No. 19-1353

In The
Supreme Court of the United States

AGI CONSULTING LLC, BY ASSAF AL-ASSAF
AS TRUSTEE/OWNER/PLAN ADMINISTRATOR
OF AN ALLEGED NON-INTEGRATED
DEFINED BENEFIT PLAN,

Petitioner,

v.

AMERICAN NATIONAL INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Tenth Circuit

BRIEF IN OPPOSITION

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GOLDEN & NELSON, P.C.

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QUESTIONS PRESENTED

1. Regarding AGI Consulting, LLC's ("Petitioner/Plaintiff" or "AGI") claim that American National Insurance Company ("Respondent/Defendant" or "ANICO") breached its fiduciary duty to AGI under the Employee Retirement Income Security Act of 1974 ("ERISA") by allegedly replacing the terms of a handwritten Defined Benefits Plan ("DBP") with different terms contained in a typewritten DBP, did the Tenth Circuit Court of Appeals correctly rule that the claim is time-barred pursuant to both 29 U.S.C. § 1113(1) and the fraud-or-concealment exception thereto when the alleged replacement took place more than six years before AGI filed suit and AGI acknowledged in its filings that it had constructive knowledge of the alleged replacement more than six years before it filed suit?

2. Regarding AGI's claim that ANICO breached its fiduciary duty to AGI under ERISA by allegedly failing to resolve disputes with AGI regarding the calculation of the census and determining the list of eligible employees, did the Tenth Circuit Court of Appeals correctly rule that the claim is time-barred pursuant to 29 U.S.C. § 1113(2) when AGI's pleadings show that AGI had actual knowledge that ANICO included employees in the census who were allegedly ineligible under the handwritten DBP's terms and that this had resulted in increased costs for AGI more than three years before it filed suit?

QUESTIONS PRESENTED – Continued

3. When Congress used the phrase "after the date of discovery" in the fraud-or-concealment exception to Section 1113(1) and "actual knowledge" in Section 1113(2), did it intend for the "after the date of discovery" language to require a plaintiff to have actual knowledge of a breach or violation in order to trigger the exception or did it intend for a plaintiff to be charged with those facts that a reasonably diligent plaintiff should have known?

CORPORATE DISCLOSURE STATEMENT

American National Group, Inc., a publicly held corporation, is the parent corporation of ANICO. No other publicly held corporation owns ten percent or more of the outstanding shares of ANICO.

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INTRODUCTION

This case is about the straight-forward application of 29 U.S.C. § 1113, the statute which limits breach-of-fiduciary-duty claims brought under ERISA, to two claims AGI sought to include in its Complaint after the district court granted judgement in favor of ANICO. In full, the statute provides that:

> 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.

29 U.S.C. § 1113. As has been explained by this Court most recently in *Intel Corporation Investment Policy Committee v. Sulyma*, Section 1113 includes a six-year statute of repose (Section 1113(1)), a three-year statute of limitations that applies when a plaintiff has actual knowledge of a breach or violation (Section

1113(2)), and a fraud-or-concealment exception which requires a plaintiff file suit within six years of "the date of discovery" of a breach or violation. 140 S. Ct. 768, 774 (2020).

In this matter, after the Western District of Oklahoma court dismissed AGI's initial state law fraud claim because it was time-barred and denied AGI's first request to amend its Complaint to add three more time-barred state law claims, AGI sought to amend its Complaint for a second time, this time to add two breach-of-fiduciary-duty claims pursuant to ERISA. Pet'r's App. 12–13. For its first claim, AGI alleged ANICO breached its fiduciary duty by allegedly replacing the agreed-upon terms from a handwritten DBP with different terms contained in a typewritten DBP, which ANICO then used to administer the plan. Pet'r's App. 24–25. For its second claim, AGI claimed ANICO breached its fiduciary duty by failing to resolve its disputes with AGI regarding ANICO's calculation of the census (the list of employees eligible to participate in the DBP). Pet'r's App. 26.

Both the Western District of Oklahoma and the Tenth Circuit Court of Appeals correctly concluded that the claims were time-barred. Pet'r's App. 11 & 31. With respect to the first claim, as is set forth in detail below, both courts determined (and AGI admitted) that the terms contained in the typewritten DBP replaced those in the handwritten DBP sometime in 2011 and that AGI had constructive notice of the typewritten DBP and its different terms no later than March 14, 2012, when an AGI employee received a copy of the

typewritten DBP from ANICO. Pet'r's App. 6–8 & 23–25. Accordingly, because AGI had constructive knowledge of facts that form the basis of its breach claim more than six years before filing suit, the claim was time-barred pursuant to either Section 1113(1) or the fraud-or-concealment exception thereto. Pet'r's App. 6–8 & 23–25.

