UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION OF COURT'S APRIL 10, 2009 ORDER REGARDING STATUTE OF LIMITATIONS

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I. INTRODUCTION

This case presents legal questions that are complicated even by the demanding standards of the Employee Retirement Income Security Act of 1974 (ERISA). Plaintiff Frank Bilello ("Bilello") believes the intricacy of the several issues he presents led to the misconstruction of an argument he advanced in his Opposition to Defendants' Motion to Dismiss. But it is the very complexity of ERISA—a level of complexity that goes far above the head of the average plan participant—which also shows that the statute of limitations does not bar Bilello's claims.

Bilello respectfully submits that in its April 10, 2009 Order, the Court overlooked controlling case law and made unarticulated assumptions that conflict with that case law. The Court should therefore reconsider its Order regarding the statute of limitations ("Order") and conclude that the statute of limitations bars none of his claims.[1]

II. LEGAL STANDARD

Local Civil Rule 6.3 provides for reconsideration of a court order determining a motion and directs the party requesting reconsideration to set forth "the matters or controlling decisions which counsel believes the court has overlooked." Local Civ. R. 6.3. Although "reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court," *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995), here Bilello respectfully submits that the Court failed to fully consider an argument he made in his Motion to Dismiss, and in doing so overlooked controlling case law. The Court also overlooked relevant "data" by misconstruing Bilello's First Amended Complaint ("Complaint").

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[1] Because the Order was entered on April 13, 2009, Bilello's Motion for Reconsideration is timely under Local Civil Rule 6.3.

III. ARGUMENT

A. The Court Overlooked Bilello's Argument That Because the Average Plan Participant Could Not Have Understood Defendants' Communications, His Claims Are Not Time-Barred.

Bilello respectfully submits that in its analysis of the details of this case, the Court neglected a larger legal issue. In determining that his claims were time-barred, the Court expressed surprise that Bilello responded to Defendants' statute-of-limitations argument with the general point that, when Defendants' communications were not merely complex and incomprehensible, they were affirmatively misleading. Order 16. Bilello, however, believes that the Court misunderstood his main argument: that because the average plan participant could not understand Defendants' communications, they could not trigger the statute of limitations as a matter of law.

In his Opposition, Bilello argued that the Court should judge whether a claim has accrued by the "employer's clarity in repudiating benefits," and that because the documents Defendants provided "either implied that Plan participants would receive a *greater* benefit under the new cash balance formula, or provided a complex, incomprehensible, and misleading description that neither warned about nor explained the amended benefit formula," they failed to trigger the running of the limitations period. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 6-7 ("Pl.'s Mem.") (citing Compl. ¶¶ 112-113). By prominently citing to the portions of his Complaint that dealt with his disclosure claims, Bilello meant to direct the Court to his Complaint for further detail about the communications that Defendants distributed.[2] Bilello

[2] *See* Compl. ¶ 112 (alleging that 1993 SPD was not written in a manner calculated to be understood by the average plan participant, and was not "sufficiently accurate and comprehensive to reasonably apprise plan participants and beneficiaries of their rights and obligations under the plan"); *id.* ¶ 113 (same allegations with respect to 1999 SPD); *id.* ¶ 115 (alleging that "the Plan's SPDs [failed] to timely and fully disclose Plan provisions that negatively impacted the benefits participants reasonably expected to receive").

discussed the disclosure claims elsewhere in his Opposition, *see* Pl.'s Mem. 9-11 & n.8, and in light of space constraints, he reasonably concluded that he need not duplicate that discussion. In rebutting Defendants' statute-of-limitations arguments, however, he clearly applied the disclosure claims' "average participant" standard. Pl.'s Mem. 2-3, 6-7, 11, 23 n.21. This standard requires that the "average plan participant" be able to understand summary plan descriptions (SPDs) and summaries of material modifications (SMMs), and it is on this standard that Bilello has relied. *See* ERISA §§ 102(a), 104(b)(1), 29 U.S.C. §§ 1022(a), 1024(b)(1); *see also* Compl. ¶¶ 108, 112-113, 118, 124 (repeatedly invoking the "average plan participant" standard).[3]

