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
No. 21-cv-6319 – Judge John G. Koeltl

RESPONSE BRIEF OF DEFENDANT-APPELLEE INTERNATIONAL BUSINESS MACHINES CORP.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee International Business Machines Corporation states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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INTRODUCTION

Last year, the Southern District of New York was flooded by individual declaratory-judgment actions filed by the same counsel seeking the same result: the invalidation of key provisions in arbitration agreements between IBM and its former employees. The district judges in each case have now unanimously granted IBM's motions to dismiss, and denied the plaintiffs' competing summary-judgment motions as moot. In doing so, they recognized that the plaintiffs' arguments have "no merit," and in some instances are "patently absurd." As the decision below illustrates, that is the right result.

This matter involves a former IBM employee who signed an agreement with IBM requiring confidential individual arbitration of any claims arising under the Age Discrimination in Employment Act ("ADEA"). Under that agreement, Plaintiff had the same amount of time to file an arbitration demand as ADEA plaintiffs typically have to file a charge of discrimination with the EEOC—either 180 or 300 days after termination, depending on the jurisdiction (the "Timeliness Provision"). But nevertheless, it is undisputed that Plaintiff failed to file a timely arbitration demand within the prescribed deadline.

In an attempt to resurrect his untimely claim, Plaintiff now challenges the validity of the filing deadline he agreed to in his arbitration agreement. Under the Federal Arbitration Act ("FAA"), however, his challenge clearly fails. The FAA requires the terms of arbitration agreements to be strictly enforced as long as they give plaintiffs a "fair opportunity" to assert the substance of their claim in the arbitral forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Here there is no question that Plaintiff had a "fair opportunity," because he had the same amount of time the ADEA typically provides for a plaintiff to file a charge of discrimination. Plaintiff thus had every opportunity to file a timely claim; he simply failed to do so.

Plaintiff tries to get around this problem by resorting to the so-called "piggybacking" doctrine—a judge-made rule that sometimes excuses plaintiffs' failure to file an EEOC charge in satisfaction of the statutory prerequisite for filing suit in court. Plaintiff has waived this argument on appeal by failing to develop it in his own brief and instead attempting to incorporate briefing from two separate, unconsolidated cases. But in any event, piggybacking is irrelevant here because Plaintiff was not required to file an EEOC charge before arbitrating. Piggybacking

also has nothing to do with the relevant question under *Gilmer*—whether Plaintiff had a "fair opportunity" to pursue his ADEA claim in arbitration—which he plainly did.

In any event, Plaintiff's complaint warranted dismissal because it is an untimely vacatur motion. Before filing the present suit, he arbitrated his ADEA claim and lost when the arbitrator dismissed the claim as untimely. He had three months under the FAA to move to vacate the adverse arbitral award—but he did not. Instead, he filed this case long after the three-month clock expired, seeking to collaterally attack the arbitrator's decision. As many courts have recognized, this is an improper end run around the FAA's exclusive vacatur procedure.

Plaintiff is also wrong to argue that his arbitral confidentiality provision (the "Confidentiality Provision")—a standard term found in arbitration agreements across the country—is somehow "unconscionable." He claims that the provision is invalid because it would hamper his ability to prove his ADEA claim in arbitration by preventing the sharing of information with other claimants in other confidential individual arbitrations. But his arguments on this front are both moot and meritless. First, since his ADEA claim is time-barred, he has no

viable claim to arbitrate and the confidentiality issue is moot. And second, even if the Court reached the merits of the confidentiality challenge, the district court properly rejected it. New York law is clear that contractual terms must be enforced unless they are *both* procedurally and substantively unconscionable, or so "exceptional" and "outrageous" that they can be struck down on substantive unconscionability alone But Plaintiff has never even tried to show procedural unconscionability, and he has no serious argument that the standard confidentiality provision he signed is "exceptional" or "outrageous."

That leaves only Plaintiff's demand that the confidential arbitration materials attached to his moot summary-judgment papers be unsealed. That argument fails for two reasons. First, the materials are not subject to the presumption of public access because they were irrelevant to the district court's exercise of the judicial function. The district court did not, and could not, consider the extra-complaint materials in adjudicating IBM's motion to dismiss. And second, any presumption of access here would be exceedingly weak (given that the

materials played no role in the court's decision) and easily overcome (given the FAA's strong policy favoring arbitral confidentiality).

JURISDICTIONAL STATEMENT

IBM agrees that this Court has jurisdiction under 28 U.S.C. § 1291. The district court originally had federal-question jurisdiction under *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372, 388 (2d Cir. 2016), because Plaintiff's underlying ADEA claim presents a federal question. Although the Supreme Court overturned *Doscher* in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), that makes no difference here because the district court also had diversity jurisdiction. The parties are completely diverse, *see* Compl. ¶¶ 3–4 (App.002), and the amount in controversy exceeds $75,000 given the damages sought on the ADEA claim.

In addition, the district court had federal-question jurisdiction because the hypothetical coercive action for Declaratory Judgment Act purposes—IBM's motion to compel arbitration—presents a federal question under the ADEA. *See Vaden v. Discover Bank*, 556 U.S. 49, 53 (2009).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly held that the Timeliness Provision is enforceable.

2. Whether, in the alternative, dismissal of Plaintiff's complaint was warranted because he already arbitrated his ADEA claim, lost, and failed to file a timely vacatur motion.

3. Whether the district court correctly held that Plaintiff's challenge to the Confidentiality Provision is moot and, in any event, that the Confidentiality Provision is enforceable.

4. Whether the district court abused its discretion in sealing confidential arbitration materials that Plaintiff submitted in support of his summary-judgment motion, which the district court denied as moot.

STATEMENT OF THE CASE

1. When Plaintiff separated from IBM in 2017, he signed an agreement waiving most claims against IBM in exchange for a severance package. Add.002. The agreement did not waive ADEA claims, however, instead providing for them to be resolved through individual arbitration. *Id.* The parties agreed that any dispute over the "interpretation" of the agreement "shall be submitted to and ruled on by the Arbitrator." JAMS

Rule 11(b), *incorporated by* App.092, 095. But "[a]ny issue concerning" the "validity or enforceability" of the agreement must be "decided only by a court of competent jurisdiction." App.094.

The agreement contains a Timeliness Provision, which states that, "[t]o initiate arbitration, [the employee] must submit a written demand for arbitration . . . 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." Add.002–03. Under the Timeliness Provision, "[t]he filing of a charge or complaint with a government agency . . . shall not substitute for or extend the time for submitting a demand for arbitration." Add.003.

The agreement also contains a Confidentiality Provision, which states that "the parties shall maintain the confidential nature of the arbitration proceeding and the award." *Id.* With narrow exceptions, "[t]he parties agree[d] that any information related to the proceeding . . . is confidential information which shall not be disclosed[.]" *Id.*

2. On January 17, 2019—more than a year after his termination—Plaintiff filed an arbitration demand against IBM asserting claims under

the ADEA. Add.004. The arbitrator dismissed Plaintiff's claim as untimely on July 19, 2019, "because [he] did not file an arbitration demand within the 300-day deadline provided for under the ADEA[,]" as required by the Timeliness Provision. *Id.* (citing 29 U.S.C. § 626(d)(1)(B)). In reaching that conclusion, the arbitrator "concluded that under the Agreement, the plaintiff could not take advantage of the so-called 'piggybacking rule,'" which excuses plaintiffs in some circumstances from filing an EEOC charge before filing suit in court. Add.004–05. Following the adverse arbitration decision, Plaintiff did not file a petition to vacate under the FAA. *See* Add.021 n.5.

3. In an attempt to rescue his untimely claim, Plaintiff sought to opt into a collective action filed by his counsel on behalf of other IBM employees, arguing that his claim should be deemed timely under the "piggybacking" doctrine. Add.005. In March 2021, Judge Valerie Caproni dismissed Plaintiff on the ground that he had "signed . . . a class and collective action waiver" and thus could not participate in the collective action. *Rusis v. IBM*, 529 F. Supp. 3d 178, 195–96 (S.D.N.Y. 2021). Although Judge Caproni did not reach Plaintiff's "piggybacking" argument, she "note[d] [her] skepticism" of it. *Id.* at 192 n.4.

Piggybacking can excuse the failure to satisfy the EEOC charge-filing requirement. But since, in arbitration, Plaintiff was "not required to file a charge of discrimination with the EEOC," piggybacking "is wholly inapplicable in the arbitration context." *Id.*

Judge Caproni also stated that it was "patently absurd" for Plaintiff to argue that IBM or the Timeliness Provision somehow prevented him from filing a timely arbitration demand. *Id.* at 194 n.8. He "could have avoided this entire issue" by filing his claim within the standard deadline provided under the arbitration agreement—and had he done so, "there would be no need to resort to a (far-fetched) argument that the piggybacking doctrine saves [his] untimely demand[.]" *Id.* at 194–95 n.8. Plaintiff cannot "set the fault at IBM's feet when [he] need look no further than [his] own counsel for the appropriate locus of blame." *Id.* at 195 n.8.

4. After Judge Caproni's decision in *Rusis*, Plaintiff's counsel filed over two dozen individual declaratory-judgment actions seeking to invalidate the Timeliness Provision and the Confidentiality Provision. Twenty-six of the actions were consolidated with Judge Furman. *See In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.) ("*In Re: IBM*"). Of the other three cases, one was assigned to Judge Karas,

Tavenner v. IBM, No. 22-2318 (2d Cir.), and two were assigned to Judge Koeltl: *Lodi v. IBM*, No. 22-1737 (2d Cir.) and this case.[1] All three judges have now dismissed the cases before them, and all plaintiffs have appealed.

