No. 22-1733

United States Court of Appeals for the Second Circuit

WILLIAM CHANDLER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellee.

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

PLAINTIFF-APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant William Chandler 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 he entered into with IBM are not enforceable, as the provisions undermine or extinguish his ability to pursue his claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*[1] Upon his termination, Plaintiff entered into an arbitration agreement with IBM that released (in exchange for a small severance payment) almost all claims he 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 *Tavenner v. International Business Machines Corp.*, No 22-2318. 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 his 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 his ADEA claim in arbitration, a claim that he indisputably would have been able to pursue in court had he not signed the arbitration agreement. While Plaintiff has not challenged the overall enforceability of IBM's arbitration agreement, he 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 seemed to misunderstand that Plaintiff was challenging the arbitration agreement as a whole and thus considered whether he had shown procedural unconscionability, as well as substantive unconscionability. However, Plaintiff was not challenging the agreement as a whole – he was only challenging two substantively

these provisions unenforceable since [redacted][4]

Although Plaintiff submitted a summary judgment motion with an extensive record to support his arguments, the District Court granted IBM's cross-motion to dismiss his complaint and denying his 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.

First, the District Court should have held unenforceable the arbitration agreement's timeliness provision through which IBM effectively

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unconscionable provisions so that he would be allowed to able pursue his ADEA claim in arbitration. *See Castellanos v. Raymours Furniture Co., Inc.*, 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018).

[4] [redacted]

extinguished Plaintiff's ability to bring an ADEA claim in arbitration. As explained in greater detail in the plaintiffs' Opening Brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 and *Lodi*, No. 22-1737, there can be no dispute that if Plaintiff had been able to pursue his claim in court, it would have been timely.[5]

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

[5] 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 not able to vindicate in arbitration a claim that he would have been able to vindicate in court.

prevented Plaintiff from advancing his claim in arbitration even though he 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 Plaintiff had to initiate his ADEA claim by *years*, 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 result 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 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 his claim in arbitration, is unenforceable. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Second, 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.[6] 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 showing 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). Nonetheless, the District Court refused even to consider the extensive summary judgment record that Plaintiff submitted to support his claim,

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[6] 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 ¶¶ 16-98, App.017-037.)

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 his 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.[7] 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.

[7] In this case, the District Court dismissed Plaintiff's protest of the sealing in a single sentence, stating that "[b]ecause the Confidentiality Provision is enforceable, the outstanding sealing requests . . . are granted." *Chandler v. International Business Machines Corp.*, 2022 WL 2473340, at *8 (S.D.N.Y. July 6, 2022). This reasoning improperly conflates the question of whether the arbitration agreement's confidentiality provision is enforceable with whether the various documents Plaintiff filed should have been made public.

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 his 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 his 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 August 5, 2022, App.573-574, appealing from the District Court's Order granting IBM's Motion to Dismiss and denying Plaintiff's Motion for Summary Judgment and Judgment issued on July 6, 2022, App.549-572.

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 District Court erred by holding the confidentiality provision in IBM's arbitration agreement to be enforceable.

(3) 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 he entered into with IBM are not enforceable (a timeliness provision and a confidentiality provision), as they undermine or extinguish his 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. 14) and the accompanying Statement of Material Facts (hereinafter "SOF", App.011-038), 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 he fell victim to IBM's discriminatory scheme when IBM summarily terminated him in 2017, at the age of sixty-one, after fourteen 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, he signed an arbitration agreement in exchange for a modest severance payment; this agreement released almost all claims he had against IBM, with the specific exception of claims under the ADEA. The agreement allowed him 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] 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 his termination, Plaintiff signed an arbitration agreement that IBM has contended limits the time he had to submit an arbitration demand to 300 days from his layoff. At 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 his claim, as required by his agreement with IBM. [redacted] he properly proceeded to court to challenge that unconscionable provision.

He began in arbitration knowing that, had he begun his claim in court, a court likely would have required him to pursue arbitration first, in order to determine whether an arbitrator would interpret the agreement in the way he 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 v. American Tower Corporation*, 506 F. Supp. 3d 61, 71-73 (D. Mass. 2020) (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 v. Coverall North America*, 2022 WL 807075, at *7-14 (D. Conn. March 16, 2022) (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 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 his case in arbitration on January 17, 2019. (Arbitration Demand, App.097-125.) [redacted] App.126-131.)

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] As Plaintiff set forth below, IBM has aggressively invoked this provision in the dozens of arbitrations that his 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

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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.)

brought this challenge before the court so that, when he is able to arbitrate his claim, he would be able to vindicate his 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 used its confidentiality provision to block in arbitration includes [redacted]

[redacted] (SOF ¶¶ 16-98, App.017-037.)

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 his 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 cited three reasons for rejecting Plaintiff's argument that the piggybacking waiver in IBM's arbitration agreement was unenforceable: (1) the court concluded that the waiver of the piggybacking was not a waiver of a substantive right under the ADEA; (2) relatedly, the court did not consider the piggybacking rule to be part of the limitation law of the ADEA; and (3) the court did not agree that IBM's failure to provide OWBPA disclosures rendered the piggybacking waiver unenforceable. Opinion at 6-17, App.554-565.

