No. 05-1448

In the Supreme Court of the United States

JEFFREY H. BECK, LIQUIDATING TRUSTEE OF THE ESTATES OF CROWN VANTAGE, INC., AND CROWN PAPER COMPANY, PETITIONER

v.

PACE INTERNATIONAL UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an employer that sponsors and administers a single-employer defined benefit plan has a fiduciary obligation under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, to consider merger as a way to implement the employer's decision to terminate the plan.

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, sets minimum standards for employee benefit plans to ensure their equitable character and financial soundness. See 29 U.S.C. 1001(a). Among those standards are requirements that plan fiduciaries discharge their duties solely in the interest of plan participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, with prudence, and in accordance with the documents and instruments governing the plan insofar as they are consistent with ERISA. 29 U.S.C. 1104(a)(1)(A), (B) and (D). In general, a person is a fiduciary "to the extent" he exercises "discretionary authority or discretionary control" over plan "management," exercises "au-

thority or control" over plan "assets," or has "discretionary authority or discretionary responsibility" in the plan's "administration." 29 U.S.C. 1002(21)(A)(i) and (iii).

One kind of pension plan governed by ERISA is a defined benefit plan. 29 U.S.C. 1002(35). In a defined benefit plan, employees are entitled, upon retirement, to fixed periodic payments. See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). To ensure the availability of sufficient funds to make those payments, ERISA sets minimum funding standards for defined benefit plans. 29 U.S.C. 1001(c), 1081(a), 1082. Title IV of ERISA, 29 U.S.C. 1301 *et seq.*, also provides an insurance program, administered by the Pension Benefit Guaranty Corporation (PBGC), to protect plan participants and beneficiaries from loss of certain promised benefits upon plan termination. See 29 U.S.C. 1001(c); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 361-362 (1980).

An employer may initiate termination of a single-employer defined benefit plan "only" through "standard" or "distress" termination procedures prescribed in Title IV of ERISA. 29 U.S.C. 1341(a)(1). This case concerns a standard termination. In a standard termination, the plan administrator must provide advance notice to affected parties, actuarial information indicating to the PBGC that the plan's assets will be sufficient to satisfy benefit liabilities, subsequent notice to each participant and beneficiary of the amount of benefit liabilities attributable to him or her, and additional information required by PBGC regulations. 29 U.S.C. 1341(a)(2), (b)(1)(A) and (B), (b)(2); 29 C.F.R. 4041.23-4041.27. The PBGC then decides whether the plan has sufficient assets to satisfy all benefit liabilities and whether other requirements have been met. See 29 U.S.C. 1341(b)(2)(C); 29 C.F.R. 4041.31. If the PBGC does not issue a notice of noncompliance, and if the plan assets are sufficient to satisfy benefit liabilities on the termination date, the plan administrator makes a final distribution of plan assets. 29 U.S.C. 1341(b)(2)(D); 29 C.F.R. 4041.28.

Pursuant to 29 U.S.C. 1341(b)(3)(A), the plan administrator must "distribute" the assets of the plan "in accordance with" 29 U.S.C. 1344, which allocates the assets "among the participants and beneficiaries of the plan" in a specified order of priority. 29 U.S.C. 1344(a). If assets are left over after benefits are satisfied, any assets attributable to employee contributions must be distributed to the participants who made the contributions or to their beneficiaries. 29 U.S.C. 1344(d)(3). After that distribution, the employer sponsoring the plan may recover any residual assets if the plan so provides and the distribution does not violate any law. 29 U.S.C. 1344(d)(1); see *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 (1989). To distribute the assets, the plan administrator must either "purchase irrevocable commitments [*i.e.*, annuities] from an insurer to provide all benefit liabilities under the plan," or, "in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan." 29 U.S.C. 1341(b)(3)(A).

The PBGC's regulations similarly require the plan administrator, "in accordance with all applicable requirements under the [Internal Revenue] Code and ERISA," to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." 29 C.F.R. 4041.28(c)(1). The regulations stress that "[a] plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in [29 U.S.C. 1344]." 29 C.F.R. 4044.4(a). The regulations also impose various other requirements, including that the plan administrator inform each participant and beneficiary that, after distribution of plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9).

