

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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:
FRANK BILELLO, individually and on behalf of all :
others similarly situated, : Via ECF
:
Plaintiff, :
:
Case No.: 07-CV-7379 (DLC)
:
vs. :
:
JPMORGAN CHASE RETIREMENT PLAN, :
JPMORGAN CHASE DIRECTOR OF HUMAN :
RESOURCES, as administrator of the JPMorgan :
Chase Retirement Plan, :
Defendants. :
-----X

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT**

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PRELIMINARY STATEMENT

In several rulings on Defendants' motion to dismiss, the Court dismissed five of the eleven counts in the Amended Complaint in their entirety (Counts 1-4 and 6) and two Counts (7 and 8) in part on statute of limitations and other grounds. The Court has yet to address the arguments that defendants raised in their motion to dismiss for the dismissal of three of the remaining claims: Counts 5, 10 and 11. On April 15, 2009, Defendants submitted a letter to the Court addressing the Second Circuit's recent decision in *Kendall v. Employees Retirement Plan Of Avoyesn Products*, 561 F.3d 112 (2d Cir. 2009) on Plaintiff's standing. Defendants submit this supplemental memorandum pursuant to the Court's April 20, 2009 Order, in which the Court requested that the parties address the implications of *Kendall* on Plaintiff's standing to assert each of the claims in the Amended Complaint, including those already dismissed.¹

Kendall makes clear that plaintiff lacks standing to assert Counts 1-6 and 9. In these Counts, Mr. Bilello fails to allege that his benefits were reduced or that he was otherwise injured as a result of the alleged violations of ERISA. Accordingly, Mr. Bilello lacks Article III standing to assert these claims.

ARTICLE III STANDING

"In order to have constitutional standing . . . plaintiffs must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 433 F.3d 181, 198 (2d Cir. 2005) (citation omitted) ("*Central States*"). "The Art. III judicial power exists only to redress or

¹ In its April 20, 2009 Order, the Court correctly directed that the parties address whether Mr. Bilello lacks constitutional standing (including with respect to the already dismissed claims) before finally deciding this case on the merits. Given that Mr. Bilello lacks standing to assert Counts 1-6 and 9, the Court lacks subject matter jurisdiction over these claims and the proper course is for these Counts to be dismissed for lack of standing. See Point III, *infra*.

otherwise to protect against injury *to the complaining party*, even though the court’s judgment may benefit others collaterally.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis added) (citations omitted). “If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim.” *Central States*, 433 F.3d at 198; *see, e.g., Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2008 WL 4964714, at *9 (E.D.Wis. Nov. 14, 2008) (dismissing ERISA claim for lack of subject matter jurisdiction where plaintiffs could not “establish an injury arising from the violation”). In a proposed class action, “the named class plaintiffs ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.’” *Central States*, 433 F.3d at 199 (quoting *Warth*, 422 U.S. at 502); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) (Article III standing requirements are “no less true with respect to class actions than with respect to other suits”).

“As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing that he has suffered a concrete injury, or is on the verge of suffering one.” *Central States*, 433 F.3d at 198. An issue of constitutional standing “can be raised *sua sponte*” by the court. *Central States*, 433 F.3d at 198.

SUMMARY OF THE KENDALL DECISION

In *Kendall*, the plaintiff participated in a defined benefit pension plan that provided for an annual benefit that was offset by each participant’s Social Security benefit (the “Offset”). *Kendall*, 561 F.3d at 113-14. The Offset applied to participants who were at least 25 years old and had less than 50 years of service. *Id.* at 114. Certain participants were eligible for an early retirement benefit in which the Offset was reduced. *Id.*

The plaintiff asserted four claims relating to the Offset (“the Offset Claims”): (1) the reduced Offset in the early retirement benefit results in “backloading,” (2) discontinuing the Offset after 50 years of service violates ERISA, (3) limiting the Offset to participants who were at least 25 years old violates ERISA, and (4) the early retirement benefit is greater than the normal retirement benefit in violation of ERISA. *Id.* at 114-116. The plaintiff sought, *inter alia*, an order requiring defendant to “reform the Plan to bring it into compliance with ERISA” and requiring defendant to “recalculate the accrued benefits or pensions of all Class members under the terms of the reformed Plan.” *Id.* at 116. The district court dismissed these claims for lack of standing and for failure to state a claim upon which relief could be granted. *Id.* at 116-17.

