

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT**

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I. INTRODUCTION

Plaintiff Frank Bilello (“Bilello”) has sought leave to file a Second Amended Complaint, primarily to reflect facts developed since he filed his First Amended Complaint and cure certain perceived deficiencies. In opposing Bilello’s motion, Defendants focus primarily on the passage of time between Bilello’s First Amended Complaint and his present motion to amend. But as the Second Circuit has made clear, the mere passage of time, and especially one to which Defendants have themselves contributed cannot itself justify the denial of Bilello’s motion. Defendants’ other arguments, which rest on misunderstandings of the law and of Bilello’s Proposed Second Amended Complaint, are equally meritless. Bilello should therefore be given the opportunity to amend his Complaint.

II. ARGUMENT

A. This Case’s Procedural History Is No Impediment to Granting Bilello’s Motion.

Defendants argue that Bilello’s proposed amendments are untimely, pointing out that previous amendments have already been made, and much time has passed since the commencement of the case. Defendants’ narrative of this case’s progress, though, is a revisionist history. Misleading and incomplete, it presents no reason to deny Bilello’s motion.

Defendants begin with the related action before Judge Baer, *In re JP Morgan Chase Cash Balance Litigation*, No. 06-cv-732 (S.D.N.Y.). They note that the plaintiffs in that case voluntarily withdrew their wear-away claim and that their pre-2002 notice claims were not certified for class treatment. *See* Mem. in Opp. to Pl.’s Mot. for Leave to File a Second Am. Compl. 2 (“Defs.’ Mem.”).

The plaintiffs withdrew the wear-away claim, however, only because Defendants had not provided them with documents they had requested—and Defendants were legally obliged to give them—under ERISA section 104(b)(4), 29 U.S.C. § 1024(b)(4). The documents the plaintiffs

had requested would have allowed them to discern whether the opening balance of the 1989 Cash Plan account was less than the protected benefit under the pre-1989 Plan—and thus would have shown the plaintiffs whether there had been wear-away. *See* Decl. of Peter S. Linden, Ex.1 (correspondence between plaintiffs’ counsel and counsel for Defendants, documenting plaintiffs’ unsuccessful attempt to obtain the documents); Pls.’ Opp. to Defs.’ Mot. to Dismiss at 4-5, *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006) (No. 06-732) (Dkt. 38) (plaintiffs’ opposition, withdrawing wear-away claim due to refusal to produce documents). It would be a perverse result if Defendants’ failure to produce those documents prevented Bilello from amending his Complaint.

While omitting their failure to produce documents, Defendants try to make much of Judge Baer’s dictum that, “following discovery,” he would be “unlikely” to allow “any further amendments.” *In re JP Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479, 490 (S.D.N.Y. 2006). Even if that dictum had binding force, it would be inapposite, because Judge Baer did not permit any discovery on pre-2002 claims in the related action, discovery in this case has not even begun, and the case remains in its early procedural stages.¹ Thus, at this point in the litigation, Defendants cannot credibly claim prejudice.²

It is unclear why Judge Baer’s decision not to grant class certification for pre-2002 notice claims, which was based merely on typicality concerns, should prevent Bilello from amending his complaint. By filing a complaint on August 17, 2007, Bilello was not getting another bite at the pre-2002 notice claims, but was responding to Judge Baer’s certification decision.

¹ The early procedural stage of this case also makes it quite unlike *In re Wireless Telephone Services Antitrust Litigation*, No. 02-2637, 2004 WL 2244502 (S.D.N.Y. Oct. 6, 2004), on which Defendants rely. *See* Defs.’ Mem. 5. There, a Rule 16 scheduling order had already been entered, and the court scrutinized the plaintiffs’ proposed amendment under the more rigorous standard of Rule 16(b). *See* 2004 WL 2244502, at *5.

² *See Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 113 (S.D.N.Y. 2004); *Presser v. Key Food Stores Co-op., Inc.*, 218 F.R.D. 53, 56 (E.D.N.Y. 2003); *Computech Int’l, Inc. v. Compaq Computer Corp.*, No. 02-2628, 2002 WL 31398933, at *5 (S.D.N.Y. Oct. 24, 2002).