In this case (as in the others), the parties filed competing dispositive motions—IBM moved to dismiss under Rule 12(b)(6), and Plaintiff moved for summary judgment. Add.002. When Plaintiff filed his summary-judgment motion, he attached a slew of confidential materials his counsel obtained from separate confidential arbitrations involving other plaintiffs. Those materials are covered by the same Confidentiality Provision that Plaintiff challenges here.

Although he filed the confidential materials under seal, Plaintiff asked the district court to immediately *unseal* them. According to Plaintiff, the mere filing of those materials required their immediate unsealing under the "public access" doctrine. Judge Koeltl granted IBM's request that "the Court . . . defer any filing in the public record of documents with confidential information redacted until after the

[1] Another case, assigned to Judge Liman, settled. *See Lohnn v. IBM*, No. 21-cv-6379 (S.D.N.Y.).

resolution of the underlying summary judgment motions/motions to dismiss." App.500–01.

5. On July 6, 2022, the district court granted IBM's motion to dismiss and denied Plaintiff's summary-judgment motion "as moot." Add.002. *First*, the district court held that Plaintiff's challenge to the Timeliness Provision is "without merit." Add.010. Contrary to Plaintiff's arguments, "the piggybacking rule is not a substantive, non-waivable right protected by the ADEA." *Id.* Rather, "[t]he substantive right protected by the ADEA is the 'statutory right to be free from workplace age discrimination,' and there can be no reasonable dispute that the Timing Provision afforded the plaintiff a 'fair opportunity' to vindicate this right in arbitration within an entirely reasonable time frame." *Id.* (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009); *Gilmer*, 500 U.S. at 31). Plaintiff "simply failed to do so." Add.011.

In addition, the district court emphasized that "the piggybacking rule is not part of the statute of limitations law of the ADEA." Add.012. Piggybacking is "an exception to the exhaustion doctrine that excuses plaintiffs from . . . filing an EEOC charge when [the employer and the EEOC] are already on notice of the facts surrounding the plaintiff's

claims from an earlier filed EEOC charge." *Id.* It "is not a statute of limitations doctrine extending the time for ADEA plaintiffs to file their claims." Add.013.

Moreover, because piggybacking is not a non-waivable substantive right, "any alleged . . . failure by IBM [to comply with the disclosure requirements of the Older Workers' Benefits Protection Act ('OWBPA')] d[id] not render the Timing Provision enforceable." Add.014. "[T]he Second Circuit has made clear that the rights that give rise to the OWBPA disclosure requirements are 'substantive rights and [do] not include procedural ones.'" Add.013–14. OWBPA is thus not implicated here because piggybacking is "a procedural exhaustion doctrine, not a substantive right protected by the ADEA." Add.014.

Second, the district court rejected Plaintiff's challenge to the Confidentiality Provision. Because the Timeliness Provision is enforceable—and because Plaintiff's arbitration demand undisputedly was untimely—his "claim for declaratory relief with respect to the Confidentiality Provision is . . . moot." Add.017 n.4. "[F]or the sake of completeness," however, the district court noted that Plaintiff's arguments "are without merit." *Id.*

Under New York law, a provision ordinarily will not be struck down as unconscionable unless the plaintiff can show "both procedural and substantive unconscionability." Add.018. It is only in "'exceptional cases'" that a contractual provision can be deemed "'so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.'" *Id.* Here, Plaintiff did not even "argue that the Confidentiality Provision or the Agreement as a whole is procedurally unconscionable." Add.019. Nor could he. He "had 21 days to review the Agreement before signing it[,]" and "the Agreement explicitly advised [him] to consult with an attorney prior to executing the Agreement." *Id.* There is simply "no indication that the circumstances surrounding the execution of the Agreement were coercive or that [he] 'lacked a meaningful choice.'" *Id.*

As to substantive unconscionability, Plaintiff's argument failed because the standard arbitral confidentiality provision he signed was "'not one-sided,'" but instead applied equally to both parties. *Id.* Moreover, although Plaintiff claimed that confidentiality somehow prevented him from obtaining relevant discovery, that argument was "undercut" by the fact that, if he had filed a timely claim, "he would have had the opportunity to obtain relevant discovery from IBM within the

confines of the arbitration." Add.020. The district court thus found Plaintiff's arguments "without merit" and held that there was "no basis on which to conclude that the Confidentiality Provision is unenforceable." Add.021–22.

Having granted IBM's motion to dismiss Plaintiff's challenges to both the Timeliness Provision and the Confidentiality Provision on the pleadings, the district court denied Plaintiff's summary-judgment motion "as moot." Add.021. In addition, the court acknowledged "several outstanding letter motions to seal materials that were filed in this case that contain or discuss arbitration materials that are covered by the Confidentiality Provision." Add.022. "Because the Confidentiality Provision is enforceable," the court reasoned, "the outstanding sealing requests are granted[,]" leaving the confidential materials sealed. *Id.* (citations omitted).

7. Plaintiff appealed and filed a motion asking this Court to immediately unseal the confidential materials. ECF No. 49. IBM opposed that request on various grounds, noting that the unsealing issue is one of the very issues pending on appeal. ECF No. 60. This Court declined to immediately unseal the documents, and instead referred the unsealing

request to the merits panel as it has done in similar cases. ECF No. 74. *See also* Order at 2, *In Re: IBM*, No. 22-1728 (2d Cir. Oct. 31, 2022); Order at 2, *Lodi*, No. 22-1737 (2d Cir. Oct. 31, 2022); Order, *Tavenner v. IBM*, No. 22-2318 (2d Cir. Nov. 30, 2022).

SUMMARY OF ARGUMENT

I. The district court correctly rejected Plaintiff's challenge to the Timeliness Provision. The FAA requires arbitration provisions to be enforced as long as they allow plaintiffs a "fair opportunity" to pursue their claims in the arbitral forum. Here, Plaintiff had a fair opportunity to pursue his ADEA claim in arbitration because the Timeliness Provision gave him the same deadline to file a claim that plaintiffs typically have to file a charge of discrimination with the EEOC.

Plaintiff is wrong to contend that the Timeliness Provision is invalid because it waives the judge-made "piggybacking" rule. Piggybacking is an exception to the exhaustion doctrine that excuses a plaintiff from the ordinary procedural requirement to file an EEOC charge before filing an ADEA suit in court. That doctrine is entirely inapplicable here, because there is no requirement for a plaintiff to file an EEOC charge before filing an ADEA claim in arbitration. Moreover,

piggybacking is clearly waivable under the FAA because it is a procedural rule about how to file a claim, not part of the "substantive" right to be free from workplace age discrimination.

II. In the alternative, Plaintiff's challenge also fails because it is an improper collateral attack on the decision of the arbitrator who dismissed his ADEA claim as untimely. Plaintiff already arbitrated and lost on his ADEA claim. Under the FAA, he had three months to file a motion to vacate the award. He did not do so. Instead, he filed this suit long after the three-month clock expired. Courts routinely construe such declaratory judgment actions as untimely vacatur motions and dismiss them on the theory that they would effect improper end runs around the FAA. Dismissal was warranted for the same reason here.

III. The district court also correctly rejected Plaintiff's challenge to the Confidentiality Provision. Because Plaintiff's ADEA claim is time-barred, he has no live claims to arbitrate and the confidentiality issue is moot.

In any event, to prevail on his unconscionability claim under New York law, Plaintiff was required to establish either that the Confidentiality Provision is both procedurally and substantively

unconscionable, or that it is "exceptional" and "outrageous." He concedes he has never made a procedural-unconscionability argument—and regardless, there is no dispute that he had a meaningful choice whether to sign the arbitration agreement. Nor can he show that the run-of-the-mill Confidentiality Provision at issue here is substantively unconscionable. Among other things, it binds both parties and allows for ample discovery to obtain relevant information—discovery Plaintiff could have accessed had he timely filed. This Court itself has described such agreements as a "paradigmatic" feature of arbitration, and, not surprisingly, courts across the country have upheld similar provisions. The district court here correctly followed suit.

IV. Finally, the district court did not abuse its discretion in denying Plaintiff's request to unseal the confidential arbitration materials he attached to his summary-judgment briefing. Since the court dismissed the case on the pleadings, it never had occasion to consider the summary-judgment materials, and thus no presumption of public access applies. Even if such a presumption did apply, moreover, it would be exceedingly weak and easily overcome by the strong interests in upholding arbitral

confidentiality and preventing plaintiffs from obtaining the relief they seek merely by filing a challenge to a confidentiality provision.

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a motion to dismiss for failure to state a claim." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009). The Court similarly reviews *de novo* a district court's order denying summary judgment. *Fisher v. Aetna Life Ins.*, 32 F.4th 124, 135 (2d Cir. 2022). "In reviewing a district court's order to seal or unseal, [this Court] examine[s] the court's factual findings for clear error, its legal determinations de novo, and its ultimate decision to seal or unseal for abuse of discretion." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139 (2d Cir. 2016).

ARGUMENT

I. PLAINTIFF'S CHALLENGE TO THE TIMELINESS PROVISION FAILS

The district court properly rejected Plaintiff's challenge to the Timeliness Provision. Under the FAA, arbitration terms must be upheld as long as they allow a "fair opportunity" to pursue a claim in arbitration. That is not a close question here, as the Timeliness Provision gave

Plaintiff the same amount of time to file ADEA claim in arbitration as plaintiffs typically have to file ADEA claims with the EEOC. Nothing prevented Plaintiff from filing a timely claim. He simply failed to do so.

A. The Timeliness Provision Is Valid and Enforceable.

1. Arbitration terms must be upheld as long as they provide a fair opportunity to pursue a claim.

The FAA provides that, with narrow exceptions not at issue here, arbitration agreements "shall be valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2. In a long line of cases interpreting that provision, the Supreme Court has repeatedly held that "courts must 'rigorously enforce' arbitration agreements according to their terms[.]" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

Among the terms courts must enforce are the parties' "chosen arbitration procedures." *E.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). Indeed, a central feature of arbitration is that the parties enjoy "discretion in designing arbitration processes." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). The Supreme Court has thus underscored that courts must "respect and enforce . . . '*the rules*'" that parties adopt for arbitration. *Epic Sys.*, 138 S. Ct. at 1621 (emphasis in

original); *accord Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 228 (2d Cir. 2016).

