

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANK BILELLO, individually and on behalf) Via ECF
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,)
)
Defendant.)

**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. APPLICABLE LEGAL STANDARDS 1

III. ARGUMENT 2

 A. Because Bilello Has Suffered an Identifiable and Quantifiable Injury Resulting in the Reduction of His Benefits, He Has Standing to Bring Counts 1 and 6. 2

 1. The Violation Alleged in Count 1 Reduced Bilello’s Benefits in an Identifiable and Quantifiable Way..... 4

 2. The Violation Alleged in Count 6 Reduced Bilello’s Benefits in an Identifiable and Quantifiable Way..... 6

 B. Bilello Has Standing to Bring His Other Claims. 7

 1. Because the Lack of Notice Likely Prejudiced Him, Bilello Has Standing to Bring Counts 7 and 8..... 7

 a. Bilello has standing to assert Count 7..... 7

 b. Bilello has standing to assert Count 8..... 10

 2. Bilello Has Standing to Bring Counts 10 and 11 Because the Violations They Allege Invaded Bilello’s Statutory Right to Disclosure. 11

 C. Claims That Bilello Lacks Standing to Assert Should Be Dismissed on Jurisdictional Grounds..... 13

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

Federal Cases

Amara v. Cigna Corp., 534 F. Supp. 2d 288 (D. Conn. 2008) 9

APWU v. Potter, 343 F.3d 619 (2d Cir. 2003)..... 2

Blazejewski v. William E. Gibson Money Purchase Pension Plan & Trust, No. 97-5466, 1999 WL 1044892 (N.D. Ill. Nov. 10, 1999) 12

Catskill Dev., L.L.C. v. Park Place Entm’t Corp., 547 F.3d 115 (2d Cir. 2008)..... 9

DiSabatino v. DiSabatino Bros., Inc., 894 F. Supp. 810 (D. Del. 1995)..... 12

Fin. Insts. Ret. Fund v. Office of Thrift Supervision, 964 F.2d 142 (2d Cir. 1992)..... 12, 13

Friends of Hamilton Grange v. Salazar, No. 08-5220, 2009 WL 650262 (S.D.N.Y. Mar. 12, 2009) 1, 2

Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006) 8, 9, 10

Gillis v. Hoechst Celanese Corp., 4 F.3d 1137 (3d Cir. 1993)..... 12

Hirt v. Equitable Ret. Plan for Employees, Managers, & Agents, 533 F.3d 102 (2d Cir. 2008) 9

Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450 (3d Cir. 2003)..... 2, 11, 13

Hurlic v. S. Cal. Gas. Co., 539 F.3d 1024 (9th Cir. 2008) 9

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

Makarova v. United States, 201 F.3d 110 (2d Cir. 2000)..... 2

Pagovich v. Moskowitz, 865 F. Supp. 130 (S.D.N.Y. 1994)..... 12

Richards v. FleetBoston Fin. Corp., 427 F. Supp. 2d 150 (D. Conn. 2006)..... 9, 10

Federal Statutes

ERISA § 102, 29 U.S.C. § 1022 10

ERISA § 104(b), 29 U.S.C. §1024(b)..... 10, 11

ERISA § 105(a), 29 U.S.C. § 1025(a) 11

ERISA § 204(b), 29 U.S.C. § 1054(b)..... 2
ERISA § 204(h), 29 U.S.C. § 1054(h)..... 7
ERISA § 404(a), 29 U.S.C. § 1104(a) 11, 13
ERISA § 502(c), 29 U.S.C. § 1132(c) 11, 12

Federal Regulations

29 C.F.R. § 2520.102-2..... 10

Other Authorities

Carole Fleck, *Retirement on Hold: How Long Will You Have to Keep Working?*,
AARP Bull., July 7, 2008 11
Richard W. Johnson et al., Urban Inst., *The Impact of Late-Career Health and
Employment Shocks on Social Security and Other Wealth* (Dec. 2007) 10

