No. 22-1737

United States Court of Appeals for the Second Circuit

PATRICIA LODI,
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-6336 – Judge John G. Koeltl

PLAINTIFF-APPELLANT'S REPLY BRIEF

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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 Plaintiff in this case, and the 29 plaintiffs in the three other cases that will be heard with this appeal, there are hundreds of additional employees who have attempted, or are trying, to pursue

First, IBM argues that the arbitration agreement's timeliness provision is enforceable even though it has severely truncated Plaintiff's ADEA limitations period. Indeed, the arbitration agreement has served to abridge Plaintiff's ADEA limitations period by more than two years. In truth, the timeliness provision has impeded Plaintiff's ability to pursue her ADEA claim and thus cannot be enforced, because it does not permit Plaintiff to effectively vindicate her statutory rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Nonetheless, IBM argues that the ADEA limitations is a procedural right that can be waived in an arbitration agreement. IBM's position should be rejected, as it butts heads with the EEOC's interpretation of the ADEA[2] and the recent Sixth Circuit decision in *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). Because the ADEA's limitations period is a

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arbitrations against IBM to challenge its egregious discriminatory behavior. This appeal will determine whether these employees can have their claims heard.

[2] *See Thompson v. Fresh Products, LLC*, EEOC Brief, 2020 WL 1160190, at *19-23 (March 2, 2020).

substantive right, it cannot be waived through arbitration. Nor could IBM obtain a waiver of this right without first satisfying the strict requirements of the Older Workers' Benefits Protections Act ("OWBPA"), 29 U.S.C. § 626(f), which it did not do. In effect, even though plaintiffs in court can assert age discrimination claims in court through the piggybacking rule sometimes even **years after** they suffered discrimination, *see Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998), IBM contends that Plaintiff here waived that right by agreeing to having their age discrimination claims heard in arbitration.[3]

IBM's contention that *Thompson* does not apply in the arbitration context should be rejected. IBM's position is essentially that, even though *no other kind of contract* could abridge the ADEA' limitations period, *arbitration agreements can* because of the policies espoused in the Federal

[3] IBM clearly realized it could not outright ask for a release of age discrimination claims (as it did for other discrimination claims) as part of the small severance it offered, since it had not made the disclosures required by the OWPBA. Instead, it tried to make age discrimination claims harder to pursue, by requiring them to be brought individually in arbitration. However, it cannot use the arbitration agreement to block these claims for some employees altogether, as it did for Plaintiff in this case.

Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* However, the Supreme Court has made clear that courts are not to elevate arbitration agreements over other kinds of contracts. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Even notwithstanding Plaintiff's timely charge, she would have been able to bring her claim in court under the ADEA's "piggybacking rule," which allows individuals who did not timely submit an EEOC charge to nevertheless assert an ADEA claim in court if they can "piggyback" on someone else's timely filed classwide EEOC charge. *See Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-59 (2d Cir. 1990); *Holowecki v. Federal Exp. Corp.*, 440 F.3d 558, 565-70 (2d Cir. 2006). IBM raises several arguments as to why the piggybacking doctrine cannot apply here, and Plaintiff respectfully directs the court to the plaintiffs' reply brief in *In Re: IBM Arbitration Agreement Litig.* No. 22-1728 (2d Cir.), which addresses those arguments.

Plaintiff, however, addresses here two of IBM's arguments that are unique to this case. First, citing *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 564 (2d Cir. 2006), IBM argues that Plaintiff cannot make use of the

piggybacking rule, because she filed her own EEOC charge. *Holowecki* merely stands for the proposition that piggybacking cannot save the claim of an employee who has filed an EEOC charge and has failed to file in court within 90 days of having received a right-to-sue letter. *Id.* That is not the issue here.

Second, IBM argues that because Plaintiff has relied on the appellate briefing in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, she has waived her piggybacking argument since Fed. R. App. P. 28(i) does not permit incorporation of briefs from other appeals unless those briefs have been formally consolidated. Rule 28(i) does not stand for the rigid proposition that IBM asserts, and courts have permitted incorporation by reference in contexts similar to this one. *See In re National Sec. Agency Telecommunications Records Litig.*, 669 F.3d 928, 931 (9th Cir. 2011). In any event, while Plaintiff has made reference to the briefing in *In Re: IBM Arbitration Litig.*, she has also set forth the argument in sufficient detail in her briefing to avoid waiver.

