No. 23-

IN THE

Supreme Court of the United States

GREGORY ABELAR *et al.*,

Petitioners,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this Petition is whether an arbitration agreement can be used to bar an employee from pursuing a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, when that employee would have been able to pursue that claim in court.

The ADEA includes a comprehensive timing scheme setting forth the time individuals have to file a charge of discrimination. 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). Under that scheme, individuals have either 180 or 300 days to file a charge first with the Equal Employment Opportunity Commission ("EEOC"), after which they may proceed in court. However, if similar charges of discrimination have already been filed with the EEOC, an individual need not meet this time limit but instead can file a claim in court much later (even years later, after learning that he or she may have been the victim of discrimination, based upon an EEOC investigation or claims brought forward by other employees).

The Second Circuit below erroneously held that an arbitration agreement can undermine this scheme, thus preventing employees from pursuing claims of age discrimination that would have been timely in court.

In so holding, the Second Circuit diverged from the Sixth Circuit, which has held that the comprehensive timing scheme for asserting an ADEA claim before the EEOC and in court is a substantive right that cannot be waived by contract. *See Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021). In contrast,

the Second Circuit held that this timing scheme is a procedural right that can be waived. The Second Circuit's conclusion violates this Court's pronouncement in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) , that arbitration is an acceptable alternative to court action so long as an employee can pursue claims in arbitration that could have been pursued in court.

Petitioners thus ask the Court to correct the Second Circuit's erroneous conclusion that an arbitration agreement can take away a right to pursue an age discrimination claim that could have been pursued in court and thereby resolve this significant circuit split.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Gregory Abelar, William Abt, Brian Brown, Brian Burgoyne, Mark Carlton, William Chastka, Phillip Corbett, Denise Cote, Michael Davis, Mario DiFelice, Joseph Duffin, Brian Flannery, Fred Gianniny, Om Goeckermann, Mark Guerinot, Deborah Kamienski, Douglas Lee, Colleen Leigh, Stephen Mandel, Mark McHugh, Sandy Plotzker, Alexander Saldarriaga, Richard Ulnick, Mark Vornhagen, James Warren, Dean Wilson, Patricia Lodi, Deborah Tavenner, and William Chandler were the plaintiffs in the district court cases at issue in this Petition and the appellants in the court of appeals.

Respondent International Business Machines Corp. ("IBM") was the defendants in the district court cases and the appellees in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings[1]:

- *In Re: IBM Arbitration Agreement Litig.*, Civ. Act. No. 1:21-cv-06296-JMF (S.D.N.Y.) (judgment entered July 14, 2022)[2]

- *Lodi v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06336-JGK (S.D.N.Y.) (judgment entered July 11, 2022)

- *Tavenner v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06345-KMK (S.D.N.Y.) (judgment entered Sept. 23, 2022)

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1. The four appeals at issue in this Petition for Writ of Certiorari are *In Re: IBM Arbitration Agreement Litig.*, No. 22-1728 (2d Cir.) (a consolidation of twenty-six cases), *Lodi v. International Business Machines Corp.*, No. 22-1737 (2d Cir.) , *Tavenner v. International Business Machines Corp.*, No. 22-2318 (2d Cir.), and *Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.). Because these appeals raised closely related issues, the Second Circuit opted to hear argument in the appeals in tandem. As such, Petitioners submit a single Petition pursuant to S. Ct. R. 12.4.

2. Twenty-six (26) cases before the United States District Court for the Southern District of New York were consolidated into *In Re: IBM Arbitration Agreement Litig.*, including the following case numbers: 21-cv-6296; 21-cv-6297; 21-cv-6308; 21-cv-6310; 21-cv-6312; 21-cv-6314; 21-cv-6320; 21-cv-6322; 21-cv-6323; 21-cv-6325; 21-cv-6326; 21-cv-6331; 21-cv-6332; 21-cv-6337; 21-cv-6340; 21-cv-6341; 21-cv-6344; 21-cv-6349; 21-cv-6351; 21-cv-6353; 21-cv-6355; 21-cv-6375; 21-cv-6377; 21-cv-6380; and 21-cv-6384.

- *Chandler v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06319-JGK (S.D.N.Y.) (judgment entered July 6, 2022)

- *In Re: IBM Arbitration Agreement Litigation*, No. 22-1728 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Lodi v. International Business Machines Corp.*, No. 22-1737 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Tavenner v. International Business Machines Corp.*, No. 22-2318 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Sept. 22, 2023)

- *Chandler v. International Business Machines Corp.*, No. 22-1733 (2d Cir.) (judgment entered Aug. 4, 2023, petition for reh'g *en banc* denied Oct. 12, 2023)

There are no other related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

This case involves issues of exceptional importance concerning the interplay between the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.* , and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* The Second Circuit's opinion in this matter permits employers to undermine employees' ability to pursue ADEA claims in arbitration that they could have pursued in court, running afoul of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Petitioners in this matter are twenty-nine (29) former IBM employees, who sought declaratory judgments pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, that the timing provision in their arbitration agreements with IBM is unenforceable because it effectively extinguished their ability to arbitrate their age discrimination claims against IBM (without meeting the statutory requirements for a waiver of their ADEA claims, as set forth in the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f)).[1]

Upon their terminations, Petitioners entered into arbitration agreements with IBM that released (in exchange for a small severance payment) almost all claims they may have against IBM, but expressly excluded claims under the ADEA. Under this agreement, these employees were permitted to pursue ADEA claims against IBM, but

1. The OWBPA requires specific disclosures in order for an employer to obtain a waiver of ADEA claims. This Court has made clear that this disclosure requirement is strict. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) .

only through individual arbitrations. However, Petitioners were ultimately blocked from pursuing their claims in arbitration based upon IBM's argument that their claims were untimely in arbitration.

Although Petitioners would have been timely to pursue their claims in court, they were unable to do so in arbitration due to the timing provision in IBM's arbitration agreement. Petitioners thus sought below declarations that this provision is unenforceable. *See Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125-26 (2d Cir. 2010) ("[T]he appropriate remedy when a court is faced with a plainly unconscionable provision of an arbitration agreement – one which by itself would actually preclude a plaintiff from pursuing her statutory rights – is to sever the improper provision of the arbitration agreement, rather than void the entire agreement."). The district courts and the Second Circuit rejected Petitioners' arguments for such declarations and agreed with IBM's argument that the arbitration agreement could eliminate their claims.

This matter raises a particularly important question, in light of the growing proliferation of arbitration agreements in recent years, as caselaw has expanded their use by employers. This Court's foundational ruling in *Gilmer* established that arbitration is an acceptable alternative to court proceedings for discrimination claims (in that case, particularly, as here, an age discrimination claim under the ADEA), only so long as an employee can actually pursue the claim in arbitration. *See Gilmer*, 500 U.S. at 28 (upholding arbitration as an alternative to court only "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the

arbitral forum . . . ."). The Second Circuit's ruling provides a clear roadmap for employers to avoid the mandate of *Gilmer* – and write arbitration agreements that effectively insulate them from having to defend against claims of discrimination altogether.

Here, Petitioners could have pursued their claims in court (absent their arbitration agreements), as their claims clearly would have been timely, but they were barred from pursuing their claims in arbitration. They were thus not able to effectively vindicate their rights under the ADEA in arbitration.[2]

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2. IBM argues that the employees could have pursued their claims in arbitration if they had only brought their claims sooner. This argument overlooks the fact that the timing scheme set forth in the ADEA, and as developed through the courts, recognizes that employees will often not know that they may have been victims of discrimination until much later than the 180/300 day limitations period – until they learn of an EEOC investigation or other employees pursuing similar claims. This timing scheme in court serves the reasonable function of not encouraging employees to file discrimination claims as soon as they are terminated or laid off without knowing, or having reason to know, that their terminations were the result of discrimination. Eliminating this rule would open the floodgates, requiring employees to file such claims immediately, before they have had time to do much if any investigation – and could place increased burdens on the courts, as well as the EEOC, to process such claims.

IBM's argument, and the Second Circuit's decision below, adopts such a result – but for arbitration only, not court actions. This Court has often made clear, most recently in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) , that arbitration contracts are not any more enforceable than any other contracts. A rule that could not be upheld in court cannot be upheld through use of an arbitration agreement.

What is more, the Second Circuit's decision created a clear circuit split with the Sixth Circuit. In *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021), the Sixth Circuit held that the ADEA's limitations period is a ***substantive*** right that cannot be abridged by contract. *Thompson* reached its conclusion following the interpretive expertise of the EEOC, which took this position in an amicus brief.[3] The Second Circuit, on the other hand, held in this matter that the ADEA's limitations period is a mere ***procedural*** right that can be waived.

The practical import of the substantive/procedural split between the Sixth Circuit and the Second Circuit is not only that substantive rights cannot be waived by contract while procedural rights can. It is also that substantive rights trigger the additional protections from waiver under a federal statute, the OWBPA,[4] whereas procedural rights do not. *See Estle v. International Business Machines Corp.*, 23 F.4th 210, 214 (2d Cir. 2022). IBM used its arbitration agreement to obtain a waiver of rights under the ADEA, without providing Petitioners with disclosures required by the OWBPA in order to obtain such a waiver (and IBM expressly informed the employees that they could still bring claims under the

3. The EEOC's amicus brief can be found at *Thompson v. Fresh Products, LLC*, EEOC Amicus brief Brief, 2020 WL 1160190, at *19-23 (6th Cir. March 2, 2020) .

4. The OWBPA requires employers to provide employees over the age of 40 and subject to mass layoffs the ages of employees who were and were not laid off, to give the employees some indication whether they may have been a victim of age discrimination. As noted these disclosures are required in order for an employer to obtain a valid waiver of rights under the ADEA. *See Oubre*, 522 U.S. at 427 .

ADEA in arbitration, by excluding the ADEA from the release). Under *Thompson*, the ADEA's limitations period is substantive, and it cannot be waived through an arbitration agreement (particularly where the OWBPA would not allow such a waiver). However, the Second Circuit held that the limitations period was a procedural right, which could be waived (and the OWBPA could be ignored).

The Second Circuit spent two sentences dismissing *Thompson*, reasoning that *Thompson* did not concern the arbitration context. App. 15a. In drawing this distinction, the Second Circuit ran headlong into this Court's pronouncement in *Morgan*, 142 S. Ct. at 1713 , that courts cannot create special rules to hold arbitration agreements enforceable when other kinds of contracts would not be.

The Second Circuit's decision stands to impact not only Petitioners in this case, but also hundreds of former IBM employees who find themselves in the same position as Petitioners, as well as countless employees who will unquestionably have their rights stripped from them if the Second Circuit's decision is allowed to stand. The Court should grant *certiorari* to curb this misuse of arbitration agreements by employers to extinguish statutory rights through arbitration and to resolve this significant split between the Sixth and Second Circuits.

OPINIONS BELOW

The Second Circuit's opinion in *In Re: IBM Arbitration Agreement Litig.*, is reported at 76 F.4th 74 (2d Cir. 2023), and reproduced at App. 1a. The Second Circuit's opinion in *Lodi*, 2023 WL 4983125 (2d Cir. Aug. 4, 2023),

is reproduced at App. 23a. The Second Circuit's opinion in *Tavenner*, 2023 WL 4984758 (2d Cir. Aug. 4, 2023), is reproduced at App. 25a. The Second Circuit's opinion in *Chandler*, 2023 WL 4987407 (2d Cir. Aug. 4, 2023), is reproduced at App. 27a.

The district court's opinion and order in *In Re: IBM Arbitration Agreement Litig.*, 2022 WL 2752618 (S.D.N.Y. July 14, 2022), is reproduced at App. 29a. The district court's memorandum opinion and order in *Lodi*, 2022 WL 2669199 (S.D.N.Y. July 11, 2022), is reproduced at App. 64a. The district court's opinion and order in *Tavenner*, 2022 WL 4449215 (S.D.N.Y. Sept. 23, 2022), is reproduced at App. 79a. The district court's opinion in *Chandler*, 2022 WL 2473340 (S.D.N.Y. July 6, 2022), is reproduced at App. 126a.

JURISDICTION

The Second Circuit issued its opinions and judgments in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, *Tavenner*, and *Chandler*, on August 4, 2023. App. 1a, 23a, 25a, 27a. It denied Petitioners' timely petitions for rehearing *en banc* in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, and *Tavenner* on September 22, 2023, App. 126a, 128a, 130a, and in *Chandler* on October 12, 2023. App. 132a. On December 15, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to January 22, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 626 of the Age Discrimination in Employment Act, 29 U.S.C. § 626, reproduced at App. 134a.

STATEMENT

I. Statutory Background

A. The ADEA's Limitations Period

Pursuant to the ADEA, individuals are required to file a charge with the EEOC within 300 days of the date of the alleged discriminatory act (or within 180 days in non-deferral jurisdictions[5]). 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. §§ 626(d), 633(b). After a charge has been filed, the EEOC commences an investigation, and the plaintiff may initiate a lawsuit after at least sixty (60) days have passed from the filing of the charge. *See Holowecki v. Federal Exp. Corp.*, 440 F.3d 558, 562 (2d Cir. 2006); 29 U.S.C. § 626(d). If, after investigating the charge, the EEOC issues a notice of right to sue to the plaintiff, the plaintiff must file his or her lawsuit within 90 days of the receipt of the letter. *See Holowecki*, 440 F.3d at 563; 29 U.S.C. § 626(e).

The statutory period to file an EEOC charge alleging age discrimination can be tolled by the filing of a classwide

5. The non-deferral jurisdictions are Alabama, Arkansas, Georgia, Mississippi, and North Carolina, as well as the territories American Samoa, Guam, Wake Island, and the Commonwealth of the Northern Mariana Islands. *See* Individual Field Office Webpages, *available at http://www.eeoc.gov/field/*.

