IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

KENNETH WALTON GEORGE, et al.,	)	
	)	
Plaintiffs,	)	C/A No.: 8:06 CV 373 RBH
	)	
vs.	)	
	)	
DUKE ENERGY RETIREMENT CASH BALANCE PLAN, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Plaintiffs file their Reply to Defendants' Opposition to Plaintiffs' Motion to Compel filed February 1, 2010 (Dkt 271) ("Duke Br").[1]

1. Duke Mischaracterizes the Facts and Ignores the Critical Issues.

The stream of events which triggered the present briefing was initiated by the IRS sending its September 24, 2007 letter to Duke. The letter on its face is responsive to Plaintiffs' discovery requests. The letter refers directly to the Plan, Section 5.04(c) of the Plan, and to the effect of Notice 96-8 and its "safe harbor," on the Plan.[2]

Duke made a strategic choice not to produce the IRS letter[3] when there was no legal basis. If the letter had been produced, of course, it would have been impossible thereafter to "unring the bell." Production would have alerted Plaintiffs to the fact that the IRS was raising questions about the Plan directly overlapping the issues in this case.

In its brief Duke provides no basis to justify holding back the IRS letter, except to argue that it made a general objection that it could not be expected to make "continuous production" of documents because "[t]he administration of the Plan is ongoing." (Duke Br 10-11). Even while

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[1] Plaintiffs incorporate their arguments from Plaintiffs' Memorandum in Support of Motion for *In Camera* Review, to Abrogate Privilege and to Compel (filed at Dkt. #283-1) which are equally applicable here.

[2] The documents sought by Plaintiffs cover two time frames: (1) those documents that predate the filing of this lawsuit and are clearly related to administration (Exh. 1, pp. 1-14, Dkt. #263-2); and (2) the balance of the documents, which post date the September 24, 2007 IRS letter (Exh. 1, pp. 15-72, Dkt# #263-2). None of the documents involve Duke's litigation counsel, Sidley Austin.

[3] There were actually two such initial letters from the IRS: A Sept. 15, 2007 letter with regard to the related PanEnergy Plan, and the Sept. 24, 2007 letter regarding the Duke Plan. The former is equally relevant. See Exs. 4 and 5 respectively to Plaintiffs' Mem. in Support of Motion for *In Camera* Review, to Abrogate Privilege, and to Compel filed Feb. 24, 2010 (Dkt 283-1). The Sept. 15, 2007 letter expressly references that "section 5.04(c) provides for an interest rate of 4 percent or less for purposes of determining a lump sum distribution … there may be an impermissible forfeiture of accrued interest." Dkt 283-1, Ex. 4.

pointing to that objection, Duke argues that the subject documents "pertain to the issue of plan design, not plan administration activities." (Id. 27). Stated differently, Duke concedes that the fiduciary exception applies to "documents that pertain to acts of plan administration." (Id. 18-19).[4] Yet Duke identifies as its only basis for not producing the first IRS letter and other related documents, a general objection limited to documents regarding "[t]he administration of the Plan." (Id. 10). Duke cannot in the same breath attempt to avail itself, albeit wrongfully, to an objection relating to administration of the plan and at the same time say it was not administering the plan in its communications with and concerning the IRS matter.

Duke argues that "the IRS' position on Duke's whipsaw obligations is unambiguously supportive of Duke's position in the lawsuit." (Duke Br 2). This of course, if true, would not be a basis to withhold production of relevant discovery; however, it is not true. The very first IRS letter says the Plan does not meet the Notice 96-8 safe harbor.[5] Duke has claimed that the Plan does meet the safe harbor – in fact it has claimed the Plan so clearly meets the safe harbor that the plaintiffs' claim should have been dismissed.[6] Notice 96-8 is an IRS pronouncement.

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[4] *E.g., Driver v. Nortel Networks, Inc.*, USDC-EDNC, No. 5:03-cv-86-BR(3) (Order filed Aug. 29, 2003) at p. 10 (ordering production, finding that "any privileged communication in the notes related directly to plan administration"); *Coffman v. Metropolitan Life Ins. Co.*, 204 F.R.D. 296, 298 (S.D.W.Va. 2001) (noting in ordering production that "an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration," *quoting In re Long Island Lighting Co.*, 129 F.3d 268, 272 (2d Cir. 1997)); *see generally* Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege, 47 A.L.R.6th 255 (2009) (collecting cases).

