved party here?

MR. SACKMAN: Apparently.

THE COURT: Yes?

MR. SACKMAN: Well, the Court apparently holds that this exception under ERISA applies, that this is indeed a guaranteed benefit policy, and we would not argue with that.

The problem is South Bay is not an insurance company and that is a required part of—

THE COURT: I believe it qualifies under the broad definition given.

MR. SACKMAN: I think I have the definition here in the statute.

THE COURT: Do you contend that this applies only to companies that carry the nomenclature "insurance company"?

MR. SACKMAN: Well, according to—

THE COURT: You agreed in your papers this is functionally equivelent [sic]to an insurance company.

MR. SACKMAN: Yes. They treated it like an insurance company, but under the statute to qualify under 29 U.S.C. Section 1101(b((2)(a), an insurer means an insurance company, insurance service or insurance organization, qualified to do business in a state.

THE COURT: Let's talk about those three: insurance company, insurance service or insurance organization.

Now, how do you think that insurance organization and insurance service differ from an insurance company and who it intended to cover?

MR. SACKMAN: It means someone that's qualified to issue insurance in south—

THE COURT: Where does it say that?

I mean insurance company covers companies that are qualified to sell insurance.

When they put in there "insurance organization" or "insurance service," or insurance organization, those words are just surpluses, and as if this was to be intended to apply only to recognized qualified insurance companies, it would say so.

So you're asking me to disregard those words.

MR. SACKMAN: No. We're asking the Court to follow the literal words, they're not an insurance company, they're not an insurance service and they're not an insurance organization.

THE COURT: And in this case they were. And you admitted they were functionally equivalent to provide death and disability insurance to the benefit members—to the plan members.

MR. SACKMAN: In this transaction they acted the same way that an insurance company does.

THE COURT: Wasn't this an insurance contract?

MR. SACKMAN: Because they are not qualified to do business as an insurance company under state law and they cannot be under law because ERISA also tells us under Section 114(d), I believe, that an ERISA plan cannot be deemed to be an insurance company. So even if they act like it, ERISA, the statute itself tells us that an ERISA plan such as South Bay cannot be deemed to be an insurance company.

THE COURT: Well, where in all of the dealings with these parties does it provide even that payment premiums which are not used to pay benefits should be refunded to your clients. I find that to be completely—what's the basis for that claim?

MR. SACKMAN: All the agreement says is that this money is to be used to fund benefits for security fund participants. That's all it says. And that's all that we wanted to do.

THE COURT: Lawyers, I assume prepared this, and couldn't have any understanding of the parties that moneys which are not used to pay benefits shall be refunded to the payor. Then it would have been a simple matter to do that. You're asking us to read that into it.

MR. SACKMAN: They could have but it was not necessary.

THE COURT: All right. Counsel, that's enough. The Court will stand by its tentative conclusion.

MR. SACKMAN: Thank you.

MR. VANIC: Thank you, Your Honor.

(Proceedings concluded.)

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS SECURITY FUND, et al.,

Plaintiffs,

v.

RICK MIDDLETON, et al.,

Defendants.

CASE NO. CV 03-5550 ER

ORDER GRANTING DEFENDANT'S MOTION FOR ATTORNEYS' FEES

The Defendants have filed a motion requesting attorneys' fees in the sum of $140,508.00 and costs in the amount of $4,288.86. The Court previously entered summary judgment in favor of Defendants, and against Plaintiffs, on October 25, 2004. The motion for attorneys' fees came on for hearing on December 27, 2004, the Honorable Edward Rafeedie, presiding. At that time, the Court heard argument from the parties and took the matter under submission. The court now concludes that the motion for attorneys' fees should be GRANTED for the following reasons:

I. Background Facts

The underlying dispute in this case involved the disposition of so-called "surplus funds" in a death benefits agreement between two labor unions. On August 1, 1987, Plaintiff Southern California Bakery Drivers Security Fund ("the Security Fund") entered into the first of a series of agreements with Defendant South Bay Trust Fund ("the South Bay

Trust") for the purchase of life insurance ("the Trust-to-Trust agreements"). The substantive terms of the contract were simple: the Security Fund agreed to pay Defendant $5.50 per month/per participant, and South Bay provided $10,000 death and accidental death and dismemberment ("AD & D") benefits (or $2,500 for retirees). The agreement was renewed four times before it was terminated on May 31, 2001.