As for the second claim, based on AGI's pleadings, the courts correctly concluded that AGI had actual knowledge that ANICO included employees in the census who were allegedly ineligible under the handwritten plan's terms and that this had resulted in increased costs for AGI by September 12, 2013, when the DBP was frozen. Pet'r's App. 8–11 & 26–30. Accordingly, because AGI had actual knowledge of the facts that formed the basis of the claim more than three years before filing suit, the claim was time-barred pursuant to Section 1113(2). Pet'r's App. 8–11 & 26–30. In so holding, both courts determined that the issue as to whether AGI had actual knowledge of the existence of two different plans did not prevent the time period from running because this fact was not material to the second claim. Pet'r's App. 10 & 30.

AGI now argues that the Tenth Circuit Court of Appeals "missed the mark" and "held in effect that actual knowledge means constructive knowledge." Pet'r's Br. 6 & 29. AGI also asserts that the Tenth Circuit's decision conflicts with this Court's decision in *Sulyma*. Pet'r's Br. 20. AGI, however, is wrong on all counts. Rather, the Tenth Circuit applied Section 1113 in a straight-forward manner in conformance with this

Court's jurisprudence, including both *Sulyma* and *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010). There are no grounds which justify certiorari review, and ANICO respectfully requests that this Court deny AGI's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On June 22, 2011, AGI and ANICO entered into a contract in which AGI purchased from ANICO a DBP for AGI's employees. Pet'r's App. 2. When AGI's representatives entered into the contract with ANICO, AGI alleges that the terms of the DBP were to be administered pursuant to terms handwritten by AGI's representatives on a form provided by ANICO. Pet'r's App. 2. AGI further alleges that, unbeknownst to it, ANICO fraudulently replaced the handwritten DBP with a different, typewritten one that contained materially different terms. Pet'r's Br. 2.[1] After a dispute arose by and between AGI and ANICO regarding the list of eligible employees to be included in the census and the increase in funding requirements as a result thereof, the plan was frozen on September 12, 2013. Pet'r's App. 22. AGI further asserted that it did not have actual knowledge of the existence of two separate plans until August 10, 2016. Pet'r's App. 2. Based on these allegations, Plaintiff filed suit for common-law fraud on March 21, 2018. Pet'r's App. 2.

[1] ANICO adamantly disputes that it acted fraudulently in any manner with respect to its relationship with AGI.

ANICO moved to dismiss the Complaint pursuant to Oklahoma's statute of limitations for fraud (2 years), because at least by September 12, 2013, AGI received a Summary Plan Description. Pet'r's App. 2. The Summary Plan Description contained a complete summary of the DBP, including the terms that differed from the handwritten plan. Pet'r's App. 2. Accordingly, AGI knew or should have known of the differing terms vis-à-vis the Summary Plan Description on September 12, 2013. Pet'r's App. 2. As such, ANICO argued that AGI's fraud claim was time-barred by the statute of limitations and should be dismissed. Pet'r's App. 2.

In its Response to ANICO's Motion to Dismiss, AGI conceded that the fraud claim was time-barred. Pet'r's App. 2. Even more so, AGI admitted that it had discovered an electronic copy of the typewritten plan dated March 14, 2012, which had been downloaded and saved to an old computer by a former employee, and acknowledged that it had constructive knowledge more than 6 years before it filed suit that ANICO replaced the handwritten DBP with the typewritten DBP. Pet'r's App. 2. After abandoning the fraud claim, AGI requested leave to amend its Complaint to assert three new causes of action under Oklahoma law—(1) rescission; (2) reformation; and (3) breach of contract. Pet'r's App. 2–3.

After reviewing the relevant statute of limitations for the three proposed state-law claims (five, two, and five years, respectively) and the relevant dates provided in AGI's Complaint and proposed Amended Complaint, the district court denied AGI's request to amend

its complaint on the basis of futility because each of the asserted claims would also be time-barred. Pet'r's App. 3. Based on this analysis and AGI's agreement that the fraud claim was also time-barred, the district court dismissed AGI's Complaint with prejudice on July 30, 2018. Pet'r's App. 32–47.