2. a. Crown Vantage, Inc., and its subsidiary Crown Paper Co. (collectively Crown) operated paper mills. Crown's board of directors served as administrator of Crown's 18 pension plans. PACE International Union (PACE) represented employees covered by seventeen of the plans. Pet. App. 2, 4.

In March 2000, Crown filed for bankruptcy and began liquidating its assets. In July 2001, Crown's board of directors began to consider terminating its pension plans under a standard termination through the purchase of annuities. Pet. App. 4. PACE proposed that Crown instead merge the plans covering employees represented by PACE with the PACE Industrial Union Management Pension Fund (PIUMPF), a multiemployer plan. *Id.* at 5; see 29 U.S.C. 1002(37), 1301(a)(3) (defining "multiemployer plan"). Crown's board of directors decided to terminate twelve of the plans (which, by then, had been combined into a single plan) by purchasing annuities. Crown paid $84 million for the annuities, with the expectation that, after termination and distribution of the annuity contracts to participants and beneficiaries, approximately $5 million would revert to Crown. Pet. App. 5-7.

b. After Crown purchased the annuities, respondents PACE and two plan participants brought an adversary action against Crown in bankruptcy court. Pet. App. 7; see 28 U.S.C. 157. Respondents alleged that Crown had breached its fiduciary duties under ERISA by failing to give adequate consideration to PACE's merger proposal. Pet. App. 7.

The bankruptcy court agreed with respondents that Crown had breached its fiduciary duties. Pet. App. 51-73. The court acknowledged that the board of directors' decision to terminate the plan was a "business" rather than a fiduciary decision. *Id.* at 65. The court nonetheless reasoned that the decision whether to "annuitize" the plan or to merge it into PIUMPF was a fiduciary decision. *Id.* at 66. And the court found that the board did not seriously consider the proposed merger with PIUMPF. *Id.* at 65.

The court did not, however, order Crown to cancel the annuity purchase, because that would have triggered a $4 million penalty for breach of the purchase agreement. Pet. App. 61, 66-67. Instead, the court issued a preliminary injunction preventing Crown from recovering the $5 million in surplus plan assets remaining after the annuity purchase. *Ibid.* In later decisions, the court kept that injunction in effect, but approved termination of the plan and distribution of the residual assets to the participants and beneficiaries. *Id.* at 74-83. The distribution of the residual assets was stayed pending resolution of any appeals. See Pet. 9.

c. Petitioner, the liquidating trustee of the Crown bankruptcy estates, appealed to the district court, which affirmed the bankruptcy court's order. Pet. App. 29-50. The district court rejected petitioner's argument that the decision to terminate the plan by purchasing annuities rather than to merge the plan with PIUMPF was a business, rather than a fiduciary, decision. *Id.* at 45-48. The Court reasoned that merger is an alternative method, permitted by ERISA, of implementing a termination because a merger can "otherwise fully provide all benefit liabilities under the plan." *Id.* at 46 (quoting 29 U.S.C. 1341(b)(3)(A)(ii)). The court also rejected petitioner's contention that the terms of the Crown plan did not permit merger as a method of termination. *Id.* at 47.

d. Petitioner appealed, and the Ninth Circuit affirmed the district court's judgment in relevant part. Pet. App. 1-24. The court of appeals acknowledged that "the decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations." *Id.* at 9. The court stated, however, that "the *implementation* of a decision to terminate is discretionary in nature and subject to ERISA's fiduciary obligations." *Ibid.* (citing *Waller* v. *Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994)). The court then reasoned that whether Crown breached its fiduciary duty turns on whether merger was a permissible means of implementing the decision to terminate the plan. *Ibid.*

The court concluded that merger was a permissible way to implement plan termination. In reaching that conclusion, the court refused to consider whether the terms of the Crown plan permitted merger as a means of termination, because Crown had not raised the issue in the bankruptcy court. Pet. App. 10. Turning to the provisions of ERISA and the PBGC's regulations, the court construed 29 U.S.C. 1341(b)(3)(A) and 29 C.F.R. 4041.28(c)(1) to permit any method of termination, including merger, that is "sufficient to cover plan liabilities." Pet. App. 12. The court rejected petitioner's arguments that merger is a procedure distinct from termination and that merging the Crown plan into PIUMPF would not "distribute" plan assets as required by Section 1341(b)(3). *Id.* at 12-14.

