No. 21-1266

In The
Supreme Court of the United States

♦

ERICA TALASEK,

Petitioner,

v.

NATIONAL OILWELL VARCO, L.P.,

Respondent.

♦

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

♦

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

♦

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals was correct in holding that Petitioner failed to satisfy the reasonable reliance element of an ERISA equitable estoppel claim because the alleged misrepresentation was contrary to the clear and unambiguous terms of the benefit plan, was made by a third-party that had no authority to make representations regarding coverage under the plan, and where the factual basis underlying the claim is attempted insurance fraud.

CORPORATE DISCLOSURE STATEMENTPURSUANT TO SUPREME COURT RULE 29.6

Defendant National Oilwell Varco, L.P. certifies that it is a limited partnership ("NOV LP"). Grant Prideco, Inc., a Delaware corporation, owns a 99.99% limited partnership interest in NOV LP, and NOW Oilfield Services, LLC, a Delaware limited liability company, owns a 0.01% general partnership interest in NOV LP. Grant Pricedo, Inc., in turn, owns 100% of the membership interests in NOW Oilfield Services, LLC. Grant Prideco, Inc. is owned 100% by NOV Inc., a publicly-traded corporation.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent National Oilwell Varco, L.P. ("NOV" or "Respondent") respectfully requests that Erica Talasek's ("Petitioner") Petition for a Writ of *Certiorari* ("Petition") be denied.

OPINIONS BELOW

The Opinion of the Fifth Circuit affirming the District Court's grant of summary judgment is attached to the Petition as Exhibit A of the Appendix. The District Court's Order Adopting Magistrate Judge's Memorandum and Recommendation granting NOV's Motion for Summary Judgment is attached to the Petition as Exhibit B of the Appendix.

STATUTES AND REGULATIONS INVOLVED

NOV agrees with Petitioner's recitation of the relevant statutory provisions. NOV also believes Supreme Court Rule 10 is relevant.

INTRODUCTION

Attempted insurance fraud and an imaginary circuit split do not warrant this Court's attention. Petitioner asks this Court to grant *certiorari* and second-guess a correct, fact-specific decision arrived at by applying general equitable principles that the circuit courts agree on. She claims this would allow the Court to address a circuit split that does not exist. Worst of all, if successful, Petitioner would have this Court endorse insurance fraud. National precedent cannot be built on deceit. This Court has never been in the business of building legal principles by endorsing illegal activities. There is no reason to start now. The Petition must be denied.

STATEMENT OF CASE

The Petition attempts to manufacture a circuit split by sampling unremarkable circuit court decisions applying the same general principles of equity and highlighting only their different outcomes. However, when the procedural posture, actual facts, and actual legal reasoning of these cases are considered, it is clear that the circuit courts all agree that as a general matter misrepresentations contrary to unambiguous terms of a benefit plan cannot be reasonably relied on for an ERISA estoppel claim unless there are highly unusual facts suggesting otherwise. There is no circuit split warranting clarification by this Court.

Moreover, if this Court were to revive Petitioner's claim, it would effectively consummate insurance fraud. This case originated when the Petitioner's husband (by Petitioner's own admission) lied on an evidence of insurability form submitted to his life insurance provider. It continued when Petitioner filed a lawsuit in the hopes of financially benefiting from that attempted fraud. Today, it continues with an attempt to have this Court endorse insurance fraud. Dishonesty cannot be rewarded with a writ of *certiorari*. This case, of all cases, is not a proper vehicle through which to clarify the legal principles governing ERISA estoppel claims.

1. Petitioner and Her Husband Attempted Insurance Fraud.

This case arose over an unsuccessful attempt at insurance fraud. Petitioner insists this case presents a neat opportunity to create national precedent regarding ERISA estoppel claims. But this Court cannot yield to her request and use an attempted

insurance fraud as a basis for purportedly clarifying the legal standards for an ERISA estoppel claim. Equity demands the exact result the Fifth Circuit reached below.

Instead of acknowledging the crooked origins of this dispute, the Petition is devoted to demonizing NOV. That devotion is misplaced. This is not a story of NOV trying to mislead an employee (indeed, the undisputed evidence below established that NOV's actions at issue were the result of an inadvertent payroll coding error); it is the story of an employee who attempted to conceal pancreatic cancer long enough to defraud his way into an additional $300,000.00 in life insurance coverage, and whose actions unequivocally confirm that he understood the clear terms of the benefit plan that he had failed to meet to secure such coverage. Indeed, he called his life insurance provider *twice* to check on its written approval of his insurability for supplemental life insurance benefits that he was clearly told – both in the terms of the plan and on forms he submitted – he would need before the coverage was effective, and all parties agree this approval *never was provided*.

More specifically, Petitioner's late husband, Mr. Ben Talasek, started working for NOV in 2001. (App. 48a.) Like many employers, NOV offered employees benefits through ERISA governed welfare benefits plans, including basic and supplemental life insurance coverage. (*See* App. 13a.) Every employee could receive basic life insurance benefits without undergoing medical screening. (*See* R. 709.) They could choose to add to that basic coverage with supplemental life insurance available through a group policy issued by Unum Life Insurance Company of America ("Unum").

(R. 762.) Supplemental coverage could be obtained only by submitting evidence of insurability ("EOI") to Unum which Unum expressly approved. (*See* R. 762-63.) The life insurance plan specifically stated "[EOI] is required for any amount of life insurance" and that coverage would not begin until "Unum approves your [EOI] form for life insurance." (R. 1010.)

Under the plan, NOV had no power to approve supplemental life insurance applications or review EOI. NOV delegated all authority for claims and eligibility decisions concerning its life insurance plan to Unum. (App. 13a.) Further, the terms of the life insurance policy expressly informed participants that the actions of NOV *were not and could not* be construed as the actions of Unum. (*Id*; R. 1009.) The plan stated that "[u]nder no circumstances will [NOV] be deemed the agent of Unum[.]" (R. 1009.)