IBM also argues that Plaintiff has waived her challenge to the

confidentiality provision, again by making reference to the briefing in another appeal that is being heard in tandem with this one, *Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.). IBM ignores the fact that the District Court in this matter itself incorporated the reasoning from the *Chandler* decision. And ironically, IBM itself then directs the Court to its own *Chandler* briefing. In any event, the District Court clearly erred by holding that the confidentiality provision was not unconscionable without even examining the evidentiary record.

Equally unavailing is IBM's argument in the alternative that Plaintiff's Complaint is merely an untimely motion to vacate the arbitration award. Not so. Plaintiff does not ask the Court to vacate the arbitration award – she 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 arbitrators pursuant to Fed. R. Civ. P. 60 for relief from judgment.

Finally, IBM argues that the District Court was correct to seal permanently what it claimed were the "confidential" portions of the

summary judgment briefing and supporting evidence. IBM's position that these documents were not "judicial documents", since the District Court did not reach Plaintiff's summary judgment motion, runs directly contrary to Second Circuit law. *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 is Unenforceable

A. IBM has used its arbitration agreement to impermissibly abridge Plaintiff's ADEA limitations period by more than two years, preventing Plaintiff from effectively vindicating her claim.

Plaintiff should be able to assert an ADEA claim in arbitration to the same extent she would be able to in court. If the District Court's decision is affirmed, Plaintiff will have been deprived of her ability to pursue her claim in arbitration, even though the 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*, 500 U.S. at 28, 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, Plaintiff submitted her own timely EEOC charge on October 11, 2018,[4] and then she submitted an arbitration demand on January 17, 2019 (more than 60 days after filing her EEOC charge and well before 90 days after the EEOC issued her a right to sue letter). (SOF ¶¶ 8-9, App.015-016.) The EEOC investigated her claim (along with the claims of at least 57 other former IBM employees alleging age discrimination) and issued a determination that there was reasonable cause to believe that IBM had systematically discriminated against its older employees (including Plaintiff) since 2013. (SOF ¶ 9, App.016.) After attempting to conciliate, the EEOC issued Plaintiff a Right to Sue Notice on July 30, 2021, meaning that Plaintiff would have had until at least October 28, 2021, to initiate a lawsuit in court. (SOF ¶ 9, App.015-016.) However, IBM has successfully argued

[4] Under the ADEA, individuals are required to file a charge with the EEOC within 300 days of the date of the alleged discriminatory act (or within 180 days in non-deferral jurisdictions). 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). Plaintiff worked in a deferral jurisdiction. (Compl. ¶ 3, App.002.)

that because of the timeliness provision of the arbitration agreement, the arbitration demand that she filed ***more than two years before her court deadline*** was somehow untimely.[5]

As *Gilmer* acknowledged, "the ADEA is designed not only to address individual grievances, but also to further important social policies." *Id.* at 27. Thus, while arbitration may be an adequate forum in which to litigate an ADEA claim, an arbitration agreement is only enforceable to the extent that it allows the ADEA "to serve both its remedial and deterrent function" in a given case. *Id.* at 28. The District Court's decision in this case has allowed IBM's arbitration agreement to impede the ADEA's remedial and

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[5] IBM posits the EEOC charge itself was not timely filed, as it was submitted more than 300 days after Plaintiff's termination. As Plaintiff explained in her Opening Brief, she was laid off by IBM on July 31, 2017. (SOF ¶ 9 n.3, App.015.) Both shortly before and after her layoff, she submitted several job applications for other positions that she was qualified for, the latest of which was submitted on February 28, 2018. (SOF ¶ 9 n.3, App.015.) After that date, she learned that IBM had deleted all of her pending applications from its system, meaning that it was only then that it was clear to Plaintiff that she would not be permitted to work in a different position at IBM. She filed her charge with the EEOC on October 11, 2018 (less than 300 days after she learned that IBM had deleted all of her pending applications). (SOF ¶ 9 n.3, App.015.) The EEOC treated her charge as timely. (SOF ¶ 9 n.3, App.015.)

deterrent function by severely abridging Plaintiff's limitations period – by more than two years.