The court next concluded that Crown breached its fiduciary duty to act solely in the interest of plan participants and beneficiaries by failing to undertake an intensive and scrupulous investigation of the proposed PIUMPF merger as an alternative to the purchase of annuities. Pet. App. 15-20. In a separate, unpublished opinion, the court upheld the bankruptcy court's ordered distribution of residual plan assets as a remedy for Crown's fiduciary breach. *Id.* at 25-28.

e. Petitioner sought rehearing and rehearing en banc. The PBGC and the Department of Labor filed amicus briefs in support of petitioner's request, but the court of appeals denied further review. Pet. App. 84-85.

DISCUSSION

The decision of the court of appeals seriously misconstrues ERISA. It disregards the distinction this Court has consistently drawn between settlor and fiduciary functions, and it is in significant tension with decisions of other courts of appeals that have adhered to that distinction. The court of appeals' decision also imposes substantial burdens on plan sponsors, plan participants and beneficiaries, and the PBGC. This Court's review is therefore warranted.

A. The Decision Of The Court Of Appeals Is Incorrect

The court of appeals misinterpreted ERISA in two important respects. First, the court erroneously held that ERISA's fiduciary duties apply to an employer's decision whether to terminate a pension plan by purchasing annuities or instead to merge the plan with another plan. Second, the court further erred in holding that merger is a permissible means of terminating a defined benefit pension plan.

1. ERISA draws a fundamental distinction between settlor and fiduciary functions. Decisions about the design, composition, and structure of pension plans are settlor functions, which plan sponsors may make based on business considerations. Decisions about the administration and management of plan assets are fiduciary functions, which must be made in the best interests of plan participants and beneficiaries. An employer's choice between terminating a plan by purchasing annuities and merging the plan with another plan is a decision about plan design, composition, and structure. That decision is therefore a settlor function that is not subject to ERISA's fiduciary duties.

a. This Court has repeatedly recognized the distinction between settlor and fiduciary functions. The Court first discussed it in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995), which held that a provision in a welfare plan stating that the sponsor could amend the plan at any time was valid under ERISA § 402(b)(3), 88 Stat. 875 (29 U.S.C. 1102(b)(3)). In reaching that holding, the Court noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. The Court explained that employers do not act as fiduciaries when taking those actions. *Ibid.*

The Court applied that principle to a pension plan in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). *Spink* held that Lockheed did not breach any fiduciary duty under ERISA when it amended its retirement plan for business reasons. *Id.* at 889-891. Relying on *Curtiss-Wright*, the Court stated that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.* at 890. The Court explained that "amending or terminating a plan" involves "plan design" rather than "plan 'management' or 'administration.'" *Id.* at 890 (citations omitted).

The Court provided further elaboration in *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999). In that case, the Court held that claims that Hughes breached its fiduciary duties in amending its pension plan were "directly foreclosed by *Spink*'s holding that, without exception, '[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.'" 525 U.S. at 445 (quoting *Spink*, 517 U.S. at 890). The Court explained that, "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." *Id.* at 444. Thus, "ERISA's fiduciary duty requirement simply is not implicated where" an employer, acting as a plan's "settlor, makes a decision regarding the form or structure of the [p]lan." *Ibid.*

b. The distinction between settlor and fiduciary functions follows from ERISA's definition of fiduciary. See *Spink*, 517 U.S. at 890. As relevant here, ERISA provides that a person is a plan fiduciary "to the extent * * * 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," or "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A)(i) and (iii). Thus, a person is a fiduciary under ERISA "only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management and administration." *Spink*, 517 U.S. at 890 (citation omitted). Those functions do not include plan design, composition, or structure. *Ibid.*; *Hughes Aircraft*, 525 U.S. at 444.