On August 24, 2018, AGI filed a Motion and Brief for a New Trial, this time requesting leave to amend its Complaint to include claims that ANICO breached its fiduciary duties to AGI in violation of ERISA. Pet'r's App. 12–13. In response, ANICO asserted that AGI's second request to amend the Complaint should be denied because (1) AGI already had an opportunity to assert that ERISA's, rather than Oklahoma's, statute of limitations applied; and (2) even if AGI could assert a new theory pursuant to ERISA, the claims would still be time-barred pursuant to 29 U.S.C. § 1113. Pet'r's App. 20.

The district court agreed to consider whether AGI's ERISA claims would be time-barred pursuant to 29 U.S.C. § 1113. Pet'r's App. 16–17. Upon doing so, the district court agreed with ANICO and denied AGI's motion for new trial. Pet'r's App. 30.

Ultimately, the district court determined that Plaintiff's second proposed Amended Complaint contained two claims—one for fraudulently managing a DBP that contained terms that differed from the handwritten DBP executed on June 22, 2011,[2] and a second

[2] Some of the changes about which AGI claims it did not know include changing the eligibility period from one year of

for failing to resolve the issues surrounding the list of eligible employees, or "census," issued on September 12, 2013, after AGI complained about the increase in funding. Pet'r's App. 20–30. As to the first claim, the court determined that the claim would be barred pursuant to Section 1113's six-year fraud-or-concealment exception because AGI admitted it had constructive knowledge of the different DBP as early as March 14, 2012, when it received a copy of the typewritten plan revealing the materially different terms. Pet'r's App. 22–25. As for the second claim, the court held that AGI had actual knowledge of the census dispute issue as early as August 22, 2013, when AGI was notified of a substantial increase in the funding and the inclusion of allegedly ineligible persons on the census, and no later than September 12, 2013, when the plan was frozen as a result of the census dispute. Pet'r's App. 27–30. Accordingly, the court concluded that AGI's proposed ERISA claims were also time-barred and denied AGI's Motion. Pet'r's App. 30. AGI subsequently appealed the decision to the Tenth Circuit Court of Appeals. Pet'r's App. 2.

On appeal, AGI argued that that its first claim—that ANICO fraudulently administered the DBP with terms different than what AGI originally agreed to—would not be barred pursuant to Section 1113(2)'s

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employment to six months of employment and changing the percentage of average compensation from unmarked to 200% even though, as attached to the Complaint, AGI provided ANICO with a written change notice on June 22, 2011, that the eligibility term should, in fact, be six months. Pet'r's App. 27.

three-year statute of limitations because AGI did not have actual knowledge of the existence of a separate plan until August 10, 2016. Pet'r's App. 6–8. The Tenth Circuit rejected this argument, noting that AGI's claim would be barred pursuant to Section 1113(1)'s statute of repose, which begins to run at the time the breach occurs (in this case, no later than March 14, 2012), regardless of when AGI should have discovered it. Pet'r's App. 7–8.

AGI also argued that Section 1113's fraud-or-concealment exception applied to the first claim, but that the date would begin to run from AGI's actual knowledge of the two differing plans. Pet'r's App. 7–8. The Tenth Circuit summarily rejected this argument, noting that, unlike Section 1113(2) which requires actual knowledge for claims thereunder, the fraud-or-concealment exception to Section 1113 requires only constructive knowledge ("after the date of discovery"), and the period begins to run when the plaintiff, by exercising diligence, should have discovered the breach. Pet'r's App. 7–8. Thus, under the fraud-or-concealment exception, AGI's first claim for breach of fiduciary duty began to run on March 14, 2012 (the date by which AGI admits it had constructive knowledge), more than six years before it filed the lawsuit, and is, therefore, time-barred. Pet'r's App. 7–8.

As to the second claim regarding ANICO's alleged failure to resolve the census dispute, AGI again argued that it lacked actual knowledge of the two different plans until August 10, 2016, and thus Section 1113(2)'s actual knowledge statute of limitations period had not

run when AGI filed suit. Pet'r's App. 8–9. The Tenth Circuit rejected this argument, noting that the district court determined that AGI had actual knowledge of all the material facts underlying the claim as of September 12, 2013. Pet'r's App. 10. Moreover, the district court concluded that the existence of the typewritten DBP was not included as a material fact to the claim. Pet'r's App. 10. Rather, the record made clear that AGI had actual knowledge that ANICO had included allegedly ineligible employees in the census and that this had resulted in increased costs for AGI as of September 12, 2013, when the plan was frozen. Pet'r's App. 10. Thus, because AGI had actual knowledge of the material facts underlying the claim more than three years before filing suit, that claim was also time-barred. Pet'r's App. 10–11.

