No. 22-1728

United States Court of Appeals for the Second Circuit

IN RE: IBM ARBITRATION AGREEMENT LITIGATION

On Appeal from the United States District Court for the Southern District of New York
Case Nos. 21-cv-6296; 21-cv-6297; 21-cv-6307; 21-cv-6308; 21-cv-6310; 21-cv-6312; 21-cv-6314; 21-cv-6320; 21-cv-6322; 21-cv-6323; 21-cv-6325; 21-cv-6326; 21-cv-6331; 21-cv-6332; 21-cv-6337; 21-cv-6340; 21-cv-6341; 21-cv-6344; 21-cv-6349; 21-cv-6351; 21-cv-6353; 21-cv-6355; 21-cv-6375; 21-cv-6377; 21-cv-6380; 21-cv-6384 – Judge Jesse M. Furman

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants[1] hereby make the following corporate disclosure statement pursuant to Fed. R. App. R. 26.1:

Plaintiffs-Appellants are individuals and therefore have no parent corporation or shareholders.

[1] The Plaintiffs-Appellants in these consolidated matters are Gregory Abelar, William Abt, Brian Brown, Brian Burgoyne, Mark Carlton, William Chastka, Phillip Corbett, Denise Cote, Michael Davis, Mario DiFelice, Joseph Duffin, Brian Flannery, Fred Gianiny, Om Goeckermann, Mark Guerinot, Deborah Kamienski, Douglas Lee, Colleen Leigh, Stephen Mandel, Mark McHugh, Sandy Plotzker, Alexander Saldarriaga, Richard Ulnick, Mark Vornhagen, James Warren, and Dean Wilson.

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INTRODUCTION

These consolidated cases were brought by twenty-six (26) former IBM employees, seeking declaratory judgments pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, that two provisions of an arbitration agreement that they entered into with IBM are not enforceable, as the provisions undermine or extinguish their ability to pursue their claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[2] Upon their terminations, Plaintiffs entered into arbitration agreements with IBM that released (in exchange for a small severance payment) almost all claims they may have against IBM, but not claims under the ADEA.[3] Under this agreement, these employees

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[2] This Court has before it three other appeals, which raise nearly identical issues: *Chandler v. International Business Machines Corp.*, No. 22-1733; *Lodi v. International Business Machines Corp.*, No. 22-1737; and *Tavenner v. International Business Machines Corp.*, No 22-2318. Plaintiffs incorporate the Opening Briefs in these matters herein by reference, and Plaintiffs' counsel intends to move to have these appeals heard together.

[3] IBM's arbitration agreement could not have waived Plaintiffs' ADEA claims, because IBM did not provide disclosures required under the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. ¶ 626(f), to obtain

were permitted to pursue ADEA claims against IBM, but they had to be brought in individual arbitrations.

However, two provisions of IBM's arbitration agreement prevent Plaintiffs from pursuing their ADEA claims in arbitration – claims that they would have been able to pursue in court had they not signed arbitration agreements. Plaintiffs have thus sought declarations holding unenforceable these two provisions. *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.").[4] It was proper for

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a release of claims under the ADEA. The agreement therefore *must* permit Plaintiffs to pursue their ADEA claims.

[4] The District Court seemed to expect that Plaintiffs were challenging the arbitration agreement as a whole and considered procedural unconscionability. However, Plaintiffs were not challenging the agreement as a whole – they were only challenging two substantively unconscionable provisions so that they could pursue their ADEA claims in arbitration.

Plaintiff to ask the District Court to hold these provisions unenforceable since [redacted].[5]

Although Plaintiffs moved for summary judgment with an extensive supporting record, the District Court granted IBM's cross-motion to dismiss their complaints and denied their summary judgment motion. The District Court's decision was rife with legal and factual errors and should be reversed.

First, the District Court should have held unenforceable the arbitration agreement's timeliness provision by which IBM purported to abridge the limitations period for them to bring an ADEA claim. There can

[5] [redacted]

be no dispute that if Plaintiffs had been able to pursue their claims in court, they would have been timely.[6]

In court, Plaintiffs would be able to make use of the ADEA's "piggybacking rule," which allows individuals who did not timely submit an EEOC charge to nevertheless 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 Plaintiffs from advancing their claims in arbitration even though they would have been considered ***amply*** timely to do so in court.

The District Court incorrectly held that the timeliness provision in the arbitration agreement was enforceable even if it abridged the time Plaintiffs

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[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).

had to initiate their ADEA claim by *years*,[7] finding that the ADEA's timing scheme could be waived by contract because 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 runs afoul of *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 also governed by OWBPA, which includes strict requirements for obtaining

[7] It so held with respect to the two Plaintiffs who had not already obtained a final award in arbitration – Flannery and Corbett. As explained *infra*, the District Court abused its discretion by declining to exercise jurisdiction over the declaratory judgment claims of the remaining twenty-four Plaintiffs.

an effective waiver of any right or claim under the ADEA. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998). IBM did not meet these requirements and the arbitration agreement's purported abridgement of the ADEA's limitations period is unenforceable. At bottom, IBM's arbitration agreement impermissibly abridged the Plaintiffs' right to enjoy the full limitations period that they would have had to initiate their ADEA claims in court, which has impeded the effective vindication of Plaintiffs' claims in arbitration. *See Gilmer*, 500 U.S. 20.

Second, Plaintiffs challenged the agreement's confidentiality provision, which IBM has aggressively wielded to block employees pursuing discrimination cases against IBM in arbitration from using smoking gun evidence that Plaintiffs' counsel have obtained in other arbitration cases raising the same issues. [8] This Court has recognized the

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[8] In these arbitrations, Plaintiffs' counsel obtained [redacted], but IBM, wielding its confidentiality provision, has fought to prevent the use of this evidence across arbitrations. (SOF ¶¶ 17-80, App.025-038.)

crucial importance of such pattern and practice evidence in *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (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 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). The District Court erred when it refused to reach this issue.

Third, with respect to the other twenty-four (24) Plaintiffs ("Dismissal Plaintiffs"), the District Court abused its discretion by not reaching the enforceability of the timeliness provision, because it refused to exercise jurisdiction under the Declaratory Judgment Act. The District Court posited that their declaratory judgment claims would serve no useful purpose, because they already obtained final arbitration awards dismissing their claims. However, the District Court ignored the plain language of the

arbitration agreement which [redacted]. Thus, Plaintiffs properly sought the court's determination of whether the timeliness provision was enforceable.[9] Then, after obtaining a decision from court holding that the agreements cannot waive their rights to pursue claims in arbitration, Plaintiffs would have moved in their arbitrations for relief from judgment pursuant to Fed. R. Civ. P. 60, which the arbitrators would be obligated to entertain under the agreement. Arbitration Agreement at 26, App.105.

[9] It was proper for Plaintiffs to bring this claim in court after having submitted their claims to arbitration because, if they had sought a declaration holding the timeliness provision unenforceable earlier, prior to their arbitrations, 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). However, now that [redacted], it is clear that these Plaintiffs need declaratory relief. With respect to the plaintiffs who have not yet brought their claims in arbitration, it is now clear that most [redacted], and so they can properly seek a ruling that this clause is unenforceable.

Fourth, the District Court erred by keeping under seal significant portions of Plaintiffs' extensive summary judgment record as well as wide swathes of the briefing. As Judge Liman explained in *Lohnn v. International Business Machines Corp.*, "[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." 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)).[10] The District Court's decision to keep these documents under seal was directly contrary to this Court's decision in *Lugosch*, 435 F.3d at 123; *Lohnn*, 2022 WL 36420 at *9.