I. INTRODUCTION

On April 20, 2009, the Court asked the parties to address the effect of *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), on Bilello's standing to bring each of his claims. Although *Kendall* has led Bilello to conclude that he lacks constitutional standing to assert Counts 2, 3, 4, 5, and 9 of his Complaint,¹ it has had precisely the opposite effect on his evaluation of Counts 1, 6, 7, 8, 10, and 11. Not only does he have standing to assert his claims alleging violations of ERISA's anti-backloading rules and its notice and disclosure requirements, but it is now clear how grievously Defendants' actions have harmed Bilello and other participants. Their violations of the anti-backloading rules reduced Bilello's benefits by tens of thousands of dollars, and their violations of ERISA's notice requirements prevented Bilello from enjoining the backloading violations, from increasing his savings and investment to make up for his drastically reduced retirement income, or from seeking employment elsewhere. Defendants' refusal to provide Bilello with documents explaining the amount of his benefits, how those benefits were calculated, and how they compare to his benefits under the prior plan has precluded him, even now, from fully determining how much the 1989 cash balance conversion reduced his accruals. Bilello's injuries have hindered his ability to plan for the future, compromised the security of his retirement, and satisfied constitutional requirements.

II. APPLICABLE LEGAL STANDARDS

A district court adjudicating a motion to dismiss for lack of jurisdiction must “take all facts alleged in the complaint as true.” *Friends of Hamilton Grange v. Salazar*, No. 08-5220, 2009 WL 650262, at *12 (S.D.N.Y. Mar. 12, 2009) (quoting *Makarova v. United States*, 201

¹ Here, “Complaint” will refer to the First Amended Complaint. Very shortly, Bilello will submit a motion to amend the First Amended Complaint, and with the motion a proposed Second Amended Complaint.

F.3d 110, 113 (2d Cir. 2000)). Jurisdiction, however, cannot be based on inferences drawn from the pleadings, *id.*, and must be shown affirmatively, *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003). A district court may consider matters outside the pleadings when resolving a Rule 12(b)(1) motion. *Friends of Hamilton Grange*, 2009 WL 650262, at *12.

With minor exceptions not pertinent here, Defendants accurately summarize the facts and holding of *Kendall*. Defendants' Supplemental Mem. in Supp. of Mot. to Dismiss 2-4 ("Defs.' *Kendall* Br."). For an ERISA plaintiff to have suffered an injury in fact sufficient to invoke the federal courts' subject matter jurisdiction, he must have suffered "individualized harm." *Kendall*, 561 F.3d at 120. It is not enough merely to show a violation of ERISA, for the plaintiff must show that the violation *injured* him. *See id.* at 121. One way for a plaintiff to show standing—although not the only way, *see id.* at 120-21 (quoting *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003))—is to show "an identifiable and quantifiable injury" that "result[s] in a reduction of [the participant's] benefits." *Id.* at 122.

III. ARGUMENT

A. Because Bilello Has Suffered an Identifiable and Quantifiable Injury Resulting in the Reduction of His Benefits, He Has Standing to Bring Counts 1 and 6.

Counts 1 and 6 of Bilello's Complaint both allege violations of ERISA's "133 ⅓% rule," which requires that a pension participant's rate of benefit accrual in any one year not be more than 133 ⅓% of the accrual rate in any other year. *See* ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B). Count 1 alleges that because the post-1997 plans at issue in this case failed to set a minimum rate at which notional "interest credits" would be added to participants' hypothetical cash balance accounts, the rate of accrual in some years was more than one third greater than—more than 133 ⅓% of—the rate of accrual in others. Compl. ¶¶ 50-53. Count 6 alleges that after Chemical Bank's traditional defined benefit pension plan was converted into

the 1989 Cash Plan, there was a period when the balance in participants' hypothetical accounts was lower than the benefit they had already accrued under the terms of the pre-1989 Plan. *Id.*

¶ 79. After December 31, 1990, the accrued benefit under the pre-1989 formula was static, while participants' cash balance accounts reflected periodic contributions. Because the 1989 Cash Plan provided that participants were entitled to the greater of either (1) their already accrued benefit under the pre-1989 Plan as of December 31, 1990, or (2) the balance in their hypothetical cash accounts, *id.* ¶ 74, participants suffered a period during which their benefits did not accrue, *id.*

¶ 79. Although Defendants did not explain this benefit calculation method to Mr. Bilello or to other average Plan participants, it was only after the amount in participants' cash balance accounts *surpassed* their accrued benefit under the pre-1989 formula that participants' benefits actually accrued. And because any positive number is more than 133 ⅓% of zero, the 1989 Cash Plan violated the 133 ⅓% rule at the point when benefits actually began to accrue. *Id.* ¶ 81.

