No. _____

In The
Supreme Court of the United States

AGI CONSULTING, LLC, an Oklahoma Limited Liability Company by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an Alleged non-integrated Defined Benefit Plan,

Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY, a Texas insurance Company,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS TO BE CONSIDERED

There is no uniformity among the Circuit Courts as to the meaning or application of the ERISA statute of limitations for breach of fiduciary duty, 29 U.S.C. §1113.

1. What gives rise to abandonment of an issue on appeal?
2. What does the "last action which constitutes [a breach] or a part of the breach" mean in 29 U.S.C. §1113?
3. Can a litigant rely upon the plain meaning of a statute without abandoning an issue raised in the lower court and raised in their Brief in Chief on appeal to the Circuit Court?
4. Does the exception to 29 U.S.C. §1113 apply to both the statute of repose, 29 U.S.C. §1113(1), and the statute of limitations provisions 29 U.S.C. §1113(2)?
5. Does the context in which the word "discovery" as used in the exception contained in 29 U.S.C. §1113 mean actual discovery or constructive discovery?

THE PARTIES TO THIS APPLICATION

AGI Consulting, LLC, by Assaf Al-Assaf As Trustee/ Owner/Plan Administrator,
Petitioner

American National Insurance Company,
Respondent

CORPORATE DISCLOSURE

AGI CONSULTING, LLC, has no parent company and no publicly held company owns 10% or more membership interest or shares in the LLC. AGI CONSULTING, LLC, is an Oklahoma limited liability company in good standing with the Oklahoma Secretary of State.

LIST OF ALL PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

AGI Consulting, LLC

Plaintiff

v.

American National Insurance Co.

Defendant

Case No. CIV-18-252

Complaint	3-21-18
Motion to Dismiss	5-24-18
Complaint for Declaratory Judgment	
Response to Motion to Dismiss	6-29-18
Amended Complaint	6-29-18
Reply to Response	7-6-18
Sur Reply to Reply	7-23-18
Judgment and Order Dismissing Plaintiff	7-30-18
Motion for New Trial	8-24-18
Response to Motion	9-12-18
Reply to Response	9-19-12
Order Denying Motion for New Trial	3-28-19
Notice of Appeal	4-26-19

LIST OF ALL PROCEEDINGS – Continued

AGI Consulting LLC

v.

American National Insurance Co.

Appellee

Case No. 19-6060

Appellant's Brief in Chief	8-29-19
Appellee's Brief	10-16-19
Reply Brief of Appellant	11-4-19
Order and Judgment	01-09-20
Mandate Issued	01-31-20

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PETITION FOR WRIT OF CERTIORARI

AGI Consulting, LLC, an Oklahoma Limited Liability Company by Assaf Al-Assaf as Trustee/Owner/Plan Administrator of an alleged non-integrated Defined Benefit Plan, Petitions the Court for a Writ of Certiorari.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit Case No. 19-6060, is unpublished. App. *infra*. The Opinion of the District Court for the Western District of Oklahoma Case number 5:18-CV-00252-G, is unpublished. App. *infra*.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The date of judgment in the Tenth Circuit was January 9, 2020.

STATUTORY PROVISION INVOLVED

Section 1113 of title 29 to the United States Code provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty or obligation under

this part, or with respect to a violation of this part, after the earlier of –

(1) Six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

Except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA statute §413(a)(2)(A), 88 Stat. 889, as amended.

STATEMENT OF THE CASE

Introduction

This Petition for Writ of Certiorari involves all three provisions of the ERISA statute of limitations for breach of fiduciary duty. 29 U.S.C. §1113, i.e., repose, statute of limitations and the exception in case of fraud or concealment. The Supreme Court should grant Certiorari because ERISA is the most misunderstood and misapplied law in the United States Civil Code. ERISA is sui generous. Although ERISA is based on the law of trusts, it deviates from it, i.e., tort law is excluded, only

trust law applies. Contract law only applies to the interpretation of ERISA provisions.

ERISA is unique because employers are not required by law to provide pension plans. If they do, ERISA regulates their activities. Even if they do, employers can change their pension plans or health insurance coverage at will or cancel them altogether subject only to vesting, funding and notice requirements provided for in ERISA.

Ten years ago in 2010, this Court acknowledged that most Circuit Courts either misapplied or misunderstood that "actual knowledge means actual." *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 647, 130 S.Ct. 1784, 176 L. Ed. 2d 582 (2010).

