

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 TO DEFENDANTS' OPPOSITION TO MOTION FOR
RECONSIDERATION OF COURT'S APRIL 10, 2009 ORDER REGARDING STATUTE
OF LIMITATIONS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 1

 A. Bilello Has Amply Satisfied the Standard Governing Motions for Reconsideration..... 1

 B. Defendants Advocate—and Read the April 10 Order to Have Adopted—a Position That Finds No Support in the Case Law and Would Make ERISA Violations Impossible to Remedy. 3

 C. An Average Plan Participant Could Not Have Understood from the Communications That Defendants Were Violating ERISA’s Antibackloading Rules..... 4

 1. Count 1: An Average Plan Participant Could Not Have Understood from Defendants’ Communications That the Plans Were Impermissibly Backloaded. 4

 2. Count 6: An Average Plan Participant Could Not Have Understood from Defendants’ Communications That the Cash Balance Conversion Created “Wear-Away.”..... 6

 a. Minimum benefit. 6

 b. Relationship between accrued benefit and opening account balance. 8

 D. Count 1’s Allegations Apply to the 2002 and 2005 Plans As Well As to the 1997 Plan..... 10

III. CONCLUSION..... 10

TABLE OF AUTHORITIES

Federal Cases

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 10

Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville, No. 05-6998, 2006 WL 3161647 (S.D.N.Y. Oct. 30, 2006)..... 2

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)..... 10

Bradley v. Jusino, No. 04-8411, 2008 WL 3891529 (S.D.N.Y. Aug. 19, 2008)..... 2

Capgemini v. Sorensen, No. 04-7584, 2005 WL 1560482 (S.D.N.Y. July 1, 2005)..... 8

James v. Fed. Reserve Bank of N.Y., 471 F. Supp. 2d 226 (E.D.N.Y. 2007) 2

Kendall v. Employees Retirement Plan of Avon Products, 561 F.3d 112 (2d Cir. 2009) 1

Kingdom 5-KR-41, Ltd. v. Star Cruises PLC, No. 01-2946, 2002 WL 1159659 (S.D.N.Y. May 31, 2002)..... 2

N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc., 497 F.3d 109 (2d Cir. 2007) 8

O’Brien v. Bd. of Educ., 127 F. Supp. 2d 342 (E.D.N.Y. 2001)..... 3

Romero v. Allstate Corp., 404 F.3d 212 (3d Cir. 2005)..... 4, 5, 9

Tang v. Jinro Am., Inc., No. 03-6477, 2008 WL 4163183 (E.D.N.Y. Sept. 4, 2008) 3

United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993)..... 1

Varela v. Flintlock Constr., Inc., No. 01-2736, 2002 WL 342657 (S.D.N.Y. Mar. 5, 2002) 2

Federal Statutes

ERISA § 2(a), 29 U.S.C. § 1001(a) 4

Federal Regulations

29 C.F.R. § 2520.102-2..... 9

I. INTRODUCTION

Defendants seriously misportray Plaintiff Frank Bilello's Motion for Reconsideration. Somewhat theatrically, they dub Bilello's Motion "a transparent and improper attempt to reargue the merits of the April 10 Order," but their reasoning does not bear out their rhetoric. In fact, Bilello has pointed the Court to overlooked arguments and misconstrued case law, and has explained why the April 10 Order undermines ERISA's notice requirements. Defendants do not really attempt to argue otherwise. His Motion for Reconsideration should be granted and the April 10 Order vacated.¹

II. ARGUMENT

A. Bilello Has Amply Satisfied the Standard Governing Motions for Reconsideration.

Defendants simply fail to respond to Bilello's argument for reconsideration: that reconsideration is due because the Court did not consider Bilello's main statute-of-limitations argument. Defendants do not deny that Bilello made an "average plan participant" argument—the argument that, because average plan participants could not understand Defendants' communications, the communications did not trigger the statute of limitations. Nor do they earnestly contend that the Court addressed the argument in its April 10 Order. While the Court properly required "clear notice" of the provisions to participants, April 10 Order 12-13, it never considered what the legally required level of clarity *was*. It did not analyze whether Defendants' "notices" were clear under an average-plan-participant standard or acknowledge that Bilello had

¹ Although Bilello will shortly submit to the Court a voluntary dismissal of Counts 2, 3, 4, 5, and 9 of his Complaint, the Court should nevertheless vacate its April 10 dismissal of them. Since it is now clear under *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), that Bilello lacks Article III standing to bring those claims, this Court lacked subject matter jurisdiction to rule on them in its April 10 motion. See *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1155-56 (2d Cir. 1993) (district court should not have dismissed claims on statute-of-limitations grounds without first addressing whether it had subject matter jurisdiction). Bilello does not at all retreat from the position—explained at length in his opening memorandum—that if the Court had possessed the jurisdiction to rule on those Counts, it would have erred to dismiss them on statute-of-limitations grounds.