Defendants also emphasize that Bilello amended his complaint in December 2007. That amendment preceded any ruling on the complaint and therefore was not a second bite at the apple. *Cf.* Defs.’ Mem. 5 (citing *In re Federated Dep’t Stores, Inc. Sec. Litig.*, No. 00-6362, 2005 WL 696894, at *6 (S.D.N.Y. Mar. 25, 2005)). It does not militate against giving Bilello an opportunity to amend his Complaint. *See Goldberg v. Meridor*, 567 F.2d 209, 213 (2d Cir. 1977) (Friendly, J.) (although plaintiff had amended complaint *before* anything had been “said by the defendants or the judge concerning the alleged inadequacy of his pleading of the federal claim,” plaintiff “was seeking a second round, not a third” by requesting further leave to amend *after* district court had identified deficiencies); *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 312 (S.D.N.Y. 2008) (although plaintiffs had amended complaint earlier, it was only *after* the court had evaluated the pleadings that an amendment constituted a second bite at the apple).

B. Bilello Should Be Permitted to Amend Counts 1 and 6.

1. A Nonprejudicial Delay, Caused in Large Part by Defendants, Cannot Justify Denying Bilello the Opportunity to Amend Counts 1 and 6.

In April 2006, Bilello’s counsel began requesting documents that set forth the terms of the Plans after the 1989 conversion, as well as the terms of the pre-1989 Plan. *See* Decl. of Peter S. Linden, Ex. 1. The earliest document Defendants produced was the 1997 Chase Plan. Defendants did not produce the terms of the pre-1989 Plan, or any document that stated how participants’ “prior service balance” under the 1989 Plan was calculated.

Despite numerous further requests, *see* First Am. Compl. ¶¶ 131-132, 135, it was not until September 2007, when Defendants produced the “calculation worksheet,” that they furnished Bilello with documents that gave any indication about how his benefit had been calculated. Even the calculation worksheet failed to disclose the terms of the pre-1989 Plan or how the “prior service balance” was calculated. *Id.* ¶ 136. The worksheet is extraordinarily

difficult to understand, and some delay in digesting its contents was inevitable. *Defendants'* failure to give Bilello an understandable accounting of his benefits is hardly a reason to deny *Bilello* an opportunity to amend his Complaint.

In any case, it is well established that without a showing of bad faith or prejudice, the passage of time is no reason to deny Bilello the opportunity to amend his Complaint. "Mere delay, absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981).³ Defendants do not claim that they will be prejudiced by the amendment, and only briefly suggest that Bilello "waited to see how he would fare on the prior motion to dismiss." Defs.' Mem. 5 (citation and quotation marks omitted). But Defendants provide no more than this conclusory assertion, and do not say why he would have any tactical motivation to wait until the motion to dismiss was decided. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, No. , 2004 WL 405886, at *34 n.63 (S.D. Tex. Feb. 25, 2004) (granting motion for leave to amend where defendants had not made "anything but an indirect and conclusory allegation of bad faith"). Because Bilello is not guilty of bad faith, the appellate cases Defendants cite are easily distinguishable. *See State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409, 418 (2d Cir. 1990); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 636 (2d Cir. 1967).⁴

³ See also *Richard Greenshield Secs., Inc. v. Lau*, 825 F.2d 647, 653 n.6 (2d Cir. 1987) (noting that "parties . . . have been permitted to amend their pleadings to assert new claims long after they acquired the facts necessary to support those claims," and collecting numerous cases); *Abbatiello v. Monsanto Co.*, 571 F. Supp. 2d 548, 553 (S.D.N.Y. 2008) (stating that "even if the Court were to agree [that] Plaintiffs had all the necessary information . . . available to them prior to . . . filing the Complaint," that would provide no reason to deny the proposed amendment)

⁴ The other case Defendants cite in support of their "undue delay" argument, *New Hampshire Insurance Co. v. Total Tool Supply, Inc.*, No. 08-5213, 2009 WL 1531812, at *2 (S.D.N.Y. June 2, 2009), was decided on grounds of futility.

2. Defendants' Assertion That the Proposed Amendments to Counts 1 and 6 Are "Futile" Is Not Appropriately Addressed in This Motion.