In the context of ADEA claims, in particular, the Court has rejected complaints about arbitration procedures that were "more limited" than, or "not . . . as extensive" as, those in federal court. *Gilmer*, 500 U.S. at 31. After all, the entire point of arbitration is to allow parties to choose procedures *different* from those in court. "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.*

Even when a statute "expressly" creates procedural rights—such as the right to a judicial forum, the right to a jury trial, or the right to pursue a class or collective action—the FAA makes such rights presumptively waivable in an arbitration agreement unless Congress "clearly" states otherwise. *Epic Sys.*, 138 S. Ct. at 1624, 1627–28. In *Gilmer*, for example, the Court held that even though the ADEA gives plaintiffs the express right to sue "'in any court of competent jurisdiction,'" 500 U.S. at 29, as well as the right to pursue a "'collective action,'" *id.* at 32, those rights can be waived in an arbitration agreement. Likewise, the ADEA provides that plaintiffs "shall be entitled to a trial by jury," 29 U.S.C. § 626(c)(2),

but *Gilmer* illustrates that this right too may be set aside in favor of arbitration.

The Supreme Court has suggested—though never actually held—that a court may decline to enforce an arbitration provision that "prevent[s] the 'effective vindication' of a federal statutory right." *Italian Colors*, 570 U.S. at 235 & n.2. But to the extent the exception exists, it protects only the right of the plaintiff to "'vindicate its statutory cause of action in the arbitral forum.'" *Id.* at 235.

As the district court recognized, Add.010, the relevant "substantive" right protected by the ADEA is "the statutory right to be free from workplace age discrimination[.]" *14 Penn Plaza*, 556 U.S. at 265; *see also Estle v. IBM*, 23 F.4th 210, 214 (2d Cir. 2022). Accordingly, under the effective-vindication doctrine, an arbitration agreement cannot "forbid[] the assertion of [that] statutory right[]" by prohibiting a plaintiff from bringing an ADEA claim. *Italian Colors*, 570 U.S. at 236. Nor can an arbitration agreement impose obstacles that effectively deprive plaintiffs of the right to bring an ADEA claim, such as by setting an unreasonably short filing deadline or charging arbitration fees "that are so high as to make access to the forum impracticable." *Id.*

Simply put, the question under the effective-vindication doctrine is whether the arbitration procedures agreed to by the parties "allow" plaintiffs "a fair opportunity to present their claim[]." *Gilmer*, 500 U.S. at 31. "'[S]o long as the prospective litigant effectively may vindicate [that] statutory cause of action in the arbitral forum,'" the arbitration agreement must be enforced. *Italian Colors*, 570 U.S. at 235.

2. The Timeliness Provision gave Plaintiff a fair opportunity to vindicate his ADEA claim.

As the district court held, the Timeliness Provision gave Plaintiff a fair opportunity to pursue his claim in arbitration. Indeed, Plaintiff's contrary argument "borders on frivolous." *In Re: IBM Arbitration Agreement Litig.*, No. 21-CV-6296, 2022 WL 2752618, at *9 (S.D.N.Y. July 14, 2022). In particular, "the timeline for filing an arbitration demand established by the Timeliness Provision is the *same* 180- or 300-day deadline provided by the ADEA itself." *Id.* (citing 29 U.S.C. § 626(d)(1)); Add.010–11 (same). "Thus, to hold that Plaintiff[] w[as] prevented by the Timeliness Provision from effectively vindicating [his] rights under the ADEA would be to hold that no plaintiff can effectively vindicate his or her rights under the statute." *In Re: IBM*, 2022 WL

2752618, at *9. That "would be 'patently absurd.'" *Id.* (quoting *Rusis*, 529 F. Supp. 3d at 194 n.8).

On top of that, "'Plaintiff[] do[es] not identify any obstacle, let alone one imposed by IBM, that prevented [him] from filing an arbitration demand on their ADEA claims within the 180- or 300-day deadline established by the separation agreement[].'" *Id.* Had he done so, he "'could have received any relief to which [he was] entitled in an individual arbitration, as contemplated by IBM's separation agreement[].'" *Id.* Indeed, "[t]he simplest way for Plaintiff to vindicate [his] ADEA claim was to file a timely demand for arbitration, which [he] did not do." *Smith v. IBM*, No. 21-CV-3856, 2022 WL 1720140, at *7 (N.D. Ga. May 27, 2022); *accord Rusis*, 529 F. Supp. 3d at 194 n.8 (same); Add.010–11 (same).

In short, Plaintiff cannot "set the fault [for his untimely ADEA claim] at IBM's feet when [he] need look no further than [his] own counsel for the appropriate locus of blame." *Rusis*, 529 F. Supp. 3d at 194 n.8. The district court thus correctly held that the Timeliness Provision is enforceable.

B. Plaintiff's Piggybacking Argument Fails.

Plaintiff nonetheless asserts that the Timeliness Provision impermissibly waives the judge-made "piggybacking" rule, which he claims is a "substantive" right protected by the ADEA. Plaintiff has largely waived this argument, however, by failing to develop the argument in his own brief and instead attempting to "incorporate[] . . . by reference" piggybacking arguments from two different briefs filed in the separate cases of *In Re: IBM* and *Lodi*, Br. 25. Since Plaintiff has affirmatively disavowed any intent to consolidate these cases, ECF No. 62 at 2, he cannot expand the word-limit of his brief by incorporating arguments made by other appellants in other cases, *e.g.*, *United States v. Johnson*, 127 F. App'x 894, 901 n.4 (7th Cir. 2005).

To the extent he makes his own arguments, Plaintiff is doubly wrong. First, piggybacking is an exception to an exhaustion doctrine, not a limitations rule. It excuses plaintiffs from filing EEOC charges before filing suit in court. But since plaintiffs are not required to file an EEOC charge before filing a claim in arbitration, piggybacking is entirely irrelevant in this context. Second, even if piggybacking were part of the ADEA's limitations period, it is still just a procedural rule, not a

substantive right. Accordingly, there is no merit to Plaintiff's argument that the "piggybacking" rule somehow gives him a non-waivable right to file an untimely claim in arbitration outside of the ordinary filing deadline.

1. The judge-made piggybacking doctrine is an inapposite exception to an exhaustion rule for EEOC charges, which Plaintiff was not required to file.

Plaintiff argues that the Timeliness Provision is invalid because it waives the piggybacking rule, which in certain circumstances allows plaintiffs to file ADEA claims in court by piggybacking on EEOC charges filed by other plaintiffs. Br. 25. But no court has ever adopted Plaintiff's argument—and numerous courts have rejected it. There is simply no authority for the claim "that the ADEA creates a substantive right to piggybacking in any context—let alone specifically in the context of determining the enforceability of an agreement to arbitrate." *In Re: IBM*, 2022 WL 2752618, at *7. Indeed, since piggybacking is about excusing the requirement to file EEOC charges before filing suit in court, it is irrelevant in arbitration. Add.012.

a. As this Court explained in *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), Title VII and the ADEA require a plaintiff to "fil[e] a

charge with the EEOC before bringing a suit in . . . district court." *Id.* at 1056. "The purpose" of that exhaustion requirement "is to afford the agency the opportunity to 'seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.'" *Id.* at 1057.

In broad terms, the judge-made piggybacking rule allows a plaintiff to forgo filing an EEOC charge by "piggybacking" onto a similar charge filed by a different plaintiff. *Id.* at 1057–58. The rationale for excusing exhaustion in that circumstance is that, if the EEOC "is satisfied that a timely filed administrative charge affords it sufficient opportunity to discharge [its conciliation, conference, and persuasion] responsibilities with respect to similar grievances, it serves no administrative purpose to require the filing of repetitive . . . charges." *Id.* at 1057. Thus, if the filed charge is broad enough to provide notice of the claims of non-charge filers, then the non-charge filers' failure to file their own charges can be excused. *Id.*

As the case law makes clear, therefore, the piggybacking rule has nothing to do with making sure plaintiffs have enough time to file a claim. It is an exception to an *exhaustion* rule, which excuses the

statutory requirement that a plaintiff first file an EEOC charge before bringing suit in court. It is not a *statute-of-limitations* doctrine, as it "neither 'tolls' the statute of limitations nor is it intended to permit otherwise time-barred claims to proceed in litigation." *Rusis*, 529 F. Supp. 3d at 192 n.4. To be sure, there is language in piggybacking cases requiring the plaintiff who *did* file an EEOC charge to have filed "a timely administrative charge." *Tolliver*, 918 F.2d at 1056. But that is just a requirement that *someone* must have filed a timely EEOC charge in order to make piggybacking possible.

If there were any doubt on this point, this Court has held that piggybacking is not available to plaintiffs who file their own untimely charges of discrimination, even if they otherwise would be eligible for piggybacking based on the timely-filed charge of a different plaintiff. *See Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 564 (2d Cir. 2006), *aff'd*, 552 U.S. 389 (2008). This "underscore[s]" that piggybacking does not extend the statute of limitations for filing an ADEA claim, but only excuses the requirement of filing an EEOC charge. Add.013.