argued that that standard was the correct one. *Cf.* Defs.’ Mem. in Opp. to Pl.’s Mot. for Recons. 7 (“Defs.’ Recons. Opp.”). Defendants half-heartedly suggest that “the Court fully understood Plaintiff’s argument the first time,” but they cite to a portion of the April 10 Order which held that, at least in this case, the statute-of-limitations inquiry could be resolved on the pleadings. Defs.’ Recons. Opp. 4 n.3 (citing April 10 Order 15). The Court was rejecting the argument that questions of fact prevented a decision on the pleadings. It did not discuss, let alone reject, Bilello’s “average plan participant” argument.

So it is that Defendants have effectively narrowed the question before this Court. They do not dispute that Bilello made the average-plan-participant argument, and their attempt to show that the Court considered it is thoroughly unconvincing. The question, then, is whether reconsideration is due when a party makes a dispositive argument, supported by case law, that a court fails to consider in its initial order. The unremarkable answer is that reconsideration is indeed due.²

Defendants apparently take the position that reconsideration is improper because Bilello has directed the Court to no case that presented *precisely* the same legal issues as those here. *See*

² *See Bradley v. Jusino*, No. 04-8411, 2008 WL 3891529, at *2 (S.D.N.Y. Aug. 19, 2008) (“The Court grants Defendant’s motion to the extent that the February 12th Opinion failed to address his argument that Bradley had waived any objection to the jury instructions.”); *James v. Fed. Reserve Bank of N.Y.*, 471 F. Supp. 2d 226, 231 (E.D.N.Y. 2007) (“Although there was discussion at oral argument of the conflicts alleged to exist between federal and state employment law, those alleged conflicts were not addressed in the [order]. Defendant therefore is entitled to reconsideration of the preemption issue”); *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville*, No. 05-6998, 2006 WL 3161647, at *1 (S.D.N.Y. Oct. 30, 2006) (Cote, J.) (“Here, [the defendants] have identified two issues raised in the briefs on the original motion that the Court did not address in the Opinion. Therefore, the motion for reconsideration is granted, and this Memorandum Opinion will consider the merits of their arguments.”); *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, No. 01-2946, 2002 WL 1159659, at *2 (S.D.N.Y. May 31, 2002) (holding that an argument raised in a *footnote* can “serve as the basis for a motion to reconsider,” since “neither placement on the page nor size of font are legitimate proxies for the strength of an argument”); *Varela v. Flintlock Constr., Inc.*, No. 01-2736, 2002 WL 342657, at *2 (S.D.N.Y. Mar. 5, 2002) (Cote, J.) (granting motion for reconsideration because the earlier order had not “specifically address[ed] . . . Flintlock’s arguments with respect to a common law cause of action for sexual harassment”).

In discussing Local Rule 6.3, Bilello relies on decisions from both the Eastern and Southern Districts of New York, since the Eastern District shares this District’s local rules.

Defs.' Recons. Opp. 5. Defendants miss the point both of Bilello's Motion and of Local Rule 6.3. Bilello claims not that the cases on which he bases his Motion for Reconsideration presented exactly the same issue as that here, but rather that the Court, when relying on those cases in its April 10 Order, misinterpreted them. Reconsideration is entirely appropriate when, as here, the Court has misinterpreted or misapplied cases that support the position of the party moving for reconsideration.³

B. Defendants Advocate—and Read the April 10 Order to Have Adopted—a Position That Finds No Support in the Case Law and Would Make ERISA Violations Impossible to Remedy.

Defendants take, and have interpreted this Court as taking, an extraordinarily radical position. They now expressly argue that noncompliant SPDs and SMMs—SPDs and SMMs that average plan participants cannot understand—can trigger the running of the statute of limitations. *See* Defs.' Recons. Opp. 5. Bilello believes that the Court did not have this position in mind when it issued its April 10 Order. There is no indication in the Order that the Court endorsed Defendants' position, even though the logical consequence of the Order is indeed to allow noncompliant SPDs and SMMs to put average plan participants on notice of ERISA claims.

