No. 10-1687

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HILDA L. SOLIS, Secretary of Labor,
Appellee,

v.

THE FOOD EMPLOYERS LABOR RELATIONS ASSOCIATION AND UNITED FOOD AND COMMERCIAL WORKERS PENSION FUND
and
THE FOOD EMPLOYERS LABOR RELATIONS ASSOCIATION AND UNITED FOOD AND COMMERCIAL WORKERS HEALTH AND WELFARE FUND
Appellants.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORTIES

Cases: Page

Cases--continued: Page

Cases--continued: Page

Cases--continued: Page

Cases--continued: Page

Cases--continued: Page

Federal Statutes:

Federal Statutes--continued: Page

Miscellaneous--continued: Page

STATEMENT OF THE ISSUES

1. Whether the Secretary of Labor (the Secretary) may assert the fiduciary exception to the attorney-client privilege, when she issues an administrative subpoena pursuant to her investigation of possible malfeasance in the administration of ERISA plans.

2. Whether the district court correctly held that the Secretary was entitled to obtain under her administrative subpoenas materials that appellants claimed were attorney work product.

STATEMENT OF THE CASE

The appeal arises from a petition by the Secretary of Labor to enforce administrative subpoenas filed in the District Court of Maryland on March 11, 2010. Joint Appendix (JA) 6-11. The Secretary issued the subpoenas against two multiemployer employee benefit plans, the Food Employers Labor Relations Association and United Food and Commercial Workers Pension Fund, and the Food Employers Labor Relations Association and United Food and Commercial Workers Health and Welfare Fund (collectively FELRA or the FELRA Funds), as part of an investigation by the Secretary into possible mismanagement of fund assets. The Secretary filed suit to enforce the subpoenas after FELRA objected to the production of some of the requested materials, claiming attorney-client and work-product privileges. Following

briefing by the parties, the court held a hearing on May 19, 2010, at which time the court held that the fiduciary exception to the claimed privileges applied. The court therefore ordered that the withheld documents be produced and issued an order to that effect on the same date. JA 83-85. FELRA appealed. JA 87.

STATEMENT OF FACTS

The Secretary began her investigation into the management of the two FELRA Funds at issue after they lost $10.1 million dollars in ERISA plan assets as a result of their investments in Bernard L. Madoff-related funds. JA 59-60. Bernard L. Madoff is the founder of Bernard L. Madoff Investment Securities LLC. On June 29, 2009, Madoff was sentenced to 150 years in prison for securities fraud and other charges stemming from his now-notorious Ponzi scheme. JA 16.

On April 15, 2009, the Secretary issued two subpoenas duces tecum to FELRA requesting documents relating to the administration of the FELRA Funds. JA 13. FELRA refused to comply with the subpoenas in full. JA 16. In particular, FELRA redacted and failed to produce: (a) Board of Trustees and Policy Committee meeting minutes for both plans; (b) documents that were referred to in or distributed in these meetings; (c) notes taken at these meetings; and (d) any correspondence relating to the plans' Madoff-related investments,

the latter especially being precisely the kinds of documents necessary to determine if there was any fiduciary misfeasance with regard to these investments. JA 15-16.

The Secretary made numerous concessions and engaged in months of negotiations, during which she made three offers of settlement in hopes of avoiding litigation. JA 9-10. For instance, the Secretary agreed that the respondents need not produce communications related to individual benefit disputes, delinquent contributions, withdrawal liability or collective actions involving employers. JA 83-85. However, despite the numerous and significant modifications of the subpoenas made by the Secretary, the respondents continued to assert that many of the documents were privileged, and the Secretary brought suit in federal district court to obtain compliance. JA 10.

After briefing and argument, the district court applied the fiduciary exception to the privileges asserted and concluded that it "was not persuaded that the dire consequences [asserted by FELRA] are going to occur" and that, in any event, the Secretary had established good cause if such a standard does apply. JA 82. The court thus ordered FELRA to comply with the subpoenas. Id. Significantly, however, the court expressly precluded from disclosure, as the Secretary had agreed in response to FELRA's concerns, any document

dealing exclusively with benefit disputes, benefit claims, subrogation agreements, delinquent contributions, withdrawal liability, or collection actions involving employers. JA 84. Moreover, the court also excluded from disclosure any information covered by the attorney-client privilege or work-product protection in "any document dated [after the issuance of the subpoenas and] prepared in connection with the Secretary's investigation of the Plans." JA 85. Finally, the court held that "compliance with [the] Order does not waive any attorney-client or work product privilege with respect to any third party," ordered that the "Secretary [] not assert that the Respondent has waived any privilege with respect to any third party," and that "if the Department receives a request under the Freedom of Information Act … for any documents that must be produced under this Order, the Department will timely notify Respondents." JA 85.

SUMMARY OF ARGUMENT

Federal Rule of Evidence 501 requires federal courts to develop evidentiary privilege law according to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The common law has long recognized the authority of trust beneficiaries to discover all communications between trustees and trust attorneys and all documents produced by trust attorneys as a result of those

communications. Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 716-17 (Del. Ch. 1976). Only when the trustee hired and personally paid for a separate personal attorney could the trustee assert the attorney-client privilege against trust beneficiaries. Restatement (Second) of Trusts §173 cmt. b, at 378 (1959). The federal courts have, in light of reason and experience, extended this principle of common law and applied the fiduciary exception to ERISA plan fiduciaries.

This same reason and experience has also led all courts that have considered the issue to conclude that the Secretary may assert the fiduciary exception to the attorney-client privilege on behalf of plan beneficiaries when she is exercising her enforcement powers under ERISA by investigating plan administration and prosecuting fiduciaries for their malfeasance in the administration of ERISA plans. These courts have correctly reasoned that allowing the Secretary to discover or subpoena such materials does not disadvantage, but instead benefits the plan participants and beneficiaries, who are the true clients of the plan attorneys. For this reason, there is no cause to apply the privilege where, as here, the interests of the plan participants and beneficiaries, holders of the attorney-client privilege, would not be furthered by its application. 8 John H. Wigmore, Evidence in Trials at Common Law § 2285, at 527 (McNaughton rev. 1961) (Wigmore).

Nor must the Secretary make any showing of good cause in order to come within the fiduciary exception. Such a good cause test was developed in the corporate law context in response to the very real possibility that a derivative action by one group of shareholders could be at odds with the interests of other shareholders and indeed of the corporation as a whole. These concerns are wholly absent where the Secretary is investigating possible fiduciary breaches, and for this reason most courts allow the Secretary to obtain materials under the fiduciary exception without the need to show good cause. But even if such a showing were necessary, the Secretary has established good cause to obtain the requested materials under the fiduciary exception to the attorney-client privilege, as the court below held.

