22-2318

United States Court of Appeals for the Second Circuit

DEBORAH TAVENNER,
Plaintiff-Appellant,
– v. –
INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York
No. 21-cv-6345 – Judge Kenneth M. Karas

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 ("IBM") 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

In 2021, 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 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 their 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 her untimely claim, Plaintiff now challenges the validity of the Timeliness Provision to which she agreed. She also challenges the standard arbitral confidentiality provision that she signed (the "Confidentiality Provision"), arguing that it is "unconscionable" because it would somehow frustrate her ability to pursue her claim in arbitration, if that claim were not time barred.

Plaintiff's challenges are meritless, but the district court never reached the merits because it exercised its discretion to decline jurisdiction under the Declaratory Judgment Act. As the district court noted, Plaintiff already arbitrated her claim to finality, lost, and then failed to file a timely motion to vacate the adverse arbitration award. Thus, since she no longer has any claim to arbitrate, a declaration would serve no useful purpose. The Court should affirm on that ground alone.

The Court also may affirm on the ground that Plaintiff's suit is an untimely vacatur motion. She had three months under the Federal Arbitration Act ("FAA") to move to vacate her adverse arbitral award—but she did not. Instead, she filed this case years later, 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.

The Court also may affirm the district court's dismissal on the merits because, as the district court correctly noted in closing, Plaintiff's arguments fail. Under the FAA, the terms of arbitration agreements must be strictly enforced as long as they give plaintiffs a "fair opportunity" to assert their claim in the arbitral forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Here there is no question that the Timeliness Provision gave Plaintiff a "fair opportunity," because she 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; she simply failed to do so.

Plaintiff tries to get around this problem by resorting to the "piggybacking" doctrine—a judge-made rule that sometimes excuses plaintiffs from filing an EEOC charge before filing suit in court. Plaintiff has forfeited this issue by failing to develop it in her own brief and instead trying to incorporate briefing from separate 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—whether Plaintiff had a "fair opportunity" to pursue her ADEA claim in arbitration—which she plainly did.

Plaintiff's challenge to the Confidentiality Provision similarly fails. She argues that the Provision is invalid because it would hamper her ADEA claim in arbitration by preventing the sharing of information with other claimants in other confidential individual arbitrations. But her arguments on this front are moot, waived, and meritless.

First, since her ADEA claim is time-barred, she has no viable claim to arbitrate and the confidentiality issue is moot. Second, she has waived the issue because she does not develop any arguments in her brief, choosing instead to incorporate nearly 30 pages of a brief filed in a different, unconsolidated case. And third, 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 she has no serious argument that

the standard confidentiality provision she signed is "exceptional" or "outrageous."

That leaves only Plaintiff's complaint that the district court sealed (at her request) the confidential arbitration materials attached to her moot summary-judgment papers. That complaint is meritless for two reasons. First, the materials are not subject to the presumption of public access because they were irrelevant to the district court's decision. 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 and easily overcome by 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, Add.007, and the amount in controversy exceeds $75,000 given the damages sought on her ADEA claim.

The district court also 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 abused its discretion in declining to exercise jurisdiction under the Declaratory Judgment Act.

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

3. Whether the district court correctly held, in the alternative, that the Timeliness Provision is enforceable.

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

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

STATEMENT OF THE CASE

1. When Plaintiff separated from IBM, she signed an agreement to waive most claims against IBM in exchange for a severance package. Add.008. The agreement did not waive ADEA claims, however, instead providing for such claims 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.094, 097. But "[a]ny issue concerning" the "validity or enforceability" of the agreement must be "decided only by a court of competent jurisdiction." Add.009.

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.008. 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." *Id.*

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 180 days after her termination—Plaintiff filed an arbitration demand against IBM asserting claims under the ADEA. App.103.[1] The arbitrator dismissed Plaintiff's claim as untimely on July 19, 2019, because she did not file her arbitration demand within the 180-day deadline provided for under the ADEA, as required by the Timeliness Provision. Add.009; *see* 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 doctrine," which excuses plaintiffs in some

[1] Although immaterial here, the district court's order stated that Plaintiff filed her demand on January 18 rather than January 17. Add.009.

circumstances from filing an EEOC charge before filing suit in court. Add.009 & n.5. Following the adverse arbitration decision, Plaintiff did not file a petition to vacate under the FAA. *See* Add.016.