[10] In *Lohnn*, 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. International Business Machines Corp.*, 2022 WL 3359737, at *2-6 (S.D.N.Y. Aug. 15, 2022).

Finally, the Court erred by denying Plaintiffs' motion to amend their complaints to assert a fraudulent inducement claim, alleging that IBM fraudulently induced its employees to enter into the arbitration agreements in the first place. The District Court incorrectly held that the 24 Dismissal Plaintiffs waived this claim by initiating their arbitrations. To the contrary, IBM has fought hard to conceal its fraudulent scheme, and Plaintiffs only obtained evidence supporting their fraudulent inducement claims after they had initiated their arbitrations. *See Lohnn*, 2022 WL 36420, at *12. Moreover, Plaintiffs Flannery and Corbett cannot have waived these claims, as they had not yet been to arbitration. The District Court also held that Plaintiffs did not meet the heightened pleading standard to bring a fraudulent inducement claim. However, the allegations in the proposed amended complaint amply satisfy the pleading standard, and at least one other court has held that similar allegations against IBM sufficed to allow a plaintiff to survive a motion to dismiss. *See McCormack v. IBM*, 145 F. Supp. 3d 258, 276 (S.D.N.Y. 2015).

The District Court's decision should be reversed.

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, because Plaintiffs have brought claims pursuant to Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, regarding their 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. Plaintiffs timely filed a notice of appeal on August 5, 2022, App.606-607, appealing from the District Court's Opinion and Order granting IBM's Motion to Dismiss and denying Plaintiffs' Motion for Summary Judgment and Judgment issued on July 14, 2022. App.597-603.

STATEMENT OF THE ISSUES FOR REVIEW

(1) Whether the District Court erred by holding that IBM's arbitration agreement could waive Plaintiffs' ability to utilize the piggybacking rule under the ADEA.

(2) Whether the confidentiality provision is enforceable.

(3) Whether the District Court erred by declining to exercise jurisdiction over the declaratory judgment claims of the Dismissal Plaintiffs.

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

(5) Whether the District Court erred by denying Plaintiffs' motion to amend their complaints to assert claims of fraudulent inducement.

STATEMENT OF THE CASE

Plaintiffs are twenty-six (26) former employees of IBM, who sought a declaratory judgment that two provisions of an arbitration agreement that they entered into with IBM are not enforceable (a confidentiality provision and a timeliness provision), as they undermine or extinguish their ability to pursue claims against IBM under the ADEA. *See* Exemplar Complaint, App.001-010.

Plaintiffs alleged that IBM engaged in a systemic, years-long effort to reduce its number of older workers to create a younger workforce; the company sought to refresh its image to better compete with the younger, "hipper" technology companies such as Google, Facebook, and Amazon. (Statement of Material Facts (hereinafter "SOF") ¶ 3, App.019-020.)[11] Plaintiffs alleged that they fell victim to IBM's discriminatory scheme and IBM discriminated against them when terminating them on the basis of age. (Compl. ¶¶ 7-8, App.003.) After their layoffs, Plaintiffs signed an

[11] This discriminatory scheme is detailed in the Second Amended Complaint in *Rusis v. International Business Machines Corp.*, Civ. Act. No. 18-cv-08434, App.058-078.

arbitration agreement in exchange for a modest severance payment; this agreement released almost all claims that Plaintiffs had against IBM, with the specific exception of claims under the ADEA. (SOF ¶ 5, App.020.) The agreement allowed Plaintiffs to pursue claims under the ADEA but only in individual arbitration. (SOF ¶ 5, App.020.)[12]

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

Plaintiffs are not the only individuals to have alleged that IBM engaged in systemic age discrimination in recent years. 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 class EEOC charge on May 10, 2018, alleging that IBM engaged in a companywide discriminatory scheme of laying off its older workers. (SOF ¶ 14 n.9, App.023.)[13]

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[12] Because IBM did not provide Plaintiffs disclosures required by the OWBPA, *see* SOF ¶ 5 n.3, App.020, the arbitration agreement could not release ADEA claims. *See Oubre*, 522 U.S. at 427.

[13] *Rusis* named plaintiffs Henry Gerrits, Phil McGonegal, and Sally Gehring also timely filed timely classwide EEOC charges. (SOF ¶ 14 n.9,

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

Upon their terminations, Plaintiffs signed an arbitration agreement that IBM has contended limits the time they had to submit their arbitration demand to 300 or 180 days. Because arbitrators have agreed with IBM's position, Plaintiffs have challenged the enforceability of the agreement's timeliness provision.

The arbitration agreement states:

> 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 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

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App.023.) 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.032-033.)

demand for arbitration.

(SOF ¶ 13, App.022.).

Twenty-four of the Plaintiffs in this appeal sought to bring ADEA claims against IBM in arbitration. (SOF ¶ 7, App.020.) [redacted]. (SOF ¶ 9, App.021.) The two other Plaintiffs in this appeal, Brian Flannery and Phillip Corbett, sought a declaration in court rather than going straight to arbitration. (SOF ¶ 8 n.5, JA, App.021.)

Plaintiffs then sought to opt in to *Rusis* in order to challenge before a court the validity of the purported waiver of piggybacking. (SOF ¶ 10, App.021-022.) The *Rusis* court dismissed Plaintiffs due to the class action waiver in the arbitration agreement. *See Rusis*, 2021 WL 116469, at *4-7. Plaintiffs thereafter initiated individual matters in the Southern District of New York, challenging the arbitration agreement. (SOF ¶ 11, App.022.) The District Court consolidated 25 of these complaints into this proceeding. (SOF ¶ 12, App.022.)

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

Plaintiffs also challenged IBM's aggressive use of its confidentiality provision as unconscionable and therefore unenforceable.[14] IBM has aggressively invoked this provision in the dozens of ADEA arbitrations that Plaintiffs' counsel have pursued on behalf of former employees and has used it to hamper the ability of former employees to prove their cases. Plaintiffs have put together a record demonstrating that IBM has routinely attempted (often successfully) to stop its former employees from using

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[14] 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.024-025.)

crucial [redacted] evidence of IBM's discriminatory animus in their arbitrations and to prevent the employees across arbitrations from relying on key arbitral decisions.

For instance, IBM has used its confidentiality provision to block employees from using evidence obtained in similar cases, including:

[redacted]. (SOF ¶¶ 16-98,

App.024-045.)

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

In the court below, Plaintiffs moved for summary judgment on their Declaratory Judgment Act claims, while IBM moved to dismiss these claims.

The District Court declined to exercise jurisdiction over the declaratory judgment claims of the Dismissal Plaintiffs, finding no current controversy between the parties. Opinion at 8, App.577. The District Court declined to exercise jurisdiction over the remaining two Plaintiffs' claims regarding the confidentiality provision, finding ripeness lacking. Opinion. at 11, App.580.

The District Court granted IBM's motion to dismiss the remaining two Plaintiffs' declaratory judgment claims challenging the enforceability of the timeliness provision, finding that the timing scheme of the ADEA was not a non-waivable substantive right, Opinion at 13-15, App.582-584, and the timeliness provision did not prevent effective vindication of Plaintiffs' ADEA rights, Opinion at 18, App.587.

Additionally, Plaintiffs separately moved to amend their complaints to assert classwide fraudulent inducement claims. (Proposed Am. Compl., App.547-569.) The District Court denied Plaintiffs' motion for leave to amend, finding futility (with respect to the Dismissal Plaintiffs) and that proposed amendments by the two remaining Plaintiffs failed to meet Rule 9(b) standards. Opinion at 23-24, App.592-593.

Lastly, in a separate decision, the District Court granted IBM's request to permanently seal many of the exhibits and briefing, as IBM contended they were confidential under the arbitration agreement's confidentiality provision. Memorandum Opinion and Order, App.597-603.