The Second Circuit considered whether the plaintiff alleged an injury to herself with respect to the Offset Claims. The Court noted that a plan participant suing under ERISA must establish “a constitutionally sufficient injury.” *Id.* at 118. The Court rejected the plaintiff’s contention that “she need not show individualized harm” in an action for injunctive relief under ERISA § 502(a)(3)² as a “clear misstatement of law.” *Id.* at 118-19.³

The Court held that plaintiff failed to allege any injury with respect to the Offset Claims. The plaintiff conceded that the plan’s reduction of “[h]er benefits” by the amount of the Offset “was legal,” and failed to allege that the Offset caused her benefits to be reduced improperly. *Id.* at 122 (emphasis added). Regardless of plaintiff’s allegations that the Offset

² ERISA § 502(a)(3) authorizes a civil action “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.” 29 U.S.C. § 1132(a)(3).

³ The Court also noted that many of the plaintiff’s claims “are effectively claims for money damages” that are “outside the scope” of ERISA § 502(a)(3). *Kendall*, 561 F.3d at 119. As the Court explained, plaintiff’s “claims for payment of benefits under a revised Plan . . . is effectively a request for a disgorgement of funds [she] believes [defendant] gained by not paying out benefits under a plan that conforms with ERISA,” and plaintiff must “demonstrate some injury-in-fact to have standing to bring these claims.” *Id.* at 119-20.

caused the plan to violate ERISA (*e.g.*, by causing the plan to be backloaded), she failed to allege an injury “*specific to her*” that resulted from these alleged ERISA violations. *Id.* at 122 n.15 (emphasis added).⁴ Indeed, plaintiff could not *possibly* allege an injury with respect to her claim that the plan violated ERISA by limiting the Offset to participants who were at least 25 years of age and had less than 50 years of service. *Id.* The plaintiff (who was employed at age thirty and had less than 50 years of service) did not experience the change in treatment that occurs when a plan participant reaches age 25 or 50 years of service and thus was not “directly affected” by the plan’s limits on the applicability of the Offset. *Id.*

The Court also rejected plaintiff’s argument that she had constitutional standing because if the Offset was “eliminated or the Plan modified” to correct the alleged ERISA violations her benefits would allegedly increase. *Id.* As the Court explained, the allegedly greater benefits “under a modified Plan . . . are not yet determined” and speculative and thus plaintiff could not show any injury relating to them. *Id.*⁵

⁴ Similarly, the Court rejected plaintiff’s attempt to demonstrate Article III standing by providing “a calculation of how a *hypothetical* Plan participant would be injured” by the Offset. *Id.* at 122 (emphasis added). As the Court stated, this calculation of alleged injury to a hypothetical plan participant is “speculative and therefore does not constitute an injury-in-fact.” *Id.*

⁵ The plaintiff also asserted three claims relating to the plan’s allegedly improper method of calculating her final average salary for purposes of determining her annual benefit. The Court held that these claims stated “an identifiable and quantifiable injury” because the allegedly improper method of calculating plaintiff’s final average salary “result[ed] in a reduction of *her* benefits” and related “to a past and present reduction in accrued benefits.” *Id.* at 122 (emphasis added). But the Court declined to entertain these claims, because plaintiff’s allegations as to how she established injury with respect to these claims were not raised in the district court. *See id.* at 123.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO ASSERT COUNTS 1-6 AND 9 OF THE AMENDED COMPLAINT

A. Plaintiff Lacks Standing To Assert Counts 4 and 5

In Counts 4 and 5 of the Amended Complaint, Plaintiff alleges a “forfeiture” of benefits resulting from the Plan’s alleged failure to project future interest credits to age 65. As *Kendall* confirms, Mr. Bilello lacks standing to assert these Counts.

