No. 17-1478

In the Supreme Court of The United States

SUSAN RENE JONES,
Petitioner,
v.
MERCK SHARP & DOHME CORP.; MSD MEDICAL, DENTAL AND LONG TERM DISABILITY PLAN FOR NON UNION EMPLOYEES; AND LIFE INSURANCE COMPANY OF NORTH AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents[1] Merck Sharp & Dohme Corp. ("MSD" hereafter); MSD Medical, Dental and Long Term Disability Plan for Non Union Employees ("Plan" hereafter); and Life Insurance Company of North America ("LINA" hereafter) reject Petitioner's statement of the factual and legal questions assertedly presented by her Petition. More specifically, Respondents reject the proposition that if a writ were to issue, the Court would be called upon to address allegedly inconsistent disability determinations, or allegedly inconsistent plan interpretations. The questions actually presented for potential merits briefing by the Petition are:

1. Where the plan documents consistently granted discretion to the Plan's administrator and claims administrators regarding plan interpretation and benefit determinations, did the lower courts err in reviewing for abuse of discretion?
2. Where disputed claim determinations were based upon reasonable plan interpretations that gave effect to all relevant plan provisions, did the lower courts err in rejecting Petitioner's

[1] These entities are the only Respondents, because they are the prevailing parties on the judgment from which Petitioner appealed, and they were the only appellees in the Ninth Circuit appeal to which the Petition is addressed. Petitioner's listing of former names for the Plan entity as though such are separate respondents is puzzling (*see* Appendix to Petition ["App."], p. 7 at n.2, Ninth Circuit opinion detailing the evolution of the Plan name), but not relevant.

arguments for evading those plan provisions?

3. Did the lower courts err in rejecting Petitioner's attempt to eviscerate the holdings of *Cigna v. Amara* and *Conkright v. Frommert* by "interpreting" the Court's opinions to mean the opposite of what they say?
4. Should this Court entertain Petitioner's proposed arguments about allegedly conflicting lines of authorities when such authorities, even if conflicting, are not relevant to the merits decided by the lower courts?
5. Should this Court fashion new ERISA penalty liabilities which neither Congress nor the Secretary of Labor has seen fit to create?

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JURISDICTION

Respondents agree with Petitioner's statement of this Court's jurisdiction.

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STATUTES AND REGULATIONS

ERISA 502(c)(1) provides that an administrator may be liable for penalties when it "fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant . . . ."

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STATEMENT

Introduction. The factual and legal points underpinning the lower courts' decisions and orders, to the extent challenged in the Petition, are straightforward ones. As such, they were easily resolved by the courts below and do not require further consideration by this Court.

The Petition revolves around Petitioner's continuing attempts to avoid a plainly worded provision of an ERISA-regulated employee benefit plan under which all Social Security benefits, including benefits for a disability, are offset from plan benefits. Petitioner has argued unsuccessfully in the lower courts for eight years that this provision does not apply to her, relying on convoluted parsing of plan language. She now hopes that this Court will undo all of the work of the lower courts and give her a windfall that is contrary to the terms of her plan and is unavailable to other similarly situated plan participants.

The lower courts found, as discussed in the opinions contained in the Appendix to the Petition, that Petitioner Susan Jones is a former employee of a predecessor of Respondent Merck Sharp & Dohme Corp. ("MSD" hereafter) who participated in her employer's welfare benefit plans. She became disabled in June of 2001 and applied for long term disability ("LTD") benefits under the Plan, an ERISA-regulated and self-funded employee welfare benefit plan[2] sponsored and administered by MSD.[3]

The proceedings below. In the lower courts, as relevant here, Petitioner's contention was that the Plan's SSDI offset provision did not apply to her family SSDI benefits, notwithstanding that the Plan has always required that all Social Security benefits (including both primary and family SSDI), be offset from otherwise payable Plan benefits. Over many years of litigation (and also during remand administrative proceedings before the Plan) Petitioner offered a panoply of legal and factual theories to support her contention that her Plan benefits could not be reduced to account for receipt of family SSDI benefits, even though those benefits were awarded to Petitioner because of her disability.