Defendants claim that the amendments to Counts 1 and 6 are futile. Even if the amendments were accepted, they say, Bilello would still lack standing and the Counts would still be untimely and fail to state a claim.

For reasons explained at length elsewhere, the facts set forth in amendments to Counts 1 and 6 show beyond a doubt that Bilello has standing to bring them. *See* Pl.'s Supplemental Mem. in Opp. to Defs.' Mot. to Dismiss 2-7 (Dkt. 66). Bilello's Opposition to Defendants' Motion to Dismiss and his Motion for Reconsideration have explained why Counts 1 and 6 are not untimely. *See* Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Dismiss 4-7 (Dkt. 27); Mem. in Supp. of Pl.'s Mot. for Recons. 9-12, 14 (Dkt. 60); Pl.'s Reply to Defs.' Opp. to Mot. for Recons. 4-9 (Dkt. 64). And Bilello has already responded in detail to Defendants' argument that Counts 1 and 6 fail to state a claim. *See* Pl.'s Mem. of Law in Opp. to Defs.' Mot. to Dismiss 12-17 (Dkt. 27). He will not repeat those arguments here.

More fundamentally, Defendants' arguments are more appropriately considered elsewhere. Bilello's Motion for Reconsideration has explained Bilello's statute-of-limitations argument, and the original briefing of the Motion to Dismiss has put the merits of Counts 1 and 6 before the Court. The Court has yet to rule on Bilello's Motion for Reconsideration or to address the merits of Counts 1 and 6. Defendants' arguments about the statute of limitations, therefore, would be better considered in the context of Bilello's Motion for Reconsideration, and their arguments about the merits of Counts 1 and 6 should be deemed premature. Such a procedure would be in keeping with the usual practice of district courts in similar situations.⁵

⁵ *See Aruanno v. New Jersey*, No. 06-0296, 2009 WL 114556, at *2 (D.N.J. Jan. 15, 2009) (declining to decide statute-of-limitation issue, which was "more appropriately addressed in a fully developed motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)"); *Godfrey v. United States*, No. 07-02165, 2008 WL 80302, at *2 (D. Colo.

C. Bilello Should Be Permitted to Amend Counts 7 and 8.

Defendants argue that Bilello shouldn't be allowed to amend Counts 7 and 8, because his amendment fails to state a claim and would be futile. This argument, however, is premised on a misunderstanding of what Bilello's amendment to Counts 7 and 8 is meant to remedy. In fact, the amendment to Counts 7 and 8 successfully fulfills its intended purpose. Because it specifies how Defendants' communications with participants violated the average-plan-participant standard and were misleading, it remedies the deficiencies that Bilello meant for it to cure.

1. Bilello's Proposed Amendment to Count 7 Is Not Futile.

Defendants contend that the proposed amendment should not change the Court's conclusion, made in its Opinion and Order of April 10, 2009 ("April 10 Order"), that the statute of limitations bars any claim that Defendants' ERISA section 204(h) notices were untimely. The amendment, Defendants add, does not address the Court's holding, expressed in its Opinion and Order of April 24, 2009 ("April 24 Order"), that at the time of the notices distributed in connection with the 1989, 1993, and 1997 Plans, ERISA section 204(h) merely required a 204(h) notice to include the "amendment" to the Plan and its "effective date." April 24 Order 12. These arguments fundamentally misconceive the purpose of Bilello's proposed amendment.

