

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, :
:
 vs. :
:
JPMORGAN CHASE RETIREMENT PLAN, :
JPMORGAN CHASE DIRECTOR OF HUMAN :
RESOURCES, as administrator of the JPMorgan :
Chase Retirement Plan, :
 Defendants. :
-----X

**MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION
FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

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Defendants respectfully submit this memorandum of law in opposition to Plaintiff's Motion for Leave to File a Second Amended Complaint (the "Motion").

PRELIMINARY STATEMENT

Plaintiff's Motion should be denied because Plaintiff has had ample time and opportunity to attempt to state claims for relief, has no valid excuse for seeking now to add new allegations and new claims and, in any event, the proposed amendment of the First Amended Complaint is futile.

Plaintiff's Motion seeks to bolster the allegations for Counts 1, 6, 7 and 8, each of which this Court has already dismissed in whole or in part, and to assert a new count alleging breach of fiduciary duty. However, even with the additional allegations contained in the Proposed Second Amended Complaint with respect to Counts 1, 6, 7 and 8, these Counts still fail because (1) Plaintiff lacks standing to assert these Counts, as articulated by Defendants in the supplemental briefing addressing the impact of *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009); (2) the Counts are barred by the applicable statute of limitations for the same reasons this Court has previously articulated and/or (3) the Counts nonetheless fail as a matter of law. Count 12, asserted for the first time in the Proposed Second Amended Complaint, fails to state a claim for relief and/or is barred by the applicable statute of limitations.

Plaintiff's Motion should be denied.

PROCEDURAL HISTORY

On August 17, 2007, Plaintiff filed a Class Action Complaint in this action (the "Original Complaint"). The Original Complaint asserted four counts, alleging that: (1) Defendants failed to comply with the notice requirements of ERISA § 204(h) with respect to the 1989, 1993 and 1997 Plans; (2) Defendants failed to provide adequate Summary Plan

Descriptions; (3) Defendants filed to provide adequate Summaries of Material Modification; (collectively the “Notice Claims”); and (4) the 1991 Chemical Plan is impermissibly backloaded in violation of ERISA § 204(b)(1)(B) (the “wear-away claim”).

The Original Complaint was not, however, the first time that Plaintiff’s counsel sought to bring these claims. Indeed, these claims were first asserted over three years ago, in an action before Judge Baer from which Plaintiff acknowledges this case was “spun off,” Motion at 2, in the (Corrected) Consolidated Class Action Complaint in *In re JPMorgan Chase Cash Balance Litigation*, dated June 23, 2006 (the “Consolidated Cash Balance Complaint”). See Rice Decl. Ex. A at ¶¶ 84-106 (asserting the Notice Claims against all JPMorgan Chase predecessor plans dating back to 1989); ¶¶ 63-78 (asserting the wear-away claim against all JPMorgan Chase predecessor plans dating back to 1989). The plaintiffs in *In re JPMorgan Chase Cash Balance Litigation*, however, withdrew the wear-away claim prior to the court’s adjudication of defendants’ motion to dismiss that claim and were denied class certification to bring the Notice Claims as they related to the 1989, 1993 and 1997 Plans. See *In re JPMorgan Chase Cash Balance Litig.*, 242 F.R.D. 265 (S.D.N.Y. 2007).¹

Defendants filed a motion to dismiss the Original Complaint in the instant action on November 16, 2007, showing that (1) the Notice Claims failed under Rule 8 of the Federal Rules and otherwise failed to state a claim; (2) the wear-away claim fails as a matter of law; and (3) each of the claims was barred by the statute of limitations. Prior to filing this motion to

¹ As to withdrawing the wear-away claim, Judge Baer admonished as follows: “The Plaintiffs have withdrawn [the wear-away claim] without prejudice, and request the right to reinstate these claims during discovery, if appropriate. Plaintiffs were given an opportunity to amend their complaint prior to answering Defendants’ motion to dismiss. They elected to rest on their Consolidated Complaint. It is unlikely that any further amendments will be permitted following discovery.” *In re JP Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479, 490 (S.D.N.Y. 2006).