1. Bilello's Claims Accrued When an Average Plan Participant Could Have Discovered the Grounds of Those Claims.

Bilello relied heavily on *Romero v. Allstate Corp.*, 404 F.3d 212 (3d Cir. 2005), in his Opposition. There, the Third Circuit affirmed that even when ERISA borrows state statutes of limitation, "[t]he date of accrual of the ERISA non-fiduciary duty claims . . . is determined as a matter of federal common law." *Id.* at 221; *accord Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325, 330-31 (8th Cir. 1998) (cited by Order at 14). This only makes sense, for ERISA's policies must shape its accrual standard, as *Romero* recognized. *See* 404 F.3d at 224 (rejecting, "in light of the underlying purposes of ERISA and its disclosure requirements," the argument that claims accrue when a plan is amended).

Here, those policies dictate that the average-participant standard, which is applicable to Bilello's disclosure claims, must also be applied as an accrual standard. Otherwise, "the

[3] Contrary to what Defendants may argue, the average-participant standard was governing law *throughout* the period relevant to this case (1989 – present). Since its enactment in 1974, ERISA has always required that summary plan descriptions and summaries of material modifications "be written in a manner calculated to be understood by the average plan participant." ERISA, Pub. L. No. 93-406, § 102(1), 88 Stat. 829, 841 (1974).

underlying purposes of ERISA," and *certainly* "its disclosure requirements," would be undermined. *Id.* If ERISA's disclosure and statute-of-limitation standards were not identical, a plan could trigger the running of the statute of limitations by distributing an SPD or SMM to its participants that obfuscated or omitted the very ERISA requirement that the plan was violating.

Unsurprisingly, the average-participant standard does not impute technical knowledge of ERISA to participants. Documents that must meet the average-participant standard are "specifically written for and targeted toward laypersons," and thus must be construed in that light. *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1327 (8th Cir. 1995). Knowledge of "specialized legal definition[s]," *id.*, obscure legal maxims, *see Jones v. Ga. Pac. Corp.*, 90 F.3d 114, 116 (5th Cir. 1996), or for that matter any other expert knowledge, *see, e.g.*, *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 154 (8th Cir. 1990), is not imputed to the average plan participant. As the Third Circuit and a court in this District have pointed out, participants are "likely unfamiliar with the intricacies of pension plan formulas and the technical requirements of ERISA," and therefore are not meant "to become watchdogs over potential Plan errors and abuses" when they lack the expertise to identify those errors and abuses in the first place. *Romero*, 404 F.3d at 224 (citation and internal quotation marks omitted); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 265 (S.D.N.Y. 1997) (quoted by Pl.'s Mem. at 6), *abrogated on other grounds by Strom v. Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999).

The authorities that the Court relied on in its Order are not to the contrary, for they all have one thing in common: a readily apparent injury that was based on *fact*, not law. In *Hirt v. Equitable Retirement Plan for Employees, Managers & Agents*, 450 F. Supp. 2d 331 (S.D.N.Y. 2006), *aff'd*, 285 F. Appx. 802 (2d Cir. 2008), the court concluded that an SPD had put

participants on notice that they were being "de-grandfathered" from eligibility for certain benefits. *See id.* at 333-34. Grandfathering is a factual issue that laypeople can understand, not a violation of ERISA of which they are not aware. Just as importantly, *Hirt* allowed the statute of limitations to be triggered only by a *compliant* SPD; the court had earlier ruled, after full discovery, that the SPD that put the participants on notice "satisfied the notice requirements of section 204(h)" by being "written in a manner calculated to be understood by the average plan participant." *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, 441 F. Supp. 2d 516, 539-40 (S.D.N.Y. 2006). The appellate cases the Court cited are similar. Each held that an ERISA-compliant disclosure put participants on notice of a factual issue—how the plan determined employment status, say, or calculated years of service. *See Berger v. AXA Network LLC*, 459 F.3d 804, 807, 815-16 (7th Cir. 2006) (claim accrued when employer sent letter informing plaintiffs that employees who failed to meet specified sales goal during preceding year would not longer be considered "employees" for purposes of plan); *Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 46, 47-48 (2d Cir. 1999) (administrator explicitly advised plaintiff that he had lost all pension service due to a break in services that had occurred before he was vested); *Beckham*, 138 F.3d at 328, 331 (plaintiffs *admitted* that they were made aware of new method for crediting years of service). No case on which this Court relied imputed knowledge of ERISA to participants.[4]