Finally, although the appellants also claim that some of the sought materials are protected from disclosure as attorney work product, they have failed to meet their burden of demonstrating the applicability of this privilege. Just as there is a fiduciary exception to attorney-client privilege, this Court should recognize such an exception in the ERISA context to the work-product rule with regard to materials prepared by plan attorneys for the benefit of ERISA plan participants. Moreover, the work-product doctrine only shields materials prepared in anticipation of litigation, and the materials at issue here

were prepared from 2004 to 2008, long before the start of the Secretary's investigation in 2009.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE INFORMATION SOUGHT BY THE SECRETARY UNDER HER ADMINISTRATIVE SUBPOENAS WAS COVERED BY THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE

Under ERISA section 504 (a), 29 U.S.C. § 1134(a), the Secretary of Labor has broad power to investigate ERISA compliance and to issue subpoenas in connection with her investigations. Because administrative subpoenas of this sort provide federal agencies with the necessary tools to fulfill their congressional enforcement mandate, Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 201-02 (1946), the district court's role in enforcing such subpoenas "is sharply limited." U.S. v. Am. Target Adver., Inc., 257 F.3d 348, 351 (4th Cir. 2001) (citing E.E.O.C. v. Lockheed Martin Corp., 116 F.3d 110, 113 (4th Cir. 1997)). The court need only satisfy itself, as the district court did in this case, that the agency (1) is authorized to make the relevant investigation, (2) has complied with the statutory requirements of due process, and (3) the responsive documents are relevant. E.E.O.C. v. Am. & Efird Mills, Inc., 964 F.2d 300, 302-03 (4th Cir. 1992). FELRA does not dispute the sufficiency of the subpoenas under these criteria, nor does it argue that production of the

requested materials would be too burdensome. See id. Instead, FELRA asserts that some of the materials are immune from disclosure under the attorney-client privilege. As the court below correctly held, however, these materials and communications come within the fiduciary exception to this privilege and accordingly must be produced to the Secretary.

A. The Fiduciary Exception to Attorney-Client Privilege is Well-Established in the Law and Applicable in the ERISA Context

The attorney-client privilege refers to the client's right to refuse to disclose confidential "communications between attorney and client made for the purpose of obtaining legal advice." Genentech, Inc. v. U.S. Int'l Trade Comm'n, 122 F.3d 1409, 1415 (Fed. Cir. 1997); see also Fisher v. U.S., 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.") (citation omitted); Black's Law Dictionary 1317 (9th ed. 2009). The purpose of the attorney client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). Although "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," id. (citation omitted), it is not "an ironclad veil of secrecy." Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970). Indeed, because assertion of the privilege interferes with

"the truthseeking mission of the legal process," U.S. v. Tedder, 801 F.2d 1437, 1441 (4th Cir. 1986), it is "not favored by federal courts" and is "to be strictly confined within the narrowest possible limits consistent with the logic of its principle." In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); Fisher, 425 U.S. at 403. For this reason, the party asserting the privilege bears the burden of demonstrating its applicability, including that the attorney-client relationship existed, that the particular communications at issue are privileged, and that the privilege was not waived. U.S. v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982).

Thus, since the Nineteenth Century, English courts have recognized that trust fiduciaries cannot assert the attorney-client privilege against trust beneficiaries on whose behalf those communications and documents were made. See U.S. v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999) (citing Charles F. Gibbs & Cindy D. Hanson, The Fiduciary Exception to a Trustee's Attorney/Client Privilege, 21 Actec Notes 236 (1995)); Martin v. Valley Nat'l Bank, 140 F.R.D. 291, 322 (S.D.N.Y. 1991) (citing Riggs, 355 A.2d at 712-13; Talbot v. Marshfield, 2 Drew & Sm. 549, 62 Eng. Rep. 728 (Ch. 1865); Wynene v. Humbertson, 27 Beav. 421, 54 Eng. Rep. 165 (1858); In re Mason, 22 Ch. D. 609 (1883)). These courts reason that when a trustee obtains legal advice using both the authority and the funds of the trust, the benefit of any

advice regarding the administration of the trust runs to the beneficiaries, and the trustee therefore cannot use the attorney-client (or documentary) privilege to shield its communications with attorneys or related documents from trust beneficiaries. Talbot, 2 Drew & Sm. at 550-51, 62 Eng. Rep. at 729.

The fiduciary exception developed somewhat later in American law. In the leading American case on the fiduciary exception, the Delaware Chancery Court's decision in Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976), concluded that a trustee could not refuse to disclose trustee-attorney communications or trust-attorney work product to trust beneficiaries because:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege.

Id. at 713-14.

Shortly before that, the Fifth Circuit in Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), became the first federal court to apply the fiduciary exception outside the trust context. Garner arose in the context of a shareholder's derivative action against the corporation's officers, directors, and controlling shareholders. Although the court recognized that corporate officers were not entirely analogous to common law fiduciaries and that there would be

instances in which the interests of the shareholder bringing suit would diverge from the interests of other shareholders, the court nevertheless held that, at least in some instances, the corporate officers could not refuse to disclose their communications with attorneys to the shareholders given the officers' overarching obligation to act in the interests of the shareholders. Id. at 1101-02.

Since Garner was decided, virtually all the Circuits, including this one, have now recognized some version of the fiduciary exception to the attorney-client privilege in a wide variety of contexts. See Becher v. Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997); Sandberg v. Va. Bankshares, Inc., 979 F.2d 332 (4th Cir. 1992), vacated on other grounds, No. 91-1873, 1993 WL 524680 (4th Cir. Apr. 7, 1993); Wildbur v. ARCO Chem. Co., 974 F.2d 631, 645 (5th Cir. 1992); Fausek v. White, 965 F.2d 126, 132-33 (6th Cir. 1992); Bland v. Fiatallis N. Am. Inc., 401 F.3d 779, 787-88 (7th Cir. 2005); Mett, 178 F.3d at 1062; Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1415-16 (11th Cir. 1994); In re Lindsey, 158 F.3d 1263, 1276 (D.C. Cir. 1998). Cf. Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007) (in case of first impression, the Third Circuit found the fiduciary exception not applicable to ERISA insurer obtaining legal advice in deciding claim for benefits).

Moreover, numerous courts have, quite correctly, extended the fiduciary exception to assertions of the attorney-client privilege by ERISA fiduciaries.

See, e.g., Long Island Lighting, 129 F.3d at 272; Wildbur, 974 F.2d at 645; Bland, 401 F.3d at 787-88; Mett, 178 F.3d at 1062; Vaughan v. Celanese Ams. Corp., No. CIV.3:06CV104-W, 2006 WL 3592538, at *4-*5 (W.D.N.C. Dec. 11, 2006) (ERISA trustee could not assert privilege for communications relating to plan administration, that included decisions about severance pay under the plan); Coffman v. Metro. Life Ins. Co., 204 F.R.D. 296 (S.D. W.Va. 2001) (beneficiaries of an ERISA trust given access to documents dealing with plan administration); Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982); Valley Nat'l Bank, 140 F.R.D. at 317-19; Donovan v. Fitzsimmons, 90 F.R.D. 583 (N.D. Ill. 1981). Cf. Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488, 497 (M.D.N.C. 2008) ("when the interests of the ERISA plan fiduciary and the plan beneficiaries have diverged sufficiently such that the fiduciary . . . [is acting] in its own interests to defend itself against the plan beneficiaries, then the attorney-client privilege remains intact"), rev'd on other grounds, 392 F.3d 636 (4th Cir. 2004); Fortier v. Principal Life Ins. Co., No. 5:08-CV-5-D(3), 2008 WL 2323918 (E.D.N.C. June 2, 2008) (finding fiduciary exception inapplicable when sought communications occurred after denial of beneficiary claim and fiduciary was an insurer).