Accordingly, since claimants who file "ADEA claims in arbitration" are "not required to file a charge of discrimination with the EEOC[,]" "the

piggybacking doctrine is wholly inapplicable in the arbitration context." *Rusis*, 529 F. Supp. 3d at 192 n.4. Arbitration claimants simply do not need the relief that piggybacking provides—an exception to the ADEA's charge-filing requirement. And an arbitration claimant who files an untimely arbitration demand is in the same position as a plaintiff in court who filed his or her own untimely EEOC charge—the claim is time-barred.

b. Nothing in Plaintiff's opening brief changes this fact. Plaintiff claims that *Tolliver* understood piggybacking to be a limitations rule. But, as the discussion above suggests, Plaintiff is mistaken.

For example, Plaintiff emphasizes (Br. 30–32) *Tolliver*'s discussion of the 1978 amendments to the ADEA's charge-filing provision. But Plaintiff vastly overreads *Tolliver*. As is readily apparent from the legislative history *Tolliver* cited, Congress was focused on the burden imposed by the pre-suit "*charge filing obligation*." *Tolliver*, 918 F.3d at 1056 (emphasis added). Neither Congress nor this Court had any reason to consider whether a piggybacking rule should be created where no charge-filing obligation exists in the first place—as in arbitration.

Plaintiff similarly says that piggybacking bolsters "the remedial purpose of the [ADEA]" because 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." Br. 32. But that proves *IBM's* point. *Gilmer* held that parties can agree to arbitrate claims without making use of the EEOC charge-filing process. 500 U.S. at 29. The EEOC's statutory "informal methods" responsibilities thus do not extend to arbitration, and piggybacking in the arbitration context makes no sense.

Finally, Plaintiff attempts to drive a wedge between the decision below and Judge Furman's decision in *In Re: IBM*, claiming that Judge Furman "declined to join" the district court here in holding that piggybacking is not part of the ADEA's limitations period. Br. 32. But Judge Furman simply stated that he "need not answer" the question "whether or not the piggybacking rule is properly considered part of the ADEA's limitations period" because Plaintiff's counsel's argument fails for the independent reason (addressed below) that the ADEA's

limitations period itself is a waivable procedural rule, not a substantive right. *In Re: IBM*, 2022 WL 2752618, at *7.

2. Even if piggybacking were part of the ADEA's statute of limitations, it is a procedural rule, not a substantive right.

a. Even if piggybacking were part of the ADEA's limitations period, it would still be a procedural rule waivable through an arbitration agreement. After all, even the ADEA's express statutory rights such as the right to a jury trial and the right to a collective action can be waived, *supra* p. 20; there is no reason piggybacking should be non-waivable.

"As the Supreme Court explained in *14 Penn Plaza LLC*, the substantive right conferred by the ADEA for FAA purposes is the 'right to be free from workplace age discrimination.'" *In Re: IBM*, 2022 WL 2752618, at *7 (quoting 556 U.S. at 265). Significantly, the Supreme Court "distinguished" that right from "procedural [ones], like 'the right to seek relief from a court in the first instance.'" *Estle*, 23 F.4th at 214 (quoting *14 Penn Plaza*, 556 U.S. at 265–66). And "[t]he ADEA's limitations period falls comfortably in the latter category; it is more akin to the procedural 'right to seek relief from a court in the first instance' than it is to the substantive 'right to be free from workplace age

discrimination.'" *In Re: IBM*, 2022 WL 2752618, at *7 (quoting *14 Penn Plaza*, 556 U.S. at 265–66).

This is especially so in light of this Court's holding that "the ADEA statute of limitations is a procedural, not substantive, right." *Id.* In *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886 (2d Cir. 1995), this Court considered whether the ADEA's amended statute of limitations could apply retroactively. That analysis turned on whether the limitations period was a procedural right or a substantive right. The Court "explained that substantive rights typically govern 'primary conduct'—*e.g.*, 'the alleged discrimination'—while procedural rights generally bear on 'secondary conduct'—*e.g.*, 'the filing of [a] suit.'" *In Re: IBM*, 2022 WL 2752618, at *7 (quoting *Vernon*, 49 F.3d at 890). "Applying that reasoning, [this Court] held that the ADEA statute of limitations is a procedural, not substantive, right." *Id.*

So too here: "Because the ADEA's limitations period governs 'secondary conduct'—namely, the time period for filing a suit under the ADEA—it should not be considered a substantive, and therefore *categorically* nonwaivable, right in the arbitration context." *Id.*; *see also Spira v. J.P. Morgan Chase & Co.*, 466 F. App'x 20, 22–23 (2d Cir. 2012)

("[L]imitations periods generally do not modify underlying substantive rights.").

b. Plaintiff here offers only three brief responses, choosing instead to incorporate others "explained in greater detail in Plaintiffs' Opening Brief in *In Re: IBM*," Br. 33. All three of Plaintiff's responses fail on their own terms, and—even if the Court permitted Plaintiff to rest on arguments made in *In Re: IBM*—the plaintiffs' arguments there fail for the reasons expressed in IBM's response brief in that case.

First, Plaintiff argues that the decision below is "directly at odds with" the Sixth Circuit's decision in *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2021). Br. 27–29. But *Thompson* is inapposite because it did not involve either piggybacking or arbitration.

As an initial matter, in *Thompson*, the Sixth Circuit held only that the ADEA's *express* statutory filing deadline could not be waived. The Timeliness Provision here is consistent with that ruling: It requires an arbitration demand to be filed on the same deadline the statute sets for an EEOC charge—"'within 180 days after the alleged unlawful practice occurred'" (extended to 300 days in deferral jurisdictions). *Thompson*, 985 F.3d at 521 & n.5 (quoting 29 U.S.C. § 626(d)(1)(A)). The question before

this Court is whether the judge-made piggybacking rule can be waived, which *Thompson* did not address.

Moreover, *Thompson's* rationale does not apply to arbitration cases. The Sixth Circuit held that the ADEA's statutory filing deadline could not be shortened because it was necessary to protect the "'delicate balance'" of the pre-suit EEOC process that is required before a plaintiff may file suit *in court*. *Id.* at 519. Here, however, Plaintiffs were not required to file EEOC charges before arbitrating. The Timeliness Provision thus does not interfere with any mandatory EEOC process.

In addition, since *Thompson* did not involve arbitration, it did not have to contend with the FAA's rule that arbitration provisions "shall be valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2. That express statutory command requires enforcement of the arbitral Timeliness Provision. Indeed, the Supreme Court has said that even express statutory rights are generally waivable in arbitration provisions unless Congress has "clearly" provided otherwise. *Epic Sys.*, 138 S. Ct. at 1624, 1627–28. And when it comes to the judge-made piggybacking rule, Congress did not even mention it—much less "clearly" do so.

Finally, as the district court emphasized, Add.015–16, Sixth Circuit precedent itself recognizes a distinction between the arbitration and non-arbitration contexts. *Thompson* relied on an earlier decision that addressed only "contractually shortened limitation period[s], *outside of an arbitration agreement*[.]" *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 839 (6th Cir. 2019) (emphasis added). *Logan* expressly distinguished the Sixth Circuit's previous en banc decision in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (en banc), which *upheld* an arbitration provision that reasonably shortened the deadline for bringing a Title VII claim. *Logan*, 939 F.3d at 838.

Accordingly, "Sixth Circuit precedent *undermines* rather than *supports* Plaintiff['s] position" because it recognizes that filing periods *can* be shortened in arbitration agreements. *In Re: IBM*, 2022 WL 2752618, at *8 (emphasis added); Add.016 (same); *Tavenner v. IBM*, No. 21-CV-6345, 2022 WL 4449215, at *8 n.10 (S.D.N.Y. Sept. 23, 2022) (same). Indeed, the Sixth Circuit has actually upheld an arbitration provision that required an ADEA claim to be filed within "180[ ]day[s]," reasoning that the filing deadline was "not unreasonably short"—even if the ADEA would sometimes allow a longer period for filing in court.

Howell v. Rivergate Toyota, Inc., 144 F. App'x 475, 480 (6th Cir. 2005) (per curiam). That holding squarely contradicts Plaintiff's argument in this case.

Second, Plaintiff claims that allowing the piggybacking rule to be waived in arbitration somehow creates a "special rule[]" that "favor[s] enforceability of arbitration agreements" over other types of contracts, contrary to *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). *See* Br. 27. That is incorrect. *Morgan* involved a *judge-made* rule that applied a heightened waiver standard to agreements to arbitrate. *See* 142 S. Ct. at 1712. Here, *the parties* adopted the relevant procedural rule—the Timeliness Provision—not *the courts*. There are many procedural rules that parties can adopt in arbitration that they could not adopt if they chose to litigate in court. And the FAA requires courts to enforce such rules. *Supra* Section I.A(1).

Third, in passing, Plaintiff claims that the Timeliness Provision is unenforceable because IBM did not provide "OWBPA disclosures." Br. 27, 33. But this Court held that "the rights that give rise to the OWBPA disclosure requirements are 'substantive rights and [do] not include procedural ones.'" Add.013–14 (quoting *Estle*, 23 F.4th at 214). Because

piggybacking "is a procedural exhaustion doctrine, not a substantive right protected by the ADEA[,]" the lack of OWBPA disclosures "does not render the Timing Provision unenforceable." Add.014.

II. PLAINTIFF'S SUIT IS AN UNTIMELY ATTEMPT TO VACATE AN ADVERSE ARBITRATION AWARD.

Although the district court did not reach the issue, dismissal was also independently warranted because Plaintiff's complaint is an untimely attempt to vacate an adverse arbitration award. As Plaintiff's complaint admits, before filing the present suit he "attempt[ed] to pursue a claim of discrimination under the ADEA in arbitration." *See* Compl. ¶ 12 (App.004). The arbitrator rejected the claims as time-barred. Compl. ¶¶ 15, 19, 21 (App.005–7). In this litigation, however, Plaintiff now asks for a declaration that the Timeliness Provision is "unenforceable[,]" so that he may "obtain[] relief under the ADEA in arbitration." Compl. ¶ 2 (App.002); Compl. ¶ 26 (App.009).

