No. 22-2318

United States Court of Appeals for the Second Circuit

DEBORAH TAVENNER,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellee.

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

PLAINTIFF-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

In its Response Brief, IBM claims Plaintiff's arguments are absurd. But it is IBM that advances an absurd argument – that it can use its arbitration agreement to take away the rights of hundreds, if not thousands, of employees to pursue age discrimination claims – rights that they clearly would have been able to pursue in court. Although IBM points to five lower courts (including the District Court in this case) that have surprisingly agreed with IBM's position, those courts all simply echoed one another. And they are wrong. This appeal (along with the others being heard with it) is thus vitally important, as it will be the first appellate decision that can correct the lower court decisions that have allowed IBM to use its arbitration agreements to extinguish the rights of numerous older workers to pursue their claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* – even in the face of blatant and shocking discriminatory conduct by IBM.[1]

[1] In addition to the plaintiffs in the cases that will be heard with this appeal, there are hundreds of additional employees who have attempted, or are trying, to pursue arbitrations against IBM to challenge its egregious

First, IBM argues that the District Court correctly declined to exercise jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. However, the District Court's decision was grounded on a mistaken belief that Plaintiff could not challenge her award back in arbitration, in the event that the District Court issued declaratory relief. In fact, if the Court declares the timeliness provision of IBM's arbitration agreement to be unenforceable, Plaintiff will be able to return to arbitration and move for relief from judgment under Fed. R. Civ. P. 60. The arbitration agreement *requires* the arbitrator to entertain such a motion, and contrary to IBM's assertions, such a motion would not be untimely at this juncture.

While IBM asserts that Plaintiff erred by obtaining an award in her arbitration rather than first seeking to stay that arbitration so that she could challenge the enforceability of the timeliness provision in court, IBM is incorrect. Courts have routinely found similar declaratory judgment challenges to be premature when the issues presented depend on

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discriminatory behavior. This appeal will determine whether these employees can have their claims heard.

arbitrator's rulings that have yet to be made. *See, e.g.*, *Anderson v. Comcast Corp.*, 500 F.3d 66, 75 (1st Cir. 2007); *Selective Insurance Co. of South Carolina v. Lawn Etc., LLC*, 2021 WL 1537794, at *6-7 (W.D.N.C. Mar. 31, 2021), report and recommendation adopted by 2021 WL 1535567 (W.D.N.C. Apr. 19, 2021); *Mondelez Global LLC v. International Association of Machinists and Aerospace Workers, AFL-CIO*, 2019 WL 216738, at *5 (N.D. Ill. Jan. 16, 2019); *Comptek Telecommunications, Inc. v. IVD Corp.*, 1995 WL 780972, at *2 (W.D.N.Y. Dec. 29, 1995). Here, it was not clear that the arbitrator would agree with IBM's position on the timeliness provision until Plaintiff's case was dismissed, and it was reasonable for Plaintiff to recognize that a court would likely have found such a preliminary challenge unripe.

Likewise, IBM incorrectly argues that Plaintiff's declaratory judgment claim is really an untimely motion for *vacatur* under Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. To the contrary, Plaintiff seeks only a declaration as to the enforceability of certain provisions of the arbitration agreement, as she is permitted to do under the agreement.

Neither the arbitration agreement nor the FAA requires the application of the ninety-day time limit for *vacatur* motions here.

Second, contrary to IBM's arguments, the District Court erred by declining to enforce the timeliness provision through which IBM effectively extinguished Plaintiff's ability to bring an ADEA claim in arbitration. IBM argues that the ADEA limitations period (and thus the piggybacking rule) is a procedural right that can be waived in an arbitration agreement. IBM's position should be rejected, as it butts heads with the EEOC's interpretation of the ADEA[2] and the recent Sixth Circuit decision in *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). Because the ADEA's limitations period is a *substantive* right, it cannot be waived through arbitration.

Nor could IBM obtain a waiver of this right without first satisfying the strict requirements of the Older Workers' Benefits Protections Act ("OWBPA"), 29 U.S.C. § 626(f), which it did not do. In effect, even though

[2] *See Thompson v. Fresh Products, LLC*, EEOC Brief, 2020 WL 1160190, at *19-23 (March 2, 2020).

plaintiffs can assert age discrimination claims in court even **years after** they suffered discrimination through the piggybacking rule, *see Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998), IBM contends that Plaintiff here waived that right by agreeing to having her age discrimination claims heard in arbitration.

IBM's contention that *Thompson* does not apply in the arbitration context should be rejected. IBM's position is essentially that, even though *no other kind of contract* could abridge the ADEA's limitations period, *arbitration agreements can* because of the policies espoused in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* However, the Supreme Court has made clear that courts are not to elevate arbitration agreements over other kinds of contracts. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Third, the District Court erred in refusing to excise the unconscionable confidentiality provision from the arbitration agreement. As is explained in greater detail in the plaintiff's reply brief in *Chandler v. International Business Machines Corp.*, No. 22-1733, there is ample reason for

this Court to declare the confidentiality provision invalid, as is *demonstrated* by the fulsome evidentiary record that Plaintiff was required to submit in bringing this challenge.