Defendants, furthermore, can point to no case holding that SPDs and SMMs that violate the average-plan-participant standard can trigger the limitations period. They cannot find case law to support their position, and for good reason. Fiduciaries could simply rely on SMMs and SPDs, even noncompliant ones, that either were silent about technical features of a plan's design that violated ERISA, *see infra* p. 6, or disclosed them, but in an incomprehensible or misleading

³ *See, e.g., Tang v. Jinro Am., Inc.*, No. 03-6477, 2008 WL 4163183, at *3 (E.D.N.Y. Sept. 4, 2008) (granting reconsideration on ground "that I misapplied relevant case law"); *O'Brien v. Bd. of Educ.*, 127 F. Supp. 2d 342, 346 (E.D.N.Y. 2001) ("Because the Court's misapplication or misinterpretation of a case upon which it relied significantly in rendering its previous decision, if true, is a matter that might reasonably be expected to alter the conclusion reached in that decision, Defendant's motion for reconsideration is procedurally sound and is granted.").

way, *see infra* p. 7, 9. Such SMMs and SPDs would not allow plan participants to determine that their rights were being violated, and by the time they discovered the violations—perhaps by seeing that their annuity was much less than they had expected, or perhaps by consulting with an ERISA expert as they near retirement age—the statute of limitations would have long run out. Because ERISA’s drafters could not have intended this manifest injustice, Defendants’ position should be rejected. *See* ERISA § 2(a), 29 U.S.C. § 1001(a) (“Congress finds . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . .”); *Romero v. Allstate Corp.*, 404 F.3d 212, 224 (3d Cir. 2005) (because participants are “likely unfamiliar with the intricacies of pension plan formulas and the technical requirements of ERISA,” they are not intended “to become watchdogs over potential Plan errors and abuses” (citation and internal quotation marks omitted)).

C. An Average Plan Participant Could Not Have Understood from the Communications That Defendants Were Violating ERISA’s Antibackloading Rules.

1. Count 1: An Average Plan Participant Could Not Have Understood from Defendants’ Communications That the Plans Were Impermissibly Backloaded.

In his Motion for Reconsideration, Bilello pointed out that the 1994 SPD spoke of a “minimum annual rate” of interest applied to cash balance accounts, Compl. Ex. 9 at CBPJPMC00014581, and that the other communications Defendants made with participants were at best silent on the question of a minimum interest credit rate. Mem. in Supp. of Pl.’s Mot. for Recons. 9-10 (“Pl.’s Mot. for Recons.”). Defendants’ attempts to show that these communications triggered the statute of limitations for Bilello’s backloading claim do not convince.

Defendants briefly address the 1994 SPD in a footnote. Defs.’ Recons. Opp. 8 n.7. They claim that the 1994 SPD’s reference to a “minimum annual rate” of interest “in no way suggests a *fixed* minimum interest rate,” *id.*, a view that is in some tension with their interpretation of the “minimum benefit” provision, *see id.* at 11 (interpreting “minimum” to refer to fixed amount). However that may be, the mere fact that the 1994 SPD did *not* say the interest rate was fixed certainly does not mean that the average plan participant interpreted it to mean “floating.” “Minimum” refers to a fixed point much more often than to a floating one, but even if both meanings were of equal currency, the 1994 SPD failed to tell participants which kind of minimum it meant. This failure could not have “clear[ly]” informed the average plan participant that there was no minimum interest rate, and therefore did not trigger the running of the statute of limitations.⁴ *Romero*, 404 F.3d at 224.

Defendants agree with the Court’s assessment that the communications other than the 1994 SPD made no mention of a minimum interest credit rate. Defs.’ Recons. Opp. 8. Because Count 1 is “wholly predicated on the absence of a minimum interest rate,” they say, Defendants’ communications put Bilello on notice of his claim. *Id.* There are two main problems with this argument. First, even if an average plan participant would have known that there was no minimum interest rate, this piece of information by itself could not have put an average plan participant on notice that the plans in this case were backloaded. A plaintiff would also need to be intimately familiar with ERISA’s antibackloading rules—and not only that, but would also have to perform the actuarial calculations required to confirm that the plans violated those rules.

⁴ Defendants say participants should have known that the average rate of interest for one-year Treasury Bills—the rate to which the interest credit rate was pegged—was a floating rate, but they give no reason for this assertion. *See* Defs.’ Recons. Opp. 8 n.7. Financial literacy is indeed relevant here, for if the average level of financial literacy in the nation is quite low, as it is, then the average participant will likely be ignorant of a fact that is part of financial literacy: the fact that the one-year Treasury rate is variable. *See* Pl.’s Mot. for Recons. 10 n.7.

The legal knowledge and the drawn-out reasoning required to deduce an ERISA violation from the lack of a minimum interest credit rate are simply too technical and complicated to have triggered the limitations period. *See* Pl.’s Mot. for Recons. 12. Second, mere silence about whether there was a minimum interest rate could not have clearly informed the average plan participant that no minimum interest rate existed. *See id.* at 9 (explaining why silence cannot trigger the running of the limitations period). From Defendants’ communications, no average plan participant could determine that his ERISA rights were being violated.