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. *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 467 (2d Cir. 2019).

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. Appx. 22, 27 (2d Cir. 2018).

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).

Finally, 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 Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016).

SUMMARY OF THE ARGUMENT

The District Court committed several errors of law and fact in granting IBM's Motion to Dismiss and sealing request. These decisions should be reversed.

First, with respect to Plaintiffs Flannery and Corbett, the District Court incorrectly held that the timeliness provision of IBM's arbitration agreement was enforceable, even to the extent that it purports to the waive the ADEA's piggybacking rule. The waiver of this rule is unenforceable, as the ADEA limitations period is a substantive, non-waivable right. *See Thompson*, 985 F.3d at 521. To have waived Plaintiffs' ability to pursue an ADEA claim, IBM would have had to provide OWBPA disclosures, which it did not do.

Second, the Court erred when it did not find that the confidentiality provision is unenforceable. IBM has aggressively wielded its confidentiality provision to block employees pursuing discrimination cases against IBM in arbitration from using smoking gun evidence that Plaintiffs' counsel have obtained in other arbitration cases raising the same issues.

And this Court has made clear that a confidentiality provision may be unenforceable where, as here, a plaintiff builds a record showing it to have unduly prevented 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.

Third, the District Court abused its discretion in declining to exercise jurisdiction over the 24 Dismissal Plaintiffs who obtained final awards in their arbitrations. The District Court incorrectly concluded that the declaratory judgment claims would serve no useful purpose, as 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, Plaintiffs would submit motions for relief from judgment under Fed. R. Civ. P. 60 – which the arbitrators are *required* to hear – and likely proceed with their arbitrations.

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

Finally, the District Court erred by denying Plaintiffs' motion to amend their complaints to add a fraudulent inducement claim, finding that the Dismissal Plaintiffs waived this claim by arbitrating their claims, despite the fact that IBM's fraudulent conduct was not known to the Plaintiffs until well after they attempted to arbitrate their claims. Additionally, the District Court incorrectly held that the pleadings did not satisfy the heightened pleading standards for fraudulent inducement claims. The pleadings in the proposed amended complaints amply set forth IBM's fraudulent conduct, similar to the allegations in *McCormack*, 145 F. Supp. 3d at 276, where the court denied IBM's motion to dismiss a fraudulent inducement claim.

ARGUMENT

I. Even Though Plaintiffs' ADEA Claims Would Have Been Timely Had They Filed in Court, the District Court Wrongly Held that IBM's Arbitration Agreement Could Render Their Claims Untimely

There can be no question that Plaintiffs' ADEA claims would have been timely had they filed in court. Plaintiffs could timely file their ADEA claims in court tomorrow by availing themselves of the "piggybacking" rule, and "piggyback" onto EEOC charges filed by the named plaintiffs in the earlier-filed class action age discrimination case against IBM, the *Rusis* matter, or the 58 charging parties that were a part of the EEOC investigation (SOF ¶ 10, App.App.003-004.). *See Tolliver*, 918 F.2d at 1057.[15] IBM, however, argued to the arbitrators (successfully with respect to the 24 Dismissal Plaintiffs)[16] that the timeliness provision waives Plaintiffs' ability

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[15] The arbitration agreement reads: "The Arbitrator shall apply the substantive law (and the law of remedies, if applicable) of the state in which the claim arose, or federal law, or both, as applicable to the claim(s) asserted." App.105. Plaintiffs contend that their claims arose in New York, as IBM's headquarters are in Armonk, New York, and thus Second Circuit law applies.

[16] The District Court declined to reach the substance of Plaintiffs' piggybacking argument with respect to the Dismissal Plaintiffs – as

to rely on the piggybacking rule. The effect of the arbitration agreement's purported waiver of application of the "piggybacking" rule is that the Plaintiffs' claims have been dismissed as time-barred and they are unable to pursue those claims in arbitration, even though they could timely proceed in court.

This outcome—that Plaintiffs could have proceeded with their claims in court but were unable to do so in arbitration due to the agreement truncating the time to file—is not permitted under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Under *Gilmer*, arbitration is an acceptable alternative forum ***only so long as*** an employee can pursue their claims in arbitration just as they would be able to 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*

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explained herein, the District Court erred in reaching this conclusion. With respect to the two Plaintiffs who sought declarations in court prior to arbitrating their claims – Plaintiffs Flannery and Corbett – the District Court reached the substance of their piggybacking arguments but nevertheless engaged in a deeply flawed analysis.

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 an unenforceable). The purported waiver of the application of the piggybacking rule to Plaintiffs' 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.

The District Court erred in reaching a contrary conclusion with respect to Plaintiffs Corbett and Flannery (the two Plaintiffs who had not yet arbitrated their claims), and this Court should reverse. In dismissing Plaintiffs' challenge to the timeliness provision, the District Court has placed arbitration agreement on a pedestal above other kinds of contracts, running afoul of the Supreme Court's recent admonition in *Morgan*, 142 S. Ct. at 1713, that courts cannot invent special rules to favor enforceability of arbitration agreements.

A. The ADEA's Timing Scheme, Including the "Piggybacking" Rule, is a Substantive Right that Cannot be Abridged by Contract

Pursuant to 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). However, this statutory period can be tolled by the filing of a class-wide EEOC charge by a similarly situated individual under the "piggybacking" or "single filing" rule.

The piggybacking rule permits individuals to assert ADEA claims against employers even if the claims are brought outside the time to file an EEOC charge. Under the rule, a plaintiff can "piggyback" off of an earlier, timely-filed EEOC charge alleging that the employer engaged in a similar course of discrimination. *See Tolliver*, 918 F.2d at 1057. "Thus, a plaintiff who has never filed an EEOC charge, and therefore has never given notice of her discrimination complaint to either the employer or the EEOC, can still litigate her claims so long as they fall 'within the scope' of the timely

filed claims."*Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *3 (S.D.N.Y. Sept. 17, 2008).[17]

Importantly, a plaintiff may initiate a separate, individual action by piggybacking off charges filed by plaintiffs to a separate action. *Tolliver*, 918 F.2d at 1057 ("[t]he purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit **or initiate their own.**"); *see also Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993).[18]

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[17] The administrative prerequisites of discrimination statutes such as the ADEA and Title VII "must be interpreted liberally to effectuate [their] purpose of eradicating employment discrimination," and courts must look to "fairness, and not excessive technicality" in addressing such issues. *Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *2 (S.D.N.Y. Sept. 17, 2007). Moreover, the Second Circuit has "aligned itself with the 'broadest' interpretation of the single-filing rule." *Id.* at *6 (citing *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1058 (2d Cir. 1990)).

[18] IBM will likely argue that the timeliness provision waiving the ability to piggyback is not the reason for the inability of IBM's former employees to arbitrate their claims, because they could have demanded arbitration during the 300/180 day window. Setting aside that the arbitration agreement is not actually explicit as to the deadline for arbitration demands, these former employees were not generally aware that IBM had

In extending the "piggybacking" rule (or "single filing rule") to the ADEA context in *Tolliver*, this Court examined the language of the statute, as well as the remedial purpose behind the ADEA's notice provision; it identified the notice provision of section 7(d) as one of "two provisions that function like statutes of limitations." *Id.* at 1056.

The Court began its analysis of 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

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discriminated against them at the time of their separations, because IBM had (falsely) informed them that they were separated for legitimate reasons. Indeed, this is the very reason that Congress enacted OWBPA, which allows laid off employees to evaluate whether their terminations may be due to age discrimination by requiring disclosure of the ages of other employees who were terminated and retained in the same layoff. Because IBM did not provide these disclosures to its former employees, they lacked information to know that they may have a viable age discrimination claim until later when they learned of allegations that IBM was engaged in a companywide systemic effort to oust older workers. This is also the reason behind the piggybacking rule; employees may not realize they have a discrimination claim at the time of their termination, but later, when they find out that a class charge of discrimination has been filed, they may join it. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996).