Counts 4 and 5 are based on the requirement that in calculating lump sum distributions of employees retiring before age 65, cash balance plans must project future interest credits to age 65 and then discount the result back to present value using an IRS-specified discount rate.⁶ Here, Counts 4 and 5 allege that “there is no projection of future interest credits to normal retirement age” (Compl. ¶ 66) but fail to allege any injury specific to Mr. Bilello. There is no allegation that in calculating *Mr. Bilello’s* lump sum benefit the plan failed to project future interest credits to age 65. Accordingly, Mr. Bilello has failed to allege any injury-in-fact with respect to Counts 4 and 5.

Indeed, Mr. Bilello was 66 years old (and had not yet taken a lump sum) when he filed suit, and could not *possibly* have been injured by any alleged failure to project interest credits to age 65. “[W]hen an employee reaches the normal retirement age of 65” — as Mr. Bilello had before he received his lump sum distribution from the plan — “the pension benefit is the value of the hypothetical account balance.” *Durand v. Hanover Ins. Group, Inc.*, 560 F.3d 436, 437 (6th Cir. 2009). After Mr. Bilello reached the age of 65, no projection of future interest credits was required in order to calculate his lump sum. Thus, even if the plan was required to

⁶ See Defendants’ Memorandum Of Law In Support Of Motion To Dismiss The First Amended Class Action Complaint, dated February 25, 2008 (“Moving Brief”), at 14-15; Defendants’ Reply Memorandum In Support Of Motion To Dismiss The First Amended Class Action Complaint, dated April 14, 2008 (“Reply Brief”), at 3-4.

project interest credits to age 65 and failed to do so, such a requirement did not apply to Mr. Bilello. Thus, he cannot demonstrate an injury-in-fact and lacks standing to assert Counts 4 and 5. *See Kendall*, 561 F.3d at 122 n.15.⁷

In his briefing on Defendants' motion to dismiss, Plaintiff contended that he was not required to demonstrate an "injury in fact" in order to assert Count 5 because he is seeking relief under ERISA § 502(a)(3) which, according to Plaintiff, "authorizes any participant to seek appropriate equitable relief . . . regardless of whether the violation has harmed him." Pl.'s March 31, 2008 Opp. Br. at 21. The same argument was rejected in *Kendall* as "a clear misstatement of law." 561 F.3d at 119; *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (Congress "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 606-07 (6th Cir. 2007) ("even where statutory standing pursuant to ERISA is satisfied, the elements of Article III must be met) (citation omitted); *id.* at 609-10 (applying Article III standing requirement to ERISA § 502(a)(3) claim). The Court should reach the same conclusion here.

B. Plaintiff Lacks Standing To Assert Counts 2, 3, and 9

Count 2 alleges that the cash balance plans in effect from 1989 to 1997 violated ERISA §§ 402(a)(1)⁸ and 402(b)(4) because the employer had discretion in setting the variable

⁷ Nor can Mr. Bilello demonstrate standing with the conclusory allegation that a hypothetical employee could receive "less than his accrued benefit" (Compl. ¶¶ 66, 71). Even if Mr. Bilello had provided a calculation demonstrating that such a hypothetical employee could receive less than his accrued benefit — which he did not — "a calculation of how a hypothetical Plan participant would be injured . . . is speculative and therefore does not constitute an injury-in-fact." *Kendall*, 561 F.3d at 122.

⁸ ERISA § 402(a)(1) requires that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). ERISA § 402(b)(4) provides that "[e]very employee benefit plan shall . . . specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(b)(4).

interest rate and, therefore, benefits were not “definitely determinable.” Compl. ¶¶ 55-56.⁹ Count 3 alleges that, since a variable interest rate renders it impossible to “definitely determine” the accrued benefit before normal retirement age, the 1991 Chemical Cash Plan and its successors violate ERISA §§ 402(a)(1) and 402(b)(4) because they do not prescribe a method for selecting the interest projection rate. *Id.* ¶¶ 58-61. Count 9 alleges that defendants did not issue a Summary of Material Modification (“SMM”) following each exercise of the plan’s discretion to set interest credit rates during the period 1989 to 2001. *Id.* ¶¶ 121-26.