In applying the fiduciary exception to the ERISA context, courts have relied on two related rationales. Mett, 178 F.3d at 1063 (citing Rust E. Reid, William R. Mureiko & D'Ana H. Mikeska, Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996)). Some courts rely on a Garner-type rationale, emphasizing the ERISA fiduciary's duty to act in the exclusive interest of beneficiaries, and concluding that this duty supersedes the fiduciary's right to assert attorney-client privilege. See Long Island Lighting, 129 F.3d at 271-72. Asserting privilege as a means of avoiding any inquiry by the agency charged with protecting plan participants is inconsistent with the statutory duty imposed on all plan fiduciaries to act with undivided loyalty to plan participants. See 29 U.S.C. § 1104(a)(1). Other courts rely on a Riggs-like rationale – that "'[a]s a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served.'" U.S. v. Evans, 796 F.2d 264, 266 9th Cir. 1986 (emphasis in original) (quoting Washington Star, 543 F. Supp. at 909); see also 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §5:33, at 666 (3d ed. 2007) (Mueller) ("The client is the holder of the attorney-client privilege[.]"). This rationale views the fiduciary "exception" as "not 'an exception' . . . at all," but instead as a reflection of "the fact that, at least as to advice regarding plan administration, a 'trustee is not the real client' and

thus never enjoyed the privilege in the first place." Mett, 178 F.3d at 1063 (quoting Evans, 796 F.2d at 266).

Thus, in the ERISA context, the fiduciary exception extends to advice given by an attorney for an ERISA plan to a plan fiduciary concerning plan administration. It does not cover a fiduciary's communications with a personal attorney regarding the development of his or her personal defense in an action for fiduciary breach, and these communications remain subject to the normal attorney-client privilege. E.g., Mett, 178 F.3d at 1064. Likewise, legal advice sought by corporate officials acting in a non-fiduciary, "settlor" capacity, such as when determining how to set up or terminate a plan, are not subject to the fiduciary exception. E.g., Bland v. Fiatallis N. Am., Inc., No. 02 C 69, 2002 WL 31655213, at *4 (N.D. Ill. Feb. 3, 2002) ("We agree that those [documents] we found covered by the attorney-client and/or work product privilege are not subject to the fiduciary exception because they all concern plan termination and/or amendment, not its management."), aff'd, Bland v. Fiatallis N. Am., 401 F.3d 779, 787-88 (7th Cir. 2005).[1] The Secretary crafted her subpoenas to

[1] Courts have also recognized two other limitations on the ERISA fiduciary exception, not at issue in this case. Where the exception is asserted by an individual plan beneficiary during discovery in a benefit claim dispute, most courts allow the beneficiary to assert the privilege, but only as to "pre-decisional" communications and work product. See, e.g., Coffman, 204 F.R.D. at 296. The Third Circuit has also recently held that the ERISA fiduciary exception should not apply to an third-party health insurer fiduciary whose

avoid requesting communications and documents that qualify for these limitations on the fiduciary exception, and instead sought only plan-related communications that are subject to the fiduciary exception. [2]

B. The Fiduciary Exception Covers Information of the Kind Sought Here by the Secretary Pursuant to Her Administrative Subpoena Power Under ERISA

All of the reasons that lead to the creation of the fiduciary exception also support its application to the Secretary of Labor where, as here, she seeks communications between a plan's fiduciaries and its attorneys under an administrative subpoena. Thus, where the government is investigating and prosecuting fiduciaries for plan-related crimes under ERISA, courts have

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fiduciary status arose only out of its discretionary control over benefit claim payments, because that fiduciary is less like a common law trustee than other ERISA fiduciaries to whom the exception commonly applies, and thus "the logic underlying the fiduciary exception" did not apply. Wachtel, 482 F.3d at 234. The FELRA fiduciaries who seek to assert the privilege here, the trustees of the fund, are quite literally trustees in the common law sense with authority and control over trust assets.

[2] FELRA does not appear to dispute, as the public filings (Form 5500's) support, that the law firms at issue, Slevin and Hart, PC and Morgan, Lewis, and Bockius, LLP, were acting as attorneys for the Plans, rather than for the individual fiduciaries, and that the Plans pay their fees. See Wachtel, 482 F.3d at 235-36 ("when a trustee pays counsel out of trust funds, rather than out of its own pocket, the payment scheme is strongly indicative of the beneficiaries' status as the true clients"); Riggs, 355 A.2d at 712 ("when the beneficiaries desire to inspect opinions of counsel for which they have paid out of trust funds effectively belonging to them, the duty of the trustees to allow them to examine those opinions becomes even more compelling"). See also Restatement (Third) of Trusts § 82 cmt. f, at 198 (2007).

correctly noted that "[j]ust as there is little justification for hiding trustee-attorney communications from beneficiaries investigating the plan's administration, so there is little justification for hiding the communications from public prosecutors seeking to protect those beneficiaries." U.S. v. Doe, 162 F.3d 554, 557 (9th Cir. 1998). Cf. Valente v. Pepsico, Inc., 68 F.R.D. 361, 369-70 n.16 (D. Del. 1975) ("[W]here a fiduciary represents conflicting interests, particularly where one of those interests is its own, the only purpose to be served by the use of the privilege to withhold information from those to whom the fiduciary obligation runs is fraud. The more general and important right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.").[3] Likewise, every court that has considered the issue has held that the Secretary may assert the fiduciary exception on behalf of ERISA plan participants when investigating or prosecuting a plan fiduciary for violations of ERISA. Mett, 178 F.3d at 1064 n.9; Valley Nat'l Bank, 140 F.R.D. at 317-19 (Where a law firm listed an ERISA plan as its client on billings, the firm's fees were not paid by the plan trustee, and the firm offered no evidence suggesting that it had represented

[3] For these reasons, when asserted by the Secretary in investigating and prosecuting ERISA cases, the fiduciary exception is akin to the well-known crime-fraud exception. See, e.g., Wachtel, 482 F.3d at 231.

trustee in the trustee's corporate capacity, the trustee had not established that it was the firm's client. Therefore, the trustee lacked standing to invoke attorney-client privilege with respect to documents produced as a result of communications between the plan trustee and plan attorney.); Fitzsimmons, 90 F.R.D. at 588; Wsol v. Fiduciary Mgmt. Assocs., No. 99 C 1719, 1999 WL 1129100, at *4 (N.D. Ill. Dec. 7, 1999).