[5] "Notice 96-8 … permitted a plan to pay a participant's hypothetical account balance without violating Code Section 417(e)(3) provided interest was credited using one of several specified variable 'safe harbor' rates. Since the plan contains a minimum interest rate and a maximum interest rate, the plan's interest crediting rate is not one of the safe harbor rates." (Sept. 24, 2007 IRS letter, Ex. 3 to Dkt 263-1).

[6] The whipsaw class consists of plan participants typically with decades of years of service who took early retirement and took a lump sum representing their vested and accrued pension benefits. Plaintiffs' lawful interpretation of the Section has the effect of increasing benefits to

Evidence reflecting what the IRS itself thought about application of Notice 96-8 and its safe harbor to the Plan is clearly pertinent. In its first letter, the IRS said the Duke Plan did not meet the requirements of Notice 96-8. The IRS sent this letter presumably based on its own independent review of the Plan after the moratorium was lifted, and without knowing either Plaintiffs' or Defendants' contentions in this case.[7]

Duke tries to shift the focus off of the initial IRS letter to the final determination letter. (Duke Br. 2). Duke states the determination letter supports its arguments herein. (*Id*.) Setting aside the fact that Plaintiffs disagree, once again the over-arching question remains: what lawful basis did Duke have to withhold the initial IRS letter and subsequent communications? There was none. Duke was, simply stated, "hiding the ball."

At page 5 of its brief, Duke is forced to admit at least that the first IRS letter "indicates that…. it was the IRS's view that…. the Plan was not a 'safe harbor' plan under Notice 96-8." (Duke Br 5). Again, Duke's position throughout this case has been that the Plan was a safe harbor plan.

Plaintiffs have consistently argued that 1) Section 5.04(c) is unlawful as construed by Duke; 2) Section 5.04(c) is lawful if properly construed as setting the discount rate; and 3) under rules of construction, the Court should choose a construction that makes a plan term lawful as

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this group of Plan participants. The amount of the increase is not unreasonable and does not create absurd results as will be demonstrated in the forthcoming summary judgment briefing.

[7] Duke's statement that "the IRS's position on Duke's whipsaw obligations is unambiguously supportive" is also contradicted by Duke's own redacted emails documenting that the IRS had a series of different positions. See Godofsky email to Ringel dated May 20, 2008 (attached as part of Dkt 263-11) ("We have gone round and round with the IRS and their position evolves with each round. The email below explains their current position.").

opposed to unlawful.[8] Duke has argued its construction of the Section is lawful because "the Plan meets the safe harbor requirements of Notice 96-8." (Dkt 58 at 4).[9] Given this argument, it is pertinent that in its first letter the IRS states the Plan does not comply with Notice 96-8 because "the plan's interest crediting rate is not one of the safe harbor rates." (Dkt 263-1, Ex. 3).

Duke argues that Section 5.04(c) is unambiguous; that it can only be interpreted in the way that Duke interprets it; and that its meaning is plain on its face. The first IRS letter is relevant to this issue given that the IRS, having reviewed the Section on its own, asks, "Please explain what this provision does."[10] The IRS clearly did not view the provision as having the plain meaning Duke espouses. For the purpose of opposing this Motion, Duke ignores the fact that the act of explaining what a plan provision does is an act of plan administration. In fact, in arguing for dismissal of the whipsaw claim, Duke urged that this Court find that, as Plan Administrator, Duke had the discretion to interpret the plan as it did.[11]

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[8] See Order filed June 2, 2008 (Dkt 195), p. 31 ("Plaintiffs maintain that § 5.04(c) could only apply to the discount rate because switching from the Treasury bond rate under Appendix A and Plan § 5.04(b) to a lower 4% interest rate for the 'interest credit' benefit would constitute an illegal forfeiture.").