The limitations on the scope of ERISA's fiduciary duties reflect the statute's basic requirements and purposes. ERISA does not require employers to create benefit plans or to provide any particular kind or level of benefits. See *Spink*, 517 U.S. at 887; *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). ERISA therefore generally allows employers to decline to adopt, to alter, or to terminate benefit plans for any reason, including the employers' business interests.

ERISA does seek to *encourage* plan formation and the provision of benefits, 29 U.S.C. 1001a, 1001b, and the employers' freedom to alter or to terminate plans furthers those goals. It reassures employers that they retain substantial authority over the structure of and the benefits provided by the plans that they create.

ERISA also seeks to ensure that employees receive the benefits that they have been promised by employers. *Spink*, 517 U.S. at 887; *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980); 29 U.S.C. 1001(b) and (c). For that reason, ERISA requires that decisions about the administration and management of existing plans be made "solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1)(A).

c. The court of appeals' decision cannot be squared with the distinction between settlor and fiduciary functions. An employer's decision whether to terminate a pension plan is a settlor action. *Spink*, 517 U.S. at 890; *Curtiss-Wright*, 514

U.S. at 78. It "cannot be an action of plan 'management' or 'administration.'" *Spink*, 517 U.S. at 890 (citation omitted). Rather, it is a decision whether fundamentally to alter the plan's design, composition, and structure by ending the plan altogether. An employer's decision whether to merge a pension plan with another plan is likewise a settlor action. Like the decision to terminate a plan, the decision to merge plans is a decision about the design, composition, and structure of the plans. The courts of appeals that have considered the question have therefore refused to impose ERISA's fiduciary obligations on employer decisions to merge plans. See *Malia* v. *General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), cert. denied, 513 U.S. 956 (1994); *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992).

Because an employer's decision whether to terminate a plan and its decision whether to merge a plan with another plan are, considered separately, settlor rather than fiduciary functions, it follows that the choice between the two is also a settlor function. That choice is necessarily a decision about plan design, composition, and structure. Thus, Crown's decision whether to terminate its pension plan by purchasing annuities or instead to merge it with PACE's multiemployer plan was not a fiduciary decision. It was a settlor decision that Crown was free to make for business reasons.

d. The court of appeals mistakenly concluded that Crown had a fiduciary duty to consider merger on the theory that merger was a possible means of implementing Crown's decision to terminate the plan. As discussed below, the court was incorrect in concluding that merger is a method of plan termination. See pp. 11-16, *infra*. Even apart from that error, however, the court was incorrect in concluding that the choice between terminating a plan by purchasing annuities and merging the plan with another plan is a fiduciary decision.

The court of appeals incorrectly analogized that decision to choosing between two insurance companies to provide annuities upon termination. See Pet. App. 9 (citing *Waller* v. *Blue Cross*, 32 F.3d 1337, 1342-1344 (9th Cir. 1994)). The choice between two annuity providers is a fiduciary decision because it is a decision about how to expend plan assets. See 29 C.F.R. 2509.95-1; *Waller*, 32 F.3d at 1342-1343. But an employer's choice whether to merge a plan with another plan—like an employer's choice between two potential merger partners—is not a decision about how to expend or otherwise manage or administer plan assets. It is, as described above, a decision about plan design, composition, and structure. That decision is not transformed into a fiduciary act simply because it is (mis)characterized as a method of implementing a plan termination. It remains a settlor rather than a fiduciary function, however it is labeled.

2. The court of appeals also erred in holding that merger is a permissible method of terminating a defined benefit plan. ERISA's provisions governing plan termination and the PBGC's implementing regulations establish that merger is not a means of accomplishing plan termination. Instead, merger is a separate and distinct procedure that plan sponsors may use to alter the structure or composition of a plan.

a. As this Court noted in *Hughes Aircraft*, 29 U.S.C. 1341 provides the exclusive means for voluntary termination of a single-employer defined benefit plan. See 525 U.S. at 446. Section 1341(b), which governs the standard termination involved here, makes clear that merger is not a permissible method of effectuating termination. It states that, in a termination, plan assets must be distributed "in accordance with [29 U.S.C. 1344]." 29 U.S.C. 1341(b)(3)(A). A merger does not comply with the requirements of Section 1344.