2. Count 6: An Average Plan Participant Could Not Have Understood from Defendants’ Communications That the Cash Balance Conversion Created “Wear-Away.”

Defendants argue that two kinds of disclosures made “wear-away” known to Bilello.⁵ The first is that the “minimum benefit” provision *itself* triggered the running of the statute of limitations. Defs.’ Recons. Opp. 11. The second is that the September 1990 SMM and the 1992 SPD “both clearly stated” that a participant’s opening account balance “was derived from, but not necessarily equal to,” the minimum benefit. *Id.* These arguments are wrong on a number of different levels.

a. Minimum benefit.

Defendants’ argument, evidently, is that the very concept of a “minimum” benefit should have indicated that the opening account balance was less than the minimum protected benefit—otherwise, there wouldn’t have been a need for a minimum at all.

The problem with this argument is that informing participants of a “minimum benefit,” as Defendants claim to have done here, is meaningless without identifying what the relevant

⁵ “Wear-away” refers to a period of time in which benefits do not accrue. Here, the fact that the opening cash balance was less than the accrued benefits necessarily created a period during which benefits did not accrue for participants.

minimum *is*, and why it is being offered. If the minimum benefit is equal to the opening account balance, then the clear purpose of the minimum would be to provide a base from which benefits are to grow. The ordinary meaning of “minimum,” after all, refers not just to a floor beneath which benefits cannot fall, but also to a base to which benefits may be *added*. Thus, the opening account balance was also the “minimum” account balance.

Defendants, however, do not even try to argue that participants would have known that the relevant “minimum” differed from the opening account balance. And after reading the September 1990 SMM, an average plan participant would not only fail to comprehend that the opening account balance was different from the minimum benefit, but would actually be convinced that they were *equal*. “[Y]our Cash Plan account,” the SMM tells participants, “will begin with a *prior service balance*.” Compl. Ex. 3 at JPMC00001734. The SMM then states: “By starting . . . with a prior service balance, [the Plan] preserves your benefit under the prior Plan formula and combines it with your benefits under the Cash Plan” *Id.* The key word here is “preserves”: because it makes no sense to speak of “preserv[ation]” if the opening account balance is *less* than benefits accrued under the prior plan, an average plan participant would believe that the opening account balance was at least equal to previously accrued benefits.

The concrete example that the September 1990 SMM provides is even more misleading. The SMM asks the reader to assume that “the value of your benefit under the [previous plan] at the end of 1988 was \$3,800. *As a result*, effective January 1, 1989, \$3,800 is credited to your Cash Plan account *as your prior service balance*.” *Id.* at JPMC00001734-35 (emphasis added). Thus, the example of the conversion that the SMM gives says explicitly that participants’ opening balance will be equal to the value of their accrued benefit under the prior plan. From this information, the average plan participant would naturally believe that the relevant

“minimum” in the “minimum benefit” provision simply *is* the opening—the “minimum”—account balance.⁶

Of course, even if Defendants’ strained reading of the “minimum balance” provision were correct, their argument still wrongly assumes that the average plan participant knows of ERISA’s antibackloading rules. As Bilello has already shown, the average-participant standard does not impute such knowledge to participants. *See* Pl.’s Mot. for Recons. 4, 14.

b. Relationship between accrued benefit and opening account balance.

Relying on the statement in the September 1990 SMM that the opening account balance was “based on” the accrued benefit under the prior plan, Compl. Ex. 3 at JPMC00001734, Defendants claim that the SMM “clearly stated” that the opening balance “derived from, but not necessarily equal[led],” the accrued benefit, Defs.’ Recons. Opp. 11. Their argument is sophistical. It ignores the SMM’s reference to “preserv[ation]” of the accrued benefit, as well as its concrete example, which indicated that the opening balance *did* equal the accrued benefit. Compl. Ex. 3 at JPMC00001734. After reading such things, an average plan participant would believe that here, “based on” simply meant “equal to.” It is *possible* for “based on” to mean “derived from,” as Defendants want it to mean; but it may also mean “equal to,”⁷ and in context that is what the average plan participant would have interpreted it to mean. At the very least, it would not have been *clear* that the value of the opening account balance was not equal to the

⁶ Defendants, using the same argument about “minimum benefit,” also rely on the 1994 SPD. *See* Defs.’ Recons. Opp. 11 n.11. Like the September 1990 SMM, however, the 1994 SPD fails to specify what the relevant minimum is. Moreover, it tells participants that their benefit under the cash balance plan will be composed of a “prior service balance [f]or service before 1989,” plus the cash balance benefit accrued since then. Compl. Ex. 9 at CBPJPMC00014586. Since the September 1990 SMM had already told Bilello that the “minimum benefit” equaled the “prior service balance,” the 1994 SPD actually deepens participants’ misunderstanding.