Counts 2 and 3 fail to allege any injury specific to Mr. Bilello. With respect to Count 2, there is no allegation that the plan used its “discretion” to set interest credit rates in a manner that reduced *Mr. Bilello’s* benefits or otherwise caused him injury. Similarly, Count 3 does not allege that the plan’s failure to specify a method for projecting future interest credits to age 65 caused any reduction in *Mr. Bilello’s* benefits or otherwise caused him injury. Indeed, as discussed, Mr. Bilello could not possibly have been injured by any failure to project interest credits to age 65. *See supra* at 5-6. Because Counts 2 and 3 do not allege that the plans’ allegedly improper discretion reduced Mr. Bilello’s benefits or otherwise harmed his entitlement to benefits, Mr. Bilello failed to “demonstrate [an] injury-in-fact” with respect to these Counts. *Kendall*, 561 F.3d at 120; *see also Engers v. AT&T et al.*, 428 F. Supp. 2d 213, 224 n.15 (D.N.J. 2006) (plaintiffs alleged that plan was improperly amended in violation of ERISA § 402(a)(1), and sought a “higher benefit” under the pre-amendment formula).

⁹ The “definitely determinable” requirement is in Internal Revenue Code (“IRC”) § 401(a)(25). As this Court noted, “[s]ections 402(a)(1) and 402(b)(4) of ERISA do not mention a ‘definitely determinable’ violation created by employer discretion regarding interest rate projection methods” and plaintiff “failed to demonstrate that ERISA incorporates I.R.C. § 401(a)(25)” granted defendants’ motion to dismiss “on the basis that no private right of action exists under ERISA.” April 24, 2009 Order at 7, 10.

Count 9 alleges a failure to provide SMMs describing the very same exercise of “discretion” regarding interest credit rates that is at issue in Count 2. Given that Mr. Bilello fails to allege that the plan’s exercise of discretion caused any injury to him, he cannot allege any injury with respect to the alleged failure to disclose this exercise of discretion. Accordingly, Count 9 also must also be dismissed.

C. Plaintiff Lacks Standing To Assert Counts 1 and 6

As the Court has correctly stated, Counts 1 and 6 of the Amended Complaint allege a “risk of backloading” rather than alleging that backloading ever actually occurred.¹⁰ Count 1 alleges that all versions of the Plan since 1989 violate the 133 1/3 percent rule because of the hypothetical possibility that an improper interest rate might have been used, but fails to allege that an improper rate was actually used (or that benefits accrued in any plan year were backloaded). *See* Moving Brief at 11-12; Reply Brief at 1-2. Similarly, as the Court correctly stated, Count 6 is based on the allegation that the “minimum benefit formula” under the 1991 Chemical Cash Plan “created a risk of a period of no accrual” that resulted in alleged backloading. April 10, 2009 Order at 24.

Counts 1 and 6 fail to allege a constitutionally cognizable injury. There is no allegation that Mr. Bilello’s benefits were reduced or that he was otherwise injured by the alleged backloading risk (or that this alleged backloading risk will materialize in a manner that does harm to Mr. Bilello). Because Mr. Bilello fails to allege any injury, his backloading claim must be dismissed for lack of standing. *See Kendall*, 561 F.3d at 122 n.15, (affirming dismissal of backloading claim where plaintiff failed to allege an injury specific to herself); *King v.*

¹⁰ April 10, 2009 Order at 18 (describing Count 1); *id.* at 24 (“Count 6 . . . like Count 1, complains of a risk that the cash balance plans could become backloaded”); *id.* at 25 (Count 6 alleges the “the risk of backloading” resulting from the “minimum benefit feature” of the 1991 Chemical Cash Plan); *id.* at 30 (“Creating the risk of backloading . . . is not the same as actually committing” backloading).

Pension Trust Fund Of The Pension Hospitalization And Benefit Plan Of The Electrical Industry, No. 03-9014, 2005 WL 414871, at *2 (2d Cir. Feb. 22, 2005) (summary order) (plaintiff lacked standing to allege that break-in-service provision resulted in violation of 133 1/3 percent rule because that provision was “decades away” from impacting him); *Thompson*, 2008 WL 4964714, at *8 (plaintiffs lacked standing to assert claim that plan used above-market interest rate in violation of ERISA, because the “use of such a rate is an advantage to plaintiffs, not an injury”).