The common law rule of discovery has no place in ERISA. See *Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. ___ (Feb. 26, 2020), No. 18-1116, where this Court held that actual knowledge means actual, not constructive knowledge.

What petitioner AGI asks this Court to decide is:

> Does the statute of repose, 29 U.S.C. §1113(1), mean what it says " . . . the last act [breach] . . . "?
>
> And do the exceptions to 29 U.S.C. §1113(1), and 29 U.S.C. §1113(2) mean what they say?

In spite of the fact that employers are not required to provide retirement benefits, millions of American workers are covered by ERISA. This Court has the perfect case to resolve the remaining two provisions of the

ERISA statue 29 U.S.C. §1113 – the repose provision and the exception provision.

Factual Summary

Petitioner AGI is a small business providing health care consulting to foreign hospitals preparing them for Joint Commission International Accreditation. As a result of its success winning two contracts for over a dozen hospitals, AGI sought to provide its employees with a retirement plan. Financial advisors recommended it contact an insurance company to purchase a Defined Benefit Plan. Petitioner, AGI contacted Respondent, American National Insurance Company (ANICO) and entered into a contract to purchase a Defined Benefit Plan (DBP). A DBP is a retirement plan where various annuities are provided by the insurance company to the employer for the benefit of its employees.

The annuity itself is based upon the number of employees, plan start date, employment time after plan start date, the amount of benefits sought to be provided to the employee-beneficiaries, the annuity calculated on actuarial predictions and the DBP's aspirations as determined by the cost of the Plan the employer (AGI) is willing to pay.

AGI believed it had purchased a particular plan (referred to in the Record as the "handwritten plan"), while in fact the insurance company ANICO provided a substantially different plan (referred to in the Record as the "typewritten plan"). ANICO fraudulently switched AGI's signature from the handwritten plan to the

substantially different typewritten plan without AGI's knowledge.

Because of the switched signature page, AGI originally sued ANICO for common law fraud. The statute of limitations in Oklahoma is two years from the date the fraud is discovered or should have been discovered. AGI learned after filing its Complaint, that an employee had downloaded or dragged and dropped an electronic attachment to an email which attachment contained a copy of the ANICO Plan. The clerical employee did not tell anyone about the attachment or provide anyone with a copy. Under Oklahoma law that employee's action is imputed knowledge to the employer AGI. Upon discovery of this download, AGI informed the Court and sought leave to amend for Breach of Contract type claims which have a five year Statute of Limitations in Oklahoma. Because of various Oklahoma Statutes, these claims were deemed to have expired under Oklahoma Law.

AGI sought leave to amend again to an ERISA cause of action whose Statute of Limitations for Breach of Fiduciary Duty is six years, or three if the fraud is actually known, i.e., repose, limitations and exception. See 29 U.S.C. §1113.

The District court denied leave and gave judgment to ANICO. AGI then filed a Motion for New Trial, more properly, a Motion to Reconsider. That Motion was briefed by the parties and the District Court ruled again, giving judgment to ANICO and against AGI. AGI appealed to the Tenth Circuit. The issues in the

District Court and Circuit Court concerned 29 U.S.C. §1113 – repose, limitations and the exception.

Legal Issues

The statute of repose has a start date. That date is the date of a violation or breach.

The end date is a legislatively determined time period. However, that time period, may vary. The date the violation may be discovered can determine a date longer than the start date. This is an exception to a statute of repose. The statute of repose in ERISA's breach of a fiduciary duty contains such an exception, 29 U.S.C. §1113. The exception applies to cases of fraud or concealment. In the case of fraud or concealment, the date ends six (6) years after the fraud is discovered, not six (6) years from the date of the violation.

In addition to ERISA's statute of repose, there is a statute of limitations. In ERISA, that limitation period is three years from the date the violation is actually discovered. Imputed, constructive, or anything less than "actual knowledge" of the violation, does not apply. Actual knowledge in the statute 29 U.S.C. §1113(2) means what it says – actual. See *Intel v. Sulyma*, 589 U.S. ___ (2020).