⁷ *See, e.g., N.Y. Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 497 F.3d 109, 111 (2d Cir. 2007) (noting that at New York Mercantile Exchange, price of futures contract at end of each day is “based on a formula”), *cert. denied*, 128 S.Ct. 1669 (2008); *Capgemini v. Sorensen*, No. 04-7584, 2005 WL 1560482, at *11 (S.D.N.Y. July 1, 2005) (describing defendant’s motion “to modify the Award to value the stock price based on the price on the date of the breach”).

value of the accrued benefit. *See Romero*, 404 F.3d at 224 (demanding “clear” repudiation of benefits for statute of limitations to be triggered). Parsing out the meaning of “based on,” as Defendants do, is skillful lawyering, but it is not faithful to the average-participant standard.

Defendants also rely on a statement from their late-produced 1992 SPD, which there is no evidence Bilello ever received. *See* Pl.’s Mot. for Recons. 8 n.6; *see also* Pl.’s Mem. of Law in Opp’n to Defs.’ Mot. to Dismiss 11 n.11 (explaining that 1992 SPD had not been previously produced). Defendants cannot now rely on it. Even if they could, however, it would not help them. It tells participants that the opening balance “does not represent in all cases the benefit accrued under” the prior plan, but does not actually tell them that the opening balance is *less* than the accrued benefit. And, by failing to state that the prior service balance is less than the accrued benefit under the prior plan, it does not correct the misunderstanding fostered by the September 1990 SMM. Instead, it says that the opening balance “is based upon a number of assumptions and rules,” but does not say what those “assumptions and rules” actually are, or even how participants can find out what they are. This failure to explain how the opening balance was calculated falls far short of the average-plan-participant standard or ERISA’s disclosure standards for SPDs. *See* 29 C.F.R. § 2520.102-2(a)-(b) (“The summary plan description . . . shall be *sufficiently comprehensive* to apprise the plan’s participants and beneficiaries of their rights and obligations under the plan. . . . Any description of exception, limitations, reductions, and other restrictions of plan benefits shall not be minimized, *rendered obscure* or otherwise made to appear unimportant.” (emphasis added)).

Finally, even if the September 1990 SMM or 1992 SPD had clearly stated that the opening account balance was less than the minimum benefit, an average plan participant would not have known either of the antbackloading rules or that wear-away violated them.

D. Count 1's Allegations Apply to the 2002 and 2005 Plans As Well As to the 1997 Plan.

Defendants offer nothing but *ipse dixit* in response to Bilello's argument that the Court misinterpreted Count 1 to apply only to the 1997 Plan. *See* Defs.' Recons. Opp. 12. The Complaint makes it clear that Count 1 applies to the 2002 and 2005 Plans. *See* Pl.'s Mot. for Recons. 14-15.

Defendants also briefly assert that Count 1's allegations about the 2002 and 2005 Plans fail to satisfy Federal Rule of Civil Procedure 8. This is simply untrue. Count 1 details how the 2002 and 2005 Plans violated the 133 ⅓% rule by failing to set the interest rate at 5.25% or above, Compl. ¶ 51, and specifies the way in which the grandfathering of pay credit scales under the 2002 Plan contributed to the backloading violation, *id.* ¶ 52. In short, "[b]y failing to specify any minimum interest rate prior to 2005, and failing to provide an adequate minimum interest rate thereafter," the Defendants violated the 133 ⅓% rule. *Id.* ¶ 53. These allegations specify the grounds on which Bilello is entitled to relief, and are far from the mere "labels and conclusions" or "formulaic recitation[s]" that the Supreme Court has condemned. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Count 1 is more than sufficient under Rule 8.⁸

III. CONCLUSION

For the reasons given above and in his opening memorandum, Bilello's Motion for Reconsideration should be granted and the April 10 Order vacated.

RESPECTFULLY SUBMITTED this 18th day of May, 2009.

KELLER ROHRBACK L.L.P.

By: s/Amy Williams-Derry

⁸ Bilello also stands by his position that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the *In re JPMorgan Chase Cash Balance Litigation* tolled the statute of limitations for Counts 6, 7, 8, and 9. *See* Pl.'s Mot. for Recons. 16.

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I hereby certify that on May 18, 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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