The District Court also dismissed Plaintiff's challenge to the confidentiality provision of the arbitration agreement. Opinion at 17-21, App.565-569. Without even addressing the extensive record that Plaintiff submitted in support of his Motion for Summary Judgment, the District Court summarily held that the confidentiality provision was not unconscionable under New York law. Opinion at 17-21, App.565-569.

Finally, the Court also denied Plaintiff's motion to unseal summary judgment briefing materials. Opinion at 22, App.570.

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)).

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 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 incorrectly held 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 his ADEA claim in arbitration, just as he would have been able to pursue the claim in court. In court, he 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.

Second, the District Court erred in dismissing Plaintiff's challenge to IBM's aggressive use of the confidentiality provision in its arbitration agreement. The District Court did not even consider the extensive summary judgment record that Plaintiff submitted in support of his 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. Since Plaintiff's ADEA Claim Would Have Been Timely in Court, the District Court Wrongly Held that IBM Could Render His Claim Untimely Through Use of an Arbitration Agreement

The District Court erred in holding that the timeliness provision in IBM's arbitration agreement was enforceable even though [redacted] it waived Plaintiff's ability to rely on the piggybacking rule, thereby abridging the limitations period for an ADEA claim. Plaintiff's counsel have set forth this argument extensively in the Opening Briefs in *In Re: IBM Arbitration Litig.*, No. 22-1728, and *Lodi*, No. 22-1737, and 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 he filed in court. Plaintiff could have timely filed his ADEA claim in court by availing himself of the "piggybacking" rule, which would have allowed him 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; he was thus unable to pursue a claim in arbitration that he could timely have pursued in court.

This outcome—that Plaintiff could have proceeded with his 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.

The District Court erred in rejecting this conclusion, and this Court should reverse. In dismissing Plaintiff's challenge to the timeliness provision, the District Court placed the arbitration agreement on a pedestal above other kinds of contracts - and thus ran 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").

Moreover, in concluding that the ADEA's timing scheme was a procedural rather than a substantive right, the District Court's decision was 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.

While the District Court relied on *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 891 (2d Cir. 1995), for the proposition that the ADEA's limitations period is procedural, this Court 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. 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. 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.").[13]

Additionally, there is an important difference between the District Court's holding in this case and the reasoning in the *In Re: IBM Arbitration Litig.* matter, which highlights the significance of the District Court's failure here to understand the piggybacking rule. In this case, the District 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

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[13] *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).

those parties are already on notice of the facts surrounding the plaintiff's claims from an earlier filed EEOC charge." Opinion at 12, App.560. 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.

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 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).[14] In other words, this Court acknowledged that piggybacking is baked into the language of the

[14] 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 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.

statutory provision of the ADEA that functions like a statute of limitations.[15]

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)).

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. Notably, the court in *In Re: IBM Arbitration Litig.* declined to join this Court in that aspect of its holding. *See* 2022 WL 2752618, at *7 (S.D.N.Y. July 14, 2022).

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[15] 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.

For these reasons (and those explained in greater detail in Plaintiffs' Opening Brief in *In Re: IBM Arbitration Litig.*), 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.

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

IBM has aggressively used the confidentiality provision in its arbitration agreement to impede its former employees from advancing their claims in arbitration under the ADEA. Particularly in an age discrimination case such as this, that relies heavily on pattern and practice evidence, employees must be able to build their cases using common evidence adduced by other employees with similar claims. *See Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84-85 (2d Cir. 1990). Plaintiff therefore also challenged the enforceability of the confidentiality provision so that, when he pursues his claim in arbitration, IBM will not be able to use it to impede his claim, as IBM has already done in dozens of similar arbitrations.

Even though this Court has held in *American Family Life Assurance Co. of New York v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019), that parties can challenge the enforceability of arbitration agreements' confidentiality provisions by demonstrating through an evidentiary record the ways in which the provision is unduly hindering the arbitration claimants' ability to pursue their cases, the District Court denied Plaintiff the opportunity to do so by granting IBM's Motion to Dismiss without even considering the extensive record that Plaintiff built. As such, the District Court's decision should be reversed.[16]

A. Courts Routinely Invalidate Confidentiality Provisions in Arbitration Agreements that Provide an Unfair Advantage to Employers

This Court, through its decisions in *Guyden v. Aetna, Inc.*, 544 F.3d

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[16] As noted in footnote 4, *supra*, [redacted] filed in *In Re: IBM Arbitration Agreement Litigation*, Dkt. 29-4.) [redacted] (SOF ¶ 15 n.5, App.015.)