dismiss, as per Judge Sullivan's individual practices,² Defendants submitted a request for a pre-motion conference, outlining the basis for their anticipated motion. In Plaintiff's November 2, 2007 response to Defendants' request and at a subsequent November 9, 2007 pre-motion conference, Plaintiff's counsel stated Plaintiff's intention to defend the Original Complaint. However, on December 21, 2007, shortly before Plaintiff's opposition to Defendant's motion was due, Plaintiff instead filed his First Amended Class Action Complaint for Violations of the Employee Retirement Income Security Act (the "First Amended Complaint"), asserting eleven Counts. Seven of the Counts were not asserted in the Original Complaint, including Count 1, which purported to assert that all plans from 1989 to the present are impermissibly backloaded.³ Four Counts were from the Original Complaint – Counts 7, 8 and 9 reasserted the Notice Claims and Count 6 reasserted the wear-away claim. The First Amended Complaint, however, dropped Count 7's notice claim as against the 1993 Plan.⁴

In September 2007, three months *before* Plaintiff filed the First Amended Complaint, Defendants provided Plaintiff with the calculation sheets that Plaintiff now alleges

² This case was originally assigned to Judge Sullivan.

³ While new to the Bilello complaint, Count 1's backloading claim had been previously asserted in the cash balance case from which this action was spun off. Specifically, the claim had been asserted in February 2006 in one of the several complaints that was ultimately consolidated into the Consolidated Cash Balance Complaint. *See* Rice Decl. Ex. B at ¶¶ 37-41. This claim did not, however, appear in the subsequently filed Consolidated Cash Balance Complaint.

⁴ Plaintiff states that Count 7 was asserted as against the 1993 Plan in the First Amended Complaint "even if not specifically mentioned." Motion at 6 n.5. However, Plaintiff offers no explanation as to why both the Original and Second Amended Complaints specifically reference the 1993 Plan in the context of the ERISA § 204(h) notice claim, but the First Amended Complaint does not. *Compare* Original Compl. at ¶ 60 ("Similarly, Defendants did not satisfy ERISA § 204(h) with respect to disclosures related to the Plan amendment(s) implementing the 1993 Chemical Plan.") and Proposed Second Amended Compl. at ¶ 94 ("At no point in time did Defendants issue any other notice, SPD, or other Plan communication that satisfies the requirements of ERISA section 204(h) with respect to the 1989, **1993**, or 1997 cash balance plans.") (emphasis added); *id.* at ¶ 101 ("Defendants did not comply with the timing, content and method-of-distribution requirements of ERISA section 204(h) 29 U.S.C. § 1054(h), or its applicable regulations, with respect to the 1989, **1993**, or 1997 cash balance plan amendments) (emphasis added), *with* First Amended Compl. at ¶¶ 83-105 (no allegations relating to the 1993 Plan).

are the basis of the “developed” factual record *since* the filing of the First Amended Complaint. Motion at 3.⁵ Plaintiff argues that the “miniscule type” and counsel’s inability to “decipher” the calculation sheet prevented Plaintiff from including the proposed new allegations with respect to Counts 1 and 6 in the First Amended Complaint. However, Plaintiff now appears capable of reading the document and it is clear that Plaintiff had expert assistance in developing the First Amended Complaint (at the very least, in alleging that the interest rate for the 1997 Plan must be at least 5.25% to avoid backloading) – an expert that could have assisted with “deciphering” the calculations sheets at that time, if in fact such help was needed. *See* Decl. of Claude Poulin at ¶¶ 7A-B (revealing that expert analysis required to calculate allegedly required minimum interest rate).⁶

On February 25, 2008, Defendants filed their motion to dismiss the First Amended Complaint (“Def. Motion to Dismiss”). In Orders dated April 10, 2009 (the “April 10 Order”) and April 24, 2009 (the “April 24 Order”) this Court dismissed Counts 1-4 and 6 in their entirety and Counts 7 and 8 in part, on statute of limitations and other grounds.⁷

Thus, over three years after filing the Consolidated Cash Balance Complaint, nearly two years after filing his Original Complaint and a year and a half after filing his First Amended Complaint, Plaintiff’s Motion now seeks to amend the First Amended Complaint in an

⁵ The other newly-alleged fact – “Mr. Bilello’s withdrawal of a lump sum benefit as of April 2008,” Motion at 3 – has no bearing on the pending motion to dismiss. Indeed, Plaintiff offers no explanation as to the relevance of this new allegation to any pending motion.

