

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK BILELLO, individually and on behalf of
all others similarly situated,

Plaintiff;

v.

JPMORGAN CHASE RETIREMENT PLAN,
JPMORGAN CHASE DIRECTOR OF HUMAN
RESOURCES as administrator of the JPMorgan
Chase Retirement Plan,

Defendants.

Via ECF

Civ. No. 07-CV-7379 (DLC)

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
LEAVE TO FILE A SECOND AMENDED CLASS ACTION COMPLAINT**

I. PRELIMINARY STATEMENT

Plaintiff Frank Bilello seeks leave to file a Second Amended Class Action Complaint (“Second Amended Complaint”). The purposes of Bilello’s amendment are: (1) to update the allegations in the First Amended Class Action Complaint (“First Amended Complaint”) to reflect facts developed since its filing; (2) to cure what the Court perceived as deficiencies in Count 1, 7 and 8;¹ (3) to add a claim alleging breaches of fiduciary duty against the Defendant Plan Administrator; and (4) to withdraw certain claims (Counts 2 through 5 and 9). Federal Rule of Civil Procedure 15(a)(2) permits a party to amend its pleadings “with the opposing party’s written consent or the court’s leave. *The court should freely give leave when justice so requires.*” *Id.* (emphasis added). The proposed Second Amended Complaint will be Bilello’s first opportunity to address deficiencies identified in this Court’s orders. In this Circuit, courts generally allow further amendment under such circumstances. There will be no prejudice to Defendants, as there has been no merits discovery to date. In short, the interests of justice will be served by allowing plaintiff to amend his complaint.²

II. PROCEDURAL HISTORY

This lawsuit was “spun off” from *In re JP Morgan Chase Cash Balance Litigation*, No. 06-cv-732 (S.D.N.Y.). The complaint in that case alleged that the JPMorgan Chase Retirement Plan and its predecessors discriminated on the basis of age, that several versions of the plan violated ERISA’s anti-backloading and anti-forfeiture rules, and that Defendants had failed to provide adequate notice under ERISA sections 204(h), 102(a), and 102(b). In July 2006, the plaintiffs voluntarily dismissed two backloading and forfeiture claims without prejudice, and on

¹ Bilello does not concede that the Court was correct in its determination that Counts 1, 7, and 8, as stated in the First Amended Class Action Complaint, were in any way deficiently pled. Bilello files this motion to amend while reserving all rights and without waiver of any argument.

May 30, 2007, Judge Baer decided not to grant class certification for notices that had been distributed before 2002. *See In re JPMorgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 273-74 (S.D.N.Y. 2007). On August 17, 2007, Plaintiff Bilello filed his initial complaint in this action.

Plaintiff amended his complaint on December 21, 2007 while Defendants' motion to dismiss was pending, prompting Defendants to move to dismiss once again. Following briefing on the motion, this Court issued a series of orders on January 6, April 10, and April 24, 2009, directed to Defendants' motion to dismiss.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 15 permits a party to amend its pleading "once as a matter of course" at any time before a responsive pleading is served, or, "[i]n all other cases, . . . only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(1), (2).³ The rule specifies that leave shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d. Cir. 1995) (granting leave to amend four years after original complaint); *Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 379, 390 (S.D.N.Y. 2007); *E*Trade Fin. Corp. v. Deutsche Bank AG*, 420 F. Supp. 2d 273, 282 (S.D.N.Y. 2006) ("This mandate to give leave freely is to be heeded." (citations omitted)); *Christiana Gen. Ins. Corp. of N.Y. v. Great Am. Ins. Co.*, 745 F. Supp. 150, 163-64 (S.D.N.Y. 1990) (quoting *Jaser v. N.Y. Prop. Ins. Underwriting Ass'n*, 815 F.2d 240, 243 (2d Cir. 1987)).

² A proposed Second Amended Class Complaint is submitted with the Declaration of Amy Williams-Derry ("Derry Decl.") filed herewith.

³ Several days before filing this motion, Plaintiff's counsel advised Defendants' counsel of Plaintiff's intent to file the instant motion to amend.

The Second Circuit and district courts within the Circuit have similarly held that the extremely liberal policy of Rule 15(a) favors amendment in the absence of “undue delay, bad faith, futility of the amendment, [or] . . . resulting prejudice.” *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 603 (2d Cir. 2005). Indeed, leave to amend is appropriate even when the request is made well after discovery, up to the eve of trial. *Guzman v. Bevona*, 90 F.3d 641, 649 (2d Cir. 1996); *Hanlin v. Mitchelson*, 794 F.2d 834, 840-41 (2d Cir. 1986).