For its part, IBM argues that the timeliness provision is permissible because it afforded Plaintiff a "fair opportunity" to pursue a claim in arbitration by giving her the same amount of time to initiate arbitration as she had to file an EEOC charge. IBM's attempt to use the arbitration agreement to abridge Plaintiff's limitations period by more than two years does not allow for "effective vindication" of her claims.

Even though this Court has explicitly 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*, 918 F.2d at 1059 (emphasis added), IBM has weaponized the charge-filing period to act as a bright-line cutoff for arbitration demands. In so doing, IBM reduced Plaintiff's limitations period by more than two years and prevented

Plaintiff from effectively vindicating her claim.[6]

B. The ADEA's timing scheme is a substantive right that cannot be waived by contract, especially where IBM did not satisfy the requirements of the OWBPA.

As Plaintiff detailed in her Opening Brief, the ADEA's timing scheme is a substantive right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521; *Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. Furthermore, as this Court held in *Estle v. International Business Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022), where – as here – an employer seeks to obtain a waiver of a substantive right under the ADEA, the employer must first satisfy the strict requirements of the OWBPA, 29 U.S.C. § 626(f)(1)(H).[7] *See Estle*, 23 F.4th at 214; *also Oubre*, 522 U.S. at 427. Because

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[6] IBM obtusely asserts that *Gilmer* actually supports IBM's argument, since it held that arbitration can substitute for the EEOC charge filing process. The question at issue here, however, is not merely about the flexibility of selecting a forum – it is about IBM's use of its arbitration agreement to prevent its employees from vindicating their claims to the same extent that they could in court.

[7] In *Estle*, this Court held that an arbitration agreement's class action waiver was not precluded based on the employer's failure to comply with the OWBPA. *See Estle*, 23 F.4th at 213-15. This result is unsurprising, since the Supreme Court has held that class action waivers do not affect

IBM did not satisfy the requirements of the OWBPA,[8] the timeliness provision's truncation of Plaintiff's limitations period must be deemed invalid. IBM disputes this conclusion by raising a number of baseless arguments.

First, IBM argues that the ADEA's limitations period is procedural and not substantive. As an initial matter, this argument is directly at odds with the position espoused by the EEOC. *See Thompson*, EEOC Brief, 2020 WL 1160190, at *20 ("[J]ust as with Title VII, the ADA, the FLSA, and the EPA, the ADEA's statutory limitations period is a substantive right and

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substantive rights and do not impact the effective vindication of statutory claims by merely requiring them to be litigated individually. *See American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236-37 (2013). The issue here is very different. IBM has brandished its arbitration agreement to prevent claimants from pursuing their ADEA claims at all, even individually, in arbitration.

[8] As explained in Plaintiff's Opening Brief at 44-46, Dkt. 89, IBM did not satisfy the OWBPA because: (1) it failed to provide disclosures that the OWBPA requires; and (2) it failed to describe the right being waived (i.e., the right to make use of the piggybacking rule and thus enjoy the full ADEA limitations period) in a manner calculated to be easily understood by the employees. *See* 29 U.S.C. § 626(f)(1).

prospective waivers of its limitations period are unenforceable").[9]

Nevertheless, IBM cites *Vernon Cassadaga Valley Central School District*, 49 F.3d 886, 890 (2d Cir. 1995), for the proposition that the ADEA's limitations period is procedural. While *Vernon* concluded that the ADEA's limitations period was procedural for the purposes of determining the retroactive applicability of the Civil Rights Act of 1991, *see id.*, this Court later clarified that "in different contexts, a statute of limitations may fairly be described as either procedural or substantive . . . ." *Enterprise Mortg. Acceptance Co., LLC, Sec. Litig. v. Enterprise Mortg. Acceptance Co.*, 391 F.3d 401, 409 (2d Cir. 2004); *see also Vernon*, 49 F.3d at 892 (Cabranes, J. concurring). Here, the Court should read *Vernon* in harmony with the EEOC's position in *Thompson* and conclude that while the ADEA's timing scheme may be procedural in nature for the purposes of determining whether a statutory amendment applies retroactively, it is substantive for