In support of this Memorandum, Bilello has submitted a Declaration from actuary Claude Poulin. Decl. of Claude Poulin ¶ 1 ("Poulin Decl."). Poulin is an Enrolled Actuary under ERISA, a Fellow in the Society of Actuaries, and a member of the American Academy of Actuaries. *Id.* Using the worksheets that Defendants gave Bilello, *see* Compl. ¶ 136, Poulin has conducted an analysis, "based on the limited data available," to determine the extent to which the violations in Counts 1 and 6 harmed Bilello. Poulin Decl. ¶¶ 5-6.

Poulin's conclusions—which are, of course, based on the Defendants' own data—are striking. He demonstrates that the lack of a minimum interest-crediting rate in the post-1997 Plans cost Bilello almost \$3,000 in benefits. That number is far from insignificant, but wear-away more drastically decreased Bilello's benefits. According to Defendants' worksheets, six years after his benefits under the pre-1989 Plan had ceased to accrue, the amount in Bilello's

1989 Cash Plan account was over \$27,000 less than his protected benefit under the pre-1989 formula.² These substantial harms are more than enough to satisfy Article III’s injury-in-fact requirement.

1. The Violation Alleged in Count 1 Reduced Bilello’s Benefits in an Identifiable and Quantifiable Way.

Under the 1997 Chase Retirement Plan, “pay credits,” or notional amounts of money based on a percentage of compensation, were added to participants’ accounts. The Plan also imputed notional growth to participants’ accounts in the form of “interest credits.” The pay credits rose from 4% as a minimum to 14% as a maximum, according to the following schedule:

Completed Full Years of Pay Credit Service	Percentage of Eligible Compensation
1 – 3	4%
4 – 6	5%
7 – 10	6%
11-15	8%
16 – 20	10%
21 – 25	12%
26 or more	14%

Poulin Decl. ¶ 10. Because these pay credits increased by more than 133 ⅓%, the only way that the Plan could avoid a violation of the 133 ⅓% rule was to ensure that interest credits that participants received in their earlier years of employment were high enough to counteract the impact of the higher pay credits in later years. *Id.* ¶ 11. Poulin calculates that the Plan would have had to provide for a minimum annual interest-crediting rate of 5.21% in order to avoid a

² See Ex. C to Feb. 25, 2008 Aff. Thomas C. Rice (Dkt. 25) (attaching JPMFJP00719 – 762) at 758. Defendants produced this document to Plaintiff Bilello in September 2007. Compl. ¶ 136. .

violation of the 133 ⅓% rule.³ The calculations that led him to this conclusion are set out in Exhibits B1 and B2 to his Declaration.

The Plan not only failed to provide for a minimum annual interest-crediting rate, but *actually* made interest credits to Bilello's account at rates lower than 5.21%. *Cf.* Defs.' *Kendall* Br. 8 (claiming that Bilello has shown only a "risk" of backloading rather than actual backloading). From January 2003 through April 2008, Bilello was subject to the 4%-to-14% pay credit schedule—for while the 1997 Chase Retirement Plan had been superseded by the 2002 and 2005 JPMC Plans, Bilello and certain other participants had been grandfathered into those Plans under the 1997 pay credit scale. Poulin Decl. ¶ 18. Based on data from the worksheets, Poulin sets out the "actual progression of Plaintiff Frank Bilello's cash balance account from January 2003 through his benefit withdrawal as of April 1, 2008" as Exhibit C1 to his Declaration. *Id.* ¶ 19. Then, to show the benefits Bilello lost because of the violation of the 133 ⅓% rule, Poulin attaches as Exhibit C2 to his declaration "the progression of Plaintiff Bilello's cash balance account if the Plans had provided an annual minimum interest crediting rate of 5.21% in order to avoid backloading." *Id.* ¶ 20. Comparing the two Exhibits, Poulin concludes that if the Plans had complied with the 133 ⅓% rule, Bilello's account "would have received greater periodic contributions" in earlier years, which, "together with the application of compound interest," would have resulted in higher benefits. *Id.* ¶ 21. Based on the data currently available, Poulin calculates Bilello's loss of benefits at \$2,996.35. *Id.* ¶ 22.

