No. 22-2318

United States Court of Appeals for the Second Circuit

DEBORAH TAVENNER,
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-6345 – Judge Kenneth M. Karas

PLAINTIFF-APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Deborah Tavenner hereby makes the following corporate disclosure statement pursuant to Fed. R. App. R. 26.1:

Plaintiff-Appellant is an individual and therefore has no parent corporation or shareholders.

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INTRODUCTION

This case was brought by a former IBM employee seeking a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, that two provisions of an arbitration agreement that she entered into with IBM are not enforceable, as the provisions undermine or extinguish her ability to pursue her claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[1] Upon her termination, Plaintiff entered into an arbitration agreement with IBM that released (in exchange for a small severance payment) almost all claims she may have against IBM, but not claims under the ADEA.[2] Under this

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[1] This Court has before it three other appeals which raise nearly identical issues to this case: *Lodi v. International Business Machines Corp.*, No. 22-1737; *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728; and *Chandler v. International Business Machines Corp.*, No. 22-1733. Plaintiff's counsel have moved to have these appeals all heard in tandem.

[2] Indeed, IBM's arbitration agreement could not have waived Plaintiff's ADEA claim, because IBM did not provide disclosures that would have been required under the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. ¶ 626(f), in order for an employer to obtain a release of claims under the ADEA. The agreement therefore *must* permit Plaintiff to pursue her ADEA claim. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998).

agreement, Plaintiff was permitted to pursue an ADEA claim against IBM, but it had to be brought in individual arbitration.

However, two provisions of IBM's arbitration agreement prevent Plaintiff from pursuing her ADEA claim in arbitration, a claim that she indisputably would have been able to pursue in court had she not signed the arbitration agreement. While Plaintiff has not challenged the overall enforceability of IBM's arbitration agreement, she sought a declaration holding unenforceable the two provisions in question. *See Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2d Cir. 2010) ("[T]he 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.").[3] Plaintiff correctly asked the District Court to hold

[3] The District Court's *dicta* indicated that it seemed to misunderstand Plaintiff's claims and thought that Plaintiff was challenging the arbitration agreement as a whole; the court thus considered whether she had shown procedural unconscionability, as well as substantive unconscionability. *See* Opinion and Order at 18 n.10, App.813. However, Plaintiff was not

these provisions unenforceable since [redacted][4]

Although Plaintiff submitted a summary judgment motion with an extensive record to support her arguments, the District Court granted IBM's cross-motion to dismiss her complaint and denied her request for summary judgment. As will be explained below, the District Court's decision was rife with legal and factual errors and should be reversed.

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challenging the agreement as a whole – she was only challenging two substantively unconscionable provisions so that she would be allowed to able pursue her ADEA claim in arbitration. *See Castellanos v. Raymours Furniture Co., Inc.*, 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018).

4 [redacted]

First, the District Court abused its discretion by not reaching the enforceability of the timeliness and confidentiality provisions of IBM's arbitration agreement, because it refused to exercise jurisdiction under the Declaratory Judgment Act. The District Court posited that Plaintiff's declaratory judgment claims would serve no useful purpose, because she already obtained final arbitration awards dismissing her ADEA claim. However, the District Court ignored the plain language of the arbitration agreement which [redacted]. Thus, Plaintiff properly sought the court's determination of whether the timeliness provision was enforceable.[5] Then,

[5] As is explained in greater detail in footnote 11 *infra*, it was proper for Plaintiff to bring this claim in court after having submitted her claim to arbitration because, if she had sought a declaration holding the timeliness provision unenforceable earlier, prior to her arbitration, the court may well have said [redacted] *See, e.g.*, *Billie v. Coverall North America*, ---F. Supp.3d---, 2022 WL 807075, at *7-14 (D. Conn. March 16, 2022); *CellInfo, LLC v. American Tower Corp.*, 506 F. Supp. 3d 61, 71-73 (D. Mass. 2020). [redacted], it is clear that Plaintiff needs declaratory relief from a court.

after obtaining a decision from the court holding that the agreements cannot waive her right to pursue an ADEA claim in arbitration, Plaintiff would have moved in her arbitration for relief from judgment pursuant to Fed. R. Civ. P. 60, which the arbitrator would be obligated to entertain under the agreement. Arbitration Agreement at 26, App.097.

Second, the District Court should have held unenforceable the arbitration agreement's 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' Opening Briefs in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.), and *Lodi*, No. 22-1737 (2d Cir.), there can be no dispute that if Plaintiff had been able to pursue her claim in court, it would have been timely.[6]

[6] As the Supreme Court explained in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), statutory claims are "are appropriate for arbitration" only "[s]o long as the prospectively litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum . . . ." (internal quotation omitted). Here, Plaintiff was plainly not able to vindicate in arbitration a claim that she would have been able to vindicate in court.

In court, Plaintiff would be able to make use of the ADEA's "piggybacking rule," which allows individuals who did not timely submit their own charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") to assert an ADEA claim 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). Nevertheless, IBM prevented Plaintiff from advancing her claim in arbitration even though she would have been considered ***amply*** timely to do so in court.

In *dicta*, the District Court incorrectly posited that the timeliness provision in the arbitration agreement was enforceable even if it abridged the time Plaintiff had to initiate her ADEA claim by *years*, since it concluded the ADEA's timing scheme could be waived by contract on the ground that it was not a substantive right. This conclusion is *directly at odds* with the EEOC's interpretation of the statute, which was adopted by the Sixth Circuit in *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). *See also Thompson v. Fresh Products, LLC*, EEOC Brief, 2020 WL

1160190, at *19-23 (March 2, 2020). The District Court's reasoning placed IBM's arbitration agreement *above* other contracts with respect to enforceability; in doing so, the District Court simply ignored *Thompson* because *Thompson* did not concern arbitration. But this result runs afoul of the Supreme Court's recent decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022), which made clear that arbitration agreements are no more enforceable than any other type of contract.