[9] "[I]t is axiomatic that the EEOC's interpretation of [the ADEA], for which it has primary enforcement responsibility, need . . . only be reasonable to be entitled to deference." *EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988).

the purposes of determining whether a limitations period may be abridged by contract.[10]

IBM points out that in Judge Cabranes' *Vernon* concurrence, he explained that there is nothing "talismanic" about the labels "substantive" and "procedural." IBM Response Brief at 37, Dkt. 99 (quoting *Vernon*, 49 F.3d at 891-92 (Cabranes, J. concurring)). In one breath, IBM asserts that the "superficial label of substance/procedure" does not matter, and in the next, IBM contends that the OWBPA is inapplicable here precisely because of the ADEA's limitations period is a procedural and not a substantive right. IBM cannot have it both ways. This Court has held that the OWBPA only protects substantive (and not procedural) rights. *See Estle*, 23 F.4th at 214. Therefore, because the ADEA limitations period is *substantive*, IBM cannot reasonably dispute that the OWBPA prevents impeding on this right if the

[10] IBM also relies on *Spira v. J.P. Morgan Chase & Co.*, 466 F. App'x. 20, 22-23 (2d Cir. 2012), a non-precedential summary order that is easily distinguishable. *Spira* stands for the uncontroversial position that a federal statute's failure to reference a limitations period does not compel the conclusion that no limitations period applies. *Spira* has nothing to do with the issue in this case.

required disclosures have not been made.

Second, IBM contends that its arbitration agreement is consistent with *Thompson*, because it requires an arbitration demand to be filed on the same deadline the statute sets for an EEOC charge. Not so. The arbitration agreement has truncated Plaintiff's ADEA limitations period by more than two years. While Plaintiff would have been timely to pursue ADEA claims in court until at least October 2021, she cannot pursue her claim in arbitration despite initiating it in January 2019. Because *Thompson* recognized the ADEA limitations period to be a non-waivable right, IBM is simply wrong to suggest that its arbitration agreement is consistent with *Thompson*. 985 F.3d at 521.

IBM also contends that *Thompson* is distinguishable because it did not concern arbitration. At bottom, IBM's argument is that an arbitration agreement is free to abridge employees' ADEA limitations periods, whereas other kinds of contracts cannot. IBM's argument runs afoul of *Morgan*, 142 S. Ct. at 1713, where the Supreme Court held that arbitration agreements cannot be elevated over other kinds of contracts. As such, "a

court may not devise novel rules to favor arbitration over litigation." *Id.*[11]

As such, the District Court's decision cannot stand. In deciding that *Thompson* was limited to contractually shortened limitations periods outside of arbitration agreements, those courts lost sight of the fact that "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan*, 142 S. Ct. at 1713.[12]

IBM counters that, while *Morgan* involved a judge-made procedural rule that favored arbitration agreements over other kinds of contracts, the procedural rule at issue here was adopted by the parties in the arbitration agreement. IBM misses the point – by limiting *Thompson* to the non-

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[11] This Court's *dicta* in *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2d Cir. 2010), supports Plaintiffs' position. In *Ragone*, the Court opined that, even in the arbitration context, a provision shortening the time period to file an anti-discrimination claim may be unenforceable as being "incompatible with [the] ability to pursue [] Title VII claims in arbitration, and therefore void under the FAA." *Id.* at 125-26.