3. In an attempt to rescue her untimely claim, Plaintiff sought to opt into a collective action filed by her counsel on behalf of other IBM employees, arguing that their claims should be deemed timely under the "piggybacking" doctrine. *Id.* In March 2021, Judge Valerie Caproni dismissed Plaintiff on the ground that she 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." *Id.* at 192 n.4. Piggybacking can excuse the failure to satisfy the requirement to file an EEOC charge before filing suit in court. 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 her from filing a timely arbitration demand. *Id.* at 194 n.8. She "could have

avoided this entire issue" by filing her claim within the standard deadline provided under the arbitration agreement—and had she done so, "there would be no need to resort to a (far-fetched) argument that the piggybacking doctrine saves [her] untimely demands." *Id.* Plaintiff cannot "set the fault at IBM's feet when [she] need look no further than [her] 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 Arb. Agreement Litig.*, No. 22-1728 (2d Cir.) ("*In Re: IBM*"). Of the other three cases, two were assigned to Judge Koeltl, *Chandler v. IBM*, No. 22-1733 (2d Cir.); *Lodi v. IBM*, No. 22-1737 (2d Cir.), and this case was assigned to first to Judge McMahon and then to Judge Karas when Judge McMahon recused herself.[2] All three judges have now dismissed the cases before them, and all plaintiffs have appealed.

[2] Judge McMahon explained that, after she entered various orders in motion practice, her husband purchased shares of IBM stock, which required her recusal. Dist. Ct. ECF No. 37.

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.010–11. When Plaintiff filed her summary-judgment motion, she attached a slew of confidential arbitration materials that her counsel had obtained from separate arbitrations involving other plaintiffs. Those materials are covered by the same Confidentiality Provision that Plaintiff challenges here.

Although Plaintiff sought permission to file the confidential materials under seal, Plaintiff suggested that sealing was unwarranted because the mere filing of those materials required their unsealing under the "public-access" doctrine. Add.023–28.

Plaintiff's counsel contemporaneously made the same argument in *In Re: IBM*, and Judge Furman rejected that argument as "perverse" and "absurd." No. 21-CV-6296, 2022 WL 2752618, at *12 (S.D.N.Y. July 14, 2022); No. 21-CV-6296, 2022 WL 3043220, at *2, *3 (S.D.N.Y. Aug. 2, 2022). Since the plaintiffs were challenging the Confidentiality Provision, immediately unsealing the confidential materials would give the plaintiffs the very "relief they ultimately sought"—public disclosure of the confidential documents—simply by virtue of filing a challenge. 2022

WL 3043220, at *2, *3. Judge Furman thus granted IBM's motions to seal the materials "pending [a] decision on the underlying motions." 2022 WL 2752618, at *12.

Similarly, in this case, Judge McMahon (prior to her recusal) ordered Plaintiff to publicly file redacted versions of her summary-judgment materials that maintained the confidentiality of materials covered by the Confidentiality Provision. *See* Add.023–28. Plaintiff never moved to unseal the confidential materials, and neither the court nor the parties addressed the sealing issue again.

5. On September 23, 2022, the district court granted IBM's motion to dismiss and denied Plaintiff's summary-judgment motion "as moot." Add.019. In particular, the district court found, in its discretion, that "it is not appropriate to entertain jurisdiction over [Plaintiff's] claims." Add.016 (quoting *In Re: IBM*, 2022 WL 2752618, at *4). That is because Plaintiff "directed [her Timeliness Provision] challenge" to the arbitrator, even though the Agreement plainly states that only a court may decide the validity of the Agreement's provisions. *Id.* In addition, Plaintiff filed "an untimely" arbitration demand, which the arbitrator dismissed as untimely. *Id.* Plaintiff then "failed to file a vacatur motion challenging

the validity of the Timeliness Provision." Add.017. And she then "waited for just over two years" after she lost in arbitration before filing the present lawsuit. *Id.* (quotation mark omitted).