During the 14-year period that the Trust-to-Trust agreements were in effect, Security Fund paid a total of $2,753,642.00 in premiums. The South Bay Trust paid a total of $770,768.19 in benefits, as well as $220,304.92 in administrative expenses. In total, the premiums-paid exceeded the benefits-received and administrative expenses by more than $1,700,000.00 ("the surplus funds").

II. Analysis

ERISA Section 1132(g)(1) commits the awarding of attorneys' fees to the discretion of the Court. The Court's discretion is guided by the factors announced by the Ninth Circuit in *Hummell* v. *S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). These factors include: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Id*. at 453.

Of these, the fourth factor applies "only when a prevailing plaintiff seeks attorney fees; [as] ERISA's provision for such an award recognizes that a case brought by such a plaintiff often benefits a large group of others in similar situations." *Bogue* v. *Ampex Corp.*, 976 F.2d 1319, 1327 n.37 (9th Cir. 1992). Defendant argues that Bogue's limitation on the fourth *Hummell* factor should not apply in this case because it dealt with the usual situation where the prevailing plaintiff

is an individual challenging an employer. The Court disagrees. *Bogue* seems to contemplate a situation where a decision will benefit not only the instant plaintiff (or defendant) but separate, future plaintiffs (or defendants). As both parties concede, the agreement in this case was unusual and hence, there is little chance that it will benefit "a large group of others in similar situations."

1. Bad Faith

The first factor is the degree of Plaintiffs' culpability or bad faith. For several reasons, the Court concludes that the Plaintiffs brought this action in bad faith.

First, there 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 high 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.

To accept Plaintiffs' argument, the Court would have to believe that South Bay was willing to absorb considerable funding risk and provide costly services with no mechanism that could produce a profit (or even guarantee that they would break even). This position is not only unsupported, it defies common sense.

Second, on multiple occasions, Plaintiffs abruptly adopted positions that were entirely inconsistent with, and of-

ten directly contradicted, their previous positions. Most notably, Plaintiffs originally alleged that they were participants in the South Bay Trust during the term of the Trust-to-Trust agreements. However, in their motion for summary judgment, they abruptly changed their tune and argued that "the Security Fund participants were never participants of the South Bay Trust," while casually noting the complete contradiction in a footnote.

Additionally, in their respective motions for summary judgment, the parties agreed that, during the course of the agreement, the parties treated the arrangement like a standard purchase of insurance. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment at 4. During oral argument at the summary judgment motion, the Court noted that the "Defendant would have been liable to pay benefits to the Plaintiff, even if the amount of benefits paid exceeded the amount of premiums received." Exhibit B to Vanic Declaration of Michael A. Vanic in Support of Motion for an Award of Attorneys' Fees at 111: 12-14. In response to the Court's description of the contractual relationship, Plaintiffs' counsel responded that "we would not argue with that." *Id.* at 112: 7. However, during oral argument on this motion for attorneys' fees, Plaintiffs' counsel argued—for the first time—that had the South Bay Trust faced a funding deficit, the Security Fund would have been obligated to make up the difference. This statement is not only unsupported by the Trust-to-Trust agreements, it contradicts the position Plaintiffs had maintained throughout the litigation.

Finally, Plaintiffs' have flagrantly misrepresented material facts to the Court. For example, in oral arguments for this motion for attorneys' fees, Plaintiffs' counsel stated that Trust-to-Trust agreements contained a provision that allowed for the payment of an administrative fee. No such provision exists in any of the Trust-to-Trust agreements.

In sum, it appears to the Court that Plaintiffs' have consistently acted in bad faith by pursuing claims[*] that had no basis in fact or law, repeatedly changing their position on material issues, and misrepresenting crucial facts to the Court. Thus, the Court concludes that this factor weighs in favor of an award of attorneys' fees.