⁶ This declaration was filed in support of Plaintiff’s Supplemental Memorandum in Opposition to Defendants’ Motion to Dismiss, dated May 27, 2009.

⁷ On April 27, 2009, Plaintiff filed a motion for reconsideration of the Court’s April 10 Order with respect to the Court’s dismissal of Counts 1, 2, 3, 4 and 6 on statute of limitations grounds (“Motion for Reconsideration”). The motion is fully briefed. In addition, pursuant to the Court’s April 20, 2009 Order, the parties have briefed the implications of *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009). In the *Kendall* briefing, Plaintiff conceded that he lacks standing to assert Counts 2, 3 and 4 (effectively mooting his reconsideration motion), as well as Counts 5 and 9. The Court dismissed those Counts on June 8, 2009.

effort to breathe life back into the fully dismissed Counts 1 and 6, and the partially dismissed Counts 7 and 8, and to assert a new Count 12, that fails as a matter of law. The Court should deny this Motion.

ARGUMENT

I. PLAINTIFF SHOULD NOT BE AFFORDED YET ANOTHER OPPORTUNITY TO STATE A CLAIM

The Proposed Second Amended Complaint represents the latest in a series of failed attempts by Plaintiff to state claims for relief. Contrary to Plaintiff's position, leave to replead need not be granted where, as here, "the plaintiff has repeatedly failed to cure deficiencies through amendments previously allowed." *In re Federated Dep't Stores, Inc. Sec. Litig.*, No. 00 CV 6362 (RCC), 2005 WL 696894, *6 (S.D.N.Y. Mar. 25, 2005). The Court in *In re Federated Department Stores* denied plaintiffs "a third bite at the apple." *Id.* Defendants are asking this Court to deny Plaintiff what can conservatively be labeled his *fifth* bite.

Moreover, "the Court may deny a motion to amend when the movant knew or should have known of the facts upon which the amendment is based when the original pleading was filed." *New Hampshire Ins. Co. v. Total Tool Supply, Inc.*, No. 08 Civ. 5213(AJP), 2009 WL 1531812, *2 (S.D.N.Y. June 2, 2009) (internal quotations omitted). *See also Vine v. Beneficial Finance Co.*, 374 F.2d 627, 636 (2d Cir. 1967) (affirming the district court's denial of a motion for leave to amend when, *inter alia*, "the new information alleged in the complaint was within plaintiff's knowledge before argument of the motion to dismiss the first amended complaint"). Further, denial of a Rule 15(a) motion "may be warranted where a party waited to see 'how he would fare on the prior motion to dismiss.'" *In re Wireless Tele. Servs. Anti-Trust Litig.*, No. 02 Civ. 2637 DLC, 2004 WL 2244502, *5 (S.D.N.Y. Oct. 6, 2004) (citing *Vine*, 374 F.2d at 637). *See also State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d

409, 418 (2d Cir. 1990) (citations omitted) (“A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.”). These principles also dictate that the Motion be denied.

First, as it relates to Counts 1 and 6, Plaintiff’s request “to utilize [the calculation sheets] to flesh out his allegations” should be denied because Plaintiff had these documents since September 2007, and could have developed these allegations prior to filing the First Amended Complaint (or, at a minimum, well before this Court’s April 2009 Orders).

Second, Plaintiff offers no legitimate reason why each of the new allegations asserted with respect to Counts 7 and 8 and the attempt to revive Count 7 as against the 1993 Plan, were not asserted in First Amended Complaint, or at a minimum, shortly after Defendants filed their Motion to Dismiss, putting Plaintiff on notice of what Defendants believed were the deficiencies in the allegations with respect to Counts 7 and 8.