[12] In other words, an arbitration agreement cannot be valid if it contains a prohibition that would not be allowed in a non-arbitration agreement. Either the purported prohibition must not be enforced, or the affected party cannot be required to arbitrate. Plaintiff here is content to arbitrate, so long as her rights are not impeded in arbitration.

arbitration context, the District Court held that the arbitration agreement was enforceable where any other type of agreement would not be.[13]

Even if IBM were correct that an arbitration agreement could abridge an ADEA limitations period, the employer would first have to satisfy the requirements of the OWBPA. In order to abridge a substantive right under the ADEA, the employer must comply with the OWBPA. *See Estle*, 23 F.4th at 214. Because the agreement has abridged Plaintiff's ADEA limitations by more than two years, preventing her from being able to pursue her claim at all, IBM has run afoul of the OWBPA. *See* note 8, *supra*.[14] Thus, Plaintiff

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[13] IBM also attempts to distinguish *Thompson* on the basis that its reasoning was grounded in the EEOC's investigatory process, which is not at issue in arbitration. As explained *supra*, however, Congress did not intend the EEOC charge-filing deadline to be a procedural hurdle for employees where a charge has indeed been filed. *See Tolliver*, 918 F.2d at 1059. Moreover, the EEOC's "informal methods" do not exist in court either (they exist at the EEOC).

[14] IBM makes hay of the fact that *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 833 (6th Cir. 2019) (on which *Thompson* relied), and *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 655 (6th Cir. 2003), limited their holdings to court actions. However, those cases concerned Title VII, which does not have a counterpart to the OWBPA.

must be permitted to pursue her claim of discrimination.[15]

II. Even Apart From Plaintiff's Timely Filed EEOC Charge, Plaintiff's Arbitration Demand was Timely Under the Piggybacking Rule

Even apart from her timely filed EEOC charge, Plaintiff should have been able to proceed in her arbitration by making use of the piggybacking rule of the ADEA. 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 against the application of the piggybacking rule.

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. *See Tolliver*, 918 F.2d at 1059; *Holowecki v. Fed. Express Corp.*, 2002 WL 3120266, at *3 (S.D.N.Y. 2002), *rev'd on other grounds*, 440 F.3d 558 (2d Cir. 2006); *see also Leal v. Wal-Mart Stores, Inc.*, 2016 WL 2610020, at *5 (E.D. La. May 6,

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[15] If Plaintiff cannot pursue her claim in arbitration (which she is content to do), then she should be permitted to pursue her claim in court. Because the OWBPA was not satisfied, Plaintiff must be able to pursue her claims somewhere.

2016); *Catlin v. Wal-Mart Stores, Inc.*, 123 F. Supp. 3d 1123, 1131 (D. Minn. 2015) (same); *Allen v. Sears Roebuck and Co.*, 2010 WL 259069, at *2 (E.D. Mich. Jan. 20, 2010). Indeed, the lower court in *Holowecki* described the piggybacking rule as "an exception to the ADEA's time limitations . . . ." *Holowecki*, 2002 WL 3120266, at *3. 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 *supra* in Section I.B.

Plaintiff also addresses here an additional argument that IBM raised in this case. IBM asserts that because Plaintiff filed her own EEOC charge, she is bound to the parameters of that charge and therefore cannot make use of the piggybacking rule pursuant to this Court's decision in *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 564 (2d Cir. 2006). While *Holowecki* suggests that the piggybacking rule is not boundless (and may not be available for someone who started the process of bringing a charge at the EEOC but did not pursue it in court), that has nothing to do with the issue before the Court in this case.

As the court explained in *Ellis v. Costco Wholesale Corp.*, 2015 WL

2453158, at *2 (N.D. Cal. May 22, 2015), *Holowecki* framed its discussion by citing the concern that the Second Circuit considered in *Levy v. United States Gen. Acct'g Office*, 175 F.3d 254, 255 (2d Cir. 1999), where individuals who had received a right to sue notice on their claims but did not file suit in the 90-day window attempted to use the piggybacking rule to escape the consequences of their failure to timely file. Thus, while *Holowecki* sought to curb misuse of the piggybacking rule as an end-run around the 90-day limit, that is not the concern here. Indeed, Plaintiff timely filed her charge and filed her arbitration demand more than two years before the 90-day limit ran; nevertheless IBM contends that her demand was untimely. *Holowecki* thus does nothing to preclude Plaintiff from piggybacking.

Finally, IBM argues that Plaintiff waived her piggybacking argument, because she seeks to incorporate the argument from a different case. IBM already unsuccessfully advanced this argument in its opposition (Dkt. 83) to Plaintiff's motion (Dkt. 63) for the Court to hear this appeal in tandem with three other appeals. In its opposition, IBM argued that Plaintiff's request was "primarily aimed at expanding the word limit for the opening

brief." IBM Opp. to Hearing in Tandem at 9, Dkt. 83. The Court rejected this argument (at least implicitly) by granting Plaintiff's motion. *See* Order at 2, Dkt. 111.