376, 384-85 (2d Cir. 2008), 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 do so where a record of arbitration proceedings demonstrate that it has unfairly advantaged one party over the other. This Court explained, "[i]f arbitration proceedings ultimately unfold, the parties are free to contest the enforceability provision as applied to them . . . ." *American Family Life Assurance Co.*, 778 Fed. App'x. at 27; *see also Guyden*, 544 F.3d at 387 (recognizing that a provision that deprived a claimant of "a meaningful opportunity to present her claim" "might well be unenforceable.") (citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000) for the proposition that where an arbitration claimant argues that a provision of the agreement is invalid because it deprives the claimant of a meaningful opportunity to present the claim, the provision must be enforced unless the record demonstrates that the concerns are well-founded). As Judge Liman explained in *Lohnn v. International Business Machines Corp.*, 2022 WL 36420, at *11 (S.D.N.Y. Jan. 4, 2022):

> **If *Guyden* means anything, it must mean that a plaintiff should have the ability to present a case that an arbitration clause – in practice – has the effect of frustrating a right granted by Congress**. Although the provision as to which the Circuit held that record evidence was required in *Guyden* involved limitations on arbitral discovery and the provision at issue here involves arbitral confidentiality, the challenge is the same – Plaintiff argues that the confidentiality clause (combined with the discovery provisions) deprives her of a meaningful opportunity to present her statutory claim. And the underlying principle is the same. In order to hope to prevail on such a claim, a plaintiff must present record evidence that her fears are well-founded and not just speculative. **It follows that, unless *Green Tree* and *Guyden* are to be empty letters, a plaintiff must be allowed to present a record that the effect of a challenged arbitration provision (or set of arbitration provisions) is to deprive her of a meaningful opportunity to present her claim.**

(emphasis added). As will be explained below, Plaintiff here submitted an extensive evidentiary record to support this claim, and yet the District Court refused even to consider it.

Contrary to the District Court's approach, courts around the country have invalidated confidentiality provisions that unfairly prevent plaintiffs from investigating and prosecuting their claims. For example, in *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017), the Eleventh Circuit invalidated a confidentiality provision in an arbitration agreement where, the court recognized, confidentiality gave the defendant an "obvious

informational advantage." In reaching this decision, the *Larsen* court cited a case that is on all fours with this case, *Zuver v. Airtouch Communications, Inc.*, 153 Wash. 2d 293, 312-15 (2004), an employment discrimination case where the Washington Supreme Court struck a confidentiality provision in an arbitration agreement that operated to keep the entire arbitral process shrouded in secrecy. *Zuver* found the confidentiality provision unconscionable, concluding that "[a]s written, the provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations." *Id.* at 315; *see also DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012) ("However, with respect to the confidentiality provision, Plaintiff has made a showing that this provision unfairly benefits Perkins Coie. Perkins Coie has institutional knowledge of prior arbitrations. In contrast, individual litigants, such as Plaintiff, are deprived from obtaining information regarding any prior arbitrations. Thus, Perkins Coie is the only party who would obtain any benefit from this provision without receiving any negative impact in return. Accordingly, the Court finds that the confidentiality provision is

substantively unconscionable.").[17]

Courts have recognized that arbitrators may rely on other relevant arbitration awards, and employers cannot hamper employees' abilities to establish their cases by hiding the outcomes of other cases. These concerns are particularly salient where, as here, the corporate defendant is benefitted by the institutional knowledge gained by being a repeat player in the ADR process such that confidentiality is no real burden to the defendant, while each individual plaintiff/claimant must re-invent the proverbial wheel each time. *See, e.g., McKee v. AT & T Corp.*, 164 Wash. 2d 372, 398, 191 P.3d 845, 858 (2008), abrogated on other grounds by *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (finding confidentiality clause to be unconscionable, explaining that "[c]onfidentiality unreasonably favors

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[17] *See also Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042, 1066 (2018), as modified (Nov. 28, 2018) (finding confidentiality provision unconscionable, and noting that "[b]ecause it requires [Plaintiff] to keep "all aspects of the arbitration" secret, she would be in violation if she attempted to informally contact or interview any witnesses outside the formal discovery process" and "such a limitation would not only increase [Plaintiff's] costs unnecessarily by requiring her to conduct depositions rather than informal interviews, it also defeats the purpose of using arbitration as a simpler, more time-effective forum for resolving disputes").

repeat players such as AT & T" and "secrecy conceals any patterns of illegal or abusive practices" and "hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of AT & T" while "[m]eanwhile, consumers are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar") (internal citations and quotation marks omitted)); *see also, e.g.*, *Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012) (observing that while "it is well-established that confidentially agreements may be enforceable to protect, for example, personal information or trade secrets; in situations like here, where such concerns are not present, the provision is wholly one-sided, protecting only the company that prepared the contract with no reciprocal benefit to the consumers"); *Sprague v. Houseld Intern.*, 473 F. Supp. 2d 966, 975 (W.D. Mo. 2005) (finding confidentiality provision in an arbitration agreement unconscionable, because "[a]lthough it appears that [defendant] has had related disputes with consumers in the past, the Plaintiffs will not have

access to the details of those proceedings – for example, to see how fees and waiver requests have been handled or to determine whether an agreement to arbitrate is even wise, given the track record of [defendant's] success during arbitration"); *Luna v. Household Finance Corp. III*, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) ("a lack of public disclosure may systematically favor companies over individuals" and "the unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies") (internal quotations omitted).[18]