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 limit failure to timely file notice as "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).[19] In other words, this

[19] 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* 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 dismissing an ADEA case prior to June of 1977 was sufficiency

Court acknowledged that piggybacking is baked into the language of the statutory provision of the ADEA that functions like a statute of limitations.[20]

The Court in *Tolliver* also acknowledged the practical impact of the piggybacking rule, which permits individuals to institute lawsuits outside

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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.

[20] 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.

In *Chandler*, one of the other appeals before this Court, the court held that the "piggybacking rule is not part of the statute of limitations law of the ADEA" and that "[i]nstead, the piggybacking rule is an exception to the exhaustion doctrine that excuses plaintiffs from notifying their employer and the EEOC of their claims and filing an EEOC charge when those parties are already on notice of the facts surrounding the plaintiff's claims from an earlier filed EEOC charge." *Chandler*, 2022 WL 2473340, at *4. This conclusion 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 discussed *supra*. The *Chandler* court's block quotation from *Tolliver* ignores this Court's discussion of amendments to the statutory language and the Court's characterization of the notice requirement as functioning like a statute of limitations provision. *See Chandler*, 2022 WL 2473340, at *4.

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)). Thus, application of the piggybacking in the ADEA bolsters the remedial effect of the statute.

This Court's decision in *Tolliver* to extend the piggybacking rule to the ADEA context and individual actions, is in line with sister Circuit Court precedents. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996); *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *cf. Anson v. Univ. of Tex. Health Sci. Ctr. At Hous.*, 962 F.2d 539, 541 (5th Cir. 1992).

The discussion of the ADEA's timing scheme in *Tolliver* is in accord with the Sixth Circuit's discussion of this scheme in *Thompson*. There, the Sixth Circuit held that an employer cannot contractually shorten the limitations period of the ADEA because the timing provisions contained in

the ADEA "are part of the **substantive law** of the cause of action created by the ADEA." *Thompson*, 985 F.3d at 521.

In so concluding, the Sixth Circuit relied on an earlier case, *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 833 (6th Cir. 2019), which held that an employer could not abrogate the limitations period for a Title VII claim by contract. As the Court reasoned, although statutes of limitations are traditionally regarded as procedural mechanisms, there are exceptions to this general rule where statutes that "create rights and remedies contain their own limitation periods." *Id.* (citing *Davis v. Mills*, 194 U.S. 451, 454 (1904)). In such instances, the statute of limitations is considered a "substantive right" that "generally is not waivable in advance by employees." *Id.* at 829. The Court noted that this conclusion aligned with Circuit precedent "disallow[ing] contractual limitations" on claims brought under other statutory schemes containing their own limitations periods, such as the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) and the Equal Pay Act, 29 U.S.C. § 206(d). *Id.* at 830-31. Case law within the Second Circuit similarly holds that limitations periods under statutes such as the

FLSA are substantive rights that cannot be truncated by contract.[21] Further, this Court in *Ragone*, 595 F.3d at 125-26, indicated its agreement with the principles espoused in *Logan*, including in the context of evaluating the enforceability of an arbitration agreement.[22]

In *Thompson*, the court extended its ruling in *Logan* to the ADEA. *See Thompson*, 985 F.3d at 521. The Sixth Circuit noted that application of the rule against enforcing contractual limitations on the ADEA time period furthers the underlying purpose of the notice provision: "[T]he ADEA emphasizes the importance of the pre-suit cooperative process, outlining the EEOC's obligation upon receiving a charge to 'seek to eliminate any

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[21] *See, e.g., Castellanos v. Raymours Furniture Company, Inc.*, 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018).

[22] In *Ragone*, the arbitration agreement at issue included a provision shortening the time for plaintiff to file a Title VII claim to 90-days; the defendant agreed to waive enforcement of the provision, so this Court did not rule on the provision's enforceability. *Id.* at 123. The Court however rang a "A Note of Caution", that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor … [I]t is at least possible that Ragone would be able to demonstrate that th[is] provision[] w[as] incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." *Id.* at 125-26.

alleged unlawful practice by informal methods of conciliation, conference, and persuasion.' 29 U.S.C. § 626(d)(2). Altering the time limitations surrounding these processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Id.* at 521. Importantly, the EEOC submitted an amicus brief in *Thompson*, also taking the position 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. The EEOC's reasonable interpretation of the ADEA as set forth in this amicus is entitled to deference. *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.").[23]

In sum, under this Court's ruling in *Tolliver*, and the reasoning in *Thompson* (approved of in *Ragone*), the time-period for filing contained in

[23] *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).

the ADEA, to which the piggybacking rule is integral, should be held to be a substantive right that cannot be waived or truncated in an arbitration agreement. Indeed, given the fact that this Court's strong and expansive position in favor of the piggybacking rule, this Court should follow *Thompson*.[24] The District Court's refusal to recognize this substantive right was flawed.

B. The District Court Erred by Declining to Follow the EEOC and the Sixth Circuit in *Thompson*, Instead Holding that the ADEA's Timing Scheme was a Procedural Right that Could be Waived in an Arbitration Agreement

First, the District Court erred in narrowly construing the ADEA as ***only*** providing the substantive right to be free from workplace age discrimination. Opinion at 13-17, App.582-586 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009)). *14 Penn Plaza* does not declare the right to be free from workplace age discrimination to be the ***only*** substantive right

[24] As one court has described it, the Second Circuit has "aligned itself with the 'broadest' interpretation" of the piggybacking rule. *Cronas*, 2007 WL 2739769, at *5 (applying the piggybacking rule because the court should not "elevate form over substance" when ensuring that employees bringing discrimination claims can have their complaints heard) (citing *Tolliver*, 918 F.2d at 1057).

(to the exclusion of all others) provided under the ADEA; the cited portion of the case simply stands for the now widely accepted rule that "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination." This language is subject to *Gilmer* and this Court's *dicta* in *Ragone* is directly at odds with the District Court's narrow proclamation here, as this Court has recognized that the time-period for filing an anti-discrimination claim may be construed as a substantive right.[25]

Additionally, the District Court erred in wholly failing to grapple with the analysis in *Thompson*, under which Plaintiffs contend the conclusion that piggybacking is a substantive right. The District Court

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[25] In support of its narrow reading, the District Court relied on *Estle v. International Business Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022). However, *Estle* is not relevant, as it concerned whether the collective action waiver contained in IBM's arbitration agreement was valid despite the fact that IBM failed to make certain disclosures required under the OWBPA. *See id.* at 211-12. The Second Circuit concluded that the collective action waiver was valid under the OWBPA, because the collective action mechanism is a procedural right rather than a substantive right. *See id.* at *213-15. *Estle* said *nothing* with respect to the question in this case – whether the ADEA's timing scheme is a **substantive** right rather than a procedural right.

primarily distinguished *Thompson* because the *Thompson* court was not faced with analyzing the enforceability of a waiver in an arbitration agreement. *See* Opinion at 15-16, App.584-585. It is immaterial that the Sixth Circuit was not analyzing an arbitration agreement in *Thompson*. IBM has sought to waive a substantive right in an arbitration agreement as opposed to other kinds of contracts (such as a pre-employment agreement in *Thompson*) does not immunize it from enforceability challenges. The Supreme Court recently made clear in *Morgan* that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 142 S.Ct. at 1713. Indeed, the FAA contains "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.* at 1714. The District Court's conclusion that *Thompson*'s holding is inapplicable to arbitration agreements runs headlong into *Morgan*. IBM's arbitration agreement is no different from the pre-employment contract at issue in *Thompson* – in either case, the ADEA's limitations period is a substantive right that cannot be abridged by contract. Furthermore, this Court's *dicta* in *Ragone* suggests

that even in the arbitration context, a provision shortening the time period to file an anti-discrimination claim may be unenforceable as "incompatible with [the] ability to pursue [] Title VII claims in arbitration, and therefore void **under the FAA**." *Id.* at 125-26 (emphasis supplied).