Since Plaintiff already arbitrated her ADEA claim and lost, and did not timely seek to vacate the arbitrator's decision, the court declined to issue a declaratory judgment on the validity of the arbitration terms. With no claim left to arbitrate, there was "no possibility of an impending 'dispute[] that may yield later litigation,' nor is there any 'uncertainty' in the Parties' legal rights that such a judgment would elucidate." *Id.* (citation omitted). Because "declaratory judgment would not serve a 'useful purpose,'" the Court found "an exercise of its discretionary authority inappropriate." *Id.*

Although the district court found that it "should not exercise its discretion," the court noted "its agreement" with the reasoning of Judge Furman, Judge Koeltl, and Judge Caproni. Add.018 n.10. The court "concur[red] that 'the purported right to take advantage of the piggybacking rule is not a substantive, non-waivable right protected by the ADEA' nor is it a 'part of the statute of limitations law of the ADEA.'" *Id.* In addition, the court "agree[d] that Plaintiff's reliance on two [S]ixth

Circuit cases [for this argument] is inapposite, as such cases 'did not extend to the context of arbitration agreements.'" *Id.* Thus, "'there is no merit to Plaintiff['s] claim that the Timeliness Provision is unenforceable.'" *Id.*

Finally, as to Plaintiff's argument that the Confidentiality Provision would hamper her ability to press her ADEA claim in arbitration, the district court noted this argument is "moot" because Plaintiff has no timely claim to arbitrate. *Id.* And in any event, "'the Confidentiality Provision is neither procedurally unconscionable nor substantively unconscionable under New York law.'" *Id.*

7. Plaintiff appealed and filed a motion asking this Court to immediately unseal the confidential materials. ECF No. 36. IBM opposed that request on various grounds, noting that the unsealing issue is one of the very issues pending on appeal. ECF No. 44. 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. 52. *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, *Chandler*, No. 22-1733 (2d Cir. Nov. 28, 2022).

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion in declining to exercise jurisdiction over Plaintiff's claims under the Declaratory Judgment Act. Plaintiff arbitrated her ADEA claim to finality and lost. But rather than filing a timely motion to vacate the arbitrator's decision, she waited more than two years to file this lawsuit. Accordingly, since Plaintiff no longer has any live claim to arbitrate, a declaration in her favor would serve no useful purpose. In other words, Plaintiff's request for a declaratory judgment about the validity of terms in her arbitration agreement does not present a substantial controversy of sufficient immediacy to warrant a decision. For that reason, the district court did not abuse its broad discretion in declining to issue a declaratory judgment here.

II. Plaintiff's challenge also independently fails because it is an improper collateral attack on the decision of the arbitrator who dismissed her ADEA claim as untimely. Plaintiff already arbitrated and lost on her ADEA claim. Under the FAA, she had three months to file a motion to vacate the award. She did not do so. Instead, she 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 correctly recognized, in the alternative, that Plaintiff's challenge to the Timeliness Provision fails on the merits. 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 her ADEA claim in arbitration because the Timeliness Provision gave her 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.

IV. The district court also correctly recognized (again, in the alternative) that Plaintiff's challenge to the Confidentiality Provision is meritless. Because Plaintiff's ADEA claim is time-barred, she has no live claims to arbitrate and the confidentiality issue is moot. In addition, Plaintiff has waived the issue on appeal by failing to brief it and relying instead on briefs filed in other cases. And in any event, to prevail on her 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." She has never made a procedural-unconscionability argument, and cannot seriously contend that the run-of-the-mill Confidentiality Provision at issue here is exceptional or "outrageous."

V. Finally, the district court did not abuse its discretion in sealing the confidential arbitration materials Plaintiff attached to her 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 interest in upholding arbitral confidentiality.

STANDARD OF REVIEW

This Court "review[s] *de novo* the grant of a motion to dismiss for failure to state a claim . . . under Federal Rule of Civil Procedure 12(b)(6)." *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. Co.*, 32 F.4th 124, 135 (2d Cir. 2022). The Court "review[s] a district court's decision of whether to exercise jurisdiction over a declaratory judgment action deferentially, for abuse of discretion." *Duane Reade Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005); *see also Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) (per curiam). And "[i]n 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. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO EXERCISE JURISDICTION OVER PLAINTIFF'S CLAIMS

The Court need do no more in this appeal than affirm on the ground that the district court did not abuse its discretion in declining to exercise jurisdiction under the Declaratory Judgment Act.

A. District courts have "a broad grant of discretion to . . . refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) (per curiam). Accordingly, an abuse of discretion "will be found only if the district court 'bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact.'" *Duane Reade, Inc.*, 411 F.3d at 388 (quotation marks omitted).