Finally, IBM argues that the District Court was correct to seal permanently portions of the summary judgment briefing and supporting evidence. But IBM's position runs directly contrary to Second Circuit law and should be rejected. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006).

ARGUMENT

I. The District Court Erred by Declining to Exercise Jurisdiction under the Declaratory Judgment Act

The District Court declined to exercise jurisdiction over Plaintiff's Declaratory Judgment Act claim based on the incorrect assumption that Plaintiff could not proceed in arbitration since she did not attempt to have the arbitration award vacated. IBM insists that the District Court was correct to do so. This argument should be rejected.

First, IBM maintains that the declaratory judgment that Plaintiff seeks would serve no useful purpose, because Plaintiff has already obtained an

award dismissing her arbitration. However, as Plaintiff explained in her Opening Brief at pp. 27-33 (Dkt. 68), the arbitration award does not definitively resolve Plaintiff's ADEA claim. Should Plaintiff obtain a declaratory judgment in her favor, she would then return to arbitration and submit a motion for relief from judgment under Fed. R. Civ. P. 60, because the timeliness provision of the arbitration agreement that the arbitrator relied on in dismissing her claim would have been declared unenforceable. The arbitration agreement expressly requires the arbitrator to hear such motions. *See* Arbitration Agreement at 26, App.097.

IBM makes a half-hearted argument that Plaintiff would be unsuccessful in bringing a Rule 60 motion to reopen her arbitration because, although the arbitrator is *required* to hear the motion, the arbitrator *could* still find it to be untimely. IBM does not dispute that the arbitrator would be *required* to hear such a motion, and the fact that IBM would make a timeliness argument in response to the motion does not justify the District Court's outright refusal to hear Plaintiff's claims. And in any event, this motion would be timely, particularly given the circumstances here:

Plaintiff has been pursuing the relief at issue since the dismissal of her claim (on July 22, 2019, *see* Award at App.128-133), first by opting into *Rusis* on October 17, 2019, *see Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434, Dkt. 86-1 (S.D.N.Y. Oct. 17, 2019), and then initiating this action when the *Rusis* court concluded that Plaintiff had to bring this challenge individually.[3]

The cases that IBM relies on do not support its argument. IBM cites *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618, at *5 n.9 (S.D.N.Y. July 14, 2022), for the proposition that it was "highly unlikely that any arbitrator would in fact entertain any Rule 60(b) motion" in these circumstances, but as the plaintiffs in that case have explained on appeal, that court ignored the fact that IBM's arbitration agreement *requires* the

[3] Other courts have proceeded to sever unconscionable provisions from arbitration agreements, even after holding that plaintiffs who filed a class action in court would need to proceed with their claims individually in arbitration. *See, e.g., Castellanos v. Raymours Furniture Co., Inc.*, 291 F. Supp. 3d 294, 301 (E.D.N.Y. 2018). However, rather than immediately stop to appeal the *Rusis* ruling that required the plaintiffs to file these individual separate actions, Plaintiff (and 29 other individuals in similar circumstances) simply followed what the *Rusis* court said and filed individual actions.

arbitrator to entertain such a motion. IBM also cites *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995); *Johannes Baumgartner Wirtschafts-Und Vermogensberatung GmbH v. Salzman*, 969 F. Supp. 2d 278, 293 (E.D.N.Y. 2013); and *Moses v. United States*, 2002 WL 31011864, at *2 (S.D.N.Y. Sept. 9, 2022), as examples of courts finding Rule 60 motions untimely. However, those cases are factually dissimilar to this one. In *Truskoski*, the plaintiff became aware of the basis for her Rule 60 motion and then waited nearly a year to submit the motion. *See Truskoski*, 60 F.3d at 77. In *Johannes Baumgartner*, the plaintiffs became aware of their basis to seek relief from judgment and inexplicably waited another fourteen months before submitting the motion. *See Johannes Baumgartner*, 969 F. Supp. 2d at 293. And in *Moses*, the defendant waited twenty months to file a Rule 60 motion after a decision issued by the Supreme Court that formed the basis for the motion. *See Moses*, 2002 WL 31011864, at *2.

In contrast to those cases, Plaintiff here timely sought to challenge the enforceability of the timeliness provision, and should she obtain a declaratory judgment, she will promptly submit a Rule 60 motion in

arbitration.

Second, IBM argues that "there is no dispute here that Plaintiff's arbitration demand was untimely under the agreement" and the "proper solution" was for Plaintiff to seek a stay of her arbitration and bring this challenge in court. IBM Response Brief at 23, Dkt. 81. IBM insists that Plaintiff erred, because she "arbitrated to finality, failed to seek *vacatur*, and filed this challenge only years later." IBM Response Brief at 23, Dkt. 81.