³ The required minimum interest-crediting rate that Poulin gives (5.21%) fleshes out the rough approximation given in the Complaint (5.25%). *See* Compl. ¶ 51.

This is precisely the kind of “identifiable and quantifiable injury,” supported by “mathematical calculations,” that *Kendall* found sufficient to create an injury in fact. 561 F.3d at 122. Bilello thus has standing to bring Count 1.

2. The Violation Alleged in Count 6 Reduced Bilello’s Benefits in an Identifiable and Quantifiable Way.

Poulin also concludes, based on the worksheets, that the 1989 Cash Plan created a period of wear-away that harmed Bilello. A document reproduced below, bearing the sadly ironic title of “WINNING BENEFIT SUMMARY,” compares Bilello’s accrued benefit, or “protected benefit,” under the pre-1989 Plan with his benefit under the terms of the 1989 Cash Plan. Poulin Decl. ¶¶ 23-24.

WINNING BENEFIT SUMMARY		
	Life Annuity	Lump Sum
	-----	-----
(1) Cash Balance Benefit	1709.89	565261.30
(2) Chemical 12/31/90 Benefit		
(a) Old Chemical 12/31/90 Benefit	1765.89	246591.71
(b) TCB Chemical 12/31/87 Benefit		
(c) Horizon 12/31/89 Benefit		
(d) Chemical 12/31/96 Cash Balance Account	1566.86	218798.68

Ex. C to Feb. 25, 2008 Aff. Thomas C. Rice at JPMFJP00758 (emphasis added). According to this account summary, the benefit Bilello had accrued under the pre-1989 Plan as of December 31, 1990 was a lump sum of \$246,591.71 or a monthly life annuity of \$1,765.89. *Id.* ¶ 23. The benefit he had accrued under the terms of the 1989 Cash Plan as of December 31, 1996, a full six years later, was only a lump sum of \$218,798.68 or a monthly life annuity of \$1,566.86. *Id.* ¶ 24. No communication from the Plan ever told Bilello—in a way that was neither misleading nor above the head of an average plan participant—that he would experience this period of “wear-away.” See Pl.’s Reply to Defs.’ Opp. to Mot. for Recons. 6-9; *infra* pp. 7-10.

Thus, from December 31, 1990 through at least December 31, 1996 and almost surely beyond that date, Bilello accrued no additional benefits. To say that this long period of no accrual concretely harmed Bilello is to state the obvious. If he had accrued benefits during this period in accordance with the 133 ⅓% rule, his benefit would have been greater by tens of thousands of dollars. Any accrual of benefits is greater than none, of course, and the base from which his benefits would have grown would have been the higher “protected benefit.” Once again, this “identifiable and quantifiable injury . . . resulting in a reduction of . . . benefits” is sufficient to confer constitutional standing on Bilello. *Kendall*, 561 F.3d at 122.

B. Bilello Has Standing to Bring His Other Claims.⁴

1. Because the Lack of Notice Likely Prejudiced Him, Bilello Has Standing to Bring Counts 7 and 8.

Counts 7 and 8 are “notice” claims, predicated on Defendants’ failure to disclose crucial facts to participants. Bilello has standing to bring both of these claims.

a. Bilello has standing to assert Count 7.

Count 7 alleges that Defendants violated ERISA section 204(h), 29 U.S.C. § 1054(h), by never telling participants that the 1989 Cash Plan and the 1997 Chase Plan would reduce future benefit accrual compared to the prior Plans, that both Plans decreased accruals as participants aged, or that the 1989 Cash Plan further reduced benefits by creating a long period of wear-away. No communication ever informed participants of these facts. Indeed, several communications—

⁴ Defendants’ briefing only discusses Counts 1-6 and 9 of the Complaint. Because the Court ordered the parties to brief “the implications of the *Kendall* decision on Bilello’s standing to bring *each* of his claims, including those already dismissed,” Bilello can only assume that Defendants concede that he has standing to bring Counts 7, 8, 10, and 11 of his Complaint. April 20, 2009 Order 2 (emphasis added). But because a district court must satisfy itself that it has subject matter jurisdiction over every claim before it, Bilello will also analyze those Counts.

including two letters sent to participants in July 1990⁵ and a Statement of Material Modification distributed in September 1990⁶—misled average plan participants into believing that their benefits would *increase*.