"[C]laims 'in a declaratory judgment action' are only 'ripe[]' where 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *In Re: IBM*, 2022 WL 2752618, at *4 (quoting *Duane Reade, Inc.*, 411 F.3d at 388). Thus, "to decide whether to entertain an action for declaratory judgment," courts in this Circuit

consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." *Duane Reade, Inc.*, 411 F.3d at 389.

B. The district court—like the district court in *In Re: IBM*—was well within its discretion in declining to exercise Declaratory Judgment Act jurisdiction over Plaintiff's claims. Plaintiff already arbitrated her ADEA claim, lost, and chose not to file a vacatur petition within the FAA's three-month deadline. Add.016–17. Not only that, she also waited more than two years after losing in arbitration to file this lawsuit seeking to invalidate the Timeliness Provision and Confidentiality Provision. Add.017; *see In Re: IBM*, 2022 WL 2752618, at *4 (observing that similarly situated plaintiffs "already arbitrated their ADEA claims, lost, and chose not to file any [timely] motion to vacate," and also "waited nearly two (and in some cases more than two) years" to file their individual lawsuits).

The upshot is that Plaintiff's arbitration "definitively resolved" her ADEA claim. *In Re: IBM*, 2022 WL 2752618, at *5. Thus, because she has no claim left to arbitrate, there would be no point in issuing a declaratory

judgment about the validity of the terms of her arbitration agreement. Under ordinary Declaratory Judgment Act principles, "declaratory judgment would not serve a 'useful purpose,'" "nor is there any 'uncertainty' in the Parties' legal rights that such a judgment would elucidate." Add.017 (quoting *Duane Reade, Inc.*, 411 F.3d at 389); *see In Re: IBM*, 2022 WL 2752618, at *5 ("[B]oth factors that the Second Circuit has instructed district courts to consider weigh against exercising DJA-jurisdiction over the Post-Arbitration Plaintiffs' claims."). In addition, Plaintiff's transparent attempt to use the Declaratory Judgment Act as an end-run around the FAA's limited vacatur grounds (*see infra* Argument Section II) "is all the more reason to be wary of exercising subject-matter jurisdiction in these circumstances." *In Re: IBM*, 2022 WL 2752618, at *5 n.9. The district court thus did not abuse its discretion in declining to exercise jurisdiction.

C. Plaintiff offers no serious response. *First*, she says nothing is final because she can return to her arbitrators with a motion for relief from judgment under Rule 60. *Id.* But that "proposed Rule 60 workaround" does not work. *Id.* Rule 60 requires any request for relief to be filed "within a reasonable time" (or in some cases within a year). *See*

Fed. R. Civ. P. 60(c). But here, it has been more than two years since Plaintiff's claims were dismissed in arbitration, "making it highly unlikely that any arbitrator would in fact entertain any Rule 60(b) motion." *In Re: IBM*, 2022 WL 2752618, at *5 n.9; *see also, e.g.*, *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (18-month delay "plainly" was not reasonable for purposes of Rule 60); *Johannes Baumgartner Wirtschafts-Und Vermogensberatung GmbH v. Salzman*, 969 F. Supp. 2d 278, 293 (E.D.N.Y. 2013) ("delay of nearly twenty-two months" was not reasonable); *Moses v. United States*, No. 90-CR-863, 2002 WL 31011864, at *2 (S.D.N.Y. Sept. 9, 2002) (collecting cases and noting that courts have denied Rule 60(b) motions as untimely after delays of 10, 16, and 20 months), *aff'd* 119 F. App'x 357 (2d Cir. 2005).

While Plaintiff argues that her arbitrator would be "require[d]" to "hear and decide" her hypothetical Rule 60 motion, Br. 30 n.15 (emphasis omitted), nothing would preclude the arbitrator from denying it as untimely. And denial would be especially appropriate given that the delay was entirely of Plaintiff's own making. *See* Add.016 (observing that Plaintiff "directed" her untimely challenge to the Timeliness Provision's validity to the arbitrator even though the Agreement states that such a

challenge "shall be decided only by a court of competent jurisdiction"). Accordingly, in light of the vanishingly unlikely prospect of Rule 60(b) relief, the district court did not abuse its discretion in deciding that a declaratory judgment would not "serve a useful purpose." *See Duane Reade, Inc.*, 411 F.3d at 389.