[4] There are, moreover, district courts within this Circuit that have implicitly held the opposite, refusing to impute legal expertise to participants. The courts in *DeVito*, 975 F. Supp. 258, and *Carollo v. Cement & Concrete Workers District Council Pension Plan*, 964 F. Supp. 677 (E.D.N.Y. 1997), concluded that since 1976 the plans' accrual rates had not complied with ERISA by being impermissibly "backloaded." Despite the passage of time and the distribution of SPDs to plan participants, both *DeVito* and *Carollo* concluded that the causes of action accrued "at the earliest" when the plaintiffs had first received their benefits. *Carollo*, 964 F. Supp. at 689; *accord DeVito*, 975 F. Supp. at 264-65.

On a practical level, it would create perverse incentives and harmful consequences to allow the statute of limitations to be triggered by "communications" that an average plan participant cannot understand. That would only encourage unethical plan administrators whose plan amendments violate ERISA's substantive requirements to distribute incomprehensible communications. For if the "disclosure" of a substantive violation triggered the running of the statute of limitations even if participants didn't understand the disclosure, the participants' claims would likely be barred by the time they discovered the substantive violations. Moreover, allowing a noncompliant communication to trigger the limitations period would allow plans to be sued for disclosure violations but not the substantive violations that the disclosures failed to properly communicate. This would fundamentally contradict the purpose of ERISA's disclosure requirements, which is to prevent substantive violations of the sort alleged here. *See Romero*, 404 F.3d at 224 (citing *Hunger v. AB*, 12 F.3d 118, 119 (8th Cir. 1993)).

Because an average plan participant could not have understood from Defendants' "communications" that Defendants were violating ERISA, Bilello's claims did not accrue with distribution of those documents. Rather, his claims accrued, at the earliest, in December 2006, when he consulted with counsel and learned that the Plans at issue in this case violated numerous provisions of ERISA.[5]

2. Because an Average Plan Participant Could Not Have Understood from the "Communications" That Defendants Were Violating ERISA, Bilello's Claims Are Not Time-Barred.

In ruling that several of Bilello's claims are time-barred, the Court pointed to a range of communications that Defendants distributed to plan participants. As Bilello alleges in both the

[5] They may have *accrued* in December 2006, but they were equitably tolled during the pendency of the earlier class action under Judge Baer. *See infra* Part III.C.

Complaint and his Opposition to Defendants' Motion, however, none of these communications put an average plan participant on notice that ERISA was being violated to his detriment.

The communications can be divided into three overlapping categories—"overlapping" because some communications belong in more than one category. First, there are communications that were simply *silent* on whether the Plan was violating certain provisions of ERISA; an average plan participant would not infer from mere silence that fiduciaries, who, after all, have a duty of full and fair disclosure, were violating ERISA. Second, as this Court has recognized, certain of Defendants' communications *affirmatively misled* the average plan participant. Finally and most significantly, there are communications that informed Bilello of what would become the *factual* basis of some of his claims, but which would have prompted him to bring those claims *only* if he had had knowledge of some of the most complicated provisions in ERISA.

a. The communications relied on to dismiss Counts 3 and 4 were silent as to whether the Plan violated ERISA.

Counts 3 and 4 allege that the Plans' variable interest rate violates the rights of participants who retire before normal retirement age. The variable rate, the Complaint alleges, does not provide participants who retire before normal retirement age with a "definitely determinable" benefit (Count 3) and does not project future interest credits to normal retirement age (Count 4). This Court concluded that the statute of limitations bars both counts. In support of that conclusion, the Court pointed first to the SMM issued to participants in September 1990, stating that participants would "receive interest credits quarterly on the salary-based credits Chemical ma[de] to [their] account[s]." Compl. Ex. 3 at JPMC 00001736. It described as "even more clear," Order 21, the 1992 SPD's statement that "[y]our account is credited with interest *only* on the salary-based credits that have been in your account for a full calendar quarter." Aff.

of Thomas C. Rice Ex. A at 4 ("Rice Aff."). Because both of these communications were "silent regarding the projection of future interest credits," they put participants on notice of their claims. Order 21.