Contrary to FELRA's contention, FELRA Br. 19-24, these decisions do not turn on whether the Secretary sought information under an administrative subpoena as part of an investigation or in discovery as part of a civil action. Indeed, the Ninth Circuit has expressly "extended the holding of Riggs to allow the government to stand in the shoes of beneficiaries when it is investigating and prosecuting malfeasance in the administration of an ERISA fund." Doe, 162 F.3d at 557 (emphasis added) (citing Evans, 796 F.2d at 265). Likewise, the Northern District of Illinois, in reliance on Doe, correctly held that there was no waiver of attorney-client privilege with regard to information given to the government during an investigation of the ERISA plan because that information came within the fiduciary exception to the attorney-client privilege. Wsol, 1999 WL 1129100, at *4. Cf. Sandberg, 979 F.2d at 351 ("officers and directors must only exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of

themselves as individuals.") (internal quotation marks and citation omitted); U.S. v. Segal, No. 02-CR-112, 2004 WL 830428 (N.D. Ill. Apr. 16, 2004) (acknowledging government's standing to assert fiduciary exception).

Moreover, although many of these cases arose in the context of discovery disputes, the rationales relied on by these courts support the Secretary's assertion of the exception to defeat a claim of privilege with regard to communications between plan fiduciaries and plan attorneys where, as here, she is enforcing investigative subpoenas. First, courts have homed in on the shared interests of the participants and the Secretary in uncovering and correcting fiduciary malfeasance to conclude that these interests clearly outweigh any interests of the plan participants and beneficiaries that theoretically run to the contrary. Fitzsimmons, 90 F.R.D. at 587-88; Doe, 162 F.3d at 557 ("Just as there is little justification for hiding trustee-attorney communications from beneficiaries investigating the plan's administration, so there is little justification for hiding the communications from public prosecutors seeking to protect those beneficiaries."). Courts have also reasoned that because the participants and beneficiaries are the holders of the attorney-client privilege, any assertion of the privilege to protect communications between plan fiduciaries and attorneys when their conduct is under question is likely to be contrary to the interests of the participants and beneficiaries. Mett, 178 F.3d at

1064; Valley Nat'l Bank, 140 F.R.D. at 317-19 ("Insofar as the [fiduciary bank's] relationship with [the law firm] is concerned, [the fiduciary bank] has failed to establish that it was the client and thus that it has standing to invoke the attorney-client privilege."). Both of these rationales support the district court's order enforcing the subpoenas in this case because the participants' interests are undoubtedly served by "securing complete disclosure in order to ferret out and discover any past wrongdoing affecting the Fund." Fitzsimmons, 90 F.R.D. at 586-87.

That these interests are served is as true when the Secretary is investigating plan management as when she is prosecuting a suit. Thus, there is no logical justification for limiting the fiduciary exception to the Secretary's enforcement role under ERISA section 502, 29 U.S.C. § 1132, and not applying it to her investigatory function under section 504, 29 U.S.C. § 1134. During an investigation, as in litigation, the Secretary is a "person duly authorized by [the beneficiary] to inspect . . . documents relating to the trust," Valley Nat'l Bank, 140 F.R.D. at 325-26 (internal quotation marks and citation omitted), and thus shares a "sufficient identity of interests" with ERISA plan participants and beneficiaries to trigger standing to assert the fiduciary exception. Fitzsimmons, 90 F.R.D. at 586. On a practical level, not only does the Secretary's effectiveness in litigation depend on her ability to gather evidence in

investigations, but much of the money that the Secretary recovers from plan fiduciaries for plan participants is paid before the Secretary ever files suit. On a more formal level, Congress granted the Secretary in section 502 the right to issue administrative subpoenas to investigate violations of Subchapter I of ERISA, which is entitled "Protection of Employee Benefit Rights" and which, as a whole, is expressly designed to protect "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

It is also true, as FELRA asserts, that the Secretary's interests are not identical to those of the participants and beneficiaries, but this divergence of interests is far from fatal. See, e.g., Fitzsimmons, 90 F.R.D. at 586 (recognizing Secretary's authority to obtain documents pursuant to the fiduciary exception even though "the interests of the participants and [the Secretary] might somewhat diverge" after the privilege dispute is determined); Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 697 n.18 (7th Cir. 1986) (reversing district court's holding that the Secretary was estopped from denying privity for res judicata purposes based on the Secretary's successful argument that it "shared a community of interests" with the plan's participants for purposes of the fiduciary exception). For instance, numerous cases have correctly held, as FELRA notes, that the Secretary is not bound by res judicata principles when plan participants and beneficiaries settle a case. FELRA Br. at 28-29 (citing

Agway, Inc. Employees' 401(k) Thrift Inv. Plan v. Magnuson, 409 F. Supp. 2d 136 (N.D.N.Y. 2005); Beck v. Levering, 947 F. Supp. 2d 136, 145-46 (N.D.N.Y. 2005); Herman v. S.C. Nat'l Bank, 140 F.3d 1413, 1424 (11th Cir. 1988)).

Although the Secretary undoubtedly brings her cases to serve the broader public interest in ERISA, nevertheless her interests are broadly aligned with the interests of the participants and beneficiaries she seeks to protect through her enforcement program. Indeed, when the Secretary recovers the losses caused by fiduciary misconduct, those losses are awarded to the plan and redound to the benefit of plan participants and beneficiaries. Moreover, as the res judicata cases recognize, participants often lack the resources or expertise necessary to recover all losses to the plan and thus to adequately deter their fiduciary's future breaches. See, e.g., S.C. Nat'l Bank, 140 F.3d at 1424-26 (noting the Secretary contention that the participants' private "recovery was wholly inadequate in light of the number and dollar amount of the claims against the former trustees and also that the settlement agreement failed to allow recovery from the personal assets of the former trustees"). This same reasoning supports, rather than undercuts, that the interests of plan participants is served by allowing the Secretary to assert the fiduciary exception on their behalf when she is

investigating and prosecuting malfeasance in the administration of ERISA plans.

FELRA asserts that participant interests are threatened because disclosure of otherwise privileged materials to the Secretary would result in a waiver of the privilege as to outside parties and would likewise subject such materials to disclosure under FOIA. This is not the case.

Disclosures, pursuant to a court-enforced subpoena, do not waive the attorney-client privilege. Transamerica Computer Co. v. Int'l Bus. Machines Corp., 573 F.2d 646, 651 (9th Cir. 1978) (party does not waive privilege "for documents which he is compelled to produce"). Express waiver occurs only when disclosures to third parties are voluntarily made. See Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286, 294-95 (4th Cir. 2004) ("waiver occurs when a party claiming the privilege has voluntarily disclosed confidential information on a given subject matter to a party not covered by the privilege"); see also 98 C.J.S. Witnesses § 385, Voluntary disclosure by holder of privilege; disclosure, or intent that communication be transmitted, to third person (2010); 32 Am. Jur. Proof of Facts 3d 189**,** Proof of Waiver of Attorney-Client Privilege (2010). Compliance with DOL investigatory subpoenas is not voluntary, regardless of whether they are court-enforced. ERISA section 504(a) grants the Secretary investigative powers, including the power "to require the

submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under [ERISA]." 29 U.S.C. § 1134(a)(1) (emphasis added); cf. Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 494 n.14 (D.C. Cir.1984) ("when an agency serves compulsory process in the form of an investigative subpoena, it compels the recipient to act").