Second, Plaintiff claims in passing that, if she "had sought declaratory relief prior to going to arbitration, it is likely the court would have held that the claims could not be addressed, because it was not clear that [the] arbitrators would hold the claims to be untimely." Br. 31. But there is no dispute here that Plaintiff's arbitration demand was untimely under the Agreement. The proper solution was thus for Plaintiff to seek a declaratory judgment at a much earlier stage: Either before arbitrating or, at the very latest, by seeking a stay of arbitration proceedings before the issuance of a final award so that she could challenge the validity of the Timeliness Provision in court. Plaintiff instead arbitrated to finality, failed to seek vacatur, and filed this challenge only years later.

Plaintiff's cited district court cases are irrelevant. *See id.* (citing *Billie v. Coverall N. Am.*, 594 F. Supp. 3d 479 (D. Conn. 2022); *CellInfo, LLC v. Am. Tower Corp.*, 506 F. Supp. 3d 61 (D. Mass. 2020)). *Billie* and

CellInfo addressed Section 3 of the FAA, under which "a district court must stay judicial proceedings when the parties have agreed to arbitrate the issues and one party has applied for a stay." *Billie*, 594 F. Supp. 3d at 486; *CellInfo*, 506 F. Supp. 3d at 65. Here, however, had Plaintiff timely sought a stay of arbitration proceedings to press her challenge to the Timeliness Provision in federal court, no party would have sought to stay that judicial proceeding—not least because the Agreement mandates that a court of competent jurisdiction decide the validity of any arbitration provision if it is called into question.

Finally, Plaintiff suggests (Br. 31–33) that the district court somehow erred by observing—like the district court in *In Re: IBM*—that her "window to challenge" the dismissal of her claims in arbitration "has long since closed." Add.017 (quoting *In Re: IBM*, 2022 WL 2752618, at *4–5). In particular, she complains that the Agreement "does not impose a deadline for seeking a judicial determination around the validity or enforceability of its provisions" and that the district court erroneously "grafted the 'window' applicable to vacatur petitions under Section 10 of the FAA onto this proceeding." Br. 32.

Plaintiff misses the point of Judge Furman's analysis in *In Re: IBM*. Once an arbitration award is finalized, Section 10 of the FAA provides the exclusive avenue for vacatur, and it provides a three-month deadline for filing a petition to vacate. *In Re: IBM*, 2022 WL 2752618, at *5 (citing 9 U.S.C. § 12). Accordingly, Plaintiff's choice was to seek a declaratory judgment attacking the arbitration agreement *before* any final arbitration award was entered, or else file a vacatur petition within three months under Section 10 *after* the award was entered. But she did neither. She also failed to file a Rule 60 motion within "a year" or "a reasonable time" after the arbitration award was entered, as required by Rule 60. *Id.* at *5 n.9 (citing Fed. R. Civ. P. 60(c)). There is no excuse for that delay. The district court did not abuse its discretion in making this commonsense observation and citing it as one reason to decline Declaratory Judgment Act jurisdiction.

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 she "attempt[ed] to

pursue a claim of discrimination under the ADEA in arbitration." *See* Compl. ¶ 12 (App.004). The arbitrator rejected her claim 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 she 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 she filed her 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 she, that she satisfied the three-month deadline for seeking vacatur. Thus, as Plaintiff has already gone through arbitration, her complaint must be dismissed as an untimely attempt to vacate the arbitration award. *Cf. In Re: IBM*, 2022 WL 2752618, at *5 n.9 (noting that "Plaintiffs' reliance on the DJA is little more than a transparent attempt to 'avoid the procedural requirements' and limitations associated with motions to vacate arbitral awards," which "is all the more reason to be wary of exercising subject-matter jurisdiction in these circumstances").

III. PLAINTIFF'S CHALLENGE TO THE TIMELINESS PROVISION FAILS

In all events, the district court rightly observed, in the alternative, that "there is no merit to Plaintiff['s] claim that the Timeliness Provision is unenforceable." Add.018 (quoting *In Re: IBM*, 2022 WL 2752618, at *6). Indeed, five federal judges have rejected identical challenges filed by Plaintiff's counsel, and this Court should do the same. 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 an ADEA claim in arbitration as plaintiffs typically have to file ADEA claims with the EEOC. Nothing prevented Plaintiff from filing a timely claim. She simply failed to do so.

