

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

STEPHEN COLACO, et al.,	)	Case No. 5:13-cv-00972-PSG
	)	
Plaintiffs,	)	<b>ORDER GRANTING-IN-PART</b>
v.	)	<b>PLAINTIFFS' MOTION TO COMPEL</b>
	)	<b>AND DENYING MOTION FOR</b>
THE ASIC ADVANTAGE SIMPLIFIED	)	<b>SANCTIONS</b>
EMPLOYEE PENSION PLAN, et al.,	)	
	)	<b>(Re: Docket Nos. 48, 50)</b>
Defendants.	)	

Four years ago, Defendant ASIC Advantage, Inc. terminated its Simplified Employee Pension Plan but committed to pay employees like Plaintiffs those SEP benefits accrued through June 30, 2011. After the company's sale to Defendant Microsemi Corporation was completed a few days later, Microsemi had a change of heart—or so says Plaintiffs anyway—and refused to honor ASIC's commitment. Not happy with this turn of events, Plaintiffs filed this suit against ASIC, Microsemi and others, seeking ERISA benefits under the SEP Plan, equitable relief and fines for failure to provide plan and claim-related documents.

Plaintiffs now move to compel production of documents authored or created by Microsemi's attorney Harley Bjelland in relation to the SEP plan. They assert a fiduciary exception to the attorney-client privilege. Plaintiffs also move to compel information relating to other former ASIC SEP plan participants.<sup>1</sup> Though Plaintiffs fail to demonstrate that Bjelland

<sup>1</sup> See Docket No. 57 at 5.

1 acted as a fiduciary in the capacity of a claims administrator, they do show that information  
2 regarding other former ASIC SEP plan participants is relevant to this action. The court GRANTS-  
3 IN-PART Plaintiffs' motion to compel and DENIES Plaintiffs' motion for sanctions.

4 **I.**

5 The attorney-client privilege attaches to a confidential communication between the attorney  
6 and the client and bars discovery of the communication irrespective of whether it includes  
7 unprivileged material.<sup>2</sup> "In the Ninth Circuit, the privilege is jealously guarded."<sup>3</sup> The party  
8 claiming the privilege has the burden of establishing the preliminary facts necessary to support its  
9 exercise.<sup>4</sup> "Once that party establishes the privilege, . . . the opponent of the claim of privilege has  
10 the burden of proof to establish the communication was not confidential or that the privilege does  
11 not . . . apply."<sup>5</sup>

12 One limit to the attorney-client privilege is the fiduciary exception.<sup>6</sup> "[A]n employer acting  
13 in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against  
14 plan beneficiaries on matters of plan administration."<sup>7</sup> For the purposes of ERISA, "a person is a  
15 fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or  
16 discretionary control respecting management of such plan or exercises any authority or control  
17 respecting management or disposition of its assets, (ii) he renders investment advice for a fee or  
18 other compensation, direct or indirect, with respect to any moneys or other property of such plan,

19 \_\_\_\_\_  
20 <sup>2</sup> See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (holding that only the communications  
21 pertaining to advice between an attorney and client, and not the underlying facts, are protected by  
the privilege).

22 <sup>3</sup> *Fischel v. Equitable Life Assurance*, 191 F.R.D. 606, 607 (N.D. Cal. 2000).

23 <sup>4</sup> See *id.*

24 <sup>5</sup> *Id.*

25 <sup>6</sup> See *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999) (recognizing a "fiduciary  
26 exception" to the attorney-client privilege "which has been applied to numerous fiduciary  
relationships").

27 <sup>7</sup> *Id.* at 1063; see 29 U.S.C. § 1002 (holding that ERISA is a federal law that sets standards of  
28 protection for individuals in most voluntarily established, private-sector retirement plans).

1 or has any authority or responsibility to do so, or (iii) he has any discretionary authority or  
2 discretionary responsibility in the administration of such plan.”<sup>8</sup>

3 Fed. R. Civ. P. 26 provides that a party “may obtain discovery regarding any non-privileged  
4 matter that is relevant to any party’s claim or defense.”<sup>9</sup> “Once the moving party establishes that  
5 the information requested is within the scope of permissible discovery, the burden shifts to the  
6 party opposing discovery. An opposing party can meet its burden by demonstrating that the  
7 information is . . . privileged.”<sup>10</sup>

8 ASIC was a California corporation with its principal place of business in Sunnyvale. ASIC  
9 provided a SEP plan for its employees that gave ASIC the discretion to contribute a certain  
10 percentage of each employee’s compensation toward the employees’ retirement savings.<sup>11</sup> ASIC  
11 established the SEP plan in October 2008 and contributed to the SEP plan through 2009.<sup>12</sup> As  
12 allowed by the Internal Revenue Service, ASIC typically paid SEP contributions in October to  
13 cover the previous year.<sup>13</sup> Consistent with this schedule, in October 2010, ASIC paid SEP  
14 contributions that employees had earned in 2009.<sup>14</sup>

15 <sup>8</sup> 29 U.S.C. § 1002(21)(A).

