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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Barbara Allen, et al.,

Plaintiffs,

vs.

Honeywell Retirement Earnings Plan, et
al.,

Defendants.

No. CV-04-00424-PHX-ROS

ORDER

The Court appointed Magistrate Judge David Duncan to act as a Special Master in resolving a discovery dispute. Magistrate Judge Duncan prepared a detailed and well-reasoned order addressing each document at issue. Plaintiffs request the Court modify Magistrate Judge Duncan’s order and require the production of all documents at issue. Defendants request the Court adopt Magistrate Judge Duncan’s ruling in its entirety. For the following reasons, the Court will adopt portions of Magistrate Judge Duncan’s Order but require production of additional documents.

BACKGROUND

This lawsuit involves claims by Plaintiffs that Defendants violated ERISA by adopting amendments to benefit plans which reduced Plaintiffs’ benefits. The date the amendments were adopted is crucial to proving Plaintiffs’ case. Beginning in 2001, Plaintiffs’ counsel began requesting information regarding the amendments. In October 2001, Defendants learned that a number of retirees had decided to challenge the legality of the amendments.

1 On July 26, 2002, Plaintiffs' counsel filed an administrative claim on behalf of several
2 hundred employees. The administrative claim argued, in part, that certain plan amendments
3 violated numerous statutory provisions. Because the administrative claim asserted statutory
4 violations, administrative exhaustion may not have been required.¹ Recognizing this, the
5 administrative claim stated "[a]lthough we were not required to bring the Retirees' legal
6 claims for violations of ERISA to your attention before filing suit, we do so in a good faith
7 effort to resolve these matters amicably, without resort to litigation."

8 Upon reviewing the administrative claim, Honeywell's Assistant General Counsel
9 concluded that "class litigation . . . was inevitable." (Doc. 225-2 at 5). Based on the belief
10 that litigation was "virtually certain," Defendants retained outside counsel to assess their
11 "potential exposure" and "to assist in preparing to defend [the] litigation." (*Id.* at 6). Outside
12 counsel prepared documents for use in settlement discussions and provided assistance "in
13 drafting responses to [the] Retirees' administrative claims." (Doc. 225-4 at 3). Outside
14 counsel also claims it began preparing documents for use in litigation. (Doc. 225-4 at 4).

15 The formal denial of Plaintiffs' claims was issued on January 24, 2003. The denial
16 advised Plaintiffs "they [had] a right to file a written appeal." (Doc. 16b Ex. K). If the
17 parties submitted an appeal, the plan administrator would "reexamine all facts [relevant] to
18 the appeal and make a final determination as to whether the denial of benefits is justified
19 under the circumstances." (*Id.*) The denial cautioned that Plaintiffs "must exhaust their
20 appeal remedies before they [could] bring a court action." Plaintiffs filed an administrative
21 appeal on July 1, 2003.

22 Defendants issued a final administrative denial on October 29, 2003. That letter
23 referred to the earlier denial as the "Preliminary Decision." The letter also stated the plan
24 administrator had engaged in a "careful review" of Plaintiffs' claims. Plaintiffs filed this suit
25 in March 2004.

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27 ¹ The Ninth Circuit does not require administrative exhaustion of statutory violation
28 claims. *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1416 (9th Cir. 1991).

1 Some time after commencement of their suit, Plaintiffs submitted notice of a
2 discovery dispute. (Doc. 169). According to that notice, Plaintiffs believed they were
3 entitled to “documents generated prior to denial of Plaintiff’s administrative appeal” and
4 “documents Defendants claim contain advice to Honeywell as Plan sponsor, not as Plan
5 Administrator.” (*Id.* at 3). Defendants responded that the documents Plaintiffs sought were
6 “prepared in anticipation of litigation.” (*Id.* at 4). According to Defendants, the initial
7 administrative claim, and the surrounding circumstances, “explicitly raised the specter of
8 litigation.” Thus, Defendants believed certain documents connected to the administrative
9 claim were not subject to disclosure. (*Id.*)

10 The discovery dispute was not resolved at that time as other aspects of the litigation
11 consumed the parties’ attention. After a partial settlement, Plaintiffs again sought production
12 of “documents generated or reviewed during the ERISA claims process.” (Doc. 332 at 5).
13 The Court directed Defendants to submit the documents for an *in camera* review. (Doc.
14 392). On February 3, 2009, the Court appointed Magistrate Judge Duncan as a special
15 master to resolve the dispute. After hearing from the parties, Magistrate Judge Duncan
16 issued his order.