Further, because the ADEA's timing scheme is a *substantive* right, it is also governed by OWBPA, which includes strict requirements that require disclosures of the ages of employees who were laid off and not laid off, in order for an employer to obtain an effective waiver of any right or claim under the ADEA. *See Oubre*, 522 U.S. at 427. Because IBM did not meet these requirements, it could not extinguish Plaintiff's right to bring a claim under the ADEA. Thus, the arbitration agreement's abridgement of the ADEA's limitations period, which prevented Plaintiff from pursuing her claim in arbitration, is unenforceable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Third, Plaintiff also challenged the confidentiality provision in IBM's arbitration agreement, which IBM has aggressively wielded in numerous other arbitration cases, in order to block employees pursuing discrimination cases against IBM in arbitration from using smoking gun evidence in support of their claims that Plaintiff's counsel have obtained in other arbitration cases raising the same issues.[7] This Court has recognized the crucial importance of such pattern and practice evidence in *Hollander v. American Cyanamid Co.*, 895 F.2d 80 (2d Cir. 1990). Courts have routinely found similar confidentiality clauses in arbitration agreements unenforceable, and this Court has held that employees can challenge these provisions by developing a record demonstrating that they provide an unfair advantage to an employer. *See American Family Life Assurance Co. of N.Y. v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019); *Guyden v. Aetna, Inc.*, 544

[7] During the course of these arbitrations, Plaintiff's counsel obtained [redacted]; however, IBM, wielding its confidentiality provision, has blocked Plaintiff's counsel from using this evidence from arbitration to arbitration. (SOF ¶¶ 16-99, App.017-038.)

F.3d 376, 384-85 (2d Cir. 2008); *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022). Nonetheless, the District Court refused even to consider the extensive summary judgment record that Plaintiff submitted to support her claim, instead granting IBM's Motion to Dismiss. The District Court's decision must be reversed.

Finally, the District Court erred by keeping under seal significant portions of the extensive record that Plaintiff submitted in support of her summary judgment motion, as well as wide swathes of the briefing. The District Court did not even address the sealing issue in its decision, thus impliedly permitting the documents to remain permanently under seal. As another District Court explained in another case ordering practically the same record to be unsealed, "[t]he Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment." *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *6 (S.D.N.Y. Jan. 4, 2022) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir.

2006)).[8] The public's right of access attached the moment that Plaintiff filed her summary judgment motion in court, and there is no countervailing interest in keeping the documents under seal. *See Lugosch*, 435 F.3d at 123; *Lohnn*, 2022 WL 36420 at *9.

For all these reasons, the District Court's decision should be reversed.

[8] Following that decision in *Lohnn*, IBM sought an emergency stay from this Court of the District Court's order to unseal documents virtually identical as those in this case. This Court declined to stay the District Court's order. *See Lohnn v. International Business Machines Corp.*, No. 22-32, Order, Dkt. 71 (2d Cir. Feb. 8, 2022). IBM then petitioned for a rehearing *en banc*, which this Court also denied. *See Lohnn*, Order, Dkt. 90 (2d Cir. Feb. 16, 2022). While the summary judgment briefing, the plaintiff's statement of facts, and the declaration of Shannon Liss-Riordan were unsealed, the exhibits forming the record was never unsealed, because the parties settled the case prior to the District Court's approval of the parties' proposed limited redactions. *See Lohnn v. International Business Machines Corp.*, 2022 WL 3359737, at *2-6 (S.D.N.Y. Aug. 15, 2022).

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Plaintiff's claims pursuant to 28 U.S.C. § 1331, because Plaintiff has brought a claim pursuant to Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 regarding her rights under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal on September 28, 2022, App.818-819, appealing from the District Court's Opinion and Order granting IBM's Motion to Dismiss and denying Plaintiff's Motion for Summary Judgment and Judgment issued on September 23, 2022, App.796-817.

STATEMENT OF THE ISSUES FOR REVIEW

(1) Whether the District Court erred by declining to exercise jurisdiction over Plaintiff's declaratory judgment claims.

(2) Whether IBM's arbitration agreement could waive Plaintiff's ability to utilize the piggybacking rule under the ADEA.

(3) Whether the confidentiality provision in IBM's arbitration agreement is enforceable.

(4) Whether the District Court erred by keeping materials in this case under seal despite this Court's strong presumption that judicial documents must be public. *See Lugosch,* 435 F.3d at 126.

STATEMENT OF THE CASE

Plaintiff brought this lawsuit on July 26, 2021, seeking a declaratory judgment that two provisions of an arbitration agreement that she entered into with IBM are not enforceable (a timeliness provision and a confidentiality provision), as they undermine or extinguish her ability to pursue claims against IBM under the ADEA. *See* Complaint, App.001-010.

As described in Plaintiff's Motion for Summary Judgment (D. Ct. Dkt. 13) and the accompanying Statement of Material Facts (hereinafter "SOF", App.011-039), Plaintiff alleged that IBM engaged in a systemic, years-long effort to reduce its number of older workers in order to create a younger workforce; the company sought to refresh its image in order to better compete with the younger, "hipper" technology companies such as Google, Facebook, and Amazon. (SOF ¶ 3, App.013.)[9] Plaintiff alleged that she fell victim to IBM's discriminatory scheme when IBM summarily terminated her in 2018, at the age of fifty-five, after twenty-five years with

[9] This discriminatory scheme is detailed in the Second Amended Complaint in *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.), App.048-068.

the company. (Compl. ¶ 7, App.03.) After Plaintiff's layoff, she signed an arbitration agreement in exchange for a modest severance payment; this agreement released almost all claims she had against IBM, with the specific exception of claims under the ADEA. The agreement allowed her to pursue claims under the ADEA but only in individual arbitration. (SOF ¶ 5, App.014.)[10]

I. Background of Classwide Allegations, and the EEOC's Reasonable Cause Finding, of Age Discrimination Against IBM

Plaintiff is not the only individual to have alleged that IBM engaged in systemic age discrimination in recent years against its older workers in an effort to build a younger workforce. In 2018, an ADEA collective action was filed against IBM, *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.). As a predicate to bringing the action, lead plaintiff Edvin Rusis filed a classwide EEOC charge on May 10, 2018. (SOF ¶ 14 n.4, App.015-016.) *Rusis* named plaintiffs Henry Gerrits, Phil

[10] As noted above, because IBM did not provide Plaintiff disclosures required by the OWBPA (SOF ¶ 5 n.2, App.014), the arbitration agreement could not release ADEA claims. *See Oubre*, 522 U.S. at 427.