[9] See Order (Dkt 195), p. 31 ("Duke maintains that its Cash Balance Plan falls under a "safe harbor" provision, which provides that where a plan's interest crediting rate is no greater than the applicable interest rate under § 417(e)(3), a distribution equal to the employee's hypothetical account balance will satisfy ERISA. See IRS Notice 96-8.").

[10] "Section 5.04(c) of the Plan provides that for a participant who elects to receive a lump sum distribution prior to his normal retirement date, the monthly interest rate applied for purposes of determining the lump sum distribution is the lesser of 4% or the "applicable interest rate" specified in Code Section 417(e) … Please explain what this provision does. Why is the Monthly Interest Rate defined differently here than in Section 2.39 of the Plan?" (Sept. 24, 2007 IRS letter, attached as Ex. 3 to Dkt 263-1).

[11] See Dkt 103, p. 17, in which Duke contends: "Finally, the Plan Administrator has not construed § 5.04(c) as prescribing a present-value discount rate. Because that interpretation is reasonable (and in fact compelled by § 5.04(c)'s plain terms), this Court would have to defer to that interpretation if § 5.04(c) were otherwise ambiguous. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) ('reasonable' interpretation 'will not be disturbed' where plan

2. Rule 26(e) Requires Supplementation.

Rule 26(e) does not allow a party to supplement discovery with only what it wants to produce and when it wants to do so. Here, Duke never produced the IRS letter during the pertinent times until Plaintiffs insisted on discovery following disclosure of the retroactive amendment. Duke did not timely produce the final IRS determination letter either – a document routinely produced in ERISA cases[12]-- or the email and correspondence with the IRS that spanned the proceedings, until Plaintiffs insisted on discovery following disclosure of the retroactive amendment. Duke produced the March 30, 2009 amendment, but in a misleading fashioned only six months later.

Duke's indisputable duty was to produce the initial 2007 letters that it received from the IRS opening up the issues found in those first two letters. If Duke had timely produced those letters, Plaintiffs would have been able to express their position in the IRS proceedings and advocate their interpretation of Section 5.04(c) to the IRS, as has occurred in other similar cases.[13] As it played out, Plaintiffs took ten depositions in this case without being privy to the

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affords administrator 'power to construe disputed or doubtful terms'); 1999 Plan, § 10.08 (conferring interpretive authority on Benefits Committee)."

[12] *E.g.*, *Lyons v. Georgia-Pacific Corp. Salaried Emp. Ret. Plan*, 221 F.3d 1235, 1240 (11th Cir. 2000) (noting "two IRS determination letters"), *cert. denied*, 532 U.S. 967 (2001); *King v. Pension Trust Fund*, 2003 WL 22071612 (E.D.N.Y. Sept. 5, 2003) (defendant failed to produce IRS determination letter in initial disclosures then produced it later in support of summary judgment; court found the letter should have been disclosed and no substantial justification was offered for not producing it earlier and struck it as exhibit), *aff'd*, 131 Fed.Appx. 740 (2nd Cir.), *cert. denied*, 546 U.S. 1031 (2005); *Thornton v. Graphic Comm. Conf.*, 566 F.3d 597, 615 (6th Cir. 2009); *Kifafi v. Hilton Hotels Ret. Plan*, 616 F.Supp.2d 7, 18 (D.D.C. 2009); *Esden v. Bank of Boston*, 229 F.3d 154, 176 (2nd Cir. 2000); *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 469 (7th Cir. 1992) (noting IRS determination letter in the record); *In re Gulf Pension Litig.*, 764 F.Supp. 1149, 1172 (S.D.Tex. 1991) (same), *aff'd sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995).

[13] *See Kifafi*, 616 F.Supp.2d at 17 ("[O]n September 3, 1999, Hilton submitted the amended Plan to the IRS and requested a determination that the Plan, as amended, satisfied the requirements of

IRS letters or any of the subsequent emails, correspondence or other documents and commencing discovery anew is not an option at this stage of the litigation.[14]

The final prejudice is that the parties are now three weeks before summary judgment motions and we are presently briefing motions on discovery issues which could be pertinent to summary judgment issues. In short, Duke's conduct has made the current schedules effectively unworkable which operates to Duke's advantage and prejudices Plaintiffs. If Plaintiffs file their summary judgment motions under the current Scheduling Order (Dkt. 281 - March 24, 2010) such motions will have to be filed with a reservation that the record be held open to be supplemented upon conclusion of the discovery issues.