Jan. 7, 2008) (where court had not ruled on motion to dismiss, concluding that "Defendants' futility arguments are better addressed in a Motion to Dismiss, and thus, that the amendment is sufficient under the liberal standards of Rule 15(a) to allow for this amendment"); *In re Ramp Corp. Sec. Litig.*, No. 05-6521, 2006 WL 2037913, at *1 (S.D.N.Y. July 21, 2006) (Cote, J.) (where motion to dismiss and motion to amend were pending simultaneously, stating that "[t]he motion to amend is granted, and this Opinion shall address the motions to dismiss in the context of the most recent articulation of the plaintiffs' case"); *Kelly v. Laminated Prods., Inc.*, No. 99-50234, 2001 WL 503051, at *1 (N.D. Ill. May 10, 2001) (where defendants raised statute-of-limitations and merits issues in response to amendment filed before court had ruled on first complaint, court concluded that defendants' "objections are more appropriately raised in a motion to dismiss, a motion in limine or a motion for summary judgment"); *Qualcomm, Inc. v. Motorola, Inc.*, 989 F. Supp. 1048, 1051 (S.D. Cal. 1997) (where court had not ruled on complaint, contention that amendment was futile was "premature" and "properly raised by a Rule 12(b)(6) motion after an amendment is permitted, rather than in the context of this motion"); *see also Keiter v. Penn. Mut. Ins. Co.*, 900 F. Supp. 1339, 1343 (D. Haw. 1995) ("Because Defendants oppose the motion for leave to file the Second Amended Complaint based only upon the merit of the claims alleged therein, the court will GRANT the Plaintiffs' leave to amend and will address Defendants' opposition as a motion to dismiss. The court will treat the Second Amended Complaint as filed . . .").

The purpose of Bilello's proposed amendment to Count 7 is not to resurrect the claim that Defendants' purported 204(h) notices were untimely, or to reargue the legal standard applicable to the merits of a section 204(h) claim.⁶ Rather, his purpose is to allege further facts supporting the claim that Defendants' purported 204(h) notices were misleading and inaccurate. The April 10 and April 24 Orders, after all, held that Count 7 could survive to the extent it alleged that 204(h) notices were misleading or inaccurate. *See* April 24 Order 15 (dismissing Count 7 "except to the extent it argues that the notice of the 1989 Plan provided in compliance with ERISA § 204(h) was inaccurate and misleading"); April 10 Order 27-28 (concluding that the statute of limitations did not preclude Counts 7 and 8 to the extent they alleged that communications were "misleading" or omitted information necessary to make a notice "accurate and comprehensive").

However, the Court has expressed its concern that Bilello has not "point[ed] to specific inadequacies in the notices." April 10 Order 16. Many of the proposed additions to the Complaint, therefore, correct that deficiency, specifying in detail how the communications connected to the 1989 and 1993 Plans were misleading and inaccurate. *See* Proposed Second Am. Compl. ¶¶ 60-65, 68 (attached as Ex. A to Decl. of Amy Williams-Derry in Supp. of Mot. for Leave to File a Second Am. Class Action Compl. ("Williams-Derry Decl.")). Defendants, notably, do not claim that the proposed Complaint fails to sufficiently allege that those notices were misleading and inaccurate. This Court should reject Defendants' futility argument, which is simply unresponsive to Bilello's proposed amendment.

⁶ To be sure, Bilello has not *removed* allegations that the Court has ruled do not state a claim, but that is merely because he is not waiving any argument. *See* Pl.'s Mem. of Law in Supp. of Mot. for Leave to File a Second Am. Compl. 1 n.1.

2. Bilello's Proposed Amendment to Count 8 Is Not Futile.

Like Bilello's proposed amendment to Count 7, his amendment to Count 8 is intended to specify communications that were inaccurate or misleading. And like Defendants' objections to Count 7 of the Proposed Amended Complaint, their objections to Count 8 fail to understand Bilello's purpose in seeking leave to file his amendment.

In its April 10 Order, the Court was careful to uphold Count 8 to the extent it alleged that SPDs were misleading or inaccurate. April 10 Order 28. Bilello's additions to the Complaint successfully flesh out how and why certain SPDs were misleading or inaccurate, and thus these additions are not futile. *See* Proposed Second Am. Compl. ¶¶ 56-59, 68, 110.

Defendants' final argument, about the reduction of accrued benefits with age, is deeply confused. *See* Defs.' Mem. 12-13. It is of course true that under *Hirt v. Equitable Retirement Plan for Employees, Managers & Agents*, 533 F.3d 102 (2d Cir. 2008), the way in which cash balance plans reduce accrued benefits with age is legal. But the *legality* of that feature of cash balance plans does not negate its *existence* or the obligation to disclose it. *Hirt* candidly recognized that because a cash balance plan allocates the same notional amount to similarly situated older and younger workers' hypothetical accounts, the money contributed to older workers' accounts has less time to earn annual interest credits—and thus the same contribution ultimately results in a smaller pension for the older worker. *Id.* at 107 (quoting *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150, 162-63 (D. Conn. 2006)). *Hirt* acknowledged that cash balance plans, as a matter of fact, reduce accrued benefits for older workers, but simply held that “the fact that the ultimate benefit might grow to be larger for younger employees” does not violate the law. 533 F.3d at 108. Thus, Count 8 is based not on a “failure to disclose something that does not occur,” Defs.' Mem. 13, but on a failure to disclose a lawful but *real* reduction in benefits. Valid notice claims under ERISA can, of course, be predicated on failures to disclose