McGonegal, and Sally Gehring also timely filed timely classwide EEOC charges. (SOF ¶ 14 n.4, App.015-16.)

Ms. Gehring was one of fifty-eight former IBM employees whose charge led to a two-year, class-wide investigation by the EEOC, which resulted in the agency issuing a Letter of Determination on August 31, 2020, finding reasonable cause that IBM has been engaged in an aggressive campaign over at least a five-year period, from 2013 through 2018, to reduce the number of its older workers and replace them with younger workers, thereby discriminating against its older workers in violation of the ADEA. (SOF ¶¶ 49-55, App.024-025.)

II. Plaintiff's Challenge to the Arbitration Agreement's Purported Abridgement of the Time Period to File an ADEA Claim

Upon her termination, Plaintiff signed an arbitration agreement that IBM has contended limits the time she had to submit an arbitration demand to 300 days from her layoff. In the District Court, Plaintiff challenged the enforceability of the agreement's timeliness provision.[11]

[11] As explained in footnote 4, *supra*, IBM has argued that [redacted]

> IBM's arbitration agreement included the following provision:
>
> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for

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[redacted] Plaintiff nevertheless began by attempting to arbitrate her claim, as required by her agreement with IBM. [redacted] she properly proceeded to court to challenge that unconscionable provision.

Indeed, Plaintiff began in arbitration knowing that, had she begun her claim in court, a court likely would have required her to pursue arbitration first, in order to determine whether an arbitrator would interpret the agreement in the way she feared. *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 first instance); *CellInfo, LLC*, 506 F. Supp. 3d at 71-73 (requiring claim to proceed in arbitration, where it was not yet clear if the arbitration association would require the plaintiff to pay fees he could not afford); *see also Billie*, 2022 WL 807075, at *7-14 (having previously compelled arbitration despite a potentially unconscionable cost-splitting provision since the costs were speculative prior to arbitration, *see Billie v. Coverall North America, Inc.*, 444 F. Supp. 3d 332, 351-53 (D. Conn. 2020), subsequently allowing the case to proceed in court after it was clear that the plaintiff could not vindicate his claims in arbitration, since the arbitrator ordered plaintiff to pay fees he could not afford).

> arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern though the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

(SOF ¶ 13, App.015.)

Plaintiff brought her case in arbitration on January 17, 2019. (Arbitration Demand, App.099-127.) [redacted] App.128-135.)

Plaintiff then opted in to the *Rusis* collective action in order to challenge before a court the validity of the purported waiver of piggybacking in the arbitration agreement. (SOF ¶ 10, App.014-015.) The *Rusis* court dismissed the claims of Plaintiff (and nearly 30 other individuals raising the same challenge) because of the class action waiver in IBM's agreement they signed; the court held that, while they could challenge the provision in court**,** they could not do so as part of a class or collective action. *See Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 194-97 (S.D.N.Y. March 26, 2021). Plaintiff thereafter initiated

this matter individually.

III. Plaintiff's Challenge to IBM's Aggressive Use of the Confidentiality Provision in the Arbitration Agreement

Plaintiff also challenged IBM's aggressive use of its confidentiality provision as unconscionable and therefore unenforceable.[12] IBM has aggressively invoked this provision in the dozens of arbitrations that her counsel have pursued on behalf of former employees suing the company for age discrimination and has used it to hamper the ability of former employees to prove their cases under the ADEA. Plaintiff brought this

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[12] This provision states:

> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

(SOF ¶ 16, App.017.)

challenge before the court so that, when she is able to arbitrate her claim, she would be able to vindicate her rights effectively, as required under *Gilmer*. Plaintiff submitted a comprehensive record demonstrating that IBM has routinely used its confidentiality provision to prevent its former employees from using *crucial* [redacted] evidence their counsel have obtained from other arbitration cases, which demonstrate IBM's systemic discriminatory animus, as well as key arbitral decisions supporting their claims.

The evidence that IBM has blocked by wielding its confidentiality provision includes [redacted]

[redacted] (SOF ¶¶ 16-99, App.017-038.)

IV. The District Court Grants IBM's Motion to Dismiss Plaintiff's Challenges to Its Arbitration Agreement

In the District Court, Plaintiff moved for summary judgment on her Declaratory Judgment Act claims, while IBM moved to dismiss them. The District Court granted IBM's motion and held Plaintiff's motion to be moot.

The District Court declined to exercise jurisdiction over Plaintiff's declaratory judgment claims, finding no current controversy between the parties. Opinion and Order at 15-19, App.811-814. In *dicta*, the District Court also indicated that it believed that the piggybacking waiver in IBM's arbitration agreement was enforceable because: (1) it was not a waiver of a substantive right under the ADEA; and (2) relatedly, the court did not consider the piggybacking rule to be part of the limitation law of the ADEA; and (3) *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir.

2021), which held that the ADEA's timing scheme is a substantive right that cannot be waived by contract, is inapplicable in the arbitration context. Opinion and Order at 18 n.10, App.813.

The District Court, again in *dicta*, also expressed disagreement with Plaintiff's challenge to the confidentiality provision of the arbitration agreement. Opinion and Order at 18 n.10, App.813. Without even addressing the extensive record that Plaintiff submitted in support of her Motion for Summary Judgment, the District Court summarily noted that the confidentiality provision is neither procedurally nor substantively unconscionable under New York law. Opinion and Order at 18 n.10, App.813.

