22-1737

United States Court of Appeals for the Second Circuit

PATRICIA LODI,
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-6336 – Judge John G. Koeltl

RESPONSE BRIEF OF DEFENDANT-APPELLEE INTERNATIONAL BUSINESS MACHINES CORP.

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CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

OTHER AUTHORITIES

INTRODUCTION

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

This matter involves a former IBM employee who signed an agreement with IBM requiring confidential 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. 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 claims, Plaintiff now challenges the validity of the filing deadline she agreed to in her arbitration agreement. Under the Federal Arbitration Act ("FAA"), however, her challenge clearly fails. The FAA requires the terms of arbitration agreements to be strictly enforced as long as they give plaintiffs a "fair opportunity" to assert the substance of their claim in the arbitral forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Here there is no question that Plaintiff had a "fair opportunity," because 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 emphasizing that she filed a "timely" EEOC charge before demanding arbitration—and thus, that she would have been able to file a timely suit in court absent her agreement to arbitrate. But she was not required to file an EEOC charge before arbitrating. In fact, the agreement expressly states that the filing of a charge does not extend the limitations period for demanding arbitration. And that approach was sanctioned in *Gilmer*, where the Court emphasized that arbitration was a suitable substitute for the out-

of-court dispute resolution process that an EEOC charge ordinarily triggers. Moreover, this Court's precedents make clear that the ADEA's limitations period is a waivable procedural rule that the parties may modify in an arbitration agreement as long as the plaintiff retains a fair opportunity to file a claim in arbitration—as Plaintiff clearly did here.

Plaintiff also clings to the so-called "piggybacking" doctrine—a judge-made rule that sometimes excuses plaintiffs from filing an EEOC charge before filing suit in court. But she does not actually develop any affirmative arguments, opting instead to incorporate by reference briefing in an unconsolidated case. That is a clear waiver, as numerous courts of appeals have held. In any event, piggybacking is an exhaustion doctrine that has nothing to do with the relevant question under *Gilmer*—whether Plaintiff had a "fair opportunity" to pursue her ADEA claims in arbitration—which she plainly did. And finally, Plaintiff could not properly invoke the piggybacking rule under this Court's precedents because she filed her own EEOC charge.

In addition to her challenge to the timeliness provision, Plaintiff challenges her arbitral confidentiality provision, but that challenge is moot. Plaintiff argues the confidentiality provision is invalid because it

somehow hampers her ability to prove her claims in arbitration. But since her claims are time-barred, she cannot advance them regardless. Here too, Plaintiff also has waived any arguments on appeal because she improperly rests on nearly 30-pages' worth of arguments in a brief filed in a different, unconsolidated case 19 days *after* Plaintiff filed hers. And even if the Court reached the merits, Plaintiff has no serious response to the district court's conclusion that she did not meet New York's high bar for unconscionability claims. On mootness, waiver, or the merits, therefore, the Court should affirm dismissal of her challenge.

Although the district court did not need to proceed further, it is also notable that Plaintiff's complaint independently warranted dismissal because it is an untimely vacatur motion. Before filing the present suit, she arbitrated her ADEA claim and lost when the arbitrator dismissed the claim as untimely. She had three months under the FAA to move to vacate or modify the arbitral award—but she did nothing. Instead, she filed this litigation long after the three-month clock expired, seeking to overturn the award under the "declaratory judgment" flag. As many courts have recognized, this is an improper end run around the FAA's exclusive vacatur procedure.

That leaves only Plaintiff's demand that the confidential arbitration materials (covered by the challenged confidentiality provision) attached to her moot summary-judgment papers be unsealed under the public access doctrine. In a virtually identical case, Judge Furman rightly rejected that demand as "perverse" and "absurd." For one thing, the materials are not subject to the presumption of public access because they were irrelevant to the district court's exercise of the judicial function. The district court did not, and could not, consider the extra-complaint materials in adjudicating IBM's motion to dismiss. And even if that were not so, the presumption would be exceedingly weak (given that the materials played no role in the court's decision) and easily overcome (given the FAA's strong policy favoring arbitral confidentiality). The district court thus did not abuse its discretion in keeping the materials sealed.

For all of these reasons, the Court should affirm.

JURISDICTIONAL STATEMENT

IBM agrees that this Court has jurisdiction under 28 U.S.C. § 1291. The district court originally had federal-question jurisdiction under *Doscher v. Sea Port Group Securities, LLC*, 832 F.3d 372, 388 (2d Cir.

2016), because Plaintiff's underlying ADEA claim presents a federal question. Although the Supreme Court overturned *Doscher* in *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), that makes no difference here because the district court also had diversity jurisdiction. The parties are completely diverse, *see* Compl. ¶¶ 3–4 (App.002), and the amount in controversy exceeds $75,000 given the damages sought on her ADEA claim.

In addition, 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 correctly held that the Timeliness Provision is enforceable.

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

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

4. 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 on July 31, 2017, she signed an agreement waiving most claims against IBM in exchange for a severance package. Add.002. The agreement did not waive ADEA claims, however, instead providing for them to be resolved through individual arbitration. Add.002–03. 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.096, 099. But "[a]ny issue concerning" the "validity or enforceability" of the agreement must be "decided only by a court of competent jurisdiction." App.098.

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.003. 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 October 11, 2018—more than a year after her termination—Plaintiff filed an EEOC charge against IBM alleging age discrimination in violation of the ADEA. Add.004. On January 17, 2019—while the EEOC's investigation was pending—Plaintiff filed an arbitration demand against IBM similarly asserting claims under the ADEA. *Id.*

The arbitrator dismissed Plaintiff's claims as untimely on August 12, 2019, "because [she] did not file an arbitration demand within 300 days after her termination[,]" as required by the Timeliness Provision.

Id. In reaching that conclusion, the arbitrator "also concluded that under the Agreement, the plaintiff could not take advantage of the so-called 'piggybacking rule,'" which excuses plaintiffs in some circumstances from filing an EEOC charge before filing suit in court. Add.004–05. Following the dismissal of her arbitration, Plaintiff did not file a petition to vacate under the FAA. *Id.*

3. In an attempt to rescue her untimely claims, Plaintiff sought to opt into a collective action filed by her counsel on behalf of other IBM employees, arguing that her claim should be deemed timely under the "piggybacking" doctrine. Add.005–06. 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" of it. *Id.* at 192 n.4. Piggybacking is an exception to the EEOC charge-filing requirement. But since Plaintiff was "not required to file a charge of discrimination with the EEOC" before arbitrating, 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 claims within the 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 demand[.]" *Id.* at 195 n.8. 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.*

4. Some four months 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 in *In Re: IBM Arbitration Agreement Litigation*, No. 22-1728 (2d Cir.) ("*In Re: IBM*"). Of the other three cases, one was assigned to Judge Karas in *Tavenner v. IBM*, No. 22-2318 (2d Cir.), and two were assigned to Judge Koeltl in *Chandler v. IBM*, No. 22-1733 (2d Cir.) and this case. All three judges have now dismissed these cases, and all plaintiffs have appealed.