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[2] Respondent MSD Medical, Dental and Long Term Disability Plan for Non Union Employees is the current iteration of this plan, the history of which is traced in the opinions and orders set forth in the Appendix to the Petition.

[3] Respondents collectively refer throughout this discussion to the Plan and the MSD-related corporate entities with the names by which they now are known, to avoid the unnecessary confusion that is generated by Petitioner's references to predecessor entities.

The lower courts meticulously analyzed and carefully considered Petitioner's arguments, rejecting each of them based upon the clear Plan language and the relevant law.

Petitioner now would have this Court put on blinders, ignore the long history of ERISA jurisprudence, defy common sense and the plain language of the Plan document, and engage in linguistic contortions that the law does not allow. This Court, however, should resist that invitation and should decline issue a writ.

As relevant to the Petition, the record shows that the lower courts correctly resolved the case on narrow bases which disposed of all claims:

- They determined that the Plan's fiduciaries properly rejected Petitioner's attempts to dispute calculations that were mandated by the Plan documents under which both primary and family Social Security disability benefits paid on account of Petitioner's disability must be offset from gross Plan benefits when Petitioner received them, and refused to allow Petitioner to place herself in a more favorable position than that of other Plan participants whose benefits were offset when they received family SSDI benefits;[4] and

[4] Petitioner contends that family SSDI benefits can be offset only as to dependents who were born prior to the onset of disability. As the District Court pointed out during oral arguments, however, Petitioner's approach would result in substantially disparate treatment of otherwise identically

- They determined that the evidence did not show that MSD, the Plan's administrator, had failed to timely provide documents of a type that it was required by ERISA section 502(c) to provide, such as to support a claim for penalties.

What the Petition does *not* involve. Petitioner asserts in her "Questions Presented" and recitation of alleged facts that if the Petition is granted and a writ is issued, her merits appeal will address such matters as alleged "inconsistent disability determinations" and various supposed improprieties that she contends occurred at the Plan level. However, there is no procedural basis for this Court to take up such matters, which are conspicuously absent from the orders and opinions appended to the Petition. This is so because neither the District Court nor the Ninth Circuit Court of Appeals had occasion to adjudicate an issue regarding the termination of Plan benefits in 2007, given that the termination was reversed voluntarily by Metropolitan Life Insurance Company ("MetLife"), then the Plan's claims administrator in

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situated Plan participants – those who had children prior to onset of disability would have Plan benefits offset by the full family SSDI benefits, while those who had a child before and a child after the onset of disability would have some – but not all – of the family SSDI benefits offset. Still others, such as Petitioner, would have none of their family SSDI benefits offset from Plan benefits. Such unequal treatment, creating windfalls in varying amounts for some Plan participants but none for others – depending on the happenstance of whether a child was born before or after the parent's disability – is contrary to logic, as well as the terms of the Plan.

2009. The matter did not go to judgment in the first instance until mid-2010 and since no such issues then were part of the case, the lower courts did not address them. (*See*, *e.g.*, Appendix to Petition at 49.)

The Petition also is off the mark in its lengthy discussions of ERISA 502(a)(3) relief. Petitioner's pleadings made no such claim, nor did she raise any such issue in the District Court. She proceeded only on theories that her Plan benefits were underpaid, and sought additional benefits.

What the Petition *does* involve. When MetLife reinstated Petitioner's claim, it calculated her accrued and unpaid Plan benefits. In August of 2009, around the time of the reinstatement, Petitioner for the first time applied for family SSDI on the basis of two dependents who were born after she became disabled. Her claim for family SSDI was granted but she received retroactive payments going back only 12 months from her belated application.

MetLife offset the retroactive family SSDI benefits Petitioner received,[5] which somewhat reduce the accrued Plan benefits for the same period, and also recalculated the ongoing stream of payments to take account of the future payment stream Petitioner would be receiving. The Petition seeks permission to file a merits brief in which

[5] Petitioner has claimed from time to time, and says in the Petition, that she was told that she must repay the Plan for family SSDI that she could have received if she had applied for it earlier. That is untrue – notwithstanding Plan language authorizing a claims administrator to take offsets of benefits for which a participant could apply but does not, no offset was taken except as to the family SSDI benefits actually received, nor was Petitioner ever told that such an offset would be taken.