17 Magistrate Judge Duncan began by analyzing the scope of the fiduciary exception.²
18 As recognized in the order, “the fiduciary exception provides that an employer acting in the
19 capacity of an ERISA fiduciary is disabled from asserting the attorney-client privilege
20 against plan beneficiaries on matters of plan administration.” *United States v. Mett*, 178 F.3d
21 1058, 1063 (9th Cir. 1999). “Decisions regarding a benefit determination . . . are fiduciary
22 functions.” (Doc. 528 at 3). Thus, communications regarding administrative claims
23 normally would be subject to the fiduciary exception. But Magistrate Judge Duncan rejected
24 Plaintiffs’ assertion “that all communications prior to a benefit determination fall within the
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26 ² There was a threshold issue of whether Honeywell was a fiduciary during the
27 relevant period. Magistrate Judge Duncan concluded Honeywell was, in fact, a fiduciary.
28 Neither side objected to this ruling and the Court adopts that portion of Magistrate Judge
Duncan’s ruling.

1 fiduciary exception.” (*Id.* at 4). Instead, Magistrate Judge Duncan concluded that “[w]hen
2 the fiduciary is faced with a threat of litigation and seeks legal advice for its own protection
3 against plan beneficiaries, regardless of whether that threat of litigation occurs before,
4 during, or after the administrative claims process, the attorney-client privilege reasserts
5 itself.” (*Id.*) Once there is a “divergence of interests” between a beneficiary and the plan
6 administrator, the fiduciary exception does not apply. (*Id.*)

7 Based on this understanding, Magistrate Judge Duncan concluded there had been a
8 divergence of interests even before the administrative claim had been filed. Thus, a wide
9 variety of documents were deemed protected.³ The Court must “decide de novo” whether
10 the documents should be produced. Fed. R. Civ. Pro. 53(f).

11 ANALYSIS

12 The starting point for resolving the current dispute is the “fiduciary exception” to the
13 attorney-client privilege. *Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). Generally, the
14 exception applies when the plan administrator is performing fiduciary functions, such as
15 claims administration, but does not apply when the plan administrator is performing settlor
16 functions, such as the adoption, modification, or termination of a plan. *See Hughes Aircraft*
17 *Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (outlining settlor functions). The Ninth Circuit
18 has identified cases addressing the exception as marking “out two ends of a spectrum.” *Mett*,
19 178 F. 3d at 1064. First, “where an ERISA trustee seeks an attorney’s advice on a matter of
20 plan administration and where the advice clearly does not implicate the trustee in any
21 personal capacity,” the exception applies. *Id.* Second, “where a plan fiduciary retains
22 counsel in order to defend herself against the plan beneficiary,” the exception does not apply.
23 *Id.* Determining where on the spectrum particular communications fall depends on the
24 “context and content” of the communications. *Id.*

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27 ³ Magistrate Judge Duncan ordered the production of certain documents. Defendants
28 did not agree with those rulings, but “in the interest of judicial economy, Defendants [did]
not challenge those rulings.” (Doc. 532 at 2).

1 There is no Ninth Circuit authority addressing where on the spectrum materials
2 involving administrative claims fall. But other courts have addressed the issue and adopted
3 a test that requires examination of the interests of the plan participant and plan administrator
4 at the time of the administrative claim. The general test is that “when the interests of the
5 ERISA plan fiduciary and the plan beneficiaries have *diverged sufficiently* such that the
6 fiduciary . . . [is acting] in its own interest to defend itself against the plan beneficiaries, then
7 the attorney-client privilege remains intact.” *Tatum v. R.J. Reynolds Tobacco Co.*, 247
8 F.R.D. 488, 497 (M.D. N.C. 2008) (emphasis added). The interests of plan participants and
9 plan administrators undoubtedly diverge sufficiently upon the final denial of an
10 administrative claim or upon the initiation of litigation. *See, e.g., Geissal v. Moore Medical*
11 *Corp.*, 192 F.R.D. 620, 625-26 (E.D. Mo. 2000) (ruling post-administrative claim denial
12 advice privileged). The more difficult issue, and the issue presented here, is whether the
13 interests can diverge prior to the final denial of an administrative claim.

14 It is well established that a benefit determination is a fiduciary act. *Aetna Health Inc.*
15 *v. Davila*, 542 U.S. 200, 218 (2004); *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (“[A]
16 plan administrator engages in a fiduciary act when making a discretionary determination
17 about whether a claimant is entitled to benefits under the terms of the plan documents.”).
18 Therefore, the plan administrator’s records generated during the handling and resolution of
19 an administrative claim generally qualify for disclosure under the exception. This includes
20 communications between a plan administrator and its counsel regarding an administrative
21 claim. Despite this, Defendants argue the communications regarding Plaintiffs’
22 administrative claims are not subject to the exception. Defendants believe the sequence of
23 events in this case is such that the parties’ interests diverged *prior* to any administrative
24 claim. According to Defendants, they “reasonably anticipated litigation” even before the
25 administrative claim was filed. (Doc. 538 at 2). Defendants’ argument is not convincing.