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[18] *See also Balan v. Tesla Motors Inc.*, 2019 WL 2635903, at *3-4 (W.D. Wash. June 27, 2019) (following *McKee* and severing a confidentiality provision in an arbitration agreement); *Hoober v. Movement Mortgage, LLC*, 382 F. Supp. 3d 1148, 1160-61 (W.D. Wash. 2019) (following *McKee* and holding the confidentiality provision to be substantively unconscionable); *Narayan v. The Ritz-Carolton Development Co., Inc.*, 140 Hawai'i 343, 355 (2017) (finding that a confidentiality provision in an arbitration agreement was unconscionable, because "[i]n addition to detrimentally affecting the plaintiffs' ability to investigate their claims, the confidentiality provision insulates the defendants from potential liability"); *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 42 (Ill. 2006) (finding that confidentiality provision "burden's an individual's ability to vindicate statutory claims" explaining, "the strict confidentiality clause that prohibits Cingular, the

As the *Zuver* court observed, overly burdensome confidentiality restrictions "undermine[] an employee's confidence in the fairness and honesty of the arbitration process, and thus potentially discourages pursuing a valid discrimination claim." *Zuver*, 153 Wash.2d at 299 (severing arbitration agreement where the confidentiality provision "hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations"). *See also Ramos*, 28 Cal. App. 5th at 1067-68 (explaining that "requiring discrimination cases be kept secret unreasonably favors the employer to the detriment of employees seeking to vindicate unwaivable statutory rights and may discourage potential plaintiffs from filing cases").[19]

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claimant, and the arbitrator from disclosing 'the existence, content, or results of any arbitration,' means that even if an individual claimant recovers on the illegal-penalty claim, neither that claimant nor her attorney can share that information with other potential claimants," and "Cingular, however, can accumulate experience defending these claims").

[19] There are many employees who may have been subject to IBM's scheme to oust older workers, who may not realize the strength of their claims due to IBM's shielding evidence that some employees have amassed in arbitration through its confidentiality provision. Thus, the confidentiality provision is also likely deterring many other former

B. Plaintiff Submitted an Extensive Record Gleaned from Dozens of Arbitrations Demonstrating that the Confidentiality Agreement Would Unduly Impede His Ability to Pursue his Claim in Arbitration

Below, Plaintiff submitted a fulsome evidentiary record demonstrating that the confidentiality provision should be invalidated. Extensive arbitration proceedings have unfolded that show how severely prejudiced IBM's former employees have been by IBM's wielding of the confidentiality provision to prevent former employees in arbitration from obtaining and using essential pattern and practice evidence, as well from benefiting from decisions obtained in other similar arbitrations. As this Court has explained, "[b]ecause employers rarely leave a paper trail – or 'smoking gun' – attesting to a discriminatory intent, disparate treatment plaintiffs must often build their cases from pieces of circumstantial evidence," which includes "[e]vidence relating to company-wide practices." *Hollander*, 895 F.2d at 84-85. The torrent of evidence that Plaintiff's counsel have amassed in arbitrations against IBM weaves a stark

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employees from bringing what they do not even realize are meritorious claims.

tapestry demonstrating IBM's discriminatory companywide scheme to oust older workers. However, it is extremely difficult, if not impossible, to paint the full picture in any one arbitration, where IBM's confidentiality provision has been used to block the production or admission of much of this evidence.

In Plaintiff's Statement of Material Facts ¶¶ 16-98, App.017-037, he laid out the myriad ways in which former employees who have pursued ADEA claims against IBM in arbitration have been so limited. For example,

[redacted][20][redacted]

[20] [redacted]

[redacted]

[redacted] The evidence also shows [redacted]

[redacted] Plaintiff's counsel have also obtained evidence showing [redacted]

[redacted] (SOF ¶ 32, App.020-021; Email, App.148.) These communications also include emails between [redacted] explicitly discussing [redacted] (SOF ¶¶ 22-36, App.019-021.)

[redacted],[21] [redacted]

[21] In *Travers v. FSS*, 737 F.3d 144, 147 (1st Cir. 2013), the First Circuit reversed the district court's grant of summary judgment to an employer where the plaintiff alleged he had been fired because of unlawful retaliatory animus harbored by the CEO against the plaintiff for filing a lawsuit alleging a violation of the Fair Labor Standards Act. The district court had held that there was no causal connection between the CEO's retaliatory animus and the supervisor who actually terminated the plaintiff, since the supervisor had justified the plaintiff's termination based on another reason (a customer complaint). *See id.* at 146-47. The First Circuit acknowledged that "the retaliatory animus resided at the apex of the organizational hierarchy" and reversed summary judgment against the plaintiff, recognizing that since "[a] CEO sets the tone and mission for his subordinates, many of whom presumably consider it an important part of their jobs to figure out and deliver what the CEO wants." *Id.* at 147. As the court noted, "**strongly held and repeatedly voiced wishes of the king . . .**

[redacted] (SOF ¶¶ 16-98, App.017-037.)