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

Although she filed the confidential materials under seal, Plaintiff asked the district court to immediately *unseal* them. According to Plaintiff, the mere filing of those materials required their immediate unsealing under the "public access" doctrine.

Plaintiff's counsel contemporaneously made the same request 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 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 Koeltl stated that he would "decide the issues concerning redaction in connection with the pending motion for summary judgment." App.799; *see also* App.809 (denying Plaintiff's motion for reconsideration).

5. On July 11, 2022, the district court granted IBM's motion to dismiss and denied Plaintiff's summary-judgment motion "as moot." Add.002. In adjudicating IBM's motion to dismiss, the district court stated that its earlier decision granting IBM's motion to dismiss in *Chandler*, which involved the same issues, "is dispositive of [Plaintiff's] arguments here." Add.007.

First, the district court held that Plaintiff's challenge to the Timeliness Provision is "without merit." Add.008. Contrary to Plaintiff's arguments, "the purported right to take advantage of the piggybacking rule is not a substantive, non-waivable right protected by the ADEA." *Id.* (quoting *Chandler v. IBM*, No. 21-cv-6319, 2022 WL 2473340, at *4 (S.D.N.Y. July 6, 2022)). "The substantive right protected by the ADEA is the 'statutory right to be free from workplace age discrimination,' and

there can be no reasonable dispute that the Timing Provision afforded the plaintiff a 'fair opportunity' to vindicate this right in arbitration within an entirely reasonable time frame." *Chandler*, 2022 WL 2473340, at *4 (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009); *Gilmer*, 500 U.S. at 31). Plaintiff "simply failed to do so." *Id.*

In addition, the district court emphasized that "the piggybacking rule is not a part of the statute of limitations law of the ADEA." Add.008 (quoting *Chandler*, 2022 WL 2473340, at *5). Piggybacking is "an exception to the exhaustion doctrine that excuses plaintiffs from notifying their employer and the EEOC of their claims and filing an EEOC charge when those parties are already on notice of the facts surrounding the plaintiff's claims from an earlier filed EEOC charge." *Chandler*, 2022 WL 2473340, at *5. It "is not a statute of limitations doctrine extending the time for ADEA plaintiffs to file their claims." *Id.*

Moreover, because piggybacking is not a non-waivable substantive right, "any alleged failure by IBM to comply with the disclosure requirements of the Older Workers' Benefits Protection Act ('OWBPA') did not render the Timing Provision enforceable." Add.008 (citing *Chandler*, 2022 WL 2473340, at *5). "[T]he Second Circuit has made clear

that the rights that give rise to the OWBPA disclosure requirements are 'substantive rights and [do] not include procedural ones.'" *Chandler*, 2022 WL 2473340, at *5. OWBPA is thus not implicated here because piggybacking is "a procedural exhaustion doctrine, not a substantive right protected by the ADEA." *Id.*

Finally, the district court acknowledged slight factual differences between this case and *Chandler*, but the court deemed them "immaterial." Add.008. Most notably, unlike the plaintiff in *Chandler*, Plaintiff here claimed that she "filed a timely EEOC charge and received [a] Right to Sue Letter in July 2021." Add.009. Thus, absent the arbitration agreement, she argued that she "could have filed a timely ADEA action in federal court" after the arbitration agreement's limitations period expired. *Id.*

The district court noted that Plaintiff's complaint was actually "devoid of any allegation[s]" showing that she filed a timely EEOC charge: She was terminated in July 2017 but did not file a charge until October 2018, which is past the EEOC deadline because it is "more than 300 days after she was terminated." Add.009 n.4. But regardless, the district court held that the filing of a timely EEOC charge was irrelevant:

What mattered is that she did not file an *arbitration demand* on time. Under the Timeliness Provision, she was required to file an arbitration demand within 300 days of her termination, which she did not do. And even if she could have filed a timely claim in court absent her arbitration agreement, that would not make the Timeliness Provision unenforceable. Add.009.

The district court noted the Supreme Court's holding that "[p]rovisions in an arbitration agreement are enforceable 'so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.'" *Id.* And here, Plaintiff "had 300 days to file an arbitration demand under the Timing Provision, which is the same limitations period that the ADEA itself affords certain plaintiffs to file an EEOC charge and longer than the 180-day limitations period that [the] ADEA affords other plaintiffs that live in certain states." Add.010. Plaintiff thus "had a full and fair opportunity to file her Arbitration Demand within the applicable limitations period and simply failed to do so"—that she "may have had more time to file her claim in federal court had she not agreed to arbitrate her ADEA claims is immaterial." Add.010–11.

What is more, the district court observed that, because she filed her own EEOC charge, Plaintiff could not properly invoke piggybacking anyway. "An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge." Add.011 (quoting *Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 564 (2d Cir. 2006)). Thus, even had Plaintiff been allowed to proceed in court, she "would not have been able to piggyback from earlier-filed EEOC charges." Add.011–12.

Second, the district court rejected Plaintiff's challenge to the Confidentiality Provision. Because the Timeliness Provision is enforceable—and because Plaintiff's arbitration demand undisputedly was untimely—her "claim for declaratory relief with respect to the Confidentiality Provision is . . . moot." Add.012 n.6. "[F]or the sake of completeness," however, the district court noted that "all [Plaintiff's] arguments . . . were considered and rejected by this Court in *Chandler*" and they "are without merit." Add.012 & n.6. "Because the Confidentiality Provision is neither procedurally unconscionable nor substantively unconscionable under New York law," the Court granted IBM's motion to dismiss Plaintiff's claim challenging the Confidentiality Provision. Add.012.

Having rejected both of Plaintiff's challenges on IBM's motion to dismiss, the district court denied Plaintiff's summary-judgment motion "as moot." Add.014. In addition, the court directed the clerk "to close all pending motions and to close this case[,]" leaving the confidential materials sealed. *Id.*; *see also Chandler*, 2022 WL 2473340, at *8 (holding that "the outstanding sealing requests . . . are granted").

7. Plaintiff appealed and filed a motion to temporarily seal the confidential materials contained and referenced in her opening brief and appendix in this Court—but simultaneously requested that this Court immediately unseal the materials. ECF No. 50. IBM opposed that request on various grounds, including that the validity of the district court's sealing order is one of the merits issues presented in Plaintiff's opening brief. ECF No. 59. On October 31, 2022, Judge Merriam granted the motion to seal and "referred to the merits panel . . . Appellant['s] requests that the now-sealed documents be unsealed." ECF No. 66 at 2.