3. **Duke's Arguments on the Law are Unavailing.**

a. Duke Should not Reap the Benefit of the "Personal Defense" Limitation to Fiduciary Exception.

Duke primarily argues the "personal defense" exception to the fiduciary exception. (Duke Br 29). If Duke had timely produced to Plaintiffs the IRS 2007 letters, then some of Duke's interaction thereafter with the IRS might arguably have been for "personal defense" of the company. Under that scenario Plaintiffs would have been seeking to have their voice heard in the IRS proceedings and offering precisely the interpretation that they offer in this lawsuit and Duke would have been opposing it and defending itself.

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a qualified retirement plan … In connection with the same, Kifafi's counsel drafted at least three letters advising the IRS of the claims asserted in this case to 'protect the rights of [the] class.'").

[14]Duke contends "the delay had no prejudicial effect." (Duke Br 14). This is not correct. If Plaintiffs could have been heard in the IRS proceedings, the reviewers would have had both sides to the controversy and may well have been even more reluctant to abandon their demands for whipsaw payment (the IRS position that corresponds with Plaintiffs' "little whipsaw" claims). And, even here Duke tries to muddle the issue, framing it in terms of the prejudicial effect of not producing the Plan Amendment for six months, and ignoring the prejudicial effect of not producing the more than 1400 pages of IRS-Duke communications going back to 2007.

However, by not producing the first IRS letter, which arrived at Duke's door in the middle of the discovery period in this case and was clearly subject to production, Duke may fairly be deemed to have lost the benefit of any "personal defense" limitation. Instead Duke continued to be acting not only for itself but as a fiduciary for the participants in responding to the IRS's plan administration inquiry because its sandbagging blocked any opportunity for the participants to take on that role themselves. It thus continued in its fiduciary role in administering the Plan while, unbeknownst to its participants, it was responding to the IRS inquiries and doing what the IRS required to become tax qualified.

By Duke's own choice in keeping Plaintiffs ignorant, Duke was thus acting as a proponent of the participants. It cannot be otherwise. Duke was wearing two hats: fiduciary for the participants, and settlor/sponsor. The determination letter issued by the IRS on February 23, 2009, with its addendum deemed to be "an integral part of this determination,"[15] highlights this fact: "The determination letter applies only to the employer and its participants on whose behalf the determination letter was issued."[16] (Emphasis added). In short, the determination letter was sought and acquired to benefit Duke ***as well as*** the participants. "Ultimately, the existence of the privilege hinges on a finding that the trustee asserting the privilege sought advice or engaged in

[15] DE 181489, Ex. 6 to Plaintiffs' brief at Dkt 263-1.

[16] DE 181492, Ex. 6 to Dkt 263-1. That is the conclusion reached in the IRS Advisory Opinions cited in Plaintiffs' opening brief, at pp. 18-19. They stated that a party communicating with the IRS may be acting in both fiduciary (for the participants) and settlor (for the sponsor) roles. Plaintiffs respectfully submit that at a minimum, an *in camera* review is appropriate. *See Tatum v. R.J. Reynolds Tobacco Co.*, 247 F.R.D. 488 (M.D.N.C. 2008) (*in camera* review); *Shields v. UNUM Provident Corp.*, 2007 WL 764298, at *5 (S.D. Ohio Mar. 9, 2007); *Anderson v. Sotheby's Inc. Severance Plan*, 2004 WL 5402553, *11 (S.D.N.Y. Oct. 18, 2004); *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 89 (N.D.N.Y. Jan. 10, 2003) (documents related to tax audit ordered for *in camera* inspection); *Coffman v. Metropolitan Life Ins. Co.*, 204 F.R.D. 296, 297 (S.D.W.Va. 2001) (*in camera* review); *Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45, 48 (D.Mass. 2007); *Fischel v. The Equitable Life Assurance*, 191 F.R.D. 606, 610 (N.D. Cal. 2000); *Stoffels v. SBC Comm., Inc.*, 2009 WL 4799741 (W.D.Tex. Nov. 12, 2009) (all same).

communication that did *not* benefit the trust beneficiaries." *Cobell v. Norton*, 212 F.R.D. 24, 28 (D.D.C. 2002) (emphasis in original).

b. Duke's Duties Flow from the Trust Precepts Underlying ERISA.