2. Ability of Parties to Satisfy Award

The second factor is the ability of the party to satisfy an award of attorneys' fees. While the parties agree that Plaintiffs have the ability to satisfy an award of attorneys' fees, they also agree that the Defendants do as well. In such a circumstance, the Ninth Circuit has recently held that this factor is neutral. *Honolulu Joint Apprenticeship and Training Committee of United Ass'n Local Union No, 675* v. *Foster*, 332 F.3d 1234, 1239 (9th Cir. 2003). Thus, this factor weighs neither for, nor against, an award of attorneys' fees.

3. Deterrent Effect

[*] Although the vast majority of the parties argument was devoted to the ERISA claim, the Plaintiffs also claimed that the Trust-to-Trust agreements incorporated by reference the Security Fund's collective bargaining agreements (CBA), which mandated that funds be used for the "exclusive benefit" of Security Fund employees. This argument proved equally specious. The Trust-to-Trust agreements simply do not contain any provision incorporating the Security Fund's CBA. Plaintiffs claim that South Bay was aware of the CBA based on the minutes of a December 29, 1988 meeting of the South Bay Fund, which state that "[s]ubject to contractual obligations entered into by the parties to the Bakery Industry negotiations, this trust, effective August 1, 1987, provides life insurance benefits to participants of the Southern California Bakery Drivers Security Fund." Even assuming, arguendo, that this (seemingly ambiguous) after-the-fact statement could be said to definitively incorporate the CBA into the Trust-to-Trust agreements, it would be forbidden parol evidence in a benefits contract, because ERISA explicitly requires all terms, conditions, and modifications to be in writing. *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3d Cir. 1990).

The third factor is whether such an award would deter others from acting under similar circumstances. Both sides agree that Trust-to-Trust agreements, like the one at issue in this case, are unusual, though not unheard of. Because such agreements are rare, an award of fees in this case is unlikely to have a significant deterrent effect in cases arising under similar agreements. As such, this factor weighs only slightly in favor of an award of attorneys' fees.

4. Policy Considerations

For the reasons discussed above, the fourth factor is not relevant.

5. Relative Merits of the Parties Position

The fifth and final factor is the relative merits of the parties' positions. As discussed above, Plaintiffs 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 the Trust-to-Trust agreements were in effect. Plaintiffs' position was, in a word, meritless. As such, this factor weighs heavily in favor of an attorneys' fees award.

III. Conclusions

In total, two factors weigh strongly in favor of awarding fees, one factor weighs slightly in favor of award fees, one factor is neutral, and one factor is irrelevant. No factors weigh against an award of fees. Therefore, the Court believes an award of attorneys' fees is appropriate under *Hummell* and hereby GRANTS Defendants' motion and awards fees in the amount of $140,508.00 and costs in the amount of $5,116.31.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax or by email, copies of this Order on counsel for the parties in this matter.

Dated:Jan 31 2005

/s/ Edward Rafeedie
EDWARD RAFEEDIE
Senior United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS SECURITY FUND; DIRK GEERSEN,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

NOS. 04-56982, 05-55192

FILED APRIL 27, 2007

Before: **REINHARDT** and **BYBEE**, Circuit Judges, and **BURNS**,* District Judge.

The panel judges have voted to deny Appellants' petition for rehearing. Appellants' petition for rehearing, filed February 8, 2007, is DENIED.

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* The Honorable Larry A. Burns, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX F

ERISA § 3(21), 29 U.S.C. § 1002(21)

§ 1002. Definitions

For purposes of this subchapter:

* * *

(21) **(A)** Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment

company, investment adviser, or principal underwriter by any other law.

ERISA § 401, 29 U.S.C. § 1101

§ 1101. Coverage

(a) **Scope of coverage**.

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than—

(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; or

(2) any agreement described in section 736 of Title 26, which provides payments to a retired partner or deceased partner or a deceased partner's successor in interest.

(b) Securities or policies deemed to be included in plan assets.

For purposes of this part:

(1) In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. § 80a-1 et seq.], 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.

(2) In the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by reason of the issuance of such policy, be deemed to include any assets of such insurer. For purposes of this paragraph:

(A) The term "insurer" means an insurance company, insurance service, or insurance organization, qualified to do business in a State.