In this litigation, the Tenth Circuit Court of Appeals missed the mark on all three issues; the statute of repose, the statute of limitations and the exception. It is easy to understand how the Tenth Circuit missed the mark on the statute of limitations. Ten years ago,

Justice Breyer stated in his prescient dicta that Circuit Courts seem to rationalize the word "actual" with common law legal principles. Justice Breyer said:

> " . . . 29 U.S.C. §1113(2) (statute in which Congress provide that an action be brought "three years after the earliest date on which the Plaintiff had actual knowledge of the breach or violation). Not surprisingly, the Courts of Appeal unanimously have continued to interpret the word "discovery" in this statute as including not only facts a particular plaintiff knows, but also the facts any reasonably diligent Plaintiff would know. . . ."

Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 647, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010), Justice Breyer writing for the majority, Justice Stevens concurring in part and concurring in the judgment.

> "Until a case arises in which the difference between an "actual discovery rule" and a "constructive discovery rule" would affect the outcome, I will reserve decision on the merits of Justice Scalia's argument . . . "

The Supreme Court held in *Intel v. Sulyma*, 589 U.S. ___ (2020), No. 18-1116, ALITO, J., delivered the opinion for a unanimous Court . . .

> " . . . Such suits [for breach of fiduciary duty] must be filed within one of three periods, each with different triggering events . . .

. . . The first begins when the breach occurs. Specifically under §1113(1) suit must be filed within six years of the "the date of the last action which constituted a part of the breach or violation" . . .

. . . The second period, which accelerates the filing deadline, begins when the plaintiff gains "actual knowledge" of the breach . . .

. . . The third period, . . . "in the case of fraud or concealment", begins when the plaintiff discovers the alleged breach §1113. In such cases, suit must be filed within six years of "the date of discovery." . . .

. . . We must enforce plain and unambiguous statutory language" in ERISA, as in any statute, "according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). . . . When Congress passed ERISA, the word "actual" meant what it means today: "existing in fact or reality." Webster's Seventh New Collegiate Dictionary 10 (1967) . . .

. . . Thus to have "actual knowledge" of piece of information, one must in fact be aware of it . . .

. . . Thus, Congress has repeatedly drawn a "linguistic distinction" between what an ERISA plaintiff actually knows and what he should actually know. *Merck*, 559 U.S., at 647 . . .

. . . Although "the words of a statute must be read in their context," *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989), petitioners'

> argument again gives the word "actual" little meaning at all . . . "

How the Tenth Circuit Court missed the mark on ERISA's statute of repose is difficult to explain. The statute is clear: " . . . **six years after (A) the date of the last action** which constituted a part of the breach. . . ."

The general law is that statutes should be read in their ordinary meaning, to wit: **"the last action"** means the last breach or part of the breach, i.e., the most recent breach. The Tenth Circuit measured the breach from the first breach, not the last. Perhaps the Court made its finding based on its conclusion at page of 5 of its opinion (see Appendix) where it concluded:

> ". . . However, AGI does not challenge the district court's conclusion that the claim would be time-barred by the six-year statute of repose period in §1113(1), which begins to run at the time the breach occurred regardless of when a plaintiff discovers or should have discovered it. See *Fulghum*, 785 F.3d at 413 . . . 19-6060, and *AGI Consulting, LLC v. Am. Nat'l Ins. Co*. (10th Cir. 2020)."

Appellant, AGI, never abandoned 29 U.S.C. §1113(1), see the record wherein AGI stated:

From the Record, AGI'S Reply to Defendant's Response to Plaintiff's Motion for New Trial

> . . ."2. Defendant breached its fiduciary duty to Plaintiff when it made no effort to correct

the census after the plan was frozen on 9-12-13. Defendant instructed Plaintiff to freeze the Defined Benefit Plan and then abandoned Plaintiff. No effort was made to correct the census and hence change the funding. Had the Defendant contacted Plaintiff in person and brought its DBP with them the Plaintiff would have discovered the existence of the two different plans and the census would have comported with Plaintiff's adopted DBP which would have solved the problem. Defendant failed to cure this violation of the DBP as required by 29 U.S.C. §1113(1) . . . "AGI's Reply to Def. Response to Pl. M.N.T. pg. 1

. . . "3. Defendant made no effort [to] resolve the issue, but continued to charge Plaintiff for services it no longer rendered. It wasn't until Plaintiff actually discovered there were two different plans on 8-10-16, that Plaintiff realized Defendant had breached its fiduciary duty to Plaintiff. . . . "AGI's Reply to Def. Response to Pl. M.N.T. pgs. 1 and 2.

