No. _____

In The
Supreme Court of the United States

ZAID ABDUL-AZIZ, Individually and
on behalf of all others similarly situated,

Petitioner,

vs.

NATIONAL BASKETBALL ASSOCIATION
PLAYERS' PENSION PLAN,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under ERISA, the National Basketball Association's retirement plan has a statutory obligation to continuously recalculate retirement benefits during a player's natural life upon the accrual of any "accrued benefit," even for those retired players who elected to receive an actuarial equivalent instead of a life annuity.

Thus, did the Second Circuit legally err in its application of ERISA – not only deviating from its own decision in *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), but more importantly simultaneously creating a split in ERISA jurisprudence with its sister circuits as well – by holding the following in a summary opinion order involving retired professional basketball players of the National Basketball Association?

That the statute of limitations on a player's ERISA denial-of-benefits claim – specifically one involving an "accrued benefit" that might or might not arise subsequent to receiving an actuarial equivalent – automatically begins to accrue by the mere identification of the scheduled end date of the actuarial equivalent, as required by ERISA § 204(c)(3), and even though the "accrued benefit" at issue had not arisen before the scheduled end date of the actuarial equivalent, and thus had not yet legally accrued for purposes of New York's breach of contract statute of limitations.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Zaid Abdul-Aziz, an individual, who played basketball for the National Basketball Association between 1968 through 1978.

2. The National Basketball Association Players' Pension Plan.

CORPORATE DISCLOSURE

Zaid Abdul-Aziz is a person of legal age. The National Basketball Association Players' Pension Plan is an association that provides retirement benefits for those who played in the National Basketball Association.

LIST OF RELATED CASES

Zaid v. National Basketball Association Players' Pension Plan, No. 1:17-cv-08901, Southern District of New York.

Judgment entered March 20, 2019.

Zaid v. National Basketball Association Players' Pension Plan, No. 19-782-cv, United States Court of Appeals for the Second Circuit.

Judgment entered November 12, 2019.

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OPINIONS BELOW

The United States District Court, Southern District of New York, granted the defendant-respondent National Basketball Players' Pension Plan's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, dismissing with prejudice plaintiff-petitioner Zaid Abdul-Aziz's ("Abdul-Aziz") ERISA denial-of-benefits claim. Mr. Abdul-Aziz filed an ERISA claim for unpaid additional retirement benefits that arose from an "accrued benefit," i.e., cost-of-living adjustments ("COLAs") to the defined monthly benefit for all retired basketball players, which accrued after receipt of his actuarial equivalent. The District Court held that Mr. Abdul-Aziz should have known to file a lawsuit for COLAs that might or might not arise after receiving his actuarial equivalent because the actuarial equivalent was scheduled to end in July 2001. The court ruled that the six-year statute of limitations under New York's law for breach of contract began to run in July 2001, because Mr. Abdul-Aziz's actuarial equivalent was scheduled to end in July 2001.

On appeal, the United States Second Circuit affirmed, equally holding that the July 2001 scheduled end date for the actuarial equivalent provided sufficient notice to start the accrual of New York's six-year breach of contract statute of limitations, even though the "accrued benefit" at issue had not arisen under the pension contract – thus had not yet legally accrued – for purposes of New York's breach of contract statute of limitation and despite the plan's statutory obligation under ERISA to continuously recalculate retirement

benefits during any player's natural life upon the accrual of any "accrued benefit," even for those retired players who elected to receive an actuarial equivalent instead of a life annuity option. *Abdul-Aziz v. National Basketball Association Players' Pension Plan*, 784 Fed.Appx. 46 (2d Cir. 2019).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (Cases in the courts of appeal may be reviewed by the Supreme Court . . . [B]y writ of certiorari . . .).

RELEVANT FEDERAL STATUTORY AND REGULATORY PROVISIONS

29 U.S.C. § 1002(22), ERISA § 3(22)

> The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to –
>
> (A) medical benefits, and
>
> (B) disability benefits not in excess of the qualified disability benefit.
>
> For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the

participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

29 U.S.C. § 1002(22), ERISA § 3(23)

The term "accrued benefit" means –

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

29 U.S.C. § 1054(b)(1)(B), ERISA § 204(b)(1)(B)

(b) Enumeration of plan requirements

(1)(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal

to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph –

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

29 U.S.C. § 1054(c)(3), ERISA § 204(c)(3)

(c)(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the

accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

29 U.S.C. § 1132, ERISA § 502(a)(1)(B)

(a) Persons empowered to bring a civil action. A civil action may be brought –

(1) by a participant or beneficiary –

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

26 U.S.C. § 411(a)(11), IRC § 411(a)(11)

(a)(11) Restrictions on certain mandatory distributions

(A) In general

If the present value of any nonforfeitable accrued benefit exceeds $5,000, a plan meets the requirements of this paragraph only if such plan provides that such benefit may not be immediately distributed without the consent of the participant.

(B) Determination of present value

For purposes of subparagraph (A), the present value shall be calculated in accordance with section 417(e)(3).

(C) Dividend distributions of ESOPS arrangement

This paragraph shall not apply to any distribution of dividends to which section 404(k) applies.

(D) Special rule for rollover contributions

A plan shall not fail to meet the requirements of this paragraph if, under the terms of the plan, the present value of the nonforfeitable accrued benefit is determined without regard to that portion of such benefit which is attributable to rollover contributions (and earnings allocable thereto). For purposes of this subparagraph, the term "rollover contributions" means any rollover contribution under sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii), and 457(e)(16).

26 U.S.C. § 411, IRC § 411(c)(3)

(3) Actuarial adjustment

For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to

a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

26 U.S.C. § 415(b), IRC §§ 415(b)(1), (b)(2)

(b) Limitation for defined benefit plans

(1) In general Benefits with respect to a participant exceed the limitation of this subsection if, when expressed as an annual benefit (within the meaning of paragraph (2)), such annual benefit is greater than the lesser of –

(A) $160,000, or

(B) 100 percent of the participant's average compensation for his high 3 years.

(2) Annual benefit

(A) In general

For purposes of paragraph (1), the term "annual benefit" means a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)) are made.

(B) Adjustment for certain other forms of benefit

If the benefit under the plan is payable in any form other than the form described in subparagraph (A), or if the employees contribute to the plan or make rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16)), the determinations as to whether the limitation described in paragraph (1) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary by adjusting such benefit so that it is equivalent to the benefit described in subparagraph (A). For purposes of this subparagraph, any ancillary benefit which is not directly related to retirement income benefits shall not be taken into account; and that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity (as defined in section 417) shall not be taken into account.