EEOC charge (or an EEOC charge that can reasonably be understood to state a claim of discrimination that would affect other similarly situated individuals) under a rule referred to as the "piggybacking" or "single filing" rule. The piggybacking rule permits individuals to assert ADEA claims against employers in court even if their claims are brought outside the time limit to file an EEOC charge (180 or 300 days). Under the rule, a plaintiff can "piggyback" off of an earlier, timely-filed EEOC charge alleging that the employer engaged in a similar course of discrimination. *See Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057-59 (2d Cir. 1990). "Thus, a plaintiff who has never filed an EEOC charge, and therefore has never given notice of her discrimination complaint to either the employer or the EEOC, can still litigate her claims so long as they fall 'within the scope' of the timely filed claims." *Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *3 (S.D.N.Y. Sept. 17, 2008).[6] An important reason for the piggybacking rule is that employees may not realize they have a discrimination claim at the time of their termination, but only later, when they find out that a class charge of discrimination has been filed, or that the EEOC has investigated their employer for discrimination, they may then want to pursue a claim. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996). Without this rule, employees would be required or at least incentivized to bring claims quickly, without knowing if they have any

6. The administrative prerequisites of discrimination statutes such as the ADEA and Title VII "must be interpreted liberally to effectuate [their] purpose of eradicating employment discrimination," and courts must look to "fairness, and not excessive technicality" in addressing such issues. *Cronas v. Willis Group Holdings Ltd.*, 2007 WL 2739769, at *2 (S.D.N.Y. Sept. 17, 2007).

real basis for such a claim. This rule therefore ameliorates inefficiency and administrative burden resulting from unnecessary filings, both at the EEOC and in the courts. *See id.*

Importantly, an employee may initiate a separate, individual action by piggybacking off charges filed by employees in a separate action. *Tolliver*, 918 F.2d at 1057 ("[t]he purpose of the charge filing requirement is fully served by an administrative claim that alerts the EEOC to the nature and scope of the grievance, regardless of whether those with a similar grievance elect to join a preexisting suit **or initiate their own.**"); *see also Calloway v. Partners Nat. Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993).[7]

Both the Sixth Circuit and the EEOC have taken the position that the ADEA's limitations period is a substantive right that cannot be abridged by contract. *See Thompson*, 985 F.3d at 521; *Thompson*, EEOC Amicus Brief, 2020 WL 1160190, at *19-23. Relying on the EEOC's expertise, the Sixth Circuit held that an employer cannot contractually shorten the limitations period of the ADEA because the timing provisions contained in the ADEA "are part of the **substantive law** of the cause of action created by the ADEA." *Thompson*, 985 F.3d at 521.

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7. The Second Circuit's decision in *Tolliver* to apply the piggybacking rule to the ADEA context and individual actions is in line with sister Circuit Court precedents. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1103 (11th Cir. 1996); *Howlett v. Holiday Inns, Inc.,* 49 F.3d 189, 194 (6th Cir. 1995); *cf. Anson v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 962 F.2d 539, 541 (5th Cir. 1992).

The Sixth Circuit noted that application of the rule against enforcing contractual limitations on the ADEA time period furthers the underlying purpose of the notice provision: "[T]he ADEA emphasizes 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.'" 29 U.S.C. § 626(d)(2). Altering the time limitations surrounding these processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Id.* at 521.[8]

B. The Older Workers' Benefits Protection Act

The ADEA includes a provision called the Older Workers' Benefits Protection Act ("OWBPA"), 29 U.S.C. § 626(f). The OWBPA mandates strict requirements that employers must meet in order to obtain a valid waiver from an employee of "any right or claim" under the ADEA. *See* 29 U.S.C. § 626 (f)(1)(H); 29 C.F.R. § 1625.22(f); *see*

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8. The EEOC submitted an amicus brief in *Thompson*, also taking the position that "the ADEA's statutory limitations period is a substantive right and prospective waivers of its limitations period are unenforceable." *See Thompson*, EEOC Brief, 2020 WL 1160190, at *19-23. The EEOC's reasonable interpretation of the ADEA as set forth in this amicus is entitled to deference. *See EEOC v. Comm. Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("[I] t is axiomatic that the EEOC's interpretation of [the ADEA], for which it has primary enforcement responsibility, need . . . only be reasonable to be entitled to deference."); *see also Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)); *Jones v. American Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999).

also Oubre, 522 U.S. at 427.[9] In order for such a waiver to be valid, it must be "knowing and voluntary." 29 U.S.C. § 626(f)(1).

The OWBPA includes a disclosure requirement, stating that "if a waiver is requested in connection with . . . [a]n employment termination program offered to a group or class of employees" the employer must provide disclosures to the employee of:

> (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
>
> (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

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9. The OWBPA's requirements have been enforced strictly. *See, e.g.*, *Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090, 1093-96 (10th Cir. 2006) (finding waiver invalid where OWBPA disclosures did not include entire decisional unit); *Loksen v. Columbia Univ.*, 2013 WL 5549780, at *7-8 (S.D.N.Y. Oct. 14, 2013) (finding substantial compliance not enough; omission of even one person from group of 17 considered, although probably immaterial, invalidated waiver); *Butcher v. Gerber Prods. Co.,* 8 F. Supp. 2d 307, 314 (S.D.N.Y. 1998) (holding that releases that did not contain all the elements listed in 29 U.S.C.S. § 626(f)(1)(A)-(H) of the OWBPA, were invalid and because employers were required to comply with the OWBPA upon their first notification to employees, their later correspondence could not cure the earlier deficiencies).

29 U.S.C. § 626(f)(1)(H).[10]

The OWBPA was enacted out of Congress' concern that employers would obtain waivers from employees of their rights under the ADEA without ever knowing that they had a potential claim for age discrimination. 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.

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10. Moreover, the arbitration agreement's purported waiver of the piggybacking is further invalid because OWBPA requires that, for a waiver to be valid, it must be "a part of an agreement between the individual and the employer that is **calculated to be understood by such individual, or by the average individual eligible to participate.**" 29 U.S.C. § 626(f)(1(A) (emphasis added). The OWBPA's requirement that the language of the waiver be calculated to be understood by the employee has been strictly construed by numerous courts, including against IBM. *See Syverson v. International Business Machines Corp.,*472 F.3d 1072, 1082-87 (9th Cir. 2007) (invalidating a waiver containing both a release and a covenant not to sue because average individuals might be confused and think that they could still bring an action under the ADEA); *Thomforde v. International Business Machines Corp.*, 406 F.3d 500, 503-05 (8th Cir. 2005) (same); *Bogacz v. MTD Products, Inc.,* 694 F. Supp. 2d 400, 404-11 (W.D. Pa. 2010); *Rupert v. PPG Industries, Inc.,* 2009 WL 596014, at *38-49 (W.D. Pa. Feb. 26, 2009); *see also* 29 C.F.R. § 1625.22(b)(3) (2005) (comprehensibility requirement "usually will require the limitation or elimination of technical jargon and of long, complex sentences.").

II. Factual and Procedural Background

Petitioners are twenty-nine (29) former employees of IBM, who sought declaratory judgments that two provisions of IBM's arbitration agreement are not enforceable (the timeliness provision at issue here and a confidentiality provision[11]), as they undermine or extinguish their ability to pursue ADEA claims against IBM.[12] (App. 1a-4a, 24a, 26a, 28a; *In Re: IBM* Appellants' Second Circuit Appendix (hereinafter "*In Re: IBM* App.") at App.001-010.[13]) As will be explained below, even though Petitioners would have been timely in pursuing their ADEA claims in court, they were barred from pursuing those claims in arbitration by virtue of the arbitration agreement's timeliness provision. (*In Re: IBM* App.001-010.)

A. Petitioners' Arbitration Agreements

Petitioners alleged that IBM engaged in a systemic, years-long effort to reduce its number of older workers to

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11. Petitioners also challenged the confidentiality provision of IBM's agreement below but are asking this Court to review only their challenge to the timeliness provision.

12. These 29 employees are a subset of a much larger group of hundreds of employees who have attempted to pursue their ADEA claims against IBM in arbitration and were prevented from doing so based on the arbitration agreement's timeliness provision.

13. For ease of reading, Petitioners cite to the appendix submitted in *In Re: IBM Arbitration Agreement Litig.* rather than the appendices submitted in all four appeals before the Second Circuit. The appendices in *Lodi*, *Tavenner*, and *Chandler* are materially similar to that in *In Re: IBM Arbitration Agreement Litig.*, and Petitioners will note any relevant differences.

create a younger workforce. (App. 1a; *In Re: IBM* App.019-020.) Further, they alleged that they fell victim to IBM's discriminatory scheme when IBM terminated them on the basis of age. (App. 4a; *In Re: IBM* App.003.) Petitioners were not alone in making these allegations. The EEOC engaged in a wide-ranging multi-year investigation of age discrimination at IBM. (*In Re: IBM* App.032-033.) As part of that investigation, the EEOC consolidated claims of age discrimination brought by 58 employees[14] who alleged they were separated from IBM because of their age. (*In Re: IBM* App.032-033.) On August 31, 2020, the EEOC issued a determination finding reasonable cause to believe that IBM engaged in classwide age discrimination, on the basis of "top-down messaging from [IBM's] highest ranks directing managers to engage in an aggressive approach to significantly reduce the headcount of older workers to make room for Early Professional Hires" and evidence that "it was primarily older workers . . . in the total potential pool of those considered for layoff." (*In Re: IBM* App.032-033.)[15]

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14. Petitioner Lodi was one of the charging parties in this investigation. (*Lodi* Appellants' Second Circuit Appendix (hereinafter "*Lodi* App.") at App.015-016.)

15. Following the EEOC investigation and claims brought by some individuals (who were terminated later in the IBM layoffs and thus were able to bring claims quickly in arbitration – within the 180/300 day deadlines), shocking evidence came to light substantiating these claims. Such evidence included executives and managers disparagingly referring to older workers as "dinobabies" who needed to be made "extinct", and other explicit evidence supporting claims of widespread age discrimination in layoffs. *See* Noam Scheiber, *Making 'Dinobabies' Extinct: IBM's Push for a Younger Workforce*, N.Y. Times, (Feb. 12, 2022), https://www.nytimes.com/2022/02/12/business/economy/ibm-age-

After their layoffs, Petitioners signed agreements in exchange for a modest severance payment; these agreements released most claims that Petitioners may have against IBM, with the specific exception of claims under the ADEA. (App. 1a-2a; *In Re: IBM* App.020.) The agreements allowed Petitioners to pursue claims under the ADEA but only in individual arbitration. (App. 1a-2a; *In Re: IBM* App.020.) The agreements also included the following provision:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern though the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

(App. 2a.) IBM did not provide the disclosures required by the OWBPA to Petitioners with their agreements, which would have allowed IBM to obtain a waiver of their ADEA claims. (*In Re: IBM* App.020.)

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discrimination.html (Feb 12, 2022); Robert Weisman, *Disparaging e-mails suggest IBM's top executives sought to shed older workers*, Bos. Globe, (Feb. 14, 2022, 4:20 p.m.) https://www.bostonglobe.com/2022/02/14/metro/disparaging-emails-suggest-ibms-top-executives-sought-shed-older-workers/.

B. Petitioners' Efforts to Arbitrate their ADEA Claims

Twenty-seven of the Petitioners sought to bring ADEA claims against IBM in arbitration.[16] (App. 4a, 24a, 26a, 28a; *In Re: IBM* App.020.) In each case, the arbitrator dismissed their claims under the above-quoted "timeliness provision" of IBM's arbitration agreement because they had not filed their arbitration demand within 180 or 300 days of their layoff. (App. 4a, 24a, 26a, 28a; *In Re: IBM* App.021.) Petitioners argued that their claims were nevertheless timely under the ADEA's piggybacking rule, because they could piggyback on the earlier-filed EEOC charges[17] filed by the plaintiffs in a then-pending ADEA collective action, *Rusis v. International Business Machines Corp.*, Civ. Act. No. 1:18-cv-08434 (S.D.N.Y.). There is no question that their claims would have been recognized as timely filed if they were in court, based on the piggybacking rule. (*In Re: IBM* App.021.) However, the arbitrators rejected those arguments and dismissed

16. The two other Petitioners in this appeal, Brian Flannery and Phillip Corbett, sought a declaration in court first rather than going straight to arbitration. (App. 4a; App. 4a, 24a, 26a, 28a; *In Re: IBM* App.021.)

17. As a predicate to bringing the action, Edvin Rusis filed a class EEOC charge on May 10, 2018, alleging that IBM engaged in a companywide discriminatory scheme of laying off its older workers. (*In Re: IBM* App.023.) Other named plaintiffs in that action, Henry Gerrits, Phil McGonegal, and Sally Gehring, also timely filed timely classwide EEOC charges. (*In Re: IBM* App.023.) Ms. Gehring was one of fifty-eight former IBM employees whose charge led to the EEOC finding that there was reasonable cause to believe that IBM engaged in age discrimination, described at p. 14 *supra*. (*In Re: IBM* App.032-033.)

their arbitration claims as untimely. (App. 4a; *In Re: IBM* App.021.)[18]

C. Petitioners' Efforts to Challenge the Timeliness Provision in Court

Following these rulings by the arbitrators in most (but not all) of their cases, Petitioners initiated individual declaratory judgment actions in the Southern District of New York, challenging the agreements' timeliness and confidentiality provisions.[19] (App. 5a, 24a, 26a, 28a; *In*

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18. Notably, Petitioner Lodi did not even need to rely on the piggybacking rule since she herself timely filed an EEOC charge. (*Lodi* Appellants' Second Circuit Appendix (hereinafter "*Lodi* App.") at App.015-016.) The EEOC investigated her charge over a period of several years, and in the meantime, she also initiated an arbitration against IBM. (*Lodi* App.015-016.) Even though she had timely filed an EEOC charge (well before 90 days before the EEOC's dismissal of her claim), the arbitrator deemed her arbitration untimely. (*Lodi* App.015-016.)

Thus, even though Petitioner Lodi had filed her arbitration demand ***more than two years*** before she received her Notice of Right to sue from the EEOC, it was nevertheless deemed untimely because the arbitrator agreed with IBM that the arbitration agreement required the demand to be submitted within 300 days of the date that Petitioner Lodi was informed of her termination. (*Lodi* App.015-016.)

19. Before Petitioners initiated individual actions, they opted into the *Rusis* collective action (with the exception of Petitioners Flannery and Kamienski) in order to challenge the arbitration agreement's timing provision (with the intent of arbitrating their claims after obtaining such a ruling). (App. 4a; *In Re: IBM* App.021-022.) However, the *Rusis* court dismissed Petitioners' claims from the case without prejudice on the ground that their agreements contained a class action waiver. *See* App. 4a; *Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 193-

Re: IBM App.022.) Judge Jesse M. Furman consolidated 26 of those cases into the *In Re: IBM Arbitration Litig.* matter. *See In Re: IBM Arbitration Agreement Litig.*, Civ. Act. No. 1:21-cv-06296-JMF (S.D.N.Y.). Three other cases remained unconsolidated, including *Lodi v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06336-JGK (S.D.N.Y.); *Tavenner v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06345-KMK (S.D.N.Y.); and *Chandler v. International Business Machines Corp.*, Civ. Act. No. 1:21-cv-06319-JGK (S.D.N.Y.).

In each of those cases, Petitioners moved for summary judgment, while IBM moved to dismiss. The respective district courts granted IBM's motions to dismiss (without addressing Petitioners' motions for summary judgment). (App. 5a-6a, 29a-125a.)

Petitioners timely appealed, and the Second Circuit Panel heard argument in all four cases in tandem. (App. 1a-28a.) The Panel issued its substantive opinion in *In Re: IBM Arbitration Agreement Litig.* (App. 1a-22a) and issued summary orders adopting that reasoning in *Lodi* (App. 23a-24a), *Tavenner* (App. 25a-26a), and *Chandler* (App. 27a-28a). The Panel concluded that the piggybacking rule was *per se* inapplicable in the arbitration context and that the piggybacking rule was not a substantive right but instead a procedural right that could be waived in an arbitration agreement.[20] (App. 12a-15a.)