. . . "As stated at paragraph 8 of this brief, actual knowledge means knowledge in fact or in reality, not some potential knowledge of something else. The Defendants type of legal reasoning involves the common law discovery rule known or should have known, which ERISA clearly rejects. See the 1987 Amendment of 29 U.S.C. §1113 . . . " AGI's Reply to Def. Response to Pl. M.N.T. pg. 2.

. . . "7. As between the two rules: justice and futility, justice must prevail particularly when the futility allegation is doubtful. In this case ERISA and its statute of limitations, to wit: 29 U.S.C. §1113(1) and (2) apply. Defendant incorrectly applies the common law rule of discovery to an ERISA cause of action . . . " AGI's Reply to Def. Response to Pl. M.N.T. pg. 3.

. . . "10. Defendant not only misapplies the law but misinterprets it as well. Plaintiff's case is not about when Plaintiff could have discovered the two plans. It is about, when in fact did the Plaintiff actually know that there were two different Defined Benefit Plans. The fact that Plaintiff was aware and had actual knowledge there was a problem with the plan census, does not mean that the Plaintiff knew that there were two different plans. 29 U.S.C. §1113(2) clearly makes exceptions to the three (3) year rule. The Defendant's attaching Plaintiffs signature page from their plan document to a second plan falls within the fraud exception to the 3 year rule and extends the statute of limitations to six years . . . " AGI's Reply to Def. Response to Pl. M.N.T. pg. 3.

. . . "11. Plaintiff contends the ERISA statute of limitations begins to run six years after the date the last time the Defendant could have corrected the census or in the case of fraud or concealment, six year after Plaintiff actually knew there were two different Defined Benefits Plans. Even if this court determines the statute is three (3) years after discovery, the Plaintiff has brought the case

within three years of actual discovery (and their actual knowledge) of the existence of two different plans . . . " AGI's Reply to Def. Response to Pl. M.N.T. pgs. 3 and 4.

. . . "14. Defendant re-pleads his futility argument stating the ERISA statute of limitations of six years or three years have both expired and even if Plaintiff were allowed to amend it would be futile. The Defendant is ignoring the Supreme Court's ruling in *Tibble v. Edison International*, 135 S.Ct. 1823, 191 L.Ed.2d 795 and the application of 29 U.S.C. §1113 which contains an exception to the three year rule. Plaintiffs fall within the six year statute of limitations and have brought their claim within that time . . . " AGI's Reply to Def. Response to Pl. M.N.T. pg. 4.

. . . "21. Justice Breyer speaking for an en banc Supreme Court held, "The Ninth Circuit erred by applying a 6-year statutory bar based solely on the initial selection of the three funds without considering the contours of the alleged breach of fiduciary duty." *Tibble v. Edison International,* 135 S.Ct. 1823, 191 L.Ed.2d 795 (2015)" . . . AGI's Reply to Def. Response to Pl. M.N.T. pg. 7.

22. It is the "contours" with which Plaintiff and Defendant are concerned. Plaintiff argues those "contours" are not futile and thus an amendment to a breach of fiduciary duty cause of action under ERISA must be allowed. To that[sic] hold an amendment to state an ERISA cause of Action would be futile not only

violates the supreme court's ruling in *Tibble v. Edison International*, 135 S.Ct. 1823, 191 L.Ed.2d 795 (2015) but also the very spirit of ERISA law." AGI's Reply to Def. Response to Pl. M.N.T. pg. 7.

From the Record: Appellant's Brief in Chief in the Tenth Circuit.

"One: The relevant dates were not evaluated in terms of the Actual Knowledge of the Employer. They were evaluated in terms of the State common law rule. i.e., constructive or imputed knowledge. Two: the Dates evaluated did not "make clear" the statute of limitations had expired" . . . Brief In Chief, pg. 8

. . . "C.(1) 3-14-12 Download

> The date 3-14-2012 was first raised in the pleading by Employer ¶2, Doc 12 where Employer informed the Court that on 6-12-2018 (after the Complaint was filed) while searching the drive of an archived employee computer.
>
> ". . . . [Employer] found a computer file labeled "Pension" [that] contained a downloaded copy of the typewritten plan [Ins Co.'s DBP] from March 14, 2012 . . . " See FN pg. 3 Doc 12 to ¶8.[1]

[1] Doc 12 is employer's Response to Ins Co Motion to Dismiss Doc 9. Doc 9 was a Motion to Dismiss Employer's original Complaint Doc 1 for a common law fraud cause of action, which does

> . . . [Doc 12] Employer's Response was nothing more than an admission of the discovery of an e-file from an email meant it had constructive knowledge that there two DBPs See Doc 12 at ¶¶ 2,3,4,8, FN to 8, 9 & 14. At no time did Employer admit or imply it had actual knowledge of two different plans. Applying common law, the admission was imputed to Employer, but this is not so in ERISA . . . "

"Also at Doc 15 pg. 4 (Employer's Sur Reply) it was stated:

> " . . . Because the Plaintiff and Defendant could not agree on the census, the plan was frozen until the census could be resolved. When the Plan was frozen Plaintiff did not know there were two different DBPs . . . " Brief In Chief pg. 16.

