UNITED STATES DISTRICT COURT
FOR THE 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) **[PROPOSED]** SECOND AMENDED CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

I. PRELIMINARY STATEMENT

1. Plaintiff Frank J. Bilello, a participant in the pension plan formerly maintained by Chemical Banking Corporation ("Chemical Bank"), which was merged into the Defendant JPMorgan Chase Retirement Plan ("the Plan"), brings this action on his own behalf and on behalf of all similarly situated plaintiffs, Plan participants, their beneficiaries and estates, pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1]

2. Plaintiff, on his own behalf and on behalf of a class of participants and beneficiaries similarly situated, alleges the following violations (Counts 1, 6, 7, and 8) by the Defendant JPMC Plan, formerly known as the Cash Plan for Retirement of Chemical Bank (the "1989 Cash Plan"), and the Defendant Plan Administrator: (a) the 1997 Chase Plan and its

[1] This amendment relates back to both the first class action complaint in this action, filed August 17, 2007, as well as the first class action complaint filed on January 31, 2006 in *Wilson v. J.P. Morgan Chase Ret. Plan et al.*, No. 06-cv-732 (S.D.N.Y. Jan. 31, 2006), now pending as the related action *In re JPMorgan Chase Cash Balance Litig*., No. 06-cv-0732 (DLC), in which Bilello was a putative class member. Under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), which holds that the commencement of a class action tolls the applicable statute of limitations "as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," the pendency of the *In re JPMorgan Chase Cash Balance Litigation*, No. 06-cv-732 (S.D.N.Y.), tolled the statute of limitations for Count 6 from January 31, 2006 to July 20, 2006 when it was voluntarily withdrawn, and the statute of limitations for Counts 7 and 8 from January 31, 2006 to at least May 30, 2007, when the Court denied class certification in part. *See In re JPMorgan Chase Cash Balance Litig*., 242 F.R.D. 265 (S.D.N.Y. 2007) (granting in part and denying in part plaintiffs' motion for class certification, and certifying, *inter alia*, plaintiffs' "notice claims" from 2002 to the present).

successor-in-interest Plans from January 1, 1997 to the present—including the 2002 and 2005 JPMC Plans—are impermissibly backloaded in violation of ERISA's 133 ⅓% rule; (b) the 1989 Cash Plan causes wear-away, resulting in violations of ERISA's 133 ⅓% rule; (c) Defendants violated ERISA section 204(h) with respect to the 1989, 1993, and 1997 cash balance plan amendments by their failure to provide each participant in the plan "not less than 15 days before the effective date of the plan amendment" written notice setting forth the plan amendment and its effective date; and (d) Defendants violated ERISA's notice provisions with respect to the Plans' reductions in participants' rates of future benefit accrual and wear-away, including but not limited to their omissions and misleading statements that were not understandable by the average plan participant. In addition to these claims asserted against both Defendants, Plaintiff alleges in Count 12 that the Defendant Plan Administrator's actions and inactions in providing misleading and materially false statements about the 1989 Cash Plan and its successors in interest, and its concealment of the fact or type of benefit reductions under these Plans constitute fiduciary breaches under ERISA section 404(a). Accordingly, Plaintiff asks the Court to: (a) order Defendants to reform the Plan to cure all ERISA violations; (b) declare that the plan amendment(s) purportedly implementing the cash balance formula(e) never became effective; (c) order Defendants to retroactively recalculate the accrued benefits of Plaintiff and all participants as though the plan amendment(s) implementing or subsequently amending the cash balance formulas did not become effective; (d) pay participants, their beneficiaries and estates the greater of the benefits paid to them heretofore, and the benefits recalculated as though the challenged plan amendment(s) did not become effective; and (e) order that the Defendant Plan Administrator is personally liable for statutory penalties of up to $110 a day from the date of violation until the date of compliance for procedural violations related to ERISA's disclosure

requirements.

3. In addition, Plaintiff Bilello alleges the following violations of ERISA (Counts 10 and 11) by the Defendant Plan Administrator: (a) failure to provide Plaintiff Bilello with requested governing Plan documents and compliant calculation worksheets; and (b) violations of fiduciary obligations by the repeated and ongoing refusal to provide Plaintiff these requested Plan documents and calculation worksheets. Accordingly, Plaintiff asks the Court to: (a) order that the Defendant Plan Administrator is personally liable to Plaintiff for statutory penalties of up to $110 a day from July 28, 2007 until the date of compliance for procedural violations related to ERISA's disclosure requirements; and (b) award such further equitable, remedial, and procedural relief as is authorized and just.

II. JURISDICTION AND VENUE

4. Jurisdiction over this action is based on:

(a) ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1); and

(b) 28 U.S.C. § 1331(a), because this action arises under the laws of the United States, namely ERISA.

5. Declaratory, injunctive, and procedural relief are authorized by 28 U.S.C. §§ 2201 and 2202, respectively, by Rules 57 and 65 of the Federal Rules of Civil Procedure and by ERISA sections 502(a)(1)(B), 502(a)(3), and 502(c), 29 U.S.C. §§ 1132(a)(1)(B), (a)(3) and (c).

6. Venue in this District is proper pursuant to ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered and Defendants can be found in this District.

III. PARTIES

A. Plaintiff

7. Plaintiff Bilello is a "participant," within the meaning of ERISA section 3(7), 29

U.S.C. § 1002(7), of the plan formerly administered by Chemical Bank and now administered by the Defendant Plan Administrator. Mr. Bilello resides in Riverdale, New Jersey. He began working for Chemical Bank in 1960 and at the time of his retirement was employed by JP Morgan Chase & Co., the successor in interest to Chemical Bank. On April 1, 2008, Mr. Bilello received his benefit under the JPMorgan Chase Retirement Plan as a lump sum.

B. Defendants

8. Defendant JPMorgan Chase Retirement Plan (the "Plan") is an "employee pension benefit plan" within the meaning of ERISA section 3(2)(A), 29 U.S.C. § 1002(2)(A), and more precisely, a "defined benefit plan" within the meaning of ERISA section 3(35), 29 U.S.C. § 1002(35). The Plan is administered in this District. The Plan covers employees and former employees of JPMorgan Chase & Co. ("JPMC"), which is the successor in interest to numerous other companies, including, without limitation, Chemical Bank, The Chase Manhattan Bank ("Chase"), Manufacturers Hanover Trust ("MHT"), Bank One, and J.P. Morgan & Co., Inc. ("J.P. Morgan") (collectively, the "JPMC Predecessor Companies"), whose former employees participate in the Plan or whose prior retirement plans have been merged into the Plan.

9. JPMC's Director of Human Resources (or the person, persons or entity appointed by the Board of Directors of JPMC or JPMorgan Chase Bank, N.A. to serve in this role) is the Plan Administrator within the meaning of ERISA section 3(16)(A)(i), 29 U.S.C. § 1002(16)(A)(i), a Plan fiduciary within the meaning of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(a), and is a named defendant herein. The Plan Administrator administers the Plan and the plans of the JPMC Predecessor Companies, including Chemical Bank's 1989 Cash Plan. The Plan Administrator's offices are also located in this District.

IV. FACTUAL BACKGROUND

A. Cash Balance Plans

10. A cash balance plan is a defined benefit plan that relies on a hypothetical account to keep track of each participant's accrued benefit.

11. Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age.

12. A hypothetical cash balance account tracks credited amounts, or "inputs," to a participant's hypothetical account by utilizing a formula that is dependent on, among other things, a participant's age, salary, and years of service.