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97 (S.D.N.Y. 2021). They later initiated individual actions, which were consolidated into the *In Re IBM Arbitration Litig.* matter.

20. This aspect of the Panel's decision pertained to Petitioners Corbett and Flannery. With respect to the other 24 Petitioners in *In Re: IBM Arbitration Agreement Litig.* who had already

Petitioners in each of the four cases submitted timely petitions for rehearing *en banc*. The Second Circuit denied those petitions in *In Re: IBM Arbitration Agreement Litig.*, *Lodi*, and *Tavenner* on September 22, 2023. (App. 126a-130a.) The Second Circuit denied the petition in *Chandler* on October 12, 2023. (App. 132a.)

REASONS FOR GRANTING THE PETITION

This case involves issues of exceptional importance concerning the interaction of the ADEA and the FAA. The Second Circuit's opinion below permits employers to deploy arbitration agreements to prevent claimants from vindicating otherwise viable age discrimination claims, running afoul of *Gilmer*, 500 U.S. at 28. *Gilmer* makes clear that arbitration is an acceptable alternative forum ***only so long as*** an employee can pursue their claims in arbitration just as they could in court, without sacrificing any substantive rights. IBM – now with the Second Circuit's blessing – has been able to use arbitration agreements to curtail the ability of hundreds of former employees to pursue ADEA claims against it (even individually, in arbitration).[21]

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obtained final awards dismissing their claims, the Panel affirmed the District Court's decision declining to exercise jurisdiction under the Declaratory Judgment Act. (App. 12a.) The district court erred in assuming that there was no practical likelihood that those 24 Petitioners could reopen their claim in arbitration, should they prevail in this appeal.

21. In more recent decisions, this Court has upheld arbitration agreements precluding class actions, finding the class action to be a procedural mechanism for bringing some claims. *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1621-30 (2018) ; *Estle*, 23 F.4th at 214. However, these cases assumed that the claims could

The practical effect of the timeliness provision in IBM's arbitration agreement is that Petitioners would have had *years* longer to submit their claims in court than they had in arbitration. This provision thus stood as an impermissible impediment to the effective vindication of their claims.[22] Moreover, in holding that the ADEA's timing scheme was merely a procedural right, the Second Circuit's decision created a significant split with the Sixth Circuit's decision in *Thompson*, 985 F.3d at 521, which held that the ADEA's timing scheme is a substantive right. The Second Circuit's decision likewise served to elevate IBM's arbitration agreement over other kinds of contracts with respect to enforceability, in contravention of *Morgan*, 142 S. Ct. at 1713.

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still be brought individually in arbitration. That is exactly what Petitioners attempted to do but were blocked from doing so.

22. *See Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115, 125 (2d Cir. 2010) (explaining that "if certain terms of an arbitration agreement served to act 'as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy"); *Greer v. Sterling Jewelers, Inc.*, 2018 WL 3388086, at *6-7 (E.D. Cal. July 10, 2018) (finding arbitration agreement's one-year statute of limitation to bring a Fair Employment & Housing Act claim to be unconscionable, where the FEHA statute provides litigants with one year to file such a claim with the state administrative agency *plus* one additional year from the administrative claim being processed to file a civil claim); *Newton v. American Debt Services, Inc.*, 854 F.Supp.2d 712, 732-33 (N.D. Cal. 2012) (finding arbitration clause as a whole unconscionable and therefore unenforceable; "[T]he shortened statute of limitations has the practical effect of limiting a customer's ability to bring a claim in arbitration by requiring a customer to give up their statutorily-mandated statute of limitations and risk losing their claim forever if they did not bring a claim within one year.").

I. This Case Presents an Important Issue Which is Likely to Recur and Over Which There is a Clear Circuit Split

The fundamental legal error of the Second Circuit's holding is its conclusion that the ADEA's timing scheme (which includes the piggybacking rule) is not a substantive right. This conclusion is *directly at odds* with the Sixth Circuit in *Thompson*, 985 F.3d at 521, as well as the EEOC's interpretation of the ADEA.

The arbitrators in Petitioners' cases held that their arbitration demands were untimely even though those individuals would indisputably would have been timely to proceed in court if not for the arbitration agreement. The Second Circuit condoned the conclusion that Petitioners could be barred from pursuing claims in arbitration that they would have been able to pursue in court.[23]

The Second Circuit rejected Petitioners' contention that the ADEA's timing scheme is a substantive right.

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23. Petitioner Lodi's case was especially egregious. As explained in note 20 *supra*, her limitations period was abridged by more than two years *even though she timely filed an EEOC charge*. (*Lodi* App.015-016.) The EEOC investigated her claim, found reasonable cause to believe that IBM had discriminated against her (and many others), unsuccessfully attempted to conciliate her claim, and issued a Notice of Right to Sue. (*Lodi* App.015-016.) Then, when she did bring her claim in arbitration, and even though she submitted her arbitration demand more than two years *before* receiving the Notice of Right to Sue (which should have set her deadline to bring a claim for 90 days after receiving that notice), the arbitrator in her case nevertheless adopted IBM's argument and held that her claim was untimely. (*Lodi* App.015-017.)

In so doing, it created a clear circuit split with the Sixth Circuit in *Thompson* (as well as diverging from the EEOC's interpretation of the ADEA). Both the Sixth Circuit and the EEOC found that the ADEA's timing scheme 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. As the Sixth Circuit explained, "[a]ltering the time limitations surrounding [the ADEA's] processes risks undermining the statute's uniform application and frustrating efforts to foster employer cooperation." *Thompson*, 985 F.3d at 521.

The Second Circuit simply brushed off *Thompson* because it "did not involve an arbitration agreement or the FAA." (App. 15a.) While it is true that *Thompson* did not address an arbitration agreement,[24] that distinction does not impact whether or not the ADEA's timing scheme is a substantive right. According to the Second Circuit, an arbitration agreement is free to abridge the ADEA limitations period, even though other kinds of contracts cannot. But this conclusion runs afoul of this Court's decision in *Morgan*, 142 S. Ct. at 1713 , where the Court held that arbitration agreements cannot be elevated over other kinds of contracts.

In *Morgan*, the Court explained that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 142 S.Ct. at 1713. Indeed, the FAA

24. In *Thompson* the employer required its employee to sign an agreement stating that any employment-related claims that arose against the employer would bound by a six-month limitations period. *Thompson*, 985 F.3d at 515.

contains "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.* at 1714. IBM's arbitration agreement is no different from the pre-employment contract at issue in *Thompson* – in either case, the ADEA's limitations period is a substantive right that cannot be abridged by contract.

The Second Circuit also opined that Petitioners' argument that the piggybacking rule is a substantive right is foreclosed by *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259, 265-66 (2009). But *14 Penn Plaza* says nothing about whether the ADEA's timing scheme is a substantive or a procedural right – it merely held that the right to a judicial forum (as opposed to an arbitral forum) is a procedural right. *See id. 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; the cited portion of the case simply stands for the now widely accepted rule that "[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination." *See id.*

The inclusion of the OWBPA in the ADEA serves to strengthen the argument that the ADEA's timing scheme is a substantive right, as the EEOC itself has recognized:

> The ADEA does have one other arguably relevant provision with no analogue in Title VII: 29 U.S.C. § 626(f) . . ., which expressly governs waivers of "rights or claims under this chapter." However, § 626(f), read together with *Logan*'s holding that a statutory limitation period is a substantive right, only strengthens

> the argument against construing the ADEA's limitations period as prospectively waivable.

Thompson, EEOC Amicus Brief, 2020 WL 1160190, at *25. The Sixth Circuit agreed. *Thompson*, 985 F.3d at 521.

Here, Petitioners could not have waived their right to enjoy the full ADEA limitations period – and thus pursue their claims at all - because IBM did not provide the OWBPA disclosures necessary to render such a waiver "knowing and voluntary." As the Second Circuit held in *Estle*, 23 F.4th at 214, 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 OWBPA, which IBM did not do.

The Second Circuit, however, also wrote off the applicability of the OWBPA, again because it did not believe that the piggybacking rule was a substantive right.[25] Under *Estle*, 23 F.4th at 214, "[t]he phrase 'right or claim' as used in § 626(f)(1) is limited to substantive rights and does not include procedural ones," and as such, the Second Circuit concluded that the OWBPA was not at play.[26] (App. 13a-15a.) In holding that the ADEA limitations

25. The Second Circuit appeared not even to recognize that Petitioner Lodi's claim did not even need to rely on the piggybacking rule.

26. The Second Circuit concluded further that the piggybacking rule is judge-made and is not found in the text of the ADEA but did not explain why that matters. For decades, courts have read the piggybacking rule into the ADEA's timing scheme. Indeed, since the Second Circuit adopted the piggybacking rule in *Tolliver*, 918 F.2d at 1057-59, Congress has amended the ADEA but has not precluded piggybacking. *See, e.g.*, Pub. L. 104–208,

period was a procedural right rather than a substantive right, the Second Circuit completely discounted the well-reasoned conclusion of the Sixth Circuit in *Thompson* and the interpretation of the ADEA by the EEOC.

Under the guise of following the FAA, the Second Circuit bent over backward to permit IBM's improper use of its arbitration agreement to eliminate dozens of employees' substantive ADEA claims (and effectively hundreds of other employees who filed their claims in arbitration and are awaiting the final outcome of this appeal). *Certiorari* is warranted to correct the Second Circuit's misapprehension and to resolve the split between the Second and Sixth Circuits.

II. The Second Circuit Exceeded the Bounds of the FAA in Holding that the Piggybacking Rule Does Not Apply in Arbitration

The Second Circuit's decision is also fundamentally flawed in that it created an extreme rule out of whole cloth that the piggybacking rule is *per se* inapplicable in the context of arbitration. This rule is completely unsupported by law and unduly impedes the right of parties to contract for the application of the piggybacking rule in an arbitration agreement. In its decision, the Second Circuit relies on only the Eleventh Circuit's decision in *Smith v. International Business Machines Corp.*, 2023 WL 3244583 (11th Cir. May 4, 2023) , but *Smith* too appears to have made up this rule out of whole cloth.

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div. A, title I, § 101(a) [title I, § 119], Sept. 30, 1996, 110 Stat. 3009, 3009–23.

Ironically, *Smith* invoked the proposition set forth in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662, 683 (2010) , that "[p]arties are generally free to structure their arbitration agreements as they see fit" and to agree on "rules under which any arbitration will proceed." *Smith*, 2023 WL 3244583, at *6. But the Second Circuit's conclusion that the piggybacking rule can ***never*** apply in arbitration goes so far that it actually would impede parties who expressly wished to contract for the ADEA's timing scheme in whole from doing so.[27] The Second Circuit has, in effect, invented an arbitration-specific rule to impede the ability of Petitioners to pursue their ADEA cases, thus running afoul of this Court's admonition that under the FAA, "federal policy is about treating arbitration contracts like all others . . . ." *Morgan* , 142 S. Ct. at 1714.[28]

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27. The Second Circuit's extreme position would also require reversal of many arbitration awards that have applied the piggybacking rule. *See, e.g.*, *In the Matter of Arbitration Between: [Claimant], Claimant, v. [Respondent] (Food and Kindred Products), Respondent*, 2018 WL 1933357 (Arb. Frank Abramson Feb. 27, 2018), and *In the Matter of Arbitration Between: [Claimant], Claimant, and [Respondent] (Services, Not Elsewhere Classified)*, 2017 WL 6943558, at *4 (Arb. Linda F. Close, AAA Dec. 15, 2017) ("The Arbitrator now rules that Claimant had a right, under the single-filing rule, to proceed as she did.") .

28. Moreover, the EEOC charge-filing process is relevant to arbitration notwithstanding that the arbitration agreement, like here, can waive the administrative exhaustion requirement. Courts have held that employers do not waive their right to arbitrate by participating in EEOC investigations, *see e.g.*, *Marie v. Allied Home Mortgage*, 402 F.3d 1 (1st Cir. 2005) , reasoning that the purpose of the EEOC investigation is to determine whether there are grounds to conclude that discrimination may have occurred. As the First

Certiorari is urgently needed because the Second Circuit overstepped the boundaries of the FAA by adopting a rule that would, ironically, limit the ability of parties to freely contract for the application of the piggybacking rule.

III. The Second Circuit Wrongly Held that the Piggybacking Doctrine Does Not Operate to Extend a Limitations Period

Finally, *certiorari* is warranted because the Second Circuit also bafflingly concluded that the piggybacking rule has nothing to do with the ADEA limitations period. According to the Second Circuit, "[a]ll that the piggybacking rule does is functionally waive the administrative-exhaustion requirement – it does not extend the 300-daydeadline to file an EEOC charge." (App. 13a.)

The Second Circuit blinded itself to the practical ramifications of the piggybacking rule. Outside of the arbitration context, plaintiffs do *not* have to bring discrimination claims within the deadline for filing an EEOC charge (either 300 days or 180 days in non-deferral jurisdictions). Instead, they are allowed to piggyback on previously filed class claims and file court actions even years after their EEOC charge filing period has run.[29]

Circuit stated: "We will not force an employer to make a wasteful, preemptive decision to arbitrate." *Id.* The same should hold true for employees.

29. Numerous courts have recognized that the piggybacking rule is both an administrative exhaustion doctrine ***and*** a limitations doctrine. *See, e.g.*, *Leal v. Wal-Mart Stores, Inc.*, 2016 WL 2610020,

This approach allows employees who may not have any reason to know at the time of their termination that they had a viable discrimination claim to still pursue such a claim, if they learn later – through a filing by other employees or a determination by the EEOC – that they may have been the victim of discrimination.[30]

The Second Circuit's failure to recognize this point serves to minimize the degree to which Petitioners' ability to pursue their age discrimination claims was impeded. IBM's attempt to use the arbitration agreement to shut down ADEA claims that the Petitioners would have been able to pursue in court does not allow for "effective vindication" of their claims, as required by *Gilmer*.

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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) (same); *Holowecki v. Federal Express Corp.*, 2002 WL 31260266, at *3 (S.D.N.Y. Oct. 9, 2002) (same); *Shannon v. Hess Oil Virgin Islands Corp.*, 100 F.R.D. 327, 333 (D.V.I. 1983) (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").

30. As noted, here, employees would not have any reason to know they were chosen for layoff based on their age until learning of the investigations by the EEOC and claims brought by other employees. By the time the evidence of executives calling older employees "dinobabies" who needed to be made "extinct" was uncovered, *see* note 17 *supra*, the limitations period would have long run for most employees with viable age discrimination claims.

The legislative history of OWBPA evinces Congress's concern about this very problem. As explained *supra*, Congress was motivated to pass the OWBPA explicitly due to concerns "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). The piggybacking rule serves as a safeguard against unscrupulous employers dodging liability simply because the 300 or 180 days have run. Here, Petitioners have been denied that safeguard, simply by having signed an arbitration agreement that they were told would allow them to still pursue claims for age discrimination (and did not include the OWBPA disclosures that would allow IBM to obtain releases of their ADEA claims). Petitioners have not enjoyed a genuinely "fair opportunity" to advance their claims in arbitration.

