

1 The motion for reconsideration is **DENIED**.

2 Discussion

3 Defendants assert that although the documents were created during the period
4 of time that Plaintiffs' administrative claim was pending, the context in which those
5 documents were created mitigates in favor of privilege. The documents consist of an
6 electronic mail thread covering March 25, 2009, through April 9, 2009, reflecting
7 communications between John St. Martin, the now-deceased pension and savings
8 benefits manager of Liberty Mutual and personnel of Hewitt Associates, LLC, the
9 record-keeper of the Liberty Mutal Retirement Benefit Plan. At the time of the
10 communications, Plaintiffs' initial claim for benefits had been denied by Mr. St.
11 Martin and the denial was pending review by Defendants' Retirement Benefit Board.
12 In his Declaration, Mr. Abel, outside litigation counsel for Liberty Mutual, asserts
13 that the communications were the result of requests that he made to Mr. St. Martin
14 for information in anticipation of litigation. Inasmuch as this is not obvious from the
15 content of the communications, and was not shown in the earlier motion, Defendants
16 have moved for reconsideration. *See* CivLR 7(i)(1).

17 Despite the fact that the communications at issue were initiated by a query
18 from outside litigation counsel to Mr. St. Martin, the Court finds that the fiduciary
19 exception applies. The communications at issue involve calculations of plan benefits
20 under several hypothetical scenarios. In that regard, the communications appear
21 quite similar to those at issue in *Stephan v. Unum Life Ins. Co.*, ___ F.3d ___, 2012
22 WL 3983767, *13 (9th Cir. Sept. 12, 2012). In finding the documents subject to the
23 fiduciary exception in that case, the Court of Appeals observed:

24 The documents at issue are notes of conversations between Unum
25 claims analysts and Unum's in-house counsel about how the insurance
26 policy under which Stephan was covered ought to be interpreted and
whether Stephan's bonus ought to be considered monthly earnings
within the meaning of the plan.

27 *Id.*

28 Here, the communications are alternative calculations of plan benefits based

1 upon different start dates. At the time of the communications, Plaintiffs’
2 administrative appeal had been pending for about one year and would not be decided
3 for another four months. As in *Stephan*, Mr. Abel’s Declaration notwithstanding,

4 The context of the documents at issue here – communications in advance
5 of Unum’s decision on Stephan’s appeal – indicates that their goal was
6 the determination of Stephan’s pre-disability earnings, a matter of plan
7 administration, and was not preparation for litigation.

8 *Id.* Substitute Liberty Mutual for Unum, Plaintiffs for Stephan and determination of
9 benefits under different vesting scenarios for pre-disability earnings, and we have our
10 case.

11 Defendants place great emphasis on the litigation history between Plaintiff
12 Moyle and Defendants. While it no doubt was true that Plaintiff would sue if he
13 received an adverse decision on his appeal, that fact does not mean that the interests
14 of the fiduciary and the plan beneficiary sufficiently had diverged at the time of the
15 communications. The Ninth Circuit has agreed with the courts that have held “that
16 it is not until after the final determination – that is, after the final administrative
17 appeal – that the interests of the Plan fiduciary and the beneficiary diverge for
18 purposes of the fiduciary exception.” *Id.* Nothing in the communications reflect that
19 they were in anticipation of litigation and there is no discussion of any possible
20 personal liability of the fiduciary. The context added by Defendants in support of
21 reconsideration, that these calculations were run at the request of Mr. Abel with
22 litigation in mind, does not change the fact that the various permutations of benefits
23 under different scenarios remain a matter of plan administration while the appeal
24 was pending.

25 //

26 //

27 //

28 //

//

//

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Conclusion

The motion for reconsideration is **DENIED**. Absent further order of the Court or agreement of the parties, production of the disputed documents must occur no later than October 25, 2012.

IT IS SO ORDERED.

DATED: October 15, 2012


Hon. Mitchell D. Dembin
U.S. Magistrate Judge