26 C.F.R. § 1.411(a)-7(c)(1), Treas. Reg. § 1.411(a)-7(c)(1)

(7)(c) Normal retirement benefit –

(1) In general. For purposes of section 411 and the regulations thereunder, the term "normal retirement benefit" means the periodic benefit under the plan commencing upon early retirement (if any) or at normal retirement age, whichever benefit is greater.

26 C.F.R. § 1.417(e)-(1), Treas. Reg. § 1.417(e)-(1)

(e) Special rules for annuity contracts –

(1) General rule. Any annuity contract purchased by a plan subject to section 401(a)(11) and distributed to or owned by a participant must provide that benefits under the contract are provided in accordance with the applicable consent, present value, and other requirements of sections 401(a)(11) and 417 applicable to the plan.

STATEMENT OF THE CASE

Zaid Abdul-Aziz ("Abdul-Aziz") played professional basketball with the National Basketball Association ("NBA") from 1968 through 1978.[1] During his career, he earned eight years of credited service towards retirement. This case arises from the NBA's denial of "accrued benefits" he earned during his NBA career.

[1] Named Donald A. Smith at birth, Zaid Abdul-Aziz was drafted from Iowa State University by the Cincinnati Royals in 1968. He played 10 seasons before his release by the Houston Rockets in 1978. In 2006, Aziz published a memoir, *Darkness to Sunlight*, which included stories of his basketball career, personal challenges, and spiritual journey. Zaid Abdul-Aziz served as a drug and alcohol counselor in Seattle, Washington. For more, see https://en.wikipedia.org/wiki/Zaid_Abdul-Aziz.

I. In 1969, the NBA and NBPA Reached an Agreement to Provide Retirement Benefits for All Current Players.

One year into his career, in 1969, the NBA and the National Basketball Players' Association ("NBPA") reached a collective bargaining agreement ("CBA"). The 1969 CBA negotiated a defined benefit pension for all players on a current roster of any member team. The NBA formalized the defined benefit in a pension plan in 1970 ("Plan"). The 1970 Plan guaranteed Mr. Abdul-Aziz and all current NBA players a Normal Retirement Pension in the form of a Life Annuity, which equaled the number of years of credited service multiplied by $60.00 per month for each year of credited service. The 1970 Plan also offered retired players so called "Actuarial Equivalents." Actuarial Equivalents are optional forms of retirement benefits payable in a lump-sum or defined span of time. Actuarial equivalents are statutorily and contractually required to be a *benefit of equivalent dollar value* when compared to retirement benefits offered through a life annuity.

II. In 1976, the Plan Adopted Cost-of-living Adjustments for Players' Defined Monthly Benefits.

In 1974, Congress adopted the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001, *et seq*. Before ERISA, there were no real limits on the amount of benefits that an employer could provide. The pre-ERISA limitation on annual benefits was, in general, 100% of the pensioner's

working compensation. ERISA imposed an annual benefit limitation to maintain favorable tax status. *See* § 415(b) of the Internal Revenue Code ("IRC"). IRC § 415(b) set the first annual dollar limit at $75,000.00 beginning after 1975. The dollar limitation was initially permitted to grow with inflation through cost-of-living adjustments ("COLAs").

In conformity with newly enacted ERISA laws, the NBA amended the Plan in 1976. The 1976 Plan increased the defined benefit from $60.00 to $75.00 payable per month, for life, for each year of credited service with prospective COLAs dependent on the National Consumer Price Index. To remain a qualified trust for tax purposes, the 1976 Plan also adopted ERISA's newly enacted § 415(b) limitation as well. Mr. Abdul-Aziz actively played in the NBA when the 1976 Plan adopted COLAs, thereby entitling him to all future COLA benefits because the COLAs were now an "accrued benefit" under ERISA.

III. Aziz Elected Early Retirement Benefits in 1991 Under the 1989 Plan and Chose to Receive an Actuarial Equivalent Payable in a Fixed Amount Over 120 Months.

During the 1980s, due to budgetary shortfalls, Congress eliminated COLA increases for defined benefit plans. Congress lifted federal restrictions on COLAs in 1988; thus, the NBA and NBPA negotiated and implemented new COLA increases to the defined benefit through the 1988 CBA. The 1989 Plan adopted the

1988 CBA COLAs, increasing the defined benefit for all former and current NBA players to $200.00 per month for each year of credited service beginning September 1, 1988.

The NBA set Mr. Abdul-Aziz's normal retirement date for May 1996; however, he applied for early retirement benefits in May 1991. According to the 1989 Plan and the 1991 retirement application documents, Mr. Abdul-Aziz's *Normal Retirement Pension* was a *Life Annuity* in the amount of $200.00 per month, for life, for each of his eight years of credited service, or $1,600.00 per month, commencing May 1996, subject to a pro-rata reduction of 66.7% for drawing early retirement. Accordingly, the Plan offered Mr. Abdul-Aziz a *Normal Retirement Pension* in the form of a *Life Annuity* payable in the amount of $1,067.20 per month for life ($200.00 per month x 8 years credited service x .667 early retirement factor).

In addition to the *Life Annuity*, the Plan also offered two optional actuarial equivalents: (1) a lump sum distribution of $218,960.00, or (2) a 10-year certain only payment of $1,813.17 per month, beginning May 1, 1991 and ending April 30, 2001. According to the Plan's *Benefit Calculation Worksheet*, the lump sum amount of $218,960.00 and the 10-year fixed payment of $1,813.17 constituted a *benefit of equivalent dollar value* when compared to the *Life Annuity* in the amount of $1,067.20 per month for life. As mandated

by Section 204(c)(3) of ERISA,[2] the 1991 application documents identified the scheduled end date of the 10 year fixed payment period as April 2001. In hindsight, it is important to note that the *Benefits Calculation Worksheet* contained no express language or examples explaining the effects of COLAs should Mr. Abdul-Aziz elect to receive either $218,960.00 or $1,813.17 for 120 months. Nevertheless, relying on the plan documents providing that all three options provided the same *benefit of equivalent dollar value* when compared to a life annuity, Mr. Abdul-Aziz elected to receive a nominal increase of approximately $745.00 per month for 120 months.

After signing his retirement paperwork, on July 12, 1991, Mr. Abdul-Aziz received a letter from the Plan stating that, due to timing issues, he would actually begin to receive $1,851.64 per month beginning on August 1, 1991 with benefits scheduled to cease 120 months later on July 31, 2001. Once again, in conformity with ERISA § 204(c)(3), the July 12, 1991 letter identified the scheduled end date of the actuarial equivalent, only, and lacked any explicit language or examples explaining the impact of COLAs implemented either during or after receipt of the actuarial equivalent. In hindsight, no plan document clearly or unequivocally advised Mr. Abdul-Aziz that he *de facto* forfeited his ERISA protected right to any and all "accrued benefits" that would arise during his natural life.