In the first instance, Bilello respectfully submits that the 1992 SPD did *not* clearly state that interest credits are not projected to normal retirement age.[6] The statement tells participants about the amount of principal from which the interest credits are calculated, informing them that the relevant principal amount is only the salary-based credits that have been in each account for a full quarter-year or more. It fails, however, to tell participants that interest credits are not projected forward to normal retirement age. In short, the statement only discusses the mechanics of an individual interest credit, and not whether those mechanics are *projected* into the future in order to determine accrued benefits. By omitting that the plan did not project interest rates, it was affirmatively misleading.

Thus, both of the statements on which the Court relied for its dismissal of Counts 3 and 4 misleadingly omit any information about projection of future interest credits. Based on this "silen[ce]," the Court concluded that the statements put plan participants on notice. Bilello believes this conclusion is untenable. Even if average plan participants were aware that ERISA

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[6] A crucial and related point is this: *there is no evidence that Bilello ever received the 1992 SPD in the first place*. Rather, Defendants produced that document for the first time only in their motion-to-dismiss briefing. Rice Aff. ¶ 2; *see also* Pl.'s Mem 11 n.11 (noting that the 1992 SPD had not been previously produced and that its incomprehensibility violates ERISA's average-participant standard). To infer that Bilello did receive this late-produced SPD is to draw inferences in Defendants' favor, which is forbidden on a motion to dismiss. *See Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008).

Applying the SPD against Bilello is especially inequitable given Bilello's allegations that Defendants violated his individual rights under ERISA sections 104(b) and 105(a). Count 10 of the Complaint alleges that, prior to filing suit in 2007, Bilello requested that Defendants provide him with all the written instruments, including SPDs, that govern how the Plan is operated or how Bilello's benefits are calculated—but that Defendants did not provide him with all documents to which he was entitled. *See* Compl. ¶ 132 (request under § 104(b)); *see also id.* ¶ 131 (request under § 105(a)). In fact, Defendants did not produce the 1992 SPD until their motion-to-dismiss briefing. Neither Bilello nor his counsel was aware of the 1992 SPD before Defendants submitted it via the Rice Affidavit on February 25, 2008.

required future interest credits to be projected to normal retirement age, they would not conclude from mere *silence* that there was no projection. Because of Defendants' fiduciary duty of disclosure, it is reasonable for average participants to assume that any parts of the plan that a fiduciary does not explicitly discuss comply with ERISA. *See, e.g.*, *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88-89 (2d Cir. 2001) (fiduciaries have a duty not to withhold full and accurate information to participants regarding a plan). To require that participants infer violations from silence is to put them in the position of "watchdogs over" what are merely "*potential* Plan errors and abuses." *DeVito*, 975 F. Supp. at 265 (emphasis added).

b. The communications relied on to dismiss Counts 1 and 6 were misleading.

(i) Count 1.

Count 1 of Bilello's Complaint alleges that because Chemical Bank's 1989 Cash Plan for Retirement and its successors provide no minimum rate of accrual for participants' cash balances, it is possible for later annual rates of accrual to be more than 133 ⅓% of earlier rates. The plans therefore violate the "133 ⅓% rule" of ERISA section 204(b)(1)(B), an "anti-backloading" provision. *See* Compl. ¶¶ 49-50.

The Court concluded, based on the 1999 SPD, that the statute of limitations bars Count 1. In its discussion of interest credits, the Court observed that the 1999 SPD's section entitled "Interest Credits," as well as Appendix II to the SPD, make no mention of a minimum rate of interest credits. One of the other communications to which the Defendants pointed in their motion to dismiss made no mention of a minimum rate, *see* Compl. Ex. 3 at JPMC00001736, but the other communication, the 1994 SPD, described "[t]he minimum annual rate for interest credits" as "based on the average rate for the one-year U.S. Treasury bills . . . for September, October, and November of the previous year," Compl. Ex. 9 at CBPJPMC00014581.

Thus, the 1994 SPD did indeed refer to a "minimum annual rate," leading the average plan participant to the mistaken belief that there was a floor beneath which the rate could not drop. This "minimum" rate was set by reference to the one-year Treasury rate of interest, but like most laypeople, an average participant would not know that the one-year Treasury rate of interest has no floor.[7] At the very least, the question whether the 1994 SPD put an average plan participant on notice requires further factual development.