26 Courts have repeatedly rejected the argument that “the prospect of post-decisional
27 litigation” is enough to overcome the fiduciary exception. *Geissal*, 192 F.R.D. at 625
28 (“Because the denial of claims is as much a part of the administration of a plan as the

1 decision-making which results in no unhappy beneficiary, the prospect of post-decisional
2 litigation against the plan is an insufficient basis for gainsaying the fiduciary exception to the
3 attorney-client privilege.”); *Lewis v. Unum Corp. Severance Plan*, 203 F.R.D. 615, (D. Kan.
4 2001) (same); *Tatum*, 247 F.R.D. at 500 (“Legal advice related to the ordinary administration
5 of the plan, such as preparing a response to a beneficiary’s claim, is not privileged as against
6 the beneficiaries.”). This rejection is well founded in that any other conclusion would
7 potentially negate the exception in its entirety.

8 If the mere prospect of litigation were enough to overcome the fiduciary exception,
9 the administrative claim files associated with all benefit denials would be privileged. Any
10 sophisticated plan administrator would conduct a *pro forma* review of claims, make a record
11 that denial of that claim would lead to litigation, and then rely on counsel to formulate
12 responses to the administrative claim. The “inevitability” of litigation would then be used
13 to negate any application of the fiduciary exception. Assuming litigation did materialize, a
14 court would be forced to determine whether the fear of litigation was legitimate. This time-
15 consuming inquiry is not one courts are well-equipped to make. A straightforward
16 application of the fiduciary exception makes much more sense.

17 Plan administrators have a fiduciary responsibility to resolve claims for benefits. In
18 performing that function, a plan administrator may consult with counsel but the parties’
19 interests cannot “diverge” for purposes of the fiduciary exception until there is, at the very
20 least, an initial administrative decision.^{4,5} Thus, Defendants must turn over all documents
21 generated by the plan administrator, produced for the plan administrator’s consideration, or
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23 ⁴ The claims in this suit raised the personal liability of the fiduciaries in only the most
24 general terms. (Doc. 16, Ex. I at 5). The vast majority of Plaintiffs’ claims could not result
25 in the fiduciaries being personally liable. Moreover, having reviewed the documents, the
26 overriding concern *was not* the fiduciaries’ personal liability but the validity of Plaintiffs’
27 statutory claims.

27 ⁵ This statement assumes the plan administrator engages in the administrative process.
28 The interests could, of course, diverge prior to the administrative claim if the plan
administrator communicates that any administrative claim would be futile.

1 reviewed by the plan administrator in connection with the initial administrative decision.⁶
2 This includes documents generated by outside counsel given that outside counsel drafted the
3 administrative denial letter.⁷ The issue remains, however, whether documents generated or
4 reviewed after the initial administrative decision was made are subject to the exception.

5 In the circumstances of this case, Defendants' own communications weigh against
6 finding a divergence of interests immediately after the initial claim denial. The letter denying
7 Plaintiffs' initial administrative claim invited an administrative appeal of that decision.
8 Defendants do not explain why the initial claim denial letter invited an administrative appeal
9 if Defendants had already concluded the claim would be denied. Moreover, the final claim
10 denial stated Defendants had conducted a "careful review" of the administrative appeal.
11 Again, Defendants do not explain how a "careful review" was conducted given that they had
12 already concluded litigation was "inevitable." If the parties' interests had, in fact, diverged
13 prior to the initial administrative claim, Defendants should not have engaged in the
14 administrative process.⁸ At the very least, Defendants should not have invited an appeal of
15 the initial administrative determination.⁹ The plan administrator held itself out to be making
16 a standard benefit determination, unquestionably a fiduciary function. Thus, the fiduciary
17 exception applies. Defendants must turn over all documents generated by the plan

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19 ⁶ This includes all documents allegedly protected by the work product privilege.
20 Given that no administrative decision had been made, the documents could not have been
21 created in anticipation of litigation. *Lewis v. Unum Corp. Severance Plan*, 203 F.R.D. 615,
22 (D. Kan. 2001) ("[T]he Plan Administrator's act of securing legal advice for the plan, and
the advice rendered, prior to the plan's decision regarding benefits cannot be said to be in
anticipation of litigation.").

23 ⁷ In some respects, outside counsel was acting as plan administrator (*i.e.* evaluating
24 the merits and drafting the administrative response).

25 ⁸ Administrative exhaustion is an affirmative defense Defendants could have waived.