Duke argues "the Fourth Circuit has never recognized the fiduciary exception in an ERISA case." (Def Br 17). However, the Fourth Circuit has readily adopted the doctrine when faced with the issue in non-ERISA cases, *Sandberg v Virginia Bankshares, Inc.*, 979 F.2d 332, 350-52 (4th Cir. 1992), *vacated on other grounds*, 1993 WL 524680 (4th Cir. Apr. 7, 1993), and district courts in the Fourth Circuit have shown no reluctance to apply the fiduciary exception to ERISA cases on this basis. Every other circuit court that has had occasion to address the application of the fiduciary exception to ERISA cases has held it applies,[17] as they must.

ERISA § 403 imposes a rule of mandatory trusteeship requiring that "all assets of an employee benefit plan shall be held in trust…" The drafters of ERISA explained that they wanted to "apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." H.R. Conf. Rep. No. 1280, 93d (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076; Langbein and Wolk, Pension and Employee Benefit Law (3rd ed.), pp. 646-47.

The Supreme Court emphasized ERISA's background in trust law in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 by stating:

> ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H.R.Rep. No. 93-533, p. 11 (1973), U.S.Code Cong. & Admin.News 1974, pp. 4639, 4649. Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.

[17] *See Cobell v. Norton*, 213 F.R.D. 1, 27 (D.D.C. 2003) ("[F]ederal courts, including this Court, have uniformly recognized the existence of a fiduciary exception.").

Id. (emphasis added). The guiding principles of trust law unmistakably recognize the fiduciary exception to the attorney-client privilege. George G. Bogert, George T. Bogert & Amy M. Hess, The Law of Trusts and Trustees § 961 ("The beneficiary . . . has a right to obtain and review legal opinions given the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct."); 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 173 (4th ed. 1987) ("A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust" and citing the long-established English cases of *Wynne v. Humberston*, 27 Beav. 421 (1858) and *Talbot v. Marshfield*, 2 Dr. & Sm. 549 (1865)). The seminal American case on the subject, *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713-14 (Del.Ch. 1976), discussed in Plaintiffs' opening brief at p. 12 was ignored by Duke in its Brief.

Duke can point to no case that rejects the application of the fiduciary exception when the trustee obtains legal advice regarding plan management or administration. Clearly the trust law principles of ERISA, as directed by the Supreme Court, [18] command adherence to the fiduciary exception to the attorney-client privilege.

It is fair to hold Duke strictly accountable to its fiduciary duty to administer the Plan in the participants' best interests, particularly where Duke hid the initial IRS letters from Plaintiffs to prevent them from stepping into the IRS fray to advocate for the affected plan participant group,. *See Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 620 (D.Kan. 2001) (in

[18] In *Varity Corp. v. Howe*, the Supreme Court gave instructional guidance on the meaning of "plan administration." "The ordinary trust law understanding of fiduciary 'administration' of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents…The law of trusts also understands a trust document to implicitly confer 'such powers as are necessary or appropriate for the carrying out of the purposes' of the trust. *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) (internal citations omitted).

applying fiduciary exception to compel disclosure, Court noted that defendant's position that its documents were only to defend itself "contradicts the principle that the Plan's Administrator administers the plan in the beneficiaries' best interests"); *Redd v. Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters*, 2009 WL 1543325, *2 (E.D.Mich. June 2, 2009) (same, ordering production).