Finally, the District Court did not address Plaintiff's arguments with respect to unsealing the record in the case, presumably leaving the record permanently sealed. Opinion and Order at 15-19, App.811-814.

STANDARD OF REVIEW

The Court reviews *de novo* a district court's order granting a motion to dismiss a complaint for failure to state a claim upon which relief may be granted. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

The Court reviews *de novo* a district court's determination that it lacks subject-matter jurisdiction. *See Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013).

The Court reviews a district court's decision of whether to hear a declaratory judgment claim for abuse of discretion. *See Keller Foundations, LLC v. Zurich American Ins. Co.*, 758 Fed. App'x. 22, 27 (2d Cir. 2018).

Likewise, the Court reviews *de novo* a district court's order denying summary judgment. *See Fisher v. Aetna Life Insurance Co.*, 32 F.4th 124, 135 (2d Cir. 2022). Summary judgment under Rule 56 is appropriate where admissible evidence in the form of affidavits, deposition transcripts, or

other documentation demonstrates the absence of a genuine issue of material fact, and one party's entitlement to judgment as a matter of law. *See Viola v. Philips Med. Sys. of N. Am.*, 42 F.3d 712, 716 (2d Cir. 1994).

The Court reviews a district court's order to seal for an abuse of discretion with respect to the ultimate decision, clear error as to factual determinations, and *de novo* as to conclusions of law. *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016).

SUMMARY OF THE ARGUMENT

The District Court committed several key errors of law and fact in its decisions granting IBM's Motion to Dismiss, denying Plaintiff's Motion for Summary Judgment, and keeping the summary judgment record under seal. As such, the District Court's decisions should be reversed.

First, the District Court abused its discretion in declining to exercise jurisdiction over Plaintiff's Declaratory Judgment Act claims. The District Court incorrectly concluded that the declaratory judgment claims would serve no useful purpose, based on its conclusion that there was no impending dispute that would yield further litigation. IBM's arbitration agreement *requires* arbitrators to entertain any motions the parties submit under the Federal Rules of Civil Procedure, and had the Court declared the timeliness provision unenforceable, Plaintiff would submit a motion for relief from judgment under Fed. R. Civ. P. 60 – which the arbitrator is *required* to hear – and likely proceed with her arbitration.

Second, the District Court erred in declining to grant a declaration that the timeliness provision of IBM's arbitration agreement was

enforceable, even if it waives the ADEA's piggybacking rule. Plaintiff should have been permitted to pursue her ADEA claim in arbitration, just as she would have been able to pursue the claim in court. In court, she would have been entitled to rely on the piggybacking rule, and IBM's arbitration agreement could not waive that right, as the ADEA limitations period is a substantive, non-waivable right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521. And IBM was not permitted to obtain a waiver of Plaintiff's ADEA claim, since it did not provide the required OWBPA disclosures.

Third, the District Court erred in declining to declare that IBM's aggressive use of the confidentiality provision in its arbitration agreement rendered the confidentiality provision unenforceable. The District Court did not even consider the extensive summary judgment record that Plaintiff submitted in support of her claim challenging IBM's aggressive use of the confidentiality provision. This Court has made clear that a confidentiality provision may be unenforceable when a plaintiff builds a record showing that the provision unduly prevents arbitration claimants

from pursuing their claims. *See American Family Life Assurance Co.*, 778 Fed. App'x. at 27; *Guyden*, 544 F.3d at 384-85.

Finally, the District Court wrongly allowed significant portions of the record and briefing in this matter to remain sealed, in contradiction to this Court's decision in *Lugosch*, 435 F.3d at 126.

ARGUMENT

I. The Court Should Reverse the District Court's Refusal to Exercise Jurisdiction Over Plaintiff's Declaratory Judgment Act Claim

After nearly a year of litigation and permitting the parties to engage in summary judgment briefing, the District Court held that it lacked subject matter jurisdiction. This conclusion is erroneous, and the dismissal of Plaintiff's claims should be reversed. In reaching its decision, the District Court relied heavily on the decision in *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618, at *4 (S.D.N.Y. July 14, 2022), which is also before this Court on appeal, No. 22-1728. Thus, in addition to setting forth the argument here, Plaintiff also respectfully directs the Court to the Opening Brief submitted by the plaintiffs in *In Re: IBM Arbitration Agreement Litig.*[13]

The District Court reached its conclusion after noting that, in order "[t]o decide whether to entertain a declaratory judgment action", the court is to ask "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would

[13] As noted *supra*, Plaintiffs have filed motions to have these cases heard in tandem, and those motions remain pending.

finalize the controversy and offer relief from uncertainty." *Parker v. Citizen's Bank*, 2019 WL 5569680, at *4 (S.D.N.Y. Oct. 29, 2019) (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir. 2005)). The District Court erred when it dismissed Plaintiff's claims.

Relying on the decision in *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618, at *4, the District Court found that "there exists no possibility of an impending dispute that may yield later litigation . . . , nor is there any uncertainty in the Parties' legal rights that such a judgment would elucidate . . . ," because the arbitrator "dismissed Plaintiff's claim as untimely on July 22, 2019," then "Plaintiff waited for just over two years after [she] received [her] arbitration decision[] to initiate this action . . . " and did not "file a vacatur motion challenging the validity of the Timeliness Provision." Opinion and Order at 16-17, App.811-812 (internal quotation marks and citations omitted; alterations in original). Thus, the District Court declined to exercise subject matter jurisdiction over the claims because it determined that a declaratory judgment would not have

served a useful purpose. *See generally* Opinion and Order, at 16-19, App.811-814. These conclusions are erroneous. *Id.*