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[2] Section 204(c)(3) of ERISA mandates that the Plan identify the scheduled start date and end date of the *Actuarial Equivalent*.

IV. The 1995 CBA Materially Redefined the Normal Retirement Benefit to Include Annual Cost-of-living Adjustments for All Current and Former Players.

Four years after Mr. Abdul-Aziz elected to receive a 10 year fixed period actuarial equivalent, in 1995, the NBA and NBPA reached another CBA. The 1995 CBA materially redefined the normal retirement benefit to include annual COLAs for all current and former players. The NBA's life annuity option would now increase every year to the maximum amount under the IRC's § 415(b) dollar limitation. Following the 1995 CBA, for example, the 1996 Plan increased the defined benefit to $285.00 per month for each year of credited service effective September 1, 1996. The following year, the 1997 Plan implemented a series of systematic, prospective COLA benefit increases: March 1, 1997 – $296.24 per month, March 1, 1998 – $309.34 per month, and March 1, 2000 – $321.24 per month. Obviously, Mr. Abdul-Aziz could not foretell the NBA and NBPA would so drastically alter the value of a life annuity back in 1991, when he was presented with three options and asked to choose only one of them.

V. In 1997, After an Inquiry by Mr. Abdul-Aziz, the NBA Explained that He Received Monthly Benefit Increases Due to COLAs.

Because the COLAs implemented by the 1995 CBA resulted in increases to the life annuity for all retired players, consequently, the Plan increased Mr. Abdul-Aziz's monthly retirement benefits as well.

Mr. Abdul-Aziz experienced the following monthly increases to his retirement benefits: (a) September 1, 1996 – $2,479.53 per month; (b) January 1, 1997 – $2,582.91 per month; (c) January 1, 1998 – $2,686.22 per month;(d) January 1, 2000 – $2,789.58 per month; and (e) January 1, 2001 – $2,892.88 per month.

However, Mr. Abdul-Aziz did not know why the Plan had suddenly increased his monthly retirement benefits, because they were purportedly "fixed" at $1,851.64 back in July 1991; therefore, Mr. Abdul-Aziz sent a letter to the Plan asking for an explanation. The Plan replied on October 30, 1997 (the "October 1997 Letter"). The October 1997 Letter explained that his monthly benefits had increased pursuant to COLAs implemented by the NBA. Once again, the October 1997 Letter reiterated the scheduled end date of his actuarial equivalent in July 2001, yet lacked any declarative statement that Mr. Abdul-Aziz should not expect COLAs when and if the Plan implemented COLAs after the actuarial equivalent. Although the Plan owed a fiduciary duty to properly inform Mr. Abdul-Aziz of his substantive rights, the Plan conveniently never expressly or explicitly addressed the issue of COLAs directly; the plan merely identified the scheduled end date of the actuarial equivalent as required by ERISA § 204(c)(3). Thus, the Plan continued to pay Mr. Abdul-Aziz retirement benefits until the original scheduled end date of July 2001. At that point, the Plan no longer considered him an active participant in the Plan, and thus the Plan did not provide Mr. Abdul-Aziz with any additional documentation.

VI. On June 3, 2015, the NBA First Repudiated and Formally Denied Mr. Abdul-Aziz's Claim for Additional Retirement Benefit Resulting from "Accrued Benefits" Arising After His Actuarial Equivalent Ended.

Many years after Mr. Abdul-Aziz stopped receiving retirement benefits from the Plan, in early 2015, he learned through media reports of a new CBA. The news reports stated that retired NBA players were now receiving hundreds of thousands of dollars over the modest $200.00 per month per year of credited service the Plan used to calculate his actuarial equivalent back in 1991. Realizing the NBA's life annuity option provided windfall retirement benefits to his fellow NBA players, Mr. Abdul-Aziz felt cheated for having elected an actuarial equivalent, which clearly did not constitute a benefit of equivalent dollar value when compared to the life annuity option.[3]

Mr. Abdul-Aziz retained an attorney to inquire into whether he was legally entitled to additional retirement benefits from the NBA. Mr. Daniel S. Friedberg, a sophisticated attorney, interpreted the 1991 Retirement Application and the 1991 Benefit Calculation Worksheet as a buy-out of Mr. Abdul-Aziz's *Life Annuity*. In his letter to the NBA dated April 26, 2015,

[3] For example, under today's Maximum Monthly Benefit of $572.12 per month for each year of credited service, Aziz would only need to live another five years to receive the entire $273,098.72 that he received from 1991 to 2001, which does not even factor into consideration COLAs from 2002 through the present. This suit simply seeks to bring Mr. Abdul-Aziz's retirement benefit into equivalency with the life annuity option.

entitled "Unlawful Pension Buy-Out," Mr. Friedberg wrote: "We understand that the NBA purports to have purchased all of Zaid's lifetime pension benefits in exchange for a payment which was less than the amount Zaid would in every year receive without such buy-out transaction." Mr. Friedberg requested documents pertaining to Mr. Abdul-Aziz's retirement benefits. The Office of the General Counsel for the NBA responded to Mr. Friedberg's letter on June 3, 2015.

For the first time, the NBA expressly repudiated Mr. Abdul-Aziz's ERISA protected right to "accrued benefits" arising after he received his actuarial equivalent in July 2001. The NBA claimed that Mr. Abdul-Aziz was no longer a participant under the Plan once he received his last payment in July 2001. Although no plan document ever expressly or explicitly addressed COLAs when communicating with Mr. Abdul-Aziz, the NBA now claimed that he forfeited his ERISA protected right to an "accrued benefit" arising from future COLAs by simply electing to receive an actuarial equivalent. Ms. Caroline H. Cheng, Associate Counsel, wrote:

> Mr. Abdul-Aziz elected to receive his pension benefits in the form of installments paid over a ten (10) year fixed period commencing on August 1, 1991 and ending July 31, 2001. He made his election after the Plan provided him with a benefit illustration that described each potential form of payment under the Plan, *as well as the amount he would receive under each potential form of payment under the Plan*. Mr. Abdul-Aziz's benefit application

> explained that: (a) the form of payment he elected would provide monthly payments over a fixed period; (b) upon the expiration of the fixed period, all benefits would cease; and (c) the payments over the fixed period *would equal the entire amount of his pension benefits.*

Because all actuarial equivalents have a time span less than the beneficiary's natural life, once again, Mr. Abdul-Aziz's 1991 retirement application documents merely identified the mandatory scheduled end date (July 2001) of the actuarial equivalent in conformity with ERISA § 204(c)(3). The plan documents did not clearly and unambiguously address any forfeiture of future COLA benefits by electing to receive an actuarial equivalent.

VII. Aziz Timely Filed this ERISA Denial-of-Benefits Claim Within Six Years of the NBA's June 2015 Repudiation and Formal Denial of COLA Benefits Implemented After July 2001.