Plaintiff's counsel have also obtained a number of IBM [redacted] (SOF ¶¶ 37-42, App.022-024.)

Plaintiff's counsel have likewise obtained the documents that IBM produced to the EEOC that led to the EEOC's letter of determination finding reasonable cause to believe that IBM had engaged in age discrimination on a classwide basis, [redacted]

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likely [become] well known to those courtiers who might rid him of a bothersome underling." *Id.* (emphasis added). [redacted]

[redacted] (SOF ¶¶ 49-55, App.024-025.)[22]

They have obtained useful testimony [redacted]

[redacted].[23]

(SOF ¶ 56-75, App.025-030.) They have obtained broadly relevant [redacted]

[22] Plaintiff's counsel attempted to obtain these documents from the EEOC through a public records request but were not able to obtain the documents. (SOF ¶ 55, n.6, App.025.)

[23] [redacted] testimony reveal [redacted] (SOF ¶ 65-74, App.027-030.) This evidence would be extremely helpful in other cases because IBM has consistently argued in arbitration that [redacted]

[redacted] (SOF ¶¶ 43-48, App.023-024.)[24] Employees pursuing age discrimination claims against IBM would clearly benefit from being able to use such broadly applicable evidence.[25] However, IBM has wielded its confidentiality provision aggressively to block employees from obtaining and using this [redacted] evidence against IBM.

In addition to not being able to use this evidence that has been amassed by other employees, former IBM employees pursuing age

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[24] [redacted] (SOF ¶ 43-48, App.023-024.)

[25] Plaintiff's counsel also obtained [redacted] (Liss-Riordan Reply Decl. ¶ 4, App.542.) [redacted] (Liss-Riordan Reply Decl. ¶ 4, App.542.) [redacted]

discrimination claims have also not been able to cite to [redacted] (SOF ¶¶ 81-87, App.031-034.) They have likewise not been able to cite to [redacted] from arbitrators, including [redacted] (SOF ¶¶ 88-94, App.034-036.) Abundant caselaw supports arbitrators relying on, or at least considering, decisions issued by other arbitrators in similar cases. *See, e.g.*, *Spell v. United Parcel Service*, 2012 WL 4447385, at *2 (E.D.N.Y. Sept. 25, 2012) (finding that an arbitrator's decision on factual issues was "highly probative" in a subsequent discrimination proceeding notwithstanding that the plaintiff did not even raise the issue of discrimination in the prior arbitration) (citing *Collins v. New York City Transit Authority*, 305 F.3d 113, 119 (2d. Cir. 2002)).[26]

[26] [redacted]

In a number of cases, [redacted] (SOF ¶¶ 95-98, App.036-037; Liss-Riordan Decl. ¶ 12-26, App.043.) [redacted] (SOF ¶ 95-98, App.036-037.) [redacted]

[redacted] (Liss-Riordan Reply Decl. ¶ 6, App.542.) [redacted] Liss-Riordan Reply Decl. ¶¶ 7-8, App.543

(Liss-Riordan Reply Decl. ¶ 9, App.543.) [redacted]

[redacted] (Liss-Riordan Reply Decl. ¶ 9, App.543.)[27] [redacted]

[redacted]

C. Rather Than Addressing the Evidentiary Record, the District Court Engaged in a Flawed Unconscionability Analysis and Reached an Incorrect Conclusion

In contravention of this Court's directives in *American Family Life Assurance Co.*, 778 Fed. App'x. at 27, and *Guyden*, 544 F.3d at 384-85, the District Court refused to review the extensive summary judgment record Plaintiff submitted. Instead, the District Court engaged in an unconscionability analysis using a Rule 12 standard, holding that the confidentiality agreement was neither procedurally nor substantively unconscionable. The District Court's analysis was flawed and should be

[27] [redacted] (SOF ¶ 15 n.5, App.016-017).

reversed.

First, the District Court noted that the Plaintiff had not argued that the arbitration agreement was procedurally unconscionable. However, where, as here, Plaintiff merely asked the court to excise certain substantively unconscionable provisions and then allow the case to proceed in arbitration, no showing of procedural unconscionability is required. *See Ragone*, 595 F.3d at 124-25. In *Ragone*, upon which IBM relies, the Second Circuit explained that "'the appropriate remedy' when a court is faced with a plainly unconscionable provision of an arbitration agreement – one which by itself would actually preclude a plaintiff from pursuing her statutory rights – 'is to sever the improper provision of the arbitration agreement, rather than void the entire agreement.'" *Id.* (quoting *Brady v. Williams Capital Group, L.P.*, 878 N.Y.S.2d 693, 701 (N.Y. Sup. Ct. 2009)); *see also Valle v. ATM Nat., LLC*, 2015 WL 413449, at *6 (S.D.N.Y. Jan. 30, 2015) (holding that although there was no procedural unconscionability, "[a]s the 'loser pays' provision is substantively unconscionable, the 'appropriate remedy is to sever the improper provision

of the arbitration agreement' and not to invalidate the entire Arbitration Provision.'") (internal citation omitted). Likewise, in *Larsen*, 871 F.3d at 1313, 1318-19, the Eleventh Circuit held that an arbitration agreement was not procedurally unconscionable but nevertheless excised a substantively unconscionable confidentiality provision.