Despite working for the company for more than ten years, Mr. Talesek was not interested in obtaining supplemental life insurance benefits until November of 2013 (for the 2014 plan year), shortly after he started having serious medical concerns. Mr. Talasek saw a doctor about these concerns on October 15, 2013. (*See* App. 13a; R. 1011.) Mr. Talasek's doctor was so unsettled with the issues Mr. Talasek was experiencing that he referred Mr. Talasek to a gastroenterologist. (R. 1011.) Mr. Talasek first saw the gastroenterologist on November 15, 2013. (R. 1011.) He returned for a colonoscopy on December 9, 2013 and CT scan on December 27, 2013. (R. 1012.) The gastroenterologist informed Mr. Talasek he might have cancer on January 2, 2014. (*Id.*)

Despite these concerning medical developments, Mr. Talasek felt no obligation to disclose his true health status in his application for supplemental life insurance. Instead he showed a heightened sense of urgency to finalize, submitting his Evidence of Insurability ("EOI") form on the very same day he received a preliminary cancer diagnosis. (*Id.*) Further, within the EOI form, Mr. Talasek was specifically asked whether he had "received medical advice or sought treatment for . . . cancer [or] gastro-intestinal" medical concerns in the seven years before his application. (R. 1013.) Inexplicably, he responded "No" to this question. (*Id.*) This was a lie. Petitioner, who also signed the EOI form, admits Mr. Talasek should have answered the exact opposite – "Yes" – to this question, because he had received treatment for gastro-intestinal concerns, now preliminarily diagnosed as cancer, for multiple months prior to submitting the EOI form. (R. 1060-61.)

Mr. Talasek's cancer diagnosis was confirmed on January 14, 2014. (R. 1013.) Four days later, Unum mailed a supplemental EOI form to Mr. Talesek because he did not complete the first one correctly. (*Id.*) Mr. Talasek was thus given a chance to correct his lie by Unum. He failed, submitting the supplemental EOI form on January 28, 2014 without amending his prior answers. (*See* R. 1013-14.)

Moreover, Mr. Talasek demonstrated pristine knowledge that he was not eligible for supplemental life insurance until he received express approval *from Unum*. Mr. Talasek and an NOV representative called Unum to ask about his application on January 21, 2014. (*Id.*) Unum informed him the application was still pending because his original EOI form was

incorrectly completed. (*Id.*) Mr. Talasek then began chemotherapy on February 3, 2014. (*Id.*) On February 12, 2014, while undergoing treatment for cancer, he called Unum again to ask about his application for supplemental life insurance. (R. 1014-15.) He still did not inform Unum about his condition. (*See id.*).

Mr. Talasek could only sustain the lie for so long. On March 3, 2014, he had to submit blood and urine samples as part of the paramedical exam required for supplemental life insurance, which revealed abnormal findings. (R. 1015.) Accordingly, on March 6, 2014, Unum sent Mr. Talasek a letter informing him that his application for supplemental life insurance was denied. (*Id.*) It sent this letter to the same address every other correspondence had been sent and where Mr. Talasek had admittedly received written correspondence from Unum before, such as the supplemental EOI form which he later submitted. (*Id.*) Petitioner conveniently denies that Mr. Talasek ever received this rejection letter, although she admitted in sworn testimony it could have been received and Mr. Talasek never told her about it. (*See* Petition at 6; R. 1051.)

NOV worked alongside Mr. Talasek and allowed him to continue working for the company as long as possible. He died on December 24, 2017. (App. 26a.) When the incorrect premium deductions were discovered and Petitioner's claim for supplemental life insurance proceeds was denied, NOV contacted Petitioner and offered to return all premiums

accidentally collected even though Unum, and not NOV, held those funds. (See R. 1052.) Petitioner refused to accept. (R. 1053.)

2. Petitioner Insists She Is Entitled Life Insurance Proceeds Despite the Attempted Fraud.

Despite Mr. Talasek's unsuccessful attempts to defraud his way into $300,000.00 of supplemental life insurance coverage, despite Unum informing Mr. Talasek that his request had been denied, and despite admitting that neither she nor her husband ever received any communication from Unum approving his supplemental life insurance coverage, Petitioner insists she is entitled to the $300,000.00. To support her position, she claims equitable estoppel, arguing that a payroll error by NOV "misrepresented" *Unum's approval* of her husband's EOI and should therefore estop *NOV* from refusing to pay supplemental life insurance benefits to which everyone agrees she was never entitled under the terms of the plan. (*See* Petition at 2-4.) However, the facts show that the payroll error was completely inadvertent, and nothing about the error changes the fact that the clear terms of the life insurance plan – which Mr. Talasek and Petitioner unquestionably knew about – were not satisfied.

More specifically, after Unum denied Mr. Talasek's application for supplemental life insurance in 2014, it communicated its decision to NOV. (R. 1014-16.) At that time, the benefits were coded as "suspended" for payroll purposes while Mr. Talasek's application was pending. (R. 1016.) Upon receiving notice the application was denied, NOV's Benefit Service center attempted to code this benefit to

"denied," but instead accidentally removed the "suspended" status without replacing it with a "denied" code. (*Id.*) This inadvertently started deductions from premiums from Mr. Talasek's paychecks for the supplemental life insurance benefit. (App. 14a.) This ministerial mistake also meant the supplemental life insurance would not show as suspended or denied on the annual Benefits Confirmation Statements mailed from NOV to Mr. Talasek. (*Id.*) However, despite her husband repeatedly calling *Unum* to check on its approval of his EOI, Petitioner admits neither she nor her late husband ever received any communication *from Unum* approving his application for supplemental life insurance benefits. (R. 1050.)

Armed with these facts, Petitioner set out to consummate Mr. Talasek's fraud. Petitioner first sued Unum in September 2018. (App. 15a.) Although Petitioner claims her "principal cause of action" was the instant ERISA equitable estoppel claim against NOV (*see* Petition at 7), she did not amend her complaint to make NOV a defendant until almost seven months after she initially filed suit. (*Id.*) In that Amended Complaint, Petitioner sought recovery under four different causes of action, including: (1) an ERISA § 502(a)(1)(B) denial of benefits claim, (2) an ERISA § 502(a)(3)(B) breach of fiduciary duty claim, (3) a negligence claim, and (4) a claim for equitable estoppel. (*Id.*) The fiduciary duty and negligence claims were disposed of by a Rule 12(b)(6) motion to dismiss. None of the remaining claims survived summary judgment. (App. 40a.) Petitioner abandoned the denial of benefits claim, as her Fifth Circuit briefing and this Petition only address equitable estoppel.

3. The District Court Granted Summary Judgment in NOV's Favor.

The United States District Court for the Southern District of Texas granted summary judgment in NOV's favor with respect to Petitioner's equitable estoppel claim.[1] (*See* App. 10a.) The Court held that Petitioner could not make out any of the three elements of equitable estoppel, which include: 1) a material misrepresentation, 2) reasonable reliance, and 3) extraordinary circumstances. (App. 33a-39a.) It was particularly troubled by Mr. Talasek "kn[owing] he had cancer before he submitted the signed and corrected Evidence of Insurability Form" yet "fail[ing] to give honest answers about his medical history." (R. 1761.) Mr. Talasek's lies made the alleged "reliance on NOV's representations particularly unreasonable." (R. 1761-62.)