CONCLUSION

This Court should grant the petition for *certiorari*. This Court in *Gilmer*, 500 U.S. at 28, made clear that arbitration is only an acceptable alternative to court if individuals can pursue the statutory claims in arbitration that they could pursue in court. Petitioners' ADEA claims were barred in arbitration even though they would have been timely in court. The disagreement between the Sixth Circuit and the Second Circuit as to whether the ADEA's timing scheme is a substantive or procedural right presents an important circuit split that this Court needs to resolve.

Respectfully submitted,

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January 22, 2024

APPENDIX

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APPENDIX A — *IN RE IBM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2022
May 22, 2023, Argued;
August 4, 2023, Decided

No. 22-1728

IN RE: IBM ARBITRATION AGREEMENT LITIGATION; GREGORY ABELAR, WILLIAM ABT, BRIAN BROWN, BRIAN BURGOYNE, MARK CARLTON, WILLIAM CHASTKA, PHILLIP CORBETT, DENISE COTE, MICHAEL DAVIS, MARIO DIFELICE, JOSEPH DUFFIN, BRIAN FLANNERY, FRED GIANINY, OM GOECKERMANN, MARK GUERINOT, DEBORAH KAMIENSKI, DOUGLAS LEE, COLLEEN LEIGH, STEPHEN MANDEL, MARK MCHUGH, SANDY PLOTZKER, ALEXANDER SALDARRIAGA, RICHARD ULNICK, MARK VORNHAGEN, JAMES WARREN, AND DEAN WILSON,

Plaintiffs-Appellants,

v.

Appendix A

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.[*]

On Appeal from the United States District Court for the Southern District of New York.

Before: POOLER, WESLEY, and PARK, *Circuit Judges*.

I. BACKGROUND

A. Facts[1]

Plaintiffs allege that IBM terminated thousands of older workers in the early 2010s to be more competitive in emerging technology sectors. Most of the terminated employees signed a separation agreement (the "Agreement") in exchange for severance payments and other benefits. The Agreement included a class- and collective-action waiver requiring claims arising from their termination—including ADEA claims—to be resolved by "private, confidential, final and binding arbitration according to the IBM Arbitration Procedures." App'x at App.102. The Agreement required Plaintiffs to bring claims within a certain time (the "Timeliness Provision"):

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* The Clerk of Court is respectfully directed to amend the caption accordingly.

1. We accept Plaintiffs' factual allegations as true on a motion to dismiss. *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133, 136 n.1 (2d Cir. 2022).

Appendix A

> **Time Limits and Procedure for Initiating Arbitration**. To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator . . . [I]f the claim is one which must first be brought before a government agency, [you must submit] no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The 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. at App.105. The ADEA typically requires plaintiffs to file a complaint called a "charge" with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the alleged discrimination. *See* 29 U.S.C. § 626(d)(1)(B). Employees who signed the Agreement had 300 days to submit written demands for arbitration.

The Agreement also included a confidentiality requirement (the "Confidentiality Provision"):

> **Privacy and Confidentiality**. . . . To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award.

App'x at App.106.

Appendix A

Plaintiffs are twenty-six former IBM employees who were terminated in 2017 and 2018. All signed the Agreement. After the deadlines for arbitrating their claims had passed, twenty-four Plaintiffs submitted written demands for arbitration, alleging that they were terminated in violation of the ADEA. The arbitrators in all of their cases dismissed the claims as untimely. The remaining two Plaintiffs, Phillip Corbett and Brian Flannery, did not try to arbitrate their claims.

Some former employees—almost all of whom are represented by the same counsel as Plaintiffs—did not sign the Agreement and instead filed timely charges of discrimination with the EEOC. These former employees brought a separate putative class action against IBM in 2018 (the "*Rusis* action"). *See Rusis v. Int'l Bus. Machs. Corp.*, 529 F. Supp. 3d 178, 188 (S.D.N.Y. 2021).

Plaintiffs tried to opt in to the *Rusis* action in 2019, after their arbitration claims were dismissed as untimely.[2] *See id.* at 192. In 2020, the EEOC issued a report on other former IBM employees' charges finding "reasonable cause to believe that [IBM] discriminated against [other former IBM employees] on account of their age." App'x at App.121. In March 2021, the district court in the *Rusis* action dismissed Plaintiffs from that case due to the "valid and enforceable class and collective action waiver" in the Agreement. 529 F. Supp. 3d at 193.

2. Two Plaintiffs, Brian Flannery and Deborah Kamienski, did not try to opt in to the *Rusis* action.

B. Procedural History

After Plaintiffs were dismissed from the *Rusis* action, they filed individual cases in the U.S. District Court for the Southern District of New York, seeking a declaration that the Timeliness and Confidentiality Provisions in the Agreement are unenforceable. The district court (Furman, *J.*) consolidated the individual cases.

After filing the complaint but before IBM answered or moved to dismiss, Plaintiffs filed a motion for summary judgment, attaching documents that Plaintiffs' counsel had obtained in other IBM employees' confidential arbitration proceedings. Plaintiffs filed under seal but requested immediate unsealing of the confidential documents for the admitted purpose of enabling Plaintiffs' counsel to use the documents in litigation against IBM. IBM opposed Plaintiffs' motion for summary judgment and moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). IBM argued that the claims of the twenty-four Plaintiffs who arbitrated and lost should be dismissed as untimely and that the Timeliness Provision is enforceable under the FAA. IBM further argued that the motion for summary judgment should be denied as moot. Plaintiffs opposed IBM's motion, arguing that the Timeliness Provision is unenforceable because it does not include the piggybacking rule, which permits plaintiffs who fail to file an EEOC charge to "piggyback" off a timely charge brought by another employee alleging the same discrimination. Plaintiffs also moved for leave to amend their complaints to add claims for fraudulent inducement.

The district court granted IBM's motion to dismiss. First, it declined to exercise jurisdiction over the claims of the twenty-four Plaintiffs who had already arbitrated because their claims were unripe under the Declaratory Judgment Act ("DJA"). *In re IBM Arb. Agreement Litig.*, No. 21-CV-6296, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *4-5 (S.D.N.Y. July 14, 2022). The "arbitration proceedings definitively resolved" their claims, and "the window to challenge those rulings, or the enforceability of the provisions that governed them, has long since closed." 2022 U.S. Dist. LEXIS 124991, [WL] at *5. The district court also declined to exercise jurisdiction over Plaintiffs Flannery's and Corbett's challenge to the Confidentiality Provision because it was unripe. 2022 U.S. Dist. LEXIS 124991, [WL] at *6 (stating that the Confidentiality Provision "will play a role in Flannery and Corbett's arbitration proceedings only if the arbitrator rules that they have timely ADEA claims to arbitrate in the first place," and "there is no reason to believe an arbitrator would conclude Flannery and Corbett have timely ADEA claims"). This left only Flannery's and Corbett's challenge to the Timeliness Provision.

Second, the district court concluded that the Timeliness Provision is enforceable because the piggybacking rule is not "a substantive, nonwaivable right under the ADEA." 2022 U.S. Dist. LEXIS 124991, [WL] at *7. "Plaintiffs' challenge to the Timeliness Provision on the ground that it prevents them from effectively vindicating their rights under the ADEA is without merit" because "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." 2022 U.S. Dist. LEXIS 124991, [WL] at *9.

Finally, the district court denied Plaintiffs' motion for leave to amend to add a claim for fraudulent inducement as futile because twenty-four Plaintiffs had waived their claims by arbitrating and failing to raise a claim for fraudulent inducement. *See* 2022 U.S. Dist. LEXIS 124991, [WL] at *10. The district court denied Flannery's and Corbett's motion for leave to amend because it would not satisfy the heightened pleading standard under Federal Rule of Civil Procedure 9(b). 2022 U.S. Dist. LEXIS 124991, [WL] at *11.

IBM also moved to seal Plaintiffs' motion for summary judgment and the attached confidential documents. *See In re IBM Arb. Agreement Litig.*, No. 21-CV-6296, 2022 U.S. Dist. LEXIS 137427, 2022 WL 3043220, at *1 (S.D.N.Y. Aug. 2, 2022). The district court granted IBM's motion to seal and denied Plaintiffs' request to unseal the documents. *Id.* It concluded that the materials were not "judicial documents" because they "had no tendency—or, for that matter, ability—to influence this Court's ruling on IBM's motion." 2022 U.S. Dist. LEXIS 137427, [WL] at *2 (cleaned up). The documents were "subject to only a weak presumption of public access," and any presumption of public access was outweighed by "the FAA's strong policy in favor of enforcing arbitral confidentiality provisions." 2022 U.S. Dist. LEXIS 137427, [WL] at *2-3. Plaintiffs timely appealed.[3]

3. On appeal, Plaintiffs moved to file certain materials under seal while simultaneously moving to unseal the same documents.

II. DISCUSSION

Plaintiffs argue that (1) the Timeliness Provision is unenforceable because it does not incorporate the piggybacking rule, and (2) the district court abused its discretion by granting IBM's motion to seal the confidential documents. We disagree. First, the piggybacking rule does not apply to arbitration and, in any case, it is not a substantive right under the ADEA. Second, the presumption of public access to judicial documents is outweighed here by the FAA's strong policy in favor of enforcing arbitral confidentiality provisions and the impropriety of counsel's attempt to evade the Agreement by attaching confidential documents to a premature motion for summary judgment. Finally, the district court correctly declined to exercise jurisdiction over the remaining claims and correctly denied Plaintiffs' motion for leave to amend.

A. Timeliness Provision

The Timeliness Provision is enforceable. Plaintiffs argue that "the time-period for filing contained in the ADEA, to which the piggybacking rule is integral" is "a substantive right that cannot be waived or truncated in an arbitration agreement." Appellants' Br. at 36-37. This is incorrect. The piggybacking rule has no application in the arbitration context. In any event, the piggybacking rule may be waived because it is not a substantive right under the ADEA.

Appendix A

1. *Legal Standards*

The ADEA makes it "unlawful for an employer" to "discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623. It provides that:

> (1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—
>
> > (A) within 180 days after the alleged unlawful practice occurred; or
> >
> > (B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred . . . .

Id. § 626(d).

Under this provision, an ADEA plaintiff must exhaust administrative remedies by first filing an EEOC charge within 300 days of the "alleged unlawful practice."[4] *Id.* The plaintiff must then "file an EEOC charge at least 60

4. The 300-day deadline applies to "deferral states," which are states with their own age discrimination laws and age discrimination remedial agencies. *See Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 562 (2d Cir. 2006). Most, if not all, Plaintiffs reside in deferral states.

days prior to initiating an ADEA suit in federal court." *Holowecki*, 440 F.3d at 562 (emphasis omitted).

The piggybacking rule is an exception to the ADEA's charge-filing requirement. *See Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2d Cir. 1990). It first came into use after the enactment of the Civil Rights Act of 1964, when courts applied the rule to class actions under Title VII. *See Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968). "According to the piggybacking rule, where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims arise out of similar discriminatory treatment in the same time frame." *Holowecki*, 440 F.3d at 564 (cleaned up). We have held that the piggybacking rule, also known as the "single-filing rule," applies to ADEA actions. *Tolliver*, 918 F.2d at 1059-60. Importantly, the piggybacking rule is not found in the ADEA or in Title VII. It is a judge-made exception to the statutory-filing requirements. *See Oatis*, 398 F.2d at 498 (explaining it would be "wasteful" to require Title VII class members to file individual charges); *Tolliver*, 918 F.2d at 1057 (reasoning it would be "equally appropriate" to apply the piggybacking rule to ADEA actions because the "ADEA administrative procedure is modeled on the Title VII procedure"). We explained that the rule could "afford the agency the opportunity to 'seek to eliminate any alleged unlawful practice by informal methods'" without requiring "repetitive ADEA charges." *Tolliver*, 918 F.2d at 1057 (quoting 29 U.S.C. § 626(d)).

The ADEA, as amended by the Older Workers Benefit Protection Act ("OWBPA"), also provides that: "An

individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). The Supreme Court has "construed the phrase 'right or claim' in § 626(f)(1) and one of its subparts to mean 'substantive right,' which includes 'federal antidiscrimination rights' and 'the statutory right to be free from workplace age discrimination,' as distinguished from procedural rights, like 'the right to seek relief from a court in the first instance.'" *Estle v. Int'l Bus. Machs. Corp.*, 23 F.4th 210, 214 (2d Cir. 2022) (quoting *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 259, 265-66, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009)).

Finally, the FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided." 9 U.S.C. § 2. "This text reflects the overarching principle that arbitration is a matter of contract." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). As such, "courts must rigorously enforce arbitration agreements according to their terms, including . . . the rules under which that arbitration will be conducted." *Id.* (cleaned up). "Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018); *see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) ("[P]arties are generally free to structure their arbitration agreements as they see fit." (internal quotation marks omitted)).

"We review the grant of a Rule 12(b)(6) motion to dismiss *de novo*. We accept the factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Estle*, 23 F.4th at 212-13.

2. *Application*

Plaintiffs argue that the Timeliness Provision is unenforceable because it "waive[d] a substantive right by abridging the time period to file and because it was obtained without IBM providing OWBPA disclosures."[5] Appellants' Br. at 27. Plaintiffs' argument is meritless and foreclosed by precedent.

First, the piggybacking rule does not apply to arbitration. It is an exception to the ADEA's administrative-exhaustion requirements. *See Tolliver*, 918 F.2d at 1057. And the ADEA's administrative-exhaustion process expressly applies to "civil action[s]." 29 U.S.C. § 626(d)(1). The judge-made piggybacking rule thus "has no clear application in the arbitration context." *Smith v. Int'l Bus. Machs. Corp.*, No. 22-11928, 2023 U.S. App. LEXIS 10957, 2023 WL 3244583, at *6 (11th Cir. May 4, 2023).

5. The district court correctly declined to exercise jurisdiction over the claims brought by the twenty-four Plaintiffs who arbitrated and lost. *See In re IBM Arb. Agreement Litig.*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *5. We agree that there is no "practical likelihood" that Plaintiffs will be able to reopen their claims. *See Admiral Ins. Co. v. Niagara Transformer Corp.*, 57 F.4th 85, 92 (2d Cir. 2023) (emphasis omitted). Nonetheless, we have appellate jurisdiction over the challenge to the Timeliness Provision brought by Plaintiffs Flannery and Corbett.