(B) The term "guaranteed benefit policy" means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term includes any surplus in a separate account, but excludes any other portion of a separate account.

(c) Clarification of application of ERISA to insurance company general accounts

(1) **(A)** Not later than June 30, 1997, the Secretary shall issue proposed regulations to provide guidance for the purpose of determining, in cases where an insurer issues 1 or more policies to or for the benefit of an employee benefit plan (and such policies are supported by assets of such insurer's general account), which assets held by the insurer (other than plan assets held in its separate accounts) constitute assets of the plan for purposes of this part and section 4975 of Title 26 and to provide guidance with respect to the application of this subchapter to the general account assets of insurers.

(B) The proposed regulations under subparagraph (A) shall be subject to public notice and comment until September 30, 1997.

(C) The Secretary shall issue final regulations providing the guidance described in subparagraph (A) not later than December 31, 1997.

(D) Such regulations shall only apply with respect to policies which are issued by an insurer on or before December 31, 1998, to or

for the benefit of an employee benefit plan which is supported by assets of such insurer's general account. With respect to policies issued on or before December 31, 1998, such regulations shall take effect at the end of the 18-month period following the date on which such regulations become final.

(2) The Secretary shall ensure that the regulations issued under paragraph (1)—

(A) are administratively feasible, and

(B) protect the interests and rights of the plan and of its participants and beneficiaries (including meeting the requirements of paragraph (3)).

(3) The regulations prescribed by the Secretary pursuant to paragraph (1) shall require, in connection with any policy issued by an insurer to or for the benefit of an employee benefit plan to the extent that the policy is not a guaranteed benefit policy (as defined in subsection (b)(2)(B) of this section)—

(A) that a plan fiduciary totally independent of the insurer authorize the purchase of such policy (unless such purchase is a transaction exempt under section 1108(b)(5) of this title),

(B) that the insurer describe (in such form and manner as shall be prescribed in such regulations), in annual reports and in policies issued to the policyholder after the date on which such regulations are issued in final form pursuant to paragraph (1)(C)—

(i) a description of the method by which any income and expenses of the insurer's general account are allocated to the policy during the term of the

policy and upon the termination of the policy, and

(ii) for each report, the actual return to the plan under the policy and such other financial information as the Secretary may deem appropriate for the period covered by each such annual report,

(C) that the insurer disclose to the plan fiduciary the extent to which alternative arrangements supported by assets of separate accounts of the insurer (which generally hold plan assets) are available, whether there is a right under the policy to transfer funds to a separate account and the terms governing any such right, and the extent to which support by assets of the insurer's general account and support by assets of separate accounts of the insurer might pose differing risks to the plan, and

(D) that the insurer manage those assets of the insurer which are assets of such insurer's general account (irrespective of whether any such assets are plan assets) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, taking into account all obligations supported by such enterprise.

(4) Compliance by the insurer with all requirements of the regulations issued by the Secretary pursuant to paragraph (1) shall be deemed compliance by such insurer with sections 1104, 1106, and 1107 of this title with respect to those assets of the insurer's general

account which support a policy described in paragraph (3).

(5) **(A)** Subject to subparagraph (B), any regulations issued under paragraph (1) shall not take effect before the date on which such regulations become final.

(B) No person shall be subject to liability under this part or section 4975 of Title 26 for conduct which occurred before the date which is 18 months following the date described in subparagraph (A) on the basis of a claim that the assets of an insurer (other than plan assets held in a separate account) constitute assets of the plan, except—

(i) as otherwise provided by the Secretary in regulations intended to prevent avoidance of the regulations issued under paragraph (1), or

(ii) as provided in an action brought by the Secretary pursuant to paragraph (2) or (5) of section 1132(a) of this title for a breach of fiduciary responsibilities which would also constitute a violation of Federal or State criminal law.

The Secretary shall bring a cause of action described in clause (ii) if a participant, beneficiary, or fiduciary demonstrates to the satisfaction of the Secretary that a breach described in clause (ii) has occurred.

(6) Nothing in this subsection shall preclude the application of any Federal criminal law.

(7) For purposes of this subsection, the term "policy" includes a contract.

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1)

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, 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 their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.