On the contrary, Plaintiff *did* contend to the arbitrator that her claim was timely and, only after the arbitrator disagreed with that interpretation (and held the arbitration agreement did not allow her to proceed with the claim there), did she need to address in court that she was not able to vindicate her claims in the arbitral forum. Had Plaintiff attempted to obtain declaratory relief *prior to* obtaining this ruling in arbitration, Plaintiff reasonably determined that the District Court would have found the claim not to be ripe. Until the arbitrator dismissed Plaintiff's case, it was not clear that the arbitrator would agree with IBM's position on the timeliness provision, and there may not have been a dispute for the District Court to

decide. *See Anderson*, 500 F.3d at 75 (finding that the district court erred by striking a multiple damages prohibition in an arbitration agreement before the parties arbitrated, because a conflict between that provision and the Massachusetts statute at issue would arise only if the arbitrator were to make a factual finding as to whether a statutory violation was knowing or willful); *Selective Insurance Co.*, 2021 WL 1537794, at *6-7 (where a case "present[ed] an issue that *depends* on the outcome of the arbitration," the court held that it was "too early to adjudicate [the] controversy without the arbitration conclusively determining" the issue in question); *Mondelez Global LLC*, 2019 WL 216738, at *5 ("The . . . reason to decline a declaratory judgment at this juncture is that the dispute between the parties before this Court is not yet fully developed. If, after proceeding to arbitration, the arbitrator finds in favor of [the plaintiff], the issues in this suit are all moot."); *Comptek Telecommunications, Inc*, 1995 WL 780972, at *2 (declining to issue a declaration regarding the plaintiff's vicarious liability for claims alleged against another party in an arbitration where liability had not yet been litigated).

In her Opening Brief, Plaintiff also relied on other cases demonstrating why it was reasonable and appropriate for her to arbitrate her claim prior to seeking declaratory relief, which IBM unsuccessfully attempts to distinguish. In *Billie v. Coverall N. Am.*, 594 F. Supp. 3d 479, 490-99 (D. Conn. 2022), and *CellInfo, LLC v. Am. Tower Corp.*, 506 F. Supp. 3d 61, 71-73 (D. Mass. 2020), the courts reasoned that effective vindication challenges could not proceed in court until it had been sufficiently established in arbitration that the plaintiffs would not be able to advance their claims. IBM attempts to distinguish those cases on the basis that they concerned Section 3 of the FAA, regarding when a federal court proceeding must be stayed so that the parties can arbitrate. IBM disingenuously asserts that if Plaintiff had sought to stay arbitration to initiate a court proceeding, it would not have sought to stay the federal proceeding. The Court need not accept IBM's self-serving hypothetical assertion. These cases show that courts are reticent to interfere in arbitral proceedings until it is clear how the issues have been decided in arbitration. Here, Plaintiff did not know there would be a conflict between the arbitration agreement and the

ADEA's limitations period until the arbitrator had agreed with IBM's argument, and a court would not likely have addressed the enforceability of the timeliness provision in the context of a hypothetical conflict.

Notably, Plaintiff also cited *Soto-Fonalledas v. Ritz-Carlton San Jan Hotel Spa & Casino*, 640 F.3d 471, 476-78 (1st Cir. 2011), which IBM does not even attempt to distinguish. In that case, the plaintiff argued that the arbitration agreement was unenforceable because it deprived the arbitrator of the power to grant all remedies available under Title VII and the ADA. *See id.* at 476. The First Circuit held that the remedies section of the arbitration agreement was ambiguous and subject to different plausible interpretations, and the challenge was premature before the arbitrator interpreted the agreement. *See id.* at 477-78. Similarly, IBM's insistence that Plaintiff should have stayed her arbitration to pursue her declaratory judgment claim in court makes little sense where Plaintiff did not know how the arbitrator would rule until her arbitration was dismissed.

Third, IBM asserts that since Plaintiff obtained an arbitration award, she was required to "seek vacatur" of the award under Section 10 of the

FAA within 90 days of the award's issuance. IBM mischaracterizes Plaintiff's declaratory judgment action as merely an improper end-run around the Section 10 process. IBM's assertion that Plaintiff was required to "seek *vacatur*" to challenge the enforceability of arbitration provisions at issue is contrary to law. Section 10 sets forth limited bases for vacating an arbitration award (i.e., fraud, corruption of the arbitrator, refusal to hear pertinent evidence, exceeding the arbitrator's power under the arbitration agreement, etc.), and these bases do not include the relief Plaintiff seeks here. Moreover, the parties' arbitration agreement does not impose such a procedure or timeline for making a challenge to the enforceability of its terms – it instead simply notes that challenges to the arbitration terms must be addressed by a court.[4] Here, Plaintiff has not asked the Court to vacate