On June 3, 2017, Mr. Abdul-Aziz, individually and on behalf of all others similarly situated, filed the instant denial-of-benefit claim under ERISA § 502(a)(1)(B) in the United States District Court, Southern District of New York. He alleged two federal causes of action on his behalf and on behalf of all retired players who elected to receive an actuarial equivalent: (1) the Plan violated ERISA § 501(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), by failing to recalculate and pay additional retirement benefits to only those recipients of

an actuarial equivalent, despite implementing an "accrued benefit" arising from COLAs for all life annuity recipients; and (2) the Plan breached ERISA's anti-cutback rule, § 204(c)(3) and (g), 29 U.S.C. § 1054(c)(3) and (g), by using an actuarial equivalent to decrease the value of retired NBA players' retirement benefits when compared to a life annuity option.

The NBA filed a motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), claiming (1) petitioner's claims were time barred under New York's six-year breach of contract statute of limitation; and (2) petitioner failed to state a claim upon which relief may be granted. The district court concluded that Mr. Abdul-Aziz's ERISA denial-of-benefits claim began to accrue in July 2001, after he received his final payment for his 10 year actuarial equivalent. The district court reasoned that Mr. Abdul-Aziz should have known to file suit to enforce his right to future COLAs, which might or might not have even arisen after July 2001, simply because his actuarial equivalent was "scheduled to cease" in July 2001.

Mr. Abdul-Aziz appealed to the United States Second Circuit Court of Appeals. In a summary opinion, the three-judge panel affirmed the district court's ruling, holding that, because the October 1997 Letter stated that his actuarial equivalent benefits were scheduled to cease in July 2001, Mr. Abdul-Aziz possessed sufficient notice that "he would receive no future benefits including any future cost-of-living adjustments ("COLAs")." *Abdul-Aziz v. National Basketball Association Players' Pension Plan*, 784 Fed.Appx. 46

(2d Cir. 2019). Accordingly, the Second Circuit held that the scheduled end date for the actuarial equivalent automatically extinguished Mr. Abdul-Aziz's ERISA protected right to any and all "accrued benefits" that might or might not arise during his or her natural life by operation and running of New York's six-year statute of limitations for breach of contract, and even though the "accrued benefits" at issue had not yet arisen under the plan on or before July 2001.

ARGUMENT

Fifteen years ago, the Supreme Court wrote: "There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743, 124 S.Ct. 2230, 2235, 159 L.Ed.2d 46 (2004). The Justices of the United States Supreme Court should accept Mr. Zaid Abdul-Aziz's petition for *writ of certiorari*, because (1) the District Court and Second Circuit failed to enforce petitioner's right to an "accrued benefit" that he earned during his professional basketball career; (2) the lower courts erroneously applied ERISA's laws of "accrued benefits" and "anti-cutback rule"; (3) the Second Circuit deviated from its own ERISA decision in *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), and simultaneously created a split in ERISA jurisprudence with its sister circuits as well, specifically regarding a beneficiary's ERISA right to all "accrued benefits," even if the benefit arises after

receipt of an actuarial equivalent; and (4) the lower courts eliminated an ERISA right to all "accrued benefits" earned during a retiree's career by holding that the mere identification of the scheduled end date for an actuarial equivalent automatically starts the running of the statute of limitations for breach of contract related to a future "accrued benefit," and even though the "accrued benefit" has not yet arisen under the plan, and thus has not yet accrued, for purposes of limitations.

The Second Circuit's ruling utilized state statute of limitations to substantively eliminate three fundamentally important ERISA statutory protections, not just for Mr. Abdul-Aziz and the putative class of former NBA players who unwittingly elected to receive a far less valuable actuarial equivalent, but now for all retirees – nationwide – due to the erroneous precedential effect of the Second Circuit's ruling: (1) the ruling eliminates a beneficiary's right to an "accrued benefit" that arises during his or her natural life and after receipt of the actuarial equivalent merely because of scheduled end date for the actuarial equivalent; (2) the ruling eliminates a beneficiary's non-forfeitable right to a *benefit of equivalent dollar value*, i.e., the same monetary benefit as a life annuity option, because of the substantive effects of state statute of limitations; and (3) the ruling eliminates the protections afforded by ERISA's anti-cutback rule, which provides that no plan shall take away a beneficiary's "accrued benefit" through changes to the plan documents, much less letters or correspondence, except for now the plan need

only identify the scheduled end date of the actuarial equivalent to effectuate a major cutback.

Accordingly, the novel legal question presented before the Court is: can a state statute of limitations extinguish a non-forfeitable federal ERISA right to an "accrued benefit," which arose after the final payment of an actuarial equivalent, by merely identifying its scheduled end date as required by ERISA § 204(c)(3)? Stated differently, can the lowers courts utilize an ERISA law requiring the identification of the scheduled end date for an actuarial equivalent as justification to extinguish an otherwise non-forfeitable right to all "accrued benefits" under ERISA's "anti-cutback" rule?

In the absence of clear and unequivocal plan language explicitly warning a beneficiary that he or she will not receive an "accrued benefit" arising from future COLAs upon electing to receive an actuarial equivalent, the lower courts were wholly and legally unjustified in extinguishing Mr. Abdul-Aziz's non-forfeitable right to "accrued benefits" that resulted from COLAs implemented after July 2001, a non-forfeitable right he and all other professional basketball players earned during their careers with the NBA.

I. The Lower Courts' Rulings Jeopardize Three Fundamental ERISA Statutory Protections for Retired Workers.

ERISA Protection No. 1: An "accrued benefit" under ERISA § 3(23) means, "in the case of a defined

benefit plan, the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(22) defines "normal retirement benefit" as the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit is typically a single-life annuity payable at the normal retirement age. *See Esden v. Bank of Boston*, 229 F.3d 154, 159 (2d Cir. 2000), and Treas. Reg. § 1.411(a)-7(c).

ERISA Protection No. 2: ERISA's "anti-cutback rule," pursuant to ERISA § 203(e)(3), provides: "Each pension plan shall provide that an employee's right to his normal retirement benefit is ***nonforfeitable***." See also IRC § 411(a)(11); Treas. Reg. § 1.417(e)-(1). (Emphasis added) "ERISA's anti-cutback rule is crucial to this object, and . . . provides that '[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . .'" *Central Laborers' Pension Fund*, 541 U.S. at 744. *Citing* 29 U.S.C. § 1054(g)(1).

ERISA Protection No. 3: ERISA's "Actuarial Equivalent" rule, pursuant to ERISA § 204(c)(3), provides: "[I]n the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit." *See also* IRC § 411(c)(3).