Third, Plaintiff does not even contend (nor could he) that Count 12 is based on any alleged development of the factual record or any perceived pleading deficiencies identified by this Court. *See* Motion at 7 (“Count 12, is predicated on the concealments and misrepresentations already alleged in Counts 7 and 8.”). Count 12, therefore, could have and should have been asserted long ago. Indeed, Plaintiff’s attempt to add Count 12 is nothing more than a last-ditch effort to maintain an action whose legs have been substantially cut out from underneath it by the prior rulings of the Court.

II. PLAINTIFF’S PROPOSED AMENDMENT WOULD BE FUTILE BECAUSE THE PROPOSED AMENDED CLAIMS FAIL AS A MATTER OF LAW

A motion pursuant to Federal Rule of Civil Procedure 15(a) may also be denied “where amendment would be futile or where the proposed amendment has no merit.” *Corcoran v. Sinclair*, No. 97 Civ. 9286(DLC), 1999 WL 177444, *13 (S.D.N.Y. Mar. 30, 1999) (denying

motion for leave to amend as futile). *See also In Re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 220 (2d Cir. 2006) (“[W]here amendment would be futile, denial of leave to amend is proper”); *Redhead v. Winston & Winston, P.C.*, No. 01 Civ. 11475(DLC), 2002 WL 31106934, *7 (S.D.N.Y. Sept. 20, 2002) (“Leave to amend should be denied . . . where the proposed amendment would be futile”) (citing *Dluhos v. Floating and Abandoned Vessel*, 162 F.3d 63, 69 (2d Cir. 1998)). A Rule 15(a) motion will be considered futile if the proposed amendments “could not withstand a motion to dismiss pursuant to Rule 12(b)(6).” *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002).

A. Amending Counts 1 and 6 Would Be Futile Because These Counts Still Would Be Subject To Dismissal For Plaintiff’s Lack Of Standing, On Statute Of Limitations Grounds And For Failure To State A Claim

Nothing in Plaintiff’s Proposed Second Amended Complaint remedies Plaintiff’s lack of standing to assert Count 1 (backloading claim) and Count 6 (wear-away claim). As set forth in Defendants’ Supplemental Memorandum In Support of Their Motion to Dismiss (“Def. Supp. Mem.”) and Defendants’ Supplemental Reply Memorandum In Support of Their Motion to Dismiss (“Def. Supp. Reply”), Plaintiff’s lack of standing to assert Counts 1 and 6 warrants their dismissal. *See* Def. Supp. Mem. at 8-9 and Def. Supp. Reply at 5-8.

Additionally, nothing in Plaintiff’s Proposed Second Amended Complaint could lead the Court to a different result than it reached in the April 10 Order, in which it dismissed on statute of limitations grounds Count 1’s backloading claim with respect to the 1997 Plan and Count 6’s wear-away claim in its entirety. Indeed the Proposed Second Amended Complaint does not offer any new allegations that would affect the statute of limitations analysis – an analysis based solely upon when Plaintiff knew, or should have known of the factual basis that form the basis of these claims.

Count 1 of the Proposed Second Amended Complaint is still based on the allegation that the plans needed to specify a fixed minimum interest rate to comply with ERISA's anti-backloading requirements. *See* Proposed Second Amended Compl. at ¶ 75 (“Because the 1997 Chase Plan and its successors in interest had interest-crediting rates that were too low to offset the increase in pay credits that came with increasing years of service, the Plans violated the 133 1/3% rule”); *id.* at ¶ 78 (“If the Plan had complied with ERISA by providing a minimum interest-crediting rate of 5.21%, Mr. Bilello’s cash balance as of 2005 would have been higher”). As set forth in Defendants Motion to Dismiss the First Amended Complaint at page 20 and Defendants’ Opposition to Plaintiffs’ Motion for Reconsideration at page 8, the absence of any mention of a minimum interest rate in plan communications distributed more than 6 years prior to the commencement of this action triggered the running of the statute of limitations for Count 1 with respect to the 1997 Plan. *See* April 10 Order at 19.