4. The Fifth Circuit Affirmed Summary Judgment in NOV's Favor.

The United States Court of Appeals for the Fifth Circuit affirmed. (App. 7a-8a.) While the Fifth Circuit ruled that the district court erred by not making a specific finding on material misrepresentation, it found that error harmless because Petitioner could not have reasonably relied upon NOV's payroll deduction or benefit summaries because those representations were inconsistent with unambiguous terms of the life insurance plan documents available to the Talaseks. (*See* App. 7a-8a.) In short, because the plan's Summary of Benefits unambiguously stated there would be no

[1] The District Court did so by adopting a Memorandum and Recommendation entered by a United States Magistrate Judge. (App. 41a.)

supplemental life insurance until Unum to "approve[d] [Mr. Talasek's] [EOI] form for life insurance[,]" and because the Summary of Benefits also made clear that "[u]nder no circumstances will [NOV] be deemed an agent of Unum[,]" it was not reasonable for Mr. Talasek to rely upon the payroll deductions or benefits statements provided by NOV as evidence of coverage. (R. 1009-10.)

REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*

This Court has complete discretion to determine whether to grant a petition for *certiorari*. A petition will be granted only for compelling reasons. Those reasons are outlined in Supreme Court Rule 10. The only potential grounds for *certiorari* Petitioner provided is an assertion that the Fifth Circuit's decision is in conflict with another circuit court's decisions on an important matter. *See* Sup. Ct. R. 10(a). She also argues that the Fifth Circuit's decision was "wrong" because the Fifth Circuit improperly applied the doctrine of equitable estoppel. (*See* Petition at 26-33.) This is not, however, a persuasive reason for *certiorari* because "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule[.]" Sup. Ct. R. 10.

To support her claim of a circuit split, Petitioner relies on a convoluted analysis that conflates the procedural posture of the cases below to invent an elaborate 4-4-1-1-1 circuit split before urging to Court to adopt a position at odds with its own prior authority. Petitioner articulates a bright line rule she claims to exist that supposedly pits the First, Fifth, Ninth, and Eleventh Circuit Courts of Appeal against the Second,

Third, Fourth, and Eighth. (Petition at 11-12.) She contends the circuit courts disagree over the types of misrepresentation that can be used to support ERISA equitable estoppel claims, claiming that the First, Fifth, Ninth, and Eleventh Circuits categorically disallow estoppel claims if the alleged misrepresentations contradict a written ERISA plan, while the Second, Third, Fourth, and Eighth circuits tolerate estoppel claims even if the alleged misrepresentation contradicts plan terms. (Petition at 13-23.) Petitioner claims the Sixth, Seventh, and Tenth Circuits occupy middle grounds. (Petition at 23-25.) She then urges the Court to resolve the conflict by adopting a rule inconsistent with *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013), that would permit her equitable estoppel claim to succeed even though the representation on which she relied contradicts unambiguous written terms of the plan.

Looking beneath the veneer of legalese reveals Petitioner has done little more than overgeneralize decisions by ignoring key factual and procedural differences. Setting out a survey of such different cases arranged by their outcome alone does not mean there is a persistent split in the legal standards used by the circuit courts that must be resolved by this Court. By grasping at straws to generate this circuit split, Petitioner reveals the true motivation for her petition; dissatisfaction with the outcome of her case. She now seeks *certiorari* to have this Court approve attempted insurance fraud. Her petition should be denied.

I. UNDER *US AIRWAYS, INC. V. MCCUTCHEN*, EQUITY CANNOT BE USED TO OVERRIDE THE CLEAR TERMS OF AN ERISA-GOVERNED PLAN.

In *McCutchen*, this Court expressly rejected the very notion Petitioner urges this Court to adopt—that an equitable doctrine can override the clear terms of an ERISA-governed plan. *See* 569 U.S. at 91. ("We hold that neither of those equitable rules can override the clear terms of a plan."). There, McCutchen was a participant in his employer's health benefits plan, which contained written provisions permitting the plan to obtain reimbursement of medical expenses paid for injuries to McCutchen if McCutchen recovered money from the third-party that caused his injuries. *See id.*

McCutchen was injured in a car accident, and the plan paid his medical expenses. *See id.* at 92. He then sued the third-party that caused the accident and recovered accident-related damages. *See id.* Accounting for attorneys' fees, the settlement McCutchen ultimately obtained was less than the amount that the plan had paid for his medical bills. *See id.* When the plan demanded reimbursement in an amount that equaled the entire settlement, McCutchen raised equitable defenses, including unjust enrichment. *See id.* This Court, however, rejected those defenses, clearly stating that a plan participant "cannot rely on [equitable theories] to defeat [the plan administrator's] appeal to the plan's clear terms." *Id.* at 99; *see also id.* at 101 ("The plan, in short, is at the center of ERISA. And precluding McCutchen's equitable defenses from overriding plain contract terms helps it to remain there.").

While *McCutchen* dealt with equitable defenses to a claim for reimbursement under ERISA § 502(a)(3), the equitable principles annunciated are applicable where equitable estoppel is used as an affirmative claim. Despite the purported circuit split, even Petitioner acknowledges the courts below agree on the elements of such a claim which include: (1) a material misrepresentation, (2) reasonable and detrimental reliance, and (3) extraordinary circumstances. *See, e.g.*, *Veltri v. Bldg. Serv. 32b-J Pension Fund*, 393 F.3d 318, 326 (2d Cir. 2004); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005); *Bailey v. U.S. Enrichment Corp.*, 530 F. App'x 471, 476 (6th Cir. 2013). In the First, Fifth, Ninth, and Eleventh Circuits, the courts found that—consistent with *McCutchen*—equitable estoppel claims were not viable where an individual relied on a material misrepresentation that was contradicted by clear plan terms, holding specifically that such reliance was not reasonable. Far from articulating a bright-line rule, the courts below considered all relevant circumstances—including the unambiguous plan language—to make that determination.

A. The Fifth Circuit Does Not Apply a Bright Line Rule but Instead Applies Equitable Principles Consistent with *McCutchen*.