II. The NBA Promised COLAs During Mr. Abdul-Aziz's Professional Career; Therefore, He Earned a Non-Forfeitable ERISA Right to Future COLAs as "Accrued Benefits."

It is important to first make abundantly clear that Mr. Abdul-Aziz had a federally protected and statutory right to all COLAs implemented by the Plan during his natural life, because the COLAs were negotiated through CBAs and provided to all former and current basketball players regardless of when they played in the NBA. A COLA is an "accrued benefit" if it is promised during the time of employment. *Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710 (7th Cir. 2007), *cert. denied*, 552 U.S. 1276, 128 S.Ct. 1657, 170 L.Ed.2d 386 (2008), 29 U.S.C. § 1054(c)(3). In *Williams*, the Seventh Circuit held that the defined pension benefit plan violated ERISA by failing to include COLAs into the retirees' lump sum distributions. "ERISA requires that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit," and, because COLAs are "inseparably tied to the monthly retirement benefit," COLAs were part of the "accrued benefit," and not an ancillary or supplementary benefit. *Id*. at 712-713, quoting *Hickey v. Chicago Truck Drivers*, 980 F.2d 465, 468 (7th Cir. 1992).

Thus, Mr. Zaid Abdul-Aziz possessed a non-forfeitable ERISA right to any and all COLAs implemented by the NBA at any time, so long as the Plan implemented the COLAs and increased the defined monthly benefit for all former and current basketball players;

otherwise the implementation of COLAs for life annuity recipients, only, would discriminate against and create different classes of workers who worked during the same period of time under the same plan provisions. *See Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628 (5th Cir. 1985), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985).

III. Mr. Zaid Abdul-Aziz Was Statutorily Entitled to Receive a Non-Forfeitable *Benefit of Equivalent Dollar Value* When Compared to Players Who Received a Life Annuity, Regardless of the Actuarial Equivalent He Elected to Receive.

In *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), the Second Circuit explained that, with respect to retirees who elect to receive an actuarial equivalent, and regardless of any timing or form of distribution, all vested participants in a defined benefit plan ***shall receive*** the actuarial equivalent of the normal retirement benefit, including all COLA benefit increases that constitute an "accrued benefit"; therefore, recipients of a life annuity and actuarial equivalent shall receive a *benefit of equivalent dollar value* throughout the term of his or her retirement as required by § 204(c)(3) of ERISA.

For example, in *Esden*, the plan participant had already received her one-time lump sum distribution. However, the plan administrator paid future COLA

benefits to life annuity recipients, only. The Second Circuit held that all vested participants were entitled to receive a *benefit of equivalent dollar value* under ERISA, regardless if he or she elected to receive a different timing or form of payment. Thus, if the plan promised to pay COLA benefits to all vested participants during their term of employment, and the Plan implemented a COLA for recipients of the life annuity, the plan administrator owed a continuing, statutory obligation under ERISA to recalculate and pay additional retirement benefits to all vested participants, even for those retired workers who elected to receive an actuarial equivalent in the form of a one-time lump sum payment.

The Second Circuit in *Esden* explained that the actuarial equivalent must constitute a benefit of equivalent dollar value when compared to the normal retirement benefit for all retired plan participants. A COLA increase to the normal retirement benefit for recipients of a life annuity required continuous, ongoing readjustment of the actuarial equivalence, whether benefits were previously paid or currently being paid to vested participants. In the case of a defined benefit, the employee's accrued benefit shall be the actuarial equivalent of the annual benefit commencing at normal retirement age. Thus, the accrued benefit under a defined benefit plan must be valued in terms of the life annuity that it will yield at normal retirement age. If the accrued benefit is offered to be paid at any other time or in any form other than a life annuity, for example, a lump sum distribution or fixed period payments,

the optional timing and form of payment must be worth the same amount of money as a life annuity.

Accordingly, *Esden* stands for the fundamental principle of law that ERISA § 204(c)(3) requires plan administrators to ensure that all vested participants receive the same benefit of equivalent dollar value, no matter whether the participant elected to receive a life annuity or actuarial equivalent. Thus, under ERISA § 204(c)(3), Mr. Abdul-Aziz was statutorily entitled to a benefit of equivalent dollar value whenever the Plan implemented COLA benefits that affected the value of a life annuity option for all current and former players. Nevertheless, Mr. Abdul-Aziz – and other retired NBA players who elected to receive an actuarial equivalent – has received hundreds of thousands of dollars less than retired players who elected to receive a life annuity, all due to the Plan's implementation of COLAs in violation of ERISA laws. This has led to a tremendous disparity in retirement benefits between retired NBA basketball players, which ERISA was specifically designed to prevent.

In *Kohl v. Association of Trial Lawyers of America*, 183 F.R.D. 475 (D.Md. 1998), the district court similarly held that a COLA offered as part of the normal retirement income extended to those participants who elected to receive an optional form of payment, because, generally, a participant's accrued benefit must be the actuarial equivalent of the normal retirement benefit when computed under the plan. ERISA § 1054(b)(1)(B). On summary judgment, the district court in *Kohl* held that even those vested participants

who already received their retirement benefits in the form of a lump sum distribution were equally entitled to future COLAs, yet acknowledged that there remained genuine issues of material fact regarding the calculation of damages for the participants who already received a lump sum distribution.

In *Laurenzo v. Blue Cross and Blue Shield of Mass., Inc. Retirement Income Trust*, 134 F.Supp.2d 189 (D.Mass. 2001), relying on *Esden*, *supra*, the district court held that ERISA required an alternate form of payment, i.e., a lump sum distribution, to equal the present value of the participants' accrued benefits; *see also Lightfoot v. Arkema, Inc. Ret. Benefits Plan*, 2013 WL 3283951, *2 (D.N.J. 2013) ("[W]here a defined benefit plan chooses to offer a lump sum one-time distribution, pensioners who opt for lump sums must be given the actuarial equivalent of that benefit."); *citing Hickey v. Chicago Truck Drivers*, 980 F.2d 465, 468 (7th Cir. 1992); *relying upon Shaw v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137, 105 S.Ct. 2678, 86 L.Ed.2d 696 (1985) (the court concluded that a living pension was an accrued benefit, as opposed to an ancillary benefit, and thus could not be eliminated by amendment).

Although the Second Circuit's decision herein did not explicitly state that Mr. Abdul-Aziz forfeited his ERISA right to "accrued benefits" arising after payment of the actuarial equivalent, the court's ruling substantially deviates from its own decision in *Esden*, and effectively extinguished Mr. Abdul-Aziz's

non-forfeitable right through the application of a state statute of limitations. Thus, the Second Circuit's ruling creates a clear conflict in the application of ERISA by its sister circuits, all of whom have equally protected a beneficiary's right to "accrued benefits" arising either before or after payment of the actuarial equivalent.