lawful features of a plan. *See, e.g., Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 586 (2d Cir. 2006) (concluding that although the plan did not violate ERISA by requiring that participants produce some proof that they performed work for which they didn't receive credit, the SPD's failure to give notice of that requirement did violate ERISA).

D. Bilello Should Be Permitted to Add Count 12.

Defendants make three arguments against permitting Bilello to add Count 12. Citing only one paragraph of the Proposed Second Amended Complaint, Defendants claim that Bilello fails to plead prejudice flowing from the misleading statements that Count 12 alleges. Defs.' Mem. 14. That paragraph, however, does not represent the entirety of Bilello's allegations relating to prejudice. Seen as a whole, as it must be, the Complaint alleges that participants were misled to believe that the 1989 Cash Plan would not reduce their future benefit accruals or create a long period of wear-away, *see* Proposed Second Am. Compl. ¶¶ 60-66, 71, and to believe that the accrued benefits of older employees would not experience a greater reduction than those of younger ones, *see id.* ¶¶ 56-59. *See also id.* ¶¶ 102, 112. It is neither conclusory nor speculative to allege that these false beliefs hindered participants in planning for retirement or in responding—legally or otherwise—to the Plan amendments.

Next, Defendants cite to a single case in which the plaintiffs alleged a fiduciary breach based solely on a violation of ERISA sections 102 and 204(h). *See Custer v. S. New England Tele. Co.*, No. 05-1444, 2008 WL 222558, at *15 (D. Conn. Jan. 25, 2008). Here, however, Bilello does not claim that a fiduciary can breach its duties merely by violating ERISA's SPD and 204(h) requirements. In keeping with Second Circuit precedent, Bilello asserts a fiduciary violation based on Defendants' *affirmatively misleading* statements, which go beyond what is needed to state a 204(h) or SPD violation. *See Frommert v. Conkright*, 433 F.3d 254, 271-72 (2d Cir. 2006); *Richards v. FleetBoston Fin. Corp.*, No. 04-1638, 2006 WL 2092086, at *5 (D.

Conn. July 24, 2006); *see also, e.g.*, Proposed Second Am. Compl. ¶¶ 62-63 (statements in 1990 SMM that were affirmatively misleading regarding wear-away); *id.* ¶ 65 (account statements that were affirmatively misleading regarding wear-away); *id.* ¶ 68 (statement in 1994 SPD that was affirmatively misleading regarding minimum annual interest-crediting rate).

Nor is Defendants' statute-of-limitations argument any more successful. The statements Defendants issued omitted the existence of wear-away and backloading, and ERISA section 413, 29 U.S.C. § 1113 provides that when a fiduciary has been guilty of an omission, an action for fiduciary breach must be brought within the earlier of three years of actual knowledge or six years of "the latest date on which the fiduciary could have cured the breach or violation." Here, of course, Defendants have never cured their omissions by disclosing the wear-away or backloading violations, and because Bilello did not have actual knowledge of Defendants' omissions until December 2006, at the earliest, *see* Mem. in Supp. of Pl.'s Mot. for Recons. 6 (Dkt. 60), Bilello's claim is timely.⁷

III. CONCLUSION

For the reasons set forth above, Bilello respectfully requests that the Court grant his Motion for Leave to File a Second Amended Complaint.

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⁷ Defendants' argument that Count 12 is predicated on nonfiduciary conduct must be rejected. Count 12 is based not on the act of amending but on misrepresentations about the content of an amended plan. Communicating with participants about the contents of a plan is a fiduciary function. *See, e.g., Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001).

RESPECTFULLY SUBMITTED this 2nd day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 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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