SUMMARY OF ARGUMENT

I. The district court correctly rejected Plaintiff's challenge to the Timeliness Provision.

A. 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 claims 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 her "timely" EEOC charge somehow should render her arbitration demand timely. The Timeliness Provision unambiguously states that the filing of a charge will not extend the limitations period for demanding arbitration. That waiver of the charge-filing requirement, moreover, is sanctioned by *Gilmer*, which emphasized that arbitration is consistent with (and a suitable replacement for) the EEOC procedures triggered by the filing of a charge. It follows that the waiver of the charge-filing requirement is enforceable, and Plaintiff's failure to timely demand arbitration is fatal.

In any event, as this Court has held, the ADEA's limitations period is a procedural, not substantive, right. Accordingly, parties may modify it so long as a plaintiff retains a full and fair opportunity to arbitrate her ADEA claim—as Plaintiff did here.

B. Plaintiff's passing reference to the judge-made "piggybacking" rule does not alter this analysis. To start, Plaintiff has waived this argument on appeal by attempting to incorporate arguments from a different brief in an unconsolidated case. Even if she could incorporate those arguments, moreover, they are wrong on the merits. Piggybacking is an exhaustion doctrine that excuses a plaintiff from the ordinary procedural requirement to file an EEOC charge before filing an ADEA suit in court. But that doctrine is inapplicable here, because there was no requirement for Plaintiff to file an EEOC charge before demanding arbitration. In addition, 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 age discrimination under the ADEA. And in all events, Plaintiff could not properly invoke the rule under this Court's precedents because she filed her own EEOC charge.

II. The district court also correctly rejected Plaintiff's challenge to the Confidentiality Provision. Because Plaintiff's claims are time-barred, she has no live claims to arbitrate and it is moot whether any future arbitration would have to be confidential. In any event, Plaintiff has

waived any challenge to the Confidentiality Provision by failing to brief the issue and instead trying to incorporate briefing from an unconsolidated case. And regardless, Plaintiff has no serious response to the district court's holding that her confidentiality challenge also fails on the merits.

III. In the alternative, dismissal was plainly warranted because Plaintiff's complaint represented an improper collateral attack on the arbitral award. Plaintiff already arbitrated and lost on her ADEA claim. Under the FAA, she had three months to file a motion to vacate or modify the award. She did not do so. Instead, she filed this declaratory judgment action 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.

IV. Finally, the district court did not abuse its discretion in denying Plaintiff's request to unseal the confidential arbitration materials she 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 interests in upholding arbitral confidentiality and preventing plaintiffs from unsealing confidential materials merely by filing a challenge to a confidentiality provision.

STANDARD OF REVIEW

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

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE CHALLENGE TO THE TIMELINESS PROVISION

The district court properly rejected Plaintiff's challenge to the Timeliness Provision. 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 ADEA claims in arbitration as plaintiffs typically have to file ADEA claims with the EEOC. Nothing prevented Plaintiff from filing a timely claim here. She simply failed to do so.

On appeal, Plaintiff fails to identify any error in the district court's reasoning. She claims that she filed a "timely" charge with the EEOC that would have allowed her to file a timely lawsuit in court absent her arbitration agreement. But she ignores that the Timeliness Provision expressly provides that an EEOC charge does not extend the period for demanding arbitration. The Timeliness Provision is enforceable because it gave Plaintiff more than ample opportunity to vindicate her substantive ADEA rights by filing a timely claim in arbitration.

Plaintiff lastly claims that the Timeliness Provision unlawfully waives the judge-made piggybacking rule. But Plaintiff waived this argument by attempting to incorporate arguments from a brief in an unconsolidated case. And in all events, the rule is irrelevant here. Piggybacking excuses plaintiffs from filing an EEOC charge before filing in court, but Plaintiff was not required to file an EEOC charge before

initiating arbitration. Piggybacking has nothing to do with the ADEA's "substantive right" to be free from workplace age discrimination. And on top of all that, Plaintiff could not properly invoke the piggybacking rule under this Court's precedents because she filed her own EEOC charge.

A. The Timeliness Provision Is Valid and Enforceable.

1. Arbitration provisions must be upheld as long as they give plaintiffs a fair opportunity to present their claims in the arbitral forum.

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

As the district court recognized, Add.011, the relevant "substantive" right protected by the ADEA is "the statutory right to be free from workplace age discrimination[.]" *14 Penn Plaza*, 556 U.S. at 265; *see also Estle v. IBM*, 23 F.4th 210, 214 (2d Cir. 2022). Accordingly, under the effective-vindication doctrine, an arbitration agreement cannot "forbid[] the assertion of [that] statutory right[]" by prohibiting a plaintiff from bringing an ADEA claim. *Italian Colors*, 570 U.S. at 236. Nor can an arbitration agreement impose obstacles that effectively deprive plaintiffs of the right to bring an ADEA claim, such as by setting an

unreasonably short filing deadline or charging arbitration fees "that are so high as to make access to the forum impracticable." *Id.*

Simply put, the question under the effective-vindication doctrine is whether the 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 claims.

As the district court held, the Timeliness Provision gave Plaintiff a fair opportunity to pursue her claims 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)); *Chandler*, 2022 WL 2473340, at *5. "Thus, to hold that Plaintiff[] w[as] prevented by the Timeliness Provision from effectively vindicating their rights under the ADEA would be to hold that no plaintiff can effectively vindicate his or her rights under the statute." *In Re: IBM*, 2022 WL

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

On top of that, "'Plaintiff[] do[es] not identify any obstacle, let alone one imposed by IBM, that prevented [her] from filing an arbitration demand on their ADEA claims within the 180- or 300-day deadline established by the separation agreement[].'" *Id.* 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.* Indeed, "[t]he simplest way for Plaintiff to vindicate [her] ADEA claim[s] was to file a timely demand for arbitration, which [she] did not do." *Smith v. IBM*, No. 21-CV-3856, 2022 WL 1720140, at *7 (N.D. Ga. May 27, 2022); *accord Rusis*, 529 F. Supp. 3d at 194 n.8 (same); *Chandler*, 2022 WL 2473340, at *4 (same).

In short, Plaintiff cannot "set the fault [for her untimely ADEA claims] 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 held that the Timeliness Provision is enforceable.

3. Plaintiff's "Timely" EEOC Charge Is Irrelevant.

Plaintiff argues that her arbitration demand must be considered timely because she "submitted her own timely EEOC charge on October 11, 2018," and—after receiving her Right to Sue Letter—she "would have had until at least October 28, 2021, to initiate a lawsuit" in court if she had not agreed to arbitrate. Br. 27–28. As the district court recognized, however, her EEOC charge was not actually filed within 300 days of her termination, *see* Add.09 n.4, and even it had been timely, that would be entirely irrelevant to whether her *arbitration demand* was timely.