This is an improper attack on the arbitration award. The FAA provides that a party wishing to contest an arbitration award must file a motion to "vacate, modify, or correct" the award "within three months." 9 U.S.C. § 12. A party cannot evade the FAA's procedural scheme by attacking an arbitration award through other means. To the contrary, if

a party files a declaratory-judgment action that calls into question the validity of an arbitration award, the court must construe the action as a motion to vacate or correct the award. *See, e.g.*, *Cyber Imaging Sys., Inc. v. Eyelation, Inc.*, No. 14-CV-901, 2015 WL 12851390, at *2 (E.D.N.C. Nov. 4, 2015); *Stedman v. Great Am. Ins. Co.*, No. 06-CV-101, 2007 WL 1040367, at *7 (D.N.D. Apr. 3, 2007).

Here, Plaintiff's attack on the arbitration award is untimely because he filed his declaratory-judgment complaint well after the FAA's three-month period for seeking to vacate or modify an award expired. *See* 9 U.S.C. § 12; Compl. ¶¶ 12–21 (App.004–7). Plaintiff does not allege, nor could he, that he satisfied the three-month deadline for seeking vacatur. Thus, as Plaintiff has already gone through arbitration, his complaint must be dismissed as an untimely attempt to vacate the arbitration award.

III. PLAINTIFF'S CHALLENGE TO THE CONFIDENTIALITY PROVISION FAILS

Because Plaintiff's ADEA claim is untimely, the Court need do no more than affirm the dismissal of his challenge to the Confidentiality Provision as "moot." Add.017 n.4. As Plaintiff admits, he challenged the Confidentiality Provision so that "IBM will not be able to use it" "when

he pursues his claim in arbitration[.]" *See* Br. 33 But since Plaintiff's ADEA claim is time-barred, he cannot pursue it in arbitration and the confidentiality issue is moot. Accordingly, this Court can—and should—affirm the mootness finding below without proceeding any further.

In any event, Plaintiff's challenge to the Confidentiality Provision fails on the merits. As the district court noted, "neither party disputes" that New York law governs under the arbitration agreement's choice-of-law provision. Add.017. New York does not prohibit confidential arbitration, but rather recognizes an "important public interest in protecting the rights of parties who submit to confidential arbitration." *Those Certain Underwriters at Lloyds v. Occidental Gems, Inc.*, 41 A.D.3d 362, 365 (N.Y. App. Div. 2007), *aff'd*, 11 N.Y.3d 843 (2008).

Plaintiff nonetheless contends that the Confidentiality Provision is unconscionable. But under New York law, a contract term is not unconscionable unless "it is 'so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable [sic] according to its literal terms.'" *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010). "Generally, there must be a showing that [the] contract is *both* procedurally and

substantially unconscionable." *Id.* (emphasis added). Thus, in the typical case, there must be both an "'absence of meaningful choice on the part of one of the parties'" and "'contract terms which are unreasonably favorable to the other party.'" *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999). It is only in "exceptional cases" that a provision can be found "so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 829 (N.Y. 1988).

Here, Plaintiff did not make any procedural-unconscionability argument at all, as he did not allege that he lacked a "'meaningful choice'" about whether to sign the Confidentiality Provision. *Desiderio*, 191 F.3d at 207. Nor is it the type of "exceptional" provision that is "so outrageous" as to be struck down even in the absence of procedural unconscionability. To the contrary, as this Court has recognized, confidentiality terms are commonplace. *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008). If the entirely ordinary Confidentiality Provision at issue here is invalid, the same would be true of similarly standard provisions in employment-related arbitration agreements across the country. That is not the law.

A. The Confidentiality Provision Is Not Procedurally Unconscionable.

1. As the district court noted, Plaintiff "does not argue that the Confidentiality Provision or the Agreement as a whole is procedurally unconscionable." Add.019. Nor could he. "[T]he Agreement provides that the plaintiff had 21 days to review the Agreement before signing it." *Id.* And "the Agreement explicitly advised [him] to consult with an attorney prior to executing the Agreement." *Id.* The upshot is "there is no indication that the circumstances surrounding the execution of the Agreement were coercive or that [he] 'lacked a meaningful choice' to enter into the Agreement." *Id.* (quoting *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 572 (S.D.N.Y. 2009)).

That is the end of Plaintiff's challenge to the Confidentiality Provision. Since Plaintiff did not argue that the Confidentiality Provision is exceptional or outrageous, he was required to establish that it "is both procedurally *and* [substantively] unconscionable." *Ragone*, 595 F.3d at 121 (emphasis added) (quoting *Nayal*, 620 F. Supp. 2d at 571). Plaintiff does not argue that the Provision is procedurally unconscionable. Thus, his challenge fails, and the Court should affirm.

2. Perhaps recognizing his error, Plaintiff now insists that "no showing of procedural unconscionability is required" because he "merely asked the court to excise certain substantively unconscionable provisions," rather than "challenging the arbitration agreement as a whole." Br. 2 n.3, 52. That is a distinction without a difference. As numerous courts have indicated, the standard is the same in either scenario. *E.g.*, *Rome Gas, Inc. v. Fastrac Props. I, LLC*, 196 A.D.3d 1159, 1159–60 (N.Y. App. Div. 2021) (rejecting claim that "liquidated damages provision is unconscionable," citing the rule that "unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made"); *Krodel v. Amalgamated Dwellings, Inc.*, 166 A.D. 3d 412, 413 (N.Y. App. Div 2018) (addressing unconscionability of fee provision in lease agreement, stating that "unconscionability requires 'some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'"); *Nalezenec v. Blue Cross of W. N.Y.*, 172 A.D. 2d 1004, 1004 (N.Y. App. Div. 1991) (citing the same rules while evaluating a discrete provision in a medical rider).

Plaintiff's attempt to argue otherwise hinges on *Ragone*'s statement 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.'" Br. 52 (quoting *Ragone*, 595 F.3d at 124–25). But as recounted above, *Ragone* recognized that "there must be a showing that . . . a contract is both procedurally and [substantively] unconscionable." 595 F.3d at 121–22. It is only in "'exceptional cases'" where a provision can be "'so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.'" *Id.* To be sure, "'the appropriate *remedy*' when a court is faced with a plainly unconscionable provision of an arbitration agreement . . . 'is to sever the improper provision of the arbitration agreement[.]'" *Id.* at 124–25. But the availability of a provision-specific *remedy* does not mean there is a different *standard*.

Plaintiff's other cited cases also do not help him. He says "it is commonplace for courts to sever substantively unconscionable or otherwise unenforceable provisions from arbitration agreements

regardless of procedural unconscionability." Br. 53. But the cited cases do not bear that out. Two of the cases did not actually find a provision unconscionable. Instead, in each case, the court merely repeated *Ragone*'s statement that the "'remedy'" for any unconscionable provision would be to "'sever'" it. *See Cho v. Cinereach Ltd.*, No. 19cv513, 2020 WL 1330655, at *5 (S.D.N.Y. Mar. 23, 2020); *Chang v. Warner Bros. Ent., Inc.*, No. 19 Civ. 2091, 2019 WL 5304144, at *3–4 (S.D.N.Y. Oct. 21, 2019). The third case did not involve an unconscionability claim at all; the court there found an arbitration provision unenforceable under the effective-vindication doctrine discussed above. *See Castellanos v. Raymours Furniture Co.*, 291 F. Supp. 3d 294, 301–02 (E.D.N.Y. Mar. 12, 2018). And the fourth case—the only one in which the plaintiffs prevailed by showing substantive unconscionability alone—is an example of an exceptional or outrageous provision: a "loser pays" provision that would "effectively render [the plaintiffs] bankrupt." *Valle v. ATM Nat'l, LLC*, No. 14-cv-7993, 2015 WL 413449, at *7 (S.D.N.Y. Jan. 30, 2015).

Plaintiff's inability to find a New York case that would excuse his failure to show procedural unconscionability explains his resort (Br. 53) to the Eleventh Circuit's decision in *Larsen v. Citibank FSB*, 871 F.3d

1295 (11th Cir. 2017). But *Larsen* is even farther afield. *Larsen* involved *Washington*, not *New York*, law. And as the Eleventh Circuit emphasized, "Washington law will invalidate a contractual provision if it is either procedurally *or* [substantively] unconscionable." *Id.* at 1313 (emphasis in original). That is directly contrary to New York law, which requires both procedural *and* substantive unconscionability absent extraordinary circumstances. Thus, the Eleventh Circuit's decision is irrelevant here.

B. The Confidentiality Provision Is Not Substantively Unconscionable, Much Less "Exceptional" or "Outrageous."

Having failed to argue procedural unconscionability, Plaintiff is required to show that the Confidentiality Provision is not just substantively unconscionable, but "exceptional" or "outrageous." He cannot establish the former, let alone the latter.

1. The Confidentiality Provision is a standard term that does not prevent Plaintiff from fairly pursuing a claim.

The Confidentiality Provision is a standard term of the type that can be found in countless arbitration agreements across the country. It is

not substantively unconscionable because it applies equally to both sides and does not prevent Plaintiff from obtaining relevant discovery.