26 ⁹ Of course, waiving the right to administrative exhaustion might not have been in
27 Defendants' best interest. Defendants likely wished to preserve their right to a deferential
28 standard of review of any benefit denial. Defendants also might have hoped that a thorough
administrative rejection of Plaintiffs' claims would cause Plaintiffs to abandon the claims.

1 administrator, produced for the plan administrator's consideration, or reviewed by the plan
2 administrator in connection with the final administrative decision.¹⁰

3 In light of ERISA's statutory¹¹ and regulatory¹² requirements, and having reviewed
4 many of the documents at issue, Defendants' belief that these documents should remain
5 privileged is perplexing. Many of the documents at issue were provided to outside counsel
6 during the administrative process so counsel could assess the validity of Plaintiffs'
7 administrative claims and draft the administrative response. These documents have not been
8 produced to Plaintiffs, even though Defendants apparently believed they were *necessary* to
9 determine the validity of Plaintiffs' claims. Plan participants are entitled to documents
10 necessary to assess the validity of their claims. To hold otherwise would deny plan
11 participants access to potentially dispositive materials. Defendants' attempt to use the
12 attorney-client privilege to protect documents relied upon in the administrative claim process
13 is inappropriate.

14 Finally, the conclusion that the fiduciary exception requires disclosure of the
15 administrative claim materials should not be surprising to Defendants. The fiduciary
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19 ¹⁰Once a final administrative decision was made, the parties' interests diverged. Post-
20 administrative claim documents are not subject to the fiduciary exception.

21 ¹¹ERISA requires "[e]very employee benefit plan shall be established and maintained
22 pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). ERISA also requires disclosure
23 of documents such that individuals know the important terms of their benefit plans. *See, e.g.*,
24 29 U.S.C. § 1021. ERISA recognizes the importance of documents by contemplating an
award of daily penalties in the event a plan administrator refuses to provide copies in a timely
manner. 29 U.S.C. §1132(c).

25 ¹²The regulations state "a claimant shall be provided, upon request and free of charge,
26 reasonable access to, and copies of, all documents, records, and other information relevant
27 to the claimant's claim for benefits." 29 C.F.R. § 2560.503-1(h)(2)(iii). This includes all
28 documents "relied upon in making the benefit determination" and "submitted, considered,
or generated in the course of making the benefit determination." 29 C.F.R. § 2560.503-
1(m)(8).

1 exception was well-established at the time of Plaintiffs' administrative claim.¹³ Thus, if
2 Defendants believed they needed confidential legal advice concerning possible litigation,
3 Defendants should not have allowed counsel to assist in the clear fiduciary function of claim
4 administration.

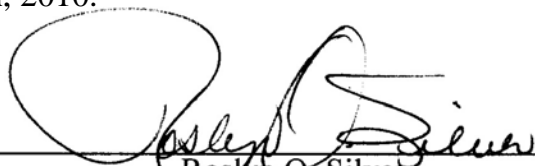
5 Defendants should review the documents at issue and, if necessary, generate a new
6 privilege log. Documents potentially privileged are documents involving a settlor function
7 (*i.e.*, amendment of the plan), provided those documents were *not* considered in evaluating
8 Plaintiffs' administrative claim. Also potentially privileged are any documents generated
9 after the final administrative denial or documents generated by *separate* legal counsel during
10 the administrative claims process if those documents involved possible litigation.

11 Accordingly,

12 **IT IS ORDERED** the Motion to Modify (Doc. 533) is **GRANTED IN PART AND**
13 **DENIED IN PART.** Defendants shall disclose the documents and a new privilege log if
14 necessary no later than March 29, 2010.

15 **IT IS FURTHER ORDERED** the Motion to Adopt (Doc. 532) is **GRANTED IN**
16 **PART AND DENIED IN PART.**

17 DATED this 16th day of March, 2010.

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19 _____
20 Roslyn O. Silver
21 United States District Judge
22

23 _____
24 ¹³ Reviewing then-recent developments, a 1998 article advised attorneys representing
25 ERISA administrators of the need to “[r]ecognize the fact that attorney-client
26 communications concerning plan administration issues simply will not be protected by
27 privilege.” Michael S. Beaver, *The “Fiduciary Exception” Under ERISA*, Idaho
28 Employment Law Letter, Vol. 2, Issue 11 (Feb. 1998). A 1999 article further advised
counsel to “[m]ake a special effort to segregate legal work concerning nonfiduciary matters
from work concerning plan administration.” Craig C. Martin & Matthew H. Metcalf, *The
Fiduciary Exception to the Attorney-Client Privilege*, 34 Tort & Ins. L.J. 827, 860 (1999).