(ii) Count 6.

Count 6 alleges that the 1989 Plan credited each participant's cash balance account with an initial amount that was *less* than the legally protected benefit each participant had already accrued. The disparity between protected benefits and the initial amount in each account led to a period of time during which participants experienced an accrual rate that was effectively zero, thus violating the 133 ⅓% rule. The Court ruled that Count 6 was time-barred due to the following language in the September 1990 SMM distributed to participants:

> If you are participant in the Chemical Retirement Plan on January 1, 1991, your benefit under the Plan as of that date will be your *minimum* benefit under [the] Cash Plan. When you leave Chemical, the value of that benefit will be compared with your Cash Plan account—and you will receive whichever is *greater*.

Compl. Ex. 3 at JPMC00001737.

Bilello respectfully disagrees with the Court. The language of the September 1990 SMM is misleading, because it leaves out the essential part of the (retroactive) 1989 Plan: the fact that the initial balance in each participant's account is *not* equal to their accrued benefit under the

[7] The level of financial literacy in the nation is extremely low. Less than 20% of people over the age of 50—the age when one would naturally expect the most financial literacy—can compute compound interest. Soc. Sec. Admin., Financial Literacy, *available at* http://aging.senate.gov/award/ssa11.pdf. A recent study by a professor of economics at Dartmouth College found that only one third of people surveyed could correctly answer three simple questions about compound interest, inflation, and risk diversification. Annamaria Lusardi, Financial Literacy: An Essential Tool for Informed Consumer Choice? (May 29, 2008), *available at* http://www.ftc.gov/be/workshops/mortgage/presentations/Lusardi_Annamaria_Presentation_FTC.pdf.

Pre-1989 Plan. It conceals the initial reduction—and the consequent period of no benefit accrual—that the 1989 Plan effects. The Court was right to point out that the language speaks of a minimum benefit, but the minimum benefit by itself does not violate the 133 ⅓% rule. Instead, the rule is violated by each participant's initial cash balance being *less* than the minimum, legally protected benefit, so that there is a period during which the participant's legally protected benefits do not grow. Thus, the accruals to the initial cash balance merely give back with one hand what the other has silently taken away.[8] By omitting the central fact that gives rise to Count 6 of the Complaint, the September 1990 SMM was misleading.

Indeed, this Court seemed to say as much in its discussion of Count 5, where it recognized that neither the September 1990 SMM nor the 1992 SPD clearly disclosed how participants' opening account balances would be calculated. Bilello's requests in 2007 for information about the calculation of his opening balance, *see* Compl. ¶¶ 131, 135, provide further evidence that the September 1990 SMM was misleading and incomplete. The statute of limitations therefore does not bar Count 6.

c. Only an ERISA expert could have determined, from the communications relied on to dismiss Counts 1, 2, 3, 4, and 6, that Defendants were violating ERISA.

(i) Count 1.

When the 1994 SPD spoke of a "minimum annual rate" based on the one-year Treasury rate of interest, it misled the average plan participant, who would not know that the Treasury rates has no floor. *See supra* Part III.A.2.b.i, at pp. 9-10. However, even if an average

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[8] This phenomenon is known as "wear-away," and is a specific type of reduction in the rate of future benefit accrual. This Court has upheld Count 7 of the Complaint, which *inter alia*, alleges that Defendants failed to disclose wear-away. Order 28; *see also* Compl. ¶ 97 (alleging failure to disclose wear-away as a violation of ERISA § 204(h)). Nowhere in their Motion to Dismiss did Defendants argue that benefit reductions through wear-away were *not* a feature of the (retroactive) 1989 Cash Plan.

participant *would* know that piece of financial information, none of the SPDs on which the Court relied to dismiss Count 1 could trigger the limitations period.