As the district court recognized, "under New York law, confidentiality provisions in arbitration agreements are not substantively unconscionable where . . . the terms of the confidentiality provision 'are not one-sided.'" Add.019 (quoting *Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 392 (S.D.N.Y. 2017)). That is the case here, as "all of the terms of the Arbitration Agreement—including those in the [Confidentiality Provision]—apply equally" to Plaintiff and IBM. *Zhu*, 291 F. Supp. 3d at 392; *see also* Add.020.[2]

That the Confidentiality Provision is not substantively unconscionable is unsurprising. Confidentiality is a "paradigmatic aspect of arbitration," and is "so common in the arbitration context" that an "'attack on [a] confidentiality provision is, in part, an attack on the

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[2] Plaintiff notes (at 56) that the ultimate enforceability of the confidentiality provision in *Zhu* was delegated to an arbitrator, but that is irrelevant to the substantive point that a freely made mutual agreement to engage in confidential arbitration is not unconscionable. *See, e.g.*, *Curtis v. Contractor Mgmt. Servs., LLC*, No. 15-cv-487, 2018 WL 6071999, at *8 (D. Me. Nov. 20, 2018) (rejecting challenge to confidentiality provision).

character of arbitration itself.'" *Guyden*, 544 F.3d at 385. Indeed, arbitral confidentiality provisions have been repeatedly upheld under New York law.[3] And New York law is no outlier on this point given the number of decisions upholding similar confidentiality provisions.[4]

Plaintiff nonetheless argues that "the Confidentiality Provision is unconscionable because it unfairly prevents former IBM employees from gathering evidence relating to IBM's alleged discrimination against other similarly situated former employees and using that evidence against IBM in arbitrations." Add.018. But as the district court recognized, this

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[3] *See, e.g.*, *Guyden*, 544 F.3d at 381 ("[B]ecause confidentiality is a common aspect of arbitration, the confidentiality clause d[oes] not render the arbitration process created by the Agreement unfair."); *Curtis*, 2018 WL 6071999, at *8 (D. Me. Nov. 20, 2018) (finding, in a wage-and-hour case applying New York law, "no indication that New York's courts would find the confidentiality clause 'so outrageous as to warrant holding [that provision] unenforceable on the ground of substantive unconscionability alone'").

[4] *See, e.g.*, *Biller v. S-H OpCo Greenwich Bay Manor, LLC*, 961 F.3d 502, 519 (1st Cir. 2020); *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1265–67 (9th Cir. 2017); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 280–81 (3d Cir. 2004); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175–76 (5th Cir. 2004); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378–79 (11th Cir. 2005); *Noye v. Johnson & Johnson*, No. 15-CV-2382, 2017 WL 5135191, at *9 (M.D. Pa. Nov. 6, 2017); *Evangelical Lutheran Good Samaritan Soc'y v. Moreno*, 277 F. Supp. 3d 1191 (D.N.M. 2017); *CarMax Auto Superstores, Inc. v. Sibley*, 215 F. Supp. 3d 430 (D. Md. 2016).

argument "is undercut by the fact that if [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." Add.020. Indeed, a New York court made that exact point in *Kopple v. Stonebrook Fund Mgmt., LLC*, 875 N.Y.S.2d 821, 2004 WL 5653914, at *3 (Sup. Ct. July 12, 2004), *aff'd*, 794 N.Y.S.2d 648 (App. Div. 2005), where another age-discrimination plaintiff argued that he "cannot prepare his case because the Agreement requires confidentiality." *Id.* at *2. The court rejected that argument because, while the confidentiality provision "requires that arbitrations 'be conducted on a strictly confidential basis,' it in no way inhibits a party from preparing his case. To the contrary, the clause expressly acknowledges that the parties may engage in discovery." *Id.* at *3 (citation omitted).

As the district court in this case noted, the same is true here: The Agreement gives Plaintiff "the right to make requests for production of documents to any party and to subpoena documents from third parties to the extent allowed by law." Add.020; *see also* Add.096 (also authorizing depositions and additional discovery). If Plaintiff had a timely claim, therefore, he would have been free to use the discovery process in

arbitration to seek any relevant evidence, including evidence that other claimants obtained by using the discovery devices in their own confidential arbitrations.

Plaintiff says that *Kopple* is "inapposite" because there was no "evidence" in that case that the enforcement of the confidentiality provision had "prevented arbitration claimants from using [various information] to build their cases." Br. 57. But Plaintiff misses the point of *Kopple*'s holding, which is that, as a matter of law, a confidentiality provision does not "inhibit[] a party from preparing his case" as long as "the parties may engage in discovery" and the plaintiff is "free to conduct any investigation that he deems appropriate." 2004 WL 5653914, at *3 (cleaned up). That is undisputedly true here. It is up to the arbitrator in each case to decide whether discovery is warranted under the relevant discovery standards. A plaintiff is not entitled to simply "assume[]" that the "arbitrator will deny [him] needed discovery" in his case, because that is far "'too speculative to justify the invalidation of'" an arbitration provision on its face. *Guyden*, 544 F.3d at 387.

For that reason, this case is nothing like *Hollander v. American Cynamid Co.*, 895 F.2d 80 (2d Cir. 1990). That case did not involve a

confidentiality provision. Rather, the district court there wrongly denied (on burden and relevance grounds) a discovery request seeking information about other employees' terminations. *Id.* at 84. Here, by contrast, Plaintiff would have the right to request any relevant discovery from the arbitrator. The arbitrator's discovery rulings would then be subject to review under the FAA, which constrains arbitrators from "refusing to hear evidence pertinent and material to the controversy[.]" 9 U.S.C. § 10(a)(3).

Contrary to Plaintiff's argument (at 41), requiring him to gather information by making his own discovery requests does not "hinder[]" his "ability to pursue" his ADEA claim, because it does not make him any worse off than the typical claimant in individual arbitration. At worst, it might prevent discovery from being made more *convenient* through the type of shared discovery that could occur in a collective action. But as the Supreme Court has recognized, the lack of enhanced convenience that may result from individual arbitration instead of collective proceedings does not prevent plaintiffs from effectively vindicating their statutory rights. *Cf. Italian Colors Rest.*, 570 U.S. at 236.

2. Plaintiff's remaining counterarguments are unpersuasive.

Plaintiff raises a variety of additional unconscionability arguments, but all fail.

a. Plaintiff argues that the district court erred by "refus[ing] even to consider" the "evidentiary record" that he claims is relevant to his unconscionability claim. Br. 36. But since his claim fails as a matter of law for all the reasons discussed above, it was entirely proper for the district court to grant a motion dismiss on the pleadings. Since Plaintiff's ADEA claim is time-barred, the confidentiality provision makes no difference to his ability to pursue that claim. *See supra* pp. 37–38. And even if he had a timely claim, requiring that he develop an evidentiary record through his own discovery efforts pursuant to the discovery mechanisms in his own arbitration agreement would not, as a matter of law, unconscionably prevent him from fairly pursuing his claim. *See supra* pp. 46–49. Neither point requires any evidentiary record.

Plaintiff claims (at 35–36) that dismissing his confidentiality challenge somehow contravenes two of this Court's precedents—*American Family Life Assurance Co. of New York v. Baker*, 778 F. App'x 24 (2d Cir. 2019), and *Guyden*, 544 F.3d 376. He is wrong on both counts.

First, in *Baker*, this Court remanded the case not for any reason pertaining to the confidentiality clause, but only because it was unclear whether the arbitration agreement improperly "bar[red] [the plaintiffs] from pursuing certain state and federal statutory claims" *at all*. 778 F. App'x at 28. The plaintiffs had not had a fair opportunity to develop this point below, because "the district court severely limited the length of" their briefs. *Id.* The Court thus remanded for "a more sufficient development of the record" on this point. *Id.* That decision is completely irrelevant to whether a challenge to a standard confidentiality term may be dismissed on the pleadings when it fails as a matter of law.

Second, in *Guyden*, this Court *affirmed* the dismissal of an unconscionability claim. *See* 544 F.3d at 385. The Court held, as a matter of law, that "[b]ecause confidentiality is a paradigmatic aspect of arbitration," that "precludes [any] challenge to the privacy of the resulting arbitration." *Id.* The Court thus did not suggest that a district court "was required to look beyond the face of the agreement and consider the evidentiary record." Br. 55. Quite the contrary: The Court illustrated that a district court was *not* required to do so before rejecting a challenge to a confidentiality provision.

In short, Plaintiff is simply wrong to suggest that no unconscionability claim may ever be subject to a Rule 12(b)(6) motion. That is directly contrary to the many times that this Court has affirmed the dismissal of an unconscionability claim for failure to state a claim for relief.[5]

Plaintiff's citation (Br. 35–36) of *Lohnn v. IBM*, No. 21-cv-6379, 2022 WL 36420 (S.D.N.Y. Jan. 4, 2022), also gets him nowhere. As discussed further below, *see infra* Section IV, *Lohnn* concerned whether the confidential materials that Plaintiff's counsel attached to a virtually identical summary-judgment motion must be sealed. *Lohnn* had nothing to do with whether the district court could grant IBM's motion to dismiss. When the court there said that "a plaintiff must be allowed to present a record [of] the effect of a challenged arbitration provision," the court was expressing its view on what a plaintiff could submit as part of his "motion

[5] *See, e.g.*, *Spinelli v. NFL*, 903 F.3d 185, 208–09 (2d Cir. 2018); *Zam & Zam Super Mkt., LLC v. Ignite Payments, LLC*, 736 F. App'x 274, 277–78 (2d Cir. 2018); *Wilson v. Kellogg Co.*, 628 F. App'x 59, 60–61 (2d Cir. 2016); *Mahon v. Staff Line, Inc.*, 100 F. App'x 37, 39 (2d Cir. 2004); *Desiderio*, 191 F.3d at 207 (all affirming Rule 12(b)(6) dismissals of unconscionability claims); *Mayagüez S.A. v. Citigroup, Inc.*, No. 16 Civ. 6788, 2018 WL 1587597, at *12 (S.D.N.Y. Mar. 28, 2018) (citing cases doing same).

for summary judgment"—not what a district court must consider before granting a defendant's motion to dismiss. *Lohnn*, 2022 WL 36420, at *11–12.

b. Plaintiff next argues that the Confidentiality Provision is unenforceable because "New York has a strong public policy in favor of redressing age discrimination in employment" and "'a confidentiality clause [that] subverts public policy[] . . . is unenforceable.'" Br. 57–58. But Plaintiff does not explain how the confidentiality provision "subverts" any anti-discrimination policy, when it allows discrimination claims to be pursued in arbitration with ample discovery available to obtain relevant information. And in any event, Plaintiff's argument proves too much. By his reasoning, no arbitration agreement covering discrimination claims could *ever* require confidential arbitration. And that is precisely the type of "'generalized attack[] on arbitration'" that this Court has rejected given the reality that "confidentiality is a paradigmatic aspect of arbitration[.]" *Guyden*, 544 F.3d at 385 (quoting *Gilmer*, 500 U.S. at 30).

