No. 22-1733

United States Court of Appeals for the Second Circuit

WILLIAM CHANDLER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of New York
Case No. 21-cv-6319 – Judge John G. Koeltl

PLAINTIFF-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

In its Response Brief, IBM claims Plaintiff's arguments are absurd. But it is IBM that advances an absurd argument – that it can use its arbitration agreement to take away the rights of hundreds, if not thousands, of employees to pursue age discrimination claims – rights that they clearly would have been able to pursue in court. Although IBM points to five lower courts (including the District Court in this case) that have surprisingly agreed with IBM's position, those courts all simply echoed one another. And they are wrong. This appeal (along with the others being heard with it) is thus vitally important, as it will be the first appellate decision that can correct the lower court decisions that have allowed IBM to use its arbitration agreements to extinguish the rights of numerous older workers to pursue their claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* – even in the face of blatant and shocking discriminatory conduct by IBM.[1]

[1] In addition to the plaintiffs in the cases that will be heard with this appeal, there are hundreds of additional employees who have attempted, or are trying, to pursue arbitrations against IBM to challenge its egregious

First, contrary to IBM's arguments, the District Court erred by declining to enforce the timeliness provision through which IBM effectively extinguished Plaintiff's ability to bring an ADEA claim in arbitration. As explained in greater detail in the plaintiffs' reply brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, IBM is incorrect to argue that the ADEA limitations period (and thus the piggybacking rule) is a procedural right that can be waived in an arbitration agreement.

Second, IBM makes an argument in the alternative that Plaintiff's Complaint is merely an untimely motion to vacate the arbitration award, but this argument fails.

Third, the District Court erred in refusing to excise the unconscionable confidentiality provision from the arbitration agreement. Here, there is ample reason for this Court to declare the confidentiality provision invalid, as set forth in Plaintiff's opening brief and as *demonstrated* by the fulsome evidentiary record that Plaintiff was required

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discriminatory behavior. This appeal will determine whether these employees can have their claims heard.

to submit in bringing this challenge.

Finally, IBM argues that the District Court was correct to seal permanently portions of the summary judgment briefing and supporting evidence. But IBM's position runs directly contrary to Second Circuit law and should be rejected. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006).

ARGUMENT

I. The District Court Erred by Declining to Enter a Declaration that the Timing Provision of IBM's Arbitration Agreement (that IBM Contends Waives the Piggybacking Rule) is Unenforceable

Plaintiff should be able to assert an ADEA claim in arbitration to the same extent he would be able to in court. If the District Court's decision is affirmed, Plaintiff will have been deprived of his ability to pursue his claim in arbitration, even though his claim would be unquestionably timely if Plaintiff could assert it in court. This result would run headlong into the Supreme Court's admonition in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), that while an arbitration agreement may be enforceable with respect to an ADEA claim, "the prospective litigant [must be able to]

effectively . . . vindicate his or her statutory cause of action in the [specific] arbitral forum."

Here, the District Court's decision has allowed IBM's arbitration agreement to impede the ADEA's remedial and deterrent function by transforming the deadline to file an EEOC charge into a procedural hurdle that Congress did not intend. This Court has held that "the charge filing requirement of section 7(d) [of the ADEA] sets a time limit, **not for the purposes of limiting time for suit**, but for the purpose of affording a prompt opportunity to attempt conciliation." *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1059 (2d Cir. 1990) (emphasis added). For that reason, this Court held that employees can use the piggybacking rule to pursue ADEA claims, which allows them to "piggyback" on a timely filed class charge even when they have not themselves timely filed an EEOC charge. *See id.* at 1058-59.

The timeliness provision in IBM's arbitration agreement (at least as IBM and the arbitrators here have interpreted it) treats the ADEA's charge-filing deadline as a bright-line cutoff for individuals to initiate their claims

in arbitration. IBM's clear goal has been to wield its arbitration agreement to cut off liability for age discrimination claims in a way it could not do in court.

IBM argues that the timeliness provision is permissible because it provides Plaintiff a "fair opportunity" to pursue a claim in arbitration by giving him the same amount of time to initiate arbitration that he would have to file an EEOC charge. However, this argument simply ignores that (outside of the arbitration context) plaintiffs do *not* have to bring discrimination claims within the deadline for filing an EEOC charge – instead, they are allowed to piggyback on class claims (thus allowing employees who may not have reason to know at the time of their termination that they had a viable discrimination claim, to still pursue such a claim, even if they only realize later that they were discriminated against). IBM's attempt to use the arbitration agreement to shut down ADEA claims that plaintiffs would be able to pursue timely in court does not allow for "effective vindication" of their claims.

Plaintiff respectfully directs the Court to the reply brief of the

plaintiffs in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, which addresses IBM's arguments in further detail. To briefly reiterate, while IBM contends that the piggybacking rule is not a limitations doctrine and instead just an administrative exhaustion doctrine, numerous courts, including this one, have held otherwise. Moreover, while IBM argues that the piggybacking rule is a procedural rule that can be waived by contract, IBM is wrong for the reasons discussed in Plaintiff's Opening Brief as well as the briefing in *In Re: IBM*.