By its clear terms, the Timeliness Provision states that, "[t]o initiate arbitration," Plaintiff "must submit a written demand for arbitration" by the specified deadline. App.099. The Timeliness Provision does not say that filing a timely *EEOC charge* has anything to do with whether an *arbitration demand* is timely. To the contrary, it expressly provides that "[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.* (emphasis added). Plaintiff's EEOC charge is thus irrelevant to whether her arbitration demand was timely.

This aspect of the Timeliness Provision is enforceable because the Supreme Court has expressly held that parties may agree to arbitrate ADEA claims in lieu of going through the EEOC charge-filing process. *Gilmer*, 500 U.S. at 29. Indeed, since the ADEA provides for a "flexible approach" to resolving claims, the parties are free to rely on "out-of-court dispute resolution, such as arbitration," which "is consistent with the statutory scheme established by Congress." *Id.* This means that parties may agree to filing rules in arbitration that are independent of EEOC charge-filing rules. That is precisely what the parties did here: The arbitration agreement does not require Plaintiff to file any EEOC charge before filing a claim in arbitration, and it provides that the filing of any such charge would not affect the deadline for filing in arbitration. *Supra* p. 31. Accordingly, Plaintiff's filing of an EEOC charge does not remedy her failure to file a timely arbitration demand.

4. The ADEA's limitations period is a waivable, procedural right.

Even setting aside the Timeliness Provision's plain text and *Gilmer*, Plaintiff's argument also fails because it rests on a faulty premise: that the ADEA's limitations period is somehow a "substantive" right that cannot be waived in an arbitration agreement. That is incorrect.

a. As the district court held in *Chandler*, "[t]he substantive right protected by the ADEA [for FAA purposes] is the 'statutory right to be free from workplace age discrimination[.]'" 2022 WL 2473340, at *4 (quoting *14 Penn Plaza*, 556 U.S. at 265); *In Re: IBM*, 2022 WL 2752618, at *7 (same). Significantly, the Supreme Court has "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). The deadline for filing an ADEA claim clearly falls within the realm of *procedural* rules—i.e., where, when, and how a claim must be filed—which is distinct from the *substantive* right to "be free from workplace age discrimination" protected by the ADEA. *14 Penn Plaza*, 556 U.S. at 265.

That conclusion is especially correct in light of this Court's holding that "the ADEA statute of limitations is a procedural, not substantive, right." *In Re: IBM*, 2022 WL 2752618, at *7. 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 offers three responses, but all fail. *First*, she argues that "*14 Penn Plaza* does not declare the right to be free from workplace age discrimination to be the ***only*** substantive right (to the exclusion of all others) provided under the ADEA[.]" Br. 39. But *Estle* forecloses that argument. There, this Court emphasized that, in *14 Penn Plaza*, the Supreme Court "distinguished" the ADEA's substantive "'statutory right

to be free from workplace age discrimination' . . . from procedural rights, like 'the right to seek relief from a court in the first instance.'" *Estle*, 23 F.4th at 214. Plaintiff never even cites *Estle*.

That *Estle* did not involve the ADEA's limitations period is irrelevant. The critical fact is that, under *14 Penn Plaza* as understood by this Court in *Estle*, the substantive right under the ADEA ("the statutory right to be free from workplace age discrimination") is distinct from procedural rights (such as "the right to seek relief from a court in the first instance"). And the ADEA's limitations period falls within the latter category of procedural rights because it is about the secondary issue of how and when a claim must be filed—not about the substantive right to be free from age discrimination. *In Re: IBM*, 2022 WL 2752618, at *7. Parties are free to set their own rules for when, where, and how an ADEA claim must be filed in arbitration, as long as the plaintiff retains a "fair opportunity" to do so. *Gilmer*, 500 U.S. at 31.

Second, rather than address *Vernon* head-on, Plaintiff elsewhere invokes Judge Cabranes's concurrence. Br. 48–49. But his reasoning strongly cuts against her position. Judge Cabranes explained that there is nothing "talismanic" about the labels "substantive" and "procedural";

what matters is that plaintiffs should not have their ADEA claims "cut off" by a filing deadline "without an opportunity to comply with it." *Vernon*, 49 F.3d at 891–92 (Cabranes, J., concurring). That reinforces IBM's point that the Timeliness Provision should be enforced because it gave Plaintiff a "fair opportunity" to file her ADEA claim in arbitration. *Gilmer*, 500 U.S. at 31. And Judge Cabranes's logic also shows why Plaintiff is mistaken to rely on the "talismanic" label of "substantive" rights. What matters is not the superficial label of substance/procedure, but whether the Timeliness Provision somehow deprived Plaintiff of a fair opportunity to assert her claims in arbitration. It did not.

Finally, Plaintiff suggests (Br. 35 & n.21, 39–40, 41) that "*dicta*" in *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010), somehow supports her view that the ADEA's limitations period is a non-waivable, substantive right. Not so. In the *Ragone* dicta, the Court said it was "possible" that shortening the statutory filing period for Title VII claims to 90 days might be "incompatible with [the employee's] ability to pursue her Title VII claims in arbitration[.]" *Id.* at 125–26. But the Court did not suggest that Title VII's filing period is a non-waivable "substantive right." Instead, the Court was referring to the effective-

vindication doctrine discussed above, which requires that the filing deadline cannot be so short that it interferes with the plaintiff's right to "'vindicate its statutory cause of action in the arbitral forum[.]'" *Id.* at 125. That requires only that a filing deadline give plaintiffs "a fair opportunity to present their claims." *Gilmer*, 500 U.S. at 31. And here, that was indisputably true. Indeed, the filing deadline here was not shortened at all; it tracked the ADEA's deadline for filing an EEOC charge. Plaintiff simply has no plausible claim that the ADEA's limitations period is a non-waivable, substantive right.

5. The Sixth Circuit's decision in *Thompson* does not help Plaintiff.

a. Plaintiff's reliance (Br. 36–39) on *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2021), is misplaced. In *Thompson*, the Sixth Circuit held that the ADEA does not allow parties to shorten the express statutory time period for filing a claim *in court* after filing a timely charge of discrimination with the EEOC. But "*Thompson* did not involve an agreement to arbitrate." *In Re: IBM*, 2022 WL 2752618, at *8. As a result, it "had no occasion to consider . . . the arbitration context," where there is no requirement to file an EEOC charge at all. *Id.*; *Chandler*, 2022 WL 2473340, at *6 (*Thompson* did not address "whether under the FAA,

parties may agree in an arbitration agreement to adopt procedures that modify the filing deadline for an ADEA claim in arbitration").