"See Employer's Reply Doc. 20 ¶2 where it stated:

> . . . "Defendant breached its fiduciary duty to Plaintiff when it made no effort to correct the census after the plan was frozen on 9-12-13. Defendant instructed Plaintiff to freeze the Defined Benefit Plan and then abandoned Plaintiff. No effort was

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not involve ERISA where no meeting of the minds occurred and no plan was signed by both parties, thus no plan would exist to be governed by ERISA.

made to correct the census and hence change the funding. Had the Defendant contacted Plaintiff in person and brought its DBP with them the Plaintiff would have discovered the existence of the two different plans and the census would have comported with Plaintiff's adopted DBP which would have solved the problem. Defendant failed to cure this violation of the DBP as required by 29 U.S.C. §1113(1)." . . . Brief In Chief pg. 17

. . . "D. Argument IV

D.(1) Make Clear Rule

Although a statute of limitations bar is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss when the dates given in the complaint **make clear** that the right sued upon has been extinguished. *Radloff-Francis v. Wyoming Ed. Ctr. Inc.*, 524 F.App'x 412-13 (10th Cir. 2013) (quoting *Aldrich v. McCulloch Props, Inc*., 627 F.2d 1036, 1041, N.4 (10th Cir. 1980). . . . "

. . . "The 10th Cir. Case of *Aldrich v. McCulloch Props, Inc*., cites the 4th and 3rd Cir. Courts of Appeal. *Lukenas v. Bryce's Mountain Resort Inc*., 538 F.2d 594, 497 (4th Cir. 1976) and *Burke v. Gateway Clipper, Inc*., 441 F.2d 946, 948 (3d Cir. 1971). So what does it mean to "make clear", in order to dismiss a Complaint on a statute

> of limitations defense in a Rule 12(b)(6) motion – The dates in a complaint must be clear that the statute of limitations has expired . . . " Brief in Chief, pg. 22.

. . . "*Foman v. Davis*, 371 U.S. 178, at 181 & 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) states:

> " . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by (pg. 181) counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 [(1957)]. . . . The Rules themselves provide that they are to be construed to "secure the just, speedy, and inexpensive determination of every action' Rule 1 . . . " (pg. 182)

. . . The Court in *Gluck v. Unisys Corp*., 960 F.2d 1168 (3d Cir. 1992)

> ". . . . Section 1113 sets a high standard for barring claims against fiduciaries prior to the expiration of the section's six-year limitations period. Although the statute specifically measures the longer six-year period from "the last action which constituted the breach or violation," the statute measures the earlier three-year bar only by reference to the plaintiff's [actual] knowledge of the breach." . . . Brief in Chief. pg. 23

"Argument V

E.(1) The six (6) year actual knowledge exception

The Court below only considered 29 U.S.C. §1113(2) when it held that an amendment to an ERISA breach of fiduciary duty cause of action would be futile. It did not consider the exception which is six (6) years in the case of fraud or concealment. 29 U.S.C. §1113 states:

> . . . "No action may be commenced . . . after the earlier of (1) six years . . . A . . . or B . . . or (2) three years after . . . the plaintiff had actual knowledge of the breach or violation **except that in the case of fraud or concealment**, such action may be commenced not later than six years after the date of discovery of such breach or violation" [emphasis added]" . . . Brief In Chief, pg. 25.
>
> . . . "24. On 8-27-2013, Plaintiff was notified by Defendant of a substantial increase in the funding requirements. After AGI's complaint about the dramatic increase in the funding, Andre Fleener, ANIC's agent, consulted with his supervisor ANIC's actuary. The actuary then advised Mr. Fleener to instruct the Plaintiff to Freeze the Plan. . . .
>
> . . . "25. On 9-12-2013, the DBP was Frozen. Defendant ANIC did not Prepare the 5500 for 2013 with actuarial data as required by contract for 2013 either . . . "
>
> . . . "26. Plaintiff alleges that the Defendant ANIC could have cured the census problem at