Section 1344(a) requires that the assets of the terminating plan be allocated "among the participants and beneficiaries of the plan." 29 U.S.C. 1344(a). In a merger, however, assets are not allocated among the participants and beneficiaries of the terminating plan. Instead, they are transferred to the merged plan. Moreover, once they have been transferred, the assets are used to satisfy the benefit claims not only of the participants and beneficiaries of the terminating plan, but also of the other participants and beneficiaries of the merged plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2).

Section 1344(a) also sets out a specific order of priority for the allocation of assets. See 29 U.S.C. 1344(a); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717-718 & n.3 (1989). That allocation priority is not followed in a merger. Instead, the assets of the merging plans are combined and commingled to provide for the benefits of all participants in the merged plan. See 26 C.F.R. 1.414(*l*)-1(b)(1) and (2); *Hughes Aircraft*, 525 U.S. at 440 (noting that, in a defined benefit plan, "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool").

In addition, Section 1344(d) provides that, if all benefits are satisfied, there may in some circumstances be a reversion or distribution of residual assets to the employer.[1] In a merger, however, there is no possibility of a reversion to the employer. The plan assets are all transferred to the merged plan. And, once the assets are in the merged plan, they are subject to ERISA's anti-inurement rule, which prohibits their use for the benefit of the employer. See 29 U.S.C. 1103(c).[2]

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[1] Section 1344(d) permits a reversion if all benefit liabilities have been satisfied, the plan allows the reversion, and the reversion does not contravene any provision of law. 29 U.S.C. 1344(d)(1). Section 1344(d)(3) further requires that, after all benefits are satisfied and before any reversion, any assets of the plan attributable to employee contributions be distributed to the participants who made the contributions or their beneficiaries. 29 U.S.C. 1344(d)(3).

[2] Respondents incorrectly assert (Br. in Opp. 22) that PBGC Opinion Letter 85-25 (Oct. 11, 1985) (Br. in Opp. App. 14a-16a) allows a reversion of assets following a merger. The letter says that 1984 Joint Guidelines issued by the

b. Section 1341(b) also requires distribution of the assets of a terminating plan to be accomplished by the purchase of annuities or by "otherwise fully provid[ing] all benefit liabilities" "in accordance with the provisions of the plan and any applicable regulations." 29 U.S.C. 1341(b)(3)(A). Thus, any alternative method of distributing assets must be authorized by the PBGC's regulations. The PBGC does not view its regulations as authorizing merger as an alternative method of asset distribution. The PBGC's interpretation of its regulations is reasonable and entitled to deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Boivin* v. *U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006).[3]

PBGC, the Department of Labor, and the Internal Revenue Service (IRS) generally do not apply to a transfer of assets and liabilities from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan. The letter makes clear, however, that "[a] valid plan termination is a prerequisite to a reversion of surplus plan assets to an employer." *Id.* at 15a. The other PBGC letters cited by respondent (Br. in Opp. 15-16) address circumstances under which an employer can split a plan into two plans, terminate one plan, and obtain a reversion. PBGC Op. Ltr. 85-11 (May 14, 1985) (Br. in Opp. App. 6a-9a); PBGC Op. Ltr. 85-21 (Aug. 26, 1985) (Br. in Opp. App. 10a-13a). None of the letters suggests that an employer may obtain a reversion without following termination procedures, including distribution of the assets of the terminating plan by purchasing annuities or by another method that complies with all statutory and regulatory requirements.