Petitioner proposes to address the issue of whether the Plan's SSDI offset provision was properly applied to the calculation of her LTD benefits from 2009 forward.

The Petition also seeks to have this Court create new law by rewriting ERISA section 502(c)(1)(b) so as to impose penalties on plan administrators with regard to matters not covered by an applicable statute.

The relevant facts and the evidence below. Notwithstanding Petitioner's opaque arguments, this is a fairly simple case which turns on clear factual and legal principles. In summary, she stopped working in 2001 and made a claim to the Plan for LTD benefits. Her claim was approved on December 13, 2001, and Plan benefits took effect on December 19, 2001.

After Petitioner's Plan benefits took effect, she made a claim for primary SSDI benefits, which was approved. Her primary SSDI benefits were offset from her gross Plan benefits, as was required by the terms of the Plan. Petitioner does not dispute the propriety of the offset of her primary SSDI benefits, although she had neither applied for nor received them until after she began receiving Plan benefits.

About two years after Petitioner began receiving Plan benefits, and after she applied for SSDI benefits for herself, she had two children. She did not make a claim for family SSDI benefits (payable when an SSDI beneficiary has minor children) until the mid-2009. Her late claim for family SSDI was approved by the Social Security Administration, which designated Petitioner as the

recipient of such benefits. Retroactive family SSDI benefits were limited to the 12 months prior to her late application.

As required by the Plan's provisions requiring offset of both primary and family SSDI benefits, the Plan benefit was recalculated to offset the 12-month retroactive family SSDI payment, as well as the ongoing payment stream for her reinstated claim.[6] Petitioner appealed to the Plan's claims administrator (then MetLife) regarding the propriety of the calculation. Her appeals were made on various and shifting bases,[7] primarily arguing that the offset provision never applied to her claim as to family SSDI since her children were born after onset of her disability.

Petitioner placed primary reliance below on ambiguous summary plan description ("SPD") language that she contends ties the SSDI offset to the date of eligibility for Plan benefits, importing into the SPD a term and concept not found in the actual Plan language.[8] The SPD at all relevant times

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[6] Because family SSDI is paid with respect to minor children, payments will end when Petitioner's children reach majority; at that time, the offset under the Plan likewise will end.

[7] Petitioner says that this Court's intervention is warranted to address what she calls shifting or conflicting rationales for the application of the SSDI offset. As the lower courts observed when she made such arguments there, however, the claims administrators did not change the reasons for their decisions, but merely responded to the changing factual and legal arguments Petitioner had raised at various times.

[8] The Plan document at all times required offset of "Social Security Benefits [including both primary and family SSDI

provided, however, that in the event of a conflict with the Plan documents, the Plan documents would control. Additionally, the Plan document at all relevant times broadly conferred discretionary authority on the Plan's administrator, MSD, and on the Plan's successive claims administrators.[9]

The Plan's claims administrators (first MetLife, and then LINA) analyzed and rejected Petitioner's many appeals, explaining in multiple letters the reasons for their conclusions but always coming back to the same essential point: the Plan document requires offset of family SSDI benefits, no matter when they are sought and received, and

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benefits], effective at the time the Participant becomes entitled to benefits . . . ." The SPD, however, stated that Social Security Benefits "that you and your eligible dependents are entitled to receive when you become eligible for LTD benefits" are an offset. Petitioner's arguments, therefore, are that (1) the SPD precluded offset of any SSDI which she was not yet "entitled to receive" when she became eligible for Plan benefits, (2) there could be no "entitlement" to receive any SSDI before an application was made for it (which, in the case of her family SSDI, could not have occurred until after the births of her children), and (3) the family SSDI benefits were not "hers" but "her children's."

[9] Section 8.2 (District Court ECF 265-5, p. 257 of 266) of the 1991 Plan states, "The Claims Administrator shall make all determinations as to the right of any person to a benefit under the Plan *and shall have the discretion to construe the terms of the Plan as necessary in order to make such determination*." (Emphasis added.) The 1991 Plan document, which was in effect through 2010, the year in which the offset determination was made, defines the term "Claims Administrator" as not only the then-current claims administrator (named in the document), but additionally all successor claims administrators. *See id.*, at p. 233 of 266.

regardless of whether the participant's dependent born was before or after the onset of disability.