For participants to know that the absence of a minimum rate created a cause of action, they would have to know that (1) when a variable interest credit rate lacks a floor, the rate of accrual can become backloaded under the 133 ⅓% rule; and (2) a plan that fails to comply with the 133 ⅓% rule violates ERISA. It is deeply implausible to attribute knowledge of *either* of these facts—especially (2)—to an average plan participant, and even more implausible to impute knowledge of both. An average plan participant will not make the Holmesian deductions required to understand that the absence of a minimum interest credit rate, combined with pay credits that increase by more than one third, will create a backloaded plan. And he or she will *certainly* not know that a plan whose rate of accrual varies by more than one third violates ERISA, for average plan participants, who are "unfamiliar with the intricacies of pension plan formulas and the technical requirements of ERISA," do not know the arcana of ERISA's antibackloading rules. *DeVito*, 975 F. Supp. at 265. Count 1 is therefore not time-barred.

(ii) Count 2.

In Count 2, Bilello alleges that the cash balance formulas in effect from 1989 to 1997 gave the Plan Administrator sole discretion to set the interest credit rate, something that violated both ERISA and the Internal Revenue Code. The Court deemed the Count time-barred based on the 1992 SPD's statement that "Chemical can provide for a[n interest] rate in excess of the minimum," Rice Aff. Ex. A at 5,[9] and the 1994 SPD's statement that "Chemical will adjust the rate annually," Compl. Ex. 9 at CBPJPMC00014581.

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[9] *But see supra* p. 8 n.6 (discussing why it is inappropriate for the 1992 SPD to be used against Bilello).

Even *if* such statements would have let the average plan participant know that the Plan Administrator retained discretion to set the interest credit rate—something that does not seem obvious—no average plan participant could have known that such discretion violated ERISA. As with ERISA's antibackloading rules, average plan participants do not know that ERISA requires "[e]very employee benefit plan" to be "established and maintained pursuant to a written instrument," ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or that such an instrument must "specify the basis on which payments are made to and from the plan," ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4)—and *a fortiori* do not know that an administrator's discretionary authority to set an interest rate violates those requirements. Nor do average plan participants know that the Internal Revenue Code requires qualified plans to provide their participants with a "definitely determinable" benefit. 26 U.S.C. § 401(a)(25). Even most lawyers, put off by the "enormously complex and detailed" nature of ERISA, do not know these requirements. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Laypeople cannot be expected to know them either.

(iii) Counts 3 and 4.

In dismissing Counts 3 and 4, the Court reasoned that because communications to participants failed to mention the projection of future interest credits, the Counts, which allege that the Plans violated ERISA by not projecting future credits, are time-barred. Bilello respectfully submits that the Court's reasoning conflicts with ERISA. *See supra* Part III.A.2.a, at pp. 7-9. But even if silence put average participants on notice that the Plans did not project future credits, it would not have put them on notice of an ERISA violation. As with the other requirements at issue in this action, the average plan participant, a layperson "unfamiliar with" the "technical requirements of ERISA," *DeVito*, 975 F. Supp. at 265, lives in "blameless ignorance" of ERISA's requirements that interest rates be projected to normal retirement age and

that those rates be definitely determinable, *Urie v. Thompson*, 337 U.S. 163, 170 (1949) (quoted by Order at 11). It is simply unrealistic to impute knowledge of complicated ERISA requirements to the participants whom those requirements are designed to protect. Those requirements are meant to be their shield, not a sword to be used against them.

(iv) Count 6.

Even if the language of the SMM had not been misleading by mentioning a protected minimum benefit but not the period of *no* benefit accrual after the cash balance conversion, *see supra* Part III.A.2.b.ii, at pp. 10-11, it would have not disclosed an ERISA violation. Average plan participants, as Bilello has emphasized repeatedly, are unaware of ERISA's antibackloading rules.

B. By Limiting Count 1 to the 1997 Plan, the Court Misread Bilello's Complaint.

In its Order, the Court stated that "[w]hile Count 1's general allegations are sweeping, plaintiff concedes it applies to the 1997 Plan alone." Order 17 n.7. Bilello respectfully disagrees. Even if the Court were correct in its view that Count 1 was time-barred with respect to the 1997 Plan, it would not be time-barred with respect to the 2002 and 2005 Plans.