First, contrary to the District Court's conclusion, the arbitration proceedings did ***not*** definitively resolve Plaintiff's ADEA claim as the District Court concluded, given that the arbitrator did not reach the merits of the Plaintiff's ADEA claims. Rather, in Plaintiff's arbitration proceeding, IBM successfully argued that Plaintiff's ADEA claim was untimely under the terms of the arbitration agreement. *See, e.g.*, SOF ¶ 15 and n.5, App.016-017. Following the dismissal of the Plaintiff's claims on timeliness grounds, Plaintiff then proceeded to seek such judicial review of the enforceability of this provision of the arbitration agreement that led her not to be able to pursue her claim in arbitration. She did so first by opting into the *Rusis* action, where the court held that she (and other individuals in similar circumstances) could not participate in a collective action to make this challenge. *See* SOF ¶ 10, App.014-015. Thus, Plaintiff initiated an individual

action.[14] If successful, Plaintiff will return to the arbitrator with a motion for relief from judgment pursuant to Fed. R. Civ. P. 60, which the arbitrator will be required to entertain.[15]

Courts regularly entertain declaratory judgment actions where, like here, parties dispute the validity or enforceability of contractual provisions. *See, e.g., Wells Fargo Bank, N.A. v. Sharma*, 642 F. Supp. 2d 242, 246 (S.D.N.Y. 2009) (collecting cases)). And this result should hold particularly true here, as IBM has insisted that its arbitration agreement contemplates a judicial

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[14] The District Court's statement that Plaintiff "waited for just over two years after [she] received [her] arbitration decision[] to initiate this Action," Opinion and Order at 17, App.812, is not only incorrect as a factual matter, but it is also not legally determinative. Plaintiff ***has*** been pursuing judicial relief, first by opting into *Rusis*, and then initiating the instant action when her claim was dismissed from the *Rusis* case. Thus, Plaintiff's timing ***is*** reasonable under the circumstances. Furthermore, as explained herein, neither IBM's arbitration agreement nor any other applicable law imposes a deadline on Plaintiff's request for declaratory relief.

[15] The arbitration agreement expressly ***requires*** the arbitrator to hear such motions. *See* Arbitration Agreement at 26, App.097 ("In any arbitration, the parties may file, and the arbitrator ***shall*** hear and decide at any point in the proceeding motions permitted by the Federal Rules of Civil Procedure . . ." (emphasis added)).

determination of questions of enforceability or validity of its provisions. The District Court therefore erred in dismissing Plaintiff's claims.

And again, if Plaintiff had sought declaratory relief prior to going to arbitration, it is likely the court would have held that the claims could not be addressed, because it was not clear that arbitrators would hold the claims to be untimely. *See, e.g.*, *Billie*, 2022 WL 807075, at *7-14 (allowing case to proceed in court, only after having compelled the case to arbitration, which ultimately could not proceed due to the plaintiff's inability to pay arbitral fees); *CellInfo, LLC*, 506 F. Supp. 3d at 71-73 (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).

Second, the District Court further erred when concluding that because the Plaintiff did not file a motion for vacatur within the three-month window provided for by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12, "the window to challenge those rulings, or the enforceability of the provisions that governed them, has long since closed." *See* Opinion and

Order at 17, App.812. The District Court's conclusion that there was a "window" to seek declaratory relief and that the "window" was the three-month deadline under the FAA for seeking vacatur, *see id.*, is not supported by law or fact.

IBM's arbitration agreement does not impose a deadline for seeking a judicial determination around the validity or enforceability of its provisions – thus, the District Court's finding that there is a "window" governing Plaintiff's requested relief is erroneous. And the District Court further erred when it grafted the "window" applicable to vacatur petitions under Section 10 of the FAA onto this proceeding.

Indeed, Section 10 of the FAA contemplates specific grounds for seeking to vacate an arbitration award, *see* 9 U.S.C. § 10. Contrary to the District Court's finding, 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 in 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. By imposing such a requirement (such that Plaintiff missed the "window" for bringing such a challenge), the District Court erred, and the District Court's decision dismissing the Plaintiff's declaratory judgment claims should be reversed.

II. Since Plaintiff's ADEA Claim Would Have Been Timely in Court, IBM Cannot Render Her Claim Untimely Through Use of an Arbitration Agreement

Because the District Court declined to exercise jurisdiction over Plaintiff's Declaratory Judgment Act claims, its holding did not reach the merits of Plaintiff's argument that the timeliness provision in IBM's arbitration agreement is unenforceable. *See* Opinion and Order at 16-19, App.811-814. However, as explained *supra*, it was error for the District Court not to decide this argument, and in fact the District Court did address it (albeit in *dicta*), summarily expressing agreement with the *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, and *Chandler* courts that Plaintiff's argument fails. Plaintiff's counsel have set forth extensive arguments in the Opening Briefs in *In Re: IBM Arbitration Litig.*, No. 22-1728 (2d Cir.), and

Lodi, No. 22-1737 (2d Cir.), explaining why the Court should find that the timeliness provision in IBM's arbitration agreement is unenforceable. Thus, Plaintiff incorporates those arguments by reference here and respectfully directs the Court to those Opening Briefs. The argument is briefly recounted here.

There can be no question that Plaintiff's ADEA claims would have been timely had she filed in court. Plaintiff could have timely filed her ADEA claim in court by availing herself of the "piggybacking" rule, which would have allowed her to "piggyback" onto the EEOC administrative charges filed by the named plaintiffs in the earlier-filed class action age discrimination case against IBM, the *Rusis* matter, or the charges filed by the 58 charging parties that were consolidated into the EEOC investigation (SOF ¶ 14, App.015-016.). *See Tolliver*, 918 F.2d at 1057. IBM, however, argued to the arbitrator that the arbitration agreement waived Plaintiff's ability to rely on the piggybacking rule. Thus, the effect of the arbitration agreement's purported waiver of application of the "piggybacking" rule was that Plaintiff's claim was dismissed as time-barred; she was thus

unable to pursue a claim in arbitration that she could timely have pursued in court.