Contrary to Petitioner's view, the Fifth Circuit does not categorically refuse to permit equitable estoppel claims based on misrepresentations contradicting written plan terms. Instead, consistent with *McCutchen*, the court holds to the principle that "[a] party's reliance can *seldom, if ever,* be reasonable or justifiable if it is inconsistent with the clear and

unambiguous terms of plan documents available to or furnished to the party." *Talasek v. Nat'l Oilwell Varco*, L.P., 16 F.4th 164, 169 (5th Cir. 2021) (internal marks omitted) (emphasis added) (quoting *Nicholas v. Alcatel USA, Inc.*, 532 F.3d 364, 375 (5th Cir. 2008)). Thus, within the Fifth Circuit, that a representation contradicts the terms of the plan does not necessarily doom an equitable estoppel claim; the court must still consider whether reliance was reasonable given specific plan language and whether that language contains any ambiguity.

As such, the outcome in this case was not the unfair result of applying an unyielding standard (much less one that is unique to the First, Fifth, Ninth, and Eleventh Circuits). Instead, the court below applied settled legal principles—discussed at length in *McCutchen*—to the facts. Given the undisputed clear language in the plan—which required (1) Unum to approve Mr. Talasek's EOI form for coverage and (2) made clear that NOV's representations were not Unum's—the Fifth Circuit found it unreasonable for Petitioner to assume Mr. Talasek had supplemental life insurance coverage based on nothing more than NOV's benefit statements and payroll deductions, which are not representations of approved coverage from Unum. *See Talasek*, 16 F.4th at 169-70. The Fifth Circuit did not reject Petitioner's claim simply because the alleged misrepresentations contradicted the plan, but because the undisputed factual circumstances made it unreasonable to rely on the representations made.

B. The Ninth Circuit Does Not Apply a Bright Line Rule but Instead Applies Equitable Principles Consistent with *McCutchen*.

Like the Fifth Circuit, Ninth Circuit authority is not as rigid as Petitioner claims. While the language within the cited decisions is admittedly closer to the type of bright-line rule Petitioner claims to exist at the circuit level, reading the cases in full demonstrates that the Ninth Circuit, like its sister circuits, simply considers the totality of the factual circumstances—including the representations made, the terms of the plan, and the relative ambiguity of those plan terms—to decide whether the plaintiff claiming estoppel was reasonable in his reliance. *Compare Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 958-961 (9th Cir. 2014) (considering whether "the type of misinformation [Gabriel] received from the plan representatives, when considered in conjunction with the various provisions in the Plan, makes certain provisions in the Plan ambiguous to him" so as to render his reliance on those representations reasonable);[2] *see also Wong as Tr. of Anaplex Corp. Emp. Stock Ownership Plan v. Flynn-Kerper*, 999 F.3d 1205, 1213 n.9 (9th Cir. 2021) (internal marks omitted) (emphasis added) (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 404 (6th Cir. 1998) (*en banc*))[3] ("Estoppel requires reasonable or

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[2] In *Gabriel*, the Ninth Circuit cited Third Circuit authority to support its reasoning even though Petitioner claims these circuits advance opposing views on ERISA equitable estoppel. *See Gabriel*, 773 F.3d at 957 (citing *Kurz v. Phila Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996)).

[3] The Ninth Circuit's citation of Sixth Circuit authority again undermines Petitioner's argument that these Circuits belong to competing factions in a circuit split.

justifiable reliance . . . reliance can *seldom, if ever,* be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents[.]"). Examination of the applicable cases again shows that Petitioner's vision of a black-and-white circuit split is incorrect.

C. The Eleventh Circuit Does Not Apply a Bright Line Rule but Instead Applies Equitable Principles Consistent with *McCutchen*.

While Petitioner cherry-picks quotations from *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065 (11th Cir. 2004), to articulate a bright line rule concerning equitable estoppel in the Eleventh Circuit, reviewing the body of case law within that jurisdiction shows otherwise. Indeed, the case relied upon by *Jones* for its ruling, *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir. 1990), shows a claim for equitable estoppel under ERISA follows federal common law. *Id.* at 1286. And, in turn, those claims may have success if based upon a representation as to plan terms so ambiguous "reasonable persons could disagree as to their meaning and effect." *Id.* at 1285 & n.3. Accordingly, the law in the Eleventh Circuit is, like other circuits, premised upon determining whether the factual circumstances of a case render reliance reasonable.

That such reliance is frequently not reasonable where the representation directly contradicts unambiguous plan terms is hardly surprising. Indeed, in *Jones*, a plan initially granted life insurance coverage in retirement to certain employees. *Jones,* 370 F.3d at 1067. Although the written terms of the plan clearly stated the company had the right to modify the

terms of the plan at any time, the company represented it would not change this life insurance coverage. *See id.* at 1068. Plaintiffs sought to equitably estop the company from going back on its promise. *Id.* at 1068-69.

In affirming the district court's decision to grant summary judgment in favor of the company, the Eleventh Circuit reasoned equitable estoppel was inappropriate because reliance on the defendant's representations was unreasonable given the unambiguous provisions within the plan allowing amendment or termination at any time. *See id.* at 1071. This made it unreasonable for the plaintiffs to argue they reasonably relied on the representations as confirmation of a perpetual benefit, rendering their estoppel claim untenable. *See id.* Far from applying a bright-line rule, the *Jones* court used fact-intensive analysis to work equity, declining to estop the company from enforcing the unambiguous written plan terms.

D. The First Circuit Does Not Apply a Bright Line Rule but Instead Applies Equitable Principles Consistent with *McCutchen*.

Petitioner's claim that the First Circuit categorically limits the misrepresentations that can support an ERISA estoppel claim oversimplifies the circuit's position. In *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776 (1st Cir. 2014), the First Circuit explained that estoppel requires "reasonable reliance" on an alleged misrepresentation. *See* 774 F.3d at 782. The First Circuit continued to explain that within the context of ERISA, where plans are "established and maintained pursuant to a written instrument" it is "inherently unreasonable" to rely on oral statements

that are at odds with the unambiguous written terms of a plan. *See id.* at 782-83; *see also Livick v. The Gillette Co.*, 524 F.3d 24, 31 (1st Cir. 2008) (same).