Just like in *Kohl*, once the NBA implemented COLAs after July 2001 and increased the life annuity option for all current and former NBA players, the NBA owed a non-forfeitable statutory obligation under ERISA § 204(c)(3) to recalculate and pay additional retirement benefits to all retired NBA players, including those players who elected to receive an actuarial equivalent. Instead, the lower courts eliminated the Plan's ERISA obligation of recalculation, reasoning the statute of limitations had already began to run on the enforcement of the "accrued benefit," even though the benefit at issue had not yet even come into existence on or before July 2001.

IV. The Second Circuit Erred in Accruing the Limitations Period Effective July 2001, Because, Under New York Law, the Limitations Period for Breach of Contract Does Not Accrue and Begin to Run Until an Enforceable Right Comes into Existence and the Breach of Contract Occurs.

"Accrue" derives from the Latin words "ad" and "creso," or to grow to; thus, accrue "means to arise, to happen, or to come into force or existence." *William A. Graham Co. v. Haughey*, 646 F.3d 138, 146 (3d Cir.

2011), *cert. denied*, 565 U.S. 963, 132 S.Ct. 456, 181 L.Ed.2d 295 (2011); *citing* Black's Law Dictionary (9th ed. 2009). Thus, a cause of action "accrues" when it has "come into existence as an enforceable claim or right." *Id.* Accrual is "the event whereby a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action." *Graham*, *id*., *citing* Balletine's Law Dictionary (3d ed. 1969). Accordingly, a statute of limitations for breach of contract cannot begin to run until an enforceable right comes into existence and the breach of contract occurs.

"Unlike a statute of repose, which begins to run from the defendant's violation, a statute of limitations cannot begin to run until the plaintiff's claim has accrued." *Ma v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 597 F.3d 84, 88, n. 4 (2d Cir. 2010) (noting that statute of limitations begins when the cause of action accrues); *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998) (same); *see also P. Stolz Family P'ship v. Daum*, 355 F.3d 92, 102-03 (2d Cir. 2004) (contrasting statute of limitations and statute of repose).

As it relates to an "accrued benefit," clearly, a beneficiary cannot seek to enforce his or her right to an "accrued benefit" for breach of contract until the benefit at issue has in fact arisen or accrued, and thereby becomes enforceable; therefore, the limitations period for breach of contract under New York law did not and legally could not have begun to accrue in July 2001 for COLAs implemented by the Plan many years after July 2001; otherwise the Plan would have surely sought dismissal of Mr. Abdul-Aziz's ERISA

denial-of-benefits claim on grounds that the benefit at issue has not yet arisen, i.e., prematurity, or for failure to satisfy the case or controversy requirements for Article III standing.

Accordingly, Mr. Zaid Abdul-Aziz could not seek to enforce his ERISA right for additional retirement benefits arising from COLAs implemented after July 2001, at least until such time as the Plan implemented the COLAs and increased the life annuity option for all current and former NBA players. For example, if the NBA had never implemented COLAs and thus never increased the normal retirement benefit after July 2001, Mr. Abdul-Aziz's retirement benefits would have appropriately ceased effective July 2001. Nevertheless, as previously discussed, once the NBA implemented additional COLAs effective 2002 or thereafter, the Plan owed an ERISA obligation to recalculate retirement benefits for all retired players, including those players who elected to receive an actuarial equivalent. Nevertheless, the lower courts began the accrual of a limitations period for breach of contract even though the benefit of issue had not yet accrued as of July 2001.

In summary, the lower courts picked an arbitrary date of convenience in July 2001 to accrue the statute of limitations, because the benefits were originally scheduled to end in July 2001 back in July 1991. Thus, if the lower courts' legal analyses were procedurally true and accurate, the limitations period should have begun back in July 1991 when the scheduled end date of the actuarial equivalent was first set. Nevertheless,

the lower courts obviously realized that an accrual date to file this ERISA denial-of-benefits claim for COLA benefits would obviously not make sense beginning in July 1991, thus the lower courts picked the date of convenience of July 2001, even though this date has no bearing or notice of an "accrued benefit" arising in 2002 or thereafter.

V. The Anti-Cutback Rule Prohibited the Plan from Extinguishing Mr. Abdul-Aziz's ERISA Right to Any "Accrued Benefit," Including Benefits Arising After the Final Payment of the Original Actuarial Equivalent.

"ERISA's anti-cutback rule limits a pension plan's ability to decrease a participant's accrued benefits. The rule provides, with few exceptions, that '[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan.'" *Cinotto v. Delta Air Lines Inc.*, 674 F.3d 1285, 1291 (11th Cir. 2012), *cert. denied*, 568 U.S. 979, 133 S.Ct. 543, 184 L.Ed.2d 340; *citing* 29 U.S.C. § 1054(g)(1)-(2); *see also Board of Trustees of Sheet Metal Workers' Natl. Pension Fund v. C.I.R.*, 318 F.3d 599, 602 (4th Cir. 2003) ("[A] plan may not violate the anti-cutback rule which prohibits a plan's elimination or reduction of an accrued benefit.").

Accordingly, once the NBA promised all current and former basketball players COLA benefit increases in 1976, and thereafter implemented future COLA benefit increases for all former and current

basketball players through successive CBAs, the NBA could neither abolish nor eliminate Mr. Abdul-Aziz's ERISA right to an "accrued benefit" arising from COLAs implemented either during the original 120 month payment period or thereafter.

Nevertheless, the lower courts did exactly for the NBA what the NBA could not otherwise do for itself through plan amendments: abolish or eliminate Mr. Abdul-Aziz's ERISA protected right to an "accrued benefit" that arose under the plan during his natural life. The lower courts effectively skirted the ERISA laws and IRC rules affecting "accrued benefits," "actuarial equivalents," "benefits of equivalent dollar value," and the "anti-cutback rule," by simply applying New York's breach of contract statute of limitations, and even although the COLA benefit increases at issue had not yet "accrued" for the statute of limitations to even begin under state law.

VI. The Identification of the Scheduled End Date of an Actuarial Equivalent, as Required by ERISA § 204(c)(3), Does Not Clearly or Unequivocally Address a Complete and Total Forfeiture of Hundreds of Thousands of Dollars in Lost Future COLAs by the Mere Accepting of an Actuarial Equivalent.

By definition, an actuarial equivalent does not last until the death of the beneficiary; therefore, ERISA § 204(c)(3) requires all defined benefit plans to identify the scheduled start date and the scheduled end date. The Justices will find no ERISA law, IRC rule, or

federal jurisprudence holding that a beneficiary automatically forfeits all "accrued benefits" arising after the scheduled end date of an actuarial equivalent by merely accepting an actuarial equivalent. If anything, federal jurisprudence holds the complete opposite: a beneficiary who elects to receive his or her retirement benefits in the form of an actuarial equivalent, even in the form of a one-time lump sum, is nonetheless equally entitled to receive additional retirement benefits arising from accrued benefits implemented by a defined benefit plan after payment of the actuarial equivalent. *See Esden* and *Kohl*, *supra*. At least that was ERISA law until the lower courts' rulings.