These Plan-level adjudications of the issues were upheld in the lower courts as proper exercises of the claims administrators' discretionary authority, for the simple reason that the Plan document at all times had required the offset of a participant's family SSDI benefits at the point when the participant becomes eligible to receive such benefits.

The lower courts analyzed and rejected Petitioner's argument that her family SSDI benefit cannot be offset, as required by the Plan. Her theories that, because her children were born after she began receiving LTD benefits and/or because family SSDI benefits were not "hers," were both rejected by all of the courts below that have rendered opinions in this case, based on the Plan's terms. Petitioner's arguments all center on her assertion that the Plan language, which requires offset of "Social Security Benefits, effective at the time the Participant becomes entitled to benefits," should be read as though it actually provided that the offset applies to "only those Social Security Benefits which already are effective at the time the Participant becomes entitled to LTD benefits." That is not what the Plan says.

Rather, as the lower courts found, the most natural reading of the provision is that "entitled to benefits" refers to "Social Security Benefits," the phrase that immediately precedes it – which is a defined term under the Plan and explicitly includes both primary and family disability benefits without regard to whether SSDI family benefits are the

property of the participant or of the dependent. Both of the Plan's claims administrators came to the same conclusion in construing the offset provision: the offset applies at the point when the participant receives family SSDI benefits, regardless of whether the participant's dependent was born before or after onset of the participant's disability and eligibility for Plan benefits. The lower courts gave effect to the Plan's grant of discretion to its claims administrators, and found that their discretionary interpretation of Plan language was reasonable on the facts, and therefore was not an abuse of discretion.

Petitioner's reliance on ambiguous SPD language which she argues should be construed as temporally restricting the offset to only those Social Security benefits which the participant already was entitled to receive "when" she first became entitled to Plan benefits is, as the lower courts found, misplaced. First, nothing in the SPD language suggests that it is intended to limit the offset in the manner Petitioner suggests. (*See* District Court ECF 265-5, p. 42 of 266 [1999 SPD, in effect in 2001].) Second, the SPDs for the relevant period always provided that in the event of a conflict with the Plan documents, the Plan documents would be controlling. (*See*, *e.g.*, District Court ECF 265-5, p. 19 of 266 [1999 SPD, in effect in 2001].)[10]

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[10] As this Court subsequently held in *Cigna Corp. v. Amara*, 563 U.S. 421, 131 S. Ct. 1866 (2011), where there is both a plan document and an SPD, the SPD cannot be enforced as a "plan document" and its provisions cannot change those of the actual plan document. So it is here. As a matter of contract principles (the SPD provides that if it conflicts with the plan document,

More fundamentally, Petitioner's proposed rewriting of the offset provision is precluded by the general rule that all parts of an ERISA plan must be given effect. It is impermissible under ERISA to interpret one part of a plan document such that other parts are made meaningless. *See*, *e.g.*, *O'Shea v. First Manhattan Co. Thrift Plan & Trust*, 55 F.3d 109, 112 (2d Cir. 1995). Petitioner's arguments would render the Plan's Social Security offset meaningless as to a certain group of participants, including herself. That is an impermissible result, and requires rejection of her arguments.

Penalty claims. Petitioner sought statutory penalties for MSD's alleged failure to comply with the requirements of ERISA section 502(c)(3)(b), which imposes potential penalties on a plan administrator "who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary. . . " on written request. Her petition contends that the lower courts improperly declined to consider penalties against MSD for what she claims was failure to provide claim documents to her.

Petitioner is wrong on multiple levels. Initially, the asserted source of the alleged obligation

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the plan document will control), and as a matter of ERISA jurisprudence exemplified by *Amara*, the result sought by Petitioner is precluded. Petitioner tries to avoid *Amara* by claiming that *Amara* permits an SPD to control over the conflicting Plan language so long as it is called an "interpretation" or "explanation" of the actual Plan language – but that intellectually dishonest analysis is forbidden by *Amara*.

to provide claim documents on pain of penalties under section 502(c)(3)(b) is said to be 29 C.F.R. 2560.503-1. That Regulation is not supportive of Petitioner's argument, for multiple reasons.