This outcome—that Plaintiff could have proceeded with her claim in court but was unable to do so in arbitration due to the agreement truncating the time to file—is not permitted under *Gilmer*, 500 U.S. at 28. Under *Gilmer*, arbitration is an acceptable alternative forum ***only so long as*** an employee can pursue claims in arbitration that could have been pursued in court, without sacrificing any substantive rights. Sacrificing the right to pursue the claim *at all* as a result of the arbitration agreement's shortening of the time period to file the claim constitutes sacrificing a substantive right. *See Thompson*, 985 F.3d at 521 (holding that contract provision shortening the time-period for plaintiff to file her ADEA claim to six-months, which would have resulted in plaintiff's claim being time-barred under the agreement, to be unenforceable). The purported waiver of the application of the piggybacking rule to Plaintiff's claims in arbitration is thus unenforceable, as it waives a substantive right by abridging the time

period to file and because it was obtained without IBM providing OWBPA disclosures.

In expressing its agreement with the courts in *Chandler*, *Lodi*, and *In Re: IBM Arbitration Agreement Litig.*, that IBM could use its arbitration agreement to truncate its employees' ADEA limitations periods, the District Court placed the arbitration agreement on a pedestal above other kinds of contracts – running wholly afoul of the Supreme Court's recent admonition in *Morgan* that courts cannot invent special rules to favor enforceability of arbitration agreements. 142 S. Ct. at 1714 (holding that the FAA contains "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration").

First, the District Court's *dicta* agreeing that the ADEA's limitations period is a procedural right that can be truncated by contract is directly at odds with the Sixth Circuit in *Thompson*, 985 F.3d at 521. In *Thompson*, the EEOC submitted an amicus brief declaring that "the ADEA's statutory limitations period is a substantive right and prospective waivers of its

limitations period are unenforceable." *See Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23.

In opining instead that the ADEA's limitations period is a procedural right, the District Court cited *Chandler v. International Business Machines Corp.*, 2022 WL 2473340, at *4-5 (S.D.N.Y.). *See* Opinion and Order at 18 n.10, App.813. *Chandler*, in turn cited to *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 891 (2d Cir. 1995), for that proposition. *See Chandler*, 2022 WL 2473340, at *4-5. However, this Court has more recently held 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). Thus, while this Court held that the ADEA's limitations period was procedural for the purposes of determining whether a statutory amendment to the limitations period applied retroactively, *see Vernon*, 49 F.3d at 891, that ***does not*** mean that the limitations period is procedural in nature for all purposes. *See Enterprise*, 391 F.3d at 409.

Indeed, guided by the EEOC's interpretive expertise, the Sixth Circuit held that the ADEA's timing scheme is substantive for the purposes of determining whether an employer can abridge it by contract. *See Thompson*, 985 F.3d at 521.[16] This Court should follow the Sixth Circuit and the EEOC on this point, especially considering the deference that is owed to the EEOC's interpretations. *See EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("[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.").[17]

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[16] The District Court's effort to distinguish *Thompson* and its progeny *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 839 (6th Cir. 2019), is lacking. The District Court simply ignores those cases because they "did not extend to the context of arbitration agreements. Opinion and Order at 18 n.10, App.813 (quoting *Chandler*, 2022 WL 2473340, at *6). Given that the Supreme Court has now clearly held in *Morgan* that courts may not create special rules of contract in order to favor arbitration, *see* 142 S. Ct. at 1714, *Thompson* (and the EEOC) cannot be blatantly ignored.

[17] *See also Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)); *Jones v. American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999).

Because the ADEA limitations period is a substantive right, IBM could not have truncated it through its arbitration agreement. Furthermore, the substantive nature of the ADEA limitations period means that IBM could not have waived Plaintiff's right to the full period without providing the disclosures required by the OWBPA. *See Oubre*, 522 U.S. at 427.

Second, the District Court agreed with *Chandler* in its holding that the "piggybacking rule is not part of the statute of limitations law of the ADEA," and is instead only an administrative exhaustion doctrine. *Chandler*, 2022 WL 2473340, at *4-5. This *dicta* highlights the significance of the District Court's failure here to understand the piggybacking rule. The District Court's *dicta* runs contrary to this Court's discussion of the piggybacking rule and its implications of the ADEA's limitations period in *Tolliver*, 918 F.2d at 1056-60, as well as the ADEA's legislative history.

In *Tolliver*, this Court began by analyzing the timing provision of the ADEA, section 7(d), by observing that "[a]s originally enacted, section 7(d) provided that a suit [under the ADEA] could not be commenced 'by any individual under this section until *the individual* has given'" of the claim to

the government entity tasked with enforcement. *Id.* "In 1978, Congress amended section 7(d) to eliminate the requirement that 'the individual' bringing suit must have given the administrative notice and provided instead that suit could not be brought until 60 days after '*a charge* alleging unlawful discrimination has been filed with the Secretary'" of Labor (who was then the enforcing entity before that responsibility was transferred to the EEOC). *Id.* (citing Pub. L. No. 95–256, § 4(a), 92 Stat. 189, 190 (1978)) (emphasis supplied in *Tolliver*).

The Court expressly acknowledged that the 1978 amendment was intended by Congress to eliminate the failure to timely file notice as the "most common basis for dismissal of ADEA lawsuits by private individuals" and "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals...." *Id.* (quoting S. Rep. No. 493, 95th Cong., 1st Sess. 12 (1977), U.S. Code Cong. & Admin. News 1978, pp. 504, 515).[18] In other words, this Court acknowledged that piggybacking is

[18] The U.S. Dep't of Labor, Age Discrimination in Employment Act of 1967, 1976 Annual Report to Congress, had reported that two-thirds of all suits filed by private litigants were dismissed on procedural grounds. *See*

baked into the language of the statutory provision of the ADEA that functions like a statute of limitations.[19]

The Court in *Tolliver* also acknowledged the practical impact that the piggybacking rule permits individuals to institute lawsuits outside the ADEA's 300 (or 180 day) window, *Tolliver*, 918 F.2d at 1059, and noted that the remedial purpose of the notice requirement is served by its application as it affords the EEOC the ability to fulfill its statutory purpose of "seek[ing] to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion[,]" by investigating the initial charge. *Id.* at 1057 (quoting 29 U.S.C. § 626(d)).