> that time but did not. It is important to note that as between the insurance company's fiduciary status and the Sponsor Owner's fiduciary status the insurance company had actual knowledge of census error, while AGI did not. Thus, ANIC was in a position to cure but AGI was not. This totally violated the prudent man rule. 29 U.S.C. §1104(a)" . . . Brief in Chief, pgs. 25-26.
>
> . . . "It does not matter if you apply 29 U.S.C. §1113(1) or §1113(2), both are within the time to file a complaint on or before 3-21-18.[2] . . . Brief In Chief, pg. 27.

Thus, the issues this Court must consider are:

1. What gives rise to abandonment of an issue on appeal.
2. What does the "last action which constitutes [a breach] or a part of the breach" mean.
3. Can a litigant rely upon the plain meaning of a statute without abandoning an issue raised in the lower court and raised in their Brief in Chief on appeal.

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[2] 3-14-12 would not be within six years, but that date is not a date of actual knowledge. It was the date a past clerical employee with no role in the DBP of Employer downloaded the DBP. The Western District considered this to be knowledge imputed to the Employer.

For example, there is an exception to the ERISA repose and statute of limitations provisions which state:

> "except that in the case of fraud or concealment, such action may be commenced not later than six year after the date of discovery of such breach or violation . . . " 29 U.S.C. §1113(1).

4. Does the exception apply to both the statute of repose and the statute of limitations provisions.

5. Does the context in which the word "discovery" is used in the exception mean actual discovery or constructive discovery.

6. What does actual knowledge mean. This was answered in *Intel v. Sulyma*, No. 18-1116, 589 U.S. ___ (2020) while AGI was within the time to apply for a Petition for Writ of Certiorari. The date of the Tenth Circuit Court's opinion in AGI's case was January 9, 2020. The date of the *Intel* decision was February 26, 2020. Therefore, the issue of what is actual knowledge became moot since this Court ruled that actual knowledge means actual.

REASONS THIS COURT SHOULD ISSUE A WRIT

The Tenth Circuit Court of Appeals has decided an important question of federal law that has not been,

but should be, fully settled and clarified by this Court. Further the Tenth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court, to wit: *Intel v. Sulyman*.

Article III, Section 2, Clause 2 of the U.S. Constitution states:

> "In all cases involving Ambassadors . . . the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions and under such Regulations as the Congress shall make."

This Court has the Constitutional power to correct the errors of Circuit and District Courts. And as stated above in the Introduction, "The Supreme Court should grant Certiorari because ERISA is the most misunderstood and misapplied law in the United States Civil Code . . . "

In spite of the fact that employers are not required to provide retirement benefits, millions of American workers are covered by ERISA. This Court has the perfect case to resolve the remaining two provisions of the ERISA statue 29 U.S.C. §1113 – the repose provision and the exception provision.

The purpose of ERISA is to protect those workers who have retirement benefits and to ensure the benefits

they were promised are in fact paid. The method of protection was to put pension plans under the law of trusts and therefore impose fiduciary duties on the retirement plan sponsors and the keeper of those funds, if any.

One must bear in mind the history of trust law and fiduciary obligations, i.e., A Regent was the King's or Queen's guardian. The penalties for violation of that trust were severe. Such are the laws of ERISA.

This case concerns the statute of limitations law for breach of a fiduciary duty, 29 U.S.C. §1113. Unlike common law statutes of limitation laws that appear to be written for the benefit of malfeasor, e.g., finality of litigation, the ERISA statute of limitations for breach of fiduciary duty is written to protect the victim.

For example, Congress included a provision of repose to end litigation but with two exceptions: One – The time period when the repose period begins to run starts from the date when the fiduciary last breached his or her obligations or restated in the vernacular, as long as the thief keeps stealing, the period of repose will never run. Two – Congress included an exception in cases involving fraud or concealment. That time period does not begin to run until either the fraud or the concealment is actually discovered. The ERISA statute of limitations law seems to favor the victim.

The ERISA statute of limitations has three provisions: 1) Repose, 2) Limitation, and 3) Exception. AGI's litigation in the District Court and the Circuit Court involves all three.

Both the District Court and the Tenth Circuit Court viewed the ERISA breach of fiduciary statute of limitations statute with a common law eye and not that of trust law and fiduciary responsibilities.