Finally, IBM argues that Plaintiff waived his piggybacking argument, because he seeks to incorporate the argument from a different case. IBM already unsuccessfully advanced this argument in its opposition (Dkt. 57) to Plaintiff's motion (Dkt. 47) for the Court to hear this appeal in tandem with three other appeals, which the Court rejected (at least implicitly) by granting Plaintiff's motion. *See* Order at 2, Dkt. 70.

IBM now repeats the same arguments that were already rejected, citing an out-of-circuit case, *United States v. Johnson*, 127 F. App'x. 894, 901 n.4 (7th Cir. 2005). But this case is more akin to *In re National Sec. Agency*

Telecommunications Records Litig., 669 F.3d 928, 931 (9th Cir. 2011), where appellant was permitted to incorporate by reference additional arguments made in a companion appeal because "the cases have followed a parallel path through the MDL process, so in this rare circumstance we accept the incorporation."

Here, 30 plaintiffs filed materially identical complaints with the Southern District of New York between July 23 and 27, 2021. Judge Furman consolidated 26 of those cases, and the other cases (including this one) were not consolidated. Nevertheless, the parties briefed identical issues in these cases on parallel tracks, and the district courts[2] all issued their decisions between July and September 2022. Then, because these matters raise overlapping issues and similar arguments, this Court ordered that the appeals of those decisions be heard in tandem. *See* Order at 2, Dkt. 70. Given the parallel paths these cases have taken, and the overlapping issues they present, Plaintiffs appropriately cross-referenced their respective

[2] *Lohnn* was resolved prior to a final decision being issued. *See Lohnn v. International Business Machines Corp.*, Stipulation of Dismissal, Civ. Act. No. 21-cv-6379, Dkt. 80 (S.D.N.Y. Aug. 15, 2022).

briefs. *See id.*

Moreover, IBM is simply wrong that Plaintiff waived his argument. In each of the appeals, plaintiffs argued each issue, though did so more expansively in one or more of the opening briefs. No arguments were waived.

II. IBM Mischaracterizes Plaintiff's Complaint as an Untimely Attempt to Vacate the Arbitration Award

The Court should reject IBM's efforts to construe Plaintiff's Complaint is a belated vacatur motion. IBM's arbitration agreement does not impose a deadline for seeking a judicial determination around the validity or enforceability of its provisions, and the Court should not graft the timeline contemplated by Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, onto this proceeding.

Indeed, Section 10 of the FAA lists specific grounds for seeking to vacate an arbitration award, *see* 9 U.S.C. § 10. A challenge to the "enforceability of the provisions" governing an arbitration proceeding is not contemplated by Section 10. *See generally id*. Rather, the only way for the Plaintiff to seek a determination that the timeliness provision is

unenforceable is through a declaration by a court.[3] And there is *no* requirement that such an action be brought by way of a petition to vacate or within the same "window" as petitions to vacate.

And if Plaintiff had sought declaratory relief prior to going to arbitration, it is likely the court would have held that the claims were not ripe, because it was not clear that the arbitrator would hold the claims to be untimely. *See, e.g., Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino*, 640 F.3d 471, 476-78 (1st Cir. 2011).

In sum, Plaintiff does not ask the Court to vacate the arbitration award – he simply asks for a declaration regarding the validity of timing and confidentiality provisions. Should the Court declare that the timing provision is unenforceable, Plaintiff will then file a motion before the arbitrator pursuant to Fed. R. Civ. P. 60 for relief from judgment.

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3 [redacted]

III. The District Court Erred by Declining to Enter a Declaration that the Confidentiality Provision of IBM's Arbitration Agreement is Unenforceable

The confidentiality provision in IBM's arbitration agreement unduly impedes its former employees' ability to advance their age discrimination claims in arbitration and should be declared invalid. Plaintiff presented a full record demonstrating the ways in which his ADEA claim was unfairly impeded by the confidentiality provision, as this Court requires for such a challenge under *Am. Fam. Life Assurance Co. of N.Y. v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019). However, the District Court refused even to consider it, and it dismissed Plaintiff's challenge.

A. The Court Can Strike Unenforceable Terms from the Arbitration Agreement Without a Showing of Procedural Unconscionability

In this case, Plaintiff is not bringing a challenge to the arbitration agreement as a whole on unconscionability grounds; rather, Plaintiff merely asks the Court to excise certain unconscionable provisions from IBM's arbitration agreement and then allow the case to proceed in arbitration. Courts routinely order this *precise* relief, excising substantively

unconscionable provisions and otherwise enforcing arbitration agreements as a whole. *See, e.g.*, *Am. Fam. Life Assurance Co. of N.Y. v. Baker*, 848 Fed. App'x. 11, 13 (2d Cir. 2021) (explaining that had defendant not waived unconscionable term, "the correct remedy under New York law would be to sever [the unconscionable paragraph] and enforce the Agreement's remaining terms"). And critically, courts do so *without* a showing of procedural unconscionability. *See, e.g.*, *Valle v. ATM Nat., LLC*, 2015 WL 413449, at *7 (S.D.N.Y. Jan. 30, 2015). The District Court erred in undertaking an analysis requiring a showing of procedural unconscionability and by failing to grant Plaintiff's requested relief.