A. The Timeliness Provision Is Valid and Enforceable.

1. Arbitration provisions must be upheld as long as they prove 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.'" *In Re: IBM*, 2022 WL 2752618, at *6 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)); *accord Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 228 (2d Cir. 2016).

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).

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 waived 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.

The relevant "substantive" right protected by the ADEA is "the statutory right to be free from workplace age discrimination." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009); *In Re: IBM*, 2022 WL 2752618, at *7; *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 her ADEA claim.

The Timeliness Provision gave Plaintiff a fair opportunity to pursue her claim in arbitration. Indeed, Plaintiff's contrary argument "borders on frivolous." *In Re: IBM*, 2022 WL 2752618, at *9. 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)). "Thus, to hold that Plaintiff[] [was] prevented by the Timeliness Provision from effectively vindicating [her] rights under the ADEA would be to hold that no plaintiff can effectively vindicate his or her rights under the statute." *Id.* 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 [her] from filing an arbitration demand on [her] ADEA claim[] within the 180- or 300-day deadline established by the separation agreement[]." *Id.* (quoting *Rusis*, 529 F. Supp. 3d at 194 n.8). Had she done so, she "'could have received any relief to which [she was] entitled in an individual arbitration, as contemplated by IBM's separation agreement[].'" *Id.* As another district court addressing the same question put it, "[t]he simplest way for Plaintiff to vindicate [her] ADEA claim was to file a timely demand for arbitration, which [she] did not do." *Smith v. IBM*, No. 21-CV-03856, 2022 WL 1720140 (N.D. Ga. May 27, 2022); *accord Rusis*, 529 F. Supp. 3d at 194 n.8 (same); *Chandler v. IBM*, No. 21-cv-6319, 2022 WL 2473340, at *5 (S.D.N.Y. July 6, 2022) (same).

In short, Plaintiff cannot "set the fault [for her untimely ADEA claim] at IBM's feet when [she] need look no further than [her] own counsel for the appropriate locus of blame." *Rusis*, 529 F. Supp. 3d at 194 n.8. The district court thus correctly observed 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 she claims is a "substantive" right protected by the ADEA. Plaintiff has largely waived this argument, however, by failing to develop the argument in her 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. 33–34. Since Plaintiff has affirmatively disavowed any intent to consolidate these cases, ECF No. 35 at 2, she cannot expand the word-limit of her 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 she makes her 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 her 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 primarily 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. 34–35. But no court has ever adopted that view—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. *Chandler*, 2022 WL 2473340, at *6 (citing *Rusis*, 529 F. Supp. 3d at 192 n.4).

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) ("An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge."), *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. *Chandler*, 2022 WL 2473340, at *5.

Accordingly, since plaintiffs 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. 39–41) *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. 41. 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 "informal methods" responsibilities thus do not exist in arbitration, and piggybacking in the arbitration context makes no sense.

Finally, Plaintiff attempts to drive a wedge between *In Re: IBM* and *Chandler*, claiming that in *In Re: IBM* Judge Furman "declined to join" the district court in *Chandler* in holding that piggybacking is not part of the ADEA's limitations period. Br. 42. 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 failed 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* pp. 28–29; 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 the plaintiffs' Opening Briefs in *In Re: IBM* . . . and *Lodi*." Br. 5, 42. 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* and *Lodi*—the plaintiffs' arguments there fail for the reasons expressed in IBM's response briefs in those cases.

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. 36–38. 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, Plaintiff was 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 courts in *In Re: IBM* and *Chandler* emphasized, *In Re: IBM*, 2022 WL 2752618, at *8; *Chandler*, 2022 WL 2473340, at *6, 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); *Chandler*, 2022 WL 2473340, at *6 (same); Add.018 n.10 (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). 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. 36, 38 n.16. 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 II.A(1).

Third, in passing, Plaintiff claims that the Timeliness Provision is unenforceable because IBM did not provide "OWBPA disclosures." Br.