In any event, even if disclosure to the Secretary when she is investigating the plan is considered "voluntary" in some sense, because it falls within the fiduciary exception, there is no waiver of the privilege with regard to third parties, just as there is no waiver when a trustee gives otherwise privileged information to a beneficiary. See Wsol, 1999 WL 1129100, at *4. In other words, disclosures to parties with a common legal interest are not disclosures to third parties and therefore do not waive the privilege. 8 Wigmore § 2312, at 603; In re Grand Jury Subpoena Duces Tecum, Dated Nov. 16, 1974, 406 F. Supp. 381, 387 (S.D.N.Y. 1975); Wachtel, 482 F.3d at 231; 2 Mueller § 5:33, at 671 ("Of course disclosure to the person who is within the magic circle covered by the privilege, such as . . . a joint client . . . does not waive the privilege."). Thus, the district court's order here correctly and expressly holds that "compliance with [the] Order does not waive any attorney-client or work product privilege with respect to any third party," and orders that the "Secretary

[] not assert that the Respondent has waived any privilege with respect to any third party." JA 85.

Although it is possible that documents submitted to the Secretary might be subject to disclosure pursuant to a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, FOIA contains several applicable exemptions that make the likelihood of such disclosure remote. For instance, FOIA Exemption 4 provides that "commercial or financial information obtained from a person and privileged or confidential" is exempt from disclosure. Id. § 552(b)(4). Courts have defined "confidential" commercial information under this provision broadly enough to include at least some work done by an attorney for its clients. Indian Law Res. Ctr. v. Dep't of Interior, 477 F. Supp. 144, 146 (D.D.C. 1979); Miller, Anderson, Nash, Yerke & Wiener v. DOE, 499 F. Supp. 767, 771 (D. Or. 1980). See also Judicial Watch, Inc. v. DOE, 310 F. Supp. 2d 271, 308 (D.D.C. 2004) (holding that reports that "constitute work done for clients" are "commercial in nature").

FOIA also exempts from disclosure any "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or impartial adjudication, (C) could

reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). The Secretary's ERISA investigations and prosecutions are law enforcement efforts for the purposes of FOIA Exemption 7. See U.S. Dep't of Justice, Guide to the Freedom of Information Act (2009 ed.), http://www.justice.gov/oip/foia_guide09.htm ("[T]he 'law' to be enforced within the meaning of the term 'law enforcement purposes' [in Exemption 7] includes both civil and criminal statutes, as well as those statutes authorizing administrative (i.e., regulatory) proceedings."). When "disclosure through FOIA would furnish access to a document not available under the discovery rules and thus would confer an unfair advantage on one of the parties," Exemption 7(b) would preclude the Secretary from disclosing such documents. Washington Post Co. v. DOJ, 863 F.2d 96, 102 (D.C. Cir. 1988).

Pursuant to the district court's order, JA 85, FELRA will be notified in the unlikely event that any outside party seeks access to any of the submitted documents pursuant to FOIA. FELRA may then exercise its right under FOIA to file a "reverse FOIA" claim to bar disclosure of any materials protected by the FOIA exemptions. See Executive Order No. 12,600.

FELRA is not only wrong about whether any submitted materials would be disclosed to third parties, it is also wrong about what the effect of such a disclosure would be on plan participants. Most of the examples that FELRA

cites of disclosures that might injure plan participants deal with communications that were not requested here (and would not have been subject to the fiduciary exception). For example, as noted above, the fiduciary exception only applies to communications and work product that relate to plan administration. E.g., Mett, 178 F.3d at 1064. To the extent that a fiduciary communicates with an attorney in a personal capacity to prepare a personal legal defense, the fiduciary exception does not apply. Id.

For all these reasons, it is clear that the potential injuries to participants that FELRA asserts are speculative and overstated, in sharp contrast to the likely injury to participants if the attorney-client privilege can be asserted to shield communications and materials from disclosure to the Secretary. See Mett, 178 F.3d at 1064. Thus, FELRA has failed to demonstrate that "[t]he injury that would inure to the [client] by the disclosure of the communications" is "greater than the benefit thereby gained for the correct disposal of litigation."[4] Garner, 430 F.2d at 1100; Sandberg, 979 F.2d at 350 (citing 8 Wigmore § 2285, at 527; Riggs, 355 A.2d at 713 (same). Instead, for all the reasons set forth above, it is far more likely that plan participants will be greatly benefitted by recognizing the Secretary's right to assert the fiduciary exception on their behalf, as have all courts to date.

[4] The burden of establishing that the attorney-client privilege applies is on the party asserting the privilege. Jones, 696 F.2d at 1072.

C. The Garner Good Cause Factors Should Not Apply Here Because the Concerns Which Gave Rise to That Good Cause Test are Not Triggered in the ERISA Context

Relying on the Fifth Circuit's decision in Garner, the respondents argue that, even assuming that a fiduciary exception is applicable, the Secretary must show good cause to obtain communications that would otherwise be protected by the attorney-client privilege, and she failed to do so. FELRA Br. at 34-48. Garner, however, and its "good cause" test, arose in the very different context a shareholder's derivative action in which the shareholders claimed that a corporation's officers, directors, and controlling shareholders could not refuse to disclose their communications with attorneys to the corporation's shareholders and should not be extended to the ERISA context, as the court below held. In the particular context of a shareholder derivative action, the Fifth Circuit recognized that "corporate management is less of a fiduciary than the common law trustee." 430 F.2d at 1101-02. Moreover, the court recognized that, in the corporate context, there were instances in which the "interests or intention" of shareholders who were suing the corporation were "inconsistent with those of other shareholders." Id. at 1101 n.17. Thus, for the fiduciary exception to the attorney-client privilege to apply in the shareholder derivative context, the court concluded that "[t]he injury that would inure to the [client] by the disclosure of the communications must be greater than the benefit thereby gained for the

correct disposal of litigation," and the court remanded to the district court to assess whether, under the circumstances, there was "good cause" to order disclosure. Id. at 1100.[5]

Garner created the additional "good cause" requirement out of a concern that "shareholder[]s [may] attempt to pierce the attorney-corporate client privilege to vindicate interests other than those of a shareholder – for example, a shareholder of two competing companies who seeks to pierce the privilege adversely to one company to benefit himself as a shareholder of the other." In re Occidental Petrol. Corp., 217 F.3d 293, 298 (5th Cir. 2000) (interpreting Garner). Not surprisingly, however, because the common law fiduciary exception contained no "good cause" requirement, most courts have refused to apply such a requirement outside the corporate law context. See, e.g., Henry v.

[5] The court noted that that there are "many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons." Garner, 430 F.2d at 1104.