IBM now repeats the same arguments that were already rejected. IBM contorts Fed. R. App. P. 28(i) and claims Rule 28(i) creates a bright-line rule prohibiting referencing other appellate briefs in the circumstances present here – but Rule 28(i) does not do this.[16] IBM then cites three out-of-circuit cases, *United States v. Johnson*, 127 F. App'x. 894, 901 n.4 (7th Cir. 2005); *United States v. Bichsel*, 156 F.3d 1148, 1150 n.1 (11th Cir. 1998); and *United*

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[16] Fed. R. App. P. 28(i) states in full:

> (i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

Here, IBM's citation to Rule 28(i) and its assertion that it is only in cases "involving more than one appellant or appellee, including consolidated cases," that parties are allowed to adopt by reference a part of another's brief," *see* IBM Response Brief at 43, Dkt. 99, is a mischaracterization of Rule 28(i), which makes no such proclamation.

States v. McDougal, 133 F.3d 1110, 1114 (8th Cir. 1998). But this case is more akin to *In re National Sec. Agency Telecommunications Records Litig.*, 669 F.3d at 931. In that case, the appellant argued a Takings Clause claim and incorporated by reference additional constitutional arguments made in another companion appeal. *See id.* While the Ninth Circuit noted that it "did not ordinarily permit parties to incorporate by reference briefs in other cases," it would permit the appellant to do so because "the cases have followed a parallel path through the MDL process, so in this rare circumstance we accept the incorporation." *Id.*

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 before Judge Furman. Nevertheless, the parties briefed identical issues in these cases on parallel tracks, and the district courts[17] all issued their decisions between July and September 2022. *See* Opinion,

[17] The *Lohnn* matter 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).

App.816-29 (issued on July 11, 2022); *Chandler v. International Business Machines Corp.*, 2022 WL 2473340 (S.D.N.Y. July 6, 2022); *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618 (S.D.N.Y. July 14, 2022); *Tavenner v. International Business Machines Corp.*, 2022 WL 4449215 (S.D.N.Y. Sept. 23, 2022). Then, because these matters all raise overlapping issues and similar arguments, this Court ordered that the appeals of those decisions be heard in tandem. *See* Order at 2, Dkt. 111. Given the parallel paths these cases have taken, and the overlapping issues they present, Plaintiffs appropriately cross-referenced their respective briefs. *See In re National Sec. Agency Telecommunications Records Litig.*, 669 F.3d at 931.

Moreover, IBM is simply wrong that Plaintiff waived her argument. In each of the appeals that will be heard in tandem, Plaintiffs argued each issue, though did so more expansively in one or more of the opening briefs than in the others. For instance, the opening briefs in this matter and in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 address the timeliness issue in more detail (with the latter brief focusing more on piggybacking, and the former focused more on the timely filing of Plaintiff's EEOC

charge); the *Chandler*, No. 22-1733, opening brief addresses the confidentiality issue in more detail; and the *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, opening brief addresses the sealing issue in more detail. Accordingly, none of these arguments, including Plaintiff's piggybacking argument here, were waived.

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

Incorporating its reasoning from *Chandler*, 2022 WL 2473340, at *7-8, the District Court incorrectly held that the arbitration agreement's confidentiality provision was not unconscionable under New York Law. Opinion at 12-13, App.827-828. The plaintiff in *Chandler*, No. 22-1733, has detailed in his opening brief at pp. 33-61 (*Chandler* Dkt. 88) the many reasons why the District Court's decision was in error.

IBM, however, contends that Plaintiff has waived her challenge to the confidentiality provision by incorporating by reference portions of the *Chandler* opening brief. As explained in Section II, *supra*, IBM's waiver argument is unpersuasive and should be rejected. This waiver argument is

especially peculiar given the fact that the District Court in this matter did not set forth its reasoning beyond repeating in two sentences that it was incorporating its *Chandler* rationale. *See* Opinion at 12, App.827. Ironically, at the same time IBM takes exactly the same approach as Plaintiff, saving its full argument on this issue for its *Chandler* brief.