As in *Kendall*, Mr. Bilello cannot manufacture constitutional standing by asserting that his backloading claim is a claim for greater benefits under a “reformed” plan. *See* Compl. at Prayer For Relief, E (seeking “greater of” benefits under a “reformed” cash balance plan or the pre-cash balance plan). As in *Kendall*, any claim for greater benefits under a reformed plan is “speculative.” 561 F.3d at 122 (citation omitted); *see also id.* at 118 (“the asserted injury must be concrete and particularized as well as actual or imminent, not conjectural or hypothetical”) (citations omitted). Accordingly, Counts 1 and 6 fail to allege a constitutionally cognizable injury and Mr. Bilello lacks standing to assert these claims.

II. IF THE COURT FINDS THAT PLAINTIFF LACKS ARTICLE III STANDING TO ASSERT ANY CLAIMS, IT SHOULD DISMISS SUCH CLAIMS ON THAT GROUND

As the Second Circuit has held, a “District Court must first resolve the subject matter jurisdictional issue on which the Plaintiffs’ Article III standing depends before awarding either side a judgment that is, in essence, a judgment on the merits.” *Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 83 (2d Cir. 2006); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 (1998) (same); *Alliance For Environmental Renewal, Inc.*, 436 F.3d at 87-89 (vacating dismissal of Clean Water Act claims for lack of statutory standing and remanding to district court to determine whether plaintiffs had constitutional standing).

In this case, the Court granted defendants' motion to dismiss Counts 1, 2, 4 and 6 based on the expiration of the applicable statute of limitations. To the extent the Court now finds that Mr. Bilello lacks constitutional standing to assert Counts 1, 2, 4 and 6 (as *Kendall* suggests), it would lack jurisdiction to enter a final judgment dismissing these claims on statute of limitations grounds. *See Freund v. Republic of France*, 592 F. Supp. 2d 540, 551 (S.D.N.Y. 2008) ("the Court may not . . . reach Defendants' statute of limitations arguments before resolving the questions regarding jurisdiction and justiciability"); *Dixon v. Monihan*, No. 08 2153, 2008 WL 5191857, at *1 (D.D.C. Dec. 11, 2008) (because the court lacked subject matter jurisdiction, it had no jurisdiction to determine whether statute of limitations barred the action); *Doe v. Hartz*, 52 F.Supp.2d 1027, 1040 (N.D. Iowa 1999) ("If the court lacks subject matter jurisdiction, it would be inappropriate for the court even to reach the statute of limitations question."); *see also Hunter v. District of Columbia*, 384 F.Supp.2d 257, 259 (D.D.C. 2005) ("Although defendants argue for dismissal only on the ground that the complaint is barred by the statute of limitations, subject matter jurisdiction "goes to the foundation of the court's power to resolve a case, and the court is obliged to address it *sua sponte*"). Accordingly, the proper course is for the Court to dismiss Counts 1, 2, 4 and 6 on constitutional standing grounds.

The Court also granted defendants' motion to dismiss Count 3 on the ground that no ERISA cause of action exists with respect to the "definitely determinable" requirement. *See* April 24, 2009 Order at 5-10. To the extent the Court now finds that Mr. Bilello lacks constitutional standing to assert Count 3, it lacks jurisdiction to enter a final judgment dismissing Count 3 on the basis that there is no ERISA cause of action. *See Alliance For Environmental Renewal, Inc.*, 436 F.3d at 87 (before "constru[ing] the statute" to determine whether Clean Water Act cause of action existed, the court should determine whether plaintiff had Article III

standing). Accordingly, the proper course is for the Court to dismiss Count 3 on constitutional standing grounds.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully submit that Counts 1-6 and 9 of the Amended Complaint be dismissed with prejudice for lack of constitutional standing.

Dated: New York, New York
May 8, 2009

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