Thomas J. Reed, *Age Discrimination in Employment: The 1978 ADEA Amendments and The Social Impact of Aging*, 2:15 Univ. of Puget Sound L. Rev.15, 42 1978. Another empirical report showed that the most often cited reason for dividing an ADEA case prior to June of 1977 was sufficiency or insufficiency of notice. *Id.* at 44-45. An internal memorandum circulated in May of 1977 reported that the ADEA compliance regulations "were the least effective program administered by the Wage-Hour Division". *Id*. at 43. Congressional amendments to the Act were intended to "make equitable exceptions to the" notice requirements available in court. *Id.* at 77.

[19] Since *Tolliver*, Congress has amended the ADEA, and has declined to amend the statute so as to preclude piggybacking. *See, e.g.*, Pub. L. 104-208, div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009-23.

As such, the District Court's conclusion that the piggybacking rule is not a limitations doctrine in addition to an administrative exhaustion doctrine is patently wrong. The court in *In Re: IBM Arbitration Litig.* declined to join *Chandler* in that aspect of its holding. *See* 2022 WL 2752618, at *7 (S.D.N.Y. July 14, 2022). Likewise, it is telling that while the District Court expressed agreement with *Chandler* on this point, it also acknowledged that the piggybacking rule has the effect of "allowing certain plaintiffs the ability to file a cause of action beyond the statute of limitations." Opinion and Order at 9 n.5, App.804 (citing *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618, at *2; *Holowecki*, 440 F.3d at 564).

For these reasons (and those explained in greater detail in the plaintiffs' Opening Briefs in *In Re: IBM Arbitration Litig.* and *Lodi*), the Court should declare that IBM's waiver of the piggybacking rule through its arbitration agreement (when it had not provided Plaintiff with OWBPA disclosures, which would have been required in order to obtain a waiver) is unenforceable.

III. The District Court Erred in Failing to Find the Confidentiality Provision to be Unenforceable

As has been explained more fully in the Opening Brief in *Chandler*, Case No. 22-1733 (2d Cir.), Plaintiff has submitted an extensive record demonstrating that IBM has aggressively used the arbitration agreement's confidentiality provision to unduly hinder the ability of its former employees to advance age discrimination claims against IBM in arbitration.[20] When Plaintiff arbitrates her claims, she should have an even playing field wherein IBM cannot block her from making use of directly relevant, shockingly incriminating evidence, as well as arbitral decisions.

This Court, in its decisions in *Guyden*, 544 F.3d at 384-85 and *American Family Life Assurance Co.*, 778 Fed. App'x. at 27, has made clear that although the mere presence of a confidentiality provision in an arbitration agreement does not render it unenforceable, it may be shown to be so upon

[20] The *Chandler* Opening Brief contains a thorough description of the record that the plaintiff submitted in support of his summary judgment motion asking the court to invalidate the confidentiality provision. The record in *Chandler* is materially the same as that which the Plaintiff in this matter submitted to the District Court, which can be found at App.040-742.

a demonstration that it has unfairly advantaged one party over the other. *See also Lohnn*, 2022 WL 36420, at *11 ("[U]nless *Green Tree* [*Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000)] and *Guyden* 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."). The District Court's findings should be reversed.[21]

IV. The District Court Erred by Declining to Unseal the Sealed Portions of the Summary Judgment Record Below

Finally, the District Court erred in failing to unseal certain information in the summary judgment briefing should remain under seal.[22]

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[21] Again, because the District Court (erroneously) declined to exercise jurisdiction over Plaintiff's Declaratory Judgment Act claim, the District Court did not reach the substance of Plaintiff's argument regarding the confidentiality provision. The District Court did, however, in *dicta* express agreement with the reasoning in *Chandler*. *See* Opinion and Order at 18 n.10, App.813.

[22] The District Court did not explicitly rule on Plaintiff's arguments that the summary judgment record and briefing should be unsealed, implicitly deciding that these documents should remain sealed permanently. Thus, Plaintiff only briefly addresses this argument here and directs the Court to the fuller discussion of this issue in the Opening Briefs in *Chandler*, No. 22-

Indeed, another court facing this exact same situation and analyzing a virtually identical summary judgment record submitted by Plaintiff's counsel held that the record should be unsealed. [23] *See Lohnn*, 2022 WL

1733 (2d Cir.), and *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.).

[23] Like the Plaintiff in this matter, the plaintiff in *Lohnn* brought a declaratory judgment claim to challenge the enforceability of the confidentiality provision in IBM's arbitration agreement. *See Lohnn*, 2022 WL 36420, at *1. After the plaintiff in *Lohnn* filed a motion for summary judgment substantively identical to that filed in this matter, the *Lohnn* court directed briefing on whether the supposedly confidential material in the summary judgment record and briefing should remain under seal. *See id.* IBM argued that the *Lohnn* plaintiff's decision to include the summary judgment record was a "ruse" to make public information that would otherwise be subject to the confidentiality provision. *See id.* at *12. The court in *Lohnn* rejected that argument, explaining that the plaintiff submitted a record as necessary to make out her claim. *See id.* Moreover, the court in *Lohnn* held that these documents were judicial documents subject to the presumption of public access and that they must be unsealed, subject to limited redactions. *See id.* at *17-18.

IBM then sought an emergency stay from this Court of the district court's order to unseal documents virtually identical as those in this case. This Court declined to stay the district court's order. *See Lohnn v. International Business Machines Corp.*, No. 22-32, Order, Dkt. 71 (2d Cir. Feb. 8, 2022). IBM then petitioned for a rehearing *en banc*, which this Court also denied. *See Lohnn*, Order, Dkt. 90 (2d Cir. Feb. 16, 2022). While several filings were largely unsealed, the exhibits forming the record was never unsealed, because the parties settled the case prior to the district court's approval of the parties' proposed limited redactions. *See Lohnn v.*

36420, at *6 ("[t]he Supreme Court and Second Circuit have long held that there is a presumption of immediate public access to judicial documents under both the common law and the First Amendment.") (citing *Lugosch*, 435 F.3d at 126).[24] This right of public access, which "is said to predate the Constitution," *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"), is "based on the need for federal courts … to have a measure of accountability and for the public to have confidence in the administration of justice," *id.* at 119 (citing *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")).