Applying these general considerations to the facts of the case, the First Circuit concluded the plaintiff's reliance on his future employer's oral assertion that he would receive credit for seventeen years of prior service within the pension plan was unreasonable. While the plaintiff received periodic reports containing estimates of his pension benefits calculated from a start date consistent with the recruiter's promise, each such report contained a specific disclaimer that the estimate did not govern the final benefits calculation. *Guerra-Delgado*, 774 F.3d at 776. Affirming summary judgment for the employer, the First Circuit noted the plan language governing the calculations of years of service and years of credit was unambiguous, such that it was unreasonable for the plaintiff to rely on a recruiter's representations that conflicted with the clear plan language. *See id.* at 782-83 (further noting the disclaimer language associated with the informal pension plan calculations as evidence of unreasonableness). The *Guerra-Delgado* decision, therefore, was not a categorical rejection of estoppel claims based on representations that contradict written plan terms, but instead a decision holding that, under the undisputed facts established in that particular case, the plaintiff's reliance on representations that contradicted clear plan language was unreasonable.

E. Like the First, Fifth, Ninth, and Eleventh Circuits, the Third Circuit Evaluates Equitable Estoppel Through a Fact-Intensive Analysis of Whether Reliance on the Alleged Misrepresentation was Reasonable.

The only cases offered by Petitioner as evidence of dueling coalitions in a circuit split that are in the same procedural posture – summary judgment – as the instant case are from the Third Circuit. However, neither demonstrate a split that would lead Petitioner's case to a different outcome in another circuit. Instead, the cases have important distinguishable facts from the instant dispute that led the Third Circuit to find, based on facts presented, that there was a question of fact regarding the reasonableness of the plaintiffs' reliance on misrepresentations that contradicted plan terms.

First, in *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292 (3d Cir. 2008), the Third Circuit considered whether it was reasonable for a plaintiff to rely on a series of misrepresentations from his employer regarding his service date used for his pension payment following a merger. *See id.* at 297-98. Specifically, Pell first received a letter from the Director of Employee Compensation and Benefits indicating he would be credited with his original service date for purposes of his pension. *Id.* at 298. When a subsequent document showed a later date, he contacted a pre-retirement counselor, who explained the paper he received was wrong and that the company would use an earlier adjusted service date to calculate his pension. *See id.* Subsequent estimates of his

pension benefits continued to use the adjusted service date. *See id.* at 298-99.

In finding that Pell's reliance upon these representations was reasonable, the Third Circuit considered all relevant circumstances and emphasized that the representations—the letter from the Director of Compensation and Benefits and email from a pre-retirement counselor that resulted in changed benefit confirmation statements—all came from individuals with apparent authority to determine his relationship to the employee benefit plan. *See id.* at 301 ("We have determined that when an individual acts with apparent authority . . . the plan fiduciary can be responsible for the individual's material misstatements."). Accordingly, *Pell* is entirely consistent with the outcome in this case, which hinged in part on the fact—unlike in *Pell*—that the unambiguous terms of the plan informed participants that NOV had no authority to act as Unum's agent. *Compare Talasek*, 16 F.4th at 169 (emphasis added) ("The Summary of Benefits made clear that NOV's representations *were not Unum's*."). Thus, *Pell* is not evidence of a circuit split that would lead to inconsistent outcomes were this case heard in a different jurisdiction. It is instead evidence that, under different facts, the equitable decision can come out differently. Nothing about this outcome demonstrates a need for this Court's intervention.

The second decision, *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994), likewise does not demonstrate a circuit split or reasoning likely to lead to a different outcome for Petitioner. In *Curico*, the Third Circuit affirmed summary judgment on a plaintiff's claim for additional life insurance benefits

premised upon representations made by the employer. *See* 33 F.3d at 229, 236-38. In evaluating the reasonableness of relying on these representations, the Third Circuit found that, coupling the *ambiguous language* in the summary plan description with other information furnished to employees during open enrollment, "it was reasonable for [the plaintiff] to conclude that both life and AD&D insurance would continue to be made available in equal amounts" and awarded disputed benefits under an equitable estoppel theory. *See id.* at 236.[4]

This holding is in line with the authority from the First, Fifth, Ninth, and Eleventh Circuits, which have recognized a different outcome where plan language was *unambiguous*. Like the other circuit courts, the analysis in *Curcio* focused on whether the undisputed facts—including the nature of the misrepresentation, the identity of the individual making the misrepresentation, and the plan language—made the plaintiff's reliance reasonable. The situation was inherently different than the Talaseks', where the court found there was no ambiguity in the relevant plan language. (App. 7a-8a.) The *Curcio* Court finding language in the summary plan description ambiguous enough to make the plaintiff's reliance on potentially contrary statements made during a benefits presentation reasonable does

[4] The court also cited to authority from the Eleventh Circuit to support its conclusion, undermining Petitioner's claim that the Third and Eleventh Circuits are on different sides of a stark circuit split. *See Curcio*, 33 F.3d at 237 (citing *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985)).

not mandate an opposite result in the case below or evidence a circuit split.

II. THE AUTHORITY PETITIONER RELIES ON FROM THE SECOND, FOURTH, AND EIGHTH CIRCUITS DO NOT SUPPORT HER CLAIMS OF A CIRCUIT SPLIT.

A. The Cases Petitioner Sites are at the Pleading Stage.

The remaining cases cited by Petitioner to support her alleged circuit split are all distinguishable from the case below and the authority within the First, Third, Fifth, Ninth, and Eleventh Circuits because the cases deal with the pleading standard under the Federal Rules of Civil Procedure and not whether the undisputed facts show reasonable reliance. *Compare Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 99 (2d Cir. 2020) (reversing district court's dismissal of equitable estoppel claim for failure to state a claim for relief under Rule 12(b)(6)); *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 724 (8th Cir. 2014) (reversing district court's decision denying motion to amend complaint on basis of futility and finding that a § 502(a)(3) claim based on equitable estoppel can survive a Rule 12(b)(6) motion); *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176, 179 (4th Cir. 2012) (*en banc*) (reversing district court's decision on motion to dismiss that the plaintiff's remedies for her equitable estoppel claim were limited to the life insurance premiums wrongfully withheld).

That these courts found allegations of reasonable reliance plausible at the pleading stage even where the alleged misrepresentation arguably

contradicted plan language is not indicative of a circuit split concerning the reliance element of an ERISA estoppel claim at the merits stage. Indeed, every case discussed thus far in this opposition—including Talasek's own case and every case in the circuits on the other side of the supposed "split"—found the allegations made by the plaintiff were plausible such that the equitable estoppel claim alleged therein could survive the pleading stage and reach the merits. As such, none of these cases demonstrate the existence of a circuit split warranting the grant of *certiorari*.