16 <sup>9</sup> Fed. R. Civ. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as  
17 follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any  
18 party’s claim or defense—including the existence, description, nature, custody, condition, and  
19 location of any documents or other tangible things and the identity and location of persons who  
20 know of any discoverable matter. For good cause, the court may order discovery of any matter  
relevant to the subject matter involved in the action. Relevant information need not be admissible  
at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible  
evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”).

21 <sup>10</sup> *Khalilpour v. CELLCO P-ship*, Case No. 3:09-cv-02712-CW, 2010 WL 1267749, at \*1 (N.D.  
22 Cal. Apr. 1, 2010) (citing *Ellison v. Patterson-UTI Drilling*, Case No. 08-cv-67-JDR, 2009 WL  
3247193 at \*2 (S.D. Tex. Sept. 23, 2009)).

23 <sup>11</sup> See Docket No. 57 at 2-3; Docket No. 48 at 1 (stating that a SEP plan allows employers to  
24 contribute up to 25 percent of the employee’s pay each year on a tax-favored basis to individual  
retirement accounts).

25 <sup>12</sup> See Docket No. 48 at 2.

26 <sup>13</sup> See *id.*

27 <sup>14</sup> See *id.*

1 In the wake of a pending acquisition by Microsemi, ASIC's board of directors passed a  
2 resolution that terminated the SEP plan as of July 1, 2011.<sup>15</sup> Plaintiffs contend that ASIC's  
3 President and Chief Executive Officer had previously and repeatedly promised the ASIC  
4 employees that their SEP contributions would still be paid for 2010 and the first half of 2011.<sup>16</sup>  
5 Microsemi acquired ASIC on July 5, 2011 and terminated many employees, including 12 of the 15  
6 Plaintiffs. The remaining three resigned in late 2011.<sup>17</sup> Defendants say 13 of the 15 Plaintiffs  
7 signed general releases for which they received enhanced severance payments.<sup>18</sup>

8 When Plaintiffs noticed their SEP payments had not been made, they contacted a former  
9 ASIC board director through counsel who responded that Microsemi should pay Plaintiffs the  
10 remaining SEP plan contributions.<sup>19</sup> In early 2012, Plaintiffs requested in writing the payment of  
11 the SEP contributions, and upon Microsemi's request, provided the names of the individuals  
12 seeking the SEP contributions.<sup>20</sup> Microsemi then retained Bjelland, who emailed Plaintiffs to  
13 inform them that their claims were denied.<sup>21</sup> Plaintiffs requested documents referring to their  
14 claims,<sup>22</sup> and upon receiving limited documents, appealed the denial.<sup>23</sup> In a response from  
15 Bjelland, Microsemi did not budge from its decision.<sup>24</sup> Plaintiffs then filed this suit and served

16 <sup>15</sup> See Docket No. 57 at 2-3; Docket No. 48 at 2.

17 <sup>16</sup> See Docket No. 25 at ¶¶ 34, 35; Docket No. 48 at 2.

18 <sup>17</sup> See Docket No. 25 at ¶¶ 34, 35, 40, 47-50; Docket No. 48 at 2.

19 <sup>18</sup> See Docket No. 57 at 2-3.

20 <sup>19</sup> See Docket No. 25 at ¶ 52.

21 <sup>20</sup> See *id.* at ¶¶ 55, 56; Docket Nos. 49-3, 49-4.

22 <sup>21</sup> See Docket No. 25 at ¶ 57.

23 <sup>22</sup> See *id.* at ¶ 56. Among the limited documents produced were several emails between Bjelland  
24 and various Microsemi and ASIC employees, which Defendants later contended were inadvertently  
25 produced attorney-client privileged communications that should be returned. See Docket No. 48 at  
26 6.

26 <sup>23</sup> See Docket No. 25 at ¶¶ 60, 61; Docket No. 48 at 5 (explaining which documents were not  
27 produced).