Importantly, the District Court erroneously attempted to distinguish Logan by pointing to *dicta* intended by the Sixth Circuit to distinguish its holding in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003). In *Morrison*, the Sixth Circuit found that an arbitration provision abridging the limitations period for a Title VII claim was enforceable, because it did not unduly burden the plaintiff's effective vindication of her claim. *See Logan*, 939 F.3d at 837-38.[26] However, in *Morrison*—unlike the case before this Court—there was no indication that the plaintiff had been burdened at all by the limitations provision of the arbitration agreement, because in fact the plaintiff had been able to actually arbitrate her claim on the merits to a

[26] The *Logan* court pointed out that resolving the question in *Morrison* "required carefully balancing the 'liberal policy favoring arbitration and the important goals of federal anti-discrimination statutes.'" *Logan*, 939 F.3d at 838.

final award. *Morrison*, 317 F.3d at 655. Thus, neither *Morrison* nor *Logan* runs counter to Plaintiffs' position here: that where an arbitration agreement deprives a litigant of a substantive right under the ADEA, it is void under the FAA.

Moreover, as discussed further below, *Logan* and *Morrison* are both distinguishable because these cases address a plaintiff's ability to pursue Title VII claims.[27] Unlike Title VII, the ADEA implicates the requirements of OWBPA, which IBM failed to comply with despite the arbitration agreement's waiver of the piggybacking rule. IBM's failure to provide Plaintiffs with OWBPA disclosures is an additional reason to hold that the Timeliness Provision in IBM's arbitration agreement is unenforceable.

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[27] As is explained more fully below, while the District Court relied on cases such as *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 890 (2d Cir. 1995), and *Spira v. J.P. Morgan Chase & Co.*, 466 F. App'x. 20, 22-23 (2d Cir. 2012), in finding that the ADEA's limitations period is procedural, those cases do not address the circumstances present in this matter. *Vernon* did not hold that the ADEA's limitations period was procedural for all purposes, instead just for the purpose of determining whether a statutory amendment to the limitations period was retroactive. *See Vernon*, 49 F.3d at 890. *Spira* did not even concern the ADEA limitations period. *See Spira*, 466 F. App'x. at 22-23.

C. The District Court Erred in Holding that IBM's Failure to Provide OWBPA Disclosures Did Not Render the Timeliness Provision Unenforceable

Even if IBM were correct that it could abridge the ADEA's limitations in its arbitration agreement (which it is not), IBM's argument fails for yet another reason. The timeliness provision cannot waive application of the piggybacking rule (and, effectively Plaintiffs' claims altogether) under the ADEA, since IBM did not provide the disclosures required under OWBPA to obtain such a waiver. Under OWBPA, IBM must provide disclosures to Plaintiffs regarding the ages of other employees selected and not selected for layoff. Its failure to do so renders any purported waiver of the piggybacking rule unenforceable.

The OWBPA mandates strict requirements for employers to obtain a valid waiver from an employee of "any right or claim" under the ADEA. *See* 29 U.S.C. § 626 (f)(1)(H); 29 C.F.R. § 1625.22(f); *see also Oubre*, 522 U.S. at 427.[28] Importantly, the EEOC has taken the position that OWBPA protects

[28] The OWBPA's requirements have been enforced strictly. *See, e.g.*, *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093-96 (10th Cir. 2006);

employees from waiving rights by abridging their time to pursue their claims if they did not receive the proper disclosures:

> The ADEA does have one other arguably relevant provision with no analogue in Title VII: 29 U.S.C. § 626(f) . . ., which expressly governs waivers of "rights or claims under this chapter." However, § 626(f), read together with *Logan*'s holding that a statutory limitation period is a substantive right, only strengthens the argument against construing the ADEA's limitations period as prospectively waivable.

Thompson, EEOC Brief, 2020 WL 1160190, at *25. Because IBM did not provide OWBPA disclosures to Plaintiffs, Plaintiffs cannot have waived their statute of limitations rights under the piggybacking rule by signing the arbitration agreement. To the extent the agreement purports to or is held to waive that rule, that provision is invalid.

Tellingly, the *Thompson* court even pointed to OWBPA as an indicator that the ADEA's limitations period was a substantive right that could not be waived:

> The ADEA's waiver provision further supports the conclusion that**, as a substantive right, its self-contained limitation period may not be prospectively waived.** It provides that "[a]n individual may not waive any right or claim under this chapter unless the waiver is

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Loksen v. Columbia Univ., 2013 WL 5549780, at *7-8 (S.D.N.Y. Oct. 14, 2013); *Butcher v. Gerber Prods. Co.*, 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998).

> knowing and voluntary." 29 U.S.C. § 626(f). A waiver may not be "knowing and voluntary" if it includes waiver of "rights or claims that may arise after the date the waiver is executed." *Id.* § 626(f)(C). The statute's strict limitations on waivers align with "the general rule in this circuit that an employee may not prospectively waive his or her rights under either Title VII or the ADEA." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 584 (6th Cir. 1995).

Thompson, 985 F.3d at 521.[29] There is no dispute that IBM **did not make these disclosures** regarding the ages of employees selected and not

[29] Moreover, the arbitration agreement's purported waiver of the piggybacking is further invalid because OWBPA requires that, for a waiver to be valid, it must be "a part of an agreement between the individual and the employer that is **calculated to be understood by such individual, or by the average individual eligible to participate.**" 29 U.S.C. § 626(f)(1(A) (emphasis added). The timing provision is not only incoherent, but requires the reader to have the expertise of an employment discrimination lawyer and a thorough understanding of administrative exhaustion to parse it. To even attempt to understand the statute of limitations that applies to them, the IBM employees would have to understand: (1) the administrative and court statute of limitations under the ADEA; (2) which types of claims "must first be brought before a government agency"; and (3) the deadline for filing with the administrative agency in their state. That is certainly more information than the average IBM employee has. The OWBPA's requirement that the language of the waiver be calculated to be understood by the employee has been strictly construed by numerous courts, including against IBM. *See Syverson v. International Business Machines Corp.*,472 F.3d 1072, 1082-87 (9th Cir. 2007) (invalidating a waiver containing both a release and a covenant not to sue because average individuals might be confused and think that they could still bring an action under the ADEA); *Thomforde v. International Business Machines Corp.*,

selected for layoff, and therefore Plaintiffs cannot have waived their rights under the ADEA's timing scheme (whether in arbitration or otherwise).

The lower court, however, reasoned that IBM's failure to provide OWBPA disclosures did not render the provision unenforceable based on its conclusion that piggybacking is not a substantive right and OWBPA disclosures are only required to obtain waivers of a substantive right under the ADEA. This circular reasoning should be rejected for multiple reasons.

First, as argued herein, the time-period to file under the ADEA, including piggybacking, *does* constitute a substantive right that triggers OWBPA requirements. Even if it were possible to abridge the ADEA limitations period as IBM purports to do in its arbitration agreement (which it is not), IBM would have had to first meet the requirements of

406 F.3d 500, 503-05 (8th Cir. 2005) (same); *Bogacz v. MTD Products, Inc.*, 694 F. Supp. 2d 400, 404-11 (W.D. Pa. 2010); *Rupert v. PPG Industries, Inc.*, 2009 WL 596014, at *38-49 (W.D. Pa. Feb. 26, 2009); *see also* 29 C.F.R. § 1625.22(b)(3) (2005) (comprehensibility requirement "usually will require the limitation or elimination of technical jargon and of long, complex sentences.").