Indeed, it is commonplace for courts to sever substantively unconscionable or otherwise unenforceable provisions from arbitration agreements regardless of procedural unconscionability. *See Cho v. Cinereach Ltd.*, 2020 WL 1330655, at *5 (S.D.N.Y. March 23, 2020) ("Moreover, to the extent that the unilateral modification provisions of the Personnel Policy were invalid, they would be severed from the arbitration provision"); *Chang v. Warner Bros. Entertainment*, 2019 WL 5304144, at *3-4 (S.D.N.Y. Oct. 21, 2019) (where the court found no procedural unconscionability, it went on to explain that "even if the Court were to deem the limitation clause unconscionable, the 'appropriate remedy' would be 'to sever the [limitation] provision . . . rather than void the entire agreement," in which case Chang would still be required to submit his claims to arbitration,

albeit with a modified limitations period"); *Castellanos*, 291 F. Supp. 3d at 301 ("Having determined that the [arbitration agreement's] limitations provision is unenforceable, the Court concludes that the appropriate remedy is to sever that provision.").

Second, without considering the factual record presented by Plaintiff, the District Court held that the confidentiality provision was not substantively unconscionable. Relying on *Suquin Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 392 (S.D.N.Y. 2017), and *Kopple v. Stonebrook Fund Mgmt., LLC*, 2004 WL 5653914, at *3 (N.Y. Sup. Ct. July 12, 2004), the District Court reasoned that "under New York law, confidentiality provisions in arbitration agreements are not substantively unconscionable where, as here, the terms of the confidentiality provision are not one sided." Opinion at 19-20, App.567-568 (internal quotation omitted).

The District Court appears to have believed that *Suquin Zhu* and *Kopple* stood for the blanket proposition that confidentiality provisions are *per se* enforceable if, on their face, they apply equally to both parties. However, this Court's rulings in *American Family Life Assurance Co.*, 778

Fed. App'x. at 27, and *Guyden*, 544 F.3d at 384-85, make clear that this reading is incorrect, because the District Court was required to look beyond the face of the agreement and consider the evidentiary record. Furthermore, *Suquin Zhu* and *Kopple* are both easily distinguishable from this case.

In *Suquin Zhu*, the plaintiffs brought a claim under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, and argued that the arbitration agreement in that case was not enforceable in part because it contained a confidentiality provision. *See Suquin Zhu*, 291 F. Supp. 3d at 382. The confidentiality provision, the plaintiff argued, violated the dictates of *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015), which held that FLSA claims cannot be settled without the approval of a court or the Department of Labor and discouraged other employees from bringing claims. *See Suquin Zhu*, 291 F. Supp. at 392. While the court compelled the case to arbitration, it did not address the enforceability of the confidentiality provision – instead, the court held that it was for the arbitrator to decide whether or not it was enforceable. *See id.* at 395. *Suquin*

Zhu thus stands in contrast to this case, where IBM has itself taken the position that [redacted] (SOF ¶ 15 n.5, App.017.) Indeed, in *Suquin Zhu*, the court left room for a finding that the confidentiality provision was invalid and that it could potentially be severed from the arbitration agreement. 291 F. Supp. at 395. The difference between this case and *Suquin Zhu* is that, in this case, it was for the District Court to make such a determination rather than the arbitrator. The District Court made no effort at all to address this crucial difference.

Likewise, *Kopple* is inapposite. *Kopple* involved a single arbitration where the plaintiff sought an order enjoining enforcement of the arbitration agreement with no record demonstrating the ways in which the confidentiality provision would undermine his ability to advance his claim. *See Kopple*, 2004 WL 5653914, at *1-3. The plaintiff argued that the confidentiality provision would prohibit him from speaking with potential witnesses about the arbitration, but the court concluded that this concern

was unfounded because the agreement "expressly acknowledges that the parties may engage in discovery," meaning that the confidentiality provision would not prevent the plaintiff from speaking with witnesses. *Id.* The *Kopple* plaintiff's argument was very different from that advanced by Plaintiff in this case, who has set forth extensive evidence that the strict enforcement of IBM's confidentiality provision has [redacted] (SOF ¶¶ 16-99, App.017-037.)[28] *Kopple* is simply inapposite.