As *Kendall* recognized, a quantifiable pecuniary injury is not the only harm sufficient to create a constitutional injury in fact. *See* 561 F.3d at 120-21. In *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006), the Second Circuit held that for “notice” claims, plaintiffs have valid claims as long as they can demonstrate that deficient notices “likely prejudice[d]” them. *Id.* at 267. In *Frommert*, the Xerox pension plan had violated ERISA section 204(h) by failing to disclose a plan feature called the “phantom account,” which markedly reduced benefits for rehired employees. *See id.* at 266. The court concluded that the “prolonged absence of any mention of the phantom account from Plan documents . . . likely, and quite reasonably, led plan participants to believe that it was not a component of the Plan,” and that their benefits would be higher than they actually were. *Id.* at 267. This misapprehension likely prejudiced them—it deprived them of the “opportunity to take timely action in response” to the phantom account, including “seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment.” *Id.* at 266.

Here, the Plan never communicated that the 1989 Cash Plan would reduce benefits as compared to the pre-1989 Plan, and it also never communicated that the 1989 Cash Plan would further reduce benefits by creating significant periods of wear-away. Because the 1989 Cash

⁵ The first letter suggested that benefits would increase by saying that the “revised plan [would] cost [Chemical Bank] slightly more than we now spend on employee retirement benefits,” an “additional increase” that “will be well justified.” Compl. Ex. 1. The second letter about the conversion said that the Cash Plan would “continue[] to provide similar benefits at retirement,” which implies that participants’ benefits would remain at least equal to what they had been previously. Compl. Ex. 2.

⁶ *See* Pl.’s Reply to Defs.’ Opp. to Mot. for Recons. of Court’s Apr. 10, 2009 Order Regarding Statute of Limitations 6-8.

Plan communications were silent about these aspects of the new benefit formula, they “likely, and quite reasonably, led plan participants to believe” that these features were not a component of the Plan. *Frommert*, 433 F.3d at 267. Following *Frommert*, a district court in this Circuit has concluded that the kinds of deficiencies that Count 7 alleges demonstrate “likely prejudice.” *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150, 173 (D. Conn. 2006), *abrogated on other grounds by Hirt v. Equitable Ret. Plan for Employees, Managers, & Agents*, 533 F.3d 102 (2d Cir. 2008). The Ninth Circuit has also concluded that the failure to disclose wear-away creates “likely prejudice” under *Frommert*. See *Hurlic v. S. Cal. Gas. Co.*, 539 F.3d 1024, 1038-39 (9th Cir. 2008); *accord Amara v. Cigna Corp.*, 534 F. Supp. 2d 288, 354 (D. Conn. 2008). These conclusions are no more than common sense. If Bilello had known of phenomena that would reduce his benefits by tens of thousands of dollars, he would likely have “take[n] timely action in response,” either by initiating a court action, *see Amara*, 534 F. Supp. 2d at 352 (“Even the inability to bring a timely lawsuit itself can constitute likely harm if it results from misinformation provided in notices about the plan.”), or by looking for other employment or saving more for retirement, *Frommert*, 433 F.3d at 266.