IBM's Response seeks to muddy this Court's review of Plaintiff's straightforward request for an excision of the unconscionable confidentiality provision. Indeed, IBM argues (incorrectly) that this Court's decision in *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125 (2d Cir. 2010), stands for the proposition that "[s]ince Plaintiff did not argue that the Confidentiality Provision is exceptional or outrageous, he was required to establish that it is both procedurally *and* substantively

unconscionable." Response at 40 (quotation marks, citation, and alterations omitted).

As an initial matter, *Ragone* makes no such proclamation – to the contrary, *Ragone* makes clear that a procedural unconscionability showing is *not* required for a court to excise a substantively unconscionable term from an arbitration agreement. IBM would have this Court impose a bright-line rule whereby parties bringing unconscionability challenges in the absence of procedural unconscionability must utilize the magic words "exceptional" and "outrageous" – *regardless* of the circumstances of the actual challenge. The Court should reject this nonsensical assertion and find that Plaintiff has demonstrated sufficient substantive unconscionability to warrant excising the confidentiality provision.

First, in *Ragone*, this Court made clear that a showing of procedural unconscionability is not required where a party seeks to excise unconscionable terms from an otherwise enforceable arbitration agreement. The court enforced an arbitration agreement where the defendants agreed to waive two provisions that "otherwise might be

unconscionable." *Ragone*, 595 F.3d at 125 (explaining that "the appropriate remedy when a court is faced with a plainly unconscionable provision of an arbitration agreement—one which by itself would actually preclude a plaintiff from pursuing her statutory rights—is to sever the improper provision of the arbitration agreement, rather than void the entire agreement.") (internal citation and quotation marks omitted).[4] The court enforced the agreement "with something less than robust enthusiasm" and had the defendants not waived these provisions, "it is not clear" that the court would have held in defendants' favor. *Id.* Critically, the court reached this conclusion after finding that procedural unconscionability was *wholly lacking*. *See id.* at 122. The absence of procedural unconscionability did not end the court's analysis; rather, the court enforced the arbitration agreement without the terms at issue, just as Plaintiff asks the Court to do

[4] *Ragone* cited *Schreiber v. K–Sea Transportation Corp.*, wherein the New York Court of Appeals found that *regardless* of whether the arbitration agreement at issue in that case was the product of deception, if arbitration were to be compelled, the provision requiring the plaintiff to bear costs should be not be enforced, as such a provision would "would effectively preclude him from pursuing his claim." 9 N.Y.3d 331, 849 N.Y.S.2d 194 (2007).

here.[5] *See also, e.g., Valle v. ATM Nat., LLC*, No. 14-CV-7993 KBF, 2015 WL 413449, at *7 (S.D.N.Y. Jan. 30, 2015); *accord. Am. Fam. Life Assurance Co.*, 848 Fed. App'x. at 13 (explaining "New York courts generally honor the state and federal policy favoring arbitration by severing the improper provision of the arbitration agreement, rather than voiding the entire agreement," by severing "a single, isolated provision in an otherwise valid arbitration agreement" and engaging in no discussion of procedural unconscionability) (internal quotation marks, alterations, and citations omitted).[6]

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[5] For this reason, IBM's attempts to distinguish between a "remedy" and a "standard" is a non-starter – even accepting IBM's arguments, in fashioning the "remedy" of striking unconscionable provisions, courts do so without a showing of procedural unconscionability. It logically follows that the applicable standard does not require a showing of procedural unconscionability.

[6] IBM cites three cases that it contends should compel the Court to impose a procedural unconscionability requirement to Plaintiff's request to excise the confidentiality provision, *see* Response at 41; however, none involved arbitration agreements or the type of challenge that Plaintiff advances here.

Second, IBM contorts *Ragone*, arguing that Plaintiff was required to label the unconscionability in this case as "exceptional" or "outrageous" in order to obtain his requested relief. But *Ragone* (and *Schreiber*) do not impose such a requirement. Notably, these cases discuss striking substantively unconscionable terms that hinder a parties' ability to pursue their claims – *precisely* the basis for Plaintiff's challenge here. *See Ragone*, 595 F.3d at 125; *Schreiber*, 9 N.Y.3d at 341.