Furthermore, IBM conveniently ignores the fact that Plaintiff *did* recount the argument in her brief. *See* Opening Brief at 54-58, Dkt. 88. While the argument is set forth in more detail in the *Chandler* opening brief, Plaintiff here obviously has not waived the argument. Likewise, Plaintiff respectfully directs the Court to the forthcoming *Chandler* reply, wherein IBM's arguments will be addressed more fully. Suffice it to say, IBM's Response Brief fails to refute Plaintiff's argument that the lower court erred in declining to hold the confidentiality provision unenforceable. Plaintiff presented a full record demonstrating the ways in which her ADEA claim was unfairly impeded by the confidentiality provision, as this Court requires for such a challenge under *American Family Life Assurance Co. of N.Y. v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019). The District Court

declined to even examine this record.

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

IBM argues in the alternative that Plaintiff's Complaint is just an untimely attempt to vacate Plaintiff's arbitration award. 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 "window" applicable to *vacatur* petitions under Section 10 of the FAA 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 meaningful way for the Plaintiff to seek a determination that the timeliness provision is unenforceable is through a declaration by a court. 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 again, 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) (holding that where the plaintiff's effective vindication argument turned on how the arbitrator would interpret a provision of the arbitration agreement, the arbitrator must answer the interpretation question in the first instance, before the court can review the question); *see also Billie v. Coverall North America, Inc.*, 594 F. Supp. 3d 479, 490-99 (D. Conn. 2022) (allowing case to proceed in court, only after having compelled the case to arbitration, where it then became clear that the plaintiff could not proceed due to the plaintiff's inability to pay arbitral fees); *CellInfo, LLC v. American Tower Corp.*, 506 F. Supp. 3d 61, 71-73 (D. Mass. 2020) (denying motion to resume litigation in court, where it was not yet clear if the AAA would permit the arbitration to proceed notwithstanding the plaintiff's inability to pay arbitral fees).

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

As set forth in Plaintiff's Opening Brief, the documents at issue –

summary judgment papers and exhibits filed in support thereof, which Plaintiff was required to submit to sustain her challenge to the enforceability of the confidentiality provision in IBM's arbitration agreement[18] – 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 v. International Business Machines Corp.*, 2022 WL 36420 at *6-7 (S.D.N.Y. Jan. 4, 2022) (citing *Lugosch*, 435 F.3d at 121; *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)); *see also Standard Inv. Chartered, Inc. v. National Ass'n of Securities Dealers, Inc.*, 621 F. Supp. 2d 55, 65 (S.D.N.Y. 2007)

[18] Indeed, this Court has made clear that "a party cannot challenge the limitations of an arbitration clause in the abstract and must instead present evidence that the effect of the clause is to prevent a claimant from effectively vindicating a statutory right." *Lohnn v. Int'l Bus. Machines Corp.*, 2022 WL 36420, *11 (S.D.N.Y. Jan. 4, 2022) (citing *Gilmer,* 500 U.S. at 28; *Am. Fam. Life Assurance Co. of New York v. Baker*, 778 F. App'x. 24, 27 (2d Cir. 2019)).

("*Lugosch* definitively reinforced *Amodeo II*'s ruling that documents submitted in connection with a motion for summary judgment are judicial documents for presumption-of-access purposes, 435 F.3d at 123, a principle that district courts have faithfully applied.") (citing *Prescient Acquisition Group, Inc. v. MJ Pub. Trust,* 487 F. Supp. 2d 374, 374 (S.D.N.Y. 2007); *Allen v. City of New York,* 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006)). The documents at issue do not even amount to what can be considered "confidential" in the Second Circuit. IBM does not refute this point.