B. The Remand Decisions in the Second, Fourth, and Eighth Circuits Dealt not with the Character of the Alleged Misrepresentation Made but with the Appropriate Available Remedies Following *CIGNA Corp. v. Amara.*[5]

Even more importantly, the thrust of the decisions cited by Petitioner remanding claims for further review was not that the specific facts alleged in each complaint could demonstrate reasonable reliance even where there were misrepresentations in direct contradiction of clear, unambiguous plan terms. To the contrary, each of the decisions addressed whether equitable estoppel could be used to pursue what essentially amounts to unpaid benefits under the cause of action for "other appropriate equitable relief" authorized by ERISA § 502(a)(3). *Compare Sullivan-Mestecky*, 961 F.3d at 99 (plaintiff arguing on appeal that the district court's classification of her claim for $679,000 in additional benefits under a life insurance policy as money damages instead of other equitable

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[5] *CIGNA Corp. v. Amara,* 563 U.S. 421 (2011).

relief under an estoppel theory violated *Amara*); *Silva*, 762 F.3d at 717, 720-25 (plaintiff arguing on appeal that *Amara* allowed his request for additional benefits under life insurance policy by way of an estoppel claim is "other appropriate equitable relief" under § 503(a)(3)); *McCravy*, 690 F.3d at 177–79 (granting petition for rehearing to reverse earlier decision specifically because *Amara* expanded the relief and remedies available to under § 503(a)(3) to include estoppel).

Thus, while these decisions were clear that a remedy might be available, none of them held, as Petitioner intimates, that a successful estoppel claim existed on the facts alleged. Indeed, the *Silva* court expressly cautioned against it, stating that "without resolving Silva's claim on the merits, we find that this alleged wrong can survive a Rule 12(b)(6) motion because relief could be granted under § 1132(a)(3)'s catchall provision using the traditional equitable estoppel theory discussed in *Amara*." *Silva,* 762 F.3d at 723.

It is thus disingenuous to even suggest these decisions stand for the proposition that reasonable reliance has been adequately pled where the alleged misrepresentation contradicts clear, unambiguous plan terms. Indeed, *Sullivan-Mestecky* notes that the plan terms at issue were "far from clear and unambiguous." 961. F.3d at 105. Instead, these cases stand for the proposition that, following *Amara*, equitable estoppel is "other equitable relief" potentially available under ERISA § 502(a)(3), and it was error to dismiss the complaints for seeking this remedy. As such, they provide no support for the supposed circuit split dreamt up by Petitioner.

C. Petitioner Omits Relevant Decisions on the Merits from the Fourth and Eighth Circuits Demonstrating These Circuits also Engage in Appropriate Fact-Specific Analysis to Determine whether Reliance was Reasonable without Resorting to a Bright-Line Rule.

In relying upon cases at the motion to dismiss stage from the Fourth, and Eighth Circuits, Petitioner ignores decisions from those same circuits decided at the summary judgment stage which undercut her alleged circuit split. For instance—much like the First, Fifth, Ninth, and Eleventh Circuits—the Fourth Circuit has held that estoppel principles cannot be used to modify clear plan provisions. *See Ret. Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 478-79, 484-85 (4th Cir. 2017); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992). Petitioner attempts to distinguish this from *McCrary* by drawing a nonsensical distinction between using estoppel to "alter the plan's terms" and using estoppel to recover "regardless of the plan's terms." (*See* Petition at 21, n.3 (positing that this is "no doubt" the reason that *DAK* did not even mention *McCrary*).) Such linguistic gymnastics are unnecessary, as the reason *Ret. Comm. of DAK Americas LLC* fails to mention *McCravy* is much simpler: it was decided on the merits at summary judgment, while *McCravy* was decided at the pleading stage and was not concerned with reasonable reliance but with the type of remedy available under ERISA. *Compare Ret. Comm. of DAK Americas LLC*, 867 F.3d at 478-79, 484-85 *with McCravy*, 690 F.3d at 177–79.

It is thus disingenuous for Petitioner to overlook this line of authority, which puts the Fourth Circuit in line with the First, Third, Fifth, Ninth, and Eleventh Circuits. For example, in *Coleman*, the plaintiff's late husband's former employer failed to pay premiums required for medical coverage, resulting in cancellation of her group health insurance. *See Coleman,* 969 F.2d at 56. Nevertheless, the plaintiff was told via telephone by the insurer that she had coverage. *See id.* at 56-57. In declining to award the plaintiff damages under an estoppel theory, the Fourth Circuit reasoned the "resort to federal common law generally is inappropriate when its application would . . . threaten to override the *explicit* terms of an established ERISA benefit plan." *Id.* at 59 (citations omitted) (emphasis added).[6] This holding—which is entirely consistent with other circuits' refusal to recognize reasonable reliance necessary for an estoppel claim where misrepresentations contradict unambiguous plan language—undermines Petitioner's argument that the Fourth Circuit is committed to entertaining estoppel claims even when alleged representations contradict clear plan provisions.

The Eighth Circuit likewise found, as a matter of law, that equitable estoppel claims cannot succeed where the alleged misrepresentation contradicts unambiguous written plan terms. *See Neumann v. AT&T Commc'ns, Inc.*, 376 F. 3d 773 (8th Cir. 2004). In *Neumann*, the plan unambiguously stated disability benefits would terminate after 52 weeks. *Id.* at 777.

[6] The *Coleman* decision cited to authority from the Fifth Circuit, though Petitioner claims these circuits adhere to opposing legal positions concerning ERISA equitable estoppel claims. *See, e.g.*, 969 F.2d at 59 (quoting *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989)).

After receiving a letter stating her benefits were ending, the plaintiff claimed both her manager and a representative at the benefits manager told her the termination provision did not apply. *See id.* at 784. In affirming summary judgment against the plaintiff, the Eighth Circuit found reliance on such statements was unreasonable as the plaintiff "may not use an estoppel theory to modify the unambiguous terms of an ERISA plan." *Id.* at 784. This case flatly contradicts Petitioner's characterization of the Eighth Circuit as having a bright-line rule permitting ERISA equitable estoppel claims where the alleged misrepresentation contradicts plan provisions.

III. LIKE THE FIRST, THIRD, FOURTH, FIFTH, EIGHTH, NINTH, AND ELEVENTH CIRCUITS, THE SIXTH, SEVENTH, AND TENTH CIRCUIT EVALUATE EQUITABLE ESTOPPEL THROUGH A FACT-INTENSIVE ANALYSIS OF WHETHER RELIANCE ON THE ALLEGED MISREPRESENTATION WAS REASONABLE.

Petitioner tries to bolster her incorrect assertion of an alleged circuit split by arguing that three circuit courts take "intermediate views." (*See* Petition at 23-25.) The cases offered in the Petition do not support this assertion.