35–36, 38, 42. But "OWBPA[] disclosure requirements" are triggered only by "'substantive rights,'" not "'procedural ones.'" *In Re: IBM*, 2022 WL 2752618, at *8 (quoting *Estle*, 23 F.4th at 214); *Chandler*, 2022 WL 2473340, at *5. 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." *Chandler*, 2022 WL 2473340, at *5.

IV. PLAINTIFF'S CHALLENGE TO THE CONFIDENTIALITY PROVISION FAILS

The district court also correctly noted that Plaintiff's challenge to the Confidentiality Provision is a non-starter. Because Plaintiff's ADEA claim is untimely, her challenge to the Confidentiality Provision is "moot." Add.018 n.10 (citing *Chandler*, 2022 WL 2473340, at *7 n.4). As Plaintiff admits, she "brought" this challenge "so that, when she is able to arbitrate her claim, she would be able to vindicate her rights effectively." Br. 18–19, 43. But since Plaintiff's ADEA claim is time-barred, she cannot pursue it in arbitration. Plaintiff does not dispute this. *See* Br. 43–44. Accordingly, the district court was unquestionably correct in determining that Plaintiff's challenge to the Confidentiality Provision is moot, which alone dooms her challenge.

If the Court were inclined to consider Plaintiff's challenge, however, it should affirm on either of two independent bases: (1) by failing to brief the issue herself and instead trying to incorporate arguments from a brief in a different case, Plaintiff has waived any arguments on the merits; and (2) in any event, the district court correctly reasoned that the Confidentiality Provision is enforceable.

First, by dedicating little more than a page in her brief to the issue—and choosing instead to rely on a different litigant's briefing—Plaintiff has waived any argument regarding the Confidentiality Provision. As detailed above, "appellants may not incorporate by reference arguments made in briefs from separate cases." *Johnson*, 127 F. App'x at 901 n.4. Here, however, rather than make her own argument, Plaintiff tries to incorporate some 28 pages of briefing on the Confidentiality Provision from the opening brief in *Chandler*. Br. 43 & n.20; *see* Opening Brief at 33–61, *Chandler*, No. 22-1733 (2d Cir.), ECF No. 55. Plaintiff's disregard for Rule 28(i) and Local Rule 28.1.1 constitutes a waiver of her challenge to the Confidentiality Provision on appeal, and the Court should affirm on that basis.

Second, even if the Court considered the merits, the district court correctly observed that Plaintiff's challenge to the Confidentiality Provision is meritless. IBM has outlined a more-detailed discussion in response to the properly presented argument in *Chandler*, but the key points are easily summarized.

Plaintiff 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." *Chandler*, 2022 WL 2473340, at *7. But under New York law, a provision ordinarily will not be struck down as unconscionable unless the plaintiff can show "both procedural and substantive unconscionability." *Id.* 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, however, there is nothing "exceptional" about the ordinary arbitral confidentiality provision at issue. And Plaintiff has failed to establish either procedural or substantive unconscionability—much less *both*.

As to the first requirement, Plaintiff cannot show procedural unconscionability because she "had 21 days to review the Agreement before signing it," and "the Agreement explicitly advised [her] 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 [she] 'lacked a meaningful choice' to enter into the Agreement." *Id.*

As to substantive unconscionability, Plaintiff argues that "the Confidentiality Provision gives IBM an unfair advantage over claimants in arbitration." *Id.* But under New York law, arbitral confidentiality provisions are not substantively unconscionable as long as "the terms of the confidentiality provision 'are not one-sided'" but apply to both parties. *Id.* In addition, if Plaintiff "had filed a timely arbitration demand, [she] would have had the opportunity to obtain relevant discovery from IBM within the confines of the arbitration." *Id.* Thus, Plaintiff's arguments are "without merit" and there is "no basis on which to conclude that the Confidentiality Provision is unenforceable." *Id.* at *7–8.

Judge Koeltl's decision upholding the Confidentiality Provision in *Chandler*—which he followed in *Lodi*—is plainly correct, especially in

light of this Court's own precedent upholding an arbitral confidentiality provision under New York law. *See Guyden v. Aetna, Inc.*, 544 F.3d 376, 381 (2d Cir. 2008) ("[B]ecause confidentiality is a common aspect of arbitration, the confidentiality clause d[oes] not render the arbitration process created by the Agreement unfair."). For these reasons and others more fully expressed in IBM's response brief in *Chandler*, the Court should affirm.