Moreover, Plaintiff submits that he has met any "exceptional" or "outrageous" standard and directs the Court to his Opening Brief as well as the argument in section III.B *infra*. IBM faults Plaintiff for not labeling his arguments as such, but at the same time, IBM points to *Valle*, 2015 WL 413449, as providing an example of such an "exceptional or outrageous provision." Nowhere in *Valle* did the court utilize the terms "exceptional" or "outrageous" when severing an unconscionable provision without a showing of procedural unconscionability. *See generally id.*

At bottom, Plaintiff was not required show procedural unconscionability to support the relief requested.

B. The Confidentiality Provision is Substantively Unconscionable and Should Not Be Enforced

As detailed in Plaintiff's Opening Brief, Plaintiff has demonstrated through an evidentiary record that the confidentiality provision is unconscionable and has hindered arbitration claimants' ability to pursue their cases. [redacted] As a consequence, these arbitration claimants have been hampered in advancing their age discrimination claims in arbitration.

While IBM's Response argues generally that courts have upheld confidentiality provisions, *see* Response at 46, the majority of states (and federal courts addressing state laws) that have addressed the issue presented here issue head on have rejected the use of confidentiality clauses that are used to impede the pursuit of civil rights claims, or claims under other remedial statutes such as wage and hour or consumer

protection claims, and, as discussed in Plaintiff's Opening Brief, it appears that New York courts would follow the majority of states to address this issue directly.[7]

The District Court erred in refusing to excise the unconscionable confidentiality provision.

i. IBM Incorrectly Argues for a *Per Se* Rule That Contractual Confidentiality Provisions Must Be Enforced Regardless of the Circumstances

IBM argues that the confidentiality provision must stand because confidentiality is a "standard term," *see* Response at 44, and that "confidentiality is a paradigmatic aspect of arbitration . . . .," *id.* at 45

[7] *See, e.g., Ramos v. Superior Court*, 28 Cal. App. 5th 1042, 1065-66 (2018); *Narayan v. The Ritz-Carlton Development Co., Inc.*, 140 Hawai'i 343, 355 (2017); *Henderson v. Watson*, 2015 WL 2092073, at *3 and n. 3 (Nev. April 29, 2015); *Longnecker v. American Exp. Co.*, 23 F. Supp. 3d 1099, 1111 (D. Ariz., May 28, 2014); *Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012); *Post v. Procare Automotive Serv. Solutions*, 2007 WL 1290091, at *3 (Ohio Ct. App. May 3, 2007); *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1, 42 (Ill. 2006); *Sprague v. Houseld Intern.*, 473 F. Supp. 2d 966, 975 (W.D. Mo. 2005); *Zuver v. Airtouch Communications, Inc.*, 153 Wash. 2d 293, 312-21 (2004); *Taylor v. Ash Grove Cement Co.*, 2004 WL 1382726, at *9 (D. Or. Feb. 25, 2004). These cases are discussed in further detail in Plaintiff's Reply in the District Court proceedings, 21-cv-06319, Dkt. No. 47.

(quoting *Guyden v. Aetna*, 544 F.3d 376, 385 (2d Cir. 2008)). IBM advances a wildly overbroad proposition – that confidentiality provisions in arbitration agreements are *always* enforceable, no matter the factual circumstances.

Here, Plaintiff recognizes that while the mere presence of a confidentiality provision in an arbitration agreement does not render it unenforceable, such a provision may be unenforceable where, as here, there is a record demonstrating that the provision has unfairly advantaged one party over the other. Plaintiff has submitted a fulsome evidentiary record demonstrating that the confidentiality provision has severely prejudiced IBM's former employees, as IBM has aggressively wielded it to prevent those employees from using (and even obtaining) essential evidence and decisions issued in similar arbitrations.[8] While IBM argues that the confidentiality provision is a "standard term" that is "applied equally" to IBM and its former employees and that courts have upheld

8 [redacted]

similar provisions, the evidentiary record *in this case* demonstrates that these arguments ring hollow and should be rejected.

ii. The District Court Erred in Refusing Even to Consider The Fulsome Evidentiary Record, and IBM Does Not Establish Otherwise

As explained in Plaintiff's Opening Brief, the Court erred in refusing even to consider the evidentiary record that Plaintiff was required to submit to bring his challenge to the confidentiality provision.

IBM contends that the District Court properly dismissed Plaintiff's claims on the pleadings, without considering the evidentiary record, arguing first that Plaintiff's claim is time-barred so the Court properly dismissed his challenge. *See* Response at 50-51. But this argument fails, as the Court should find that Plaintiff's ADEA claim *is* timely.

IBM next mischaracterizes the unconscionability challenge, arguing that the Court was not required to consider Plaintiff's evidentiary record because "requiring that [Plaintiff] develop an evidentiary record through his own discovery efforts pursuant to the discovery mechanisms in his own arbitration agreement would not, as a matter of law, unconscionably

prevent him from fairly pursuing his claim," *see* Response at 50. But IBM misstates the nature of the unconscionability challenge and inappropriately seeks to impose a bright-line rule of law that a confidentiality provision is *per se* enforceable, no matter the circumstances, as long as there is an allowance for some discovery in arbitration. This position is untenable.