First, the Regulation is not part of "this title." Rather, it was promulgated by the Secretary pursuant to Congress' authorization in ERISA section 503, which directs "employee benefit plans" (not "plan administrators") to establish and follow claim procedures, including providing a full and fair review of denied claims. Moreover, the specific Regulation cited by Petitioner could not apply, by its terms – it applies to benefit plans, not to administrators. Further, it applies only to claims filed on or after January 1, 2002, whereas Petitioner's claim was filed in 2001.

Second, as a factual matter, the record establishes that Petitioner had received multiple copies of her claim file over a period of years in a variety of ways, in addition to receiving multiple copies of the types of documents covered by section 502(c)(3)(b).[11] Her argument that the lower courts

[11] The record below details the extensive communications between Petitioner's counsel and MSD, and the hundreds of pages of documents provided by MSD in response. *See* District Court ECF 354, and *cf.* ECF 345-1 and exhibits thereto. In addition to the documents that District Court ECF 345-1 shows were provided to her on request, a full set of Plan documents is in the District Court's record (District Court ECF 265), and the filed administrative record (District Court ECF 35 and 278) also includes Plan documents. Moreover, although claim-related documents are not subject to section 502(c)(3)(b), the record confirms that Petitioner received such materials many times, both formally in the litigation and informally from the successive claims administrators (see District Court ECF 278-1

should have interpreted the statute to make it applicable to claim materials is moot – she received them. Petitioner apparently contends that she was required to be provided with additional copies of the documents, on pain of penalties, as often as she demanded them. She is wrong – no one was required to provide her multiple copies of documents and records she indisputably had received already, much less does the statute impose penalties on MSD for alleged failure to do so.

Third, and perhaps most important, Petitioner's argument regarding penalties is an unfounded and improper attempt to have this Court create and impose new liabilities and penalties in place of the statutory framework previously established by Congress. She cites no authority for this proposed intrusion on the legislative and regulatory functions of Congress and the Secretary, respectively – because there is none.

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REASONS FOR DENYING THE WRIT

The Petition puts forward a vaguely described set of dubious legal propositions that are said to require this Court's assistance. Respondents disagree.

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at AR 1483 and 1551, ECF 278-14 at AR 2741, and ECF 278-16 at AR 3006, 3191). These facts entirely negate Petitioner's (inaccurate) diatribe regarding an alleged failure to provide documents (Petition, pp. 20-21), and particularly with regard to the alleged failure to provide evidence of the Plan's grant of discretion to its claims administrators – as is discussed above, that particular term has been part of the Plan document itself since at least 1991.

First, Petitioner posits that *Amara*, *supra*, and *Conkright v. Frommert*, 559 U.S. 506; 130 S. Ct. 1640 (2010), each have generated conflicting lines of case law which require intervention by this Court. Little of the Petition actually supports that proposition,[12] since much of the cited case law predates, and thus was implicitly overruled by, this Court's decisions in *Conkright* and *Amara*.

Petitioner argues that under *Amara*, which held that an SPD could not vary or change a conflicting plan document, that same SPD constitutes "the best evidence" of the meaning of ambiguous plan provisions.[13] (Petition, p. 16.) As such, Petitioner argues, the very SPD that *Amara* says cannot change or control over a conflicting plan document should be adopted by a reviewing court as its guide for deciding whether a plan interpretation was "reasonable" within the meaning of *Conkright*. (Petition, p. 17.)

Much of Petitioner's argument for issuance of a writ is a thinly disguised suggestion that this Court should walk back its *Amara* and *Conkright* decisions, a proposition for which she offers an imaginative parade of horribles that is said to have

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[12] For instance, at several points the Petition consists of vague and uninformative polemics decrying "lines of cases in some Circuits" and "[o]ther Circuits," leaving the reader to try to guess whether there is a serious basis for the argument. (*See*, *e.g.*, Petition, p. 17.)