Champlain Enters., Inc., 212 F.R.D. 73, 81-85 (N.D.N.Y. 2003) (applying Garner good cause criteria to the plaintiff's shareholder derivative claim and no good cause limitation to the plaintiff's requests relevant to their ERISA claims); see also Valley Nat'l Bank, 140 F.R.D. at 323; 2A Austin W. Scott & William F. Fratcher, Scott on Trusts §173, at 462-64 (4th ed. 1987); George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 961, at 2 (2d ed. rev. 1983). Indeed, when Riggs incorporated the common law fiduciary exception into modern trust law, it applied no Garner-style good cause test. See Riggs, 355 A.2d at 712-14.[6] Likewise, the Fifth Circuit, the Court which decided Garner, has held that that test is unnecessary in the ERISA context, noting that the concern underlying Garner's good cause showing is "not triggered" when ERISA beneficiaries' seek to discover fiduciary-attorney communications

[6] Significantly, the Delaware Chancery Court, has preserved the Riggs ruling as to trust-beneficiary fiduciary exception claims but applied the Garner good cause limitation to shareholder fiduciary exception claims, due to the opportunities for abuse particular to the corporate law context. See, e.g., Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990). The Southern District of New York has taken a similar approach. E.g., Lawrence v. Cohn, No. 09CIV.2396, 2002 WL 109530, at *6 (S.D.N.Y. Jan. 25, 2002) ("The 'good cause' requirement derives from the decision of the Fifth Circuit in Garner, which involved a shareholder derivative lawsuit. . . . Although some courts have applied the 'good cause' test in other contexts . . . generally speaking this requirement has been limited to the corporate shareholder context, and with good reason. As has been noted, the animating rationale for imposing the 'good cause' test is that there may well be divergences of interest between the plaintiff shareholders in a derivative action and the corporation itself. . . . In contrast in the other comparable fiduciary relationships, there exists no legitimate need for a fiduciary to shield his actions from those whom he is obligated to serve.").

because such efforts "in no way undermine [the] fiduciary['s] duties" to other beneficiaries. Occidental, 217 F.3d at 298; see also Wildbur, 974 F.2d at 645 (concluding that "[w]hen an attorney advises a plan administrator or other fiduciary concerning plan administration, the attorney's clients are the plan beneficiaries for whom the fiduciary acts, not the plan administrator[; t]herefore, an ERISA fiduciary cannot assert the attorney-client privilege against a plan beneficiary about legal advice dealing with plan administration.") (internal citation omitted).

Indeed, after Garner, only one court has ever suggested, mistakenly in the view of the Secretary, that the Garner good cause analysis applies to the ERISA context. Fitzsimmons, 90 F.R.D. at 587. Cf. Helt v. Metro. Dist. Comm'n, 113 F.R.D. 7, 10 n.2 (D. Conn. 1986) (because "good cause" was present, the court declined to decide issue, but noted its inclination to agree that, despite Garner, beneficiaries need not establish "good cause"). But aside from Fitzsimmons, a broad consensus has emerged among the federal courts that Garner's good cause criteria do not apply to ERISA fiduciary exception cases. See, e.g., Mett, 178 F.3d at 1063; Wildbur, 974 F.2d at 645; Tatum, 247 F.R.D. at 495 (rejecting Garner's good cause analysis); Hudson v. Gen. Dynamics Corp., 186 F.R.D. 271 (D. Conn. 1999); Valley Nat'l Bank, 140 F.R.D. at 323; Washington Star, 543 F. Supp. at 909 n.5; Bertolotti v. Teamsters Local 814 Pension Fund, No.

95-CV-5261, 1998 WL 12169, at *3-*4 (E.D.N.Y. Jan. 8, 1998). See also Long Island Lighting, 129 F.3d at 272 (discussing when the fiduciary exception applies to ERISA fiduciary communications at length without mention of Garner or its good cause factors); Bland, 401 F.3d at 787-88 (same). This consensus is based on the recognition that "there exists no legitimate need for a trustee to shield his actions from those whom he is obligated to serve." Valley Nat'l Bank, 140 F.R.D. at 326 (citation omitted). Moreover, the Garner good cause showing is unnecessary in the ERISA context because the ERISA participants' right to access fiduciary-attorney communications is not an exception to the attorney client privilege, meriting some kind of additional balancing test, but "merely reflects the fact that, at least as to advice regarding plan administration, a 'trustee is not the real client' and thus never enjoyed the privilege in the first place." Mett, 178 F.3d at 1063 (citation omitted).

This rationale is sound. As discussed above, the Garner good cause factors were designed to prevent shareholder exploitation of corporations. That abuse is made possible because of shareholders' voting and ownership rights, which can lead to hostile takeovers and inequitable "freeze outs" of minority shareholders. Garner (and other corporate and partnership fiduciary exception cases in its wake) have also justified application of limiting good cause factors by reference to the realistic possibility that shareholders holding shares in

multiple corporations might abuse an unfettered fiduciary exception to access sensitive inside information. See Garner, 430 F.2d at 1104 (listing disclosure of trade secrets as one of the factors to be weighed in determining appropriateness of disclosure). Such opportune shareholders could use that inside information to benefit the corporation's competitors, in which they may easily hold a larger financial stake, or as an illicit basis for selling or trading their shares. See Occidental, 217 F.3d at 298; Valley Nat'l Bank, 140 F.R.D. at 319-21.

There is simply no comparable threat of abuse here. Neither plan participants nor the Secretary can profiteer from whatever plan administration-related information they secure from ERISA plan fiduciaries and plan attorneys pursuant to the fiduciary exception. Therefore, while there may be a legitimate need for corporation officers to communicate confidentially with their attorneys in order to avoid such majority shareholder exploitation of minority interests, there is no comparable legitimate need for ERISA fiduciaries to shield their communications relating to plan administration from plan beneficiaries or the Secretary. Washington Star, 543 F. Supp. at 909 n.5. This is especially so when plan participants and beneficiaries are suing an ERISA fiduciary as a class or when the communications are sought by the Secretary while

investigating and prosecuting ERISA violations on behalf of all plan participants.[7]

Thus, FELRA's reliance on Sandberg is fundamentally misplaced. Sandberg arose in and was limited to the corporate context, and therefore has little relevance in the ERISA context for the reasons stated above. 979 F.2d at 352 ("We believe the Garner analysis provides a sound basis for balancing a corporation's need to communicate confidentially with its attorneys against the shareholders' interests as beneficiaries of a fiduciary relationship."). Accordingly, since Sandberg, three district courts in the Fourth Circuit have correctly adopted the ERISA fiduciary exception without engaging in a "good cause" analysis. Tatum, 247 F.R.D. at 495 (rather than adopting Garner's good cause test, court analyzes whether the communications relate to fiduciary functions or to legal advice to protect the plan administrator from personal liability); Vaughan, 2006 WL 3592538, at *4-*5; Coffman, 204 F.R.D. at 298 (same).

Nor does this court's decision in Faircloth v. Lundy Packing Co., 91 F.3d 648 (4th Cir. 1996), support application of Garner's good cause analysis, as

[7] Although FELRA also points to the conflicts that exist when a fiduciary defends a benefit determination claims, it is generally accepted that post-decisional benefit claims communications are not subject to the fiduciary exception in the first place, see e.g., Coffman, 204 F.R.D. at 299, and for this reason the Secretary has not sought such materials here. JA 84.