All that the piggybacking rule does is functionally waive the administrative-exhaustion requirement—it does not extend the 300-day deadline to file an EEOC charge. *See Holowecki*, 440 F.3d at 564. The Timeliness Provision clearly notes that the ADEA's administrative-exhaustion requirement does not apply to Plaintiffs' arbitrations. App'x at App.105 (stating that the "filing of a charge or complaint with a government agency . . . shall not substitute for or extend the time for submitting a demand for arbitration"). And under the FAA, "courts must rigorously enforce arbitration agreements according to their terms, including . . . the rules under which that arbitration will be conducted." *Am. Express Co.*, 570 U.S. at 233 (cleaned up). Neither the EEOC's charge-filing process nor the piggybacking rule have any place in Plaintiffs' arbitrations.

Second, in any event, the piggybacking rule is not a substantive right under the ADEA and is thus waivable under the Agreement. The Supreme Court has distinguished between substantive rights—such as the right under the ADEA "to be free from workplace age discrimination," which may be waived only if such waiver is knowing and voluntary—and procedural rights—such as "the right to seek relief from a court in the first instance," which are waivable. *14 Penn Plaza*, 556 U.S. at 265-66. *14 Penn Plaza* held that the ability to file suit in court (as opposed to arbitration) is procedural, not substantive. *See id.* The Court explained that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate." *Id.* at 269; *see also Gilmer v. Interstate/*

Johnson Lane Corp., 500 U.S. 20, 31, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) ("Although [arbitration] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985))). Following *14 Penn Plaza*, we recently held that "[c]ollective action waivers . . . address procedural, not substantive rights," and thus may be waived. *Estle*, 23 F.4th at 212.

14 Penn Plaza forecloses Plaintiffs' argument that the piggybacking rule is a non-waivable substantive right under the ADEA. The rule is judge-made and is not found in the text of the ADEA. *See* 29 U.S.C. § 626(d). Moreover, the piggybacking rule, at its core, is not about timeliness. *See Holowecki*, 440 F.3d at 564 ("An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge."); *Levy v. United States GAO*, 175 F.3d 254, 255 (2d Cir. 1999) (declining to apply rule to plaintiffs who filed an untimely complaint in the district court). As discussed above, it is an exception to the ADEA's administrative-exhaustion requirement and does not apply to these arbitrations. It thus falls well outside the scope of the substantive right protected by the ADEA and may be waived.[6]

6. Nor have Plaintiffs shown that the Timeliness Provision made "access to the forum impracticable." *Am. Express Co.*, 570 U.S. at 236. It gave Plaintiffs the same amount of time to file an arbitration demand as they would have had to file an EEOC charge

Plaintiffs argue that the ADEA's timing provisions "are part of the substantive law of the cause of action created by the ADEA." Appellants' Br. at 34 (quoting *Thompson v. Fresh Products, LLC*, 985 F.3d 509, 521 (6th Cir. 2021)). This argument is misplaced. Plaintiffs cite *Thompson*, which did not involve an arbitration agreement or the FAA. *See* 985 F.3d at 515. Neither did *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019), on which *Thompson* relied. *See* 939 F.3d at 839 (holding that a "contractually shortened limitation period, *outside of an arbitration agreement*, is incompatible with the grant of substantive rights and the elaborate pre-suit enforcement mechanisms of Title VII" (emphasis added)).

For these reasons, the Timeliness Provision in the Agreement is enforceable.

B. Motion to Unseal

The district court properly granted IBM's motion to seal. Plaintiffs argue that "a confidentiality provision . . . is not a sufficient countervailing interest to override the presumption of public access." Appellants' Br. at 63. We disagree.

1. *Legal Standards*

"Judicial documents are subject at common law to a potent and fundamental presumptive right of public

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under the ADEA. Indeed, other former employees timely filed and successfully arbitrated their claims.

access that predates even the U.S. Constitution." *Mirlis v. Greer*, 952 F.3d 51, 58 (2d Cir. 2020). "The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice." *United States v. Amodeo* ("*Amodeo II*"), 71 F.3d 1044, 1048 (2d Cir. 1995).

"[A]s a threshold question, the court determines whether the record at issue is a judicial document—a document to which the presumption of public access attaches." *Olson v. Major League Baseball*, 29 F.4th 59, 87 (2d Cir. 2022) (cleaned up). If so, the court "must next determine the particular weight of that presumption of access for the record at issue." *Id.* "Finally, once the weight of the presumption has been assessed, the court is required to balance competing considerations against it." *Id.* at 88 (internal quotation marks omitted). "Examples of such countervailing values may include . . . the protection of attorney-client privilege; the danger of impairing law enforcement or judicial efficiency; and the privacy interest of those who resist disclosure." *Brown v. Maxwell*, 929 F.3d 41, 47 n.13 (2d Cir. 2019) (cleaned up).

"When reviewing a district court's order to seal or unseal a document, we examine 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." *Olson*, 29 F.4th at 87 (cleaned up).

2. *Application*

The district court correctly granted IBM's motion to seal. The district court reasoned that the summary judgment documents were "subject to only a weak presumption of public access" because the court "did not, and could not, consider these documents in resolving IBM's motion to dismiss." *In re IBM Arb. Agreement Litig.*, 2022 U.S. Dist. LEXIS 137427, 2022 WL 3043220, at *2 (emphasis omitted). "And on the other side of the scale," the FAA's mandate requiring enforcement of arbitration agreements "according to their terms" "favor[s] maintaining these documents under seal or in redacted form." *Id.* (cleaned up). Protecting this confidentiality interest is particularly important when the stated objective of Plaintiffs' motion to unseal is to circumvent the Confidentiality Provision to assist plaintiffs in other proceedings—including Plaintiffs' counsel's other clients. *See, e.g.*, Reply Br. at 34 ("Plaintiffs have filed this lawsuit to be able to use certain evidence that has been used in other arbitrations in support of their arbitrations." (alterations incorporated)).

First, motions for summary judgment are ordinarily judicial documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006); *Brown*, 929 F.3d at 47. "[F]or a court filing to be classified as a 'judicial document,' it 'must be relevant to the performance of the judicial function and useful in the judicial process.'" *Olson*, 29 F.4th at 87 (quoting *United States v. Amodeo* ("*Amodeo I*"), 44 F.3d 141, 145 (2d Cir. 1995)). The fact that the district court did not reach the merits of Plaintiffs'

motion does not change the analysis. *Cf. Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016) ("The fact that a suit is ultimately settled without a judgment on the merits does not impair the 'judicial record' status of pleadings."); *Lugosch*, 435 F.3d at 121-23 (finding it was "error" for the district court to wait "until it had ruled on the underlying summary judgment motion" to apply the sealing analysis).

Even assuming the motion and attached materials in this case were "judicial documents," the presumption of public access is weaker because the motion was denied as moot. "[T]he weight to be given the presumption of access must be 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." *Olson*, 29 F.4th at 87-88 (quoting *Amodeo II*, 71 F.3d at 1049). "The locus of the inquiry is, in essence, whether the document is presented to the court to invoke its powers or affect its decisions." *Bernstein*, 814 F.3d at 142 (internal quotation marks omitted). Here, the presumption of access is weaker because the district court dismissed the complaint on IBM's Rule 12(b)(6) motion and did not even reach the merits of Plaintiffs' summary judgment motion, instead denying it as moot. The confidential documents thus had no "role . . . in the exercise of Article III judicial power." *Id.*

The weaker presumption of public access in this case is readily outweighed by the FAA's strong policy protecting the confidentiality of arbitral proceedings and the impropriety of using a motion for summary judgment

to evade the Agreement's Confidentiality Provision. As discussed *supra* at 12-13, "courts must rigorously enforce arbitration agreements according to their terms." *Am. Express Co.*, 570 U.S. at 233 (internal quotation marks omitted). And the "Supreme Court [has] observed that, without vigilance, courts' files might become a vehicle for improper purposes." *Brown*, 929 F.3d at 47 (cleaned up). We have explained that "courts should consider personal motives . . . at the third, balancing step of the inquiry, in connection with any asserted privacy interests, based on an anticipated injury as a result of disclosure." *Mirlis*, 952 F.3d at 62 (internal quotation marks and emphasis omitted). Here, Plaintiffs initially sued to invalidate the Confidentiality Provision, so denying IBM's sealing request "would be to grant Plaintiffs the relief they sought in the first instance." *In re IBM Arb. Agreement Litig.*, 2022 U.S. Dist. LEXIS 137427, 2022 WL 3043220, at *2. The district court correctly observed that allowing unsealing under such circumstances would create a legal loophole allowing parties to evade confidentiality agreements simply by attaching documents to court filings. 2022 U.S. Dist. LEXIS 137427, [WL] at *3. Plaintiffs' counsel may not end-run the Confidentiality Provision by filing protected materials and then invoking the presumption of access to judicial documents. The district court correctly sealed the documents.

C. Remaining Claims

Finally, we affirm the district court's disposition of Plaintiffs' remaining claims. First, the district court did not abuse its discretion in declining to exercise jurisdiction

over Plaintiffs Flannery's and Corbett's challenge to the Confidentiality Provision. Second, the district court correctly denied Plaintiffs' motion for leave to amend to add a fraudulent inducement claim.

1. *Ripeness*

"The standard for ripeness in a declaratory judgment action is that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005) (internal quotation marks omitted). "We review a district court's decision of whether to exercise jurisdiction over a declaratory judgment action deferentially, for abuse of discretion." *Id.*

Flannery's and Corbett's claim seeking a declaratory judgment that the Confidentiality Provision is unconscionable is unripe. As discussed *supra* at 12-15, this challenge to the Timeliness Provision is meritless. There is no "practical likelihood" that an arbitrator would conclude otherwise. *Admiral Ins. Co. v. Niagara Transformer Corp.*, 57 F.4th 85, 92 (2d Cir. 2023) (emphasis omitted); *see also Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 511 (2d Cir. 2014) ("A claim is not ripe if it depends upon contingent future events that may or may not occur as anticipated, or indeed may not occur at all."). As a result, Plaintiffs' challenge to the Confidentiality Provision is unripe.

2. *Leave To Amend*

"An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Federal Rule of Civil Procedure] 12(b)(6)." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002). "Where the claims are premised on allegations of fraud, the allegations must satisfy the heightened particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010) (internal quotation marks omitted). Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "[I]n order to comply with Rule 9(b), the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (cleaned up). We "review *de novo* a district court's denial of a request for leave to amend based on futility." *Glover v. Bausch & Lomb Inc.*, 6 F.4th 229, 236 (2d Cir. 2021).

Plaintiffs' proposed amended complaint fails to meet Rule 9(b)'s heightened pleading standard. It alleges that "IBM provided employees with template letters indicating that the company was required to lay them off." App'x at App.563. It references "low-level managers" but does not identify the speakers. *See id.* at App.564. It also fails to identify when or where "IBM's managers and human resource professionals presented employees with

inaccurate and/or misleading information." *Id.* at App.565. These deficient allegations cannot satisfy Rule 9(b), and the district court correctly denied leave to amend.

III. CONCLUSION

We have considered all of Plaintiffs' remaining arguments and have found them to be without merit. For the reasons set forth above, the judgment of the district court is affirmed.[7] Plaintiffs' motion to unseal is denied as moot.

7. The remaining appeals raising substantially similar issues are resolved in summary orders issued simultaneously with this opinion. *See Chandler v. Int'l Bus. Machs. Corp.*, No. 22-1733; *Lodi v. Int'l Bus. Machs. Corp.*, No. 22-1737; *Tavenner v. Int'l Bus. Machs. Corp.*, No. 22-2318.

APPENDIX B — *LODI* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

22-1737

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of August, two thousand twenty-three.

PRESENT: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
MICHAEL H. PARK,
Circuit Judges.

PATRICIA LODI,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

August 4, 2023, Decided

Appendix B

Appeal from a judgment of the United States District Court for the Southern District of New York (Koeltl, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** and Plaintiff's motion to unseal is **DENIED**.

Plaintiff is a former employee of International Business Machines Corporation ("IBM"), who sued to invalidate provisions in the arbitration agreement she signed when she was terminated. On appeal, Plaintiff raises substantially the same issues as the plaintiffs in several related appeals.[1] We affirm for substantially the same reasons stated by the district court in its decision, *see Lodi v. Int'l Bus. Machs. Corp.*, No. 21-CV-6336, 2022 U.S. Dist. LEXIS 122082, 2022 WL 2669199 (S.D.N.Y. July 11, 2022), and for the reasons stated in our opinion in the related appeal, *In re IBM Arb. Agreement Litig.*, No. 22-1728, 2023 U.S. App. LEXIS 20154 (2d Cir. Aug. 4, 2023).

We have considered all of Plaintiff's arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**. Plaintiff's motion to unseal is **DENIED** as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/_____

1. *See In re IBM Arb. Agreement Litig. [*2]* , No. 22-1728; *Chandler v. Int'l Bus. Machs. Corp.*, No. 22-1733; *Tavenner v. Int'l Bus. Machs. Corp.*, No. 22-2318.

APPENDIX C — *TAVENNER* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

22-2318

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of August, two thousand twenty-three.

PRESENT: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
MICHAEL H. PARK,
Circuit Judges.

DEBORAH TAVENNER,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant-Appellee.

August 4, 2023, Decided

Appendix C

Appeal from a judgment of the United States District Court for the Southern District of New York (Karas, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** and Plaintiff's motion to unseal is **DENIED**.

Plaintiff is a former employee of International Business Machines Corporation ("IBM"), who sued to invalidate two provisions in the arbitration agreement she signed when she was terminated. On appeal, Plaintiff raises substantially the same issues as the plaintiffs in several related appeals.[1] We affirm for substantially the same reasons stated by the district court in its decision, *see Tavenner v. Int'l Bus. Machs. Corp.*, No. 21-CV-6345, 2022 U.S. Dist. LEXIS 172888, 2022 WL 4449215 (S.D.N.Y. Sept. 23, 2022), and for the reasons stated in our opinion in the related appeal, *In re IBM Arb. Agreement Litig.*, No. 22-1728 (2d Cir. Aug. 4, 2023).

We have considered all of Plaintiff's arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**. Plaintiff's motion to unseal is **DENIED** as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/_____

1. *See In re IBM Arb. Agreement Litig*, No. 22-1728; *Chandler v. Int'l Bus. Machs. Corp.*, No. 22-1733; *Lodi v. Int'l Bus. Machs. Corp.*, No. 22-1737.

APPENDIX D — *CHANDLER* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

22-1733

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of August, two thousand twenty-three.

PRESENT: ROSEMARY S. POOLER,
RICHARD C. WESLEY,
MICHAEL H. PARK,
Circuit Judges.

WILLIAM CHANDLER,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant-Appellee.

August 4, 2023, Decided

Appendix D

Appeal from a judgment of the United States District Court for the Southern District of New York (Koeltl, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED** and Plaintiff's motion to unseal is **DENIED**.

Plaintiff is a former employee of International Business Machines Corporation ("IBM"), who sued to invalidate two provisions in the arbitration agreement he signed when he was terminated. On appeal, he raises substantially the same issues as the plaintiffs in several related appeals.[1] We affirm for substantially the same reasons stated by the district court in its decision, *see Chandler v. Int'l Bus. Machs. Corp.*, No. 21-CV-6319, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340 (S.D.N.Y. July 6, 2022), and for the reasons stated in our opinion in the related appeal, *In re IBM Arb. Agreement Litig.*, No. 22-1728 (2d Cir. Aug. 4, 2023).