Instead, IBM points to Judge Furman's opinion in *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 3043220, at *1-4 (S.D.N.Y. Aug. 2, 2020) – which Plaintiff contends was wrongly decided and which is *the subject of a substantially identical appeal* – to argue 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, *see* IBM Response Brief at 62, Dkt. 99. But whether the District Court *in fact* considered Plaintiff's summary judgment papers in ruling on IBM's motion to dismiss or any other filing is irrelevant under

controlling law. The determination whether something is a judicial document has nothing to do with "whether the judge has relied on the document or on any specific information in it because the public is entitled to know not only what the judge relied on but also what was conveyed to the judge that she did not rely on—what, from the public's perspective, 'the judge *should* have considered or relied upon, but did not.'" *Lohnn*, 2022 WL 36420 at *6 (quoting *Lugosch*, 435 F.3d at 123); *see also Brown*, 929 F.3d at 49; *Standard Inv. Chartered, Inc.*, 621 F. Supp. 2d at 64.

IBM contends that Plaintiff has cherry-picked quotes in service of this argument, but it is IBM that has misrepresented the law of public access. For example, IBM relies on *Standard Inv. Chartered, Inc.* in support of 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. *See* IBM Response Brief at 62-63, Dkt. 99 (citing 621 F. Supp. 2d at 66). But *Standard Inv. Chartered, Inc.* did not involve a motion for summary judgment, and the court made clear in that case that its holdings with respect to the presumption of public access applied only

in the context of motions to dismiss and motions for reconsideration. *See id.* at 65, 68. That court could not consider the documents at issue in that case not because of the underlying motion's procedural posture, but 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 to which the judicial documents at issue are entitled, IBM points only to the FAA, stating that arbitration agreements (and here, the confidentiality provision) should be enforced according to their terms, and that unsealing would "run contrary to the FAA's mandate." IBM Response Brief at 64, Dkt. 99. 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.

IBM's efforts to deliberately conflate these issues and question the propriety of Plaintiff's filings has 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 access[19], *see Lohnn*, 2022 WL 36420 at *13 (citing *Lugosch*, 435 F.3d at 126). Other courts apparently agree. In *Stafford v. International Business Machines Corp.*, 2022 WL 1486494, at *2-3 (S.D.N.Y. May 10, 2022), the court confirmed an arbitration award and held that it should be unsealed as a "judicial document" despite the arbitration agreement's confidentiality provision. Just last month, the Northern District of Georgia rejected a similar argument in two cases involving IBM's confidentiality provision, holding that the FAA (and the federal policy favoring arbitration) does not

[19] IBM accuses Plaintiff of misrepresenting *Lugosch* here because it "did not involve an arbitral confidentiality provision or the FAA," IBM Response Brief at 66, Dkt. 99, but does not clearly explain why that changes the analysis. *See Lohnn*, 2022 WL 36420 at *13 ("The interest in arbitral confidentiality has never been understood to alone be sufficient to overcome the public's right to access judicial documents when otherwise confidential arbitral documents are submitted to a federal court in connection with a request for the Court to enter judgment or issue a dispositive order.").

suffice to overcome the strong presumption of public access to judicial documents. *See 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). This Court should hold similarly.

Relatedly, Plaintiff has not sought to "gam[e] the judicial system" or "turn the public access doctrine on its head." IBM Response Brief at 65, Dkt. 99. As set forth in *Lohnn*, this "lawsuit and motion for summary judgment are not a 'ruse' to make public information that would otherwise be subject to a confidentiality agreement" as "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 36420, at *10. Plaintiff has done so following the direction of this Court for making such a challenge, as noted above – namely, "[i]n order to hope to prevail on such a claim, a plaintiff must present record evidence that her fears are well-founded and not just

speculative" and "[i]t follows that, unless *Green Tree* [*Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S. Ct. 513 (2000)] and *Guyden* [*v. Aetna, Inc.*, 544 F.3d 376 (2d Cir. 2008)] are to be empty letters, a plaintiff must be allowed to present a record that the effect of a challenged arbitration provision (or set of arbitration provisions) is to deprive her of a meaningful opportunity to present her claim." *Id.* at *11. 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).

For these reasons, this Court should follow *Lohnn*, reverse the district court's ruling on IBM's motion to seal, and unseal the summary judgment documents.

CONCLUSION

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

Dated: January 6, 2023

Respectfully submitted,

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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 6, 2023

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 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 6, 2023

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