Similarly, Count 6 of the Proposed Second Amended Complaint is still based on the minimum benefit feature of the 1991 Chemical Plan that Plaintiff alleges resulted in wear-away. *See* Proposed Second Amended Compl. at ¶ 82 (“Because the ‘opening balance’ of the 1989 Cash Plan was less than the ‘protected benefit’ under that Plan, the 1989 Cash Plan created a period of ‘wear-away’ in which benefits did not accrue for Participants.”). As set forth in Defendants Motion to Dismiss the First Amended Complaint at page 22 and Defendants’ Opposition to Plaintiffs’ Motion for Reconsideration at pages 11-12, the disclosure of the minimum benefit provision in plan communications distributed more than 6 years prior to the commencement of this action triggered the running of the statute of limitations for Count 6. *See* April 10 Order at 24-25.

Finally, even accepting all of the allegations in Plaintiff's Proposed Second Amended Complaint as true, Counts 1 and 6 both fail to state a claim as a matter of law. *See* Def. Supp. Reply at 3-5 (discussing Count 1)⁸ and at 7 (discussing Count 6). Specifically with respect to Count 6, as set forth in detail in the briefing in connection with Defendants' Motion to Dismiss the First Amended Complaint, Plaintiff still cannot escape that Count 6 is improperly premised on a comparison of benefits under a pre-amendment retirement plan formula to a post-amendment benefit, in direct contravention of the statutory and regulatory guidance. *See* Def. Motion to Dismiss at 7-11, Def. Reply at 2; *see also* Def. Supp. Reply at 7.⁹

B. Amending Count 7 Would Be Futile Because It Still Would Be Subject To Dismissal On Statute Of Limitations Grounds And For Failure To State A Claim

The Proposed Second Amended Complaint also fails to assert any allegations that could lead the Court to arrive at a result any different than was articulated with respect to Count 7 in the April 10 and April 24 Orders.¹⁰ At the time of the distribution of each of the 204(h) notices with respect to which claims are asserted in the Proposed Second Amended Complaint, ERISA § 204(h) provided that: “[a] single employer plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after the adoption of the

⁸ Plaintiff's meager allegation that “[t]he allegations in this Count One relate to the 2002 and 2005 JPMC Plans as well as the 1997 Chase Plan,” offered to contest the Court's holding that Count 1 applied to the 1997 Plan alone, with nothing more, is wholly insufficient to render this assertion plausible, and therefore fails as a matter of law. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (a complaint must plead “factual allegations . . . to raise a right to relief above the speculative level”); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (“where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief”).

⁹ Further, Plaintiff's allegation of wear-away is based on a misinterpretation of the calculation worksheet provided to him in 2007, and when correctly interpreted it is clear that the alleged wear-away period was shorter than Plaintiff suggests. *See* Def. Supp. Reply at 7, n.12.

¹⁰ As set forth below, the addition of an ERISA § 204(h) claim with respect to the 1993 Plan does not prevent a finding of futility, as it fails for the same reasons as articulated by this Court with respect to the 1989 and 1997 Plans.

plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to . . . each participant.” Pub. L. No. 99-272, 100 Stat. 82 §11006 (1986).

This Court previously held that claims that the ERISA § 204(h) notices were untimely are barred by the statute of limitations because “when Bilello received these notices and saw the effective dates of the retirement plans they discussed, he had all the information he needed to allege that he should have received them earlier. Any claims that the notices were untimely are now time-barred.” April 10 Order at 26. Nothing in the Proposed Second Amended Complaint could lead the Court to reach a different conclusion than it previously reached with respect to the timeliness of the notices for the 1989 and 1997 Plans. Further, although not previously addressed by the Court, the same rationale necessarily applies to bar a claim that the notice for the 1993 Plan was untimely.