Critically, IBM does not meaningfully counter that applicable precent *requires* Plaintiff to make an evidentiary showing to establish that the confidentiality provision is unduly hindering arbitration claimants' ability to pursue their cases. *See Am. Fam. Life Assurance Co.*, 778 Fed. App'x. at 27 ("[i]f arbitration proceedings ultimately unfold, the parties are free to contest the enforceability provision as applied to them . . . ."); *Guyden*, 544 F.3d at 387 (recognizing that a provision that deprived a claimant of "a meaningful opportunity to present her claim" "might well be unenforceable.") (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000), for the proposition that where an arbitration claimant argues that a provision of the agreement is invalid because it deprives the claimant of a meaningful opportunity to present the claim, the provision

must be enforced unless the record demonstrates that the concerns are well-founded). Indeed, "unless *Green Tree* and *Guyden* are to be empty letters, a plaintiff must be allowed to present a record that the effect of a challenged arbitration provision is to deprive her of a meaningful opportunity to present her claim." *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022).[9]

Instead, IBM does not even address *Green Tree*, and it wrongly characterizes *Am. Fam. Life Assurance Co.* and *Guyden* as irrelevant. IBM misleadingly posits that *Am. Fam. Life Assurance Co.* did not concern "whether a challenge to a standard confidentiality term may be dismissed on the pleadings when it fails as a matter of law," Response at 51, but this point is of no moment. Indeed, Plaintiff cites *Am. Fam. Life Assurance Co.* for the proposition that parties can challenge the enforceability of confidentiality provisions by showing the ways the provision is unduly

[9] IBM's assertion that *Lohnn* should be disregarded because it "had nothing to do with whether the district court could grant IBM's motion to dismiss," Response at 52, misses the mark. *Lohnn* detailed the applicable standard and showing that Plaintiff was required to make in order to bring his challenge.

hindering the claimants' ability to pursue their cases in arbitration – a proposition that IBM does not refute.

IBM likewise misleadingly argues that because *Guyden* "*affirmed* the dismissal of an unconscionability claim" related to confidentiality, *Guyden* therefore illustrates that the district court was not required to consider an evidentiary record, *see* Response at 51 (emphasis in original). *Guyden* involved the whistleblower protection provision of the Sarbanes–Oxley Act, and the confidentiality challenge that IBM points to concerned a general challenge to the notion that SOX claims could be addressed out of the public eye in arbitration. 544 F.3d 376, 379 (2d Cir. 2008).[10] But here, Plaintiff is not asserting that confidentiality is intrinsically at odds with the ADEA. Instead, he asserts that IBM has wielded its confidentiality clause in a manner to unfairly inhibit its employees' ability to vindicate their rights under the ADEA, and under such circumstances, the confidentiality

[10] It bears noting that Congress disagreed with *Guyden's* conclusion regarding confidentiality and amended SOX to forbid arbitration of whistleblower claims. *See Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 421 (S.D.N.Y. 2012) (citing 18 U.S.C. § 1514A(e)(2)).

provision is unenforceable. It is this type of challenge that *Guyden* later makes clear requires an evidentiary record, *see id.* at 386; *accord Lohnn*, 2022 WL 36420, at *11-12.

Here, as in *Lohnn*, which involved a substantially similar evidentiary record, Plaintiff "has presented examples of the types of evidence that would be available to [him] but for the effect of the confidentiality clause and that, if available, would enable [him] to vindicate [his] rights under the ADEA. That evidence is directly relevant to [his] claim." *Lohnn*, 2022 WL 36420, at *12. Plaintiff has also presented "evidence that IBM, and arbitrators, have taken positions that prevent such evidence from being used." *Id.* The *Lohnn* court correctly found that "[t]his information is necessary for the Court to understand and decide the merits of the motion for summary judgment." *Id.*

While IBM suggests that Plaintiff advances a bright-line rule that "no unconscionability claim may ever be subject to a Rule 12(b)(6) motion," citing cases that dismissed unconscionability claims generally, *see* Response at 52 – this statement ignores the particular challenge at issue in case and

this Court's (and Supreme Court) precedent regarding the record that Plaintiff was required to present. It is in fact IBM that would impose a bright-line rule and have the Court abandon this precedent.

iii. IBM's Remaining Arguments Should Be Rejected

IBM makes several additional arguments that it claims demonstrate the lack of substantive unconscionability present here. Each should be rejected.

First, IBM argues, citing *Kopple v. Stonebrook Fund Mgmt., LLC*, 875 N.Y.S.2d 821, 2004 WL 5653914 (Sup. Ct. 2004), *aff'd*, 794 N.Y.S.2d 648 (2005), that Plaintiff "would have been free to use the discovery process in arbitration to seek any relevant evidence, including evidence that other claimants obtained by using the discovery devices in their own confidential arbitrations." Response at 47-48. IBM asserts that *Kopple* establishes a bright-line rule that, "as a matter of law" a confidentiality provision does not "inhibit a party from preparing his case as long as the parties may engage in discovery." Response at 48 (quotation marks and citation omitted).