In fact, there is only one reported federal decision wherein the appellate court refused to enforce a beneficiary's claim to future COLAs upon accepting an actuarial equivalent, and only because the plan documents clearly and unequivocally excluded recipients of an actuarial equivalent from receiving future COLAs upon electing to receive an actuarial equivalent. In *Dix v. Total Petrochemicals USA, Inc., Pension Plan*, 540 Fed.Appx. 130 (3d Cir. 2013), also an ERISA denial-of-benefits case, the Third Circuit held that the beneficiary possessed no substantive right to future COLA benefits after electing to receive an actuarial equivalent, because the plan documents clearly and unequivocally repudiated future COLAs for actuarial equivalent recipients:

1. "The COLA only applies to monthly payments; it does NOT apply if you receive

your benefit in the form of a cash lump sum."

2. "You will not be entitled to this cost-of-living adjustment if you elected to receive your RandH accrued benefit in the form of a lump sum."

3. "You forgo cost-of-living increases if you take a lump sum pension."

In comparison to *Dix*, the substantive difference is glaringly obvious. The 1991 plan documents and October 1997 Letter merely identified the scheduled end date of the actuarial equivalent, and no documentation similarly repudiated or addressed the interplay of COLAs and actuarial equivalents as in *Dix*, *supra*.

Considering that all factual inferences shall be interpreted in favor of maintaining the claim for the complainant under Rule 12(b)(6), and in comparison to the clear and unambiguous language set forth in *Dix*, *supra*, neither the 1991 plan documents, nor the October 1997 Letter clearly or unequivocally repudiated "accrued benefits" arising from COLAs implemented either during or after the actuarial equivalent. In fact, the only reason why the NBA sent the October 1997 Letter in the first place was because the Plan had not explained that Mr. Abdul-Aziz would receive greater monthly retirement benefits prior thereto. Considering the plethora of federal decisions enforcing a beneficiary's ERISA right to COLAs, *see Esden*, *Kohl*, *Lightfoot*, etc., the Second Circuit's decision directly conflicts with ERISA laws and prior jurisprudence.

This case presents the one and only federal decision wherein the lower courts completely extinguished a beneficiary's ERISA right to an "accrued benefit" arising from COLAs, where the plan could not point to any contractual provision explicitly discussing the forfeiture of COLAs upon selecting an actuarial equivalent.

VII. The NBA Did Not Clearly and Unambiguously Repudiate Mr. Abdul-Aziz's Claim to Future COLAs Until June 2015.

The most paradigmatic example of a "clear repudiation" is a formal denial of benefits. *See, e.g., Costa v. Astoria Federal Savings & Loan Association*, 995 F.Supp.2d 146 (E.D.N.Y. 2014); and *Yuhas v. Provident Life & Casualty Insurance Company*, 162 F.Supp.2d 227 (S.D.N.Y. 2001). ERISA does not require "plan participants and beneficiaries likely unfamiliar with the intricacies of pension plan formulas and the technical requirements of ERISA, to become watchdogs over potential errors and abuses." *Romero v. Allstate Corp.*, 404 F.3d 212, 224 (3d Cir. 2005). This particularly holds true when a retiree is making a life-changing decision to elect a life annuity or an actuarial equivalent during his or her retirement:

> The average plan participant exercising reasonable diligence might not discover the difference between a monthly annuity and a lump sum until that question became relevant in his or her life, perhaps decades after a plan document or an SPD [Summary Plan

> Description] was issued. It would seem manifestly unfair to expect a plan participant, upon merely receiving a copy of the plan during the course of his or her employment, to examine the option of the normal annuity benefit versus a lump sum payment when the participant would not be called upon to make that election until years in the future at the time of retirement. ERISA does not place this onus on plan participants. . . .

Lightfoot v. Arkema, Inc. Retirement Benefits Plan, 2013 WL 3283951 (D. N.J. 2013), citing to *Romero*, 404 F.3d at 224. *See, e.g.*, *Bilello v. JPMorgan Chase Retirement Plan*, 607 F.Supp.2d 586, 593 (S.D.N.Y. 2009) ("where the [ERISA] plan documents themselves, rather than their applications, are at issue, the statute of limitations for [plaintiff's] ERISA claims accrues when he discovered or with reasonable due diligence could have discovered the deficiencies in the plan documents of which he complains.").

Thus, while the statute of limitation of the state with the most significant connection to the dispute applies to an ERISA cause of action arising pursuant to § 501(a)(1)(B), *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76 (2d Cir. 2009) (*per curiam*), *citing Miles v. New York State Teamsters Conference Pension and Retirement Fund Emp. Pension Benefit Plan*, 698 F.2d 593 (2d Cir. 1983), *cert. denied*, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983), the accrual rules for ERISA claims are governed by federal law. *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600,

604 (7th Cir. 2011), *cert. denied*, 566 U.S. 937, 132 S.Ct. 1913, 182 L.Ed.2d 771 (2012), *citing Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 816 (7th Cir. 2010), *cert. denied*, 563 U.S. 1007, 131 S.Ct. 2924, 179 L.Ed.2d 1246 (2011).

The legal determination is whether the plan documents *clearly and unequivocally* repudiated plaintiff's claim for the benefits made subject of the denial-of-benefits claim, *Carey v. International Broth. of Elect. Workers Local 363 Pension Plan*, 201 F.3d 44, 49-50 (2d Cir. 1999), and whether the plan's beneficiaries are provided notice or should have known of the repudiation. *See, e.g.*, *Hirt v. Equitable Retirement Plan for Employees, Managers and Agents*, 285 Fed.Appx. 802 (2d Cir. 2008); *Malerba v. N. Shore Long Island Jewish Health System*, No. 10 Civ. 4715, 2013 WL 1828986, p. 7 (E.D.N.Y. 2013) (letter from ERISA plan administrator detailing new schedule of benefits sufficed to provide notice); otherwise "It would make no sense, and indeed do a remarkable disservice to the underlying purposes of ERISA and its disclosure requirements, to deem a notice claim to have accrued before a plaintiff knows or should have known that an amendment has the effect which triggers the notice requirement." *Romero*, *supra*, at 225. It would even make less sense to deem a claim accrued before an amendment has even been made. *Levy v. Young Adult Institute, Inc.*, 62 Employee Benefits Cas. 2185 (S.D.N.Y. 2016), 2016 WL 6092705, *aff'd* 744 Fed.Appx. 12 (2nd Cir. 2018), *cert. denied*, 139 S.Ct. 282, 203 L.Ed.2d 281 (2019).