[3] The Crown plan also did not authorize merger as a means of distributing assets. See C.A. E.R. 386 (providing that "distributions" upon termination "may be effectuated in the discretion of the Plan Administrator by the purchase of nontransferable annuities, or by continuing the [Plan] in existence, or by a cash settlement with any Member with the Member's consent"). The court of appeals refused to consider the plan terms because it reasoned that petitioner had waived reliance on them by failing to invoke them in the bankruptcy court. Pet. App. 10. That was error, because whatever transpired in the bankruptcy court, the district court considered the plan terms on appeal. Moreover, the plan's failure to provide for merger as a method of distribution was not a defense subject to waiver by petitioner if he did not raise it. Because ERISA authorizes distribution by means other than the purchase of annuities only if the alternative distribution method is specified in the plan, 29 U.S.C. 1341(b)(3)(A)(ii), respondents bore the burden of proving that the plan

The PBGC's regulations require distribution of the assets of the terminating plan "in accordance with all applicable requirements under * * * ERISA," 29 C.F.R. 4041.28(c)(1), and, in particular, the allocation requirements of Section 1344, 29 C.F.R. 4044.4(a). As explained above, merger does not result in distribution in accordance with those requirements.

The regulations also require the administrator to "distribute plan assets in satisfaction of all plan benefits." 29 C.F.R. 4041.28(c)(1). The PBGC interprets that distribution requirement to contemplate that (1) the assets will be divided among the participants and beneficiaries of the terminating plan, and (2) those participants and beneficiaries will actually receive their benefits, either through an annuity, which is the distribution form authorized by the statute, or through a lump sum payment equal to the present value of the benefits. See 29 C.F.R. 4041.28(c)(1) and (2); note 5, *infra*.[4]

Those criteria are not satisfied in a merger. Instead, as described above, the assets are transferred to the new merged plan, where they are used to provide benefits to other individuals besides the participants and beneficiaries of the terminating plan. In addition, participants and beneficiaries do not actually receive their benefits in the form of annuity contracts or cash. Rather, they receive only the promise of future payments from the merged plan—payments which, unlike lump sum distributions or annuities, are contingent on the continued health of that plan.

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authorized merger as a distribution method. Petitioner had no obligation to disprove that fact, which was an essential element of respondents' claim that failure to consider merger was a breach of fiduciary duty. See *Schaffer ex rel. Schaffer* v. *Weast*, 126 S. Ct. 528, 534 (2005) (the general rule is that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims").

[4] In order to avoid taxation, a participant or beneficiary may elect to have his or her lump sum payment transferred or "rolled over" into an individual retirement account (IRA) or another qualified plan. 26 U.S.C. 402(c) (2000 & Supp. III 2003).

Other components of the PBGC's regulations reinforce the conclusion that merger is not a permissible method of accomplishing plan termination. For example, the regulations require that the notice of plan termination inform each participant that, after distribution of the plan assets, "the PBGC no longer guarantees that participant's or beneficiary's plan benefits." 29 C.F.R. 4041.23(b)(9). But a merger does not extinguish the PBGC's guarantee. Instead, the PBGC continues to guarantee benefits under the new merged plan.[5]

c. The structure of ERISA confirms that merger is not simply a method of terminating a plan. ERISA treats merger and termination as separate and distinct procedures. Mergers are addressed in separate statutory sections from terminations. Compare 29 U.S.C. 1058 (mergers generally), 29 U.S.C. 1411, 1412 (mergers involving multiemployer plans), and 26 U.S.C. 414(*l*) (tax implications of mergers) with 29 U.S.C. 1341 (terminations of single-employer plans) and 29 U.S.C. 1341a (terminations of multiemployer plans).

Moreover, the statutory provisions addressing mergers impose different requirements from those applicable to terminations. For example, the merger provisions generally require that participants' benefits be no lower after a merger than they were before the merger. See 29 U.S.C. 1058, 1411(b)(2), 1412(b). Those provisions do not, however, give

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[5] The court of appeals incorrectly concluded that the PBGC's regulations authorize merger as a method of plan termination because they allow distribution of assets in a termination to be effected by the purchase of annuities "or in another permitted form." 29 C.F.R. 4041.28(c)(1). The phrase "another permitted form" refers to a lump sum cash distribution, if permitted by the plan, or the rollover of such a distribution into an IRA or an other qualified plan. See p. 14 & note 4, *supra*. The phrase could conceivably encompass a distribution method other than a lump sum payment if that method was permitted by the relevant plan, ERISA, and the PBGC's regulations and provided the same degree of assurance that participants and beneficiaries would receive their promised benefits. Merger, however, meets none of those criteria.