[4] IBM relies on *Cyber Imaging Sys., Inc. v. Eyelation, Inc.*, 2015 WL 12851390, at *2 (E.D.N.C. Nov. 4, 2015), and *Stedman v. Great Am. Ins. Co.*, 2007 WL 1040367, at *7 (D.N.D. Apr. 3, 2007). In *Cyber Imaging Sys.*, the plaintiff moved to confirm an arbitration award, and the defendant filed a counterclaim seeking a declaratory judgment that would correct an arbitration award – the court held that the proper vehicle for such a challenge was Section 10 of the FAA, and the period to make this challenge had run. *See Cyber Imaging Sys.*, 2015 WL 12851390, at *2. Similarly, in *Stedman*, the plaintiff moved to confirm an arbitration award, and the

the arbitration award; she asks for a declaration regarding for the enforceability of certain terms of the arbitration agreement. There is no basis for IBM or the District Court to graft the ninety-day *vacatur* window under the FAA to Plaintiff's declaratory judgment action.

II. The Timeliness Provision of IBM's Arbitration Agreement is Unenforceable

Because the District Court declined to exercise jurisdiction over Plaintiff's declaratory judgment claims, it did not reach the question of whether the timeliness provision was enforceable and instead limited its analysis on that point to *dicta* in a footnote. *See* Opinion and Order at 18 n.10, App.813. As is explained more thoroughly in the plaintiffs' opening brief and reply brief in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (Dkts. 72 and 114), although the District Court disagreed with Plaintiff on that point, the District Court is incorrect. Plaintiff should be able to assert

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defendant asserted a counterclaim seeking vacatur as well as declaratory relief invalidating aspects of the award. *See Stedman*, 2007 WL 1040367, at *2. Here, unlike in those cases, Plaintiff did not ask the District Court to vacate or otherwise modify the arbitration award – she simply asked for a declaration invalidating certain provisions of the arbitration agreement.

an ADEA claim in arbitration to the same extent she would be able to in court. If the District Court's decision is affirmed, Plaintiff will have been deprived of her ability to pursue her claim in arbitration, even though the claim would be unquestionably timely if Plaintiff could assert it in court. This result would run headlong into the Supreme Court's admonition in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), that while an arbitration agreement may be enforceable with respect to an ADEA claim, "the prospective litigant [must be able to] effectively . . . vindicate his or her statutory cause of action in the [specific] arbitral forum."

As *Gilmer* acknowledged, "the ADEA is designed not only to address individual grievances, but also to further important social policies." *Id.* at 27. Thus, while arbitration may be an adequate forum in which to litigate an ADEA claim, an arbitration agreement is only enforceable to the extent that it allows the ADEA "to serve both its remedial and deterrent function" in a given case. *Id.* at 28.

Here, the District Court's decision has allowed IBM's arbitration agreement to impede the ADEA's remedial and deterrent function by

transforming the deadline to file an EEOC charge into a procedural hurdle that Congress did not intend. This Court has held that "the charge filing requirement of section 7(d) [of the ADEA] sets a time limit, **not for the purposes of limiting time for suit**, but for the purpose of affording a prompt opportunity to attempt conciliation." *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1059 (2d Cir. 1990) (emphasis added). For that reason, this Court held that employees can use the piggybacking rule to pursue ADEA claims, even when they have not themselves timely filed an EEOC charge, so long as they can "piggyback" on a timely filed class charge. *See id.* at 1058-59. Other courts have likewise concluded that the "principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA . . . ." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996).

The timeliness provision in IBM's arbitration agreement (at least as IBM and the arbitrator here interpret it) treats the ADEA's charge-filing deadline as a bright-line cutoff for individuals to initiate their claims in arbitration. IBM's clear goal has been to wield its arbitration agreement to cut off liability for age discrimination claims in a way it could not do in

court.

For its part, IBM argues that the timeliness provision is permissible because it provides Plaintiff a "fair opportunity" to pursue a claim in arbitration by giving her the same amount of time to initiate arbitration that she would have to file an EEOC charge. However, this argument simply ignores that (outside of the arbitration context) plaintiffs do *not* have to bring discrimination claims within the deadline for filing an EEOC charge – instead, they are allowed to piggyback on class claims (thus allowing employees who may not have reason to know at the time of their termination that they had a viable discrimination claim, to still pursue such a claim, even if they only realize later that they were discriminated against).[5] IBM's attempt to use the arbitration agreement to shut down the ADEA claim that Plaintiff would be able to pursue timely in court does not

[5] The piggybacking rule also has the beneficial effect of not requiring *all employees* to file discrimination claims immediately at the time of their termination, or forever hold their peace. Instead, it encourages a practice of allowing employees to wait to bring such claims later if information comes to light from others that leads them to believe they too have been subjected to discrimination. *See, e.g.*, *Robinson v. Locke*, 2012 WL 1029112, at *11 (S.D.N.Y. Feb. 1, 2012).

allow for "effective vindication" of her claim.