Plaintiff nonetheless claims (Br. 58–60) that the Appellate Division adopted a view "similar" to his in *Denson v. Donald J. Trump for*

President, Inc., 180 A.D.3d 446 (N.Y. App. Div. 2020). Not so. *Denson* involved a non-disclosure agreement that not only barred the plaintiff from disclosing confidential information, but also gave her no right to initiate confidential arbitration. *Id.* at 447. There was thus no way the plaintiff "could have pursued her rights" consistent with the agreement. *Id*. at 454. In that situation, the confidentiality provision was not enforceable because it literally "forbid[] the assertion of certain statutory rights" and eliminated the "'right to pursue statutory remedies.'" *Italian Colors*, 570 U.S. at 236. But that is not the case here, where Plaintiff had the option to assert a claim in confidential arbitration with an ample individual discovery process.

Plaintiff begrudgingly acknowledges this point in a footnote, but says that his "summary judgment record demonstrates why this assumption by the court of the adequacy of discovery in arbitration does not suffice." Br. 57 n.28. That response makes no sense: Plaintiff cannot trumpet (*e.g.*, Br. 42) the "extensive" evidence that his counsel have been able to obtain through discovery in other arbitrations (conducted under arbitration agreements virtually identical to the one at issue here), yet

simultaneously claim that the provided-for discovery process is ineffective.

c. Plaintiff spends significant time on cases applying the law of other states to strike confidentiality provisions on the ground that they benefit defendants who are "repeat player[s]" in arbitration, "while each individual plaintiff/claimant must re-invent the proverbial wheel each time." Br. 36–41.

As an initial matter, Plaintiff's "repeat player" argument is misleading because his counsel represents hundreds of former IBM employees in similar arbitrations. His counsel is just as much of a repeat player as IBM is, so there is no "wheel reinventing" here. Indeed, what he is really complaining about is that he would have to make an individual discovery request for the materials and the arbitrator would then have to decide whether to *grant* that request, not that he would necessarily be blocked from obtaining it.

More fundamentally, Plaintiff ignores the district court's explanation that "none of th[e] cases" he cites for his repeat-player theory involved the application of New York law," which governs here. Add.019. Indeed, Plaintiff still fails to identify a single New York case adopting

this novel "repeat player" theory. His argument thus runs headlong into the principle that a federal court should be "hesitant to adopt a theory of unconscionability that the state has yet to ratify[.]" *Evangelical Lutheran Good Samaritan Soc'y v. Moreno*, 277 F. Supp. 3d 1191, 1238–39 (D.N.M. 2017) ("declin[ing]" to adopt new substantive-unconscionability theory); *see also Travelers Ins. Co. v. Carpenter*, 411 F.3d 323, 329 (2d Cir. 2005) ("In addressing unsettled areas of state law, we are mindful that '[o]ur role as a federal court sitting in diversity is not to adopt innovative theories that may distort established state law.'"); *In re: Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 415 F. Supp. 2d 261, 269 (S.D.N.Y. 2005) ("[A] court may not adopt innovative theories without support in state law[.]").

Even if the Court were inclined to break new ground, it should reject the repeat-player argument for the reasons above, as well as those outlined in *Billie v. Coverall North America, Inc.*, 444 F. Supp. 3d 332, 354–55 (D. Conn. 2020) (applying Connecticut law). As explained above, there is no actual repeat-player advantage here. And regardless, as the court in *Billie* explained, any incidental "repeat-player advantage" is not enough to make a confidentiality clause unconscionable as long as it

"applies equally" to both parties and the explicit "terms of the Agreement are not one-sided[,]" because the benefit of allowing parties to opt for confidentiality outweighs any incidental discovery inconvenience. *Id.* It is for precisely this reason that numerous courts have "'rejected the same policy argument that [Plaintiff] make[s] here, namely that such confidentiality provisions "inhibit employees from discovering evidence from each other."'" *Id.* (quoting *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017)); *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175–76 (5th Cir. 2004) (rejecting, under Louisiana law, an argument that an arbitral "confidentiality requirement, although neutral on its face, gives an informational advantage to the repeat-player companies"); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378–79 (11th Cir. 2005) (same, under Georgia law); *CarMax Auto Superstores, Inc. v. Sibley*, 215 F. Supp. 3d 430, 436–37 (D. Md. 2016) (same, under Maryland law).

d. Finally, Plaintiff feigns surprise that IBM has gone "so far as to move for sanctions against Plaintiff's counsel in several arbitrations for filing documents or orders from those arbitrations in support of their motion for summary judgment in this case." Br. 50 (emphasis omitted).

That has nothing to do with whether the Confidentiality Provision is unconscionable. It is hardly remarkable that IBM has enforced the parties' agreed-upon confidentiality terms. Plaintiff's counsel's gambit in their dozens of declaratory-judgment actions has been to use the summary-judgment mechanism to force the immediate unsealing of the confidential materials—whether or not they succeed in challenging the Confidentiality Provision. *See infra* Section IV. In rejecting this tactic, Judge Furman correctly called it "perverse" and "absurd" for reasons explained below.

C. The FAA Would Preempt Any Ban on Arbitral Confidentiality.

In any event, New York law would be preempted by the FAA if it purported to ban confidential arbitration agreements.

First, such a ban would impermissibly single out arbitration for unfavorable treatment. The FAA "preempts any state rule" that "discriminat[es] . . . against arbitration.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). And New York law allows for confidentiality in numerous contexts. *E.g.*, *Mehulic v. N.Y. Downtown Hosp.*, 979 N.Y.S.2d 320, 322 (App. Div. 2014) (confidentiality in litigation); *King v. Marsh & McLennan Agency, LLC*, 126 N.Y.S.3d 312

(Sup. Ct. 2020) (confidentiality as a condition of employment), *aff'd*, 138 N.Y.S.3d 323 (App. Div. 2021); *Garda USA, Inc. v. Sun Cap. Partners, Inc.*, 194 A.D.3d 545, 546–47 (N.Y. App. Div. 2021) (confidentiality for companies considering an acquisition). Thus, any New York law prohibiting confidentiality in arbitration would effectively single out arbitration agreements for disfavored treatment compared to other types of contracts, and would run afoul of the FAA. *See Kindred*, 137 S. Ct. at 1426.

Second, such a ban would also be preempted by the FAA because confidentiality is a fundamental attribute of arbitration. Although the FAA has a "saving clause" that allows arbitration agreements to be invalidated based on "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" even those defenses are preempted to the extent they interfere with the "fundamental attributes" of arbitration. *Concepcion*, 563 U.S. at 339–40, 344; *see also Epic Sys.*, 138 S. Ct. at 1622–23 (same). In short, the FAA "displaces any rule" of state law that prohibits the "defining features of arbitration agreements." *Kindred*, 137 S. Ct. at 1426.

Multiple federal courts have recognized that confidentiality is a "paradigmatic" attribute of arbitration. *E.g.*, *Guyden*, 544 F.3d at 385; *Iberia Credit Bureau*, 379 F.3d at 175; *JPay, Inc. v. Kobel*, 904 F.3d 923, 933, 935-36 (11th Cir. 2018). Indeed, "confidentiality clauses are so common in the arbitration context that [an] 'attack on the confidentiality provision is, in part, an attack on the character of arbitration itself.'" *Guyden*, 544 F.3d at 385. Because confidentiality is a fundamental attribute of arbitration, therefore, the FAA would "displace[]" any rule purporting to prohibit it. *Kindred*, 137 S. Ct. at 1426.

IV. THE DISTRICT COURT RIGHTLY REJECTED PLAINTIFF'S BID FOR UNSEALING.

Finally, the district court did not abuse its discretion in rejecting Plaintiff's request to unseal the confidential arbitration materials that Plaintiff attached to his moot summary-judgment briefing. Because the court granted IBM's motion to dismiss, these materials never became judicial documents subject to a presumption of public access. Moreover, even if such a presumption existed, it would be easily overcome since the documents played no role in the disposition of the case.

A. The Confidential Materials Are Not Judicial Documents Subject to Public Access.

1. The public access doctrine protects "[t]he common law right of public access to judicial documents." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). The "presumption of access" is rooted in transparency—a "need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice." *Id.* (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")). The doctrine serves a "monitoring" function, ensuring "conscientiousness, reasonableness, or honesty of judicial proceedings." *Id.* (quoting *Amodeo II*, 71 F.3d at 1048).

"Before any . . . common law right [to public access] can attach, however, a court must first conclude that the documents at issue are indeed 'judicial documents.'" *Id.* As this Court has made clear, "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Id.* (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")). Instead, "to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the judicial process.'" *Id.* (quoting *Amodeo I*, 44 F.3d at 145).

A document is relevant to the performance of the judicial function—and hence subject to a presumption of public access—only "if it would reasonably have the *tendency* to influence a district court's ruling on a motion or in the exercise of its supervisory powers, without regard to which way the court ultimately rules or whether the document ultimately in fact influences the court's decision." *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019); *see also Amodeo I*, 44 F.3d at 146 (documents relevant to performance of judicial function because they would have "informed" the court's decision).