The Complaint shows that Count 1's allegations relate to the 2002 and 2005 Plans as well as the 1997 Plan. Bilello alleges that the 1997 Plan provided for "pay credit" rates—*i.e.*, the percentage of salary that was notionally credited to a participant's hypothetical account—that varied "from a minimum of 4% to a maximum of 14%." Compl. ¶ 51. That arrangement required that the Plan's "interest credit" rate—a percentage of the participant's account balance that was notionally credited to the account each year—had to equal 5.25% or above in order to comply with the 133 ⅓% rule. *Id.* However, the Complaint adds, that interest credit rate "was less than 5.25% every year ***since 2002***," thus making it clear that the allegations encompass the

2002 Plan. *Id.* (emphasis added). In the next paragraph, Bilello alleges that while the ***2005 Plan*** adopted a minimum interest credit rate of 4.5%, that rate could not cure backloading for participants who ***under the 2005 Plan*** remained subject to the 4%-to-14% pay credit schedule. *Id*. ¶ 52 (emphasis added); *see also id.* ¶ 53 (alleging backloading violations for all versions of the cash balance plan "from 1989 to the present").[10] These allegations make clear that Bilello's allegations encompass the 2002 and 2005 Plans.

Moreover, Bilello never conceded that Count 1 applied only to the 1997 Plan. It is true that *Defendants* discussed only the 1997 Plan in their briefing. *See* Mem. of Law in Supp. of Defs.' Mot. to Dismiss First Am. Class Action Compl. 11-12 ("Defs.' Mem."). Based on that decision—and Defendants' total failure to discuss Count 1's allegations against the 2002 and 2005 Plans—Bilello focused on the 1997 Plan also. *See* Pl.'s Mem. 16-17. Yet he never conceded that the 2002 and 2005 Plans comply with the 133 ⅓% rule—indeed, he was careful *not* to concede the point. *See id.* 12 ("The *Plans* Are Impermissibly Backloaded." (emphasis added)). Thus, Bilello would submit that, at the very least, the Court erred by dismissing the Count in its entirety.

C. The *American Pipe* Doctrine Tolled the Statute of Limitations After the Complaint in *In re JPMorgan Chase Cash Balance Litigation* Was Filed.

Bilello also takes this opportunity to correct one minor error that he respectfully submits the Court made. In its Order, the Court concluded that because Bilello filed his first complaint on August 17, 2007, "any claims must have accrued after August 17, 2001 to be within the [six-year] limitations period, unless an equitable toll applies." Order 10. The Court noted that neither of the parties explicitly discussed any equitable tolling doctrine. *See id.* 10 n.4.

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[10] In other words, for these participants, the variance in their pay credit rate was large enough to violate the 133 ⅓% rule, even though the variance in their interest credit rate alone was limited by the Plan's 4.5% floor.

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court ruled that the commencement of a class action tolls the applicable statute of limitations "as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The complaint in *In re JPMorgan Chase Cash Balance Litigation*, No. 06-cv-732, was filed on January 31, 2006, alleging that the JPMorgan Chase Retirement Plan and its predecessors discriminated on the basis of age, that the transition to a cash balance plan resulted in "wear-away," causing backloading and a forfeiture of benefits, and that the Defendants failed to provide adequate notice under ERISA sections 204(h), 102(a), and 102(b). On July 20, 2006, Plaintiffs in that action dismissed Count 2 (backloading caused by wear-away) and Count 3 (forfeiture of benefits caused by wear-away) without prejudice. Pls. Opp. to Defs.' Mot. to Dismiss 4-5, *In re JPMorgan Chase Cash Balance Litig.*, No. 06-cv-732 (S.D.N.Y. July 20, 2006) (Dkt. 38). On May 30, 2007, Judge Baer, on typicality grounds, denied class certification as to those claims which arose from notices Defendants distributed prior to 2002. *See In re JPMorgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 273-74 (S.D.N.Y. 2007). Thus, Counts 7, 8, and 9 of Bilello's Complaint—those claims which allege notice violations—were equitably tolled from January 31, 2006 until May 30, 2007. Bilello's Count 6 was equitably tolled from January 31, 2006 until July 20, 2006, when Plaintiffs in the original action before Judge Baer voluntarily dismissed their former Count 2 without prejudice.

IV. CONCLUSION

For the reasons set out above, Bilello respectfully requests that this Court reconsider its April 10 Order and conclude that, because Defendants' communications could not have alerted an average plan participant that ERISA was being violated, his claims are not time-barred.

RESPECTFULLY SUBMITTED this 27th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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