OWBPA in order to validly do so. This failure to satisfy OWBPA renders the timing provision unenforceable.

Second, even if the District Court was correct in holding that piggybacking is not a substantive right for *all* purposes, piggybacking *is* a substantive right in this specific context, sufficient to trigger the obligations of OWBPA. As Judge Cabranes noted in concurrence in *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 892 (2d Cir. 1995), "statutes of limitations . . . govern whether an individual can vindicate a right" and thus "lie on the cusp of the procedural substantive distinction." Statutes of limitations are therefore treated as "procedural" for some purposes, such as for choice-of-law purposes, *see Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and as "substantive" for the purposes of the *Erie* doctrine, *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988). *See Vernon*, 49 F.3d at 892 (Cabranes, J. concurring). Therefore, while the ADEA's limitations period may be considered procedural for the purposes of analyzing whether a statutory amendment to it applies retroactively, it may be considered substantive for the purposes of determining whether a limitations period

may be waived or truncated by contract (as argued herein), ***or for the purposes of OWBPA***. *See Thompson*, 985 F.3d at 521.[30]

For these reasons, IBM's failure to provide OWBPA disclosures provides an additional reason to hold the purported waiver of the

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[30] Even if the piggybacking rule were a procedural right, the arbitration agreement could not waive the piggybacking rule if doing so impeded the effective vindication of the Plaintiffs' ADEA claims – indeed, the District Court acknowledged this point. *See* Opinion at 17-18, App.586-587. The practical effect of the timeliness provision is that Plaintiffs would have had *years* longer to submit their claims in court than they did in arbitration. This is an impermissible impediment to the effective vindication of their claims. *See Ragone*, 595 F.2d at 125 (explaining that "if certain terms of an arbitration agreement served to act 'as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"); *Greer v. Sterling Jewelers, Inc.*, 2018 WL 3388086, at *6-7 (E.D. Cal. July 10, 2018) (finding arbitration agreement's one-year statute of limitation to bring a Fair Employment & Housing Act claim to be unconscionable, where the FEHA statute provides litigants with one year to file such a claim with the state administrative agency *plus* one additional year from the administrative claim being processed to file a civil claim); *Newton v. American Debt Services, Inc.*, 854 F.Supp.2d 712, 732-33 (N.D. Cal. 2012) (finding arbitration clause as a whole unconscionable and therefore unenforceable; "[T]he shortened statute of limitations has the practical effect of limiting a customer's ability to bring a claim in arbitration by requiring a customer to give up their statutorily-mandated statute of limitations and risk losing their claim forever if they did not bring a claim within one year.").

piggybacking rule in the Timeliness Provision to be unenforceable and void under the FAA.

II. The District Court Erred In Failing to Find the Confidentiality Provision to be Unenforceable

As will be explained more fully in the Opening Brief in *Chandler*, Case No. 22-1733, Plaintiffs have 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.[31] When Plaintiffs arbitrate their claims, they should have an even playing field wherein IBM cannot block them 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*

[31] 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 the Plaintiffs in this matter submitted to the District Court, which can be found at App.058-474.

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 a demonstration that it has unfairly advantaged one party over the other. *See also Lohnn*, 2022 WL 36420, at *11 ("[U]nless *Green Tree* and *Guyden* are to be empty letters, a plaintiff must be allowed to present a record that the effect of a challenged arbitration provision (or set of arbitration provisions) is to deprive her of a meaningful opportunity to present her claim.").[32] The

[32] Like the Plaintiffs 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 *Lohnn* plaintiff 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. *Lohnn* rejected that argument, explaining that the plaintiff submitted a record as necessary to make out her claim. *See id.* Moreover, *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.

District Court's findings should eb reversed.[33]

III. The Court Should Reverse the District Court's Refusal to Exercise Jurisdiction Over Plaintiffs' Claims

After soliciting briefing from the parties regarding the Court's jurisdiction over Plaintiffs' declaratory judgment claims, the District Court concluded on August 24, 2021, that "it is satisfied that there is subject-matter jurisdiction given that the underlying arbitrations involved claims under the Age Discrimination in Employment Act." Order at 5, App.574. Then, after nearly a year of litigation, the District Court made an about-face

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[33] The District Court erred in declining to reach this issue, finding that these claims "are not yet – and may never become – ripe" because, in the District Court's view, the Plaintiffs do not have timely ADEA claims in the first instance. *See* Opinion at 11. Yet Plaintiffs' request for a declaration regarding the unenforceability of the confidentiality provision is ripe, because Plaintiffs have challenged the confidentiality provision, IBM has successfully asserted that enforceability and validity questions should be resolve in *court*, and Plaintiffs have brought their declaratory judgment claims challenging the enforceability of this contractual provision. Moreover, even adopting the District Court's ripeness analysis, the District Court erred in dismissing these claims, as the timeliness provision is unenforceable and Plaintiffs ADEA claims are timely. For these reasons, the District Court's findings should be reversed.

Additionally, and as will be explained in herein, the District Court should have also reached this issue with respect to the Dismissal Plaintiffs whose claims the District Court declined to entertain.

and concluded that jurisdiction was lacking. This conclusion is erroneous, and the dismissal of Plaintiffs' claims should be reversed.

The District Court reached its conclusion after noting that the Second Circuit has instructed that "[i]n order to decide whether to entertain an action for declaratory judgment," the District 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 finalize the controversy and offer relief from uncertainty." *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 Plaintiffs' claims.

Specifically, with regard to the 24 Dismissal Plaintiffs,[34] the District Court found that "there is no current or impending controversy about the[ir] rights or obligations [vis-à-vis IBM] for this Court to clarify" because they "already arbitrated their ADEA claims, lost, and chose not to file any motion to vacate the arbitral decision within the three-month deadline

[34] As explained *supra*, the District Court exercised its jurisdiction over Plaintiffs Corbett's and Flannery's declaratory judgment claims, since they had not yet arbitrated their claims.

under the FAA" and then "waited two (and in some cases more than two) years after they received their arbitration decisions to initiate this action . . .." *See* Opinion at 8-9, App.577-578 (internal quotation marks 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, at 8-9, App.577-578. These conclusions are erroneous. *Id.*[35]

First, contrary to the District Court's conclusion, the arbitration proceedings did ***not*** "definitively resolve[] the Post-Arbitration Plaintiffs' ADEA claims", as the Arbitrators did not reach the merits of the Plaintiffs' ADEA claims. Rather, in Plaintiffs' arbitration proceedings, IBM successfully argued that Plaintiffs' ADEA claims were untimely and that the Arbitrators could not even consider Plaintiffs' challenge to the enforceability of the purported timeliness provision because the arbitration

[35] While the District Court pointed to the Supreme Court's recent decision in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), regarding jurisdiction under the FAA (not the Declaratory Judgment Act), the Court ultimately did not render a finding under *Badgerow* as it concluded that "jurisdiction is lacking on other grounds." *See* Opinion, 10 n.10, App.579.

agreement requires court (not arbitral) review of such challenges. *See, e.g.*, SOF ¶ 15 n.10, App.024. Following the dismissal of the Plaintiffs' claims on timeliness grounds, Plaintiffs then proceeded to seek such judicial review. They did so first by opting into the *Rusis* action, where the court held that they could not participate in a collective action to make this challenge. Thus, they initiated individual actions (which were consolidated by the court below into this case).[36] If successful, Plaintiffs will return to their arbitrators with motions for relief from judgment pursuant to Fed. R. Civ. P. 60.[37]

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[36] The District Court's statement that Plaintiffs "waited two (and in some cases more than two) years after they received their arbitration decisions to initiate this action . . ." is not only incorrect as a factual matter, but it is also not legally determinative – as explained herein, neither IBM's arbitration agreement nor any other applicable law imposes a deadline on Plaintiffs' request for declaratory relief.