13. An employee's hypothetical cash balance account is "credited" on a periodic basis with a percentage of compensation, typically referred to as a "salary" or "pay" credit. Hypothetical cash balance accounts are also credited with an additional amount, sometimes referred to as an "interest" credit, which can be derived in numerous different ways, but are most commonly derived by reference to a fixed or variable outside index.

14. While an employer's hypothetical allocation of pay credits pursuant to a cash balance plan terminates when the participant discontinues employment, the "interest credits" continue to be allocated to the participant's cash balance account until benefits are distributed.

15. Although a cash balance formula provides for a hypothetical account for each participant, the Plan is not a "defined contribution plan" as that term is defined by ERISA section 3(34), 29 U.S.C. § 1002(34). Instead, it is a "defined benefit plan," which is defined at ERISA section 3(35), 29 U.S.C. § 1002(35), as "a pension plan other than an individual account plan."

16. Because a cash balance plan is a defined benefit plan, a participant does not receive the credit balance in his or her hypothetical account. Instead, the inputs (notional

contributions) made to the account must first be converted into an age-65 annuity, and then discounted back to present value.

17. Because a cash balance plan is a *career*-average pay plan, the only one of ERISA's three minimum accrual standards it can comply with is ERISA section 204(b)(1)(B) (or section 411(b)(1)(B) of the Code), which is known as "the 133 ⅓% rule." (The other two accrual standards compare yearly accrual rates to a maximum ten-year period—thus making it impossible for a plan to be compliant if it gauges participants' benefit by reference to average pay over an entire career.) Under the 133 ⅓% rule, no later annual rate of accrual can be more than one third greater than any earlier annual rate.

B. The Chemical Bank Plan Converted to a Cash Balance Plan Effective January 1, 1989

18. The Chemical Bank Plan converted to the 1989 Cash Plan under an amendment that became retroactively effective as of January 1, 1989. Ex. 4 at 1652. The 1989 Cash Plan retroactively applied and calculated all participants' benefits pursuant to a cash balance formula beginning January 1, 1989.

19. On information and belief, the Defendant Plan Administrator adopted the 1989 Cash Plan amendment in about July 1990.

20. Prior to the implementation of the 1989 Cash Plan, the Plan operated as a traditional defined benefit pension plan and provided for the calculation of retirement benefits pursuant to a final average pay formula, under which participants accrued benefits based upon a specified percentage of their final average compensation (the "Prior Plan").

21. Plaintiff Bilello was a participant in the Prior Plan.

22. Although the 1989 Cash Plan's Effective Date was January 1, 1989, participants

did not receive any information regarding its implementation until July 1990 at the earliest. Exs. 1-2. Thus, for a period of 18 months, participants were subject to the cash balance formula under the 1989 Cash Plan without being given any warning or notice in compliance with ERISA section 204(h) that their benefit structure had changed.

23. Pursuant to the 1989 Cash Plan, the accrued benefits of employees who were participants in the Prior Plan were converted into a "prior service balance," which was also the opening balance of each participant's hypothetical cash balance account. The prior service balance was calculated based on the present lump-sum value of the benefit each participant had accrued prior to January 1, 1989 under the Prior Plan's formula. However, there was no disclosure to Plan participants regarding the interest rate used to calculate the value of their prior accrued benefit, preventing participants' ability to verify the Plan's calculations.

C. The 1989 Cash Plan's Formula Provided for Pay Credits and Interest Credits

24. Beginning on January 1, 1989, the 1989 Cash Plan caused benefits to accrue for eligible Plan participants pursuant to a cash balance formula.

25. For the period beginning January 1, 1989, the 1989 Cash Plan applied a pay credit percentage that was allocated quarterly and which ranged from 5% of a participant's pay for 1 to 10 years of service, to 7% for 21 or more years of service

26. The formula under the 1989 Cash Plan also applied an additional notional amount to participants' hypothetical accounts, characterized as an "interest credit," which was tied to an outside index. These interest credits were calculated with reference to a participant's number of years remaining until normal retirement age of 65, and thus, necessarily took age into account as part of its formula when calculating the value of this credited amount.

27. The pay credits under the 1989 Cash Plan increased from 5% to 7% based on

years of service. For certain individuals, these pay credit increases might have provided temporary bumps in a participant's rate of future benefit accrual, but did not resolve the underlying plan formula or structure, which reduces rates of benefit accrual as participants age.

28. The 1989 Cash Plan provided and still provides that participants do not receive the lump sum amount of their notional accounts as their retirement benefit. Rather, the 1989 Cash Plan dictates that the credit balance in the notional account is converted into an accrued benefit before distribution. 1989 Cash Plan, Ex. 4 at ¶ 4.5 ("The Accrued Benefit of a Participant, as of any determination date, is an increasing monthly annuity for the life of the Participant . . . , commencing immediately, which is the Actuarial Equivalent of the Participant's credit Balance as of the determination date."). An accrued benefit is defined by the Plan as: "as of any determination date, an increasing monthly annuity determined in accordance with § 4.5, which benefit is the Actuarial Equivalent of such individual's Credit Balance." *Id.*, Definitions at ¶ 1.2.

29. The 1989 Cash Plan defines "Actuarial Equivalent" as "another annuity or benefit commencing at a different date and/or payable in a different form than the specified annuity or benefit, but which has the same present value as the specified annuity or benefit (. . . determined on the basis of the interest rate, mortality table and other factors. . . .)." 1989 Cash Plan, Ex. 4, Definitions at ¶ 1.4.

30. As a result of the required conversion to an age-65 annuity, under both ERISA and the 1989 Cash Plan, and because the 1989 Cash Plan allocates interest credits to the account through normal retirement age, the 1989 Cash Plan reduces rates of benefit accrual as participants age. In addition, the 1989 Cash Plan also reduces rates of benefit accrual for participants compared to the final average pay formula of the Prior Plan.

D. The JPMorgan Chase Plan Is the Successor in Interest to the Chemical Bank Plan

31. On or about December 31, 1991, Chemical Bank merged with MHT, but retained the Chemical corporate name. Effective January 1, 1993, the 1989 Cash Plan was merged into the Retirement Plan of Manufacturers Hanover Trust and Certain Affiliated Companies. The resulting plan was known as the "The Retirement Plan of Chemical Bank and Certain Affiliated Companies, Effective January 1, 1993" (the "1993 Chemical Plan").

32. The 1993 Chemical Plan was subsequently amended. *See* "Retirement Plan of Chemical Bank and Certain Affiliated Companies, Effective January 1, 1993 (Amended and restated through August 1, 1994)" (the "1994 Amended Chemical Plan"), attached hereto as Exhibit 5.

33. A subsequent amended version of the 1993 Chemical Plan, the "Retirement Plan of Chemical Bank and Certain Affiliated Companies, Effective January 1, 1993 (As Amended through December 31, 1996)" (the "1996 Amended Chemical Plan"), is attached hereto as Exhibit 6.

34. In 1996, Chemical Bank merged with the Chase Manhattan Bank ("Chase"), with the surviving entity assuming the Chase name. As of January 1, 1997, the 1996 Amended Chemical Plan was amended and restated and merged into the Retirement Plan of the Chase Manhattan Bank and Certain Affiliated Companies (the "1997 Chase Plan," Ex. 7), and the pension plan maintained by Chase for its employees was merged into it. The 1997 Chase Plan continued to operate under a cash balance formula and was further amended for benefits accrued after December 31, 1996. The 1997 Chase Plan assumed the 1996 Amended Chemical Plan's accrued liabilities and assets as of December 31, 1996.