Moreover, the District Court's belief, founded on *Suquin Zhu* and *Kopple*, that New York courts would not strike down confidentiality provisions in arbitration agreements given the kind of record that Plaintiff has presented here is unfounded. For example, while no New York

[28] The District Court also noted in passing that "the plaintiff's argument is undercut by the fact that if the plaintiff had filed a timely arbitration demand, he would have had the opportunity to obtain relevant discovery from IBM within the confines of the arbitration." Opinion at 20, App.568. However, Plaintiff's summary judgment record demonstrates why this assumption by the court of the adequacy of discovery in arbitration does not suffice.

decision has addressed the circumstances raised by this case, New York courts have held that where "a confidentiality clause subverts public policy, it is unenforceable." *Village of Brockport v. Calandra*, 745 N.Y.S.2d 662, 668 (Sup. Ct. June 14, 2002) (citing *Matter of Anonymous v. Bd. Of Educ. Mexico Cent. School Dist.*, 162 Misc. 2d 300, 616 N.Y.S.2d 867 (Sup. Ct. 1994)). IBM cannot dispute that New York has a strong public policy in favor of redressing age discrimination in employment. *See Placos v. Cosmair, Inc.*, 517 F. Supp. 1287, 1289 (S.D.N.Y. 1981) ("[D]iscrimination in employment because of age is against the public policy of New York . . . .") (citing *Foran v. Cawley*, 354 N.Y.S.2d 757, 812 (Sup. Ct. 1973); N.Y. Exec. Law § 296(1)(A)).

The New York Supreme Court Appellate Division came to a similar conclusion in *Denson v. Donald J. Trump for President, Inc.*, 180 A.D.3d 446, 454 (N.Y. Sup. Ct. App. Div. 2020). In that case, the plaintiff had brought sexual harassment and sex discrimination claims in state court. *See id.* The defendant then demanded arbitration alleging that by filing suit, plaintiff had violated a non-disclosure agreement that she had signed in connection

with her employment. *See id.* at 446. Following the commencement of arbitration, the plaintiff brought an action in federal court seeking a declaration that the non-disclosure agreement was void as against federal policy. *See id.* at 448. Defendant then successfully moved to compel arbitration in the federal action. *See id.* The arbitrator issued an award holding that the non-disclosure agreement was valid, and that the plaintiff had breached it by filing confidential information in the federal action. *See id.* The plaintiff then petitioned in state court to vacate the arbitration agreement, which the trial court denied. *See id.* The plaintiff then appealed, and the Supreme Court, Appellate Division, held that the arbitrator's award violated public policy:

> Plaintiff's negative statements about defendant, for which the arbitrator made an award, were made in the context of the federal action in which she sought a declaration that the NDA was unenforceable (*Rosenberg v. MetLife, Inc.*, 8 N.Y.3d at 365-366, 834 N.Y.S.2d 494, 866 N.E.2d 439). By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the NDA, the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider.

Id. at 454. In other words, the court held that confidentiality could not be used in a manner to quash the plaintiff's ability to advance her claim in court, because using confidentiality in that manner would violate New York public policy. *Denson* is closely analogous to the argument Plaintiff makes in this case – that IBM cannot use its confidentiality provision to hobble Plaintiff's ability to pursue the claim in arbitration. As such, where the District Court believed that New York state law inflexibly supports the enforcement of confidentiality provisions in arbitration, that is just not the case.[29]

At bottom, the District Court erred when it declined to invalidate the confidentiality provision without even reviewing Plaintiff's summary

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[29] Given the fact that the New York Court of Appeals has not addressed the specific scenario posed here, if this Court believes the caselaw does not indicate how the Court of Appeals would address the issue, this Court could certify the question to the Court of Appeals. *See* Local Rule 27.2; *Adar Bays, LLC v. GeneSYS ID, Inc.*, 962 F.3d 86, 93 (2d Cir. 2020) ("Pursuant to the rules of the New York Court of Appeals, '[w]henever it appears . . . to any United States Court of Appeals . . . that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.") (quoting 22 N.Y.C.R.R. § 500.27(a)).

judgment record. Had it reviewed the record, the District Court would have seen that IBM has systematically used its confidentiality provision to wield an unfair advantage of its former employees in arbitration, and Plaintiff too stands to be equally prejudiced in his arbitration by his all-but-certain inability to benefit from the [redacted],

unduly hampering his ability to arbitrate his claim.

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

Finally, the District Court erred in granting IBM's letter motions to keep under seal Plaintiffs' motion for summary judgment, accompanying exhibits, and supporting memoranda of law. Opinion at 22, App.570.

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)).[30] This right of public access, which "is said to predate the Constitution," *United States v. Amodeo*, 44 F.3d

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[30] 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. 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).

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," *Lugosch*, 435 F.3d at 119) (citing *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")).

This Court 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).

Thus, under well-settled law in this Circuit regarding the presumption of public access to judicial documents, a court ruling on a motion to seal or unseal must establish a robust record documenting its findings.[31] Yet the District Court in this case did not even attempt to explain its reasoning for shielding the summary judgment documents from

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[31] 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").

the public, beyond the fact that it concluded that they are protected by a confidentiality provision that it found enforceable. *See* Opinion at 22, App.570 ("Because the Confidentiality Provision is enforceable, the outstanding sealing requests (ECF Nos. 22, 30, and 32) are granted."). 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, *see* Section III.B *infra*, the District Court's two-sentence ruling on this issue is plainly insufficient under the framework established in *Lugosch* and its predecessors. Had the District Court engaged in the necessary analysis, it would have easily found that the summary judgment filings are judicial documents that should be unsealed.