27 <sup>24</sup> See Docket No. 25 at ¶¶ 60, 61; Docket No. 48 at 5.

1 various document requests.<sup>25</sup> Plaintiffs now request an order compelling Defendants to produce  
2 responsive documents authored or created by Bjelland, and information regarding other former  
3 ASIC employees who participated in the SEP plan.<sup>26</sup>

4 **II.**

5 This court has subject matter jurisdiction and supplemental jurisdiction pursuant to 28  
6 U.S.C. §§ 1331

1 sponsor, not the plan trustee—hired Bjelland to provide legal advice about its legal liability to  
2 Plaintiffs, and nothing more.<sup>31</sup>

3 **Second**, there is no evidence that Bjelland’s functions involved the exercise of discretionary  
4 authority or control over the SEP plan. Indeed, the record evidence suggests that his functions  
5 beyond rendering legal advice were limited to ministerial-type tasks—such as mailing denial letters  
6 to Plaintiffs on behalf of his client.<sup>32</sup> “[W]ithout any responsibility or authority over a plan’s  
7 management and administration, one cannot be a fiduciary.”<sup>33</sup> “An attorney or other professional  
8 service provider who represents an ERISA plan will not qualify as an ERISA fiduciary so long as  
9 he ‘performs purely ministerial functions’ . . . within a framework of policies, interpretations, rules,  
10 practices and procedures made by other persons.”<sup>34</sup> Because his role as post-termination advisor  
11 alone did not give Bjelland any discretionary control or authority over the SEP plan contribution,  
12 Bjelland cannot be said to have acted as an ERISA fiduciary.<sup>35</sup>

13 <sup>31</sup> Cf. *Aull v. Cavalcade Pension Plan*, 988 F.Supp. 1360, 1365 (D. Colo. 1997) (holding that once  
14 a plan terminates, ERISA trustee is no longer a fiduciary); *Trigon Ins. Co. v. Columbia Naples  
Capital, LLC*, 235 F. Supp. 2d 495, 505 (E.D. Va. 2002) (same).

15 <sup>32</sup> See *Pension Trust Fund for Operating Engineers Local 3 v. McMorgan & Co.*, Case No. 06-cv-  
16 904-WBS, 2007 WL 201247, at \*8 (E.D. Cal. Jan. 24, 2007) (citing *Yeseta v. Baima*, 837 F.2d 380,  
17 385 (9th Cir. 1988)) (concluding that an attorney was not an ERISA fiduciary when neither his  
18 “status as an attorney nor as executor showed he controlled the Plan in a manner other than by  
19 usual professional functions.”). See also 29 C.F.R. § 2509.75-5(D-1); 29 C.F.R. § 2509.75-8(D-2)  
(clarifying that “preparation of employee communications material or preparation of reports  
concerning participants’ benefits” are tasks that do not make an attorney a fiduciary so long as the  
attorney does not perform any of the functions in 29 U.S.C. § 1002(21)(A)); *Custer v. Sweeney*, 89  
F.3d 1156, 1162 (4th Cir. 1996).

20 <sup>33</sup> *Brown v. California Law Enforcement Ass’n, Long-Term Disability Plan*, Case No. 14-cv-  
21 03559-JCS, 2015 WL 890564, at \*3 (N.D. Cal. Mar. 2, 2015).

22 <sup>34</sup> *Custer*, 89 F.3d at 1156, 1162 (holding that attorney’s day-to-day payment of bills, securing of  
23 funds, and monitoring of the progress of construction and operations on fund property were  
24 ministerial tasks); see 29 C.F.R. § 2509.75-8(D-2) (“A person who performs purely ministerial  
25 functions . . . within a framework of policies, interpretations, rules, practices and procedures made  
by other persons is not a fiduciary because such person” does not perform any of the functions in  
29 U.S.C. § 1002(21)(A)); see also 29 U.S.C. § 1002(21)(A) (providing the definition of a  
fiduciary as applied in ERISA cases).

26 <sup>35</sup> See 29 C.F.R. § 2509.75-8(D-2); *Mett*, 178 F.3d at 1064 (“On the one hand, where an ERISA  
27 trustee seeks an attorney’s advice on a matter of plan administration and where the advice clearly  
28 does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client  
privilege against the plan beneficiaries. On the other hand, where a plan fiduciary retains counsel

1 A separate issue is whether Defendants must produce SEP plan information of other former  
2 ASIC SEP participants. Defendants primarily object to Plaintiffs' request due to privacy and lack  
3 of notice.<sup>36</sup> But the clear relevance of the information outweighs Defendants' concerns.