FELRA contends. FELRA Br. at 37. In fact, Faircloth makes no mention whatsoever of the fiduciary exception doctrine or any of the cases that discuss the exception. Instead, Faircloth dealt with provisions in ERISA that require certain automatic disclosures, and in that context held that fiduciaries do not have an affirmative duty to disclose all documents in their possession to plan participants on demand. 91 F.3d at 655. This holding presents no conflict with the many decisions, such as Washington Star, that reject the Garner good cause factors in the ERISA context because, contrary to FELRA's assertion, none of these decisions "rely on obligations in the common law of trusts requiring trusts to make complete disclosures to participants." FELRA Br. at 37.

Even if the Secretary were required to show good cause, she has done so, as the district court concluded. JA 82. The Garner test provides a non-exhaustive list of such factors as "the number of shareholders and the percentage of stock they represent," the "bona fides of the shareholders" and the risk of revelations of trade secrets, 430 F.2d at 1104, factors that do not translate directly and are thus not well suited to the ERISA fiduciary context. As adapted to the ERISA context in the Fitzsimmons case, the relevant factors in an ERISA case include: the number of potential participants and beneficiaries; the Secretary's good faith; whether the claim is "at least colorable;" whether the materials sought are limited in scope and relevant; and

the degree to which the relevant documents are likely to disclose litigation strategy. 90 F.R.D. at 587; see also Valley Nat'l Bank, 140 F.R.D. at 326-27 (rejecting necessity of showing good cause but holding, alternatively, that Secretary satisfied test under Fitzsimmons factors).

The district court correctly found that the Secretary established good cause to obtain the contested documents under these factors. First, the Secretary's investigation clearly is conducted on behalf of all members of the two FELRA Funds, and is not aimed at a "handful of disgruntled pensioners or a small minority of the Fund's participants." Fitzsimmons, 90 F.D.R. at 587; Valley Nat'l Bank, 140 F.R.D. at 326 (the "Secretary represents, in effect, all of the trust beneficiaries and they hold one hundred percent of the interest in the Trust"). Cf. 29 U.S.C. §§ 1109, 1132 (The Secretary brings enforcement actions on behalf of ERISA plans). Second, respondents do not context the Secretary's authority to conduct this investigation and her claim for the materials is at least colorable. Valley Nat'l Bank, 140 F.R.D. at 326 ("the claims of fiduciary breach asserted by the Secretary are legally sufficient on their face, and there is no reason in the record to question the bona fides of the Secretary in asserting those claims").

Third, both subpoenas as modified and the specific documents that the Secretary seeks are limited in scope, as outlined above. And the trustee and

policy committee meeting minutes and other related documents sought here are central to fiduciary decision-making and, as such, are highly relevant to an investigation of possible ERISA violations. In fact, the Secretary routinely subpoenas such documents and routinely received them without redactions. Finally, the relevant documents would not disclose litigation strategy in the instant case because the Secretary did not seek, and the order entered by the district court does not require production of documents prepared after the date the investigation began, JA 85, and any information revealed to the Secretary is amenable to a court order protecting against third-party disclosures. See, supra, at 25.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY WAS ENTITLED TO OBTAIN MATERIALS PURPORTED TO BE ATTORNEY WORK PRODUCT

FELRA also claims that portions of the documents are protected from disclosure because they are attorney work product. The work-product doctrine bestows a qualified privilege upon documents prepared by an attorney "in anticipation of litigation." See Fed. R. Civ. P. 26(b)(3); In re Grand Jury Proceedings, Thur. Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 348 (4th Cir. 1994). As with attorney-client privilege, the appellants carry the burden of demonstrating the applicability of the work-product privilege. Id. at 353. In this case, the appellants neither have met this burden, nor can they. First,

because there is a fiduciary exception to the work-product rule, the privilege will not apply to or protect materials prepared for the benefit of ERISA plan participants. Second, even where this fiduciary exception does not apply, the work-product doctrine only shields materials prepared in anticipation of litigation and the materials at issue, prepared from 2004 to 2008, were not plausibly prepared in anticipation of litigation by the Secretary since the Secretary's investigation only began in 2009.

As an initial matter, like the attorney-client privilege, an ERISA fiduciary exception applies to, and negates the application of, the work-product privilege. Everett v. USAir Group, Inc., 165 F.R.D. 1, 5 (D.D.C. 1995) ("Lawyers who act for fiduciaries of an employee benefit plan may assert the work product privilege since the privilege belongs, at least in part, to the attorney. But generally they may not invoke it to shield their attorney work product from their own ultimate clients, the plan beneficiaries."); Aull v. Cavalcade Pension Plan, 185 F.R.D. 618, 626 (D. Colo. 1998) (ERISA beneficiaries are generally entitled to discover plan attorney work product when the documents at issue relate to allegedly improper actions of ERISA fiduciaries**)**; Riggs, 355 A.2d at 716 (any work product prepared on the trusts' behalf would not be protected from discovery by the beneficiaries, who are "entitled to know what the trustees did, that is, what legal opinion was sought on their behalf and what was done in

light of that opinion on their behalf"); see also Alpert v. Riley, No. CIV. A. H-04-CV-3774, 2009 WL 1226767, at *12 (S.D. Tex. Apr. 30, 2009) (applying the fiduciary exception to the work-product protection in a non-ERISA case); Spivey v. Zant, 683 F.2d 881, 885 (5th Cir. 1982) (attorney cannot assert work-product privilege against his client); In re Standard Fin. Mgmt. Corp., 79 B.R. 97, 99 (Bankr. D. Mass. 1987) ("[t]o protect counsel from his own client trying to recapture background detail is a perversion of the privilege"); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) (although lawyer need not provide client with own internal notes, he "should deliver all other material which is useful to the client in benefiting fully from [the lawyer's] service[,] . . . includ[ing] all significant correspondence, . . . and material . . . received from third parties," and other significant documents).

In the ERISA context, this fiduciary exception arises from the unique relationship between ERISA fiduciaries and plan beneficiaries, and, in particular, from the fact that "when an attorney advices a fiduciary about a matter dealing with the administration of an employee's benefit plan, the attorney's client is not the fiduciary personally, but rather the trust's beneficiaries." Everett, 165 F.R.D. at 4 (citations omitted). While "[l]awyers who act for fiduciaries of an employee benefit plan may assert the work-product privilege since the privilege belongs at least in part to the attorney . . . they may

not invoke it to shield their attorney work product from their own ultimate clients, the plan beneficiaries." Id. at 5.