participants the same rights to receive plan assets that the participants have in a plan termination. See, *e.g.*, *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63 (2d Cir. 1997), cert. denied, 525 U.S. 1138 (1999), and *Malia*, 23 F.3d at 831-832 (discussed at p. 17, *infra*). In addition, a plan administrator cannot begin a termination without providing notice to the PBGC. The PBGC can then block the termination if it finds that assets will not be sufficient to provide for benefit liabilities. 29 U.S.C. 1341(b)(2)(C) and (D). The PBGC has no comparable authority to block a merger, and it may not even receive notice of a merger until after it is completed. See 29 U.S.C. 1343(a), 1343(c)(8) (requiring notice after merger); compare 29 U.S.C. 1411(b) (advance notice required for merger of multiemployer plans) with 29 U.S.C. 1412 (no advance notice required for merger of single-employer plan into multiemployer plan).

B. This Court's Review Is Warranted

1. This Court should grant review because the Ninth Circuit's decision departs significantly from the teaching of the Court's cases. As explained above, in *Curtiss-Wright*, *Spink*, and *Hughes Aircraft*, this Court drew a clear distinction between settlor and fiduciary functions. See pp. 7-8, *supra*. Those cases establish that decisions about plan design, composition, and structure are settlor functions that are not subject to ERISA's fiduciary requirements. See *Curtiss-Wright*, 514 U.S. at 78; *Spink*, 517 U.S. at 890-891; *Hughes Aircraft*, 525 U.S. at 444-445. The choice between terminating a plan by purchasing annuities and merging the plan with another plan is plainly a decision about plan design, composition, and structure. The holding of the court of appeals that the decision is nonetheless subject to ERISA's fiduciary requirements cannot be reconciled with the principles set out in *Curtiss-Wright*, *Spink*, and *Hughes Aircraft*.

The decision below is also in significant tension with decisions of other courts of appeals. Consistent with this Court's rulings, two courts of appeals have held that an employer's decision to merge pension plans is not a fiduciary decision. See *Malia*, 23 F.3d at 833; *Sutter*, 964 F.2d at 562. Other courts of appeals have held that decisions by an employer to "spin off" part of a plan or to transfer assets and liabilities from one plan to another plan, which are similar to mergers, are not fiduciary decisions.[6] See, *e.g.*, *Flanigan* v. *General Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir.), cert. denied, 534 U.S. 1065 (2001); *King* v. *National Human Res. Comm., Inc.*, 218 F.3d 719, 723-724 (7th Cir. 2000); *Systems Council EM-3* v. *AT&T Corp.*, 159 F.3d 1376, 1379-1380 (D.C. Cir. 1998). The Ninth Circuit's decision cannot be reconciled with the reasoning of those cases because it treats an employer's decision not to transfer assets through a merger as a fiduciary decision.

The Ninth Circuit's decision is also in tension with decisions of other courts of appeals holding that, in a merger, plan participants do not have the same rights to plan assets that they would have in a termination. See *Brillinger*, 130 F.3d at 63 (holding that plan participants affected by a merger do not have a right to have their accrued benefits increased by the share of the residual assets that they would have received in a plan termination under 29 U.S.C. 1344(d)(3)); *Malia*, 23 F.3d at 831-832 (same). *Brillinger* and *Malia* recognize that merger and termination are alternative settlor options that entail distinct procedures, are subject to distinct requirements, and trigger distinct rights for plan participants. The decision

[6] A merger is a combining of two plans into one plan, while a transfer of assets and liabilities occurs when there is a diminution of assets in one plan and the acquisition or assumption of them by another plan. 26 C.F.R. 1.414(*l*)-1(b)(2) and (3). A "spinoff" means splitting one plan into two plans. 26 C.F.R. 1.414(*l*)-1(b)(4). A transfer of assets and liabilities is treated as a combination of a merger and a spinoff, *e.g.*, assets and liabilities are spun off from one plan and then combined with another plan. 26 C.F.R. 1.414(*l*)-1(*o*).

below, in contrast, incorrectly treats merger as a mere method of implementing plan termination rather than an alternative to termination and a separate procedure.