4 "Federal courts have recognized a person's interest in preserving confidentiality of  
5 information contained in his or her personal file."<sup>37</sup> "Personnel records, because of the privacy  
6 interests involved, should not be ordered produced except upon a compelling showing of  
7 relevance."<sup>38</sup> The "resolution of a privacy objection or request for a protective order requires a  
8 balancing of the need for the information sought against the privacy right asserted."<sup>39</sup>

9 Defendants contend the privacy of non-party, former ASIC employees should be preserved,  
10 especially because these former employees received no notice pursuant to Cal. Civ. Code §§  
11 1985.3 and 1985.6.<sup>40</sup> But even if state procedural rules were relevant here, Plaintiffs convincingly  
12 show that documents from other SEP participants regarding the July 5, 2011 company-wide  
13 meeting and similarly filed claims are relevant to Plaintiffs' claims for their SEP contributions in  
14 this action.<sup>41</sup> Several Plaintiffs testified at deposition that during the company-wide meeting on

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15 in order to defend herself against the plan beneficiaries (or the government acting in their stead),  
16 the attorney-client privilege remains intact.").

17 <sup>36</sup> See Docket No. 57 at 9. Defendants also challenge the breadth of the requests, but the court  
finds that as argued to the court they are sufficiently tailored.

18 <sup>37</sup> Nakagawa v. Regents of Univ. of Cal., Case No. 06-cv-2066-SI, 2008 WL 1808902, at \*2 (N.D.  
19 Cal. Apr. 22, 2008).

20 <sup>38</sup> See Kress v. Price Waterhouse Coopers, Case No. 08-cv-0965-LKK, 2011 WL 5241852, at \*1  
21 (E.D. Cal. Nov. 1, 2011) (citing Miller v. Fed. Express Corp., 186 F.R.D. 376, 384 (W.D. Tenn.  
1999)).

22 <sup>39</sup> Soto v. City of Concord, 162 F.R.D. 603, 603 (N.D. Cal. 1995).

23 <sup>40</sup> See 29 U.S.C. § 1059; see also Docket No. 48 at 6; Docket No. 57 at 10 (referring to  
24 Defendants' citation to Cal. Civ. Code § 1985.3 and § 1985.6, which require statutory notices to be  
25 provided to third parties); Soto, 162 F.R.D. at 616 ("Resolution of a privacy objection or request  
for a protective order requires a balancing of the need for the information sought against the  
privacy right asserted.").

26 <sup>41</sup> See Docket No. 60 at 5; see also 29 U.S.C. § 1059 (requiring a plan administrator to maintain  
27 records that might be relevant to a determination of the benefit entitlements of a participant or  
beneficiary).

1 July 5, 2011, ASIC board members said the SEP plan contributions for 2010 and the first six  
2 months of 2011 would be made.<sup>42</sup> Whether other plan participants submitted claims and whether  
3 those claims were accepted or denied is plainly relevant to Plaintiffs' contentions of what  
4 Defendants said and when they said it.<sup>43</sup> Denying Plaintiffs the production of these documents  
5 would unfairly prejudice Plaintiffs' efforts to establish their claims.<sup>44</sup>

6 **IV.**


7 Plaintiffs' motion to compel Defendants to produce documents Bjelland authored or created  
8 is DENIED.

9 Plaintiffs' motion to compel the production of other former ASIC SEP participants' SEP  
10 plan information is GRANTED. Defendants shall produce documents relevant to a determination  
11 of the SEP benefit entitlements of other participants for the disputed period, excluding any  
12 privileged documents.

13 Because Defendants acted reasonably in disputing this production, Plaintiffs' motion for  
14 sanctions is DENIED.

15 **SO ORDERED.**

16 Dated: August 10, 2015

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18 PAUL S. GREWAL  
19 United States Magistrate Judge

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<sup>42</sup> See Docket No. 60 at 5.

24 <sup>43</sup> See *id.*

25 <sup>44</sup> See *Soto*, 162 F.R.D. at 603, 616. Production will not unreasonably burden Defendants, since  
26 they should have been keeping these records anyway under Section 1059. If these documents are  
27 not reasonably accessible after diligent efforts at recovery and production, Defendants shall  
28 supplement their responses accordingly.