Some courts, including Sandberg in this circuit, have not extended the Garner fiduciary exception to the work-product doctrine, at least in the corporate context. E.g., Sandberg, 979 F.2d at 355 n.22. However, the decision in Sandberg was vacated pursuant to a joint agreement by the parties in that case, No. 91-1873(l), 1993 WL 524680 (4th Cir. Apr. 7, 1993), and is no longer binding precedent. Although vacated decisions may be given some weight, E.E.O.C. v. City of Norfolk Police Dep't, 45 F.3d 80, 83 & n.3 (4th Cir. 1995), we think this Court should not do so for all the reasons stated in this brief. And, in particular, the Court should not extend the holding to the ERISA fiduciary context. As explained above, the ERISA fiduciary exception evolved from Garner, but is a distinct doctrine because the relationship between ERISA fiduciaries is different from the relationship between corporate officers and shareholders. For example, as noted above, corporate directors and officers owe their fiduciary duties to the corporation, whereas ERISA fiduciaries owe their duties to the participants and beneficiaries; corporate fiduciaries frequently have interests that diverge from the stockholders, and at times, must be protected from, or act adverse to, their shareholders, whereas no such divergence is likely to exist in the ERISA fiduciary relationship; and ERISA

participants and beneficiaries tend to be more vulnerable than shareholders, lacking the power to vote out their fiduciaries. Indeed, ERISA fiduciaries are required to act, at all times, "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104 (a)(1). Thus, ERISA beneficiaries have a more direct and aligned relationship with plan counsel than the relationship between corporate beneficiaries and corporate counsel (or in the case of Sandberg, between bank counsel and the bank's customers and shareholders). ERISA fiduciaries are the real clients of plan counsel whereas that relationship is more attenuated in the context of corporate or bank beneficiaries and the corporate or bank counsel. For that reason, an ERISA fiduciary exception to both the attorney-client privilege and the work-product privilege is more appropriate than it may be in the shareholder or bank context.

The effect of this exception is that it renders the work-product doctrine inapplicable to documents prepared to assist a trustee in its fiduciary capacity. Riggs, 355 A.2d at 716; See Everett, 165 F.R.D. at 5 ("Lawyers who act for fiduciaries of an employee benefit plan may assert the work product privilege since the privilege belongs, at least in part, to the attorney. But generally they may not invoke it to shield their attorney work product from their own ultimate clients, the plan beneficiaries."). Applied to this case, the exception precludes assertion of the work-product privilege because FELRA failed to show that the

communications at issue did not relate the Funds, or were not prepared to assist the trustees in their fiduciary duties. This is not surprising since the contested materials were provided at plan-related meetings where the trustees presumably – if not solely – discussed matters of plan administration to benefit the plan.

The only applicable limitation of this exception – materials prepared for the defendants in their personal capacity in anticipation of litigation against them personally – does not apply here because the materials at issue were created in 2004 through 2008, well before the Department's investigation. Moreover, the documents must be prepared "exclusively" to aid the fiduciaries personally; if the documents serve a dual purpose, the doctrine will not prevent their disclosure to the beneficiaries. See Valley Nat'l Bank, 140 F.R.D. at 320 (in case where successor trustee sought to waive work-product privilege, but law firm objected, court holds that, "[h]aving been hired to serve the client, the attorney cannot fairly be authorized to subvert the client's interests by denying to the client those work papers to which the client deems it necessary to have access"). In this case, FELRA cannot meet this burden as it has never suggested that the purported work product at issue deals with the personal liability of the trustees, a showing that is particularly unlikely given that the materials at issue are from 2004 to 2008, well before the Secretary's

investigation began. Moreover, FELRA has provided nothing to establish that such purported work product dealt exclusively with liability.

For similar reasons, FELRA failed to meet its burden to show that the work-product privilege even applies to the documents, regardless of the fiduciary exception, under the Fourth Circuit's three-step test for analyzing whether work-product privilege applies. First, the court should determine whether the purported work product "was made in anticipation of litigation." Sandberg, 979 F.2d at 355. If the party asserting the privilege meets his burden and show that the material was prepared in anticipation of litigation, then the court determines whether the item is "opinion work product," which is absolutely protected, or "non-opinion work product," which may be discovered upon a showing of "substantial need." Id.

As noted above, the contested materials were prepared in 2004 to 2008, years before the Secretary's investigation, and therefore are not protected work product because they could not possibly have been created in anticipation of litigation. Although "litigation is an ever-present possibility in American life," to be prepared in anticipation of litigation, a document "must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." Sandberg, 979 F.2d at 356 (emphasis in original)

(citation omitted). In this case, there is no reason to believe the appellants or their attorneys anticipated litigation against the FELRA Funds in the years or even months before the Secretary initiated its investigation. Nor was there any prospect of Departmental litigation on the horizon. At most, the meetings and related materials were part of the ordinary march of business, and "material prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not prepared in anticipation of litigation." Id. (internal quotation marks and citation omitted). See also State of Fla. ex rel Butterworth v. Indus. Chem., Inc., 145 F.R.D. 585, 587-88 (N.D. Fla. 1991) (holding that materials produced by state attorney general are not prepared in anticipation of litigation simply because a civil investigation is open); Abel Inv. Co. v. U.S., 53 F.R.D. 485, 489-90 (D. Neb. 1971) (finding that anticipation of litigation does not begin the moment the Internal Revenue Services conducts an audit, simply because some audits eventually lead to litigation).

Even if the appellants could identify some purported litigation at issue in 2004 to 2008, they still have an affirmative burden to show the communications related solely to actual litigation preparation: communications that occur during a period of threatened litigation are not per se protected work product. Sandberg, 979 F.2d at 356. In Sandberg, for example, the Fourth Circuit

rejected a claim that meeting notes were work product simply because an attorney described the purpose of the meeting in an affidavit and it occurred during a period of litigation. Id. Instead, where the attorney did not "indicate her purpose in making the notes," the Court noted that:

> The mere fact that a lawsuit was pending does not transform an attorney's notes into material prepared in anticipation of litigation. Moreover, while a general counsel may be involved in litigation strategy and oversight, it is also possible that her involvement in the litigation is no different from that of other corporate officers.

Id.; see also Tatum, 247 F.R.D. at 501 (Although "the record is sufficient to establish that the documents at issue were created during a time period when Defendants faced the threat of litigation . . . [a]n existing threat of litigation, however, is not sufficient to establish that the documents at issue were created in anticipation of litigation.").

Thus, FELRA's burden to establish work in anticipation of litigation is highly substantive and demands a specific showing of a litigation related purpose for each withheld or redacted document. That burden was not satisfied here because FELRA make, at best, only vague claims of generalized work product.

Finally, even if the district court, which did not address the issue, could have found that certain materials were prepared in anticipation of litigation, the Secretary presented a strong argument that she has substantial need to receive

any non-opinion materials. The investigation relates to alleged breaches of ERISA because of certain plan investments in Madoff funds. Plan trustee and Policy Committee meeting minutes, reports and notes of counsel related to such, and meeting notes are highly relevant to an understanding of the investment decisions and fiduciary process. See, e.g., Fitzsimmons, 90 F.R.D. at 588 ("Because the nature of this case involves the facts of the communications to the Central State trustees as a prelude to their investment decisions, certain documents presumptively subject to the work-product doctrine may not be withheld from disclosure. Similarly, to the extent that the 'advice of counsel' is a critical area of inquiry in this case, the interests in attorney privacy must yield to the need of the Department, as the representative of the Central State participants and beneficiaries, to discover this material.") (citation omitted).

CONCLUSION

For the foregoing reasons, the order of the district court enforcing the Secretary's administrative subpoenas should be affirmed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that the Brief for the Secretary of Labor is proportionally spaced in 14-point type and contains 10,666 words as determined by the Microsoft Word software program used to prepare the brief.

/s/ Ashton S. Phillips
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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2010, I electronically filed the Brief for the Secretary of Labor with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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