2. This Court's review is also warranted because the decision below is likely to cause significant harm to plan sponsors, plan participants and beneficiaries, and the PBGC.

a. Plan sponsors in the Ninth Circuit will be harmed by the court of appeals' decision. If employers have a fiduciary duty to consider merger as an alternative to terminating plans by purchasing annuities, they will not be free to choose termination even when it makes business sense. In particular, they may be precluded from terminating over-funded plans in order to recoup excess plan assets. The court of appeals' decision therefore imposes substantial burdens on the freedom of employers in the Ninth Circuit to operate their businesses.

More fundamentally, because the decision below impedes employers from obtaining reversions from over-funded plans, it is likely to undermine ERISA's goal of promoting adequate funding of pension plans. The authority to recover residual assets reassures employers that they will be able to recoup their money if they provide plans with more resources than the plans ultimately need. That authority thus encourages adequate plan funding. Depriving employers of that authority, in contrast, deprives them of the assurance that they can recoup any over-funding and therefore creates an incentive for employers to minimize the amount that they contribute to their plans. See *Hawkeye Nat'l Life Ins. Co.* v. *Avis Indus. Corp.*, 122 F.3d 490, 502 n.7 (8th Cir. 1997); *Chait* v. *Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988).

b. The court of appeals' decision could also harm plan participants and beneficiaries in the Ninth Circuit. In the judgment of the PBGC and the Department of Labor, the purchase of annuity contracts from a financially sound insurance company provides the best assurance (other than lump-sum payments) that plan participants and beneficiaries will receive the full benefits to which they are entitled. That is particularly true because, in the view of the Department of Labor, an employer that terminates a pension plan by purchasing an annuity contract generally has a fiduciary duty to obtain the safest annuity available. 29 C.F.R. 2509.95-1(c). When a plan is merged rather than terminated by the purchase of annuities, participants and beneficiaries face a greater risk that they will not receive their full benefits. The merger provides them only a promise of future benefits under the merged plan, the payment of which is contingent on the continued health of that plan. The added risk to participants and beneficiaries is particularly great in the type of merger involved in this case—merger of a single-employer plan into a multiemployer plan. Although the PBGC continues to guarantee benefits under the multiemployer plan, the PBGC's guarantee is substantially less than under the single-employer plan. Compare 29 U.S.C. 1322 with 29 U.S.C. 1322a; see PBGC, *Annual Management Report, Fiscal Year 2006*, at 12-13 (Nov. 15, 2006) <http://www.pbgc.gov/docs/PBGCAMR.pdf> (PBGC Report).

c. Finally, if certiorari is not granted, the PBGC will be harmed by the court of appeals' decision because it will have to administer different termination regimes in different parts of the country. In the Ninth Circuit, the PBGC will have to accept merger as a method of distributing assets in a termination. In the remainder of the country, however, merger will remain an impermissible method of effectuating a termination, in accordance with the PBGC's regulations, correctly interpreted.

The PBGC will also be harmed because it will have to continue to insure some plans that would have terminated and satisfied their full benefit liabilities but are instead required under the Ninth's Circuit's rule to merge with other plans.

Despite some improvement in the PBGC's financial condition in the past two years, existing plans are massively underfunded, and the PBGC's future exposure to losses from financially troubled sponsors remains high. See PBGC Report 3-5, 15-16. The single-employer insurance program has an $18.1 billion deficit, and the PBGC estimates a reasonably possible exposure to $73 billion in underfunding. *Id.* at 4-5, 14-15. The total underfunding in all single-employer plans is estimated at $350 billion. *Id.* at 15. The PBGC's separate multiemployer plan insurance program has a deficit of $739 million, and $83 million in reasonably possible liability. *Id.* at 5, 14, 16. The total underfunding in multiemployer plans is estimated at more than $150 billion. *Id.* at 15. Although the Pension Protection Act of 2006, Pub. L. No. 109-280, Titles I, II, 120 Stat. 784, 858, attempts to address underfunding problems with new funding rules, PBGC Report 8, the PBGC is not in a position unnecessarily to assume responsibility for more underfunded plans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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