In *Thompson*, the plaintiff filed an EEOC charge within 5 days of being fired, and there was no question that the charge was timely. 985 F.3d at 517–18 & n.3. The state civil-rights agency and the EEOC then spent over a year investigating the charge before the EEOC ultimately dismissed it and issued a right-to-sue letter. *Id.* at 518. The plaintiff then filed suit in court within the 90-day period that the ADEA allows after a right-to-sue letter is issued. *Id.* Nevertheless, the employer argued that the court filing was untimely based on an agreement to file claims within six months of separation. *Id.* at 519. The court rejected that argument, holding that it would improperly require filing suit before the EEOC could fully investigate and seek to resolve a timely charge. The court emphasized "the importance of the pre-suit cooperative process, outlining the EEOC's obligation upon receiving a charge to 'seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.'" *Id.* at 521 (quoting 29 U.S.C. § 626(d)(2)).

Thompson is inapposite here for four reasons. First, although the Sixth Circuit held 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 by 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). *Id.* at 521 & n.5 (quoting 29 U.S.C. § 626(d)(1)(A)). While the Timeliness Provision here does not allow a party to use the "piggybacking" doctrine to file *after* the ordinary EEOC filing deadline expires, *Thompson* did not address that issue.

Second, *Thompson* did not involve arbitration, and its rationale does not apply to arbitration cases. The court 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. *See Gilmer*, 500 U.S. at 29 ("out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress").

Third, 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 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 Congress did not say anything to prohibit the waiver of the EEOC charge-filing process in arbitration—much less do so "clearly."

Fourth, the Sixth Circuit itself has recognized the 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). And as Plaintiff admits, Br. 41–42 & n.25, *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, as Judge Furman put it, "Sixth Circuit precedent *undermines* rather than *supports* Plaintiffs' 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); *Tavenner v. IBM*, No. 21-CV-6345, 2022 WL 4449215, at *8 n.10 (S.D.N.Y. Sept. 23, 2022) (same). Indeed, the Sixth Circuit has actually upheld an arbitration provision that required an ADEA claim to be filed within "180[ ]day[s]," reasoning that the filing deadline was "not unreasonably short"—even if the ADEA would sometimes allow a longer period for filing in court. *Howell v. Rivergate Toyota, Inc.*, 144 F. App'x 475, 480 (6th Cir. 2005). It is thus clear that the Sixth Circuit would enforce an arbitration agreement shortening the filing period for an ADEA claim as long as it provided a fair opportunity to pursue the claim.[1]

[1] Plaintiff's reliance (Br. 36–37) on the EEOC amicus brief in *Thompson* is likewise misplaced. That "amicus brief did not take any position on the question at issue here because, as noted, *Thompson* did not involve an agreement to arbitrate." *In Re: IBM*, 2022 WL 2752618, at *8 n.14. In addition, the brief relied on "the Sixth Circuit's prior decision in *Logan*, which, as discussed, acknowledged that a different conclusion would be warranted in the arbitration context." *Id.*

b. For her part, Plaintiff unsuccessfully tries to slice and dice the Sixth Circuit's case law to avoid its clear foreclosure of her claims. She principally complains (Br. 6, 32) that the Sixth Circuit's distinction between arbitration agreements and other contracts would run afoul of the rule that the FAA "does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). That principle, however, has no bearing here.

To begin, *Morgan* involved a *judge-made* rule that applied a heightened waiver standard to agreements to arbitrate. *See id.* Here, *the parties* adopted the relevant procedural rule—the Timeliness Provision—not *the courts*. There are many procedural rules that parties can adopt in arbitration that they could not adopt if they chose to litigate in court. And the FAA requires courts to enforce such rules. *Supra* Section I.A(1).

Moreover, as explained above, the FAA's enforcement mandate is not the only basis for the distinction the Sixth Circuit drew. Another obvious distinction is that the EEOC's mandatory pre-suit process does not come into play in arbitration because Plaintiff was not required to file an EEOC charge before arbitrating. As noted , the Sixth Circuit emphasized in *Thompson* that altering the statutory filing period for

claims filed in court conflicts with the EEOC pre-suit process and Congress's goal of giving the agency the chance to informally resolve the matter before a suit can be filed *in court*. But that concern does not exist *in arbitration*, where no EEOC charge is required.

Plaintiff also tries to undercut *Morrison* on the ground that, unlike her, "the plaintiff had been able to actually arbitrate her claim on the merits to a final award." Br. 41–42. But the important takeaway from *Morrison* is not whether the plaintiff arbitrated or not; it is that the Sixth Circuit adjudicated the validity of a shortened statutory limitations period based on whether the period was "unduly burdensome[.]" *Logan*, 939 F.3d at 838. In other words, the Sixth Circuit allows shortened statutory limitations periods in arbitration agreements as long as they give plaintiffs enough time to file a claim—and there is no serious question about that here.

6. The OWBPA also does not help Plaintiff.

The foregoing discussion all but resolves Plaintiff's final argument that the Timeliness Provision is invalid because "IBM did not provide the disclosures required under the OWBPA" to obtain such a waiver.[2] Br. 44.

The OWBPA "require[s] an employer to make certain disclosures" before an employee waives his or her rights under the ADEA. *In Re: IBM*, 2022 WL 2752618, at *8 (citing 29 U.S.C. § 626(f)(1)). But the OWBPA disclosure rule "is limited to [waiver of] substantive rights and does not include procedural ones." *Estle*, 23 F.4th at 214. And as discussed above, the ADEA's limitations period "is a procedural, not substantive, right." *In Re: IBM*, 2022 WL 2752618, at *7. As a result, the OWBPA "adds nothing" here. *Id.* at *8; *see also Chandler*, 2022 WL 2473340, at *5 (agreeing this argument is "without merit"); Add.008 (same).

On appeal, Plaintiff raises only two arguments that are largely redundant of her others. First, Plaintiff claims that "the time period to

[2] Plaintiff claims that the Timeliness Provision "also cannot be valid" under the OWBPA because it was not understandable. Br. 46–47 n.28. But since the OWBPA is not implicated here, this claim is beside the point. Moreover, Plaintiff forfeited this claim by failing to raise it below, and the Timeliness Provision was perfectly understandable in any event.

file under the ADEA does constitute a substantive right that triggers the OWBPA requirements." Br. 48 (emphasis omitted). Second, citing Judge Cabranes's concurrence in *Vernon*, Plaintiff argues that the ADEA's limitations period is substantive "for the purposes of determining whether a limitations period may be waived or truncated by contract (as argued herein), or for the purposes of the OWBPA." Br. 49 (emphasis omitted). Both arguments fail for the reasons discussed above, *supra* Section I.A.[3]

B. The Piggybacking Rule Does Not Save Plaintiff.

In a last-ditch effort to avoid affirmance, Plaintiff erroneously claims (Br. 49) that the Timeliness Provision impermissibly waives the judge-made "piggybacking" rule, which she claims is a "substantive" right protected by the ADEA. The Court should reject that argument for three independent reasons.