The Court also previously held that the ERISA § 204(h) notices distributed in connection with the 1989 and 1997 Plans satisfied the requirement of including “only the ‘amendment’ and its ‘effective date.’” April 24 Order at 12. Once again, nothing in the Proposed Second Amended Complaint could lead the Court to reach a different conclusion. The additional allegation in the Proposed Second Amended Complaint relating to the 1993 Plan necessarily fails for the same reasons. The October 1992 notice clearly stated that 1993 Plan was effective “beginning January 1, 1993” and provided a summary of the “cash balance benefit” and “final pay benefit” aspects of that plan. *See Rice Decl. Ex C at CBPJPMC00001631, 1639.*¹¹

¹¹ Consideration of the October 1992 communication is proper “because it is integral to the complaint.” April 10 Order at 21 n.12 (citing *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005)). *See also Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (“we have deemed a complaint to include any written instrument attached to it as an exhibit *or any statements or documents incorporated in it by reference*”) (emphasis added).

Indeed, as it relates to Count 7, Plaintiff's Motion is a red herring. Unable to allege new facts that would alter this Court's prior holdings, Plaintiff attempts to muddy the waters and to inject a requirement into ERISA § 204(h) that, as this Court has already held, simply did not exist during the relevant time period; namely, that the communications explain the effect of the plan amendment in a manner that could be understood by the average plan participant. Indeed, Plaintiff's Motion states that the amendments to the allegations with respect to Count 7 are specifically proffered to support their argument regarding this non-existent requirement by "specifying how Defendants' communications with participants violated the 'average participant standard.'" Motion at 5. However, as this Court has already held, the "average participant standard" has no place in an analysis of the statutory compliance of the content of notices distributed in connection with the 1989, 1993 or 1997 plans: "It may be unfair to expect the average plan participant to discern the effect of an amendment on his rate of benefit accrual without any guidance, but this insight may very well be what motivated Congress to amend the statute [in 2001] to require something more." April 24 Order at 13-14. Amending the First Amended Complaint to include these additional allegations is futile because it does nothing to render Count 7 meritorious.

Accordingly, amending the First Amended Complaint to add the additional allegations with respect to Count 7 is futile because Plaintiff's ERISA § 204(h) claim still fails to state a claim for the reasons previously articulated by this Court.¹²

¹² Although this Court allowed Count 7 to survive to the extent the claim asserts that the notices were "inaccurate or misleading," Defendants respectfully submit that such a claim is not a proper ERISA § 204(h) claim because, as this Court has already held, Defendants either satisfied the substantive requirements of ERISA § 204(h) or the claims that they did not satisfy the requirements of ERISA § 204(h) are time barred.

C. Amending Count 8 Would Be Futile Because The Portion Of Count 8 Dismissed By The Court Still Would Be Subject To Dismissal On Statute Of Limitations Grounds

The additional allegations with respect to Count 8 that Plaintiff asserts in the Proposed Second Amended Complaint also could not lead the Court to reach a different result regarding the portion of Count 8 already dismissed by this Court. As the Court previously held:

“All of the notices on which Count[] . . . 8 [is] based were issued more than six years prior to the filing of the instant lawsuit. The statute of limitations accrued for each notice upon its distribution, and any general claim that a notice used language that was confusing or not otherwise written in a manner calculated to be understood by the average plan participant accrued when the notices were distributed. At that point, Bilello knew or should have known whether any provisions in the notices were confusing or unclear, and he had all the information needed to bring a challenge to the language used in the notices.”

April 10 Order at 27.

Plaintiff concedes that his goal in the Proposed Second Amended Complaint is to show “with much greater detail how average plan participants could not be expected to understand Defendants’ communications.” Motion at 6. In other words, the Proposed Second Amended Complaint merely provides more detail about how Plaintiff “knew or should have known whether any provisions in the [SPDs] were confusing or unclear.” April 10 Order at 27. Accordingly, the Court’s analysis with respect to the dismissed portion of Count 8 will remain unchanged and amendment of Count 8 is therefore futile.