A. Plaintiff's Motion for Summary Judgment and Accompanying Exhibits are Judicial Documents

As the *Lohnn* court recognized, this Court 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) ("[D]ocuments submitted to a court for its consideration in a summary judgment motion are – as a matter of law –

judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment."); *see also Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)). As such, documents that accompany summary judgment motions may only be sealed "if specific on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Lugosch*, 435 at 121. (citing *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987)). The Second Circuit has explained that these documents must not remain under seal "*absent the most compelling reasons*." *Id.* (emphasis in original) (internal quotation omitted).

In their letter motions, IBM pressed the argument that the summary judgment briefing and related filings are not judicial documents because they were not "used in the performance of Article III functions." *See* D. Ct. Dkt. 30 at 3 (citing *United States v. Amodeo*, 71 F.3d 1044, 1048-49 (2d Cir. 1995)). But whether the District Court *in fact* considered Plaintiff's summary judgment papers in ruling on IBM's motion to dismiss is irrelevant under the controlling case law. In the Second Circuit, 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).

In other words, the public's right of access attached the moment that Plaintiff filed his 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 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 to which a strong presumption of access attaches, under both the common law and the First

Amendment.'") (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) ("Once [a document is] filed on the docket, the presumption of access attaches … and does not disappear.") (internal citation omitted)). That right of access is, as a matter of law, unaffected by subsequent developments in the case. *See Lohnn*, 2022 WL 3359737, at *4 (rejecting Judge Furman's reasoning in *In re IBM Arbitration Litigation* that "plaintiffs' summary judgment papers were not judicial documents because the court resolved the case on IBM's motion to dismiss"); *see also Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d at 140 (pleadings were judicial documents from moment of filing, and "[t]he fact that the suit is ultimately settled without a judgment on the merits does not impair the 'judicial record' status of pleadings"); *Dawson v. Merck & Co.*, 2021 WL 242148, at *6 (E.D.N.Y. Jan. 24, 2021) (documents attached to *Daubert* motion were "judicial documents to which a presumption of public access immediately attached and remain[ed] attached notwithstanding settlement by the parties."). Thus, at

a minimum—and as a threshold matter—the District Court should have held that the documents at issue were judicial documents.

B. There Are No Countervailing Interests Militating Against Public Access

The District Court likewise 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); *Lohnn*, 2022 WL 3359737, 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).

Within this Circuit, cognizable countervailing interests include "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure," *Amodeo II*, 71 F.3d at 1050, as well as "misuse of information for commercial gain, … violation of a deponent's constitutional rights … or a disclosure of trade secrets that

would 'work a very clearly defined and very serious injury," *Burgess v. Town of Wallingford*, 2012 WL 4344194, at *12 (D. Conn. Sept. 21, 2012). By contrast, this Court has been crystal clear that a confidentiality provision like the one that IBM has invoked to justify continued sealing of the summary judgment papers 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 within the Circuit have routinely denied keeping documents under seal 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 ("[N]either the fact that the arbitration are governed by a confidentiality provision nor the strong federal interest in favor of arbitration is sufficient in itself or together to support IBM's broad proposition that everything disclosed in the arbitration must be kept under seal… ."); *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" where "a strong presumption of public access applies to the [documents] and the parties have not adequately demonstrated ... competitive harm absent sealing and have not narrowly tailored their sealing request."); *Dentons US LLP v. Zhang*, 2021 WL 2187289, at *1 (S.D.N.Y. May 28, 2021) ("Here, Petitioner contends that sealing is appropriate because the parties agreed to file under seal any papers associated with an arbitration proceeding. Confidentiality agreements alone are not an adequate basis for sealing, however." (citing cases)); *Salerno v. Credit One Bank, N.A.*, 2020 WL 1558153, at *8 (W.D.N.Y. Mar. 31, 2020) (same) (citing *Century Indem. Co. v. AXA Belgium*, 2012 WL 4354816, at *13 (S.D.N.Y. Sept. 24, 2012) (Furman, J.)); *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543 (JMF), 2015 WL 4750774, at *4 (S.D.N.Y. Aug. 11, 2015) (the fact that information is subject to a confidentiality agreement between litigants is not, by itself, a valid basis to overcome the presumption in favor of public access to judicial documents); *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) (same); *First State Ins. Co. v. National Cas. Co.*, 2013 WL 8675930, at *1 (S.D.N.Y. Feb. 19, 2013) (same).

Consequently, the confidentiality provision, which is the sole interest that IBM has cited to justify continued sealing of the summary judgment documents, cannot insulate those documents from public disclosure. Accordingly, the District Court's ruling on IBM's motion to seal should be reversed.

CONCLUSION

The District Court wrongly held that IBM could prevent Plaintiff from pursuing his claim through use of an arbitration agreement (when IBM had not provided to him the necessary OWBPA disclosures that would have been required in order to obtain a release of his ADEA claim). The piggybacking rule should have allowed him to pursue his ADEA claim on the heels of a class discrimination charge that alleged a systemic violation of the law. Contrary to the District Court's conclusion, 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 [redacted] 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: October 31, 2022

Respectfully submitted,

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Dated: October 31, 2022

/s/ Shannon Liss-Riordan
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