[3] The same problems doom Plaintiff's attempt to distinguish *Logan* and *Morrison* on the ground that they did not involve "the requirements of the OWBPA[.]" Br. 43. Since the ADEA's limitations period is not a substantive ADEA right, *Estle*, 23 F.4th at 214, the OWBPA is similarly irrelevant here.

First, Plaintiff has waived this argument by attempting to incorporate over 20-pages' worth of arguments from a brief filed by her counsel in an unconsolidated case. Second, even if she had preserved the argument, she fundamentally misunderstands the nature of the piggybacking doctrine. Piggybacking is 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. And third, in all events, Plaintiff could not benefit from piggybacking because she filed her own EEOC charge.

1. Plaintiff has waived her piggybacking argument.

At the outset, the Court need not reach the merits of Plaintiff's piggybacking argument because she has not properly raised it in her own brief but instead seeks to incorporate the argument from a different case.

The Federal Rules authorize a party to "adopt by reference a part of another's brief" in "a case involving more than one appellant or appellee, including consolidated cases[.]" Fed. R. App. P. 28(i). From that text, "it is equally clear that appellants may not incorporate by reference arguments made in briefs from separate cases." *United States v. Johnson*,

127 F. App'x 894, 901 n.4 (7th Cir. 2005) (citing *United States v. Foster*, 789 F.2d 457, 462 (7th Cir. 1986); *United States v. Bichsel*, 156 F.3d 1148, 1150 n.1 (11th Cir. 1998); *United States v. McDougal*, 133 F.3d 1110, 1114 (8th Cir. 1998)). That makes good sense: If an appellant can incorporate by reference arguments from briefs in other (unconsolidated) cases, then that would strip Rule 28(i)—which authorizes incorporation by reference only in the same case and consolidated cases—of any effect.

Yet that is what Plaintiff attempts to do here. Rather than make her own arguments, she directs the Court to the "arguments . . . fleshed out more fully in the plaintiffs' brief in *In Re: IBM* . . . , No. 22-1728 (2d Cir.)[.]" Br. 49–50. But *In Re: IBM* is not the same case as this one, and Plaintiff has expressly *disavowed* any request for consolidation. ECF No. 87 at 2 ("Plaintiffs ***do not*** seek to consolidate their cases").

This is a blatant end run around not only Rule 28(i), but also Local Rule 28.1.1(a), which sets a word limit of 14,000 words for opening briefs. Plaintiff's brief is already 12,799 words long. She should not be able to add 23 more pages through incorporation. Accordingly, the Court should affirm on the ground that Plaintiff has waived her appeal of the district court's dismissal of her challenge. *See Johnson*, 127 F. App'x at 901 n.4.

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

In all events, Plaintiff fundamentally misunderstands the piggybacking rule. She primarily argues that the Timeliness Provision is invalid because it waives the piggybacking rule, which would have allowed her to file ADEA claims in court by piggybacking on EEOC charges filed by other plaintiffs. Br. 26. But no court has ever adopted that view—and numerous courts have rejected it. As Judge Furman and Judge Koeltl recognized, 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; Add.008 (citing *Chandler*, 2022 WL 2473340, at *4). Indeed, since piggybacking is about excusing the requirement to file EEOC charges before filing in court, it is simply irrelevant in arbitration.

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 *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*, 440 F.3d at 564 ("[A]n individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge."). This "underscore[s]" that piggybacking does not extend the statute of limitations for filing an ADEA claim, but only excuses the requirement of filing a charge of discrimination with the EEOC. *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 plaintiffs simply do not need the relief that piggybacking provides—an exception to the ADEA's charge-filing requirement. And a plaintiff who files an untimely arbitration demand is in the same position as one who files 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. 52–53) *Tolliver*'s discussion of the 1978 amendments to the ADEA's charge-filing provision. Those amendments "eliminate[d] the requirement that 'the individual' bringing suit" must have filed a charge, and replaced it with "the more general requirement that 'a charge . . . has been filed.'" *Tolliver*, 918 F.3d at 1056. Quoting a Senate report, this Court said that "Congress pointed out that '[f]ailure to timely file the notice . . . [was] the most common basis for dismissal of ADEA lawsuits by private individuals,'" and thus, "the purpose of the amendment was 'to make it more likely that the courts will reach the merits of the cases of aggrieved individuals[.]'" *Id.* From there, Plaintiff concludes that "this Court acknowledged that

piggybacking is baked into the language of the statutory provision of the ADEA that functions like a statute of limitations." Br. 53.

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*." 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—and that is this case. Indeed, "the statutory provision" containing the charge filing obligation—which this Court discussed and Plaintiff emphasizes so heavily—is completely irrelevant in this case.

Plaintiff similarly argues that, as the Court reasoned, piggybacking serves 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. 54. But that proves *IBM's* point. *Gilmer* held that arbitration can substitute for 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. For that reason alone, Plaintiff's challenge to the Timeliness Provision fails.[4]

3. Even if the piggybacking rule were relevant, Plaintiff could not invoke it.

Finally, as the district court held, Plaintiff's piggybacking argument also fails because she could not properly invoke piggybacking even if she were able to litigate in court. *See* Add.011. As explained above, this Court has held that "[a]n individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge." *See Holowecki*, 440 F.3d at 564. Accordingly, even if Plaintiff "had not been bound by the Agreement and the Timing Provision, she would not have been able to piggyback from earlier-filed EEOC charges had she filed an action in federal court." Add.011–12.

[4] To the extent the Court allows Plaintiff to incorporate by reference the "more fully" "fleshed out" piggybacking arguments laid out in *In Re: IBM*, No. 22-1728 (2d Cir.), Br. 49, they fail for the reasons laid out in IBM's briefing in that litigation and above. In short, the Timeliness Provision gave Plaintiff a fair opportunity to vindicate her claims, *supra* Section I.A(1), (2), the ADEA's non-substantive limitations period can be waived, *supra* Section I.A(4), and neither OWBPA nor the Sixth Circuit's jurisprudence aids Plaintiff, *supra* Section I.A(5), (6).

On appeal, Plaintiff claims that *Holowecki* bars only plaintiffs who filed their own timely EEOC charge, but then failed to file a timely claim in court within the 90-day deadline triggered by receipt of a right-to-sue notice. Br. 50–51. But that distinction is irrelevant and not supported by the case law. By its own terms, the *Holowecki* rule is that a plaintiff is "'bound by the parameters of his own EEOC charge,'" regardless of whether that charge is timely. 440 F.3d at 565; *see also Rusis*, 529 F. Supp. 3d at 203 (rejecting this argument and noting that "[t]he Second Circuit has never qualified that unequivocal holding to apply only to certain situations, and it is consistent with the holdings of sister circuits"). Plaintiff thus cannot overcome the fact that she would not be eligible to invoke the piggybacking rule even if it were relevant here.