Additionally, to the extent Count 8 is based on the allegation that three SPDs issued in 1992, 1994 and 1999 failed to disclose the alleged “reduction of accrual based on age,” Proposed Second Amended Compl. at ¶ 111, this allegation must fail because it flies in the face of the holding of the Second Circuit in *Hirt* (as well as every other appellate court to have considered the issue). As the Second Circuit has held, cash balance plans do not reduce the rate

of benefit accrual as participants grow older. *See Hirt v. Equitable Retirement Plan for Employees, Managers, and Agents*, 533 F.3d 102, 110 (2d Cir. 2008) (“We join the Third, Sixth, and Seventh Circuits and hold that cash balance defined benefit plans do not by definition violate ERISA’s prohibition against age based reductions in the rate of benefit accrual.”). A claim based on an alleged failure to disclose something that does not occur fails as a matter of law.

D. Amending The First Amended Complaint to Add Proposed Count 12 Would Be Futile Because Proposed Count 12 Fails As A Matter Of Law

Amending the First Amended Complaint to add Count 12 would be also futile. Count 12 purports to allege that Defendants breached their fiduciary duties by communicating allegedly misleading or confusing statements in ERISA § 204(h) notices or SPDs as alleged in Counts 7 and 8.¹³ *See* Motion at 7 (“Count 12, is predicated on the concealments and misrepresentations already alleged in Counts 7 and 8.”). Count 12 fails as a matter of law, however, for three independent reasons.

First, the Proposed Second Amended Complaint fails to adequately plead the elements of a breach of fiduciary duty claim based on misrepresentations. “To establish a breach of fiduciary duty based on alleged misrepresentations under ERISA, a plaintiff must show (1) that the defendants were acting in their fiduciary capacities when they made the alleged misrepresentations; (2) that the defendants made a material misrepresentation; and (3) that the plaintiff relied on that misrepresentation to his detriment.” *Bell v. Pfizer Inc.*, No. 03 Civ. 9945(SC), 2007 WL 3355386, *8 (S.D.N.Y. Nov. 8, 2007). Pleading reliance on alleged misrepresentations also necessarily requires pleading prejudice. *See Candela v. Mason Tenders’*

¹³ To the extent that Count 12 is based on the alleged failure to disclose that plan participants’ “rate of benefit accrual decreases as they age,” Proposed Second Amended Compl. at ¶ 138, this Count fails for the reasons articulated above.

Dist. Council Welfare Fund, 173 Fed. Appx. 87, 89 (2d Cir. 2006) (holding that a claim of reliance was insufficient because no prejudice was shown). In the Proposed Second Amended Complaint, Plaintiff attempts to satisfy his obligation to plead reliance and prejudice by asserting, “Plaintiff, like every similarly situated cash balance plan participant, has been adversely affected in his retirement planning, his understanding of the terms and conditions under which he continued employment, and his knowledge at or prior to retirement of whether he would receive the benefits to which he is entitled under ERISA.” Proposed Second Amended Compl. at ¶ 139. This bald conclusory allegation fails to adequately plead reliance or prejudice sufficient to raise the right to relief beyond mere speculation. Plaintiff, therefore, has not satisfied his pleading burden. *See Twombly*, 550 U.S. at 555; *Iqbal*, 129 S.Ct. at 1950.¹⁴

Second, Plaintiff cannot assert a claim for breach of fiduciary duty for “failing to comply with ERISA section 102 and ERISA section 204(h),” Proposed Second Amended Compl. at ¶ 137, because the content of those notices and communications are regulated only by ERISA § 204(h) and § 102(a). Indeed, in *Custer v. Southern New England Tele. Co.*, No. 3:05cv1444 (SRU), 2008 WL 222558 (D. Conn. Jan. 25, 2008), the court rejected a nearly identical claim for breach of fiduciary duty. The plaintiffs in *Custer* alleged, as does Mr. Bilello, that the defendants had breached their fiduciary duties by making “misrepresentations and/or omissions” in ERISA § 204(h) notices and SPDs and “by failing to comply with ERISA §§ 102