Frommert, however, may have intended “likely prejudice” as a merits-related rather than a justiciability standard, and *Kendall* seems to have established a less rigorous test purely for standing.⁷ The case suggests that failure to disclose any reduction in benefits creates a constitutional injury in fact. Immediately after noting that Kendall had standing to bring a claim

⁷ The *Frommert* court necessarily concluded that it had subject matter jurisdiction over the claim. See *Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*, 547 F.3d 115, 123 (2d Cir. 2008) (noting that court had independent obligation to consider presence of subject matter jurisdiction, despite the parties’ failure to address the issue), *cert. denied*, 129 S. Ct. 1908 (2009). At the very least, one can conclude this from *Frommert*: to the extent that the merits of a section 204(h) claim differ from the standards governing Article III standing to bring a section 204(h) claim, the standards governing Article III standing are not *more* rigorous than those governing the merits. Because Bilello has shown likely prejudice, he has perforce satisfied the constitutional injury-in-fact requirement.

that “relate[d] to a past and present reduction in accrued benefits,” the Second Circuit observed that Kendall also had standing to assert two “related” notice claims alleging that the defendant hadn’t disclosed that “past and present reduction.” 561 F.3d at 122-23. This is logical: because the reductions constituted injuries in fact, the plaintiff also had standing to challenge the *nondisclosure* of those reductions. Here, Bilello has standing under *Kendall* to bring Count 7. Because the reductions that Defendants misrepresented or concealed from participants constitute calculable injuries, Bilello also has standing to challenge their nondisclosure.

b. Bilello has standing to assert Count 8.

Count 8 alleges that the summary plan descriptions (SPDs) that were provided to participants in 1994 and 1999 violated ERISA sections 102 and 104(b)(1), 29 U.S.C. §§ 1022 and 1024(b)(1), as well as 29 C.F.R. § 2520.102-2. This they did by failing to disclose, in any way that an average plan participant could understand, the fact that the 1993 Chemical Plan and the 1997 Chase Plan reduced participants’ rates of future benefit accrual as they aged.

Bilello has standing to bring Count 8 for the same reasons he has standing under Count 7. Under *Frommert*, the failure to disclose that benefit accrual decreases as participants age causes “likely prejudice.” See *Richards*, 427 F. Supp. 2d at 173 (so holding). Indeed, failing to disclose that benefit accrual decreases as participants age is particularly likely to cause prejudice by preventing participants from planning for a secure retirement. In traditional defined benefit plans, pension wealth tends to grow more rapidly in the years just before retirement,⁸ and it is very difficult for workers in their late 50s or early 60s to make up for a significant loss of

⁸ See Richard W. Johnson et al., Urban Inst., *The Impact of Late-Career Health and Employment Shocks on Social Security and Other Wealth* 3-5 (Dec. 2007), http://www.urban.org/UploadedPDF/411591_impact_social_security.pdf.

benefits if they lack advance notice.⁹ Moreover, the reduction of benefits that the 1993 and 1997 Plans effected was an identifiable and quantifiable reduction, and so under *Kendall*'s more limited standard Bilello has standing to challenge the nondisclosure of that reduction.

2. Bilello Has Standing to Bring Counts 10 and 11 Because the Violations They Allege Invaded Bilello's Statutory Right to Disclosure.

Counts 10 and 11 concern the Plan Administrator's failure to provide Bilello with documents he requested explaining to him the amount of his benefits and how those benefits were calculated. Count 10 alleges that this failure violated ERISA sections 104(b) and 105(a), 29 U.S.C. §§ 1024(b) and 1025(a), and asks for statutory damages under ERISA section 502(c), 29 U.S.C. § 1132(c). Count 11 alleges that the failure violated the Plan Administrator's fiduciary duties under ERISA section 404(a), 29 U.S.C. § 1104(a).

Kendall recognized that in some ERISA cases, "plaintiffs need not show an individualized harm." 561 F.3d at 120. In cases alleging violations of statutory disclosure obligations, *Kendall* recognized that plaintiffs must only "show that they were generally harmed by the deprivation of a specific right to receive information." *Id.* at 121. Here, Counts 10 and 11 allege deprivations of Bilello's "right to 'receive particular information and to have [the plan administrator] act in a fiduciary capacity,'" and that is sufficient to satisfy Article III standing requirements. *Id.* at 120 (quoting *Horvath*, 333 F.3d at 456).