[37] The Arbitration Agreement expressly ***requires*** the Arbitrators to hear such motions. *See,* Arbitration Agreement at 26, App.105 ("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)).

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 should hold particularly true here, as IBM has insisted (and has convinced arbitrators to find) that IBM's arbitration agreement contemplates a judicial determination of questions of enforceability or validity of its provisions. The District Court therefore erred in dismissing Plaintiffs' claims.

And again, if Plaintiffs 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 the Plaintiffs "already arbitrated their ADEA claims, lost, and chose not to file any motion to vacate the arbitral decision within the three-month deadline under the FAA" and that as such, "the window to challenge those rulings, or the enforceability of the provisions that governed them, has long since closed." *See* Opinion at 9, App.578. 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.* 8-9, 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 Plaintiffs' requested relief is erroneous. And the 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 Plaintiffs to seek a determination that the timeliness provision is unenforceable is through a declaration of same. 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 Plaintiffs missed the "window" for bringing such a challenge), the District Court erred, and the District Court's decision dismissing the Dismissal Plaintiffs' claims should be reversed.[38]

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[38] The District Court further erred when it found that it is "unlikely" that an Arbitrator would entertain a Rule 60(b) Motion, because "it has been nearly two (or more) years since the Post-Arbitration Plaintiffs' ADEA claims were dismissed in arbitration." First, IBM's arbitration agreement ***requires*** the Arbitrators to hear such motions and, as noted, does not impose any such deadline, *see* Arbitration Agreement at 26, App.105. Second, contrary to the District Court's statements, Plaintiffs would not seek relief under the provisions of Rule 60(b) that carry a one-year deadline, and, moreover, Plaintiffs ***have*** been pursuing judicial relief, first

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

The District Court erred by sealing numerous documents in Plaintiffs' summary judgment record, as well as extensive portions of the briefing. *See* Memorandum Opinion and Order at App.597-603.

As Judge Liman noted in *Lohnn*, "[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." 2022 WL 36420 at *6 (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006)). 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

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by opting into *Rusis*, and then initiating the instant action when their claims were dismissed from the *Rusis* case. Thus, Plaintiffs' timing ***is*** reasonable under the circumstances.

Finally, to the extent that the District Court found (incorrectly) that Plaintiffs were seeking to belatedly vacate their arbitral awards, the District Court wrongly ignored one arbitrator's express finding that upon dismissal of their arbitrations, Plaintiffs may opt into the *Rusis* case to challenge the validity of the timeliness provision, which the Plaintiffs then did, *see* D. Ct. Dkt. 61 at 17 n.10.

… 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*")).

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 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).

Once the court makes this determination, 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).

Both Judge Liman in *Lohnn* and Judge Furman in this case applied the Second Circuit's three-step test to a virtually identical collection of summary judgment documents, but came to divergent conclusions regarding the public right to access those documents. For the reasons discussed below, the Second Circuit should adopt Judge Liman's analysis, and reverse Judge Furman's ruling on IBM's motion to seal.

A. Plaintiffs' Motion for Summary Judgment and Accompanying Exhibits Are Judicial Documents

The Second Circuit has repeatedly held that summary judgment motions and papers filed in connection therewith are judicial documents as a matter of law. *See Lohnn*, 2022 WL 36420 at *6-7 (citing *Lugosch*, 435 F.3d at 121; *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)). These documents

must not remain under seal "*absent the most compelling reasons.*" *Id.* (emphasis in original) (internal quotation omitted).

The District Court held that the summary judgment briefing and exhibits are not judicial documents because they were "irrelevant to the 'judicial function' of the case" by virtue of the fact that the court ruled on IBM's motion to dismiss without ever reaching Plaintiff's motion for summary judgment. Memorandum Opinion and Order at 4, App.600. 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 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 ("A document is 'relevant to the performance of the judicial function' if it

would reasonable have the *tendency* to influence a district court's ruling or in the exercise of its supervisory powers, without regard to… whether the document ultimately in fact influences the court's decision.").

In other words, the public's right of access attached the moment that Plaintiffs filed their summary judgment motion in court. *See Lohnn*, 2022 WL 36420 at *9 ("[The public's] rights of access attached upon filing."); *Lugosch*, 435 F.3d at 123 ("As a matter of law, … documents—by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment—are unquestionably judicial documents under the common law."); *Brown*, 929 F.3d at 47 ("[I]t is well-settled that 'documents *submitted* to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents. . .'") (internal citation omitted); *Susquehanna Int'l Grp. Ltd. v. Hibernia Express (Ireland) Ltd.*, 2021 WL 3540221, at *2 (S.D.N.Y. Aug. 11, 2021). As a matter of law, that right of access is unaffected by subsequent developments in the case. *See Lohnn*, 2022 WL 3359737, at *3 ("That the … motion was never adjudicated does not change the fact that the declaration and exhibits are

judicial documents."); *see also Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d at 140 (pleadings were judicial documents from moment of filing, notwithstanding settlement); *Dawson v. Merck & Co.*, 2021 WL 242148, at *6 (E.D.N.Y. Jan. 24, 2021) (documents attached to *Daubert* motion were judicial documents notwithstanding settlement by the parties).

Judge Furman's citation to *Lugosch* for the proposition that "the mere filing" of Plaintiff's motion for summary judgment did not suffice to render it a judicial document is based on a misreading of dicta in that case.[39] *See Lohnn*, 2022 WL 3359737 at *4 ("The Second Circuit's statement in *Lugosch* … cannot be understood to reflect the view that what would otherwise be a judicial document because it asks a court for ultimate relief does not partake of that character until after the court has acted upon it."). The summary judgment papers at issue were substantive legal filings that were

[39] The District Court's brief citation to *Giuffre v. Maxwell*, 2020 WL 133570 (S.D.N.Y. Jan. 13, 2020), *reconsideration denied*, 2020 WL 917057 (S.D.N.Y. Feb. 26, 2020) is similarly unavailing for reasons described in *Lohnn*.

relevant and useful to the performance of the judicial function at the time they were filed. *See id.* They were judicial documents.

B. There Are No Countervailing Interests Militating Against Public Access

The District Court should have found that IBM did not demonstrate a sufficient countervailing interest to outweigh the heavy "weight of the common-law presumption given to documents used by parties in connection with summary judgment … ." *Lohnn,* 2022 WL 36420 at *6 (citing *Lugosch*, 435 F.3d at 123); *see also id.* at *5 ("[In a situation where a court has *not yet* ruled on a pending motion for summary judgment or has already adjudicated the motion], the weight of the presumption of access will be strong and "of the highest.") (quoting *Lugosch*, 435 F.3d at 123).