But IBM takes *Kopple* too far. *Kopple* does not establish a rule of law that a confidentiality provision is *per se* enforceable, no matter the circumstances, as long as there is an allowance for some discovery in arbitration. Indeed, *Kopple* did not concern a challenge to the confidentiality provision like that presented here, with a fulsome record demonstrating numerous ways in which arbitration claimants have been prejudiced. Rather, *Kopple* involved a single arbitration where the plaintiff sought to enjoin enforcement of the arbitration agreement *with no record* demonstrating the ways in which the confidentiality provision would undermine his ability to advance his claim. 2004 WL 5653914, at *1-3.

Moreover, IBM's arguments do not address the fact that IBM's wielding of its confidentiality provision has blocked arbitration claimants from obtaining and utilizing both critical evidence *as well as* decisions and orders entered in other similar arbitrations. Further, Plaintiff's summary judgment record demonstrates why the assumption by the District Court (and misrepresentation by IBM) of the adequacy of discovery in arbitration does not suffice. IBM has wielded its confidentiality provision to prevent

former employees in arbitration from obtaining and using critical evidence, which, as explained in Plaintiff's Opening Brief, has the effect of improperly narrowing the scope of discovery.

As this Court has explained, "[b]ecause employers rarely leave a paper trail – or 'smoking gun' – attesting to a discriminatory intent, disparate treatment plaintiffs must often build their cases from pieces of circumstantial evidence," which includes "[e]vidence relating to company-wide practices." *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990).[11] Even within the context of the arbitration discovery process, IBM's wielding of its confidentiality provision has left arbitration claimants unable to point to broadly applicable pattern and practice evidence that would otherwise be used to support a motion to compel discovery to demonstrate the relevance and import of discovery requested. [redacted]

[redacted]

[11] Plaintiff cites *Hollander* to emphasize this Court's recognition of the import of pattern and practice evidence in age discrimination cases. While IBM attempts to distinguish *Hollander* because it did not concern a confidentiality clause, *see* Response at 48, this distinction is of no moment.

[redacted]

Thus, as a result, many employees pursuing age discrimination claims against IBM have been prevented from obtaining and presenting shocking, "smoking gun" pattern and practice evidence that their counsel have obtained, all as a result of the aggressive way that IBM has wielded the confidentiality provision. While confidentiality may be commonplace in arbitration, employers should not be able to use confidentiality agreements in this way to prevent employees from vindicating their rights under civil rights laws, such as the ADEA. Allowing IBM to do so runs counter to *Gilmer*, which made clear that arbitration is a viable alternative

to court only if employees are able to vindicate their rights in arbitration, just as they would be able to do in court.

Contrary to IBM's arguments, Plaintiff's challenge concerns arbitral claimants' ability to obtain and advance the very evidence that is necessary to prove their claims – the precise prejudice that has led courts across the country to sever confidentiality provisions. *See supra* n. 7.

Second, IBM attempts to downplay Plaintiff's evidentiary record and arguments, wrongly asserting that Plaintiff has made a generalized attack on arbitration that is not violative of New York public policy, *see* Response at 53. As Plaintiff's Opening Brief and record make clear, the confidentiality provision has hindered arbitration claimants' ability to pursue their age discrimination claim, which runs wholly counter to New York's public policy favoring employees' ability to redress age discrimination claims.

IBM also attempts to distance this case from *Denson v. Donald J. Trump for President, Inc.*, 180 A.D.3d 446, 454 (N.Y. Sup. Ct. App. Div. 2020). But while IBM asserts that *Denson* is distinguishable because there, the

arbitration agreement gave the plaintiff "no right to initiate confidential arbitration," *see* Response at 54, Plaintiff cites *Denson* not because of the arbitration-related provisions at issue there, but for the court's public policy conclusions – namely, that it would be against New York public policy if confidentiality could be used in a manner to quash the plaintiff's ability to advance her claim in court. *Denson* is closely analogous to the argument Plaintiff makes in this case – that IBM cannot use its confidentiality provision to hinder Plaintiff's ability to pursue the claim in arbitration.

Third, IBM wrongly asserts that, regardless of the record that Plaintiff developed, Plaintiff has advanced a "novel" theory of unconscionability and cannot find support for his unconscionability arguments under New York law.