The legislative history of the OWBPA evinces Congress's concern about this very problem. The Senate Committee on Labor and Human Resources explained that in layoffs, employees are often not aware "that age may have played a role in the employer's decision or that the program may be designed to remove older workers from the labor force." S. Rep. 101-79, at 9 (1989). Likewise, "[o]lder workers too often learn of these group termination programs in an atmosphere of surprise and uncertainty," where they have no way to know their employers' motives. *Id.* at 21. As such, this Court's conclusion that the charge-filing deadline is not intended to serve as a time limit on bringing suit (provided that the EEOC has been given the opportunity to investigate and conciliate through an earlier-filed charge), *see Tolliver*, 918 F.2d at 1058-59, serves as a safeguard against unscrupulous employers dodging liability simply because the 300 or 180 days have run. Here, Plaintiff has been denied that safeguard, simply by having signed an arbitration agreement, and has not enjoyed a genuinely "fair opportunity" to advance her claim.

A. The Piggybacking Rule is Not Only an Administrative Exhaustion Doctrine but Also a Limitations Doctrine

IBM begins by arguing that the piggybacking rule is only an administrative exhaustion doctrine and not a limitations doctrine. To the contrary, the piggybacking rule operates to allow individuals **who did not file timely EEOC charges** to nevertheless pursue their ADEA claims. *See Tolliver*, 918 F.2d at 1057-59.

As one court acknowledged, where the piggybacking rule acts to excuse plaintiffs' exhaustion requirements, "it would be illogical not to excuse [the plaintiffs] from the limitations period set forth therein." *Shannon v. Hess Oil Virgin Islands Corp.*, 100 F.R.D. 327, 333 (D.V.I. 1983). Other courts have likewise concluded that the piggybacking rule is a limitations doctrine in addition to an exhaustion doctrine. *See Holowecki*, 2002 WL 3120266, at *3 ("An exception to the ADEA's time limitations is the single filing rule."); *see also Leal v. Wal-Mart Stores, Inc.*, 2016 WL 2610020, at *5 (E.D. La. May 6, 2016) (noting that where an individual has filed a timely classwide EEOC charge, the piggybacking rule "tolls the statute of limitations" for the individuals in the scope of the charge); *Catlin*

v. Wal-Mart Stores, Inc., 123 F. Supp. 3d 1123, 1131 (D. Minn. 2015) (same); *Allen v. Sears Roebuck and Co.*, 2010 WL 259069, at *2 (E.D. Mich. Jan. 20, 2010) ("This judicial exception to the charge filing rule permits an alleged victim of discrimination who did not timely file a charge" to piggyback).

This Court likewise discussed the piggybacking rule's impact on the ADEA's limitations period in *Tolliver*, when it adopted the piggybacking rule over the defendant's protest that it would allow stale claims to proceed. 918 F.2d at 1059.

IBM argues that this Court's decision in *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 564 (2d Cir. 2006), bolsters the conclusion that the piggybacking rule has nothing to do with timeliness, because this Court held that piggybacking is not available to plaintiffs who file their own untimely charges of discrimination. That is a different issue from the one raised here. While *Holowecki* suggests that the piggybacking rule is not boundless, the issue addressed there has nothing to do with the issue in this case.

As explained in *Ellis v. Costco Wholesale Corp.*, 2015 WL 2453158, at *2

(N.D. Cal. May 22, 2015), *Holowecki* framed its discussion by citing the concern that the Second Circuit considered in *Levy v. United States Gen. Acct'g Office*, 175 F.3d 254, 255 (2d Cir. 1999), where employees who had received a right to sue notice on their claims but did not file suit in the 90-day window attempted to use the piggybacking rule. Thus, *Holowecki* sought to curb misuse of the piggybacking rule as an end-run around the 90-day limit when someone has filed their own timely charge.

Further, relying on *dicta* in *Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 192 n.4 (S.D.N.Y. 2021), IBM argues that the piggybacking rule is inapplicable in the arbitration context, since Plaintiff here was not required to file an EEOC charge to pursue her claim. That point makes no difference to the analysis. Employees who make use of piggybacking in court are also not required to file EEOC charges to pursue their claims. In court, they can file claims later (after the 180 or 300 days) based on an earlier class filing, and in arbitration there should be no difference. In both cases, the EEOC has been given the opportunity to investigate and conciliate claims. Again, the Supreme Court made clear in

Gilmer, 500 U.S. at 28, that even though an ADEA claim may be subject to arbitration generally, the claimant must be able to effectively vindicate the claim in arbitration, which IBM has tried to block for Plaintiff.

B. The ADEA's Timing Scheme, Including the Piggybacking Rule, is a Substantive Right that Cannot be Waived By Contract, Especially Where IBM Did Not Satisfy the Requirements of the OWBPA

The ADEA's timing scheme (including the piggybacking rule) is a substantive right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521; *Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. Furthermore, as this Court held in *Estle v. International Business Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022), where – as here – an employer seeks to obtain a waiver of a substantive right under the ADEA, the employer must first satisfy the strict requirements of the OWBPA, 29 U.S.C. § 626(f)(1)(H).[6] *See Estle*, 23 F.4th at 214; *see also Oubre*, 522 U.S. at 427.

[6] In *Estle*, this Court held that an arbitration agreement's class action waiver was not precluded based on the employer's failure to comply with the OWBPA. *See Estle*, 23 F.4th at 213-15. This result is unsurprising, since the Supreme Court has held that class action waivers do not affect substantive rights and do not impact the effective vindication of statutory claims by merely requiring them to be litigated individually. *See American*

Because IBM did not satisfy the requirements of the OWBPA,[7] the timeliness provision's purported waiver of the piggybacking rule must be deemed invalid. IBM disputes this conclusion by raising a number of baseless arguments.

First, IBM argues that the ADEA's limitations period is procedural and not substantive. As an initial matter, this argument is directly at odds with the position espoused by the EEOC. *See Thompson*, EEOC Brief, 2020 WL 1160190, at *20 ("[J]ust as with Title VII, the ADA, the FLSA, and the EPA, the ADEA's statutory limitations period is a substantive right and prospective waivers of its limitations period are unenforceable").[8]

Express Co. v. Italian Colors Rest., 570 U.S. 228, 236-37 (2013). The issue here is very different. IBM has brandished its arbitration agreement to prevent claimants from pursuing their ADEA claims at all, even individually, in arbitration.

[7] As explained in Plaintiff's Opening Brief at 14 n.10, 33-42, Dkt. 68, IBM did not satisfy the OWBPA because: (1) it failed to provide disclosures that the OWBPA requires; and (2) it failed to describe the right being waived in a manner calculated to be easily understood by the employees. *See* 29 U.S.C. § 626(f)(1).

[8] "[I]t is axiomatic that the EEOC's interpretation of [the ADEA], for which it has primary enforcement responsibility, need . . . only be

Nevertheless, IBM cites *Vernon Cassadaga Valley Central School District*, 49 F.3d 886, 890 (2d Cir. 1995), for the proposition that the ADEA's limitations period is procedural. While *Vernon* concluded that the ADEA's limitations period was procedural for the purposes of determining the retroactive applicability of the Civil Rights Act of 1991, *see id.*, this Court later clarified that "in different contexts, a statute of limitations may fairly be described as either procedural or substantive . . . ." *Enterprise Mortg. Acceptance Co., LLC, Sec. Litig. v. Enterprise Mortg. Acceptance Co.*, 391 F.3d 401, 409 (2d Cir. 2004); *see also Vernon*, 49 F.3d at 892 (Cabranes, J. concurring). Here, the Court should read *Vernon* in harmony with the EEOC's position in *Thompson* and conclude that while the ADEA's timing scheme may be procedural in nature for the purposes of determining whether a statutory amendment applies retroactively, it is substantive for the purposes of determining whether a limitations period may by abridged

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reasonable to be entitled to deference." *EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988).

by contract.[9]

Second, IBM contends that its arbitration agreement is consistent with *Thompson*, because it requires an arbitration demand to be filed on the same deadline the statute sets for an EEOC charge. Not so. By extinguishing the Plaintiff's ability to make use of the piggybacking rule, the arbitration agreement has truncated the ADEA limitations period. While Plaintiff would be timely to pursue her ADEA claim in court (even **years** after the discrimination took place, under the piggybacking rule), she cannot timely pursue her claim in arbitration. Because *Thompson* recognized the ADEA limitations period to be a non-waivable right, IBM is simply wrong to suggest that its arbitration agreement is consistent with *Thompson*. 985 F.3d at 521.

IBM also contends that *Thompson* is distinguishable because it did not concern arbitration. At bottom, IBM's argument is that an arbitration

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[9] IBM also relies on *Spira v. J.P. Morgan Chase & Co.*, 466 F. App'x. 20, 22-23 (2d Cir. 2012), a non-precedential summary order that is easily distinguishable. *Spira* stands for the uncontroversial position that a federal statute's failure to reference a limitations period does not compel the conclusion that no limitations period applies.

agreement is free to abridge employees' ADEA limitations periods, whereas other kinds of contracts cannot. IBM's argument runs afoul of *Morgan*, 142 S. Ct. at 1713, where the Supreme Court held that arbitration agreements cannot be elevated over other kinds of contracts. As such, "a court may not devise novel rules to favor arbitration over litigation." *Id.*[10]

Thus, the District Court's decision cannot stand. In deciding that *Thompson* was limited to contractually shortened limitations periods outside of arbitration agreements, those courts lost sight of the fact that "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan*, 142 S. Ct. at 1713.[11]

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[10] This Court's *dicta* in *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2d Cir. 2010), supports Plaintiff's position. In *Ragone*, the Court opined that, even in the arbitration context, a provision shortening the time period to file an anti-discrimination claim may be unenforceable as being "incompatible with [the] ability to pursue [] Title VII claims in arbitration, and therefore void under the FAA." *Id.* at 125-26.

[11] In other words, an arbitration agreement cannot be valid if it contains a prohibition that would not be allowed in a non-arbitration agreement. Either the purported prohibition must not be enforced, or the affected party cannot be required to arbitrate. Plaintiff here is content to arbitrate, so long as her rights are not impeded in arbitration.

IBM counters that, while *Morgan* involved a judge-made procedural rule that favored arbitration agreements over other kinds of contracts, the procedural rule at issue here was adopted by the parties in the arbitration agreement. IBM misses the point – by limiting *Thompson* to the non-arbitration context, the District Court held that the arbitration agreement was enforceable where any other type of agreement would not be.[12]

Even if IBM were correct that an arbitration agreement could abridge an ADEA limitations period, the employer would first have to satisfy the requirements of the OWBPA. In order to abridge a substantive right under the ADEA, the employer must comply with the OWBPA. *See Estle*, 23 F.4th at 214. Because the waiver of the piggybacking rule in the arbitration agreement has prevented Plaintiff from being able to pursue her claim at

[12] IBM also attempts to distinguish *Thompson* on the basis that its reasoning was grounded in the EEOC's investigatory process, which is not at issue in arbitration. As explained *supra*, however, Congress did not intend the EEOC charge-filing deadline to be a procedural hurdle for employees where a charge has indeed been filed. *See Tolliver*, 918 F.2d at 1059.

all, IBM has run afoul of the OWBPA. *See* note 7, *supra*.[13] Thus, Plaintiff must be permitted to pursue her claim of discrimination.[14]

C. Plaintiff Did Not Waive Any Arguments with Respect to Piggybacking

Finally, IBM argues that Plaintiff waived her piggybacking argument, because she seeks to incorporate the argument from a different case. IBM already unsuccessfully advanced this argument in its opposition (Dkt. 32) to Plaintiff's motion (Dkt. 30) for the Court to hear this appeal in tandem with three other appeals. In its opposition, IBM argued that Plaintiff's request was "primarily aimed at expanding the word limit for the opening brief." IBM Opp. to Hearing in Tandem at 9, Dkt. 32. The Court rejected this argument (at least implicitly) by granting Plaintiff's motion. *See* Order

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[13] IBM makes hay of the fact that *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 833 (6th Cir. 2019) (on which *Thompson* relied), and *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 655 (6th Cir. 2003), limited their holdings to court actions. However, those cases concerned Title VII, which does not have a counterpart to the OWBPA.

[14] If Plaintiff cannot pursue her claim in arbitration, then she should be permitted to pursue her claim in court. Because the OWBPA was not satisfied, she must be able to pursue her claims somewhere.

at 2, Dkt. 47.

IBM now repeats the same arguments that were already rejected. IBM contorts Fed. R. App. P. 28(i) and claims Rule 28(i) creates a bright-line rule prohibiting referencing other appellate briefs in the circumstances present here – but Rule 28(i) does not do this.[15] IBM cites an out-of-circuit case, *United States v. Johnson*, 127 F. App'x. 894, 901 n.4 (7th Cir. 2005). But this case is more akin to *In re National Sec. Agency Telecommunications Records Litig.*, 669 F.3d 928, 931 (9th Cir. 2011), where the appellant argued a Takings Clause claim and incorporated by reference additional

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[15] Fed. R. App. P. 28(i) states in full:

> (i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

Here, IBM's citation to Rule 28(i) and its assertion that it is only in cases "involving more than one appellant or appellee, including consolidated cases," that parties are allowed to adopt by reference a part of another's brief," *see* IBM Response Brief at 46, Dkt. 81, is a mischaracterization of Rule 28(i), which makes no such proclamation.

constitutional arguments made in another companion appeal. *See id.* While the Ninth Circuit noted that it "did not ordinarily permit parties to incorporate by reference briefs in other cases," it would permit the appellant to do so because "the cases have followed a parallel path through the MDL process, so in this rare circumstance we accept the incorporation." *Id.*

Here, 30 plaintiffs filed materially identical complaints with the Southern District of New York between July 23 and 27, 2021. Judge Furman consolidated 26 of those cases, and the other cases (including this one) were not consolidated before Judge Furman. Nevertheless, the parties briefed identical issues in these cases on parallel tracks, and the district courts[16] all issued their decisions between July and September 2022. *See* Opinion and Order, App.796-815 (issued on Sept. 23, 2022); *Chandler v. International Business Machines Corp.*, 2022 WL 2473340 (S.D.N.Y. July 6, 2022); *Lodi v. International Business Machines Corp.*, 2022 WL 2669199 (S.D.N.Y. July 11,

[16] The *Lohnn* matter was resolved prior to a final decision being issued. *See Lohnn v. International Business Machines Corp.*, Stipulation of Dismissal, Civ. Act. No. 21-cv-6379, Dkt. 80 (S.D.N.Y. Aug. 15, 2022).

2022); *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618 (S.D.N.Y. July 14, 2022). Then, because these matters all raise overlapping issues and similar arguments, this Court ordered that the appeals of those decisions be heard in tandem. *See* Order at 2, Dkt. 42. Given the parallel paths these cases have taken, and the overlapping issues they present, Plaintiffs appropriately cross-referenced their respective briefs.

Moreover, IBM is simply wrong that Plaintiff waived her argument. In each of the appeals that will be heard in tandem, Plaintiffs argued each issue, though did so more expansively in one or more of the opening briefs than in the others. For instance, the opening briefs in *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, and *Lodi*, No. 22-1737, address the timeliness issue in more detail (with the former brief focusing more on piggybacking, and the latter focused more on the timely filing of Plaintiff's EEOC charge); the *Chandler*, No. 22-1733, opening brief addresses the confidentiality issue in more detail; and the *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728, opening brief addresses the sealing issue in more detail. Moreover, the Court need only review the Opening Brief in this matter to note that

Plaintiff included an extensive discussion of piggybacking. Plaintiff did not waive her argument.

III. The Confidentiality Provision of IBM's Arbitration Agreement is Unenforceable

The District Court also declined to address Plaintiff's argument that the confidentiality provision within IBM's arbitration agreement was unenforceable, since it declined to exercise jurisdiction. As explained in Section I *supra*, the District Court erred by refusing to exercise jurisdiction. Instead, the District Court should have held that the confidentiality provision was unenforceable.

In *dicta*, the District Court noted that it agreed with the reasoning in *Chandler v. International Business Machines Corp.*, 2022 WL 2473340, at *7-8 (S.D.N.Y. July 6, 2022). *See* Opinion and Order at 18 n.10. The plaintiff in *Chandler*, No. 22-1733, has detailed in his opening brief at pp. 33-61 (*Chandler* Dkt. 88), and in his reply brief at pp. 16-38 (*Chandler* Dkt. 108) the many reasons why the District Court's decision was in error. Plaintiff thus respectfully refers the Court to those *Chandler* briefs.

Again, IBM argues that Plaintiff has waived this argument by

referring the Court to the briefs in *Chandler*. As explained in Section II.C *supra*, this argument is baseless. This waiver argument is especially peculiar given the fact that the District Court in this matter did not set forth its reasoning beyond repeating in two sentences that it was incorporating its *Chandler* rationale. *See* Opinion and Order at 18 n.10, App.827. Ironically, at the same time IBM takes exactly the same approach as Plaintiff, saving its full argument on this issue for its *Chandler* brief.

Furthermore, Plaintiff *did* recount the argument in her brief. *See* Opening Brief at 43-44, Dkt. 68. While the argument is set forth in more detail in the *Chandler* opening brief, Plaintiff here has not waived the argument. Plaintiff presented a full record demonstrating the ways in which her ADEA claim was unfairly impeded by the confidentiality provision, as this Court requires for such a challenge under *American Family Life Assurance Co. of N.Y. v. Baker*, 778 Fed. App'x. 24, 27 (2d Cir. 2019). The District Court declined to even examine this record.

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

Finally, as detailed more thoroughly in plaintiffs' opening brief and

reply brief *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (Dkts. 72 and 114), the District Court erred by failing to unseal the summary judgment record in this case. The documents at issue – which Plaintiff was required to submit to bring her challenge to IBM's confidentiality provision – are judicial documents, entitled to a presumption of public access.

IBM's assertion to the contrary contradicts judicial precedent. The Second Circuit and the Southern District of New York have repeatedly held that summary judgment filings are judicial documents as a matter of law that must not remain under seal "*absent the most compelling reasons.*" *See Lohnn v. International Business Machines Corp.*, 2022 WL 36420 at *6-7 (S.D.N.Y. Jan. 4, 2022) (citing *Lugosch*, 435 F.3d at 121; *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019)). The documents at issue do not even amount to what can be considered "confidential" in the Second Circuit.

CONCLUSION

This Court should reverse the District Court's decision granting IBM's Motion to Dismiss and direct the District Court to issue declaratory judgments striking the timeliness and confidentiality provisions of IBM's

arbitration agreement as unenforceable. The Court should also reverse the District Court's decision to keep the briefing and evidentiary record under seal.

Dated: February 14, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype font.

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 6,997 words, as determined by the word-count function of Microsoft Word 2016.

Dated: February 14, 2023

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2023, an electronic copy of the foregoing was filed with the Clerk of 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: February, 2023

/s/ Shannon Liss-Riordan
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