None of the cases cited by Duke with regard to application of the fiduciary exception to privilege involve facts when the IRS was specifically raising questions about plan administration and the interpretation of specific plan provisions, and receiving answers in that regard. This is critical because, as its first letter makes clear, the IRS was asking Duke how it administered and interpreted the Plan. Thus with regard to "section 5.04(c) of the Plan," the question from the IRS to Duke was, "Please explain what this provision does." The IRS was asking about plan administration, and Duke's responses make that clear as well. In its first substantive letter back to the IRS on November 12, 2007, Duke responds that Section 5.04(c) "has no effect," and that it "applies only when a participant elects a lump sum benefit." (Duke Br. Ex. F). Duke's own redacted emails recite how the issues relate to plan administration. In an e-mail of attorney David Godofsky of Alston & Bird, LLP to in-house counsel Robert Ringel dated Nov. 20, 2007, Mr. Godofsky reiterated "[s]ection 5.04(c) appears to have the 'negative whipsaw' result that we have discussed, which would conflict with other provisions of the plan and plan administration. Therefore, she would like that section deleted." (attached as part of Dkt 263-11)(emphasis added). What the IRS asked about was plan administration and Duke concedes that under the fiduciary exception, documents regarding plan administration are not protected.[19]

[19] See Duke Br 18-19 conceding "documents that pertain to acts of plan administration" not protected.

On the unique facts[20] of this case, all materials should be produced.

c. **Duke was Acting as a Fiduciary not as a Settlor.**

Duke contends that the filing of an application for an IRS determination letter in connection with a plan amendment is a settler, not a fiduciary function, citing *Gelles v. Skrotsky*, 983 F. Supp. 1398 (M.D.Fla. 1997) (Duke Br 24-25). However, *Gelles* did not expressly address the application of the fiduciary exception to privilege. Further, it is not the original application that is at issue here, but the IRS subsequent regarding plan administration and compliance and the subsequent communications on these points.

In *Gelles*, the plaintiff sued his employer's pension plan trustees claiming breach of fiduciary duty for a bad faith amendment to the pension plan and for permitting a Form 5300 to be filed with the IRS, which filing plaintiff alleged was a prerequisite to the bad faith plan amendment. Not surprisingly, the District Court held that amending a plan is a settlor function and the filing of a Form 5300 to effectuate a plan amendment was a part of the amending process exempt from fiduciary review. The case had nothing to do with the attorney-client privilege or fiduciary exception, and that issue was never raised. Moreover, in the case *sub judice*, Duke's responding to the IRS inquiries was undertaken to comply with Plan § 1.01 which requires the employer to maintain a tax qualified plan under IRC § 401(a) (Attached as Exhibit A hereto).

Other cases have stated that Plan communications with the IRS are part of plan administration, management and compliance – none of which are settlor functions. *U.S. v. Mett*, 178 F.3d 1058, 1061 n.2 (9th Cir. 1999) ("Pursuant to applicable tax laws, CAG as plan

[20] Cases on fiduciary exception are fact-specific. *Asuncion v. Metro. Life Ins. Co.*, 493 F.Supp.2d 716, 720-21 (S.D.N.Y.2007) (noting "courts engage in a fact-specific inquiry, examining both the content and context of the specific communication*"); Smith v. Jefferson Pilot Fin. Ins. Co.*, 245 F.R.D. 45 (D.Mass. 2007) (same). Likewise, the cases cited by Duke are distinguishable in that none dealt with similar facts.'

administrator was required to file Form 5500 annually in connection with one of the CAG plans, the Defined Benefit Plan," emphasis added); *Henry*, 212 F.R.D. at 82-86 (in case alleging overpayment in ESOP plan's purchase of stock, "[t]he Court finds these documents related to the tax audits to be highly relevant to the administration of the ESOP and must be disclosed under this 'fiduciary exception.'"); *Cobell v. Norton*, 213 F.R.D. 1, 29 (D.D.C. 2003) ("Furthermore, advice concerning legal compliance, alternatives, or strategy is part of the ordinary business of a trust and a trustee, and such legal communications and advice permit no claim of privilege."); *Fischel*, 191 F.R.D. at 610 ("Plaintiffs' motion is GRANTED with respect to internal documents in which inside counsel has reviewed and commented on the structure and design of the plan, including the plan's compliance with its statutory obligations under the Internal Revenue Code.").[21]