V. THE DISTRICT COURT RIGHTLY SEALED THE CONFIDENTIAL ARBITRATION MATERIALS.

Finally, the district court did not abuse its discretion in sealing the confidential arbitration materials attached to Plaintiff's summary-judgment filings. 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.

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.*

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.* (quoting *Amodeo II*, 71 F.3d at 1050)

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*, 2022 WL 3043220, at *2. 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.* (citation omitted). 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 would eviscerate the FAA's mandate by allowing any party to force the disclosure of confidential arbitration materials just by filing a challenge to the confidentiality provision and attaching the

confidential documents. Indeed, if the FAA's protection of arbitral confidentiality means anything, it must mean that 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 [she] sought in the first instance even though [her] 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 [her] 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, choosing instead to "direct[] the Court to the fuller discussion of this issue" in the *In Re: IBM* and *Chandler* opening brief (Br. 44–45 n.22)—which is improper as discussed above, *supra* p. 32. To the extent she makes her own arguments, she distorts the public access doctrine in an attempt to show that, absurd consequences or not, unsealing is legally required. Plaintiff is wrong.

First, Plaintiff primarily hints that the district court somehow erred by "not even attempt[ing] to explain its reasoning" for sealing the confidential arbitration materials. Br. 48–49. Respectfully, that is disingenuous: The district court sealed those confidential arbitration materials *because Plaintiff asked the district court to do so*, and IBM

agreed. Add.023–24 (requesting sealing "at least preliminarily"); Dist. Ct. ECF No. 28 (requesting sealing "for the time being"). The basis for sealing those confidential materials was obvious, and after making the initial sealing request Plaintiff never moved the district court to unseal or unredact them. As a result, the district court never addressed the sealing issue again after endorsing Plaintiff's requests. Plaintiff cannot now complain that the district court erred in doing precisely what Plaintiff asked. *Cf. United States v. Feng Li*, 682 F. App'x 56, 57 (2d Cir. 2017) (summary order) ("[A] party may not complain on appeal of errors that he himself invited or provoked the district court to commit." (quotation marks omitted)).

Second, Plaintiff argues in a footnote that "[t]he public's right of access attached the moment that Plaintiff filed her summary judgment motion in court." Br. 49 n.26. She cites 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." *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.'" *Id.* (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.

Third, in the same footnote, Plaintiff argues that "IBM is unable to point to any meaningful countervailing interest in confidentiality beyond the mere fact of including a confidentiality provision [in] its arbitration agreement." Br. 49 n.26. Plaintiff is wrong again.

As an initial matter, Plaintiff ignores that any presumption would be "weak" because the district 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 her unsealing demand is itself a sufficient "'competing consideration[]'" to outweigh disclosure here. *In Re: IBM*, 2022 WL 3043220, at *2, *3. Simply put, if merely filing confidential documents on the court docket in support of a summary-judgment motion were sufficient to require their disclosure, then any party challenging a confidentiality provision could win the challenge just by filing it and attaching the documents in question.

Plaintiff relies on this Court's statement that "[t]he mere existence of a confidentiality order says nothing about whether complete reliance on the order to avoid disclosure was reasonable." Br. 49 n.26 (quoting *Lugosch*, 435 F.3d at 126). But Plaintiff misrepresents *Lugosch*, which did not involve an arbitral confidentiality provision or the FAA. The Court in *Lugosch* acknowledged that "particular circumstances surrounding" a confidentiality order or agreement 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, and the FAA's mandate that courts rigorously enforce arbitration agreements—easily combine to displace any negligible presumption.

Finally, Plaintiff argues (Br. 45–46 & n.23) that the Court should follow Judge Liman's unsealing decision in *Lohnn v. IBM*, No. 21-cv-6379, 2022 WL 36420 (S.D.N.Y. Jan. 4, 2022). But *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.*[3]

[3] Nor can Plaintiff get any mileage out of this Court's decision to deny a stay pending appeal in *Lohnn*. *See* Br. 45–46 & n.23 (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.

CONCLUSION

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

Dated: January 31, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook Standard font.

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 11,764 words, as determined by the word-count function of Microsoft Word 2016.

Dated: January 31, 2023

/s/ Matthew W. Lampe
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2023, 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.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished on them via the appellate CM/ECF system.

Dated: January 31, 2023

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