We have considered all of Plaintiff's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**. Plaintiff's motion to unseal is **DENIED** as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court
/s/_____

1. *See In re IBM Arb. Agreement Litig.*, No. 22-1728; *Lodi v. Int'l Bus. Machs. Corp.*, No. 22-1737; *Tavenner v. Int'l Bus. Machs. Corp.*, No. 22-2318.

APPENDIX E — *IN RE IBM* OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 14, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-CV-6296 (JMF)

IN RE: IBM ARBITRATION
AGREEMENT LITIGATION

July 14, 2022, Decided
July 14, 2022, Filed

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

In these consolidated cases, twenty-six former employees of International Business Machines Corporation ("IBM") seek to challenge two provisions of the arbitration agreements that they signed prior to their termination. Plaintiffs either sought to, or intend to, assert claims under the Age Discrimination in Employment Act ("ADEA") against IBM in arbitration. When they filed these cases, Plaintiffs did not dispute that they were required to bring these claims in arbitration — and, indeed, most of them had. *See* ECF No. 1 ("Compl."), at 9-10; ECF No. 27 ("Pls.' Mem."), at 2; ECF No. 61 ("Pls.' Opp'n"), at 16.[1] Instead, through their Complaints, they

1. As discussed below, Plaintiffs have since taken a different tack, moving to amend their Complaints to bring claims challenging

seek a declaratory judgment that two provisions of their arbitration agreements are unenforceable: a provision that governs the timeliness of their arbitration claims (the "Timeliness Provision") and a confidentiality clause (the "Confidentiality Provision").

IBM now moves, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiffs' claims. At the same time, Plaintiffs move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment. Additionally, Plaintiffs move for leave to amend their Complaints to add a claim for fraudulent inducement, challenging the enforceability of the arbitration agreements in their entirety. For the reasons that follow, IBM's motion to dismiss is GRANTED, Plaintiffs' motion for summary judgment is DENIED as moot, and Plaintiffs' motion for leave to amend is likewise DENIED.

BACKGROUND

In considering a Rule 12(b)(6) motion, courts are limited to the facts alleged in the complaint, which are presumed to be true. *See, e.g.*, *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008) (per curiam). A court may also consider documents "incorporated by reference" into the complaint, *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010); documents that are "integral" to the complaint, *id.*; and "documents of which [the court]

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the enforceability of their arbitration agreements. *See* ECF No. 83 ("Pls.' Mot. to Amend Reply"), at 9. All citations to the record are to filings in 21-CV-6296 (JMF), unless otherwise specified.

may take judicial notice, including pleadings and prior decisions in related lawsuits," *Gertskis v. U.S. E.E.O.C.*, No. 11-CV-5830 (JMF), 2013 U.S. Dist. LEXIS 39110, 2013 WL 1148924, at *1 (S.D.N.Y. Mar. 20, 2013), *aff'd*, 594 F. App'x 719 (2d Cir. 2014) (summary order). Accordingly, the following facts are drawn from the pleadings and the aforementioned additional documents.[2]

A. Plaintiffs' Terminations and Arbitration Agreements

Plaintiffs are all former IBM employees who were over the age of forty at the time of their terminations. *See* Compl. ¶ 7.[3] They allege that they were laid off as a result of a company-wide discriminatory scheme designed to reduce the population of older workers to make way for a new, younger generation of employees. *Id.* ¶¶ 8-9.[4] IBM's "top management" allegedly implemented this scheme in order to better compete with newer technology companies, such as Google, Facebook (now Meta), Amazon, and others. *Id.* ¶ 9. In 2020, following a multi-year investigation, the

2. Plaintiffs submitted evidence outside of the pleadings in support of their motion for summary judgment. *See* ECF Nos. 29, 40. For the reasons discussed below, however, the Court does not reach Plaintiffs' motion and, thus, does not consider this evidence.

3. The complaints in each of the member cases consolidated under No. 21-CV-6296 are materially identical, unless otherwise noted.

4. The details of the alleged discriminatory scheme are recounted in *Rusis v. International Business Machines Corp.*, 529 F. Supp. 3d 178, 188-90 (S.D.N.Y. 2021), an opinion issued by Judge Caproni in a related case, familiarity with which is presumed.

Equal Employment Opportunity Commission ("EEOC") issued a determination that there was reasonable cause to believe IBM had in fact discriminated against older employees during the time Plaintiffs were laid off. *Id.* ¶ 10.

Upon termination, each Plaintiff signed an agreement to waive almost all of his or her legal claims against IBM in exchange for a modest severance. *Id.* ¶ 11. The waiver did not cover ADEA claims, but each Plaintiff's agreement separately provided that such claims could be pursued only through individual arbitration proceedings. *Id.* Two provisions of the arbitration agreement (the "Arbitration Agreement") — the terms of which were identical for all Plaintiffs — bear particular relevance here: the Timeliness Provision and the Confidentiality Provision. ECF No. 29-2, at 25-27 ("Arb. Agreement"), at 25-26.[5] The first provides:

> To initiate arbitration, [the employee] must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived.

5. The Court may consider the Arbitration Agreement for the purposes of resolving IBM's motion to dismiss because it is "incorporated into the complaint by reference." *Kleinman v. Elan Corp., PLC*, 706 F.3d 145, 152 (2d Cir. 2013); *see* Compl. ¶¶ 12-14, 24.

Arb. Agreement 26. Importantly, the provision further specifies 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.* The Confidentiality Provision, meanwhile, states:

> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

Id. at 27. The Arbitration Agreement also provides that "[a]ny issue concerning" its "validity or enforceability . . . shall be decided only by a court of competent jurisdiction." *Id.* at 25.

B. The Arbitration Proceedings

Before filing suit here, twenty-four of the twenty-six Plaintiffs (the "Post-Arbitration Plaintiffs") — all but Plaintiffs Brian Flannery and Phillip Corbett — sought to pursue their ADEA claims in arbitration. Compl. ¶ 12; *see* Pls.' Mem. 8; ECF No. 48 ("Def.'s Mem."), at 4, n.2; *see also* No. 21-CV-6384, ECF No. 1 ("Flannery Compl."), ¶¶ 12, 16; No. 21-CV-6380, ECF No. 1 ("Corbett Compl."), ¶¶ 12, 16. In each case, the arbitrator dismissed the Plaintiff's claims as untimely. Pls.' Mem. 8; *see also* ECF Nos. 29-26 to 29-48. Specifically, the arbitrator held that the Post-Arbitration Plaintiffs had failed to file written arbitration demands within the time specified by the Timeliness Provision. *See* Pls.' Mem. 8; *see, e.g.*, ECF No. 29-26, at 1. In each case, the arbitrator further held that the Timeliness Provision bars application of the "piggybacking rule," which Plaintiffs had argued would render their claims timely. *See* Pls.' Mem. 8; *see, e.g.*, ECF No. 29-26, at 2-3. The judicially created piggybacking rule is an exception to the ADEA's EEOC charge-filing requirement, which requires a plaintiff seeking to bring an ADEA claim in court to file an EEOC charge within 180 or 300 days after the "alleged unlawful employment practice occurred," and then to wait "until 60 days after" that charge is filed to sue. 29 U.S.C. § 626(d)(1).[6] Pursuant

6. In addition to the deadline for filing an EEOC charge, the ADEA "also imposes a 90-day deadline for the commencement of a court action if the EEOC notifies the claimant that it has dismissed her charge or has otherwise terminated the proceedings." *Francis v. Elmsford Sch. Dist.*, 442 F.3d 123, 126 (2d Cir. 2006); *see* 29 U.S.C. § 626(e).

to the piggybacking rule, a plaintiff who failed to file his or her own EEOC charge within the 180- or 300-day deadline can "piggyback" off of another person's timely filed EEOC charge that alleges "similar discriminatory treatment in the same time frame." *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 564 (2d Cir. 2006), *aff'd*, 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008).

Notably, no Post-Arbitration Plaintiff filed a petition to vacate his or her arbitral decision within the three-month timeframe set forth in the Federal Arbitration Act ("FAA"). 9 U.S.C. § 12; *see* Pls.' Opp'n 16. The other two Plaintiffs — Flannery and Corbett — had not yet initiated arbitration proceedings as of the date they filed their Complaints here. *See* Pls.' Mem. 8; Flannery Compl. ¶¶ 12, 16; Corbett Compl. ¶¶ 12, 16.

C. The *Rusis* Action and Plaintiffs' Individual Actions

Before filing their Complaints here, Plaintiffs first sought to opt into a putative class action pending before Judge Caproni, *Rusis v. International Business Machines Corp.*, No. 18-CV-8434.[7] *Rusis*, which was filed in 2018, involves the same underlying ADEA claims as those Plaintiffs press here, but was brought by IBM employees who had not signed the Arbitration Agreements at issue here. *See Rusis*, 529 F. Supp. 3d at 188-90. In March 2021, Judge Caproni dismissed the claims of Plaintiffs here on the

7. Plaintiffs clarified in briefing that the Complaints filed by Plaintiffs Flannery and Deborah Kamienski "inadvertently state incorrectly that they opted in to *Rusis*." Pls.' Mem. 3 n.4. The clarification is immaterial to the pending motions.

ground that the Arbitration Agreements they had signed contained a class and collective action waiver that barred them from opting into the *Rusis* putative class action. *Id.* at 195-96. In a footnote, Judge Caproni expressed "skepticism" with respect to Plaintiffs' argument that the Timeliness Provision in their Arbitration Agreements was unenforceable because it purported to waive a substantive right under the ADEA — namely, the piggybacking rule. *Id.* at 192 n.4. Ultimately, however, Judge Caproni "d[id] not reach the issue" given Plaintiffs' intention to file "individual actions involving the same issue." *Id.*

Approximately four months after Judge Caproni's decision in *Rusis*, Plaintiffs brought these cases seeking declaratory relief. *See* Compl. 9-10. In particular, Plaintiffs seek a declaratory judgment that two provisions of their arbitration agreements — the Timeliness and Confidentiality Provisions — are unenforceable. *See id.* On August 24, 2021, the Court consolidated the actions, while clarifying that each action would retain its "separate" identity. ECF No. 20 (quoting *Hall v. Hall*, 138 S. Ct. 1118, 1128-31, 200 L. Ed. 2d 399 (2018)).[8] Plaintiffs thereafter moved for summary judgment, and IBM filed a motion to

8. The Court consolidated the following twenty-five member cases under No. 21-CV-6296 on August 24, 2021: Nos. 21-CV-6296; 21-CV-6297; 21-CV-6308; 21-CV-6310; 21-CV-6312; 21-CV-6314; 21-CV-6320; 21-CV-6322; 21-CV-6323; 21-CV-6325; 21-CV-6326; 21-CV-6331; 21-CV-6332; 21-CV-6337; 21-CV-6340; 21-CV-6341; 21-CV-6344; 21-CV-6349; 21-CV-6351; 21-CV-6353; 21-CV-6355; 21-CV-6375; 21-CV-6377; 21-CV-6380; 21-CV-6384. *See* ECF No. 20. On November 24, 2021, the Court added one additional action, No. 21-CV-6307. *See* ECF No. 57. In total, there are twenty-six member cases in this action.

dismiss. ECF Nos. 27, 47. Nearly a month after briefing for those two motions was complete, Plaintiffs filed a motion for leave to amend their Complaints in order to add a class-based fraudulent inducement claim. *See* ECF No. 79 ("Pls.' Mot. to Amend Mem."), at 1-2; ECF No. 79-1 ("PAC"). IBM opposed. ECF No. 80.

DISCUSSION

As noted, three motions are before the Court: (1) IBM's motion to dismiss the Complaints; (2) Plaintiffs' motion for summary judgment; and (3) Plaintiffs' motion for leave to amend. Before the Court turns to any of these motions, however, it has an "independent obligation" to address the threshold question of subject-matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006) ("[Courts] have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *see, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 671, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."). To the extent that the Court concludes that it has jurisdiction to do so, the Court will then turn to the parties' motions in turn.

A. Subject-Matter Jurisdiction

Plaintiffs here invoke the Court's federal-question jurisdiction based on the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-02. *See* Compl. ¶ 5. Under the DJA, a court "may declare the rights and other legal

relations of any interested party seeking such declaration" in "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201. "The purpose of declaratory relief is to relieve litigants from the ongoing or imminent harm they may suffer when their rights vis-à-vis each other are uncertain." *Parker v. Citizen's Bank, N.A.*, No. 19-CV-1454 (VEC), 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *4 (S.D.N.Y. Oct. 29, 2019) (citing *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986)). It is therefore a "prospective remedy intended to resolve or mitigate disputes that may yield later litigation." *EFG Bank AG, Cayman Branch v. AXA Equitable Life Ins. Co.*, 309 F. Supp. 3d 89, 99 (S.D.N.Y. 2018).

Importantly, as relevant here, claims "in a declaratory judgment action" are only "ripe[]" where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005). "[A] touchstone to guide the probe for sufficient immediacy and reality is whether the declaratory relief sought relates to a dispute where the alleged liability has already accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility." *Wilmington Tr., Nat'l Ass'n v. Est. of McClendon*, 287 F. Supp. 3d 353, 364 (S.D.N.Y. 2018).

Additionally, "[t]he DJA 'confers a discretion on the courts rather than an absolute right upon the litigant.'" *John Wiley & Sons, Inc. v. Visuals Unlimited, Inc.*,

No. 11-CV-5453 (CM), 2011 U.S. Dist. LEXIS 127635, 2011 WL 5245192, at *4 (S.D.N.Y. Nov. 2, 2011) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)); *see* 28 U.S.C. § 2201 ("[Courts] *may* declare the rights and other legal relations of any interested party seeking such declaration . . . ." (emphasis added)). Indeed, "[c]ourts have consistently interpreted [the] permissive language [of the DJA] as a broad grant of discretion to district courts to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) (per curiam). "[T]o decide whether to entertain an action for declaratory judgment," courts in this Circuit consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty." *Duane Reade, Inc.*, 411 F.3d at 389.

Applying the foregoing standards, the Court first concludes, as an exercise of its discretion, that it is not appropriate to entertain jurisdiction over the Post-Arbitration Plaintiffs' claims. That is because "there is no current or impending controversy about the[ir] rights or obligations [vis-à-vis IBM] for this Court to clarify." *Parker*, 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *3. As Plaintiffs themselves concede, each of the Post-Arbitration Plaintiffs already arbitrated their ADEA claims, lost, and chose not to file any motion to vacate the arbitral decision within the three-month deadline under the FAA. *See* Compl. ¶ 12, 16; ECF Nos. 29-26 to 29-48;

Pls.' Opp'n 16; *see also* 9 U.S.C. § 12. Instead, they waited nearly two (and in some cases more than two) years after they received their arbitration decisions to initiate this action for declaratory relief challenging the enforceability of two provisions of their arbitration agreements. *See* ECF Nos. 29-26 to 29-48.