35. A subsequent amended version of the 1997 Chase Plan, the "Retirement Plan of

The Chase Manhattan Bank and Certain Affiliated Companies, Effective January 1, 1997, as amended" (the "Amended 1997 Chase Plan"), is attached hereto as Exhibit 8.

36. On December 31, 2000, J.P. Morgan & Co., Inc. was merged into Chase by way of a stock-for-stock transaction. Following the merger, Chase changed its name to JPMorgan Chase & Co. Effective January 1, 2002, the prior cash balance pension plan formerly maintained by J.P. Morgan (the "Morgan Plan") was merged into the Amended 1997 Chase Plan. To effectuate the merger of the plans, at the close of business on December 31, 2001, the net assets of the Morgan Plan were transferred to the Amended 1997 Chase Plan, which was amended and renamed "The JPMorgan Chase Retirement Plan" (and will be referred to here as the "2002 JPMC Plan").

37. On July 1, 2004, JPMorgan Chase & Co. merged with Bank One, but retained its corporate name. Subsequent to its merger with Bank One, JPMorgan Chase & Co. merged the cash balance plan previously maintained by Bank One into the Plan, effective December 31, 2004, and made certain other Plan revisions. The Plan was amended effective January 1, 2005.

38. Thus, through the aforementioned mergers, the pension plan originally maintained by Chemical Bank is now called the JPMorgan Chase & Co. Plan (hereinafter the "Plan," "JPMC Plan," or "2005 JPMC Plan"). The Plan is administered by the Defendant Plan Administrator.

39. The Plan, as presently in effect, is a cash balance formula plan that applies pay and interest credits, and which covers all eligible employees and former employees of JPMC, inclusive of its predecessor companies.

E. The 1997 Chase Plan and Its Successors in Interest Were Impermissibly Backloaded

40. Under the 1997 Chase Plan,[2] participants received pay credits ranging from a minimum of 4% to a maximum of 14%, in accordance with 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%

41. This schedule provides for increasing pay credits to be applied to participants' hypothetical account balances. The increase in pay credits is great enough that, if interest credits are not *also* applied to the account balances in the earlier years of service, the 1997 Chase Plan would not comply with the 133 ⅓% rule. For example, the 8% pay credit that a participant would receive in the eleventh year of service would be 200% of the 4% pay credit in the third year of service—a ratio, of course, that exceeds 133 ⅓%.

42. Despite this pay credit backloading, the application of a sufficient minimum interest-crediting rate would increase credits in earlier years, thus counteracting the impact of pay credits that increase by more than 133 ⅓% in later years. For any participant subject to the pay credit schedule set out in paragraph 40, the 1997 Chase Plan would have to provide a minimum interest-crediting rate of 5.21% in order to comply with the 133 ⅓% rule. Exhibit 11

[2] For the purposes of the backloading discussed in this section and alleged in Count 1, the "1997 Chase Plan" includes the Amended 1997 Chase Plan.

sets out the calculations—applying a methodology that follows *Esden v. Bank of Boston*, 229 F.3d 154, 167 n.18 (2d Cir. 2000)—demonstrating that such a minimum interest-crediting rate would have to be required in order to comply with the 133 ⅓% rule.

43. After the Amended 1997 Chase Plan was further amended effective December 31, 2001 to create the 2002 JPMC Plan, Plaintiff Bilello and all similarly situated Plan participants remained grandfathered under the pay credit scale offered under the 1997 Plan.

44. However, the interest credit rates that applied to Plaintiff Bilello under the 2002 JPMC Plan did not provide for a minimum interest-crediting rate. In fact, the applicable interest-crediting rate applied to Plaintiff Bilello was less than 5.21% in 2003, 2004, 2005, and 2008.

45. This failure to provide a minimum interest-crediting rate, and the actual provision of a rate lower than 5.21% in 2003, 2004, 2005, and 2008 created a backloaded Plan.

46. In an attempt to partially mitigate this backloading violation, the 2005 JPMC Plan adopted a minimum interest-crediting rate of 4.5%. However, this minimum interest rate was not sufficient to cure backloading for those participants grandfathered under the 4%-to-14% pay credit schedule, and did not cure the Plan's illegal backloading.

F. The 1989 Cash Plan Conversion Created "Wear-Away"

47. Although its meaning and import were neither explained to nor understood by Plaintiff Bilello prior to December 2006, the 1989 Cash Plan provides a minimum benefit equal to the greater of: (1) a participant's accrued benefit determined as of December 31, 1990 under the terms of the Prior Plan, which was a traditional final average plan (the "protected benefit" or "minimum benefit"); or (2) the benefit accrued after December 31, 1988 under the terms of the cash balance formula (the "cash balance benefit").

48. The cash balance benefit is the sum of two amounts: first, an "opening balance"—

which the 1989 Cash Plan called a "prior service balance"—equal to the present value of the benefit accrued before January 1, 1989 under the traditional benefit formula; and second, post-1988 accruals under the cash balance formula.

49. Plaintiff is unable to calculate either his opening account balance or the value of his protected benefit because Defendants have refused to provide a copy of the Prior Plan, despite Plaintiff Bilello's specific repeated requests. Upon information and belief, however, the value of his protected benefit was larger than his opening account balance.

50. Plaintiff Bilello's protected benefit was larger than his opening balance for four reasons commonly experienced by all Plan participants but never explained by Defendants.

51. The first reason is that his "prior service balance" or "opening balance" was calculated as of December 31, 1988—the last day that the Prior Plan was effective—while the protected benefit was calculated using the pre-1989 formula, but was calculated as of December 31, 1990. Thus, the amount of the protected benefit was based on two more years of accrual than the opening balance.

52. The second and third reasons are that on December 31, 1990, an employee's final average compensation was generally higher than it had been on December 31, 1988, and also that the employee would be two years closer to the normal retirement age of 65, thereby reducing the discounting period by two years. These two factors also led to a larger value for the protected benefit. Even if everything else remained constant, reducing the discounting period by two years would increase the value of the protected benefit by approximately 11% compared to the opening account balance.

53. The fourth and final reason is the different ways in which the opening account balance and the protected benefit were computed. Recall that under a defined benefit plan, an

accrued benefit is expressed as an annuity beginning at age 65. To compute the opening account balance, the benefit accrued as of December 31, 1988, expressed as an age-65 annuity, was discounted back to its present lump-sum value. The discount rates used to compute the opening account balance on January 1, 1989 were relatively high and generally decreased after 1989. To compute the value of the protected benefit, on the other hand, a lower discount rate was used, resulting in a larger lump sum value for that benefit.

54. The combination of all these factors caused the value of the protected benefit to be greater than the participant's opening account balance—so much greater, in fact, that Plaintiff Bilello's cash balance account was less than the value of his protected benefit until at least 1996.

55. As a result, Plaintiff Bilello's notional accruals under the 1989 Cash Plan were illusory until they eventually caught up to—and eventually surpassed—his protected benefit under the Prior Plan. This period of illusory accruals, or "wear-away," endured for Plaintiff Bilello from December 31, 1990 through at least December 31, 1996. However, Defendants never informed Bilello or other participants in a manner calculated to be understood by the average plan participant that wear-away was a feature of the 1989 Cash Plan. Defendants also failed to communicate that participants could have an opening account balance that was significantly lower than their protected benefit, or the role and impact that variable discount rates played in calculating these amounts.

G. Defendants' Communications with Participants Failed to Inform Them About Benefit Reductions and Were Misleading

Reduction in Benefit Accrual as Participants Age

56. A summary plan description issued by Defendants entitled "Directions" dated February 1994 ("1994 SPD") purports to describe the 1993 Chemical Plan. Ex. 9. However, the

1994 SPD is not written in a manner calculated to be understood by the average plan participant and has the effect of misleading and misinforming average plan participants because it does not provide side-by-side examples of differently aged participants who are otherwise similarly situated, thereby masking the fact that older Plan participants will experience a greater benefit reduction than will similarly situated younger Plan participants. By masking this fact, Defendants misled average Plan participants by not allowing them a chance to comprehend that older Plan participants would be more significantly impacted by the change in benefit formula than would similarly situated younger Plan participants. The 1994 SPD also does not disclose that wear-away is a feature of the 1993 Chemical Plan. *See infra* ¶ 66.

57. By presenting the information in the 1994 SPD in this manner, and by their omissions, Defendants prejudiced or likely prejudiced Plaintiff Bilello and similarly situated Plan participants.

58. A 1999 summary plan description entitled, "ChaseChoice: Your Guide to Benefits at Chase" ("1999 SPD") purports to describe the 1997 Chase Plan. Ex. 10. However, the 1999 SPD is not written in a manner calculated to be understood by the average plan participant and has the effect of misleading and misinforming average plan participants because it does not disclose that the 1997 Chase Plan's cash balance formula reduces participants' rates of future benefit accrual as they age and as compared to the Prior Plan. In particular, the 1999 SPD provides only a single example of a participant's purported benefit accrual over time, *id*. at 802, which is misleading and deceptive to the average plan participant because only a single example is provided, and no example is given for older participants nearing retirement age, for whom the reduction in rate of benefit accrual arising from the 1997 Chase Plan is the most severe. As a result, the 1999 SPD masks the fact that older Plan participants will experience a greater benefit

reduction than will similarly situated Plan participants. By masking this fact, Defendants misled average Plan participants by not allowing them a chance to comprehend that older Plan participants would be more significantly impacted by the change in benefit formula than would similarly situated younger Plan participants. The 1999 SPD does not communicate to average plan participants the impact of the cash balance formula on their rate of benefit accrual, and does not provide examples which bound the ranges of the impact.

59. By presenting the information in the 1999 SPD in this manner, and by their omissions, Defendants prejudiced or likely prejudiced Plaintiff Bilello and similarly situated Plan participants.

Wear-Away

60. The first communications participants received about the 1989 Cash Plan conversion were letters sent to them in July 1990. *See* Exs. 1-2. The first letter told participants that the plan sponsor had "decided to go beyond the bare minimum mandated by law," and had taken the "opportunity to improve and simplify our existing pension plan." Ex. 1. It 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." *Id.* The pension would be "similar" to the one that the pre-1989 Plan offered, but was "easier to understand" and "easier to administer." *Id.* The second letter told participants that the Cash Plan would "continue[] to provide similar benefits at retirement," and described it as "clear-cut and easy to understand." Ex. 2. Both letters failed to inform participants that the Cash Plan reduced their rate of future benefit accrual by creating periods of "wear-away" during which their benefits would not accrue.

61. These two letters also did not disclose the fact that the Cash Plan reduced rates of

benefit accrual as participants aged.

62. Defendants' next communication was in September 1990, in the form of a Summary of Material Modification (SMM). Ex. 3. This notice told participants that their Cash Plan account would "begin with a prior service balance," and then stated that "[b]y 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.* at JPMC00001734. By referring to "preservation" of the account balance, the September 1990 SMM misled the average plan participant into believing that the 1989 Cash Plan's opening account balance was at least equal to the protected benefits accrued under the Prior Plan. Moreover, by saying that the 1989 Cash Plan would "combine" benefits under the two plans, the SMM implied that accrual under the 1989 Cash Plan formula would be built upon, or "combine[d] with," the protected benefit under the Prior Plan. This implication was untrue and misleading to the average plan participant.

63. The September 1990 SMM also gave participants an example of how the cash balance conversion would affect an individual participant. It asked readers to assume that "the value of [their] benefit under the [pre-1989 Plan] at the end of 1988 was $3,800." Ex. 3 at JPMC00001734. It then stated that "as a result" of the cash balance conversion, "effective January 1, 1989, $3,800 is credited to your Cash Plan account as your prior service balance." *Id.* at JPMC00001734-35. This example misled the average plan participant into believing that there would be no wear-away because the opening account balance and the protected benefit would be the same amount.

64. In addition to these misleading statements, the September 1990 SMM never told participants that the opening account balance and the protected benefit would be different. Nor did it inform them that the Cash Plan reduced rates of benefit accrual as participants aged. Thus,

from reading the SMM, the average plan participant would not have been aware of either fact.

65. Moreover, throughout the period during which Mr. Bilello experienced wear-away, *see infra* ¶¶ 81-87, he received statements of account activity indicating that his account balance was growing. *See* Ex. 12. These statements made it appear as if his benefit were increasing during this period, and they failed to inform Mr. Bilello that the balance in his hypothetical account was less than his protected benefit.

66. All other communications distributed by Defendants or their predecessors in interest failed to disclose the difference between the protected benefit and the opening account balance. Thus participants were not clearly informed of the wear-away problem in a way that was calculated to be understood by the average plan participant. Bilello did not understand or suspect that he had experienced wear-away until December 2006 at the earliest, as he neared retirement age and consulted with ERISA experts.

Backloading

67. None of the communications distributed to participants in 1990 disclosed the absence of a minimum interest-crediting rate in a way that could be understood by the average plan participant.

68. Moreover, an SPD given to participants in 1994 was misleading. By referring to a "minimum annual rate for interest credits" that was "based on the average rate for the one-year U.S. Treasury bills," the SPD led average plan participants to believe that there was a minimum interest-crediting rate. Ex. 9 at CBPJPMC00014581.

69. All other communications Defendants gave to participants were silent about the existence of a minimum interest-crediting rate.

70. Bilello did not understand or suspect that the Plans violated ERISA's anti-

backloading rules (*i.e.*, the 133 ⅓% rule) until December 2006 at the earliest, as he neared retirement age and consulted with ERISA experts.

General Reduction in Future Rate of Benefit Accrual

71. By failing to disclose the fact that the Cash Plan reduced benefit accrual as participants aged, and by failing to disclose wear-away created by the 1989 amendment, Defendants never clearly informed participants, in a way calculated to be understood by the average plan participant, that the post-1989 Plans reduced their rate of future benefit accrual. Moreover, as set forth above, *see supra* ¶ 60, Defendants misled participants into believing that the Cash Plan actually maintained their rates of benefit accrual compared to the Prior Plan.

V. CLASS ACTION ALLEGATIONS

72. Plaintiff brings Counts 1, 6, 7, 8, and 12 on his own behalf and, pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure, on behalf of a class of all others similarly situated, defined as all Plan participants who accrued benefits pursuant to the Cash Plan for Retirement of Chemical Bank and Certain Affiliates, Amended and Restated as of January 1, 1989, and all subsequent amendments are restatements thereto, whether active, inactive or retired, their beneficiaries and estates, whose accrued benefits or pension benefits are or were based in whole or in part on these Plans' cash balance formulas from January 1, 1989 to the present for Counts 1, 6, and 12, and January 1, 1989 to December 31, 2001 for Counts 7 and 8.[3] The requirements for maintaining this action as a class action under Rule 23(b)(1) and (b)(2), Federal Rules of Civil Procedure, are satisfied in that:

[3] Plaintiff reserves the right to amend the definition of the proposed class.

a. The class is large in number; the exact number and identities of all class members are currently unknown to Plaintiff, but are known to Defendants. The number of class members is believed to be in the tens of thousands;

b. The members of the class are so numerous that joinder of all members is impracticable;

c. There are questions of law common to all members of the class, such as: (i) whether the 1997 Cash Plan and its successors-in-interest—including the 2002 and 2005 JPMC Plans—are impermissibly backloaded in violation of the 133 ⅓% rule, ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B); 26 U.S.C. § 411(b)(1)); (ii) whether the 1989 Cash Plan causes wear-away and violates the 133 ⅓% rule, ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B); 26 U.S.C. § 411(b)(1); (iii) whether Defendants violated ERISA section 204(h) with respect to the 1989, 1993, and 1997 cash balance plan amendments by their failure to provide each participant in the plan "not less than 15 days before the effective date of the plan amendment" written notice setting forth the plan amendment and its effective date; (iv) whether Defendants violated ERISA's notice provisions with respect to the Plans' reductions in participants' rates of future benefit accrual and wear away, including but not limited to their omissions and misleading statements; and (v) whether the Defendant Plan Administrator's actions and inactions in providing misleading and materially false statements about the 1989 Cash Plan and its successors in interest, and its concealment of the fact or type of benefit

reductions under these Plans, constitute fiduciary breaches under ERISA section 404(a).

d. Plaintiff is a member of the class as defined above; his claims are typical of the claims of the members of the class and he will fairly and adequately protect the interests of the class. Plaintiff's interests are coincidental with, and not antagonistic to those of the remainder of the class, and Plaintiff is represented by experienced ERISA class action counsel;

e. The prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendants and a risk of adjudications which as a practical matter would be dispositive of the interests of other members of the class who were not parties; and

f. Defendants have acted and/or refused to act and are likely to act and/or refuse to act on grounds generally applicable to the class, thereby making appropriate final injunctive and other relief with respect to the class as a whole.

VI. CLAIMS FOR RELIEF[4]

COUNT ONE

Backloading

73. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

[4] Because the parties—and presumably the Court—are familiar with the First Amended Complaint's numbering of counts, Plaintiff Bilello will retain the earlier Complaint's numbering to avoid any possible confusion. Mr. Bilello has eliminated Counts 2 through 5, as well as Count 9, of the First Amended Complaint.

74. The 133 ⅓% rule, ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), provides that no later annual rate of accrual can be more than one third greater than any earlier rate for "any individual who is or could be a participant" in the plan. The rate of benefit accrual in any given year may not exceed 133 ⅓% of any previous year's rate.

75. Because the 1997 Chase Plan and its successors in interest had interest-crediting rates that were too low to offset the increase in pay credits that came with increasing years of service, the Plans violated the 133 ⅓% rule and thus violated ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B).

76. Plaintiff Bilello's benefit accrual, for example, violated the 133 ⅓% rule. Under the 2002 JPMC Plan, Mr. Bilello was among the participants grandfathered under the 4%-to-14% pay credit schedule, and thus remained subject to the pay credit scale set forth in paragraph 40 above. Exhibit 13 shows the progression of Plaintiff Bilello's cash balance account from December 2002 through his benefit withdrawal on April 1, 2008; the data in Exhibit 13 were generated from the Plan formula, as set forth in the Plan documents, as well as the data provided on the worksheet (attached as Exhibit 14) with which Defendants furnished Mr. Bilello in September 2007. Exhibit 13 demonstrates that an interest crediting rate of less than 5.21% was applied to Mr. Bilello's account in at least the years 2003, 2004, 2005, and 2008, causing a violation of the 133 ⅓% rule.

77. Exhibit 15 shows what Mr. Bilello's cash balance account would have been if Defendants had complied with the 133 ⅓% rule by ensuring that the interest-crediting rate did not drop below 5.21%. The additional benefit that Mr. Bilello would have received under a compliant plan is reflected in the right-hand column of Exhibit 15, entitled "Additional Account Credit."

78. While the annual interest-crediting rates for at least some of the years after 2005 were higher than 5.21%, the *impact* of the lower interest-crediting rates in earlier years persisted past 2005. If the Plan had complied with ERISA by providing a minimum interest-crediting rate of 5.21%, Mr. Bilello's cash balance as of 2005 would have been higher, and thus his balance in later years (especially with the application of compound interest) would have been correspondingly higher.

79. In the lower right-hand corner of Exhibit 15, printed in bold, is the minimum additional benefit Mr. Bilello would have received under a compliant plan: $2,996.35. Mr. Bilello reserves the right to alter this amount as discovery progresses.

80. The allegations in this Count One relate to the 2002 and 2005 JPMC Plans as well as to the 1997 Chase Plan.

COUNT TWO

[Withdrawn]

COUNT THREE

[Withdrawn]

COUNT FOUR

[Withdrawn]

COUNT FIVE

[Withdrawn]

COUNT SIX

Plan Transition Offset Creates Impermissible Backloading ("Wear-Away")

81. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

82. Because the "opening balance" of the 1989 Cash Plan was less than the "protected benefit" under that Plan, the 1989 Cash Plan created a period of "wear-away" in which benefits did not accrue for participants.

83. Mr. Bilello's benefit under the pre-1989 plan as of December 31, 1990—*i.e.*, his protected benefit—was $246,591.71 expressed as a lump sum, or a monthly life annuity of $1,765.89. *See* Ex. 14 at JPMFJB00758.

84. A full six years later, Mr. Bilello's account balance under the 1989 Cash Plan was only $218,798.68 expressed as a lump sum, or a monthly annuity of $1,566.86. *Id*.

85. Thus, although Mr. Bilello worked full-time between December 31, 1990 and December 31, 1996, he did not accrue any additional retirement benefits during this period. This is the phenomenon called "wear-away." From the limited data that Defendants have made available, it is not clear when the wear-away period ended—at the very least, though, it continued through December 31, 1996, and it likely continued for some time thereafter.

86. Mr. Bilello and other participants in the 1989 Cash Plan, then, experienced a period of no benefit accrual followed by a period of regular benefit accruals. Such wear-away results in a violation of the 133 ⅓% rule in the year that benefit accruals resume, since *any* increase in benefit accrual from a rate of 0% will necessarily be more than 133 ⅓% of the rate during wear-away.

87. As a consequence of the foregoing, the 1989 Cash Plan violates ERISA section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), and 26 U.S.C. § 411(b)(1).

COUNT SEVEN

Violation of ERISA Section 204(h) Regarding Notice of Significant Reduction in Future Rate of Benefit Accrual

88. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

89. Plaintiff alleges this claim on his own behalf and on behalf of a class of plaintiffs similarly situated.

90. As enacted in 1986, ERISA section 204(h), 29 U.S.C. § 1054(h), entitled, "**Notice of Significant Reduction in Benefit Accruals**," provided in pertinent part:

> [A defined benefit plan] may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to (1) each participant in the plan, (2) each beneficiary who is an alternate payee . . . , and (3) each employee organization representing participants in the plan. . . .

Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, § 11006, 100 Stat. 82, 243 (1986).

91. Defendants' Plan amendments purportedly adopting a cash balance plan formula as of January 1, 1989, January 1, 1993, and January 1, 1997 provided for a significant reduction in the rate of future benefit accrual, thereby triggering the notice requirements of ERISA section 204(h).

92. The 1989, 1993, and 1997 Plan amendments reduced participants' rates of benefit accrual both as they aged, and as a matter of comparison with the formulas under participants' prior Plans.

93. At no point in time did Defendants provide a written notice "setting forth" the 1989, 1993, or 1997 cash balance plan amendment to each participant in the plan.

94. At no point in time did Defendants issue any other notice, SPD, or other Plan communication that satisfies the requirements of ERISA section 204(h) with respect to the 1989,

1993, or 1997 cash balance plan amendments.

95. As indicated by the language in section 204(h)—"may not be amended"—a purported Plan amendment does not become effective unless a plan administrator complies with section 204(h).

96. The 1989 Cash Plan amendments effective January 1, 1989 provided for "a significant reduction in the rate of future benefit accrual" by at least the following ways: (i) converting the Plan from a final average pay plan to a cash balance plan; (ii) reducing participants' rates of future benefit accrual by this conversion and plan amendment; (iii) reducing rates of benefit accrual as Plan participants aged; and (iv) allowing for an extended period of "wear-away" during which there was no benefit accrual.

97. Because Defendants did not adopt the 1989 Cash Plan amendment until some point in 1990, Defendants did not satisfy ERISA's advance notice requirements. Plaintiff and the members of the proposed class received no advance notice of the 1989 Cash Plan amendment, or its impact on their future rate of benefit accrual, before its January 1, 1989 effective date.

98. The earliest communications that were made to participants to inform them of the 1989 Cash Plan were not issued until July 1990, at the earliest, and thus failed to comply with the advance timing requirements of ERISA section 204(h). *See* Exs. 1-3. In addition, these communications were misleadingly optimistic and congratulatory, and did not warn Plan participants of the import of the Plan amendment or its effect on their rates of future benefit accrual. *See id*. Ex. 1 ("I am pleased to announce some very positive changes to our pension plan . . . ."); Ex. 2 (describing the 1989 Cash Plan as having "special advantages"); Ex. 3 at 1741 ("This brochure is designed to highlight Cash Plan . . . and the advantages it offers."). *See also*

supra ¶¶ 60-64 (describing Exhibits 1-3).

99. The amendments creating the 1993 Chemical Plan, which were purportedly effective as of January 1, 1993 (*see* 1993 Chemical Plan as adopted and subsequently further amended, attached as Exs. 5 & 6), provided for "a significant reduction in the rate of future benefit accrual" by at least the following ways: (i) further reducing the Plan's pay credit and interest-crediting rates; (ii) reducing rates of benefit accrual as Plan participants aged; and (iii) allowing for and continuing an extended period of "wear-away" during which there was no benefit accrual.

100. Defendants also did not satisfy ERISA section 204(h) with respect to the Plan amendment effective January 1, 1997 for the 1997 Chase Plan, which amendment provided for a significant reduction in participants' rates of future benefit accrual. The amendments creating the 1997 Chase Plan, which were purportedly effective as of January 1, 1997 (*see* 1997 Chase Plan as adopted and subsequently further amended, attached as Exhibits 7 and 8), provided for "a significant reduction in the rate of future benefit accrual" by at least the following ways: (i) further reducing the Plan's pay credit and interest-crediting rates; (ii) reducing rates of benefit accrual as Plan participants aged; and (iii) allowing for and continuing an extended period of "wear-away" during which there was no benefit accrual.

101. Defendants did not comply with the timing, content and method-of-distribution requirements of ERISA section 204(h), 29 U.S.C. § 1054(h), or its applicable regulations, with respect to the 1989, 1993, or 1997 cash balance plan amendments.

102. Defendants' acts and omissions prejudiced or likely prejudiced Plaintiff and the Class because the inadequate notice and failure to comply with ERISA section 204(h) concealed the impacts of the amended benefit formulae, depriving Bilello and Plan participants of a full

understanding of the impact of these plan amendments. Defendants' misleading statements, omissions, and ERISA violations therefore prevented or likely prevented Bilello and Plan participants from taking any necessary measures to supplement their retirement savings accordingly.

103. As a consequence of these violations of ERISA section 204(h) and all applicable regulations, the Plan amendments that purported to adopt cash balance formulae or otherwise effect a significant reduction in the rate of participants' future benefit accrual as of January 1, 1989, January 1, 1993, and January 1, 1997, never became effective and, thus, are unenforceable.

104. Accordingly, Plaintiff Bilello, Plan participants, and all members of the proposed Class are entitled to appropriate equitable relief under ERISA section 502(a)(3) and additional benefits under ERISA section 502(a)(1)(B) after the Plans are amended to comply with ERISA.

COUNT EIGHT

Failure to Provide Adequate Summary Plan Descriptions

105. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

106. ERISA section 102(a), 29 U.S.C. § 1022(a), requires the Plan administrator to provide all participants and beneficiaries with a summary plan description ("SPD").

107. ERISA requires the SPD to include the specific information described in ERISA section 102(b), that it be "written in a manner calculated to be understood by the average plan participant," and that it be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."

108. ERISA section 104(b)(1) imposes timing requirements for issuance of the SPD. In general, a plan administrator must furnish an SPD to each participant within 90 days of becoming a participant. A plan administrator must furnish subsequent SPDs integrating all

intervening plan amendments to each participant every fifth year.

109. Neither the 1994 nor the 1999 SPD is written in a manner calculated to be understood by the average plan participant or is sufficiently accurate and comprehensive to reasonably apprise plan participants and beneficiaries of their rights and obligations under the plans, and both SPDs have the effect of misleading and misinforming average plan participants.

110. Although Bilello was not previously aware of the "1992 SPD" that Defendants concealed from him until February 25, 2008, and without waiver as to all arguments regarding this concealment, Bilello further alleges that the 1992 SPD also fails to satisfy ERISA standards. For example, the 1992 SPD does not explain how participants' opening account balances were calculated under the 1989 Cash Plan. The 1992 SPD also does not explain in a manner calculated to be understood by the average plan participant how variable discount rates impact opening account balances under the 1989 Cash Plan, how they cause wear-away under the 1989 Cash Plan, or how the 1989 Cash Plan's formula reduces rates of future benefit accrual either based on age or as compared to the Prior Plan. And like the 1994 and 1999 SPDs, the 1992 SPD does not provide information sufficient for an average Plan participant to discern the existence of ERISA's anti-backloading rules or that they were being violated by the 1989 Cash Plan.

111. Specifically, by describing the cash balance formula in a misleading manner, without full disclosure of the formula's reduction of participants' rates of benefit accrual, or reduction of accrual based on age, the 1992, 1994 and 1999 SPDs had the effect of "misleading, misinforming [and] failing to inform participants" as to the rate of accrual, and "minimized, rendered obscure, or otherwise made to appear unimportant" the "description of exceptions, limitations, reductions, and other restrictions of plan benefits." 29 C.F.R. § 2520.102-2(b).

112. The failure of the 1992, 1994 and 1999 SPDs to timely and fully disclose Plan

provisions that negatively impacted the benefits participants reasonably expected to receive violates ERISA sections 102 and 104(b)(1), 29 U.S.C. §§ 1022 and 1024(b)(1), and 29 C.F.R. § 2520.102-2. These acts and omissions prejudiced or likely prejudiced Plaintiff and the Class by precluding their understanding of the impact of the cash balance formula and preventing them from further supplementing their retirement savings.

113. Defendants' acts and omissions in failing to issue SPDs in compliance with ERISA entitle Plaintiff and the class to procedural and injunctive relief.

COUNT NINE

[Withdrawn]

COUNT TEN

Refusal to Provide Requested Governing Plan Documents and Complete Calculation Worksheets — Brought by Plaintiff Bilello as an Individual Claim

114. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

115. Plaintiff, who began working for Chemical Bank in 1960, is a participant in the JPMorgan Chase Retirement Plan.

116. The benefit accrued by Plaintiff under the Plan is based, in part, on his prior service balance, *i.e.*, the present value of all the benefits he accrued during his employment with Chemical Bank prior to January 1, 1989. 1989 Cash Plan, Ex. 4, ¶ 4.2.

117. By letter dated June 27, 2007, Plaintiff by his counsel requested the Plan Administrator to provide him with the following documents pursuant to ERISA section 105(a): (1) "a statement indicating, on the basis of the latest available information ... the total benefit accrued"; (2) "copies of all plan documents and SPDs relied on in the calculation of his benefits"; and (3) "your calculation worksheets." The letter explained that the requested

documents were needed "so that we may verify your computation." The letter also referenced ERISA section 502(c), 29 U.S.C. § 1132(c), and requested that pursuant to that provision, the requested documents be mailed to Mr. Bilello's counsel within 30 days.

118. In a second letter dated June 27, 2007, Plaintiff by his counsel requested that the Plan Administrator provide him with the following documents pursuant to ERISA section 104(b): "Any and all written instruments in effect from March 21, 1960 through the present pursuant to which the JPMC Plan (the JPMC Plan is defined herein to include its predecessors in interest, including but not limited to the Chemical Bank Plan, Manufacturer's Hanover Trust Plan, or Chase Plan) was established or is operated, including but not limited to trust agreements, Plan documents, Summary Plan Descriptions ("SPDs"), and amendments thereto."

119. On July 25, 2007, the Plan Administrator by its counsel provided current plan documents, as well as a "computer printout" indicating the "total non-forfeitable pension benefit accrued for Mr. Bilello," but refused to provide any of the governing plan documents in effect prior to 2002.

120. The "computer printout" indicating the "total non-forfeitable pension benefit accrued for Mr. Bilello" was not "written in a manner calculated to be understood by the average plan participant," ERISA § 105(a)(2)(A)(iii), 29 U.S.C. § 1025(a)(2)(A)(iii), because it set forth the amount of the "Prior Service Balance" without any explanation of how that amount was calculated.

121. On August 8, 2007, Plaintiff Bilello by his counsel renewed his request under ERISA section 105(a) for all calculations and supporting Plan documents, including the pre-1989 Chemical Plan and the relevant pre-1989 Chemical Summary Plan Description, to allow Plaintiff Bilello to verify the Plan's calculation of Mr. Bilello's "Prior Service Balance" and "Opening

Balance," as well as the application of "Interest Credits," "Pay Credits," and any "Adjustments" to those balances.

122. On September 7, 2007, the Plan Administrator by its counsel provided a 45-page "calculation sheet for Mr. Bilello." Ex. 14. The "calculation sheet" also failed to set forth the formula used to calculate the "Prior Service Balance" pursuant to the applicable Plan provisions. This "calculation sheet" is still not "written in a manner calculated to be understood by the average plan participant," ERISA § 105(a)(2)(A)(iii), 29 U.S.C. § 1025(a)(2)(A)(iii). The calculation is lengthy, complex, and apparently incomplete, and provides neither the formula(e) on which it relies nor an understandable explanation of the calculations in plain, straight-forward language.

123. In addition to the foregoing, the current plan documents provided by Defendants and referenced in their September 7, 2007 letter do not contain or summarize the Plan provisions in effect in prior plan documents that would permit Plaintiff to understand how his "Prior Service Balance" was calculated.

124. By letter dated September 28, 2007 and pursuant to ERISA sections 104(b) and 105(a), 29 U.S.C. §§ 1024(b) and 1025(a), Plaintiff Bilello by his counsel requested from the Plan Administrator complete copies of the following documents from Defendant Plan and Defendant Plan Administrator, under which the retirement benefit of Mr. Bilello was calculated in whole or in part: (1) the Cash Plan for Retirement of Chemical Bank and Certain Affiliates, Amended and Restated as of January 1, 1989, including Appendices I through VI, which are referenced in CBPJPMC00001647 § 13.6, at 1732; and (2) The Retirement Plan of Chemical Bank and Certain Affiliates as in effect on December 31, 1988.

125. By letter dated October 29, 2007, Defendant Plan and Defendant Plan

Administrator again refused to produce the requested Plan documents on which Mr. Bilello's benefits were calculated.

126. Without the Prior Plan documents on which Mr. Bilello's benefit calculation is based, which documents Plaintiff has requested by written demand on June 27, 2007, August 8, 2007, and September 28, 2007, or a calculation worksheet "written in a manner calculated to be understood by the average plan participant," but which the Plan Administrator has refused to provide, it is impossible for Plaintiff to determine whether his "Prior Service Balance" and his "Protected Benefit" were calculated in accordance with the terms of the Prior Plan.

127. The Defendant Plan Administrator's failure to provide the requested documents pursuant to ERISA sections 104 and 105, 29 U.S.C. §§ 1024 and 1025, prevented Plaintiff Bilello from understanding the impact of the cash balance formula and prevented him from further supplementing his retirement savings.

128. Despite Plaintiff Bilello's prior requests for all governing SPDs, including by letter dated June 27, 2007, Defendants concealed from Mr. Bilello the 1992 SPD that it produced for the first time on February 25, 2008.

129. These failures constitute a breach of the Plan Administrator's statutory disclosure obligations.

130. The Defendant Plan Administrator is liable for statutory damages for these failures to comply with ERISA's disclosure requirements under ERISA section 502(c), 29 U.S.C. § 1132(c), because the requested documents and information are within the Defendant Plan Administrator's control, but the Plan Administrator had failed or refused to make the requested disclosures.

COUNT ELEVEN

Breach of Fiduciary Duty — Brought by Plaintiff Bilello as an Individual Claim

131. Plaintiff re-alleges all paragraphs above as if fully set forth herein.

132. The Defendant Plan Administrator is a fiduciary within the definition of ERISA section 3(21)(A), 29 U.S.C. § 1002(21)(A) in that he exercises discretionary authority or discretionary control over the management of the Plan and the disposition of the Plan's assets, and that he has discretionary responsibility in the administration of the Plan.

133. The Defendant Plan Administrator is also a named fiduciary of the Plan pursuant to ERISA section 1102(a), 29 U.S.C. § 402(a).

134. The Defendant Plan Administrator's repeated and ongoing refusal to provide Plaintiff Bilello with complete plan documents governing the calculation of Plaintiff's accrued benefit or governing how Plaintiff's "Prior Service Balance" was calculated precluded his understanding of the impact of the cash balance formula and prevented him from further supplementing his retirement savings.

135. This refusal also violates Defendant Plan Administrator's fiduciary duties pursuant to ERISA section 404(a), 29 U.S.C. § 1104(a).

136. In addition to the foregoing, the Defendant Plan Administrator's refusal to provide Mr. Bilello with calculation worksheets "written in a manner calculated to be understood by the average plan participant," renders it impossible for Plaintiff to determine whether his "Prior Service Balance" and his "Protected Benefit" were calculated in accordance with the terms of the Prior Plan, and is a breach of the Defendant Plan Administrator's fiduciary duties pursuant to ERISA section 404(a), 29 U.S.C. § 1104(a). Likewise, this refusal precluded Plaintiff Bilello's understanding of the impact of the cash balance formula and prevented him from further supplementing his retirement savings.

COUNT TWELVE

Breach of Fiduciary Duty — Against the Defendant Plan Administrator

137. By intentionally, recklessly, or negligently making the materially false statements described in paragraphs 88–113 above, by concealing the fact of benefit reductions under the cash balance plan amendments, and by failing to comply with ERISA section 102 and ERISA section 204(h), the Defendant Plan Administrator has breached the fiduciary duties it owes to Plan participants under ERISA section 404(a).

138. The Defendant Plan Administrator's misleading and materially false statements have concealed from Plaintiff Bilello and the members of the proposed class the impact of the cash balance plan amendments on their pension benefits. In particular, the Plan Administrator's fiduciary breaches have prevented Plaintiff Bilello and members of the proposed class from understanding that (1) their benefits under the cash balance plan formula, as amended, are lower than their benefits under the prior traditional plan; (2) their rate of benefit accrual decreases as they age; and (3) the 1989 conversion created a period of "wear-away," during which participants' benefits did not increase at all.

139. Plaintiff Bilello was prejudiced or likely prejudiced by the Plan Administrator's fiduciary breaches and concealment of the benefit reductions under the cash balance Plan amendments. As a result of these ERISA violations, Plaintiff, like every similarly situated cash balance plan participant, has been adversely affected in his retirement planning, his understanding of the terms and conditions under which he continued employment, and his knowledge at or prior to retirement of whether he would receive the benefits to which he is entitled under ERISA.

140. Accordingly, Plaintiff Bilello and similarly situated persons are entitled to

appropriate equitable relief under ERISA section 502(a)(3) and additional benefits under ERISA section 502(a)(1)(B) after the Plans are amended to comply with ERISA.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court enter judgment as follows:

A. Certifying Counts 1, 6, 7, 8 and 12 as a class action, or in the alternative, if no class is certified, extending the relief secured by Plaintiff under these Counts to all Plan participants pursuant to ERISA section 502(a)(3);

B. Declaring:

1. That the 1997 Chase Plan, the 2002 JPMC Plan, and the 2005 JPMC Plan are impermissibly backloaded, in violation of the 133 ⅓% rule, ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), 26 U.S.C. § 411(b)(1) and applicable regulations (Count One);

2. That the 1989 Cash Plan's wear-away violates ERISA, 29 U.S.C. § 1054(b)(1)(B), 26 U.S.C. § 411(b)(1) and applicable regulations (Count Six);

3. That, with respect to amendments causing a significant reduction in the rate of future benefit accrual, the Plan Administrator at no time provided Plaintiff and each Plan participant with written notice setting forth the amendment and its effective date, as required by ERISA section 204(h), 29 U.S.C. § 1054(h), so that the Plan amendments implementing, at a minimum, the 1989 Cash Plan, the 1993 Chemical Plan, and the 1997 Chase Plan, did not become effective (Count Seven);

4. That the summary plan descriptions summarizing the cash balance formulae under the 1989 Cash Plan, the 1993 Chemical Plan, and the 1997 Chase Plan violated

ERISA sections 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b)(1), and 29 C.F.R. § 2520.102-2 (Count Eight);

5. That the Defendant Plan Administrator violated ERISA's disclosure requirements by refusing to provide Plaintiff with requested worksheets that set forth Plaintiff's calculation of benefits and are "written in a manner calculated to be understood by the average plan participant," ERISA § 105(a), 29 U.S.C. 1025(a) (Count Ten);

6. That the Defendant Plan Administrator violated ERISA's disclosure requirements by refusing to provide Plaintiff with requested Plan documents, including full and complete copies of governing Plan documents pursuant to which Plaintiff's benefits are based in whole or in part, ERISA § 104(b), 29 U.S.C. § 1024(b) (Count Ten);

7. That, pursuant to ERISA sections 409 and 502(a)(3), 29 U.S.C. §§ 1109 and 1132(a)(3), relief against the Defendant Plan Administrator is appropriate for his breaches of fiduciary duty stemming from his violation of mandatory disclosure requirements under ERISA sections 104(b)(4) and 105(a), 29 U.S.C. §§ 1024(b)(4) and 1025(a) (Count Eleven);

8. That, pursuant to ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the Defendant Plan Administrator is enjoined in his acts or practices in violation of ERISA's disclosure requirements (Counts Seven, Eight, and Ten);

9. That, pursuant to ERISA section 502(c), 29 U.S.C. § 1132(c), and 29 C.F.R. 2575.502c-1, the Defendant Plan Administrator is personally liable to Plaintiff

and the Class for statutory penalties of up to $110 a day from the date of violation until the date of compliance for procedural violations related to Count Eight;

10. That, pursuant to ERISA section 502(c), 29 U.S.C. § 1132(c), and 29 C.F.R. 2575.502c-1, the Defendant Plan Administrator is personally liable to Plaintiff Bilello for statutory penalties of up to $110 a day from July 28, 2007, until the date of compliance for procedural violations related to Count Ten;

11. That, the Defendant Plan Administrator has violated its fiduciary duties to Plaintiff, Plan participants, and the proposed class under ERISA section 404(a) by intentionally, recklessly, or negligently making the materially false statements, by concealing the fact of benefit reductions under the cash balance plan amendments, and by failing to comply with ERISA sections 102 and 204(h), and that pursuant to ERISA sections 409 and 502(a)(3), 29 U.S.C. §§ 1109 and 1132(a)(3), relief against the Defendant Plan Administrator is appropriate for such breaches of fiduciary duty (Count Twelve);

C. Enjoining Defendants from enforcing the Plan's unlawful amendments or amendments that never became effective;

D. Ordering Defendants to reform the Plan to cure all ERISA violations;

E. Ordering Defendants to recalculate the accrued benefits of Plaintiff, Plan participants, and all class members based on the greater of the benefit formula sought to be amended in violation of ERISA section 204(h), or the pre-amendment formula, after these provisions are reformed to cure all ERISA violations, including pre- and post-judgment interest at the highest allowable rate;

F. Ordering Defendants to pay all pensioners, their beneficiaries and/or estates the

difference between the amount of pension paid to them heretofore, and the benefit that should have been paid based on the Plan as reformed to cure all heretofore-listed ERISA violations, with interest compounded monthly;

G. Awarding Plaintiff:

1. His costs, disbursements and expenses herein pursuant to ERISA section 502(g), 29 U.S.C. § 1132(g), or as otherwise authorized by law;

2. Reasonable attorneys' fees pursuant to ERISA section 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, or as otherwise authorized by law;

3. Statutory penalties payable by the Defendant Plan Administrator in his personal capacity of up to $110 per day from July 28, 2007 to the date of compliance pursuant to ERISA section 502(c), 29 U.S.C. § 1132(c), and 29 C.F.R. 2575.502c-1;

4. Such further equitable, remedial, and procedural relief as is authorized and just; and

H. Awarding the Class such other and further relief as the Court may deem just, proper and equitable.

Respectfully submitted this ___ day of ________, 2009.

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