The Second Circuit has made clear that a confidentiality provision like the one that the District Court invoked is not a sufficient countervailing interest to override the presumption of public access. *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."). Indeed, courts have routinely denied keeping

documents sealed that were alleged to be confidential (whether in arbitration or elsewhere) and where they were filed as part of a proceeding raising a challenge to a party's confidentiality provision. *See, e.g.*, *Lohnn*, 2022 WL 36420 at *13; *Susquehanna Int'l Grp. Ltd.*, 2021 WL 3540221, at *4 n.1 (rejecting argument that "presumption of public access is outweighed by the federal policy in favor of arbitration and interests of judicial efficiency"); *Dentons US LLP*, 2021 WL 2187289, at *1 ("Confidentiality agreements alone are not an adequate basis for sealing . . . ."); *Salerno v. Credit One Bank, N.A.*, 2020 WL 1558153, at *8 (W.D.N.Y. Mar. 31, 2020) (same); *In re Gen. Motors LLC Ignition Switch Litig.*, 2015 WL 4750774, at *4 (S.D.N.Y. Aug. 11, 2015) (same); *Utica Mutual Insurance Co. v. R&Q Insurance Co. f/k/a INA Reinsurance Co.*, 2015 WL 13639179, at *2-3 (N.D.N.Y Dec. 10, 2015); *First State Ins. Co. v. National Cas. Co.*, 2013 WL 8675930, at *1 (S.D.N.Y. Feb. 19, 2013).

Judge Furman's ruling to the contrary, which does not cite any case law that squarely addresses this issue, is contrary to the weight of authority within this Circuit.

V. The District Court Erred by Denying Plaintiffs' Motion to Amend to Add a Fraudulent Inducement Claim

The District Court erred in denying Plaintiffs' motion for leave to amend to add a fraudulent inducement claim.[40]

First, the District Court erred in finding that the Dismissal Plaintiffs could not bring fraudulent inducement claims because of an alleged "waiver" of the right to challenge IBM's arbitration agreements by initiating arbitration.[41] The Court's waiver analysis is erroneous because it assumes, at the pleading stage, that key aspects of the underlying fraudulent conduct were known to Plaintiffs at the time they initiated their arbitrations.

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[40] Plaintiffs requested to add this claim to Plaintiff Abt's case as a classwide state law claim, as well as to be allowed to amend to add this claim to each plaintiff's case individually (which had been administratively closed as part of the consolidation). *See* D. Ct. Dkt. 79.

[41] Notably, the District Court did not find that Plaintiffs Corbett or Flannery had waived this challenge, since they had not arbitrated their claims, but, as described *infra*, the District Court nevertheless denied them leave to amend.

Yet mere participation in arbitration proceedings alone does not constitute a waiver of objections to arbitrability. *See Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 369 (2d Cir. 2003); *Openshaw v. Fedex Ground Package Sys. Inc.*, 731 F. Supp. 2d 987,998 (C.D. Cal. 2010). Courts have routinely held that it is appropriate to grant leave to amend a pleading where a party becomes aware of facts supporting a fraudulent inducement argument. *Bear Ranch, LLC v. HeartBrand Beef, Inc.*, 2013 WL 4520425, at *2 (S.D. Tex. Aug. 26, 2013) ("Because it does appear that some new information relevant to fraudulent inducement has come to light during discovery, the Court finds that Plaintiff did not unduly delay in seeking leave to amend in this case."); *Intersource, Inc. v. Kidder Peabody & Co.*, 1992 WL 369918, *3–*4, (S.D.N.Y. Nov. 20, 1992) (same).

Plaintiffs only learned of shocking evidence supporting the companywide scheme of discrimination – that showed top officials in the company rather blatantly scheming to oust older workers -- long after their arbitrations had been initiated; moreover, IBM fought to conceal its fraudulent scheme from its laid-off employees for years. *See, e.g.*, *Lohnn*,

2022 WL 36420, at *12 (describing specific "[c]ommunications between high-level IBM executives in which they discussed how the percentage of millennials employed at IBM trailed that of competitor firms, used a disparaging term to describe older IBM employees, and described layoffs that would help change the age distribution of employees at IBM,"). Notably, at the time of filing their arbitration demands, Plaintiffs did not have the factual basis needed to support the heightened pleading standard referenced below.

In any event, the Court erred in accepting IBM's waiver arguments as true at the pleading stage, without construing the complaint in Plaintiffs' favor or allowing Plaintiffs to submit evidence regarding what they knew at the time of filing their arbitration demands versus the timing of the discoveries that resulted in their attempt to add a fraudulent inducement claim. *See N.L.R.B. v. New York Tel. Co.*, 930 F.2d 1009, 1011 (2d Cir. 1991) ("No waiver will be implied, however, unless it is clear that the parties were aware of their rights and made the conscious choice, for whatever

reason, to waive them. We will not thrust a waiver upon an unwitting party.").

Second, the District Court also erred in holding that the proposed amendment did not satisfy the heightened pleading standard governing fraudulent inducement claims. Opinion at 23-25, App.592-594. To state a claim of fraudulent inducement a "complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (citations and internal quotation marks omitted). Plaintiffs' allegations satisfied each of these factors. *See McCormack*, 145 F. Supp. 3d at 276.

Plaintiffs' proposed amended complaint identified the statements that they contended were fraudulent – untruthful and fraudulent rationales for Plaintiffs' terminations as pretext for age discrimination.[42] *See* Proposed

[42] Plaintiffs have also alleged that false statements regarding eligibly for COBRA (i.e., falsely asserting individuals would only be allege if they signed the separation agreement) were made in connection with the

Am. Compl. ¶¶ 40-51, App.560-564. The amended complaint identified the speakers, including IBM executives such as Ms. Rometty and Ms. Gherson, IBM's spokesperson, Douglas Shelton, and lower-level managers who were required to provide boilerplate letters to impacted employees. *Id*. at ¶¶ 38, 40-51, App.560-564. The amended complaint alleged when and where the statements were made, identifying a specific date of statements made by Doug Shelton, and alleging that Plaintiffs refused the fraudulent template letters informing them of their layoffs, at the time that they were terminated. *Id*. at ¶¶ 43, 47, App.561-563. Finally, the amended complaint clearly explained why the statements were fraudulent, as the crux of Plaintiffs' complaint is that IBM knew well that it was intentionally targeting older workers and providing false rationales to justify its layoff programs. *See id*. at ¶ 45, App.562.

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presentation of the separation agreements. *See* App.565. Plaintiffs contend that the other statements described above are sufficient to establish a claim alone, but they point out that there were additional allegations reflective of IBM's pattern of making false statements induce individuals to sign its separation agreement.

Critically, another court allowed a fraudulent inducement claim based on very similar allegation. *See generally*, *McCormack*, 145 F. Supp. 3d 258. As in *McCormack*, the allegations are sufficiently definite and clear to put IBM on fair notice as to the specific fraudulent actions to induce Plaintiffs to sign its arbitration agreement. *See McCormack*, 145 F. Supp. 3d at 276 ("There is no doubt, based on [the allegation that Plaintiff received an email from his supervisor that he was being terminated as part of a cost-driven resource action], that Lingl identifies the statements that he contends were fraudulent") (citation and internal quotation marks omitted). Plaintiffs have set forth a viable claim for relief based on similar allegations that they were induced to sign a separation agreement based on the fraudulent content of a "template letters" provided by their managers at the time of their termination. *See* Proposed Am. Compl. at ¶ 41-51, App.560-564.

In a footnote, the District Court unconvincingly attempted to distinguish *McCormack* by finding that Plaintiffs' allegations "did not specify when these 'template letters' were sent". *See* Opinion at 24 n.16,

App.593. However, the complaint made clear that the letters were sent upon the employees' terminations. Plaintiffs have provided detailed and specific allegations regarding the underlying alleged fraudulent conduct and IBM is sufficiently on notice for these claims to proceed.[43]

CONCLUSION

For the reasons set forth herein, the District Court's findings should be reversed.

[43] At a minimum, if the Court should have given Plaintiffs the opportunity to cure any perceived defects in the interest of justice.

Dated: October 12, 2022

Respectfully submitted,

PLAINTIFFS-APPELLANTS

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Dated: October 12, 2022

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