In light of these circumstances, both factors that the Second Circuit has instructed district courts to consider weigh against exercising DJA-jurisdiction over the Post-Arbitration Plaintiffs' claims. There is no "useful purpose" that a declaratory judgment would serve at this point; nor is there any "uncertainty" in the parties' legal relations for the Court to resolve. *Duane Reade, Inc.*, 411 F.3d at 389. To the contrary, the arbitration proceedings definitively resolved the Post-Arbitration Plaintiffs' ADEA claims, and the window to challenge those rulings, or the enforceability of the provisions that governed them, has long since closed. *Duane Reade, Inc.*, 411 F.3d at 389; *see also* 9 U.S.C. § 12.[9] The Court therefore declines

9. Plaintiffs argue that, although the deadline to seek vacatur of the arbitration decisions has passed, they could nevertheless seek "relief from judgment pursuant to [Federal Rule of Civil Procedure] 60" in arbitration "[s]hould th[e] Court determine that the timeliness provision in the arbitration agreement is . . . unenforceable." Pls.' Opp'n 17. But, as noted, it has been nearly two (or more) years since the Post-Arbitration Plaintiffs' ADEA claims were dismissed in arbitration, making it highly unlikely that any arbitrator would in fact entertain any Rule 60(b) motion. *See* Fed. R. Civ. P. 60(c) ("A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). Thus, Plaintiffs' proposed Rule 60 workaround does not alter this

to exercise jurisdiction to resolve the Post-Arbitration Plaintiffs' claims. *See Duane Reade, Inc.*, 411 F.3d at 389; *Jenkins v. United States*, 386 F.3d 415, 417-18 (2d Cir. 2004) ("[DJA actions] must have . . . some useful purpose to be achieved in deciding them."); *see also, e.g.*, *Parker*, 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *3, *5 (declining to exercise jurisdiction over a DJA claim where the "[d]eclaratory relief [sought] . . . would not resolve any ongoing or impending harm to [the p]laintiff vis-à-vis her relationship with [the d]efendants" and "would not clarify any uncertainty in the parties' legal relations"); *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 439 (S.D.N.Y. 2002) (reaching the same result because, *inter alia*, the "[c]ourt [wa]s not persuaded . . . the declaratory relief [sought] would . . . serve a useful purpose in clarifying the legal relations between the parties"), *aff'd*, 346 F.3d 357 (2d Cir. 2003). Thus, the claims of the Post-Arbitration Plaintiffs must be, and are, dismissed.[10]

Court's conclusion that a declaratory ruling on the enforceability of the Timeliness and Confidentiality Provisions would be unlikely to serve any "useful purpose" with respect to the Post-Arbitration Plaintiffs. *Duane Reade, Inc.*, 411 F.3d at 389. Moreover, Plaintiffs' reliance on the DJA is little more than a transparent attempt to "avoid the procedural requirements" and limitations associated with motions to vacate arbitral awards. *Parker*, 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *5; *see also John Wiley & Sons*, 2011 U.S. Dist. LEXIS 127635, 2011 WL 5245192, at *4. That is all the more reason to be wary of exercising subject-matter jurisdiction in these circumstances.

10. Separate and apart from the foregoing, the Supreme Court's recent decision in *Badgerow v. Walters*, 142 S. Ct. 1310, 212 L. Ed. 2d 355 (2022) — which was issued after the Court issued its August 24, 2022 Order regarding subject-matter jurisdiction, ECF No. 20,

and after briefing in these cases was complete — casts doubt on the Court's jurisdiction over the Post-Arbitration Plaintiffs' claims. In brief, the *Badgerow* Court held that the "look-through" approach to determining jurisdiction for motions to compel jurisdiction under Section 4 of the FAA does not apply to motions to confirm or vacate arbitral awards under Sections 9 and 10 of the FAA. *Id.* at 1314. As such, the source of jurisdiction must appear on "the face of the Section 9 or 10 application[]" — that is, it generally must show that there is diversity jurisdiction or allege "that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief." *Id.* at 1316-17. Here, the DJA is the sole proffered basis for federal jurisdiction. But the DJA does not confer jurisdiction on its own; instead, "when determining declaratory judgment jurisdiction, [courts] often look to the character of the threatened action. That is to say, they ask whether a coercive action brought by the declaratory judgment defendant . . . would necessarily present a federal question." *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 197, 134 S. Ct. 843, 187 L. Ed. 2d 703 (2014) (cleaned up). Assuming that the "threatened action" with respect to the Post-Arbitration Plaintiffs' claims would be a motion to confirm an arbitration award under Section 9 (given that those Plaintiffs have already arbitrated), then the Court could not "look through" to the underlying ADEA claim for jurisdiction per *Badgerow*, 142 S. Ct. at 1314. Instead, the federal question would have to appear on the "face" of the threatened Section 9 action for the Court to have jurisdiction over the Post-Arbitration Plaintiffs' claims. *Id.* But *Badgerow* provides "no examples" of what it means for a "federal question with respect to the award's confirmation or vacatur" to exist on the face of the petition. *Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 661 (2d Cir. 2022) (Jacobs, J., concurring). Ultimately, however, the Court need not, and does not, resolve this thorny jurisdictional question because, for the reasons discussed above, it concludes jurisdiction is lacking on other grounds. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.").

Additionally, the Court concludes that it lacks jurisdiction to adjudicate the remaining claims (those of Plaintiffs Flannery and Corbett) regarding the Confidentiality Provision because they are not yet — and may never become — ripe. *See* Compl. 10, ¶ 2.[11] As noted, "[t]he standard for ripeness in a declaratory judgment action is that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Duane Reade, Inc.*, 411 F.3d at 388 (internal quotation marks omitted). To determine whether a controversy is of "sufficient immediacy and reality," courts typically look to "whether the declaratory relief sought relates to a dispute where the alleged liability has already accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility, or even probability of some contingency that may or may not come to pass." *Dow Jones & Co., Inc.*, 237 F. Supp. 2d at 406-07. The fact that "liability may be contingent," however, "does not necessarily defeat jurisdiction of a declaratory judgment action." *Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32, 35 (2d Cir. 1992). "When liability is contingent," a court should "focus on 'the practical likelihood that the contingencies will occur.'" *U.S. Dep't of Treasury v. Off. Comm. of Unsecured Creditors of Motors Liquidation Co.*, 475 B.R. 347, 358 (S.D.N.Y. 2012) (quoting *Associated Indem. Corp.*, 961 F.2d at 35).

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11. The Court did not consider ripeness in its August 24, 2022 Order, in which the Court indicated that it was, at that point, "satisfied . . . there is subject-matter jurisdiction given that the underlying arbitrations involved claims under the [ADEA]." ECF No. 20.

Here — as IBM points out and Plaintiffs do not dispute — the Confidentiality Provision will play a role in Flannery and Corbett's arbitration proceedings only if the arbitrator rules that they have timely ADEA claims to arbitrate in the first place. *See* Def.'s Mem. 2, 24; Pls.' Opp'n 19-34 (not disputing this point). But there is no "practical likelihood" that that contingency will occur. *Associated Indem. Corp.*, 961 F.2d at 35. That is because, as explained below, there is no merit to Plaintiffs' claim that the Timeliness Provision is unenforceable. *See* Compl. 10, ¶ 1. It follows that there is no reason to believe an arbitrator would conclude Flannery and Corbett have timely ADEA claims. *See* Pls.' Opp'n 26 n.16 (acknowledging the Post-Arbitration Plaintiffs' ADEA claims were all "dismissed as untimely" in arbitration based on the Timeliness Provision); *cf. Chandler v. Int'l Bus. Machs. Corp.*, No. 21-CV-6319 (JGK), 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *7 & n.4 (S.D.N.Y. July 6, 2022) (concluding, in a case involving a challenge to the same two provisions of IBM's arbitration agreement, that the "plaintiff's claim for declaratory relief with respect to the Confidentiality Provision [was] . . . moot" given the court's holding that the Timeliness Provision is enforceable). The net result is that the "controversy" raised by Flannery and Corbett's claims regarding the Confidentiality Provision lacks "sufficient immediacy and reality" to render it ripe for this Court's review. *Duane Reade, Inc.*, 411 F.3d at 388. The Court must therefore dismiss those claims without prejudice to renewal in the unlikely event that the issue ever becomes ripe.

B. IBM's Motion to Dismiss Plaintiffs' Challenge to the Timeliness Provision

That leaves only the challenge of Plaintiffs Flannery and Corbett to the enforceability of the Timeliness Provision, which IBM moves to dismiss pursuant to Rule 12(b)(6).[12] It is well established that "arbitration is a matter of contract." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013); *see* 9 U.S.C. § 2. Thus, "courts must rigorously enforce arbitration agreements according to their terms," including "the rules under which that arbitration will be conducted." *Id.* (internal quotation marks omitted); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018). "By agreeing to arbitrate a statutory claim," however, "a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Thus, "a substantive waiver of federally protected civil rights" in an arbitration agreement "will not be upheld." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009) (citing *Mitsubishi Motors*, 473 U.S. at 637 & n.19). Federal courts will also decline to enforce "[arbitration] agreements that prevent the 'effective vindication' of a federal statutory right." *Italian Colors*, 570 U.S. at 235; *see also Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125 (2d Cir. 2010) ("[A]

12. Throughout this Section, "Plaintiffs" refers to Plaintiffs Flannery and Corbett.

federal court will compel arbitration of a statutory claim only if it is clear that 'the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.'" (quoting *Mitsubishi Motors*, 473 U.S. at 637)).

Plaintiffs challenge the enforceability of the Timeliness Provision in their Arbitration Agreements on both grounds. That is, they argue first that it is unenforceable to the extent that it purports to waive the piggybacking rule because that rule gives rise to a substantive right under the ADEA. *See* Pls.' Mem. 3, 11-21; Pls.' Opp'n 7-15. Second, they contend that the "purported waiver would impermissibly prevent the effective vindication of Plaintiffs' claims in arbitration." Pls.' Mem. 12. Neither argument is persuasive.

1. The Piggybacking Rule Is Not a Substantive Right for FAA Purposes

First, there is no merit to Plaintiffs' contention that the judge-made piggybacking rule gives rise to a substantive, nonwaivable right under the ADEA. For starters, Plaintiffs do not cite, nor has the Court found, any authority to support the proposition 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. *See* Pls.' Opp'n 7-15.[13] Instead, Plaintiffs argue that "[t]he piggybacking

13. That is perhaps unsurprising. As the Supreme Court has made clear, "courts [must] enforce agreements to arbitrate according to their terms . . . unless the FAA's mandate has been 'overridden by a contrary *congressional* command.'" *CompuCredit*

rule is part of . . . the ADEA's limitations period" and that the "ADEA's limitations period is a substantive right." Pls.' Opp'n 9, 12. But that argument is difficult, if not impossible, to square with Supreme Court and Second Circuit precedent. Indeed, whether or not the piggybacking rule is properly considered part of the ADEA's limitations period — a question the Court need not answer — Supreme Court precedent makes plain that the substantive right protected from waiver under the FAA is far narrower than Plaintiffs claim. As the Supreme Court explained in *14 Penn Plaza LLC*, the substantive right conferred by the ADEA for FAA purposes is the "right to be free from workplace age discrimination." 556 U.S. at 265. Importantly, the Court "distinguished" that right from "procedural [ones], like 'the right to seek relief from a court in the first instance.'" *Estle v. Int'l Bus. Machs. Corp.*, 23 F.4th 210, 214 (2d Cir. 2022) (quoting *14 Penn Plaza*, 556 U.S. at 265). The ADEA's limitations period falls comfortably in the latter category; it is more akin to the procedural "right to seek relief from a court in the first instance" than it is to the substantive "right to be free from workplace age discrimination." *14 Penn Plaza*, 556 U.S. at 265.

That conclusion is bolstered by Second Circuit precedent. In *Vernon v. Cassadaga Valley Central School District*, 49 F.3d 886 (2d Cir. 1995), the Second Circuit explained that substantive rights typically govern

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Corp. v. Greenwood, 565 U.S. 95, 98, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012) (emphasis added) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)). As noted, the piggybacking rule is judge-made.

"primary conduct" — *e.g.*, "the alleged discrimination" — while procedural rights generally bear on "secondary conduct" — *e.g.*, "the filing of [a] suit." *Id.* at 890. Applying that reasoning, the court held that the ADEA statute of limitations is a procedural, not substantive, right in the context of determining whether the limitations period could apply retroactively. *Id.* at 889-90; *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."). The Court sees no reason to deviate from that conclusion 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. *Vernon*, 49 F.3d at 890. Accordingly, the Court joins Judge Koeltl in rejecting Plaintiff's argument that the "piggybacking rule" is a "substantive, non-waivable right protected by the ADEA" because "[t]he substantive right protected by the ADEA is the 'statutory right to be free from workplace discrimination.'" *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *4 (quoting *14 Penn Plaza*, 556 U.S. at 265); *see also Lodi v. v. Int'l Bus. Machs. Corp*, No. 21-CV-6336 (JGK), 2022 U.S. Dist. LEXIS 122082, 2022 WL 2669199, at *3 (S.D.N.Y. July 11, 2022); *Rusis*, 529 F. Supp. 3d at 192 n.4 (expressing "skepticism," but not addressing, Plaintiffs' argument).

Plaintiffs raise two primary counterarguments, neither of which is persuasive. First, Plaintiffs rely heavily on the Sixth Circuit's decision in *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2021). *See* Pls.'