IV. ARGUMENT

A. **Bilello Should Be Permitted to Amend the Complaint to Reflect Facts Developed Since the Filing of the First Amended Complaint.**

Since Bilello filed his First Amended Complaint in December 2007, the factual record of this case has developed. In addition to Mr. Bilello’s withdrawal of a lump sum benefit as of April 2008, Bilello has also had an opportunity to examine documents Defendants previously (albeit tardily) produced, and wishes now to utilize those documents to flesh out his allegations in a Second Amended Complaint.

It was only in September 2007, after this action was first commenced, that Defendants produced a 45-page “calculation sheet,” printed in miniscule type, which purported to show the calculations on which Bilello’s benefit were based. When he filed his First Amended Complaint in December 2007, Bilello’s counsel, despite their diligent efforts, had not been able to decipher the calculation sheet. Indeed, Bilello included a new count in his First Amended Complaint—Count 10—precisely because the calculation sheet was “lengthy, complex, and provide[d] neither the formula(s) on which it relie[d] or an understandable explanation of the calculations.” First Am. Compl. ¶ 136.

Since December 2007, though, Claude Poulin, an Enrolled Actuary under ERISA, a Fellow in the Society of Actuaries, and a member of the American Academy of Actuaries, has had an opportunity to analyze the calculation sheet. Based on his analysis, Bilello is now able to update and flesh out his allegations related to Counts 1 and 6; the proposed Second Amended Complaint now alleges with more precision how he was injured. Even in much less favorable circumstances—when, for example, new facts are developed *after* discovery has begun—courts regularly allow amendments under Rule 15(a)(2). *See, e.g., Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987); *Fed. Ins. Co. v. Boston Water & Sewer Comm’n*, 551 F. Supp. 2d 117, 120 (D. Mass. 2008); *Matarazzo v. Friendly Ice Cream Corp.*, 70 F.R.D. 556, 559 (E.D.N.Y. 1976). Permission to file a Second Amended Complaint would be especially fair here, because it was Defendants’ failure to abide by ERISA’s disclosure requirements, *see* First Am. Compl. ¶¶ 136-137, 141, that prevented Bilello from including these fleshed-out allegations in his First Amended Complaint. *Cf. Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 983 (7th Cir. 2004) (“[G]iven that Treadway’s complaint was deficient only because Gateway improperly withheld information . . . , Treadway should be allowed to amend her complaint . . .”).

Nor can Defendants claim any prejudice, since the amendments are based on facts of which they have been long aware and merely elaborate claims that Bilello has asserted since the beginning of this action. *See Spanierman Gallery, PSP v. Love*, 320 F. Supp. 2d 108, 113 (S.D.N.Y. 2004) (amendment allowed because “the new facts alleged involve the same basic premise as the original complaint” and “Defendants can hardly be heard to complain of undue delay or prejudice because the case has not even proceeded to discovery”); *Bujtas v. Henningsen*

Foods Inc., 63 F.R.D. 660, 662 (S.D.N.Y. 1974) (no prejudice because “theory of plaintiffs’ action will remain the same,” and “the proofs will remain the same”); *see also Corey v. Look*, 641 F.2d 32, 38 (1st Cir. 1981) (defendants could not claim prejudice because amendment “simply sought to incorporate facts in the complaint that [defendants] had already discovered from their interrogatories”).

Defendants may claim that there has been a “delay” in amending the Complaint, and that the delay justifies a denial of this motion. As the *Spanierman Gallery* court said, however, Defendants can hardly claim that there has been an undue delay in this case, which has not yet proceeded to discovery. 320 F. Supp. 2d at 113. Even if there had been some “delay” here, that is not a sufficient basis to deny this Motion; it is only “undue” delay that provides a basis to deny leave to amend a complaint, and a delay is undue only if there is bad faith or prejudice. *See, e.g., Rachman Bag*, 46 F.3d at 234-35; *In re Horizon Cruises Litig.*, 101 F. Supp. 2d 204, 215 (S.D.N.Y. 2000) (collecting cases).

B. Bilello Should Be Permitted to Amend the Complaint to Address Perceived Deficiencies.

Bilello requests permission to file a Second Amended Complaint to address what the Court has perceived as deficiencies in his First Amended Complaint. Primarily, he wishes to lay out the grounds for Counts 7 and 8 with greater detail, particularly by specifying how Defendants’ communications with participants violated the “average plan participant” standard, and by clarifying how certain of the communications’ statements were misleading. He also seeks to be more explicit about the application of Count 1 to the 2002 and 2005 Plans.