Finally, the Tenth Circuit also rejected AGI's claim that the fraud-or-concealment exception would apply to the second claim and the date would start from August 10, 2016, when AGI claims it actually discovered the existence of two plans. Pet'r's App. 10–11. In so doing, the Tenth Circuit noted again that the existence of the two plans is not material to the second claim, and, additionally, the fraud-or-concealment exception only requires constructive, not actual, knowledge. Pet'r's App. 10–11.

AGI has now petitioned this Court to review the Tenth Circuit's decision. In so doing, AGI argues that there is no uniformity amongst circuit courts about the application of ERISA's statute of limitations (with no explanation as to how, exactly, this is the case), that the Tenth Circuit misapplied the statute, that the Tenth Circuit's decision conflicts with recent Supreme Court precedent, and that there is no place for common-law principles in interpreting the statute. Pet'r's Br. 6, 14, 20–21. As set forth below, however, because (1) the Tenth Circuit's decision does not conflict with this Court's decision in *Intel Corporation Investment Policy Committee v. Sulyma*; (2) the Tenth Circuit correctly applied the statute; and (3) its holding decided no important question of federal law that has not been, but should be, addressed by this Court, ANICO respectfully requests that this Court deny AGI's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit's Decision Does Not Conflict with this Court's Decision in *Intel Corporation Investment Policy Committee v. Sulyma*.

AGI has argued that the Tenth Circuit's decision conflicts with this Court's February 26, 2020, opinion, *Intel Corporation Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020). Pet'r's Br. 20. However, this is not the case. In *Sulyma*, this Court considered the interpretation to be given to the term "actual

knowledge" contained within Section 1113(2)'s statute of limitations. 140 S. Ct. 768, 774. Ultimately, this Court concluded actual knowledge should be given its plain, ordinary meaning—i.e., a Plaintiff has actual knowledge of a particular fact for the purpose of Section 1113(2) when the Plaintiff, in fact, has that knowledge of that particular fact. *Sulyma*, 140 S. Ct. at 778–79.

Contrary to AGI's argument, the Tenth Circuit's decision in this matter did not conflict with this Court's decision in *Sulyma*. As set out above, the district court concluded, and the Tenth Circuit agreed, that AGI had actual knowledge, i.e., knew in fact, all of the material facts underlying its second claim for breach of fiduciary duty more than three years before filing suit. Thus, the claim would be time-barred pursuant to Section 1113(2). Specifically, the decisions below highlight that AGI had actual knowledge of (1) the increased funding for the DBP and (2) the inclusion of allegedly ineligible employees in the census, which formed the basis of this claim, and that this dispute led to freezing the plan. Nowhere in AGI's Brief in Chief before the Tenth Circuit nor in its Petition for Writ of Certiorari does AGI argue that it lacked actual knowledge of these particular facts. Nor could it, as the record suggests otherwise. Ultimately, because the Tenth Circuit's decision was not contrary to this Court's decision in *Sulyma*, this case does not warrant certiorari review.

II. The Tenth Circuit's Correct Decision Did Not Decide an Important Question of Federal Law that Has Not Been, but Should be, Addressed by this Court.

In addition to arguing that the Tenth Circuit's decision conflicted with *Sulyma*, as addressed above, AGI argues that this Court "should grant Certiorari because ERISA is the most misunderstood and misapplied law in the United States Civil Code" (without articulating how, exactly, ERISA is misapplied), and that "the Tenth Circuit Court missed the mark" on applying Section 1113's provision to AGI's claims. Pet'r's Br. 6. ANICO disagrees. The Tenth Circuit and the district court's application of Section 1113 to AGI's claims is standard and in conformance with precedent. Even if there was some misapplication (there was not), Rule 10 of this Court's Rules notes that a Petition for Writ of Certiorari is rarely granted when the asserted error is a misapplication of a properly stated rule of law.

Additionally, the Tenth Circuit did not decide any important questions of federal law that should be, but have not been, addressed by this Court. Thus, while it may be true that ERISA is oft misapplied or misinterpreted, it was neither misapplied nor misinterpreted in this case. Accordingly, this Court need not grant certiorari to evaluate any novel question of federal law as one is not present.