If the documents in question are judicial documents, a court "must determine the weight of [the] presumption [of access]." *Lugosch*, 435 F.3d at 119. The weight of that presumption is "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." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). In general, "the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049).

Finally, "after determining the weight of the presumption of access, the court must 'balance competing considerations against it.'" *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050). "Such countervailing factors include but are not limited to 'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" *Id.*

2. The sealing analysis in this case is straightforward. To start, the confidential materials at issue are not judicial documents. The district court dismissed Plaintiff's claims on the pleadings, and thus denied Plaintiff's summary-judgment motion as moot. As a result, the district court "did not, and *could not*, consider" the confidential documents Plaintiff attached to his summary-judgment briefing, *In Re: IBM Arbitration Agreement Litig.*, No. 21-CV-6296, 2022 WL 3043220, at *2 (S.D.N.Y. Aug. 2, 2022). The documents thus "had no 'tendency'—or, for that matter, ability—'to influence [the court's] ruling on [IBM's] motion,' which resulted in dismissal of the consolidated cases in their entirety." *Id.*; *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 66 (S.D.N.Y. 2007).

Even if the materials were judicial documents, "they would be subject to only a weak presumption of public access" since they played no role in the district court's judicial function. *In Re: IBM*, 2022 WL 3043220, at *2. The weight of the presumption turns on "'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. But here, the summary-judgment materials played *no role* in the exercise of Article III judicial power in granting IBM's motion to dismiss—and thus, they have *no value* to "'those monitoring the federal courts.'" *Id.* The weight of any presumption of public access is thus virtually non-existent.

That "weak" presumption would be easily overcome by "strong 'competing considerations'" on "the other side of the scale[.]" *In Re: IBM*, 2022 WL 3043220, at *2 (quoting *Lugosch*, 435 F.3d at 120). "Most notably, pursuant to the [FAA], 'courts must rigorously enforce arbitration agreements,' including confidentiality provisions, 'according to their terms.'" *Id.* That mandate is especially important where arbitral confidentiality is at issue. As this Court has emphasized, "confidentiality is a paradigmatic aspect of arbitration," and an "'attack on [a]

confidentiality provision is, in part, an attack on the character of arbitration itself.'" *Guyden*, 544 F.3d at 385. Unsealing the materials in this case, therefore, would run contrary to the FAA's mandate. Indeed, if the FAA means anything, it must mean that arbitral confidentiality carries the day when nothing lies on the other side of the public access scale in the "'balance [of] competing considerations.'" *Lugosch*, 435 F.3d at 120.

Even putting aside the FAA, construing the public access doctrine to require unsealing in these cases would be "perverse" and "absurd." *In Re: IBM*, 2022 WL 3043220, at *2, *3. The very point of Plaintiff's lawsuit is to challenge the Confidentiality Provision that covers the materials at issue. To order unsealing, therefore, "would be to grant Plaintiff[] the relief [he] sought in the first instance even though [his] claims did not get past IBM's motion to dismiss." *Id.* at *2. "That would be 'perverse[,]'" and to do so merely because Plaintiff "ask[ed] for it (even though [his] request turned out to be premature and without merit) would be even more absurd." *Id.* at *2, *3.

Indeed, Plaintiff's position would turn the public access doctrine on its head. The presumption of public access is intended to ensure public

"confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings." *Amodeo II*, 71 F.3d at 1048. Yet unsealing here would do the opposite. It would reward Plaintiff for gaming the judicial system and invite future plaintiffs to use court filings to force public disclosure of confidential documents. *Cf. In Re: IBM*, 2022 WL 3043220, at *3 ("[T]his very case may well be an example of the potential for abuse."). In other words, unsealing would sanction precisely the sort of "[u]nscrupulous" "weaponiz[ation]" of "[o]ur legal process" that this Court has decried. *Brown*, 929 F.3d at 47.

B. Plaintiff's Counterarguments Fail.

Plaintiff has no answer to the analysis above. Instead, he distorts the public access doctrine in an attempt to show that, absurd consequences or not, unsealing is legally required. Plaintiff is wrong.

1. Plaintiff primarily argues that "whether the District Court *in fact* considered Plaintiff's summary judgment papers . . . is irrelevant" to whether they are judicial documents. Br. 66. In his view, "the public's right of access attached the moment that Plaintiff filed his summary judgment motion in court." Br. 67. He latches onto this Court's statements that documents "submitted to the court as supporting

material in connection with a motion for summary judgment[ ]are unquestionably judicial documents under the common law." *Id.* (quoting *Lugosch*, 435 F.3d at 123); *see also Brown*, 929 F.3d at 47 (similar).

But Plaintiff pulls those quotes out of context. As Judge Furman observed, this Court made those statements in circumstances where "'[m]uch of the case ha[d] already survived a motion to dismiss,' so the district court was *required* to resolve the motion for summary judgment before it." *In Re: IBM*, 2022 WL 3043220, at *3 (citation omitted) (quoting *Lugosch*, 435 F.3d at 113). *Lugosch* and *Brown* "did not hold that summary judgment papers are automatically judicial documents where, as here, a motion to dismiss and motion for summary judgment are pending simultaneously and the court can consider the latter only if it first denies the former." *Id.*

Indeed, this Court in *Lugosch* "explicitly reaffirmed that 'the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access.'" Add.055–56 (quoting *Lugosch*, 435 F.3d at 119); *see Olson v. MLB*, 29 F.4th 59, 87 (2d Cir. 2022) (same). Yet that is exactly the rule Plaintiff advances.

Plaintiff is thus simply wrong to say that the confidential materials are judicial documents.

2. Assuming the confidential materials are judicial documents, Plaintiff also argue that "[t]he District Court . . . should have found that IBM did not demonstrate a sufficient countervailing interest to outweigh the heavy 'weight of the common-law presumption.'" Br. 69. Plaintiff is wrong again.

As an initial matter, Plaintiff ignores that any presumption would be "weak" because the court "did not, and *could not*, consider" the materials. *In Re: IBM*, 2022 WL 3043220, at *2; *see Standard Inv. Chartered, Inc.*, 621 F. Supp. 2d at 66. Moreover, Plaintiff likewise ignores that the "perverse" and "absurd" consequences of granting his unsealing demand is a sufficient "'competing consideration[]'" to outweigh disclosure here. *Id.* at *2, *3.

Instead, Plaintiff argues that 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." Br. 70 (citing *Lugosch*, 435 F.3d at 126). Plaintiff misrepresents *Lugosch*,

which did not involve an arbitral confidentiality provision or the FAA. The Court in *Lugosch* also acknowledged that "particular circumstances surrounding" a confidentiality order could outweigh a presumption of public access. *See* 435 F.3d at 126. The unique "particular circumstances" here—including Plaintiff's direct challenge to the Confidentiality Provision, the FAA's mandate that courts rigorously enforce arbitration agreements, and the fact that the confidential materials are not even Plaintiff's, *e.g.*, Br. 42—easily combine to displace any negligible presumption.

Citing a string of unpublished district court opinions, Plaintiffs argue that "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." Br. 70–72.

But the only cited opinion that actually fits that description is the decision addressing Plaintiff's counsel's identical arguments in *Lohnn*, 2022 WL 36420. And *Lohnn* is mistaken, as Judge Furman carefully explained in *In Re: IBM*. For example, *Lohnn* misread *Lugosch* to "hold

that summary judgment papers are automatically judicial documents." *In Re: IBM*, 2022 WL 3043220, at *3. Similarly, *Lohnn* failed to consider that its decision "would create its own perverse incentives," such as permitting plaintiffs to win their challenge against a confidentiality provision simply by filing it. *Id.*

On top of all this, *Lohnn* is readily distinguishable because the court there had not yet adjudicated the pending dispositive motions and indicated that it would be "reviewing all of the papers," including the confidential materials. 2022 WL 36420, at *9. Here, by contrast, the district court adjudicated the dispositive motions and then issued the sealing order. It is now certain that the court did not consider, and could not consider, the confidential materials—and thus, they were irrelevant to the district court's dismissal of the case.[6]

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[6] Nor can Plaintiffs get any mileage out of this Court's decision to deny a stay pending appeal in *Lohnn*. *See* Br. 9 n.8, 62 n.30 (citing Order, *Lohnn v. IBM*, No. 22-32 (2d Cir. Feb. 8, 2022), ECF No. 71). That denial did not resolve the merits of the unsealing issue. And it involved a district court's decision to *unseal* documents, while this appeal involves a decision to keep them *sealed*—a significant difference in light of the abuse-of-discretion standard. *See Bernstein*, 814 F.3d at 139.

3. Finally, although Plaintiff apparently planned to attack the district court's sealing on the grounds that its "two-sentence ruling" was "plainly insufficient," *see* Br. 65, 73, Plaintiff failed to actually make the argument. Even if the argument were not waived, however, it would have been unsuccessful. The district court's reasoning was plain and simple: "Because the Confidentiality Provision is enforceable, the outstanding sealing requests . . . are granted." Add.022. To again use Judge Furman's terms, it would be perverse and absurd to give Plaintiff the relief he requested by publishing the confidential documents *even though he lost his challenge* to the Confidentiality Provision. There is nothing more to that commonsense conclusion that the district court needed to say or that this Court's precedents require.[7]

CONCLUSION

IBM respectfully requests that the Court affirm the district court's judgment.

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[7] Even if the Court believed that the district court needed to provide a longer explanation, the remedy would be to vacate and remand to the district court for further findings, not immediate unsealing. *See Lugosch*, 435 F.3d at 113 ("Because we are not in a position to assess whether the presumption is overcome by countervailing factors, we remand for the district court to make specific—and immediate—findings.").

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Respectfully submitted,

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Dated: December 5, 2022

/s/ *Matthew W. Lampe*
Matthew W. Lampe

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I hereby certify that on December 5, 2022, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

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Dated: December 5, 2022

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