This Petition for Writ of Certiorari is the perfect litigation to resolve these issues. The Circuit Court states AGI abandoned its repose arguments, i.e., 29 U.S.C. §1113(1). This not so.

Perhaps Appellant AGI, did not articulate the issue well, but the references from the Record, stated above, indicate the issue of repose was never abandoned.

Question One: Abandonment

In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon. *Roebuck v. Mecosta County Road Commission*, 59 Mich. App. 128, 229 N.W.2d 343, 345 (Mich. App. 1975). Generally, failure to object at trial; error not presented in a brief and error not supported by argument and authority give rise to abandonment on appeal. Nevertheless, abandonment involves an intention to surrender a right. See Black's Law Dictionary.

When considering "What gives rise to abandonment of an issue on appeal" once must consider the second question raised:

Question Two: Last Action

What does the "last action which constitute [a breach] or a part of the breach mean. The Respondent ANICO argued at p. 22 of its Reply Brief in the Circuit Court:

> " . . . The alleged breach (when ANICO allegedly replaced the handwritten form with a type-written form containing some different terms) occurred in 2011. AGI admits that it received the type written form by March 14. 2012 and that it was aware of its dispute with ANICO "from the beginning of the contract" in 2011. Accordingly, if the "fraud and concealment exception does not apply, the claim is also barred by the six year statute of repose . . . " ANICO Reply Brief 10th Cir. pg. 22.

It must be noted that AGI never admitted it received the type written form by March 14, 2012.

The last time ANICO breached its fiduciary duty was not on March 14, 2012, but was on 9-12-2013, when ANICO advised AGI to freeze the Plan so the census could be resolved. AGI was abandoned by ANICO after the plan was frozen. Other than continued charges to AGI for services no longer rendered by ANICO, the freeze date of 9-12-2013 was ANICO's last breach AGI is aware of. The Complaint was filed 3-2-2018. The statute of repose, 29 U.S.C. §1113(1) had not lapsed.

This gives rise to Petitioner AGI's third question to be considered:

Question Three: Statutory Reliance

> "Can a litigant rely upon the plain meaning of a statute without abandoning an issue raised in their Brief in Chief on appeal."
>
> . . . [The] first essential of due process of law that statutes must give people of common intelligence fair notice of what the law demands of them." *Connally v. General Construction Co.,* 269 U.S. 385, 391, 46 S.Ct. 126 (1926) . . . "
>
> 29 U.S.C. §1113(1) states:
>
> "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of –
>
> (1) Six years after (A) the **date of the last action** which constituted a part of the breach or violation, or. . . . " (emphasis added)
>
> The Statute is very clear, " . . . Six years after (A) the date of the last action which constituted a part of the breach . . . " The key words are: "after" and "last action".

Even if ANICO's argument that the statute of repose was breached 3-14-12 or even 2011, those were not the last breach. The "last breach" was 9-12-13. This of course does not include the fact that ANICO still charges AGI a fee for services they are not rendering.

Question Four: Exceptions
(last action in fraud or concealment)

AGI had good reason to rely on 29 U.S.C. 1113(1) as the obvious words "last action" should mean just that – the last time ANICO defrauded AGI was when the Plan was frozen at ANICO's behest and assurance that the "census" would be resolved.

> " . . . In American business most all transactions among men are an arm's length transaction, i.e., each party to a transaction negotiated by unrelated parties is where each party is acting in his or her own interest. See *Black's Law Dictionary*, Fifth Edition.
>
> In an ERISA transaction, the negotiation is founded upon trust or confidence reposed by one party in the integrity and fidelity of the other. i.e., a fiduciary relationship is created by law where the party reposing their faith, confidence, trust and reliance upon the advice and judgment in the other party. See *Black's Law Dictionary*, Fifth Edition. Employer placed its trust and confidence in the integrity and fidelity of the INS Co and relied upon its judgment and advice concerning pensions . . . " Brief in Chief, pg. 5.
>
> Statutory law is primary law.

Thus, the statute of repose provision of 29 U.S.C. §1113(1) raises two questions, 1) What does "last action" mean? And 2) can a litigant rely on what it says, i.e., does last action mean the last breach or not? As Justice Ginsburg stated in *Hamer v. Neighborhood*

Housing Services of Chicago, 138 S.Ct. 13, 20 (2017) "We . . . will presume more modestly instead that [the] legislature says what it means and means what it says . . . " (Quoting *Dodd v. United States,* 545 U.S. 353, 125 S.Ct. 2478 (2005).