¹⁴ Count 12 does not assert a valid claim with respect to the ERISA § 204(h) notices for the additional reason that ERISA § 204(h) notices relate directly to the amending of a plan, and amending a plan is not a fiduciary function. It is well established that plan design and amendment-related acts are unquestionably not fiduciary conduct, and therefore cannot give rise to a claim for breach of fiduciary duty. “Under ERISA, an employer may perform both fiduciary and non-fiduciary functions. In line with other circuits, we have held that an employer acts as an ERISA fiduciary only in plan management and administration, not in the plan’s design or amendment.” *In re LILCO*, 129 F.3d 268, 271 (2d Cir. 1997). *See also Siskin v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) (“An employer acts as a fiduciary within the meaning of ERISA . . . when fulfilling certain defined functions . . . [B]ecause these defined functions do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.”).

and 204(h).” *Id.* at *15. The court held that such a claim for breach of fiduciary duty must be dismissed because, *inter alia*, “[c]ourts have held . . . that ‘where ERISA itself specifies a notice requirement, courts must be especially cautious in creating additional ones.’” *Id.* (citations omitted).¹⁵

Third, Count 12 is barred by the statute of limitations. ERISA breach of fiduciary duty claims based on material misrepresentations must be brought within the earlier of (1) three years of actual knowledge of the breach, or (2) six years after the date of the last action that caused the breach. 29 U.S.C. § 1113.¹⁶ Here, since Plaintiff’s claim for breach of fiduciary duty is rooted entirely in the contents of the plan communications, the last action that caused the alleged breach was a statement in the 1999 SPD. Therefore, any claim for breach of fiduciary duty stemming from “intentionally, recklessly, or negligently making the materially false statements described in paragraphs 88-113 [of the Proposed Second Amended Complaint]” in plan communications relating to the 1991, 1993 or 1997 Plans is therefore time barred.¹⁷

¹⁵ In reaching this conclusion the court also noted that the plaintiffs in *Custer* did not assert any new factual predicate for their breach of fiduciary duty claim, but rather “only reassert[ed] the factual predicate for their [inadequate ERISA § 204(h) notice and inadequate SPD] claims.” *Id.* at *15. Similarly, Plaintiff here does not assert any new factual predicate for his alleged breach of fiduciary duty claim. *See* Proposed Second Amended Compl. at ¶ 137 (“By intentionally, recklessly or negligently making materially false statements described in paragraphs 88-113 above, by concealing the fact of benefit reductions under the cash balance amendments, and by failing to comply with ERISA section 102 and ERISA section 204(h), the Defendant Plan Administrator has breached the fiduciary duties it owes to Plan participants under ERISA section 404(a).”)

¹⁶ To the extent Plaintiff contends that Count 12 is based on fraud or concealment, and that, therefore, Plaintiff is entitled to the “fraud or concealment” exception of 29 U.S.C. § 1113 which permits actions to be “commenced not later than six years after the date of discovery of such [fiduciary] breach or violation,” Plaintiff must, but fails, to satisfy the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See Caputo v. Pfizer*, 267 F.3d 181, 191 (2d Cir. 2001). The Proposed Second Amended Complaint “does not allege the names of individuals who made the alleged misrepresentations” and “failed to allege any facts creating an inference of fraudulent intent.” *Watson v. Consolidated Edison of New York*, 594 F. Supp. 2d 399, 411 (S.D.N.Y. 2009).

¹⁷ Plaintiff argues in a footnote the Proposed Second Amended Complaint (but not in his Motion) that for statute of limitations purposes, the Second Amended Complaint’s allegations “relates back to both the first class action complaint in this action, filed August 17, 2007, as well as the first class action complaint filed on January 1, 2006.” Proposed Second Amended Compl. at ¶1 n.1. Defendants do not need to address that

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion for Leave to File a Second Amended Class Action Complaint.

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issue herein because, even assuming *arguendo* that Count 12 related back to Plaintiff's previously filed Complaint, Count 12 is still time barred since the latest communication at issue dates back to 1999.