Count 10 alleges a violation of statutory "disclosure requirements" which create in Bilello the "right[] to receive particular information." *Horvath*, 333 F.3d at 456. The invasion of this right creates the injury in fact required by Article III. *See id.* Where, for example, a district court had dismissed a disclosure claim under ERISA section 104(b) because the nondisclosure

⁹ See Carole Fleck, *Retirement on Hold: How Long Will You Have to Keep Working?*, AARP Bull., July 7, 2008, available at http://bulletin.aarp.org/yourmoney/retirement/articles/retirement_on_hold.html.

hadn't harmed the plaintiffs, the Third Circuit reversed, holding that "ERISA does not require that harm be shown before a plan participant is entitled to an injunction" to remedy the violation. *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993). Significantly, in remanding the case to the district court, the Third Circuit stated that the district court could impose statutory damages under section 502(c). *Id.* Thus, although the issue was not squarely before the court, *Gillis* strongly suggests that a participant need not show harm to have standing to seek statutory damages. Indeed, that is how a district court in the Third Circuit has interpreted the decision. *See DiSabatino v. DiSabatino Bros., Inc.*, 894 F. Supp. 810, 816 (D. Del. 1995) (holding, based on *Gillis*, that "it is appropriate for a district court to award the statutory fines as a sanction for pure noncompliance with ERISA, and not only where the plaintiff has sustained actual harm").

Moreover, the rationale behind these decisions also dictates that no showing of harm be required here. "ERISA's goal of deterring fiduciary misdeeds" has prompted the Second Circuit not to require a showing of actual harm in certain circumstances. *Fin. Insts. Ret. Fund v. Office of Thrift Supervision*, 964 F.2d 142, 149 (2d Cir. 1992). Since the purpose of section 502(c)'s statutory penalty is to deter fiduciary misdeeds, a showing of actual harm—beyond the invasion of a crucial statutory right, of course—should not be required for Count 10. *See Blazjewski v. William E. Gibson Money Purchase Pension Plan & Trust*, No. 97-5466, 1999 WL 1044892, at *3 (N.D. Ill. Nov. 10, 1999) ("The purpose of section 502(c) is to induce compliance with requests for information. Given this purpose, a primary focus is on the administrator's conduct, not its impact on the participant." (citation omitted)); *Pagovich v. Moskowitz*, 865 F. Supp. 130, 138 (S.D.N.Y. 1994) ("Because the purpose of [section 502(c)] is to compel administrators to timely comply with their disclosure obligations, a primary focus on the impact to the participant rather than the administrator's conduct does nothing to further that goal.").

Count 11 alleges a fiduciary breach under section 404(a) based on the Plan Administrator's "repeated and ongoing refusal to provide Bilello with complete plan documents" governing the calculation of his accrued benefit or prior service balance. Compl. ¶ 146. Because the Second Circuit has held that "violations of ERISA section 404" constitute an injury in fact "within the meaning of Article III," Bilello has standing to assert Count 11. *Fin. Insts. Ret. Fund*, 964 F.2d at 149; *see also Kendall*, 561 F.3d at 120 (invasion of the right "to have [the plan administrator] act in a fiduciary capacity" is an injury in fact (quoting *Horvath*, 333 F.3d at 456)).

C. Claims That Bilello Lacks Standing to Assert Should Be Dismissed on Jurisdictional Grounds.

Bilello agrees with Defendants that under *Kendall* he lacks standing to assert Counts 2 through 5 and 9, and respectfully moves this Court to dismiss them on grounds of lack of jurisdiction. He also agrees that this Court cannot properly issue any order on the merits of a claim before deciding whether it has subject matter jurisdiction over them. *See* Defs.' *Kendall* Br. 9-11. In particular, a federal court cannot reach statute-of-limitations issues unless it has subject matter jurisdiction. *See* Pl.'s Reply to Defs.' Opp. to Mot. for Recons. 1 n.1. Thus, this Court should vacate its Order of April 10, 2009 with respect to Counts 2, 3, and 4, as well as its Order of April 24, 2009 with respect to Count 3.¹⁰

IV. CONCLUSION

For the reasons he has set out above, Bilello respectfully urges this Court to conclude that he has constitutional standing to assert Counts 1, 6, 7, 8, 10 and 11 of his Complaint.

¹⁰ Bilello, of course, respectfully requests that the Court vacate its April 10 Order with respect to Counts 1 and 6 as well. *See* Pl.'s Mem. in Supp. of Mot. for Recons. 9-12, 14.

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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