This leads to the next questions to be considered:

Question Five: Discovery Exception

Does the exception to 29 U.S.C. §1113 apply to both the statute of repose, 29 U.S.C. §1113(1), and the statute of limitations provisions 29 U.S.C. §1113(2)?

Does the context in which the word "discovery" as used in the exception contained in 29 U.S.C. §1113 mean actual discovery or constructive discovery?

The exception to the ERISA Statute of Limitations for breach of fiduciary duty is:

> " . . . except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach . . . " 29 U.S.C. §1113.

The grammatical construction of the "exception" provision is that it appears at the end of one long sentence. The entire statute, 29 U.S.C. §1113 is only one sentence. The exception provision modifies the opening clause and the two numbered clauses, i.e., "(1) or (2)". One can only conclude that the drafters of the statute intended the exception for fraud or concealment to apply to both the repose provision numbered (1) and the limitation provision, numbered (2).

To interpret any statute, one is confronted with a myriad of rules from caselaw.

"Context may make clear that in one instance the word carries one meaning, and in a second instance another." *General Dynamics Land Systems v. Cline,* 540 U.S. 581, 596, 1245 S.Ct. 1236.

"Congress's collective intent (if such a thing even exists) cannot trump the text it enacts and, in any event, we have no reliable was to ascertain that intent apart from **reading the text**." See *Graham County Soil and Water v. United States ex rel. Wilson*, 559 U.S. 280, 130 S.Ct. 1396 (2010). (emphasis added)

"Congressional intent is discerned primarily from the **statutory text**," *FTC v. Phoebe Putney Health,* 133 S.Ct. 1003, 1016 (2013). (Emphasis added)

Justice Breyer dissenting from *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996) stated: "More importantly, meaning in law depends upon an **understanding of purpose**. Law's words, however technical they may sound, are not magic formulas; they must be read in light of their purposes, if we are to avoid essentially arbitrary applications and harmful results." (emphasis added).

"We need to examine the statute's text, context and history." Justice Gorsuch in *United States v. Davis*, 139 S.Ct. 2319, 2327 (2019). (Emphasis added).

Justice Kennedy stated in *California Public Employees Retirement v. ANZ Securities*, 582 U.S. ___ (2017),

" . . . **the text, purpose, structure and history** of the statute all disclose the congressional purpose [of the statute] . . . " (Emphasis added)

The court recently stated: "We must enforce plain and unambiguous statutory language in ERISA, as in any statute, according to its terms." *Intel v. Sulyma*, quoting *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 251 (2010) and again " . . . the words of a statute must be read in their context . . . ", *Intel v. Sulyma,* quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

In summary when it comes to statutory interpretation, one must consider why a statute was written, i.e., what is its purpose. In order to determine that one should consider the history of the statute, if any. And when considering the words of a statute one must consider the context of the statute then after all these considerations read the text which will give the Congressional intent and the words used in the statute will determine its meaning.

Therefore, to divine the meaning of the exception provision of 29 U.S.C. §1113 one must use all the rules of statutory construction. Only this Court, the Supreme Court of the United States can apply those rules properly. This Court should resolve the remaining two provisions of 29 U.S.C. §1113 as it resolved §1113(2) – what does actual discovery mean.

To Petitioner AGI the exception to the ERISA statute of limitations for breach of fiduciary duty applies by it its plain meaning. It applies both to the statute of

repose and to the statute of limitations. Petitioner also construes the word "discovery" in the context of the exception provision to mean the actual discovery of the fraud or the concealment or both.

Question Six: Actual Knowledge

What does actual knowledge mean was addressed in Petitioner's brief in Chief and Reply to ANICO's response Brief. Petitioner's argument and authority in those pleadings were essentially the same as this Court's opinion in *Intel v. Sulyma*, 589 U.S. ___ (2020). Thus, this issue became moot for Writ of Certiorari purposes but is not moot for Appellant reason, i.e., the Tenth Circuit held in effect that actual knowledge means constructive knowledge. Accordingly, the meaning of "actual knowledge" adopted in *Intel*, *supra*, should be applied to Petitioner's case as the District Court and Tenth Circuit Court's ruled in error that constructive knowledge imputes actual knowledge to the Employer.

CONCLUSION

For the reasons stated herein, this Court should grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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