A. The Seventh Circuit does not Apply a Different Test than the Other Circuit Courts.

Petitioner's imprecise articulation of the Seventh Circuit standard for ERISA equitable estoppel creates differences where none exist. In reality, the

Pearson v. Voith Paper Rolls, Inc., 656 F.3d 504 (7th Cir. 2011) decision applies the same standards as other circuits, noting the written plan document ordinarily governs ERISA plan administration, thus conduct by individuals implementing the plan may estop the employer from enforcing those terms only in extreme circumstances. *See id.* at 509 (7th Cir. 2011). The Seventh Circuit thus requires statements sufficient to estop enforcement of the plan terms as written be knowing and made in writing, and holds that mere negligent misrepresentations will not support a claim. *See id.* This principle aligns with estoppel cases decided in circuits on both sides of Petitioner's purported "circuit split": the Ninth Circuit and Third Circuits which both refuse to find the extreme circumstances necessary for an equitable estoppel award where the claim is based on an innocent mistake and instead require bad acts like "profit at the expense of . . . employees," "repeated misrepresentations," or "plaintiffs [that] are particularly vulnerable" for a misrepresentation to support an equitable estoppel claim. *Compare Gabriel*, 773 F.3d at 957 (citing *Kurz*, 96 F.3d at 1553). Thus, the Seventh's Circuit refusal to award equitable estoppel in the absence of knowing misrepresentations or based upon negligence does not render the Seventh Circuit an outlier.

Nor would the result of this case have been different had it arisen in the Seventh Circuit under *Pearson*. In that case, the plaintiff sought to recover additional pension benefits under an equitable estoppel theory after his employer provided him with a calculation of his retirement benefits during severance negotiations. *See Pearson,* at 506. This calculation correctly stated the amount that would be paid out in a lump sum election, but overstated the benefits

provided in the options that would permit payment over time. *Id.* at 506-07. Pearson was informed of the error less than two months later, when he returned his election form for payment over time and the company discovered the error. *See id.* at 507. Applying the equitable estoppel standard as articulated above, the Seventh Circuit found estoppel was not appropriate because there were no extreme circumstances as there was no evidence that would permit a reasonable person to find the misrepresentation had been intentional or that Pearson relied on that representation to his detriment. *See id.* at 509-11. In the case below, as in *Pearson*, the alleged misrepresentation resulted from an inadvertent mistake and no extreme circumstances are present, particularly given facts showing Petitioner's husband tried to secure benefits through fraud. The Seven Circuit's decision in *Pearson* affirming summary judgment in the employer's favor cannot justify granting *certiorari* in this case.

B. The Tenth Circuit does not Apply a Different Test than the other Circuit Courts.

Similarly, Petitioner's claim that the Tenth Circuit has some independent test for equitable estoppel misstates the law. Far from announcing a different standard, *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950 (10th Cir. 2011), states the Tenth Circuit has yet to recognize a claim for equitable estoppel under ERISA. *See id.* at 962. Instead, the Tenth Circuit noted—much like the Seventh, Third, and Ninth Circuits discussed above—that equitable estoppel requires extreme circumstances and left open the possibility for such a cause of action in "egregious cases, such as where the employer lied, engaged in

fraud, or intended to deceive the participants[.]" *Id.* This is not a novel legal standard; these principles are entirely consistent with the tests annunciated in other circuits, which consider all factors in making the fact-intensive decision as to whether an equitable remedy is appropriate.

Nor is the Tenth Circuit's application of these principles to the case before it indicative of a burgeoning circuit split requiring this Court's intervention. Preliminarily, this case is—like so many of the cases improperly relied upon by Petitioner—in a different procedural posture; it was decided on a motion to dismiss while this case is at summary judgment. *Compare Kerber*, 647 F3d. at 954. Nevertheless, nothing about requiring extreme circumstances to potentially justify an estoppel remedy under ERISA suggests this case would have come down differently if heard in the Tenth Circuit. Indeed, in *Kerber*, as in the case below, the court found the equitable estoppel claim had no merit because it was unreasonable for the plaintiffs to rely on representations when they contradicted unambiguous plan terms. *Compare Kerber*, 647 F.3d at 955-56, 962 (finding claim premised upon representation that retirees would obtain benefits could not support estoppel claim because the plan unambiguously permitted the employer to change the plan terms at any time). The decision therefore does not demonstrate any intermediate legal position requiring clarification from this Court.

C. The Sixth Circuit does not Apply a Different Test than the Other Circuit Courts.

Yet again, Petitioner's assertion that the Sixth Circuit applies a different "multi-factor" test for equitable estoppel unnecessarily formalizes the nature of a common law equitable estoppel claim and conflates the procedural posture of the allegedly conflicting authority to manufacture an issue for this Court's attention. In *Bloemker v. Laborers' Local 265 Pension Fund*, 605 F.3d 436 (6th Cir. 2010),[7] the Sixth Circuit considered whether the plaintiff had adequately alleged facts sufficient for his equitable estoppel claim to survive a motion to dismiss. *See id.* at 440-43. The Sixth Circuit found his allegations could survive, because he alleged he received a document certified by the plan administrator stating he was entitled to certain pension benefits, that the plan and plan administrator were aware of the true (lower) value of those benefits, they intended for him to rely upon the misrepresentation, he was not aware of the true facts, and he relied upon that misrepresentation to his detriment. *See id.* at 442-43. However, the Sixth Circuit acknowledged that it, like the other circuits discussed above, applies a general principle that estoppel "cannot be applied to vary the terms of unambiguous plan documents." *Id.* at 443 (citing *Sprague*, 133 F.3d at 404).

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[7] Notably, in discussing ERISA equitable estoppel, the *Bloemker* court groups the Second, Third, Fifth, and Ninth Circuits together in discussing the potential applicable law. *Bloemker*, 605 F.3d at 441-42. This grouping flies in the face of Petitioner's supposed "circuit split."

Bloemker was decided under a different legal standard. Accordingly, it does not, as Petitioner asserts, follow that Talasek's claim would have "at least been able to get past summary judgment" under the *Bloemker* test. (Petition at p. 25) The *pleading standard* applied in *Bloemker* says nothing about what would happen when a decision is made upon review of the available substantive evidence. And, in any event, the facts here are materially distinguishable from the alleged facts of *Bloemker*, as it is undisputed the Talaseks understood the plan terms but "contend[] that it was reasonable to rely on NOV's representations *rather than* the unambiguous group policy language." *Talasek*, 16 F.4th at 170 (citation omitted). As there are no extenuating circumstances like alleged intent to mislead the plaintiff and concealed facts to render reliance on the misrepresentations reasonable, the case below is distinguishable from the Sixth Circuit authority cited by Petitioner and no different result would occur there.