As an initial matter, Plaintiff's argument is not "novel." Through the summary judgment record, Plaintiff demonstrated that the confidentiality provision gives IBM undue advantages as a repeat player with access to institutional knowledge, evidence, and prior decisions, that the arbitration

claimants do not have.[12] These advantages have hindered the arbitration claimants from advancing their ADEA claims. This argument is not "novel" – it is part and parcel of the necessary unconscionability analysis for Plaintiff to obtain the excision of the confidentiality provision, as IBM recognizes in its Response, *see* Response at 45 (describing one-sidedness as aspect of unconscionability inquiry). [13]

Additionally, IBM goes so far as to suggest that there is no repeat-player advantage at issue at all in these cases. As a matter of common sense, IBM is incorrect. IBM asserts that, because these former employees all have the same counsel, they like IBM, are also repeat players, so there is no undue advantage to IBM. What IBM neglects to point out is that it holds all of the relevant information in its possession – the former employees, in contrast, must in every case fight tooth in nail to obtain the same discovery

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[12] While their counsel, represented by the undersigned firm, have this information, they have not been able to use it from one arbitration to the next.

[13] And if this Court believes the caselaw does not indicate how the New York Court of Appeals would address any issues presented here, this Court could certify the question to the Court of Appeals. *See* Local Rule 27.2.

that has already been produced in some of the other arbitrations. IBM has been able to refine and improve its arguments as it goes, and has used its confidentiality provision to prevent Plaintiff's counsel from obtaining this evidence to use in other arbitrations. This is unfair and prevents claimants from obtaining and sharing critical evidence that they should be able to utilize in their cases and to support their requests for discovery in their own cases.[14]

Finally, while IBM criticizes Plaintiff for pointing out the numerous motions for sanctions that IBM has filed against Plaintiff's counsel in response to the challenges to IBM's confidentiality provision, Plaintiff notes that these sanctions motions themselves evince IBM's aggressive use of its confidentiality provision. These motions demonstrate the deterrence that

[14] While IBM cites out-of-circuit cases purporting to reject the "repeat player" argument, these cases indisputably did not involve the facts or record evidence at issue here, which *demonstrate* the prejudicial consequences stemming from the arbitration agreement's favoring of IBM. Certain of these cases are distinguished in greater detail in Plaintiff's Reply before the District Court, 21-cv-06319, Dkt. No. 47.

IBM has attempted to wield in order to protect further its claimed absolute right to confidentiality in these arbitrations.

C. The FAA Would Not Preempt a Finding That IBM's Confidentiality Provision is Unenforceable

Likely realizing that New York law does not inflexibly protect the enforceability of confidentiality provisions as IBM asserts, IBM also argues that if New York law renders the confidentiality provision unenforceable, it is preempted by the FAA. This argument should be rejected.

IBM argues that finding the confidentiality provision unenforceable would discriminate against confidentiality in arbitration, even though New York law generally permits confidentiality in other respects. IBM simply cites some cases wherein the courts held that confidentiality agreements were enforceable, *see* Response at 58-59. But it does not follow that New York law *always* allows for the enforcement of confidentiality in every instance (even in court proceedings). For example, New York courts will not enforce confidentiality provisions where doing so would undermine public policy. *See Village of Brockport v. Calandra*, 745 N.Y.S.2d 662, 668 (Sup. Ct. June 14, 2002). Similarly, courts will not enforce restrictive covenants

with confidentiality provisions in employment agreements where they are "unreasonably burdensome to the employee." *Denson*, 530 F. Supp. 3d 412, 432 (S.D.N.Y. March 30, 2021) (citations omitted).

Plaintiff's argument ***does not*** treat arbitration contracts differently from non-arbitration contracts – it simply recognizes that, under certain circumstances, confidentiality provisions will not be enforced (whether in an arbitration agreement or otherwise). If IBM were trying to use its confidentiality provision in court in the same way, it would be equally impermissible under New York law. As such, IBM is incorrect in its argument that such a determination would be singling out arbitration for disfavored treatment in a manner that would justify preemption. *See AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 344 (2011).

IBM also argues that the FAA preempts any conclusion that the confidentiality provision is unenforceable, because confidentiality is a fundamental attribute of arbitration. Response at 60. Critically, none of the cases that IBM cites for this proposition involve the issue in this case – namely, a confidentiality provision that prevents the effective vindication

of a federal statutory claim. And tellingly, IBM does not and cannot cite to a single case that has held that a finding that a confidentiality provision was unenforceable was preempted by the FAA.

IV. The District Court Erred by Keeping the Sealed Portions of the Summary Judgment Record Under Seal

As set forth above and in Plaintiff's Opening Brief, the documents at issue – which Plaintiff was required to submit to bring his challenge – are judicial documents, entitled to a presumption of public access.

IBM's assertion to the contrary flies in the face of judicial precedent. The Second Circuit and the Southern District of New York have repeatedly held that summary judgment filings are judicial documents as a matter of law that must not remain under seal "*absent the most compelling reasons.*" *See Lohnn*, 2022 WL 36420 at *6-7 (citing *Lugosch*, 435 F.3d at 121; *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)). The documents at issue do not even amount to what can be considered "confidential" in the Second Circuit.