* * *

The district court correctly held that the Timeliness Provision is enforceable. The Court should affirm.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE CHALLENGE TO THE CONFIDENTIALITY PROVISION

Because Plaintiff's ADEA claims are untimely, the Court can affirm the dismissal of her challenge to the Confidentiality Provision as "moot." Add.012 n.6. Since Plaintiff's ADEA claims are time-barred, the

confidentiality issue makes no difference to her. Accordingly, this Court should affirm the district court's mootness finding.

If the Court were inclined to consider Plaintiff's challenge to the Confidentiality Provision, 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 held that the Confidentiality Provision is enforceable.

First, Plaintiff has waived her appeal of the district court's ruling on 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. But Plaintiff's disregard for that rule here is even more dramatic than her earlier efforts.

Specifically, Plaintiff acknowledges that the district court's decision rejecting her challenge to the Confidentiality Provision expressly rested on the court's "reasoning from *Chandler*[.]" Br. 55. But instead of refuting that reasoning in her own brief, Plaintiff "directs the Court to the plaintiff's Opening Brief in *Chandler*, No. 22-1733 (2d Cir.)." *Id.*

Chandler is not the same case as this one, and again, Plaintiff has expressly disavowed any attempt to consolidate the cases. In addition, by attempting to incorporate the *Chandler* brief, Plaintiff effectively bought herself an extra 28 pages, *see* Opening Brief at 33–61, *Chandler*, No. 22-1733 (2d Cir.), ECF No. 55 (addressing challenge to Confidentiality Provision)—on top of the 23 pages she already incorporated from *In Re: IBM* for her piggybacking argument—even though her opening brief already contained 12,799 words, Br. 67. Not only that, but she also bought her counsel an extra 19 days to draft a response on the Confidentiality Provision, given that her counsel filed the *Chandler* opening brief on October 31—19 days after filing Plaintiff's opening brief on October 12.

Here too, therefore, 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 dismissed Plaintiff's challenge. IBM will include a more-detailed discussion in response to the properly presented argument in

Chandler, but the key points from the district court's decision—as incorporated from *Chandler*—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 in the court below, Plaintiff 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.*[5]

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

[5] Relying on *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010), Plaintiff hints that the district court was wrong to consider procedural unconscionability because she is "not challenging the agreement as a whole" but only two "provisions." Br. 2–3 & n.3. But *Ragone* recognized that "there must be a showing that . . . a contract is both procedurally and substantially unconscionable." 595 F.3d at 121–22. It is only in "'exceptional cases'" that a provision can be "'so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.'" *Id.* Thus, to strike down any provision as unconscionable, the court must find that the provision is either 1) both procedurally and substantively unconscionable or 2) "'exceptional'" and "'outrageous,'" i.e., "one which by itself would actually preclude a plaintiff from pursuing her statutory rights." *Id.* at 122, 124–25. Plaintiff did not allege procedural unconscionability, nor did she claim the Confidentiality Provision is "exceptional" or "outrageous." Nor could she, as confidentiality is a "paradigmatic aspect of arbitration," and is "so common in the arbitration context" that an "'attack on [a] confidentiality provision is, in part, an attack on the character of arbitration itself.'" *Guyden v. Aetna Inc.*, 544 F.3d 376, 385 (2d Cir. 2008).

the confidentiality provision 'are not one-sided'" but apply to both parties. *Id.* In addition, as the district court emphasized, 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.* The district court thus rightly found Plaintiff's arguments "without merit" and held that there was "no basis on which to conclude that the Confidentiality Provision is unenforceable." *Id.* at *7–8.

The district court's decision was plainly correct, especially in light of this Court's own precedent upholding a 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 forthcoming response brief in *Chandler*, the Court should affirm.

III. IN THE ALTERNATIVE, DISMISSAL WAS PROPER BECAUSE PLAINTIFF'S COMPLAINT IS AN UNTIMELY ATTEMPT TO VACATE THE ARBITRATION AWARD.

Although the Court need not reach this issue—and the district court did not because dismissal was proper for the reasons outlined above, Add.013 n.7—dismissal was independently warranted because Plaintiff's complaint is an untimely attempt to vacate 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 under a declaratory-judgment flag. Accordingly, 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 Cyber Imaging Sys., Inc. v. Eyelation, Inc.*, No. 14-CV-901, 2015 WL 12851390, at *2 (E.D.N.C. Nov. 4, 2015) ("[T]he Court will construe defendant's declaratory[-]judgment action as a motion to correct the arbitration award pursuant to 9 U.S.C. § 11(c)."); *see Stedman v. Great Am. Ins. Co.*, No. 06-CV-101, 2007 WL 1040367, at *7 (D.N.D. Apr. 3, 2007) (rejecting

declaratory-judgment claim as untimely because it "does nothing more than raise defenses to the arbitration award that could have been raised in a timely motion to vacate").

Here, Plaintiff's request for declaratory relief must be construed as a motion to vacate because it is clearly an attack on the arbitration award that rejected her ADEA claim. As her complaint admits, she "attempt[ed] to pursue a claim of discrimination under the ADEA in arbitration." *See* Compl. ¶ 12 (App.004). The arbitrator rejected the claims as time-barred because the arbitration agreement requires any claim to be filed within 300 (or 180) days. Compl. ¶¶ 15, 19, 21 (App.005–7). In this litigation, however, Plaintiff now asks for a declaration that the Timeliness Provision and the Confidentiality Provision are "unenforceable," so that Plaintiff may "obtain[] relief under the ADEA in arbitration." Compl. ¶ 2 (App.002); Compl. ¶ 26 (App.009). Plaintiff's explicit goal, therefore, is to undo the arbitration award that she lost. As a result, her complaint must be construed as a motion to vacate or modify the award.

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. *See, e.g.*, *Stedman*, 2007 WL 1040367, at *8 (dismissing claim because "[i]t is now too late . . . to attack the decision of the arbitrator and the arbitration award through an untimely motion to vacate").

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

Finally, the district court did not abuse its discretion in rejecting Plaintiff's request to unseal the confidential arbitration materials that Plaintiff attached to her moot summary-judgment briefing. Because the court granted IBM's motion to dismiss, these materials never became judicial documents subject to a presumption of public access. Moreover, even if such a presumption existed, it would be easily overcome since the documents played no role in the disposition of the case.[6]

[6] Plaintiff again improperly tries to incorporate arguments from *Chandler*, Br. 58 n.34, 64, which the Rules do not allow, *supra* pp. 46–47.