Mem. 15-16. There, the Sixth Circuit held that an employer may not contractually shorten the ADEA limitations period for filing civil actions because "the limitations period[] in the . . . ADEA give[s] rise to substantive, non-waivable rights." *Id.* at 519-21. Importantly, however, *Thompson* did not involve an agreement to arbitrate or the piggybacking rule. The Sixth Circuit therefore had no occasion to consider whether the same conclusion would apply in the arbitration context or whether the ADEA also confers a substantive right to piggybacking. *See id.* What is more, the *Thompson* court relied extensively on *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019), in which the Sixth Circuit had concluded that Title VII's limitations period could not be contractually shortened. In so holding, however, the *Logan* court distinguished an earlier *en banc* decision upholding an agreement to arbitrate that shortened the Title VII statute of limitations period. *Id.* at 836-38 (citing *Morrison v. Cir. City Stores*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (en banc)). Indeed, *Logan* explicitly limited its holding to "contractually shortened limitation period[s] . . . *outside of . . . arbitration agreement*[*s*]." *Id.* at 839 (emphasis added); *see also id.* at 836-38 (distinguishing *Morrison* on the grounds that it involved unique considerations in the "arbitration context"). If anything, therefore, Sixth Circuit precedent undermines rather than supports Plaintiffs' position. *See Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *6 (distinguishing *Thompson* and *Logan* on similar grounds).[14]

14. Relatedly, Plaintiffs argue that the Court should "defer" to the EEOC's position in the amicus brief it submitted in *Thompson*. *See* Pls.' Mem. 16-17 & n.18. But putting aside whether such deference

Second, Plaintiffs argue, in the alternative, that they could not have waived "their statute of limitations rights under the piggybacking rule by signing the arbitration agreement" because IBM did not provide them with disclosures required by the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C.§ 626(f). Pls.' Mem. 19; *see also* Pls.' Opp'n 3, 8. The OWBPA, which amended the ADEA, does require an employer to make certain disclosures to an employee before that employee may "waive any right or claim" under the ADEA. 29 U.S.C. § 626(f)(1). But, as the Second Circuit has made clear, "[t]he phrase 'right or claim' as used in § 626(f)(1) is limited to substantive rights and does not include procedural ones." *Estle*, 23 F.4th at 214 (citing *14 Penn Plaza*, 556 U.S. at 265-66). Thus, Plaintiffs' reliance on the OWBPA adds nothing. As discussed, the piggybacking rule does not give rise to a substantive right under the ADEA. It follows that the OWBPA's disclosure requirements do not apply to waivers of that rule. *Cf. id.* at 213-15 (holding that "[a] collective-action waiver is . . . not a waiver of any 'right or claim' under the ADEA that triggers the requirements of 29 U.S.C. § 626(f)(1)" because "collective

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would be warranted otherwise, the EEOC's amicus brief did not take any position on the question at issue here because, as noted, *Thompson* did not involve an agreement to arbitrate or piggybacking. *See Thompson*, EEOC Brief, 2020 WL 1160190, at *19-26 (6th Cir. Mar. 2, 2020). Moreover, the EEOC's argument relied almost exclusively on the Sixth Circuit's prior decision in *Logan*, which, as discussed, acknowledged that a different conclusion would be warranted in the arbitration context. *See id.* Thus, the EEOC's amicus brief does not change the landscape, let alone warrant deference here. Notably, the EEOC declined the Court's invitation to submit an amicus in *this* case. *See* ECF Nos. 20, 51.

action, like arbitration, is a procedural mechanism, not a substantive right" (internal quotation marks omitted)). In short, for the foregoing reasons, the Court finds no support for Plaintiffs' argument that the piggybacking rule is a substantive, non-waivable right in this context.

2. The Timeliness Provision Does Not Prevent Plaintiffs from Effectively Vindicating Their Rights Under the ADEA

The Court's conclusion that the piggybacking rule is procedural, not substantive, for purposes of the FAA does not mean that agreements to arbitrate may establish prohibitively short filing deadlines for ADEA claims. Instead, it means that, like other procedural rules, the statute of limitations period may be modified in arbitration proceedings provided that the modification does not prevent the "effective vindication" of a plaintiff's substantive rights. *Italian Colors*, 570 U.S. at 235; *see, e.g.*, *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *4; *cf. Ragone*, 595 F.3d at 125-26 (noting that, if an arbitration agreement shortened Title VII's limitations period from 300 to 90 days, it might raise concerns under the effective-vindication doctrine). This approach aptly balances the "strong federal policy favoring arbitration" and courts' associated duty to enforce arbitration agreements according to their terms, on the one hand, with the need to ensure that "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum," on the other. *Ragone*, 595 F.3d at 121, 125.

Plaintiffs argue that, if the piggybacking rule is procedural, the Timeliness Provision violates this limiting principle. But that argument borders on frivolous. "Plaintiffs do not identify any obstacle, let alone one imposed by IBM, that prevented [them] from filing an arbitration demand on their ADEA claims within the 180-or 300-day deadline established by the separation agreements." *Rusis*, 529 F. Supp. 3d at 194 n.8. And "[h]ad [Plaintiffs] done so, . . . they could have received any relief to which they were entitled in an individual arbitration, as contemplated by IBM's separation agreements." *Id.*; *see also Smith v. Int'l Bus. Machs. Corp.*, No. 21-CV-03856 (JPB), 2022 U.S. Dist. LEXIS 95934, 2022 WL 1720140, at *6 (N.D. Ga. May 27, 2022) (rejecting this same argument on similar grounds). Notably, 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. *See* Arb. Agreement 25; 29 U.S.C. § 626(d)(1). Thus, to hold that Plaintiffs were 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. That, of course, would be "patently absurd." *Rusis*, 529 F. Supp. 3d at 194 n.8. Accordingly, Plaintiffs' challenge to the Timeliness Provision on the ground that it prevents them from effectively vindicating their rights under the ADEA is without merit. *See, e.g.*, *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *4 ("[T]here can be no reasonable dispute that the Tim[eliness] Provision afforded the plaintiff a 'fair opportunity' to vindicate [his ADEA rights] in arbitration within an entirely reasonable time frame." (quoting *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)).

* * *

In sum, because the Timeliness Provision did not waive a substantive right under the ADEA and did not prevent Plaintiffs from effectively vindicating any such rights, Plaintiffs' challenge to its enforceability fails as a matter of law. Thus, Plaintiffs claim for declaratory relief on these grounds must be, and is, dismissed. In light of that determination, Plaintiffs' motion for summary judgment on that claim is also denied as moot. *See, e.g.*, *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *8; *Oparaji v. Mun. Credit Union*, No. 19-CV-4034 (JPC), 2021 U.S. Dist. LEXIS 111221, 2021 WL 2414859, at *6 (S.D.N.Y. June 14, 2021) (denying motion for summary judgment as moot after granting motion to dismiss the claim), *aff'd*, No. 21-1518-CV, 2022 U.S. App. LEXIS 10225, 2022 WL 1122681 (2d Cir. Apr. 15, 2022) (summary order).

C. Plaintiffs' Motion for Leave to Amend

Finally, the Court turns to Plaintiffs' motion for leave to amend their Complaints to add a state-law fraudulent inducement claim, which they seek to bring on a class-wide basis. *See* Pls.' Mot. to Amend Mem.; PAC 18-21. More specifically, Plaintiffs seek to add allegations that IBM fraudulently induced them to "sign IBM's separation agreement (containing the arbitration clause[])" by (1) "fraudulently and in bad faith represent[ing] to [Plaintiffs]

that they were being laid off for legitimate business reasons"; and (2) "misrepresenting to them that they could only maintain their health benefits through COBRA by signing the agreement." PAC ¶¶ 46, 55. Based on these allegations, Plaintiffs assert that "there w[ere] no valid arbitration agreement[s] in the first place, meaning that [Plaintiffs] c[an] still pursue their claims in court." ECF No. 83 ("Pls.' Mot. to Amend Reply"), at 9; *see also* PAC 21, ¶ 1 (asking the Court to "find and declare the whole of the arbitration provision in IBM's Separation Agreement . . . to be unenforceable and otherwise void").

Rule 15 of the Federal Rules of Civil Procedure provides that courts "should freely give leave" to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a) (2). Nevertheless, a court has discretion to deny a motion to amend where "there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002). "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6)." *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002); *see also Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012). Put differently, a proposed claim is futile if, accepting the facts alleged by the party seeking amendment as true and construing them in the light most favorable to that party, a proposed claim does not "plausibly give rise to an entitlement to relief." *Ashcroft*, 556 U.S. at 679. The party opposing a motion to amend bears the burden of establishing that amendment would be futile. *See, e.g.*, *Ouedraogo v. A-1 Int'l Courier Serv.*,

Inc., No. 12-CV-5651 (AJN), 2013 U.S. Dist. LEXIS 96091, 2013 WL 3466810, at *6 (S.D.N.Y. July 8, 2013).

In this case, Plaintiffs' proposed amendments are futile. Beginning with the Post-Arbitration Plaintiffs, their proposed fraudulent inducement claim would fail as a matter of law because they waived any such challenge to their arbitration agreements. "If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter." *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) (quoting *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)); *accord Sokolowski v. Metro. Transp. Auth.*, 723 F.3d 187, 191 (2d Cir. 2013); *see also ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 685 (2d Cir. 1996) ("An objection to the arbitrability of a claim must be made on a timely basis, or it is waived."). Moreover, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is . . . an allegation of waiver . . . or a like defense to arbitrability." *Mitsubishi Motors*, 473 U.S. at 626. Applying these standards, courts regularly find that a party has waived a challenge to an arbitration agreement where the party initiated the arbitration demand and participated in the arbitration proceedings without objection. *See, e.g.*, *Time Warner Cable of New York City LLC v. Int'l Bhd. of Elec. Workers, AFLCIO, Loc. Union No. 3*, 684 F. App'x 68, 71 (2d Cir. 2017) (summary order) (finding waiver where the objecting party had "expressly ask[ed] the arbitrator" to resolve the dispute, and had not

objected "until 5 months after the arbitrator issued an adverse interim award"); *ConnTech Dev. Co.*, 102 F.3d at 685 (same where party had participated in over a month of hearings before the arbitrator and had not asserted an objection to arbitration until forty-one months after being served with notice of the arbitration demand); *Kumaran v. ADM Inv. Servs., Inc.*, No. 20-CV-3873 (GHW) (SDA), 2021 U.S. Dist. LEXIS 106780, 2021 WL 2333645, at *4 (S.D.N.Y. June 7, 2021) (same where party had "initiat[ed] the arbitration" and "participated[d] in arbitration for at least a year and a half"), *motion for reconsideration denied*, ECF No. 97, at 41-46 (S.D.N.Y Feb. 18, 2022); *Sands Bros. & Co. v. Zipper*, No. 03-CV-7731 (VM), 2003 U.S. Dist. LEXIS 19165, 2003 WL 22439789, at *3 (S.D.N.Y. Oct. 27, 2003) (same where party had waited until "just twenty-two days before the arbitration was scheduled to begin, to object to the arbitration").

This precedent forecloses the Post-Arbitration Plaintiffs' proposed fraudulent inducement claims. As Plaintiffs themselves acknowledge, each Post-Arbitration Plaintiff affirmatively initiated arbitration and actively participated in arbitration proceedings until their claims were dismissed. *See* PAC ¶ 1, 7, 20, 23; *see also* Pls.' Opp'n 26 n.16. And, critically, Plaintiffs do not allege that they objected to the enforceability of their arbitration agreements at any point during their arbitration proceedings. *See* Pls.' Mot. to Amend Reply 7-9 (responding to IBM's waiver argument). To the contrary: Plaintiffs themselves previously disclaimed any attempt to challenge the enforceability of their arbitration agreements, both in *Rusis* and in the instant cases. *See*

529 F. Supp. 3d at 192 ("Plaintiffs do not dispute that [the Arbitration Opt-Ins] must arbitrate their claims." (quoting Plaintiffs' briefing)); Pls.' Mem. 2 ("Plaintiffs have not challenged the overall enforceability of IBM's arbitration agreement. They recognize that their ADEA claims are to be pursued in arbitration."). It was not until Plaintiffs filed their motion for leave to amend — after IBM had moved to dismiss — that they first raised any challenge to the Arbitration Agreement as a whole. *Compare* Pls.' Mem. 2, *with* Pls.' Mot. to Amend Reply 9. Plaintiffs cannot now — years after having received decisions in arbitration proceedings that they themselves initiated, *see* ECF Nos. 29-26 to 29-48 — "argue that the arbitrator[s] lacked authority to decide the matter." *Opals on Ice Lingerie*, 320 F.3d at 368; *see also, e.g.*, *Time Warner Cable of New York City LLC*, 684 F. App'x at 71; *ConnTech Dev. Co.*, 102 F.3d at 685.

Plaintiffs' sole counterargument on this score is meritless. They argue that "[t]here can be no waiver here, given the fact that the information that justified the assertion of the fraudulent inducement claims became known to Plaintiffs only after they had had their claims dismissed in arbitration." Pls.' Mot. to Amend Reply 8. But that argument does not withstand scrutiny. As noted, the principal basis for Plaintiffs' proposed fraudulent inducement claims is that IBM "fraudulently and in bad faith represented to its employees that they were being laid off for legitimate business reasons" when, it is alleged, IBM was systematically discriminating against older workers. PAC ¶¶ 46-53. But these allegations were the core of the very ADEA claims that the Post-Arbitration

Plaintiffs pursued in arbitration. *See* PAC ¶¶ 16-20; *see also, e.g.*, ECF No. 29-7, Ex. A, ¶ 19 ("IBM has also reduced its population of older workers by terminating older employees for pretextual reasons."). Thus, Plaintiffs' contention that they were not aware of their fraudulent inducement claims until after dismissal of those ADEA claims — which were based on the very same conduct — does not pass the laugh test. Pls.' Mot. to Amend Reply 8.[15] Conspicuously, Plaintiffs do not even attempt to argue that they were unaware of a viable fraudulent inducement claim based on misrepresentations regarding COBRA benefits prior to the dismissal of their claims in arbitration. *See id.* at 7-9. Accordingly, the Court concludes that the Post-Arbitration Plaintiffs' proposed fraudulent inducement claims would be futile.

The proposed fraudulent inducement claim of the other two Plaintiffs, Flannery and Corbett, would likewise fail to withstand a motion to dismiss, albeit for different reasons. "To state a claim for fraudulent inducement under New York law, a plaintiff must show: (1) a representation of material fact, (2) which was untrue, (3) which was known to be untrue or made with reckless disregard for the truth, (4) which was offered to deceive another or induce him to act, and (5) which that other party relied on to its injury." *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566,

15. Indeed, Plaintiffs implicitly concede this point by arguing that "it was not until Plaintiffs' counsel had obtained the smoking gun evidence referenced in [another case], that the *degree* to which IBM fraudulently induced these individuals into entering into their arbitration agreement became clear." Pls.' Mot. to Amend Reply 8 (emphasis added).

580 (2d Cir. 2005). Additionally, "fraudulent inducement claim[s] [are] subject to the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure." *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 525 (S.D.N.Y. 2018). Specifically, such claims must "state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b). To satisfy that standard, a complaint must "allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 52 (2d Cir. 1995). That is, "the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006). Failure to satisfy the Rule 9(b) standard warrants dismissal. *See, e.g.*, *id.* at 293; *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 766 (2d Cir. 2010).

Here, the Proposed Amended Complaint does not come close to satisfying these heightened pleading standards. With respect to Plaintiffs' contention that IBM misrepresented the reasons for their terminations — and, more specifically, "fraudulently and in bad faith represented to [Plaintiffs] that they were being laid off for legitimate business reasons," PAC ¶ 46 — the Proposed Amended Complaint does not "state where and when the statements were made," *Lerner*, 459 F.3d at 290.[16] Nor

16. The closest Plaintiffs come is their allegation that "IBM provided employees with template letters indicating that the company was required to lay them off due to their allegedly unneeded skills and/or the company's decision to move in a different business

does it "identify the speaker," *id.*, other than through vague references to "IBM" and "low-level managers," *see* PAC ¶¶ 46-53. