

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: March 11, 2009 Final Submission: June 22, 2011  
5 Decided: November 3, 2011)

6 Docket Nos. 09-4061-cv(L), 09-3826-cv(XAP)

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8 CARLO NOVELLA, on his own behalf  
9 and on behalf of all similarly situated,

10 Plaintiff-Appellee-Cross-Appellant,

11 - v -

12 WESTCHESTER COUNTY, NEW YORK CARPENTERS' PENSION FUND and BOARD  
13 OF TRUSTEES OF WESTCHESTER COUNTY, NEW YORK,

14 Defendants-Appellants-Cross-Appellees.\*

15 -----  
16 Before: WALKER and SACK, Circuit Judges, KOELTL, District  
17 Judge.\*\*

18 Appeal from four decisions of the United States  
19 District Court for the Southern District of New York (Michael B.  
20 Mukasey, then-Chief Judge and Barbara S. Jones, Judge), and  
21 related judgments, (1) granting the plaintiff Novella's motion  
22 for summary judgment, (2) certifying a class action, (3) granting  
23 the plaintiff class's motion for summary judgment on the class

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\* The Clerk of Court is directed to amend the caption as set forth above.

\*\* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

1 claims, and (4) awarding prejudgment interest to the named  
2 plaintiff and the class members. We agree with the district  
3 court that the defendants' interpretation of certain plan  
4 language was arbitrary and capricious. Accordingly, we affirm  
5 the district court's award of summary judgment to plaintiff  
6 Novella on his individual claims for miscalculation of pension  
7 benefits. However, we conclude, contrary to the district court,  
8 that the six-year statute of limitations applicable to the  
9 plaintiff's and each other putative class member's Employee  
10 Retirement Income Security Act claims began to run when each  
11 pensioner knew or should have known that the defendants had  
12 miscalculated the amount of his pension benefits, and that he was  
13 being underpaid as a result. We therefore vacate the district  
14 court's judgments certifying the plaintiff class, granting  
15 summary judgment to the class, and granting prejudgment interest  
16 to the class members. We remand for further factfinding with  
17 regard to when each putative class member became, or should have  
18 become, aware of his alleged injury so as to begin the running of  
19 the statute of limitations as applied to him.

20 AFFIRMED in part; VACATED and REMANDED in part.

21 EDGAR PAUK, New York, NY, for Plaintiff-  
22 Appellee-Cross-Appellant.

23 JOHN H. BYINGTON III, Archer, Byington,  
24 Glennon & Levine LLP (Robert T.  
25 McGovern, of counsel), Melville, NY, for  
26 Defendants-Appellants-Cross-Appellees.

1 SACK, Circuit Judge:

2 This appeal and cross-appeal concern the pension  
3 benefits owed to plaintiff Carlo Novella, a retired carpenter,  
4 and members of a class he purports to represent. During  
5 Novella's three-decade career, he performed jobs for which his  
6 employers were obligated, under collective bargaining agreements,  
7 to pay into the defendant pension fund on his behalf. But there  
8 were multi-year periods -- principally from 1982 to 1986 --  
9 during which Novella did not perform any work requiring his  
10 employer to make such a contribution. In 1995, when Novella was  
11 nearing his sixty-second birthday, he became disabled as a result  
12 of injuries sustained while he was on the job. He applied for,  
13 and received, a pension ("Disability Pension"); however, he was  
14 disappointed to learn that his benefits were not calculated using  
15 the pension rate in effect in 1995, but rather using two  
16 different rates for Novella's two periods of service. The rate  
17 applicable in 1995 was applied to benefits for work performed  
18 between 1987 and 1995, and the lower rate in effect in 1981 was  
19 applied to benefits for work performed between 1962 and 1981.  
20 The use of the 1981 rate for the earlier period resulted in a  
21 lower aggregate monthly pension payment.

22 After unsuccessfully seeking administrative redress  
23 from the pension fund, Novella filed suit in the United States  
24 District Court for the Southern District of New York on his own  
25 behalf and on behalf of a class of pensioners whose benefits also  
26 were allegedly miscalculated. He asserted that the fund was

1 guilty of seven violations of the Employee Retirement Income  
2 Security Act ("ERISA") and sought declaratory and injunctive  
3 relief. On cross-motions for summary judgment, the district  
4 court agreed with Novella that the defendants -- the pension fund  
5 and its trustees -- had erred in calculating his Disability  
6 Pension at two different rates. The court did not reach  
7 Novella's other claims.

8           Novella then moved to certify a class action on behalf  
9 of either of two classes: one including recipients of various  
10 types of pensions whose benefits were calculated using multiple  
11 per-credit rates, and the other limited to disability pensioners  
12 whose benefits were affected by the same practice. The district  
13 court concluded that in light of Novella's success on his  
14 individual claims, only the narrower class of disability  
15 pensioners was eligible for certification. The court determined  
16 that the statute of limitations for the absent class members'  
17 claims did not accrue until each class member affirmatively  
18 challenged the defendants' two-rate benefit calculation, and was  
19 rebuffed. The court found twenty-four putative class members  
20 whose claims were timely and determined that this number met the  
21 numerosity requirement of Rule 23(a)(1) of the Federal Rules of  
22 Civil Procedure. Finding the other requirements of Rule 23(a)  
23 and (b) to have been met, the court certified this narrower class  
24 of disability pensioners.

25           The parties then cross-moved for summary judgment on  
26 the class claims, which motions the district court referred to a

1 magistrate judge. The magistrate judge recommended granting the  
2 plaintiff class's motion on the merits and denying the  
3 defendants', the latter of which the magistrate judge  
4 characterized as an untimely motion for reconsideration of the  
5 decision certifying the class. The district court reviewed the  
6 magistrate judge's recommendation, adopted it, and entered  
7 judgment in favor of the class. The court also awarded  
8 prejudgment interest at the fund's assumed annual rate of return  
9 to both Novella and the members of the plaintiff class. Both  
10 parties appealed.

11 We agree with the district court that the defendants'  
12 use of two rates in calculating disability pensions finds no  
13 support in the language of the fund's controlling documents --  
14 the Summary Plan Description and the Rules of the Pension Plan.  
15 We therefore affirm the district court's judgment in Novella's  
16 favor on his individual claims. We also affirm its award of  
17 prejudgment interest to Novella, and its setting of the rate and  
18 date of accrual for the award. However, we conclude that the  
19 district court erred in identifying the time at which a claim for  
20 miscalculation of benefits accrues. In light of our view that  
21 such a claim accrues when the pensioner knew or should have known  
22 that his benefits were miscalculated, we vacate the certification  
23 of the class, the judgment in favor of the class, and the award  
24 of prejudgment interest to the class members, and remand the case  
25 for further proceedings before the district court. These  
26 proceedings may include a case-by-case inquiry into when each

1 putative class member knew or had sufficient information so that  
2 he should have known that the defendants were using two different  
3 rates to calculate his pension.

#### 4 **BACKGROUND**

##### 5 Factual History

6 The relevant facts are not in dispute.

7 The plaintiff, Carlo Novella, is a 78-year-old former  
8 carpenter. From 1962 through 1995, he worked in Westchester  
9 County, New York, and in New York City, and participated in both  
10 the defendant Westchester County, New York Carpenters' Pension  
11 Fund (the "Westchester Fund" or the "Fund")<sup>1</sup> -- which is  
12 administered by the defendant eight-member Board of Trustees of  
13 the Fund -- and the New York City District Council of Carpenters  
14 Pension Plan. It is Novella's pension under the Westchester Fund  
15 -- which is an employer-funded employee pension benefit plan  
16 within the meaning of ERISA, see 29 U.S.C. § 1002(2)(A) -- that  
17 is at issue in this appeal. Novella's pension benefits under the  
18 Fund are determined by the Pension Fund Rules (the "Plan") and  
19 Summary Plan Description (the "SPD")<sup>2</sup>, which have been in effect

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<sup>1</sup> In approximately 1998, the Westchester Fund "merged with and into the Suburban New York Regional Council Pension Fund, which is now known as the Empire State Carpenters Pension Fund." J.A. 57. The Westchester Fund no longer exists as a distinct entity.

<sup>2</sup> The SPD is the simplified explanation of the Plan that must be provided to participants under ERISA. According to the Department of Labor, "[t]he summary plan description . . . tells participants what the plan provides and how it operates. It provides information on when an employee can begin to participate in the plan, how service and benefits are calculated, when

1 and unchanged since January 1, 1986. The Plan creates six  
2 classes of benefits, four of which are pension-type allowances:  
3 "Regular Pension" benefits, governed by sections 3.02-3.03 of the  
4 Plan; "Early Retirement Pension" benefits, governed by sections  
5 3.04-3.05 of the Plan; "Deferred Pension" benefits, dictated by  
6 sections 3.06-3.07 of the Plan; and "Disability Pension"  
7 benefits, as set forth in sections 3.08-3.11 of the Plan.<sup>3</sup> See  
8 J.A. 151-54.<sup>4</sup> Each participant is entitled to only one type of  
9 benefit, "except that a Disability Pensioner who recovers [from  
10 his disabling injury] may be entitled to a different type of  
11 pension." Id. at 155.

12 Fund participants earn pension credits based on the  
13 number of hours they serve in jobs that are covered by the Plan.  
14 A job constitutes "Covered Employment" if the employer is

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benefits becomes vested, when and in what form benefits are paid,  
and how to file a claim for benefits." U.S. Dep't of Labor,  
ERISA - Plan Information,  
<http://www.dol.gov/dol/topic/health-plans/planinformation.htm>  
(latest visit Sept. 5, 2011); see also Wilkins v. Mason Tenders  
Dist. Council Pension Fund, 445 F.3d 572, 580-81 (2d Cir. 2006)  
("Among other things, an SPD must set out the 'circumstances  
which may result in disqualification, ineligibility, or denial or  
loss of benefits.' 29 U.S.C. § 1022(b)."). The defendants  
printed the SPD and Plan together in one booklet, which they then  
provided to Plan participants. Although there are some  
differences between the SPD and the Plan, they are not material  
to our resolution of this appeal.

<sup>3</sup> The other two allowances provided for in the Plan are  
lump-sum benefits: the "Death Benefit" and the "Termination  
Benefit." See J.A. 154-55.

<sup>4</sup> For reasons described infra at, all citations to the  
parties' submissions on appeal, including briefs, refer to  
documents filed in connection with an earlier appeal in this  
case, docketed as numbers 08-0788-cv(L) and 08-0807-cv(XAP).

1 "obligated by its [collective bargaining] agreement to contribute  
2 to the Fund" on behalf of the relevant Plan participant. Id. at  
3 146. Novella has had two periods of covered employment: from  
4 1962 through 1981,<sup>5</sup> during which time he earned 13.20 pension  
5 credits, and from 1987 to 1995, during which time he earned an  
6 additional 6.30 pension credits.<sup>6</sup> In the years between 1982 and  
7 1986, Novella performed work in New York City, which was covered  
8 by the New York City Fund -- not a party to this action -- but he  
9 did not perform any work covered by the defendant Westchester  
10 Fund.

11 On March 22, 1995, Novella, then sixty-one years old,  
12 suffered a disabling accident while at work, for which he  
13 immediately began to receive workers' compensation. He also  
14 applied to the Fund for pension benefits. To calculate the  
15 amount of Novella's monthly pension, the defendants used two  
16 different rates: They applied a rate of \$17 per credit to the  
17 13.20 pension credits Novella earned between 1962 and 1981, and a  
18 second rate of \$40 per credit for the credits he earned between  
19 1987 and 1995.

20 Immediately after receiving notice in fall 1995 that  
21 his pension would be calculated using two different rates,

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<sup>5</sup> According to the plaintiff's Local Rule 56.1 statement, he did not perform any work covered by the Plan between 1965 and 1975 because there were no jobs available to him. See J.A. 220. This break in service is not at issue in this appeal.

<sup>6</sup> The Plan sets out various schedules for the accumulation of pension credits, which depend on the year in which the credits were earned. See J.A. 130-34.



1 Novella asked the Fund trustees for an explanation of his  
2 benefits. The defendants explained to him that the two-rate  
3 calculation was appropriate because of the break in his covered  
4 service from 1982 through 1986, during which time he performed no  
5 work covered under the Westchester Plan.

6 The defendants denied Novella's repeated appeals from  
7 the two-benefit rate calculation, referring Novella to section  
8 3.07 of the Westchester Plan, which applies to Deferred Pensions.<sup>7</sup>

9 By letter dated August 28, 1997, the defendants explained that  
10 under that section of the Plan,

11 a Deferred Pension is calculated based on the  
12 rate in effect on the last day you worked in  
13 Covered Employment prior to the accumulation  
14 of three One-Year Breaks in Service. . . .  
15 Since each of the years you were not working  
16 in covered employment was a Break in  
17 Service,<sup>[8]</sup> the credits you had accumulated up  
18 to 1981 when you left covered employment

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<sup>7</sup> That section reads:

**Section 3.07 Deferred Pension -- Amount**

The Deferred Pension shall be calculated in the same manner as the Regular or Early Retirement Pension but shall be based on the benefit level that was in effect on the last day he Worked prior to accumulation of three One-Year Breaks in Service. If additional units of credit were earned after the period in which he accumulated three consecutive One-Year Breaks in Service, the benefit amount for such additional units of credit shall be based on the benefit level in effect when the additional units were earned.

J.A. 152.

<sup>8</sup> Any calendar year "after 1974 in which [the participant] fails to complete 100 hours of Covered Employment" constitutes a one-year Break in Service. J.A. 163.

1 under the Plan (13.20) were calculated at the  
2 1981 rate (\$17.00).

3 Section 3.07 also provides that if any  
4 additional credits were earned after the  
5 Break in Service, the benefit amount for the  
6 additional credits shall be calculated on the  
7 rate that was in effect at the time of  
8 termination. The credits you earned after  
9 the Break in Service (6.30) were calculated  
10 at the rate in effect when you terminated  
11 (\$40.00).

12 J.A. 194. Although Novella was awarded a Disability Pension, not  
13 a Deferred Pension, the letter did not cite the sections of the  
14 Plan governing Disability Pensions: sections 3.08 to 3.11. The  
15 letter also failed to cite section 3.16 of the Plan, entitled  
16 "Application to Benefit Increases," on which the defendants would  
17 later rely in this litigation. Id. at 156. Section 3.16  
18 provides that a Fund participant is entitled to a Pension in an  
19 amount to be "determined under the terms of the Plan and [at] the  
20 benefit level as in effect at the time the Participant last  
21 separates from Covered Employment." Id. Under section 3.16, "[a  
22 Plan p]articipant shall be deemed to have last separated from  
23 Covered Employment on the last day of Work which is followed by  
24 three consecutive calendar years of less than 1,000 hours of  
25 Covered Employment in each year." Id.

#### 26 Procedural History

27 On March 19, 2002, having contested the two-rate  
28 calculation through the Fund's administrative review process and  
29 having failed to obtain relief, Novella filed suit in the United  
30 States District Court for the Southern District of New York  
31 against the defendant Fund and its Board of Trustees, asserting

1 violations of ERISA, and seeking declaratory and injunctive  
2 relief.<sup>9</sup> He filed an amended complaint on October 27, 2003. His  
3 suit was brought on behalf of himself and a class of "[a]ll  
4 [others s]imilarly [s]ituated." J.A. 24.

5 The amended complaint asserted seven claims falling  
6 into two categories: Claims One and Two challenged the  
7 defendants' failure to accord Novella credit for the workers'  
8 compensation hours he received; Claims Three through Seven  
9 contested the defendants' calculation of Novella's (and the class  
10 members') pensions using two different rates because of a break  
11 in service. As relevant to this appeal, Claim Six asserted that  
12 the defendants' practice of applying section 3.07 of the Plan,  
13 which governs Deferred Pensions, to recipients of Disability  
14 Pensions violated the Plan's terms, and Claim Seven alleged that  
15 because the Plan "does not contain any provision describing the  
16 application of two benefit rates when a participant suffers a  
17 three-year interruption in service," the defendants had violated  
18 ERISA in calculating Novella's pension using two rates. *Id.* at  
19 31-32.

20 In early 2004, before moving for class certification,  
21 Novella moved for summary judgment on his individual claims. The  
22 defendants cross-moved for the same. The district court (Michael  
23 B. Mukasey, then-Chief Judge) granted Novella's motion in part.

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<sup>9</sup> Subject matter jurisdiction was premised upon the questions of federal law that underlie this dispute. *See* 28 U.S.C. § 1331(a).

1 The court dismissed as unexhausted<sup>10</sup> Novella's claims (styled as  
2 Claims One and Two) regarding the "defendants' refusal to credit  
3 him with hours of service, and therefore pension credits, during  
4 the time he received workers' compensation benefits."<sup>11</sup> Novella  
5 v. Westchester County, N.Y. Carpenters' Pension Fund (Novella I),  
6 No. 02-cv-2192, 2004 WL 1752820, at \*6, 2004 U.S. Dist. LEXIS  
7 15152, at \*16 (S.D.N.Y. Aug. 4, 2004); see id. at \*6-\*7, 2004  
8 U.S. Dist. LEXIS 15152, at \*16-\*22.

9 With regard to Novella's challenge to the two-rate  
10 pension calculation (Claim Six), the court concluded that the  
11 defendants had acted arbitrarily and capriciously<sup>12</sup> by using two

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<sup>10</sup> Although "ERISA does not contain an explicit exhaustion[-]  
]of[-]remedies requirement . . . this Circuit has inferred  
[one]." Burke v. PriceWaterHouseCoopers LLP Long Term Disability  
Plan, 572 F.3d 76, 79 n.3 (2d Cir. 2009); see also id. at 79  
(noting that "an ERISA action may not be brought in federal court  
until administrative remedies are exhausted").

<sup>11</sup> After exhausting these claims, Novella again filed suit  
asserting Claims One and Two against the same defendants in the  
United States District Court for the Southern District of New  
York. On March 26, 2009, the district court (Barbara S. Jones,  
Judge) granted the defendants' motion for summary judgment and  
denied Novella's cross-motion. See Novella v. Empire State  
Carpenters Pension Fund, No. 05-cv-2079, 2009 WL 812271, at \*1,  
2009 U.S. Dist. LEXIS 25245, at \*1-\*2 (S.D.N.Y. Mar. 26, 2009);  
see also id. at \*1 n.1, 2009 U.S. Dist. LEXIS 25245, at \*2 n.1  
(explaining the history of Novella's litigation against the Fund  
and its successor, the Empire State Carpenters Pension Fund).  
Novella appealed from the district court's judgment. On November  
18, 2009, another panel of this Court affirmed the judgment in  
favor of the defendants. See Novella v. Empire State Carpenters  
Pension Fund, 353 F. App'x 596 (2d Cir. 2009) (summary order).

<sup>12</sup> The court noted that there was some question regarding  
whether the arbitrary-and-capricious or de novo standard of  
review was appropriate to the circumstances of this case, but  
concluded that the defendants' interpretation of the Plan failed  
under either standard. See Novella I, 2004 WL 1752820, at \*3,  
2004 U.S. Dist. LEXIS 15152, at \*8.

1 different rates to calculate Novella's pension because "their  
2 decision was based on an interpretation of the Westchester Plan  
3 that is inconsistent with the plain words of that Plan." Id. at  
4 \*3, 2004 U.S. Dist. LEXIS 15152, at \*8. Citing sections 3.03 and  
5 3.10 of the Plan, the court reasoned that the "Plan plainly  
6 provides that a participant who collects a Disability Pension  
7 should be entitled to the amount of a Regular Pension, which is  
8 calculated at one benefit rate." Id., 2004 U.S. Dist. LEXIS  
9 15152, at \*9. The court rejected the defendants' argument that  
10 they were entitled to rely on the provisions governing Deferred  
11 Pensions -- section 3.07 -- because, at the time of his  
12 disability, Novella was not eligible for a Regular Pension as a  
13 result of his break in service. See id. at \*4, 2004 U.S. Dist.  
14 LEXIS 15152, at \*10-\*13. The court concluded instead that  
15 "[n]othing in [the section of the plan] . . . describ[ing] the  
16 eligibility requirements for a Disability Pension . . . states  
17 that a [P]lan participant must satisfy the eligibility  
18 requirements for a Regular Pension . . . in order to collect a  
19 Disability Pension." Id., 2004 U.S. Dist. LEXIS 15152, at \*12.  
20 The court explained that section 3.10's "use of the word  
21 'eligible' in the phrase 'the Regular Pension amount for which  
22 the Employee would have been eligible,' . . . refer[red] to a  
23 'Regular Pension amount,' rather than simply to a 'Regular  
24 Pension.'" Id. (emphasis in Novella I) (quoting the Plan).

25           The court also addressed the defendants' theory, raised  
26 for the first time after commencement of this lawsuit, that

1 section 3.16 of the Plan supported their decision to use two  
2 different rates because it "authorizes [P]lan administrators to  
3 apply multiple benefit levels when calculating the pension of a  
4 [P]lan participant who has had a break in service." Id. at \*5,  
5 2004 U.S. Dist. LEXIS 15152, at \*14, \*15. The court concluded  
6 that the defendants' reliance on section 3.16 was misplaced  
7 because that section "does not reasonably allow [for the]  
8 interpretation" urged by the defendants. Id. In sum, the court  
9 rejected each of the defendants' arguments, concluding that the  
10 defendants were not entitled under the terms of the Plan to use  
11 two different rates to calculate Novella's Disability Pension.

12 Having granted Novella's motion on the basis of his  
13 challenge to the two-rate calculation, the district court  
14 "dismissed as moot" Novella's other claims regarding the amount  
15 of his Disability Pension (Claims Three, Four, Five, and Seven),  
16 which were argued "in the alternative," and were "premised on the  
17 assumption that the terms of the . . . Plan support [the]  
18 defendants' decision." Id. at \*2, 2004 U.S. Dist. LEXIS 15152,  
19 at \*6. Although the district court granted summary judgment to  
20 Novella on the merits of Claim Six, it did not award final relief  
21 at that time.

22 Following the district court's decision in Novella's  
23 favor on his individual claims, Novella moved for class  
24 certification under Rules 23(b)(1) and (2) of the Federal Rules  
25 of Civil Procedure, seeking certification of a class to include  
26 recipients of various types of pensions calculated using two

1 rates, or, in the alternative, a narrower class of disability  
2 pensioners injured by the same practice.<sup>13</sup> The district court  
3 first determined that the only class for which Novella  
4 potentially could serve as class representative was the "more  
5 limited class of Disability Pensioners" affected by the  
6 defendants' practice of applying section 3.07 of the Plan --  
7 which pertains to Deferred Pensions and permits the use of  
8 multiple per-credit rates -- to Disability Pensions. Novella v.  
9 Westchester County, N.Y. Carpenters' Pension Fund (Novella II),  
10 No. 02-cv-2192, 2004 WL 3035405, at \*4-\*5, 2004 U.S. Dist. LEXIS  
11 26149, at \*14 (S.D.N.Y. Dec. 29, 2004). Turning to the  
12 requirements of Rule 23(a), the district court concluded that the  
13 commonality, typicality, and adequacy-of-representation prongs  
14 were met, but that an evidentiary hearing was necessary to  
15 determine whether the numerosity prong was satisfied. Id. at \*6-  
16 \*7, 2004 U.S. Dist. LEXIS 26149, at \*16-\*22. And, although the  
17 court had not yet decided whether Novella could satisfy Rule  
18 23(a), it concluded that, should the class be numerous enough to  
19 satisfy Rule 23(a), "the class action [could] be maintained under  
20 Rule 23(b)(1)" because "[r]eformation of [the] defendants'

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<sup>13</sup> The defendants argued that the motion was untimely because it was not made until after the court had resolved the summary judgment motions in Novella's favor. See Novella v. Westchester County, N.Y. Carpenters' Pension Fund, No. 02-cv-2192, 2004 WL 3035405, at \*2, 2004 U.S. Dist. LEXIS 15152, at \*5 (S.D.N.Y. Dec. 29, 2004). The court rejected this argument, noting that "Rule 23 [of the Federal Rules of Civil Procedure] does not prohibit the filing of a class certification motion . . . after a decision on the merits of the named individual plaintiff's claims." Id., 2004 U.S. Dist. LEXIS 15152, at \*7.

1 practice in calculating these Disability Pensions will result in  
2 pensions amounts being due to [all] these class members" -- that  
3 is, "Plan-wide relief." Id. at \*8, 2004 U.S. Dist. LEXIS 26149,  
4 at \*23, \*24.

5 On August 2, 2006, after conducting the evidentiary  
6 hearing, the district court certified the class of Disability  
7 Pension recipients. See Novella v. Westchester County, N.Y.  
8 Carpenters' Pension Fund (Novella III), 443 F. Supp. 2d 540, 542-  
9 43 (S.D.N.Y. 2006). The court concluded that the proposed class  
10 of twenty-four "disability pensioners whose pensions were  
11 calculated using more than one rate due to a break in service"  
12 met the numerosity requirement of Rule 23(a)(1).<sup>14</sup> Id. at 544.  
13 The court's determination turned on its view of the event  
14 necessary to start the running of the six-year statute of  
15 limitations for an ERISA claim. The defendants had argued that  
16 the statute of limitations applicable to each class member's  
17 claim accrued as soon as the putative class member's pension was  
18 calculated, and that only eight of the pensioners had begun  
19 receiving pensions within six years before Novella filed his

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<sup>14</sup> The court explained that, while a class of twenty-four does not in all cases satisfy the numerosity requirement, Novella III, 443 F. Supp. 2d at 546, a balancing of the relevant factors in this case justified certification of the relatively small class, id. at 546-48 (discussing the five factors for numerosity set forth in Ansari v. N.Y. Univ., 179 F.R.D. 112, 114-15 (S.D.N.Y. 1998): "(1) . . . judicial economy . . .; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members." ).



1 complaint. Id. Novella asserted to the contrary that the court  
2 should adopt a continuing-violation approach to the statute of  
3 limitations, under which each month's pension check would begin a  
4 new six-year limitations period. Id. at 545. The district court  
5 chose a third alternative, concluding that

6 [t]he relevant date for fixing the accrual of  
7 [the putative class members'] claim[s] is  
8 when a plaintiff was put on notice that the  
9 defendants believed the method used to  
10 calculate his disability pension was correct.  
11 Thus, the claim does not begin to run until a  
12 prospective class member inquires about the  
13 calculation of his benefits and the Plan  
14 rejects his claim that the benefits were  
15 miscalculated.

16 Id. (emphasis added).

17 Applying this rule, the court found Novella's claim  
18 timely. Id. With regard to the other putative class members,  
19 the court determined that, "[b]ecause the defendants ha[d]  
20 presented no evidence that they confirmed the correctness of the  
21 dual-rate benefits calculation[s] more than six years before the  
22 filing of this lawsuit, th[e] court [could not] find [that] the  
23 statute of limitations ha[d] run on the claims of any of the 24  
24 proposed class members." Id. at 546. The court therefore  
25 concluded that the class consisted of twenty-four disability  
26 pensioners with timely claims and therefore was sufficiently  
27 large to satisfy Rule 23, and certified it. See id. at 546-48.

28 After the class was certified, both parties again moved  
29 for summary judgment, this time to resolve the class-action

1 claims. The district court (Barbara S. Jones, Judge<sup>15</sup>) referred  
2 the motions to a magistrate judge for a report and  
3 recommendation. On September 10, 2007, Magistrate Judge James C.  
4 Francis IV issued a Report & Recommendation (the "R&R")  
5 recommending that the district court grant the plaintiff's motion  
6 and deny the defendants'. See Novella v. Westchester County,  
7 N.Y. Carpenters' Pension Fund (Novella IV), No. 02-cv-2192, 2007  
8 WL 2582171, at \*1, 2007 U.S. Dist. LEXIS 66235, at \*2 (S.D.N.Y.  
9 Sept. 10, 2007).

10 The R&R first addressed the defendants' motion, in  
11 which the defendants "renew[ed] their argument that fifteen of  
12 the pensioners[' claims] are time-barred." Id. at \*2, 2007 U.S.  
13 Dist. LEXIS 66235, at \*5. As a preliminary matter, the  
14 magistrate judge construed the motion for summary judgment as "an  
15 untimely application for reconsideration" of the district court's  
16 ruling in Novella III determining the accrual of the statute of  
17 limitations and certifying the class. Id. The magistrate judge  
18 further concluded that "[e]ven if the defendants' motion were  
19 timely, there is no basis for reconsideration," id., 2007 U.S.  
20 Dist. LEXIS 66235, at \*7, because "[t]he law of the case doctrine  
21 requires a court to adhere to its own decision at an earlier  
22 stage of the litigation" absent "cogent or compelling reasons not  
23 to," id., 2007 U.S. Dist. LEXIS 66235, at \*8 (internal quotation  
24 marks omitted), and the defendants had not shown that they would

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<sup>15</sup> The case was reassigned to Judge Jones in October 2006, after Chief Judge Mukasey retired.

1 suffer any "injustice" if the court adhered to then-Chief Judge  
2 Mukasey's prior decisions, id. at \*3, 2007 U.S. Dist. LEXIS  
3 66235, at \*10. The magistrate judge rejected the defendants'  
4 argument that Novella III would "'wreak havoc [on] Taft-Hartley  
5 Funds, such as [the] defendant [Fund], which rely on actuarial  
6 soundness for their very continued existence.'" Id. (quoting  
7 Defs.' Mem. of Law in Support of Summ. J. 9). Finally, the  
8 magistrate judge refused to credit the defendants' contention  
9 that the class members' claims were not tolled by the filing of  
10 Novella's suit because, based on the holding of Novella III,  
11 "'their individual claims never accrued in the first instance.'" Id.  
12 at \*4, 2007 U.S. Dist. LEXIS 66235, at \*11 (quoting Defs.'  
13 Mem. of Law in Support of Summ. J. 11). In the magistrate  
14 judge's view, the absent class members' claims accrued "once Mr.  
15 Novella filed his complaint challenging the Fund's practice of  
16 applying two benefit rates." Id., 2007 U.S. Dist. LEXIS 66235,  
17 at \*12.

18 The magistrate judge then turned to Novella's motion  
19 for summary judgment on behalf of the class, agreeing with  
20 Novella that the defendants' argument denying liability for the  
21 class members' claims was "based exclusively on the theory of  
22 accrual that Judge Mukasey previously rejected." Id. at \*5, 2007  
23 U.S. Dist. LEXIS 66235, at \*15. The magistrate judge therefore  
24 recommended granting summary judgment to the class "on the issue  
25 of liability . . . with respect to the entire plaintiff class."  
26 Id. With regard to Novella's request for prejudgment interest

1 for himself and for the class members, the magistrate judge  
2 decided that such an award was "appropriate." Id. at \*6, 2007  
3 U.S. Dist. LEXIS 66235, at \*18. Analogizing Novella's and the  
4 class's claims to those based upon latent injuries, he set the  
5 interest accrual date, for Novella, as "the date that the Fund  
6 denied his claim," id. at \*7, 2007 U.S. Dist. LEXIS 66235, at  
7 \*20, and, for the absent class members, as "the date of the  
8 filing of the complaint," id. Lastly, the magistrate judge  
9 recommended setting the interest rate at "the Fund's assumed  
10 return of seven and one-half percent," which the magistrate judge  
11 found to be more equitable than either New York's statutory rate  
12 of 9 percent or the federal post-judgment rate. Id. at \*8, 2007  
13 U.S. Dist. LEXIS 66235, at \*21-\*22.

14 Over both parties' objections and on de novo review,  
15 see Fed. R. Civ. P. 72(b)(3), the district court (Barbara S.  
16 Jones, Judge) adopted the R&R in its entirety. See Novella v.  
17 Westchester County, N.Y. Carpenters' Pension Fund (Novella V),  
18 No. 02-cv-2192, 2008 WL 1743342, at \*1, 2008 U.S. Dist. LEXIS  
19 108341, at \*2-\*3 (S.D.N.Y. Jan. 14, 2008).



1 (internal quotation marks omitted). "Summary judgment is  
2 appropriate where there exists no genuine issue of material fact  
3 and, based on the undisputed facts, the moving party is entitled  
4 to judgment as a matter of law." O & G Indus., Inc. v. Nat'l  
5 R.R. Passenger Corp., 537 F.3d 153, 159 (2d Cir. 2008) (brackets  
6 and internal quotation marks omitted), cert. denied, 129 S. Ct.  
7 2043 (2009); see also Fed. R. Civ. P. 56(a) ("The court shall  
8 grant summary judgment if the movant shows that there is no  
9 genuine dispute as to any material fact and the movant is  
10 entitled to judgment as a matter of law.").

11 "ERISA does not itself prescribe the standard of  
12 review [by district courts] for challenges to benefit eligibility  
13 determinations." Celardo v. GNY Auto. Dealers Health & Welfare  
14 Trust, 318 F.3d 142, 145 (2d Cir. 2003). The Supreme Court has  
15 instructed that "plans investing the administrator with broad  
16 discretionary authority to determine eligibility are reviewed  
17 under the arbitrary and capricious standard." Id. (citing  
18 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989)).  
19 Otherwise, courts review plan administrators' determinations de  
20 novo. See Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 763 (2d  
21 Cir. 2002) (citing Firestone Tire, 489 U.S. at 115).

22 When the arbitrary-and-capricious standard applies,  
23 "[a] court may overturn a plan administrator's decision . . .  
24 only if the decision was without reason, unsupported by  
25 substantial evidence[,] or erroneous as a matter of law."  
26 Celardo, 318 F.3d at 146 (internal quotation marks omitted).

1 "Where both the trustees of [an ERISA plan] and a rejected  
2 applicant offer rational, though conflicting, interpretations of  
3 plan provisions, the trustees' interpretation must be allowed to  
4 control." Miles v. N.Y. State Teamsters Conference Pension &  
5 Ret. Fund Emp. Pension Benefit Plan, 698 F.2d 593, 601 (2d Cir.),  
6 cert. denied, 464 U.S. 829 (1983).

7 Here, the district court did not decide which of the  
8 two standards of review should apply, because it concluded that  
9 the defendants' interpretation of the Plan could not be sustained  
10 under either standard. However, in their briefing to this Court,  
11 the parties appear to agree that the arbitrary-and-capricious  
12 standard applies in this case. See Defs.-Appellants' Br. 17  
13 [hereinafter Appellants' Br.]; Pl.-Appellee's Br. 49, 56  
14 [hereinafter Appellee's Br.]. We therefore address the  
15 defendants' interpretation of the Plan only under that  
16 deferential standard, although, like the district court, we think  
17 that the outcome under the other, less deferential option -- de  
18 novo review -- would be no different.

#### 19 B. The Merits

20 The question before us is whether the defendants acted  
21 arbitrarily and capriciously in interpreting the Plan to permit  
22 them to calculate Disability Pensions using two different per-  
23 credit rates if the pensioner had a break in service. The  
24 district court held that doing so was arbitrary and capricious  
25 because "[n]othing in the provisions of the [Plan provides] that  
26 a Disability Pension may be calculated using two different

1 benefit rates when a participant has had a break in service."  
2 Novella I, 2004 WL 1752820, at \*3, 2004 U.S. Dist. LEXIS 15152,  
3 at \*8-\*9. We agree.

4 Disability Pensions are governed by section 3.10 of the  
5 Plan, which provides in relevant part that "[t]he Disability  
6 Pension amount shall be equal to the Regular Pension amount for  
7 which the Employee would have been eligible if he had been age 65  
8 when he became disabled if the Participant had 10 or more units  
9 of credit at the time of his disability." J.A. 153. Section  
10 3.03 sets forth the means of calculating the Regular Pension  
11 amount. It authorizes calculation of that amount by reference to  
12 the number of credits a pensioner earned during "the period  
13 during which the Employer is obligated . . . to contribute to the  
14 Fund" on behalf of the pensioner. See id. at 147, 151. The  
15 defendants offer four arguments in support of their contentions  
16 that this Plan language permits a two-rate benefit calculation  
17 for recipients of Disability Pensions, and that the district  
18 court erred in concluding to the contrary.

19 First, the defendants assert that the Trustees awarded  
20 Novella the full benefit amount to which he was entitled because,  
21 although Novella was only sixty-one years old at the time of his  
22 disability, they treated him as if he were sixty-five years old  
23 when he became disabled as required by section 3.10, the Plan  
24 section governing Disability Pensions. They did not apply the  
25 age-based reduction that would otherwise have been permissible  
26 under section 3.05, which is entitled "Early Retirement Pension -



1 - Amount."<sup>17</sup> Id. at 152. The defendants contend that they  
2 therefore complied with section 3.10's requirements.

3 Although it is correct that, had Novella received an  
4 Early Retirement Pension, the pension amount would have been  
5 reduced to reflect his age, the argument is irrelevant.  
6 Throughout this lengthy dispute, Novella has never contended that  
7 his pension was reduced because of his age at retirement, nor has  
8 any party argued that he should have been awarded an Early  
9 Retirement Pension instead of a Disability Pension. Novella's  
10 grievance, and these judicial proceedings, have focused entirely  
11 on whether the defendants' use of two different rates to  
12 calculate Novella's Disability Pension was improper.

13 Second, under section 3.02 of the Plan, to qualify for  
14 a Regular Pension, a pensioner's employment -- and consequently,  
15 employer contributions on his behalf -- must have been "more or  
16 less continuous to his retirement date." Id. at 151. The Plan's  
17 provisions explain that, in this context, "more or less  
18 continuous" means that there must be "no period of three or more  
19 consecutive years without [his performing] at least" a small,  
20 specified, amount of covered work. Id. The defendants argue  
21 that because Novella's employment was not "more or less

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<sup>17</sup> Section 3.05 provides: "The monthly amount of the Early Retirement Pension is the amount of the Regular Pension reduced by one-half of one percent for each month by which the Participant is under age 65 on the Effective Date of his Pension." J.A. 152.

1 continuous to his retirement date," id.,<sup>18</sup> Novella "was not . . .  
2 eligible for the single accrual rate Regular Pension."  
3 Appellants' Br. 22.

4 The defendants may be correct that Novella is  
5 ineligible for a Regular Pension, but any such eligibility is not  
6 material to this dispute in light of the fact that he was awarded  
7 a Disability Pension. We agree with the district court that  
8 nothing in the Plan provisions governing Disability Pensions  
9 requires that a disability pensioner actually be eligible for  
10 another type of pension as a prerequisite to receipt of his  
11 Disability Pension. See Novella I, 2004 WL 1752820, at \*3, 2004  
12 U.S. Dist. LEXIS 15152, at \*8-\*9. Section 3.10's reference to  
13 "the Regular Pension amount for which [Novella] would have been  
14 eligible if he had been age 65 when he became disabled," J.A. 153  
15 (emphases added), establishes not an eligibility requirement for  
16 a Disability Pension but a reference point for determining the  
17 proper amount of such a pension.

18 Moreover, were we to endorse a reading of the Plan  
19 requiring a Disability Pension recipient also to be eligible for  
20 a Regular Pension, we would render the Plan's inclusion of a  
21 Disability Pension meaningless, inasmuch as any person who  
22 qualified for a Disability Pension would also be eligible for a  
23 Regular Pension. It would appear likely that the Plan's drafters  
24 established both Disability Pensions and Regular Pensions -- and

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<sup>18</sup> Novella does not dispute that he performed no covered work between 1982 and 1986, and therefore that his employment was not "more or less continuous" as defined in the Plan.

1 assigned different eligibility requirements to each -- because  
2 they contemplated that Plan participants might become disabled  
3 before they become eligible for a Regular Pension, and did not  
4 want to bar such participants from receiving pension benefits.

5 Third, the defendants contend that because Novella did  
6 not meet the eligibility requirements for a Regular Pension due  
7 to his failure to perform covered work from 1982 to 1986, his  
8 pension benefit amount was "calculated pursuant to the only other  
9 methodology [i.e., section 3.07, which governs Deferred Pensions]  
10 for calculating a pension where there was a break in service."  
11 Appellants' Br. 22. Section 3.07 states that when a pensioner  
12 has a break in service that lasts at least three years, his  
13 pension shall be calculated using two rates: compensation for all  
14 credits earned before the break in service is "based on the  
15 benefit level that was in effect on the last day [the pensioner  
16 w]orked prior to" the break, while "the benefit amount for [any]  
17 additional units of credit" earned after a three-year break in  
18 service is "based on the benefit level in effect when the  
19 additional units were earned." J.A. 152. The defendants argue  
20 that because Novella's break in covered employment spanned more  
21 than three years, they are permitted to "us[e] two separate  
22 benefit accrual rates." Appellant's Br. 21.

23 The defendants' argument is fatally flawed. The quoted  
24 section, Section 3.07, explicitly applies to Deferred Pensions;  
25 however, Novella was awarded a Disability Pension, not a Deferred  
26 Pension. Nothing in the Plan permits the defendants to apply a

1 section controlling one specific type of pension to a pension of  
2 a different kind. In other words, the fact that the Disability  
3 Pension provisions do not include language permitting a two-rate  
4 calculation does not entitle the defendants to search for  
5 authorization to do so elsewhere in the Plan. Indeed --  
6 following both the presumption of consistent usage and meaningful  
7 variation, and the textual canon of expressio unius est exclusio  
8 alterius, see Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199,  
9 221 (2d Cir. 2009) -- the presence of that provision applicable  
10 to one type of pension makes clear that the omission of that  
11 provision in the part of the Plan governing another type of plan  
12 was deliberate. To permit the defendants to pick and choose  
13 language from disparate sections of the Plan would subvert the  
14 intention of the Plan's drafters and the reasonable expectations  
15 of Plan participants.

16 Finally, the defendants argue that section 3.16, which  
17 is entitled "Application to Benefit Increases," J.A. 156,  
18 justifies a two-rate method for calculating Disability Pensions.  
19 That section provides: "The pension to which a Participant is  
20 entitled shall be determined under the terms of the Plan and the  
21 benefit level as in effect at the time the Participant last  
22 separates from Covered Employment." Id. The Plan defines a  
23 "last separat[ion] from Covered Employment" as the "last day of  
24 [covered] Work which is followed by three consecutive calendar  
25 years of less than 1,000 hours of Covered Employment in each  
26 year." Id. The defendants argue that a person can "last

1 separate" from employment more than once, and that Novella did so  
2 in 1981 and again in 1995, thus permitting the defendants to  
3 calculate a pension using multiple benefit levels.

4 It is apparent from the record, however, that the  
5 defendants did not use Section 3.16 to calculate Novella's  
6 pension in the first instance. As the district court noted, the  
7 defendants identified this section as justification for their  
8 calculation of Novella's pension "for the first time in  
9 litigation." Novella I, 2004 WL 1752820, at \*5, 2004 U.S. Dist.  
10 LEXIS 15152, at \*13. They did not cite this section of the Plan  
11 in their letters to Novella explaining the calculation of his  
12 benefits. See J.A. 183-94 (letters between Novella and the  
13 Fund). Nor did they indicate to Novella at any point during his  
14 administrative appeals that their two-rate calculation relied in  
15 any way on section 3.16. To permit them to assert this newly  
16 coined rationale in litigation despite their failure to rely upon  
17 it during the internal Fund proceedings that preceded this  
18 lawsuit would subvert some of the chief purposes of ERISA  
19 exhaustion: to "'uphold Congress'[s] desire that ERISA trustees  
20 be responsible for their actions, not the federal courts,'" and  
21 to "'provide a sufficiently clear record of administrative  
22 action'" should litigation ensue. Paese v. Hartford Life &  
23 Accident Ins. Co., 449 F.3d 435, 445 (2d Cir. 2006) (quoting  
24 Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 594 (2d  
25 Cir. 1993)). It would also clearly be inequitable. See id. at  
26 447-48 (equitably estopping the defendant from arguing that the

1 plaintiff had failed to exhaust an issue because a letter from  
2 the defendant had misled the plaintiff into thinking that he had  
3 no other administrative remedies to pursue).<sup>19</sup>

4 Because we agree with the district court's  
5 determination that the defendants' two-rate calculation of  
6 Novella's disability pension was arbitrary and capricious, we  
7 affirm its entry of summary judgment in favor of Novella  
8 individually. However, for the reasons discussed below, we  
9 nonetheless decline to affirm the summary judgment in favor of  
10 the plaintiff class.

## 11 II. Statute of Limitations and Class Certification

### 12 A. Standards of Review

13 We review the question of the application of the  
14 relevant statute of limitations -- as we do all questions of  
15 law -- de novo. United States v. Domino Sugar Corp., 349 F.3d  
16 84, 86 (2d Cir. 2003). However, "[a] district court's  
17 certification of a class under Rule 23 is reviewed for abuse of  
18 discretion, provided that . . . the court applied the proper  
19 legal standard[]." Brown v. Kelly, 609 F.3d 467, 475 (2d Cir.

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<sup>19</sup> Novella also argues, and the district court concluded, that even if the defendants had cited to section 3.16 to justify their calculation, the defendants' interpretation of that section fails because the phrase "last separated from Covered Employment" must be read to contemplate only one such "last separat[ion]." See Novella I, 2004 WL 1752820, at \*5, 2004 U.S. Dist. LEXIS 15152, at \*14-\*16. While Judge Walker agrees with the district court on this score, Judge Koeltl and Judge Sack are not persuaded that the plain language of section 3.16 forecloses multiple dates of "last separat[ion] from Covered Employment." But because we think the defendants' reliance on this section fails on other grounds, we need not reach this particular rationale of the district court.

1 2010). This standard "applies both to the district court's  
2 ultimate decision on class certification and to its rulings as to  
3 the individual Rule 23 requirements." Id.

#### 4 B. The Merits

5 1. Accrual of the Statute of Limitations. The Federal  
6 Rules of Civil Procedure permit maintenance of a class action  
7 only if the "class is so numerous that joinder of all members is  
8 impracticable." Fed. R. Civ. P. 23(a)(1). This "numerosity"  
9 requirement "does not mandate that joinder of all parties be  
10 impossible -- only that the difficulty or inconvenience of  
11 joining all members of the class make use of the class action  
12 appropriate." Cent. States Se. & Sw. Areas Health & Welfare Fund  
13 v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 244-45 (2d  
14 Cir. 2007). "Determination of practicability depends on all the  
15 circumstances surrounding a case, not on mere numbers." Robidoux  
16 v. Celani, 987 F.2d 931, 936 (2d Cir. 1993). Nonetheless,  
17 several district courts in our Circuit have suggested that courts  
18 are likely to conclude that the "numerosity" requirement is  
19 satisfied "when the class comprises 40 or more members" and  
20 unlikely to be satisfied "when the class comprises 21 or fewer."  
21 Ansari v. N.Y. Univ., 179 F.R.D. 112, 114 (S.D.N.Y. 1998).

22 In this case, the question of whether the certified  
23 class was sufficiently large to satisfy Rule 23 hinges on whether  
24 the statute of limitations for each class member's claim began to  
25 run upon receipt of his first pension payment, as the defendants  
26 contend, or upon a class member's first inquiry to the Fund

1 regarding the amount of his benefits and the Fund's rejection of  
2 his request that his pension be calculated using one rate, as the  
3 district court concluded and as Novella urges on appeal.

4 The parties agree that a six-year statute of  
5 limitations governs ERISA claims and that "[t]he relevant date  
6 for fixing the accrual of a miscalculation claim is when a  
7 plaintiff was put on notice that the defendants believed the  
8 method used to calculate his disability pension was correct."  
9 Appellants' Br. 26 (brackets omitted) (quoting Novella III, 443  
10 F. Supp. 2d at 545); see also id. at 27 ("The Fund agrees with  
11 the . . . sentence quoted above. It makes perfect sense for a  
12 claim to accrue when the participant is put on notice that the  
13 Fund 'believed the method used to calculate his disability  
14 pension was correct.'"); Appellees' Br. 57 (asserting that  
15 federal courts generally apply a "discovery rule" for the  
16 "purposes of triggering the statute of limitations on an ERISA  
17 benefit claim"). The parties dispute, however, the time at which  
18 a pensioner can be considered to have been put on such notice.  
19 The issue is undecided in this Circuit.<sup>20</sup>

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<sup>20</sup> In Larsen v. NMU Pension Trust of the NMU Pension & Welfare Plan, 902 F.2d 1069 (2d Cir. 1990), we concluded that on the facts of that case -- which involved a claim by a pensioner's widow seeking to receive her late husband's pension as a "husband and wife pension" payable after his death, id. at 1070-71 -- the defendant fund had not "clear[ly] repudiat[ed]" her claim until it responded to an inquiry made on the widow's behalf and stated that "[a]ll monies have been paid that are payable and there are no further monies due [the plaintiff]," id. at 1074. We did not, however, decide that an ERISA claim cannot under any circumstances accrue before an affirmative demand is made and an explicit rejection is offered. Moreover, Larsen is factually distinguishable. That case concerned not an underpayment claim



1           The defendants urge us to reject the district court's  
2 determination that the statute of limitations on a class member's  
3 claim does "not begin to run until a prospective class member  
4 inquires about the calculation of his benefits and the Plan  
5 rejects his claim that the benefits were miscalculated," Novella  
6 III, 443 F. Supp. 2d at 545, and the court's consequent finding  
7 that the existence of twenty-four class members whose claims were  
8 therefore timely meant that the class was numerous enough to meet  
9 the requirement of Rule 23(a)(1) of the Federal Rules of Civil  
10 Procedure. They argue that we should instead adopt a strict  
11 first-payment approach under which the statute of limitations for  
12 a miscalculation claim would begin to run when the pensioner  
13 receives his first check.

14           In support, the defendants point to Miller v. Fortis  
15 Benefits Insurance Co., 475 F.3d 516 (3d Cir. 2007), in which the  
16 Third Circuit concluded that the statute of limitations on a  
17 claim that benefits have been miscalculated starts to run when  
18 the calculation or repudiation is both "clear and made known to  
19 the beneficiary." Id. at 521-22. The Miller court observed that  
20 this "ordinarily" will be "when [the beneficiary] first receives  
21 his miscalculated benefit award" because "[a]t that point, the  
22 beneficiary should be aware that he has been underpaid and that  
23 his right to a greater award has been repudiated." Id. The  
24 court explicitly "reject[ed]" the rule proposed by the plaintiff

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like the one at issue in the present appeal, but a denial of  
benefits. We therefore do not think that Larsen provides binding  
Circuit precedent on the statute-of-limitations issue before us.

1 in that case, which would have required a "formal denial of  
2 benefits to trigger the statute of limitations." Id. at 521.  
3 The court did, however, require that a Fund's "repudiation of the  
4 benefits [be] clear and [be] made known to the beneficiary" in  
5 order for the limitations period to begin running. Id. at 520-  
6 21 (emphasis in original). The court explained that it  
7 "consider[ed] the clear repudiation concept to be useful . . . ,  
8 as it represents a refinement of the federal discovery rule in  
9 the context of ERISA claims for benefits." Id. at 521. The  
10 defendants rely on Miller to support their contention that the  
11 Third Circuit has adopted a strict first-payment test for the  
12 accrual of the statute of limitations in ERISA miscalculation  
13 claims, and argue that we should follow suit.

14 Some other courts, however, including the district  
15 court in this case, have required that an ERISA fund provide a  
16 formal denial of a plaintiff's application for the adjustment of  
17 benefits to trigger the running of the statute of limitations.  
18 In Miele v. Pension Plan of New York State Teamsters Conference  
19 Pension & Retirement Fund, 72 F. Supp. 2d 88 (E.D.N.Y. 1999), for  
20 example, the court considered the argument that "a miscalculation  
21 claim accrues on the date that a plaintiff is clearly and  
22 unequivocally informed of the amount of his benefit." Id. at 99.  
23 The court noted the "logic and appeal" of such a "bright-line  
24 rule," which would be "easily enforced and would correspond  
25 directly to the . . . rule that a clear and unequivocal denial of  
26 benefits commences the statute of limitations period." Id.

1 (emphasis added). But, mindful of the fact that "a  
2 miscalculation generally involves an award of benefits rather  
3 than a denial of benefits and thus is less likely to put a  
4 plaintiff on notice of a possible claim," id., the Miele court  
5 applied the rule adopted by the district court here: that "a  
6 miscalculation claim does not accrue until a plaintiff 'inquires  
7 about the amount of benefits and is told that those benefits were  
8 correctly computed.'" Id. (brackets and ellipses omitted)  
9 (quoting Kiefer v. Ceridian Corp., 976 F. Supp. 829, 843 (D.  
10 Minn. 1997)).

11 Still other courts have applied a continuing-violation  
12 theory to the accrual of a claim in similar circumstances. See  
13 Meagher v. Int'l Ass'n of Machinists & Aerospace Workers Pension  
14 Plan, 856 F.2d 1418 (9th Cir. 1988). Under this theory, each  
15 payment based upon an alleged miscalculation "constitutes a fresh  
16 breach by the [defendants] of their duty to administer the  
17 pension plan in accordance . . . with ERISA," gives rise to "[a]  
18 separate cause of action," and starts the running of a new  
19 "limitations period . . . for each cause of action." Id. at  
20 1423. Many courts have, however, expressly rejected this  
21 approach. See, e.g., Miller, 475 F.3d at 522 (collecting Third  
22 Circuit cases declining to apply a continuing-violation approach  
23 to claim accrual); Edes v. Verizon Commc'ns, Inc., 417 F.3d 133,  
24 139-40 (1st Cir. 2005) (rejecting a continuing-violation theory  
25 where the wrongful conduct was the defendant's single  
26 misclassification of plaintiffs as off-payroll employees);

1 Pisciotta v. Teledyne Indus., 91 F.3d 1326, 1332 (9th Cir. 1996)  
2 ("Although the [plaintiffs] now contend that each and every time  
3 that they were entitled to a reimbursement payment it constituted  
4 a new and separate breach of ERISA . . . , the applicable four-  
5 year statute of limitations begins to run 'when a plaintiff knows  
6 or has reason to know of the injury that is the basis of the  
7 action.'"); Phillips v. Alaska Hotel & Rest. Emps. Pension Fund,  
8 944 F.2d 509, 520-21 (9th Cir. 1991) (declining to apply a  
9 continuing-violation approach), cert. denied, 504 U.S. 911  
10 (1992).

11 We do not adopt the continuing-violation theory. We  
12 think that approach is appropriate in ERISA cases, as elsewhere,  
13 only "where separate violations of the same type, or character,  
14 are repeated over time." L.I. Head Start Child Dev. Servs., Inc.  
15 v. Econ. Opportunity Comm'n of Nassau County, Inc., 558 F. Supp.  
16 2d 378, 400 (E.D.N.Y. 2008). Usually, "[t]hese cases are marked  
17 by repeated decision-making, of the same character, by the  
18 fiduciaries." Id. But it is not as clear a fit in cases where,  
19 as here, "the plaintiff['s] claims are based on a single decision  
20 that results in lasting negative effects." Id. at 401; see also  
21 Schultz v. Texaco, Inc., 127 F. Supp. 2d 443, 447 (S.D.N.Y. 2001)  
22 ("[T]he mere fact that the effects of a single, wrongful act  
23 continue to be felt over a period of time does not render that  
24 single, wrongful act a single 'continuing violation.'"); Miele,  
25 72 F. Supp. 2d at 102 n.14 (rejecting application of the  
26 continuing-violation theory of accrual because a pension fund has

1 no obligation "to continually reassess claim denials or benefit  
2 underpayments on a monthly basis").

3 We also decline, however, to accept either of the  
4 approaches urged by the parties. The defendants' bright-line  
5 approach is too harsh in that it places the burden on the  
6 pensioner -- a party less likely to have a clear understanding of  
7 the terms of the pension plan and their application to his  
8 case -- to confirm the correctness of his pension award  
9 immediately upon the first payment of benefits, regardless of the  
10 complexity of the calculations, or of the adequacy of the  
11 defendants' explanation of the basis for the calculation.  
12 Indeed, this case illustrates the hazards of the defendants'  
13 approach. The SPD -- the document provided to all Plan  
14 participants, including Novella and the plaintiff class, to  
15 explain the rules of the pension plan -- is silent on the  
16 underlying issue of multiple benefit calculation rates for  
17 Disability Pensions. And, unlike the simple percentage  
18 calculation at issue in Miller, see Miller, 475 F.3d at 522; cf.  
19 Young v. Verizon's Bell Atl. Cash Balance Plan, 615 F.3d 808, 816  
20 (7th Cir. 2010) (finding a claim timely because the lump-sum  
21 payment the plaintiff received more than six years before was  
22 "not so inconsistent with her current claim for additional  
23 benefits as to serve as a clear repudiation"), cert. denied, 131  
24 S. Ct. 2924 (2011), the determination of a Disability Pension

1 award under the defendants' Plan may have required more than a  
2 simple multiplication of two static numbers.<sup>21</sup>

3 The district court's and Novella's bright-line  
4 approach -- in which a limitations period does not begin to run  
5 "until a prospective class member inquires about the calculation  
6 of his benefits and the Plan rejects his claim," Novella III, 443  
7 F. Supp. 2d at 545 -- also poses problems. Under that approach,  
8 a pensioner could collect benefit checks for twenty or thirty  
9 years without any obligation to inquire as to the correctness of  
10 the calculations underlying the benefit payments and could still  
11 thereafter assert a timely claim for miscalculation. Indeed, as  
12 the defendants point out, at least one class member is long dead.  
13 See Appellants' Br. 29-30. Allowing that class member's  
14 survivors to pursue his claim, the defendants say, despite the  
15 fact that he collected his benefits for years before passing  
16 away, would undermine the purpose of a statute of limitations.  
17 See, e.g., Order of R.R. Telegraphers v. Ry. Express Agency,  
18 Inc., 321 U.S. 342, 348-49 (1944) ("Statutes of limitation . . .  
19 in their conclusive effects are designed to promote justice by  
20 preventing surprises through the revival of claims that have been  
21 allowed to slumber until evidence has been lost, memories have  
22 faded, and witnesses have disappeared."); Carey v. Int'l Bhd. of

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<sup>21</sup> We do not intend to suggest that the underlying basis for the class members' claims was undiscoverable at the time of the first payment. Rather, it is for the district court to determine in the first instance at what point the defendants provided sufficient information to each class member such that that pensioner should have been able to recognize the miscalculation.

1 Elec. Workers Local 363 Pension Plan, 201 F.3d 44, 47 (2d Cir.  
2 1999) ("Statutes of limitation serve several important policies,  
3 including rapid resolution of disputes, repose for those against  
4 whom a claim could be brought, and avoidance of litigation  
5 involving lost evidence or distorted testimony of witnesses.").  
6 To the extent that the defendants could show that the deceased  
7 class member or his survivors had information available to them  
8 by which they reasonably could have discovered the alleged  
9 miscalculation, the district court might well agree with the  
10 defendants that permitting his survivors to assert a claim more  
11 than six years after receiving such information would be  
12 inequitable.

13           Having rejected each party's views, we choose a third  
14 approach: We conclude that notice of a miscalculation can be  
15 imputed to a pensioner -- and the statute of limitations will  
16 start to run -- when there is enough information available to the  
17 pensioner to assure that he knows or reasonably should know of  
18 the miscalculation. We think this approach best balances a  
19 pension plan's legitimate interest in predictability and finality  
20 with a pensioner's equally legitimate interest in having a fair  
21 opportunity to challenge a miscalculation of benefits once it  
22 becomes known -- or should have become known -- to him. Stated  
23 another way, this case-by-case reasonableness inquiry mitigates  
24 some of the harshness of the defendants' proffered approach,

1 while better respecting the defendants' interests in finality and  
2 repose than the district court's and Novella's chosen method.<sup>22</sup>

3 We think this method is consistent with the Third  
4 Circuit's reasoning in Miller, which we read to endorse not a  
5 strict first-payment theory -- such as that urged by the  
6 defendants -- but rather a similar reasonableness approach.  
7 Indeed, in Miller, the Third Circuit appeared to contemplate that  
8 its "clear repudiation" rule would vary in its application to the  
9 facts of any individual case. See Miller, 475 F.3d at 521  
10 (rejecting the plaintiff's "proposed application of the clear  
11 repudiation rule," which would have required an explicit demand  
12 and refusal, and concluding that a court should ask "when a  
13 beneficiary knows or should know he has a cause of action"  
14 (emphasis added)); see also Fletcher v. Comcast Comprehensive  
15 Health and Welfare Plan, No. 09-cv-1272, 2011 WL 743459, at \*5,  
16 \*3, 2011 U.S. Dist. LEXIS 18199, at , \*13, \*14-\*15 (W.D. Pa. Feb.  
17 24, 2011) (noting that "Miller . . . does not stand for the  
18 proposition that every erroneously calculated benefit award  
19 automatically serves as a 'clear repudiation,'" and holding that  
20 "[a] reasonable finder of fact could conclude that . . .  
21 [communications between the Plan and the plaintiff beneficiary]

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<sup>22</sup> And it may be that in many cases, our reasonableness approach will yield the same result as the first-payment theory favored by the defendants, in that the miscalculation will be apparent from the face of a payment check, or will readily be discoverable from information furnished to pensioners by the pension plan at the time the first check is issued, thereby starting the running of the statute of limitations as of that date. Nevertheless, whether that is the case is for each district court to determine in the first instance.



1 did not suffice to alert plaintiff that his benefits were being  
2 repudiated").

3           Turning to the present case: In light of the standard  
4 we adopt, on the factual record before us, we are unable to  
5 determine whether, and if so when, each class member had  
6 information by which he knew or should have known of the  
7 miscalculation. We note that, based on the foregoing discussion,  
8 simply receiving a lower pension payment is not enough to put a  
9 pensioner on notice of a miscalculation. Conversely, actual  
10 notice to a pensioner that a double rate method was used would  
11 put him on notice. Similarly, informing a pensioner of the  
12 correct rate-times-units calculation, so that any difference  
13 between the putative calculation and the actual amount of the  
14 check would be obvious, is also probably enough. However, we  
15 cannot yet tell how many of the class members' claims are timely.  
16 We therefore cannot, at this stage of the proceedings, confirm  
17 the district court's conclusion that the class is sufficiently  
18 large to satisfy Rule 23(a)(1)'s numerosity requirement.

19           We therefore vacate the class certification and remand  
20 to the district court for further factfinding regarding when each  
21 plaintiff class member knew or should have known that the Fund  
22 had miscalculated his Disability Pension payments, and for  
23 consideration of whether there are enough class members with  
24 timely claims to merit certification. We therefore also vacate  
25 the summary judgment in favor of the class.

1           Finally on this score, we note that the approach we  
2 adopt may in some cases require a resource-intensive, claimant-  
3 by-claimant inquiry to determine when a pensioner knew or  
4 reasonably should have known that his benefits were  
5 miscalculated. And this fact-dependent inquiry into each  
6 pensioner's accrual date may in turn lessen the value, and indeed  
7 the availability, of class actions in this kind of litigation.  
8 However, that sort of problem is not unique to this context.  
9 See, e.g., Avila v. Willits Env't'l Remediation Trust, 633 F.3d  
10 828, 841-42 (9th Cir.) (concluding that material issues of fact  
11 precluded summary judgment regarding whether certain class  
12 members in toxic-tort class action knew or should have known of  
13 their injuries), cert. denied, 2011 WL 4530474, 2011 U.S. LEXIS  
14 5526 (Oct. 3, 2011); In re Brooklyn Navy Yard Asbestos Litig.,  
15 971 F.2d 831, 836 n.1 (2d Cir. 1992) (differentiating between  
16 joint trials which are "not questioned by plaintiffs or  
17 defendants" in mass tort cases from the issue of "the propriety  
18 of class actions" in such cases).

19           Moreover, the fact-intensive nature of our  
20 reasonableness approach could make it difficult for a potential  
21 class representative to meet the typicality requirement of Fed.  
22 R. Civ. P. 23(a)(3). But the case law on the effect of an  
23 individualized statute-of-limitations-accrual evaluation on a  
24 proposed class's ability to meet the typicality requirement, if  
25 any, is sparse, see Chiang v. Veneman, 385 F.3d 256, 269 (3d.  
26 Cir. 2004); Ruppert v. Alliant Energy Cash Balance Pension Plan,

1 255 F.R.D. 628, 633-34 (W.D. Wis. 2009), and we decline to  
2 address whether that requirement is satisfied on the record  
3 before us. We note, however, the well-established rule that a  
4 plaintiff must satisfy all of the requirements of Rule 23, by a  
5 preponderance of the evidence, to obtain class certification, see  
6 Teamsters Local 445 Freight Div. Pension Fund v. Bombardier,  
7 Inc., 546 F.3d 196, 202 (2d Cir. 2008); In re Initial Pub.  
8 Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006), including  
9 the numerosity and typicality requirements of Rule 23(a), see  
10 Marisol A. v. Giuliani, 126 F.3d 372, 375-76 (2d Cir. 1997)  
11 (citing Comer v. Cisneros, 37 F.3d 775, 796 (2d Cir. 1994)).

12 2. Novella's Cross-Appeal. We find no merit in  
13 Novella's contention, asserted in his cross-appeal, that the  
14 certified class was too narrow inasmuch as the district court  
15 should not have limited it to persons receiving Disability  
16 Pensions.

17 Novella's amended complaint asserted claims relating  
18 both to the two-rate calculation for disability pensioners and to  
19 the Plan's "accrued benefit" provisions. See J.A. 30-31. The  
20 district court granted summary judgment to Novella on his  
21 individual Disability Pension claims and did not reach the other  
22 "accrued benefit" claims, but rather dismissed them as moot in  
23 light of the fact that the other claims would entitle Novella to  
24 no further relief. When Novella subsequently moved for class  
25 certification with regard to both the Disability Pension claim  
26 and the other claims, the district court certified only the

1 former class because it concluded that Novella lost standing to  
2 pursue the "accrued benefit" claims when he had already  
3 "succeeded on an alternative theory of recovery." Novella II,  
4 2004 WL 3035405, at \*4, 2004 U.S. Dist. LEXIS 26149, at \*13.

5 Novella asserts in his cross-appeal that the district  
6 court "confused the mootness of an issue with the mootness of a  
7 case," Appellee's Br. 16 (emphasis in original), and therefore  
8 erred in dismissing Novella's non-Disability Pension claims as  
9 "moot." We agree that the claims were not "moot" in the  
10 technical sense; "it is cases rather than reasons that become  
11 moot" within the meaning of Article III.<sup>23</sup> Air Line Pilots Ass'n  
12 Int'l v. UAL Corp., 897 F.2d 1394, 1397 (7th Cir. 1990). But  
13 where, as here, a litigant asserts multiple arguments in support  
14 of the relief he seeks, and the court grants him complete relief  
15 based upon one contention, courts also sometimes use "the word  
16 'moot' . . . to refer to an issue that need not be decided in  
17 light of the resolution [by the court] in the same opinion of  
18 another issue." Id. It is in this sense that we understand the  
19 district court to have said that some of Novella's claims were  
20 "moot."

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<sup>23</sup> Mootness in the Article III sense occurs when there "no longer is an actual controversy between adverse litigants," and the plaintiff therefore lacks standing to continue to pursue his claims in federal court. Erwin Chemerinsky, Federal Jurisdiction 130 (5th ed. 2007); see also In re Zarnel, 619 F.3d 156, 162 (2d Cir. 2010); County of Suffolk, N.Y. v. Sebelius, 605 F.3d 135, 140 (2d Cir. 2010); ABN Amro Verzekerings BV v. Geologistics Americas, Inc., 485 F.3d 85, 94 (2d Cir. 2007); Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 205 (5th ed. 2003) (summarizing the "foundations" of the mootness doctrine).

1           In any event, we agree with the district court's  
2 decision not to certify the broader class. It was Novella's  
3 choice to proceed individually first and only later move for  
4 class certification. In his briefing on his individual motion  
5 for summary judgment, Novella offered his various arguments in  
6 support of his motion in the alternative. See Novella I, 2004 WL  
7 1752820, at \*2, 2004 U.S. Dist. LEXIS 1266, at \*6. The district  
8 court granted Novella complete relief on one claim and, in the  
9 exercise of its discretion, did not decide the merits of the  
10 others. It is the latter, unresolved claims that relate to the  
11 broader class for which Novella later sought certification. But  
12 by the time Novella moved for class certification, his individual  
13 claims no longer matched the claims of the broader purported  
14 class, and he therefore was no longer an appropriate  
15 representative of that broader class.<sup>24</sup> Stated otherwise,  
16 Novella's interest as a litigant would be to pursue the claim  
17 based on the Disability Pensions, while some class members'  
18 interest would be to pursue the claims based on the Plan's  
19 "accrued benefit" provisions instead. Novella therefore would  
20 not satisfy the typicality or adequacy-of-representation prongs  
21 of Rule 23(a).

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<sup>24</sup> Notwithstanding Novella's success on his individual claim, Novella had standing to represent the class of Disability Pension recipients inasmuch as the district court had not yet reduced Novella's victory to a final judgment.

1           III. Prejudgment Interest

2     A. Standard of Review

3           "The decision whether to grant prejudgment interest and  
4 the rate used if such interest is granted are matters confided to  
5 the district court's broad discretion, and will not be overturned  
6 on appeal absent an abuse of discretion." Endico Potatoes, Inc.  
7 v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1071-72 (2d Cir.  
8 1995) (internal quotation marks omitted); see also Slupinski v.  
9 First Unum Life Ins. Co., 554 F.3d 38, 53-55 (2d Cir. 2009);  
10 Commercial Union Assurance Co. v. Milken, 17 F.3d 608, 613-15 (2d  
11 Cir.), cert. denied, 513 U.S. 873 (1994).

12     B. The Merits

13           The district court awarded prejudgment interest to both  
14 Novella -- beginning on the date the Fund denied his claim -- and  
15 to the individual class members -- beginning on the date Novella  
16 first asserted the class claims. We find no abuse of discretion  
17 in the district court's award of prejudgment interest to Novella  
18 individually or in its selection of the appropriate rate.<sup>25</sup> We  
19 nonetheless vacate the award of prejudgment interest to the class  
20 in light of our determination that we must decertify the class  
21 and vacate the judgment in its favor.

22           The defendants argue that the district court's award of  
23 prejudgment interest to Novella amounts to a "windfall" because

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<sup>25</sup> Although ERISA does not explicitly provide for  
prejudgment interest, courts can make such awards as part of  
their "wide discretion in fashioning equitable relief to protect  
the rights of pension fund beneficiaries." Katsaros v. Cody, 744  
F.2d 270, 281 (2d Cir.), cert. denied, 469 U.S. 1072 (1984).

1 such an award would compensate him without regard to his break in  
2 service, even though his employers did not pay contributions to  
3 the Fund during that time. But this argument essentially  
4 restates the defendants' arguments on the merits of the two-rate  
5 calculation, which we have rejected. To the extent that the  
6 payment of prejudgment interest creates a financial burden on the  
7 Fund, that is a result of the Fund's misinterpretation of its own  
8 Plan. It does not render the district court's conclusion that  
9 prejudgment interest is necessary to fully compensate Novella an  
10 abuse of discretion.

11 We similarly conclude that the district court's  
12 determination that the proper interest rate is 7.5 percent -- the  
13 Fund's assumed rate of return -- was within its discretion. In  
14 light of the other options before the court, this rate seems to  
15 us to be entirely consistent with the principle that plaintiffs  
16 should be "made whole" and that defendants should "not profit by  
17 their failure to comply with their ERISA obligations." Algie v.  
18 RCA Global Commc'ns, Inc., 891 F. Supp. 875, 899 (S.D.N.Y. 1994),  
19 aff'd, 60 F.3d 956 (2d Cir. 1995); see also Slupinski, 554 F.3d  
20 at 54 (quoting Algie, 891 F. Supp. at 899).

21 We find no merit in Novella's argument that the  
22 district court should have awarded prejudgment interest from the  
23 date of the first miscalculated check. In his R&R, the  
24 magistrate judge acknowledged three possible dates for the  
25 accrual of prejudgment interest: "the date of each underpayment,  
26 the date that a plaintiff asserted a claim, or the date that the

1 Fund denied the claim." Novella IV, 2007 WL 2582171, at \*6, 2007  
2 U.S. Dist. LEXIS 66235, at \*18. The R&R recommended -- and the  
3 district court concluded -- that it would, in this case, be  
4 "anomalous to calculate interest from the date of injury, since  
5 it was within the power of the plaintiffs to assert a claim of  
6 underpayment at any time and thus trigger review by the Fund."  
7 Id., 2007 U.S. Dist. LEXIS 66235, at \*19. We have been given no  
8 reason to conclude that the district court abused its discretion  
9 in this regard.

10 **CONCLUSION**

11 For the foregoing reasons, we affirm the district  
12 court's judgment in favor of Novella on his individual ERISA  
13 claims and its award to Novella of prejudgment interest. We  
14 vacate the district court's certification of the class of  
15 Disability Pension recipients, its grant of judgment on the  
16 merits in favor of the class, and its award of prejudgment  
17 interest to the class members. We remand the case to the  
18 district court for further proceedings.

19 Each party shall bear its own costs.