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.* (quoting *Amodeo I*, 44 F.3d at 145).

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

If the documents in question are judicial documents, a court "must determine the weight of [the] presumption [of access]." *Lugosch*, 435 F.3d at 119. The weight of that presumption is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). In general, "the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049).

Finally, "after determining the weight of the presumption of access, the court must 'balance competing considerations against it.'" *Id.* (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. As Judge Furman outlined in materially identical circumstances, 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 then consequently 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 her summary-judgment briefing, *In Re: IBM*, 2022 WL 3043220, at *2: those documents were outside of the pleadings and irrelevant at the motion-to-dismiss stage. *Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 621 F. Supp. 2d 55, 66 (S.D.N.Y. 2007). 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."

In Re: IBM, 2022 WL 3043220, at *2; *Standard Inv. Chartered, Inc.*, 621 F. Supp. 2d at 66.

Even if the materials were judicial documents, "they would be subject to only a weak presumption of public access" given that they played no role in the district court's exercise of the judicial function. *In Re: IBM*, 2022 WL 3043220, at *2. As discussed above, the weight of the 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.'" *Lugosch*, 435 F.3d at 119. But, as just explained, the summary-judgment materials played *no role* in the district court's 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.* For that basic reason, the weight of any presumption of public access would be virtually non-existent.

That "weak" presumption would be easily overcome by "strong 'competing considerations'" on "the other side of the scale[.]" *In Re: IBM*, 2022 WL 3043220, at *2 (quoting *Lugosch*, 435 F.3d at 120). "Most notably, pursuant to the [FAA], 'courts must rigorously enforce

arbitration agreements,' including confidentiality provisions, 'according to their terms.'" *Id*. That mandate is especially important where arbitral confidentiality is at issue. As this Court has emphasized, "confidentiality is a paradigmatic aspect of arbitration," and an "'attack on [a] confidentiality provision is, in part, an attack on the character of arbitration itself.'" *Guyden*, 544 F.3d at 385. Unsealing the materials in this case, therefore, would run contrary to the FAA's mandate. Indeed, if the FAA means anything, it must mean that arbitral confidentiality carries the day when nothing lies on the other side of the public access scale in the "'balance [of] competing considerations.'" *Lugosch*, 435 F.3d at 120.

Even putting aside the FAA, construing the public access doctrine to require unsealing in these cases would be "perverse" and "absurd." *In Re: IBM*, 2022 WL 3043220, at *2, *3. The very point of Plaintiff's lawsuit is to challenge the Confidentiality Provision that covers the materials at issue. To order unsealing, therefore, "would be to grant Plaintiff[] the relief [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. In other words, unsealing would sanction precisely the sort of "[u]nscrupulous" "weaponiz[ation]" of "[o]ur legal process" that this Court has decried. *Brown*, 929 F.3d at 47.

B. Plaintiff's Counterarguments Fail.

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

1. Plaintiff argues that "[t]he public's right of access attached the moment that Plaintiff[] filed [her] summary judgment motion in court." Br. 64 n.37 (citing *Lugosch*, 435 F.3d at 123). But *Lugosch* "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." *In Re: IBM*, 2022 WL 3043220, at *3. To the contrary, 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.

2. Plaintiff also claims that "the mere fact of including a confidentiality provision [in an] arbitration agreement" is not a "meaningful countervailing interest" that can displace the presumption of public access. Br. 64 n.37 (citing *Lugosch*, 435 F.3d at 126). But Plaintiff's reliance on *Lugosch* is misplaced, as that case did not involve an arbitral confidentiality provision or the FAA. The Court in *Lugosch* also acknowledged that "particular circumstances surrounding" a confidentiality order could outweigh a presumption of public access. *See Lugosch*, 435 F.3d at 126. The unique "particular circumstances" here—including Plaintiff's direct challenge to the Confidentiality Provision, the FAA's mandate that courts rigorously enforce arbitration agreements,

and the fact that the confidential materials are not even Plaintiff's, *see* Br. 7—easily combine to displace any negligible presumption.

3. Plaintiff also urges (Br. 59 n.35) the Court to follow *Lohnn v. IBM*, No. 21-cv-6379, 2022 WL 36420 (S.D.N.Y. Jan. 4, 2022). But *Lohnn* is mistaken, as the Judge Furman carefully explained. For example, *Lohnn* misread *Lugosch* to "hold that summary judgment papers are automatically judicial documents." *In Re: IBM*, 2022 WL 3043220, at *3. Similarly, *Lohnn* failed to consider that its decision "would create its own perverse incentives[,]" such as permitting plaintiffs to win their challenge against a confidentiality provision simply by filing it. *Id.*

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

not consider, the confidential materials—and thus, they were irrelevant to the district court's dismissal of the case.[7]

4. Finally, Plaintiff attacks the district court's sealing on the grounds that the district court should have adjudicated the sealing issue sooner and did not say enough. Br. 62. Plaintiff is wrong.

As for timing, this is a moot point. Even if (hypothetically) the district court should have deciding the sealing issue before adjudicating IBM's motion to dismiss, the remedy for that error would not be to automatically unseal the confidential materials—particularly given that it is now clear that the district did not (and could not) consider the materials, *and* that Plaintiff's challenge to the Confidentiality Provision *failed* on the face of her complaint. In addition, the district court did not delay in adjudicating the merits and sealing issues—only seven-and-a-half months transpired from the time Plaintiff filed her summary-

[7] Nor can Plaintiffs get any mileage out of this Court's decision to deny a stay pending appeal in *Lohnn*. *See* Br. 9 n.10 (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.

judgment motion (November 19, 2021) until the district court issued its final order (July 11, 2022). *Cf. Lugosch*, 435 F.3d at 117 (no decision despite 18-month delay). Finally, the district court was exactly right to defer the sealing issue until judgment on the dispositive motions because the propriety of unsealing was the very relief Plaintiff sought in her challenge to the Confidentiality Provision. As Judge Furman observed, it would have been perverse and absurd to prematurely give Plaintiff the relief she requested.

Nor is there any merit to Plaintiff's complaint that the district court should have further explained its decision to keep the confidential materials sealed. The district court's reasoning—incorporated by reference to *Chandler*—was plain and simple: "Because the Confidentiality Provision is enforceable, the outstanding sealing requests . . . are granted." 2022 WL 2473340, at *8. To again use Judge Furman's terms, it would be perverse and absurd to give Plaintiff the relief she requested *even though she lost her challenge*. There is nothing more to

that commonsense conclusion that the district court needed to say or that this Court's precedents require.[8]

CONCLUSION

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

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

Dated: November 16, 2022

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 13,923 words, as determined by the word-count function of Microsoft Word 2016.

Dated: November 16, 2022

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

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2022, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

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: November 16, 2022

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