In nearly every ERISA case involving a clear repudiation of an additional benefit, the plaintiff was found to have been receiving less, not more, monetary benefits than otherwise provided for in the plan documents. *See Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808 (7th Cir. 2010) (no clear repudiation absent a red flag indicating actual underpayment of benefits); and *Redmon v. Sud-Chemie Inc. Ret. Plan for Union Employees*, 547 F.3d 531, 539 (6th Cir. 2008) (finding a clear repudiation when the plan stopped making payments entirely, but not earlier when the payment amount was merely inconsistent with the plaintiff's understanding of benefits).

It was wholly illogical for the lower courts to conclude that Mr. Abdul-Aziz knew or should have known to file an ERISA "denial-of-benefits claim" beginning in July 2001 simply because that was the scheduled end date of his actuarial equivalent. Prior to July 2001, Mr. Abdul-Aziz had actually been receiving greater monthly retirement benefits than he originally accepted in 1991. Moreover, the future COLAs subject of this lawsuit had not yet been implemented by the plan. Nevertheless, the lower courts expected Mr. Abdul-Aziz to basically prophesize that a future "accrued benefit" might accrue and file a prophylactic lawsuit to protect a right to an "accrued benefit" arising after the actuarial equivalent, even though the right to this accrued benefit should have been non-forfeitable under ERISA, but-for the application of a state statute of limitations.

Ultimately, neither the NBA, nor the lower courts could point to a single plan document or plan correspondence, including the October 1997 Letter, that clearly and unequivocally told Mr. Abdul-Aziz either of the following: (1) "You are hereby forfeiting your non-forfeitable ERISA right to an 'accrued benefit' that might arise from future COLAs by electing to receive an actuarial equivalent," or (2) "You hereby possess the opportunity to receive future COLA benefits by electing the life annuity option." The plan documents did not state either of these options.

The problem is the clear vagary in the plan documents that cost Mr. Abdul-Aziz hundreds of thousands of dollars in retirement benefits. On the one hand, the plan documents stated that "all benefits will cease" on the scheduled end date of July 2001 if Mr. Abdul-Aziz elected to receive a 10 year fixed payment benefit. However, on the other hand, the plan documents did not affirmatively state that he would instead be entitled to a lifetime of future COLA benefits by electing to receive a life annuity. The Plan said nothing about the impact of COLAs with respect to the relative value of a life annuity and an actuarial equivalent, but instead gave the false impression that all three payment options constituted a benefit of equivalent dollar value.

The one and only time the NBA formally repudiated Mr. Abdul-Aziz's right to COLAs implemented after July 2001 occurred in the NBA's correspondence dated June 2015, when the General Counsel for the NBA first repudiated and formally denied Mr. Abdul-Aziz's claim to additional retirement benefits. The

NBA's June 2015 letter marked the first time the NBA directly addressed Mr. Abdul-Aziz's right to retirement benefits after July 2001. *See Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 65-67 (7th Cir. 1996) ("cause of action accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary"); *citing Miles v. N.Y. State Teamsters Conf. Pension and Retirement Fund*, 698 F.2d 593, 598 (2d Cir. 1983), *cert. denied*, 464 U.S. 829, 78 L.Ed.2d 108, 104 S.Ct. 105 (1983).

For these reasons, Mr. Abdul-Aziz's ERISA § 501(a)(1)(B) denial-of-benefits claim for COLAs accruing after the actuarial equivalent payment period ended did not and could not accrue (1) until future COLAs in fact accrued after July 2001 and (2) until the Plan clearly and unequivocally repudiated COLAs accruing after July 2001. Whereas the NBA's June 3, 2015 correspondence constitutes the one and only time the Plan clearly repudiated Aziz's ERISA claim for COLA benefits accruing after July 2001, Mr. Abdul-Aziz timely filed the instant action within six years of July 2015.

CONCLUSION

The Plan owed Mr. Abdul-Aziz a duty under ERISA to clearly explain the impact of his choice in electing to receive either a life annuity or an actuarial equivalent. Moreover, the Plan owed a secondary duty under

ERISA to ensure the payment options provided a benefit of equivalent dollar value, regardless of the timing or form of payment Mr. Abdul-Aziz elected to receive. Nonetheless, the Plan provided no documentation to Mr. Abdul-Aziz that discussed the effect of future COLAs on the value of a life annuity or actuarial equivalent. The plan documents did not affirmatively state that by electing to receive an actuarial equivalent Mr. Abdul-Aziz and his family were forfeiting a lifetime of future COLA benefits worth hundreds of thousands of dollars.

The lower courts' rulings substantially erode ERISA protections designed to ensure that plan administrators fulfill the aforementioned duties. So long as plan administrators identify the scheduled end date of an actuarial equivalent, as already required by ERISA § 204(c)(3), the lower courts' rulings effectively mean that plan administrators bear no responsibility in expressly or explicitly addressing the economic impacts of future COLAs on the relative value of a life annuity or an actuarial equivalent. Plan administrators can simply identify the scheduled end date of the actuarial equivalent and allow each state's statute of limitations for breach of contract to effectively nullify non-forfeitable ERISA rights to hard earned "accrued benefits," regardless if those benefits accrued either during or after final payment of the actuarial equivalent.

The precedential effect of the Second Circuit's ruling clearly deviates from its own prior jurisprudence in *Esden*. *Esden* and numerous sister courts

continuously reaffirmed ERISA's protections for any and all "accrued benefits," regardless of when those benefits accrued. However, the Second Circuit's decision herein provides a legal roadmap for plan administrators to draft plan documentation that extinguishes a beneficiary's right to future COLA benefits without ever using the word COLA. The rulings run contrary to ERISA's public policy, violates ERISA's monetary benefit equivalence, and creates a definitive split between the federal circuits in the proper application of ERISA laws.

The plan documents herein were neither clear, unequivocal, nor explicit in telling Mr. Abdul-Aziz and his family that they were forfeiting hundreds of thousands of dollars in important retirement benefits by accepting the NBA's optional actuarial equivalent. The NBA presented Mr. Abdul-Aziz with three options purportedly constituting a present and prospective benefit of equivalent dollar value. If the plan documents had clearly and unequivocally repudiated COLA benefits upon the election of an actuarial equivalent, as presented in *Dix*, *supra*, while also simultaneously affirming future COLA benefits for life annuity recipients, only, Mr. Abdul-Aziz – and every other retired NBA basketball player who unwittingly elected to receive an actuarial equivalent – could have made

better-informed decisions concerning his family's future and retirement benefits.

Respectfully submitted,

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