The Plan provision addressing IRS tax qualification states it in terms of compliance: "The Plan is set forth in its entirety… for the purpose of ***complying*** with the provisions of [ERISA] and maintaining qualification under Section 401(a) of the Internal Revenue Code…" (emphasis added) (Plan § 1.01, attached as Ex. A). As stated in *Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996), "[t]here is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are 'ordinary and natural means' of achieving the 'objective' of the plan." (citing Bogert & Bogert, Law of Trust & Trustees § 551, at 41-52)).

[21] Further, because Duke was knowingly, at minimum, "wearing two hats" in its IRS dealings, it cannot claim that its communications were related ***solely*** to settlor functions. *See Everett v. USAir Group, Inc.*, 165 F.R.D. 1, 4-5 (D.D.C. 1995) ("USAir, the administrator of the Pension Plan, has not demonstrated that there are attorney-client communications responsive to Document Request No. 5 that relate solely to its nonfiduciary activities or to the formation, amendment or termination of the pension plan. Nor has it demonstrated that any such documents that may exist are wholly unrelated to plan administration and have not been used in connection with defendants' role as plan administrator.").

d. Duke's Claim of Work Product Should be Rejected.

Duke further asserts work product protection to certain of the documents at issue. (Duke Br. 29-33). First, the work product argument of course does not impact documents withheld only based on attorney-client privilege. Only approximately 31 entries out of 72 pages of contested privilege log entries are marked work product. The remainder are designated exclusively as attorney-client privileged. Second, it is precisely the fact that Duke was not only anticipating litigation but was in litigation that undoubtedly allowed Duke to be well aware that the IRS letters were relevant to this case and needed to be produced. *Compare Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 129 (3rd Cir. 2000) (court ordered production of memo by plan administrator's attorney over work product objection because there was no litigation at that time). However, since Duke was in whole or part representing the Plan and the participants as a fiduciary in communications regarding its issues with the IRS, such as how it calculated lump sums, work product protection cannot apply these communications. *See Coffman v. Metropolitan Life Ins. Co.*, 204 F.R.D. 296, 299 (S.D.W.Va. 2001) (applying fiduciary exception – "Likewise, the court cannot conclude that these documents are entitled to protection under the work product doctrine."); *Cobell*, 213 F.R.D. at 11, 30 n.6, 31 (work product doctrine may not shield discovery under fiduciary exception depending on the facts: "[I]t is clear that the work product doctrine should not shield documents prepared in order to assist in the administration of [a] trust from the beneficiaries, who are the true client in such an instance."); *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 626 (D. Colo. 1998) ("Is the work product privilege applicable, despite the applicability of the fiduciary-beneficiary exception? …. Most courts that have examined the question have said that the fiduciary-beneficiary exception does not automatically cover documents shielded by the work product privilege…. However, when the documents at

issue are related to allegedly improper actions of ERISA fiduciaries, discovery often is permitted despite a claim of work product privilege.").

All of the 31 entries in the privilege log marked work product involve David Godofsky of Alston & Bird, or Duke's in-house counsel. The firm of Alston & Bird is not Duke's litigation counsel, (See Ringel Depo. (1/14/10) at 60:24 – 61:9, Dkt. #283-5), but was the law firm that filed the determination letter application in December 2001, more than four years before litigation commenced. (See Exhibit. B). The driving force behind the involvement of Alston & Bird was the need to meet the administrative requirement of plan qualification, not defense of imminent or ongoing litigation. See *Coffman v. Met. Life Ins.*, 204 F.R.D. 296, 300 (S.D.W.Va. 2001)(concluding that threat of litigation was not the " 'the driving force' behind the preparation of the at-issue documents"). The post-litigation involvement of Alston & Bird continued for the purpose of obtaining a determination letter form the IRS, while Duke retained Sidley Austin to handle the litigation.

CONCLUSION

Wherefore, Plaintiffs respectfully request their motion to compel be granted.

Respectfully submitted,

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