International Business Machines Corp., 2022 WL 3359737, at *2-6 (S.D.N.Y. Aug. 15, 2022). Notably, the New York Times Company filed an amicus brief arguing that the sealed documents should be immediately unsealed. *See Lohnn v. International Business Machines Corp.*, No. 22-23, Amicus Brief, Dkt. 58 (2d. Cir. Jan. 28, 2022).

[24] Plaintiff recognizes that the District Courts in this matter, *Chandler*, 2022 WL 2473340, at *8, and *In Re: IBM Arbitration Litig.*, 2022 WL 3043220, at *1-4 (S.D.N.Y. Aug. 2, 2022), opted not to unseal the record. However, Judge Liman's well-reasoned decision in *Lohnn* is far more faithful to this Court's jurisprudence in *Lugosch* and *Amodeo*. *See Lohnn*, 2022 WL 36420, at *6-17.

The Second Circuit has developed a three-part framework to determine whether a document should be placed or remain under seal—and thereby protect the public's First Amendment right to access court filings. First, a court must determine whether the documents at issue are "judicial documents," defined as "a filed item that is 'relevant to the performance of the judicial function and useful in the judicial process.'" *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016) (quoting *Lugosch*, 435 F.3d at 119). In determining whether a filing constitutes a judicial document, courts consider "the 'relevance of the document's specific contents to the nature of the proceeding' and the degree to which 'access to the [document] would materially assist the public in understanding the issues before … the court, and in evaluating the fairness and integrity of the court's proceedings.'" *Bernstein*, 814 F.3d at 139 (quoting *Newsday LLC v. Cty of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013)).

Once the court determines that the documents at issue are judicial documents, it "must determine the weight" of the presumption in favor of

public access, which is in turn "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Lugosch*, 435 F.3d at 119 (quoting *Amodeo II*, 71 F.3d at 1049).

Finally, the court must weigh the public's right to access against "countervailing factors," including "the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

Thus, under well settled law in this Circuit, a court ruling on a motion to seal or unseal must establish a robust record documenting its findings.[25] Yet the District Court did not even attempt to explain its

[25] The First Amendment similarly requires specific, on-the-record findings to justify depriving the public of its right to review judicial documents. *See Lugosch*, 435 F.3d at 120 ("[C]ontinued sealing of [summary judgment] documents may be justified only with specific on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim."); *see also Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019) (Courts must "review the document individually" and cannot rely on "generalized statements about the record as a whole.").

reasoning for shielding the summary judgment documents from the public beyond the fact that they are protected by a confidentiality provision that it found enforceable. Leaving aside the fact that a confidentiality provision is not a sufficient countervailing interest to overcome the public's right of access to judicial documents, the District Court's failure to address this issue is obviously insufficient under the framework established in *Lugosch* and its predecessors.

Had the District Court actually engaged in the requisite three-step analysis discussed above, it would have easily found that the summary judgment filings are judicial documents that should be unsealed for public access. *See* Opening Brief in *Chandler*, No. 22-1733 (2d Cir.); Opening Brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.).[26] The Court

[26] The public's right of access attached the moment that Plaintiff filed her summary judgment motion in court, *see Lugosch*, 435 F.3d at 123; *Lohnn*, 2022 WL 36420 at *9, and IBM is unable to point to any meaningful countervailing interest in confidentiality beyond the mere fact of including a confidentiality provision its arbitration agreement. *See Lugosch*, 435 F.3d at 126 ("[T]he mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable.").

erred by failing to engage in this analysis and by rendering a decision in such a way that maintains the sealing of the judicial documents at issue.

Accordingly, the District Court's rulings on IBM's letter motions to seal should be reversed.

CONCLUSION

The District Court wrongly declined to exercise jurisdiction over Plaintiff's Declaratory Judgment Act claims in this matter. Although the District Court believed that Plaintiff could no longer pursue her ADEA claim given that she had obtained a final award in arbitration, Plaintiff has a clear avenue to pursue her claim should the Court issue a declaratory judgment holding that the challenged arbitration agreement provisions are unenforceable. In that case, Plaintiff would submit a motion for relief from judgment pursuant to Fed. R. Civ. P. 60 to the arbitrator, which the arbitration agreement ***requires*** the arbitrator to hear. Thus, Plaintiff's ADEA claim has not been definitively resolved – indeed, her ADEA claim has not been heard. Moreover, the District Court was wrong to impose the FAA's timeline for a motion to vacate.

The District Court also erred by refusing to hold that the timeliness provision in the arbitration agreement was unenforceable, meaning that IBM can prevent Plaintiff from pursuing her claim through use of an arbitration agreement (when IBM had not provided to her the necessary OWBPA disclosures that would have been required in order to obtain a release of her ADEA claim). The piggybacking rule should have allowed her to pursue her ADEA claim on the heels of a class discrimination charge that alleged a systemic violation of the law. The ADEA's limitations scheme is a substantive right that cannot be abridged by contract.

The District Court also erred in refusing to find unenforceable IBM's overly aggressive invocation of the confidentiality clause in its arbitration agreement. Plaintiff put forth a fulsome record showing how IBM has repeatedly wielded this confidentiality clause in order to impede its former employees in their discrimination claims by preventing them from using highly incriminating information that their counsel have obtained in other cases.

Finally, the District Court erred in allowing portions of the record below to remain under seal, without even engaging in the required analysis.

For these reasons, this Court should reverse the District Court's decision granting IBM's Motion to Dismiss and denying Plaintiff's Motion for Summary Judgment, as well as the District Court's orders allowing portions of the record to remain sealed.

Dated: November 16, 2022

Respectfully submitted,

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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.

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Dated: November 16, 2022

/s/ Shannon Liss-Riordan
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