Instead, IBM argues that the summary judgment filings are not judicial documents because the District Court ruled on IBM's motion to dismiss without reaching Plaintiff's motion for summary judgment. But

whether the District Court considered Plaintiff's summary judgment papers is irrelevant. That is not merely Plaintiff's view. It is the law of the Circuit. *See Lohnn*, 2022 WL 36420 at *6; *see also Brown*, 929 F.3d at 49; *Standard Inv. Chartered, Inc. v. National Ass'n of Securities Dealers, Inc.*, 621 F. Supp. 2d 55, 64 (S.D.N.Y. Sept. 26, 2007).

IBM's Response misrepresents the law of public access. IBM relies on *Standard*, 621 F. Supp. 2d at 66, for its argument that the summary judgment filings are not judicial documents because they were rendered "irrelevant" when the District Court granted IBM's motion to dismiss. But *Standard* did not involve a motion for summary judgment, and that court could not consider the documents at issue in that case because they were attached to a Rule 12(b)(6) motion to dismiss and were thus "by definition, excluded from the court's purview." *Id.* at 66.

Moreover, to overcome the strong presumption of public access, IBM points only to the FAA, stating that arbitration agreements should be enforced according to their terms, and that unsealing would "run contrary to the FAA's mandate." Response at 65. Yet this "mandate" is not

inviolable: IBM wholly ignores that arbitration claimants are free to challenge a confidentiality provision where, as here, the record demonstrates that it is being abused. And critically, the precise question at issue is whether the presumption of public access requires that documents filed in a federal court proceeding should be available to the public – not whether an arbitration clause's confidentiality provision is enforceable.[15]

IBM's efforts to deliberately conflate these issues[16] and question the propriety of Plaintiff's filings have already been rejected by Judge Liman in *Lohnn*, a ruling which is supported by *Lugosch*'s holding that confidentiality provisions, in themselves, do not override the presumption of public

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[15] Oddly, IBM posits that Plaintiff failed to make the argument that the District Court's refusal two seal supported by a mere two-sentences of analysis, was plainly insufficient. Plaintiff spent ten pages of his Opening Brief making this argument. *See* Opening Brief at 61-71.

[16] Indeed, IBM boldly contends that, because the District Court ultimately found that the confidentiality clause was enforceable, the request to unseal the record must necessarily have failed. Those are obviously two distinct questions.

access, *see Lohnn*, 2022 WL 36420 at *13 (citing *Lugosch*, 435 F.3d at 126).[17] Other courts agree. *See Stafford v. International Business Machines Corp.*, 2022 WL 1486494, at *2-3 (S.D.N.Y. May 10, 2022) (arbitration award should be unsealed despite the confidentiality provision in IBM's arbitration agreement); *Laudig v. International Business Machines Corp.*, No. 1:21-cv-05033-AT, Order at 14, Dkt. 39 (N.D. Ga. Dec. 16, 2022) ("In the face of the above authority and rationale, IBM's contention that the FAA itself provides good cause to seal all arbitration documents is unavailing."); *Howell v. International Business Machines Corp.*, No. 1:22-cv-00518-AT, Order at 14, Dkt. 35 (N.D. Ga. Dec. 16, 2022).

Plaintiff has not sought to "gam[e] the judicial system" or "turn the public access doctrine on its head." Response at 65. As set forth in *Lohnn*, "Plaintiff has filed this lawsuit to be able to use certain evidence that has been used in other arbitrations in support of her arbitration." 2022 WL

[17] IBM accuses Plaintiff of misrepresenting *Lugosch* here because it "did not involve an arbitral confidentiality provision or the FAA," Response at 68-69, but the presumption of public access outweighs arbitral confidentiality. *See Lohnn*, 2022 WL 36420 at *13.

36420, at *10. Plaintiff did so following the direction of this Court for making such a challenge. As the *Lohnn* court observed, "there is nothing wrongful or 'ruse'-like about Plaintiff attempting to make out her claim" -- "[t]hat is what courts are for." *Lohnn*, 2022 WL 36420, at *12. That the New York Times Company filed an amicus brief in *Lohnn* arguing that the sealed documents should be immediately unsealed buttresses the importance of, and heightened public interest in, this issue. *See Lohnn v. International Business Machines Corp.*, No. 22-32, Amicus Brief, Dkt. 58 (2d. Cir. Jan. 28, 2022).

CONCLUSION

This Court should reverse the District Court's decision granting IBM's Motion to Dismiss and direct the District Court to issue declaratory judgments striking the timeliness and confidentiality provisions of IBM's arbitration agreement as unenforceable. The Court should also reverse the District Court's decision to keep the briefing and evidentiary record under seal.

Dated: January 25, 2023

Respectfully submitted,

PLAINTIFF-APPELLANT

By his attorneys,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype font.

This brief complies with the type-volume limitation of Second Circuit Local Rule 32.1(a)(4)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 6,997 words, as determined by the word-count function of Microsoft Word 2016.

Dated: January 25, 2023

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, an electronic copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished on them via the appellate CM/ECF system.

Dated: January 25, 2023

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