[13] Here, of course, the relevant Plan document provisions were very clear, meaning that even under Petitioner's approach there was no basis for an attempt to evade the *Amara* rule in the guise of interpreting or explaining the meaning of the Plan.

followed in their wake. For example, she asserts that allegedly:

> some Circuits apply *Conkright*'s 'reasonable' deference ruling in a manner approaching irrebuttable administrator correctness. . . . The only explanation is [that] the [interpretation] the administrator chose gave the result it wanted and expected it to be given deference. Making an interpretation because deference allows it rather than by reasoned application of plan language is by definition an abuse of discretion.

(Petition, pp. 17-18.) She goes on, still without citation, "Post *Conkright* Courts tend to grant deference indefinitely. . . . Undefined reasonableness and indefinite limits on deferential review encourages plan administrators to offer alternative interpretation rationales during the administrative process and litigation[14] and to look for plan amendments to be applied later in the litigation." (Petition, pp. 19-20.)

At bottom, Petitioner's criticism of *Conkright* is that it requires that reviewing courts uphold a benefit plan fiduciary's "reasonable" decision, but does not attempt to draw bright line standards to be

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[14] Petitioner's point is not clear, but she seems to be referring to the fact that the recalculation of her benefits occurred during the time that the litigation was pending – because that is when she first began receiving her family SSDI benefits – and that when she then raised the alleged impropriety of that recalculation to the District Court, she was directed to follow the Plan's administrative remedies because the issue was not ripe for litigation.

used as a yardstick of "reasonableness." (*See* Petition, p. 22.) The way to fix the perceived problem, Petitioner seems to suggest, is to revert back to earlier case law that found an abuse of discretion if new or different reasons were offered in support of a fiduciary's decision.[15]

According to Petitioner, this Court should grant the writ in order to define "reasonableness" under *Conkright*. The problem, says Petitioner, is that cases in some Circuits "find[] plan interpretations reasonable if they are consistent with the 'plain meaning' of the plan, but provide[] no standard to determine whether interpretations accord with the plain meaning or are reasonable." (Petition, p. 24.) It is unclear why Petitioner finds it alarming that a plan interpretation that is consistent with the "plain meaning" of the plan would be deemed reasonable. Indeed, given the clarity of the offset provision of the1991 Plan document, there was no need for the lower courts in this case to resort to esoteric rules of interpretation – they applied the Plan document as written, and upheld the claims administrators' decisions.

Taken together, the cases cited by Petitioner can be fairly characterized as requiring that plain language in a plan document be honored, and that ambiguous language be given the interpretation

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[15] This argument appears to tie into Petitioner's contentions that minor differences in language used by the claims administrators in responding to her shifting arguments were "inconsistent rationales" that should have negated the discretion conferred on them by the Plan. As the lower courts found, however, there were no material inconsistencies in the positions taken by the claims administrators.

supplied by the plan's fiduciaries so long as that interpretation is reasonable. Those propositions are consistent with *Conkright* and *Amara*, and require no revision by this Court.

Indeed, the concept of "reasonableness" is so fact-specific that it is unlikely that any one-size-fits-all standard could be devised, even if this case presented a need for it – which it does not. In short, there is nothing about this case that makes the issuance of a writ desirable, much less necessary. The lower courts' decisions do not turn on, *e.g.*, a definition of what is "reasonable" under ERISA jurisprudence. Rather, they turn on the fact that the Plan's claims administrators applied the Plan as written – that is, they were "reasonable" regardless of how Petitioner would parse that term.

The Plan by its very terms precluded Petitioner's arguments. It does not say that the offset provision applies only if family SSDI was already is effective when LTD became effective. (District Court ECF 265-5, p. 22 of 266.) Petitioner relies on the incorrect explanation in the SPD but, as she was forced to admit below, "SPDs cannot rewrite plans. . . . The plan controls." (District Court ECF 343, 1:17, 21-22.) That is, in fact, the law, notwithstanding Petitioner's efforts to explain it away through "interpretation." (Petition, pp. 33-34.) The lower courts correctly applied the law, and there is no reason for this Court to involve itself in the dispute via a writ.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

May 29, 2018 Respectfully submitted,

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