AGI further argues that the Tenth Circuit erred in measuring ANICO's alleged breach for its first cause of action (implementing the type-written DBP instead of

the handwritten DBP) from the date of first breach rather than the date of last breach as provided in Section 1113(1). AGI does not, however, articulate what it believes to be the first and last dates for this particular breach and instead includes excerpts addressing AGI's second claim from its previous briefs in an attempt to support its argument.

ANICO asserts that the alleged breach underlying AGI's first claim is a single event—ANICO allegedly switched out the handwritten terms for the typewritten terms. Once the switch occurred, the alleged breach was complete. As evidenced in the record, AGI had constructive knowledge of the two differing plans no later than March 14, 2012, when its employee downloaded and saved the plan to AGI's computer. Pet'r's App. 4. Finally, AGI has failed to articulate what additional date it believes to be the "date of last action" for the sake of a Section 1113(1) analysis. Put simply, AGI's argument regarding statutory language not previously addressed by the courts below does not warrant this Court's review.

AGI also argues that the Tenth Circuit only considered the three-year actual knowledge provision contained in Section 1113(2) when reviewing whether AGI's claims would be time-barred and failed to consider the fraud-or-concealment exception's applicability to the claims. Pet'r's Br. 17. This is not true. The Tenth Circuit, as noted above, agreed with the district court's analysis that AGI's first breach of fiduciary claim would be barred under both Section 1113(1)'s statute of repose and the fraud-or-concealment

exception thereto. In doing so, the court stated that, as with the statute of repose, the claim would be extinguished six years after the date of the breach, regardless of AGI's actual knowledge, and with the exception, the claim would be extinguished six years after the date of discovery of the breach, which requires only constructive, not actual, knowledge. Pet'r's App. 7–8. Additionally, as to the second claim for breach of fiduciary duty, the Tenth Circuit agreed with the district court that the claim would be barred under Section 1113(2)'s actual knowledge requirement because AGI had actual knowledge of the facts underlying the claim more than three years before filing suit. Pet'r's App. 10–11. Moreover, the Tenth Circuit stated that the application of the fraud-or-concealment exception to AGI's second claim is "misguided," as the court already determined that the existence of the typewritten plan was immaterial to that claim. Pet'r's App. 11. Thus, AGI's argument that the Tenth Circuit did not consider the exception in its analysis is patently false.

AGI also posits a few questions regarding the fraud-or-concealment exception, asking whether it applies to both the statute of repose and the statute of limitations and whether the word "discovery" connotes actual or constructive knowledge. Both of these questions have already been answered, and neither question is implicated by, nor dispositive of, the matter before this Court. With respect to the first question, the Tenth Circuit has held that the fraud-or-concealment provision is a legislatively created exception to the six-year statute of repose contained in Section 1113(1).

Fulghum v. Embarq Corp., 785 F.3d 395, 414–15 (10th Cir. 2015).

With respect to AGI's second question, if Congress intended to require actual knowledge for the fraud-or-concealment exception, it would have included that language in the exception much like it included it in Section 1113(2). As this Court has noted, "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). *See also United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) ("[W]here Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."). AGI does not (and cannot) explain why Congress used the phrase "date of discovery" in the fraud-or-concealment exception and "actual knowledge" in Section 1113(2) if it intended for courts to require a plaintiff to possess actual knowledge to trigger the exception.

Additionally, as evidenced in this Court's decisions in *Sulyma* and *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010), the word "discovery," when used in a statute of limitations, without exception, "encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Merck & Co.*, *Inc.*, 559 U.S. at 648. Moreover, in spite of AGI's insistence that common-law principles have no place in ERISA, the word "discovery," when

used by Congress, is used as a term of art in connection with the common law "discovery rule," which delays the accrual of a cause of action until the plaintiff has discovered it. *Id.* at 633. And, as noted by this Court, "for more than a century, courts have understood that '[f]raud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered.'" *Id.* at 645 (internal citations omitted). Thus, this Court's precedent squarely answers AGI's question that the fraud-or-concealment exception in Section 1113 does not require actual knowledge as AGI suggests.

CONCLUSION

While AGI may be unhappy with the courts' straight-forward application of Section 1113 to its two proposed breach of fiduciary claims, neither the district court nor the Tenth Circuit erred in its analysis. Moreover, and most importantly, contrary to AGI's argument, these decisions do not run afoul of this Court's ruling in *Sulyma* nor do they contain any novel questions of federal law that warrant this Court's consideration. For these reasons, ANICO

respectfully requests that this Court deny AGI's Petition for Writ of Certiorari.

Dated: July 1, 2020

Respectfully submitted,

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