IV. THE OUTCOME OF THE CASE BELOW DOES NOT WARRANT THE GRANT OF *CERTIORARI*.

A. Dissatisfaction with the Outcome Below is Not a Reason to Grant *Certiorari*.

In addition to incorrectly asserting that there is a circuit split regarding the handling of ERISA estoppel claims, Petitioner also argues this Court should grant *certiorari* because "[t]he decision below is wrong." (Petition at 26.) However, dissatisfaction about the outcome of litigation is not one of the "compelling reasons" listed in this Court's Rule on the Considerations Governing Review on *Certiorari*. *See*

Sup. Ct. R. 10. Accordingly, it cannot justify granting her petition.

Nevertheless, Petitioner insists this Court's involvement is necessary because the Fifth Circuit incorrectly applied the doctrine of equitable estoppel to her claim. (Petition at 32) ("In short, the Fifth Circuit . . . misunderstands equitable estoppel."). She advances this argument even though this Court has made clear that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or *the misapplication of a properly stated rule of law*." Sup. Ct. R. 10 (emphasis added). This argument cannot justify *certiorari*.

B. The Fifth Circuit's Decision Is Not Wrong.

Moreover, petitioner's argument that the Fifth Circuit's decision misapplied the law is wrong.[8] Most importantly, as discussed above, the Fifth Circuit's decision was not the product of a bright-line rule that misrepresentations contradicting written plan terms can never support a claim for equitable estoppel under ERISA. As the Fifth Circuit did not apply the law as outlined by Petitioner, whether such an application of the law would misapply the principles of equity is not a question presented by the case below, and cannot justify *certiorari* in this case.

Nevertheless, even if the Fifth Circuit's decision could be read to adopt such an inflexible, rigid rule, the decision is, as discussed above, entirely consistent with the equitable principles announced by in *McCutchen*.

[8] Petitioner does not identify any erroneous factual findings as the basis for her claim the decision below was wrong.

The flurry of treatises cited by Petitioner do not demonstrate otherwise. (*Compare* Petition a 28-32.) Those treatises do little more than provide a very general presentation of the concepts behind equitable estoppel, setting out hypothetical situations like "A makes a representation of material fact to B, and B reasonably relies to his detriment on A's representation[.]" (Petition at 28.) Such general statements of the principle of estoppel do not demonstrate error below.

While Petitioner also claims this dispute is one of the "classic fact patterns giving rise to equitable estoppel[,]" and compares it to an instance where "A party asks an insurance agent if a particular matter is covered by a certain kind of insurance policy. Although the written policy does not cover that matter, the agent responds: 'We've got you covered'" (Petition at 31 (quoting George Bliss, *The Law of Life Insurance* 420 (1892))), this hypothetical is irrelevant. First, the hypothetical does not represent a situation where the purported misrepresentation contradicts unambiguous plan terms the participant admittedly knew about. (*See id.*) Instead, it represents a situation where a representation is made against *silence* of the insurance policy. Such silence could be considered as an ambiguity rendering reliance reasonable. No such circumstances exist here, where the representations relied upon were directly contradicted by clear plan language stating the coverage decision could only be made by Unum and that NOV was not Unum's agent.

Second, the hypothetical represents a situation where the misrepresentation is made by an "agent" of an insurance provider to an individual seeking insurance. (Petition at 31.) Much like the Third Circuit

authority discussed above, the statement in the hypothetical is made by someone with apparent authority. *Compare Pell*, 539 F.3d at 301. In this case, Petitioner sought to establish insurance coverage by pointing to representations made by NOV—which indisputably had no authority to speak on behalf of the insurance provider (Unum). (*See* App. 8a.). Petitioner therefore cannot demonstrate the outcome of this case is wrong by comparison to the hypothetical cited from *The Law of Life Insurance*.

Finally, Petitioner's reliance upon the "traditional principles of equity" to question the Fifth Circuit's decision overlooks the most basic equitable maxim that "he who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945) (internal marks omitted). This principle "closes the doors of a court of equity to one tainted with inequitableness or bad faith . . . however improper may have been the behavior of the defendant." *Id.*

Petitioner and Mr. Talasek shattered this foundational principle of equity by attempting to obtain supplemental life insurance benefits through fraud. Mr. Talasek had serious concerns about his health when he applied for supplemental life insurance coverage. (*See* R. 1012-1014.) He was told he could have cancer by a specialist the same day he submitted his first EOI form. (*Id.*) He completed that form by answering "No" to a question about seeking treatment for gastro-intestinal medical issues when the answer was clearly "Yes" – an action even Petitioner admits was a lie. (*See* R. 1062.) He was then diagnosed with pancreatic cancer and began chemotherapy while his application was pending, but once again submitted an

EOI form without disclosing this. (*See* R. 1012-14.) Unum only discovered his illness after screening blood and urine samples. (R. 1015.) And, although a rejection letter was mailed to the address he had received all other correspondence from Unum, the Talasek's conveniently claim this letter was never received. (R.1015-1016).

In short, Petitioner and her husband misrepresented his health status on a life insurance application form in attempted insurance fraud. And, when they no doubt feared the scheme had failed because Mr. Talasek was required to attend a paramedical exam and provide samples that would reveal his stage four pancreatic cancer, NOV's administrative payroll error threw them a lifeline. Preferring ignorance over rejection, they stopped following up with Unum as to the status of Mr. Talasek's coverage and (at worst) ignored Unum's rejection letter or (at best) turned a blind eye when they never received any coverage letter from Unum approving Mr. Talasek's application as required by the plan for any coverage to be effective. (*See* R.1012-1015.) These actions are so brazen they read less like an insurance application and more like the plot of *Breaking Bad*—a man justifying illegal activities under the illusion of benefiting his family after his death only to be discovered when his lies become too complex to conceal. Petitioner's invocation of general principles of equity rings hollow because equity cannot be sought by a party with unclean hands. Insurance fraud is the cornerstone of Petitioner's case. The principles of equity therefore would not save Petitioner's case.

CONCLUSION

For the reasons set forth herein, NOV respectfully requests that the Petition for a Writ of *Certiorari* to review the decision of the Fifth Circuit Court of Appeals be denied in its entirety.

Dated: April 18, 2022.

Respectfully submitted,

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