In its Order of April 10, 2009, the Court expressed its opinion that Bilello had not made enough of an effort to “point to specific inadequacies in the notices.” Order 16.⁴ There, of course, the Court was discussing statute-of-limitations issues. Bilello believes, however, that pointing with greater specificity to inadequacies in Defendants’ communications will aid the Court not only with respect to the statute of limitations, if the Court reconsiders its April 10 Order, but also with respect to the merits of Counts 7 and 8. Thus, much of his amendment is devoted simply to explaining with greater particularity his grounds for Counts 7 and 8. His proposed Second Amended Complaint shows with much greater detail how average plan participants could not be expected to understand Defendants’ communications.

His amendment also responds to the Court’s conclusion in its April 10 Order that Counts 7 and 8 were timely only to the extent that they alleged *misleading*, not *confusing*, communications. Order 27-28. By pointing out what communications were misleading to the average plan participant, and how they misled, Bilello seeks to address the standard that the Court has established.⁵

In its April 10 Order, the Court also stated that Bilello had “concede[d]” that Count 1 “applie[d] to the 1997 Plan alone.” Order 17 n.7. While Bilello respectfully contends that this observation was incorrect, *see* Mem. in Supp. of Pl.’s Mot. for Recons. 14-15, he seeks with his proposed Second Amended Complaint to clear up any remaining confusion.

⁴ *But see* Mem. in Supp. of Pl.’s Mot. for Recons. 2-3; Pl.’s Reply to Defs.’ Opp. to Mot. for Recons. 1-2.

⁵ Count 7 of Bilello’s proposed Second Amended Complaint also explicitly alleges that Defendants failed to comply with ERISA section 204(h) with respect to the 1993 Plan amendment, which reduced participants’ rate of future benefit accrual. This emendation will cause no prejudice to Defendants, since it was included, even if not specifically mentioned, in the broad language of the First Amended Complaint. Moreover, much of the briefing in this case has focused on communications about the 1993 Plan, *see, e.g.*, Defs.’ Mem. in Opp. to Pl.’s Mot. for Recons. 8 n.7, 9, 11 n.11, and versions of the 1993 Plan were attached as Exhibits 5 and 6 to Bilello’s First

All of these reasons, both together and individually, amply justify granting Bilello's request for leave to amend his Complaint. This is effectively his first opportunity to amend with the benefit of the Court's rulings. If a plaintiff's previous amendment preceded judicial scrutiny or other notice of putative deficiencies, that amendment normally does not "count" against leave to amend. *See Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987) (reversing dismissal where plaintiff had no opportunity to address deficiencies identified in complaint); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, No. 02-8726, 2004 WL 616123, at *4 (S.D.N.Y. Mar. 30, 2004) (granting leave to replead after dismissal of amended complaint for deficiencies under Private Securities Litigation Reform Act and Fed. R. Civ. P. 9(b)). Under such circumstances, the amendment does not constitute a second "bite at the apple." *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 518 (S.D.N.Y. 2009). Bilello should therefore be allowed to amend his Complaint.

C. Bilello Should Be Permitted to Amend the Complaint to Add Count 12 and Withdraw Counts 2 Through 5 and 9.

Bilello also seeks leave to file his proposed Second Amended Complaint to add a claim alleging a breach of fiduciary duty against the Defendant Plan Administrator and to withdraw other claims. Because the breach of fiduciary duty claim, Count 12, is predicated on the concealments and misrepresentations already alleged in Counts 7 and 8, no new issues will be injected into this litigation. The amendment should therefore be allowed. *See Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, 232 F.R.D. 169, 172 (S.D.N.Y. 2004) (granting leave to amend to add new cause of action where "the proposed new claims . . . are premised on

Amended Complaint. An SPD describing the 1993 Plan was also attached as Exhibit 9 to Bilello's First Amended Complaint.

essentially the same facts and events which are the basis of the original . . . claim”); *Inside Radio, Inc. v. Clear Channel Commc’ns, Inc.*, 209 F. Supp. 2d 302, 305 (S.D.N.Y. 2002) (granting leave to amend to add new claim which “involve[d] essentially the same facts underlying the previous claims”).

Bilello’s May 18, 2009 Reply to Defendants’ Opposition to his Motion for Reconsideration conceded that he lacked standing under *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), to assert Counts 2 through 5 and 9. Accordingly, he voluntarily withdraws those claims by dropping them from the proposed Second Amended Complaint.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant him leave to file the proposed Second Amended Class Action Complaint.

RESPECTFULLY SUBMITTED this 27th day of May, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on May 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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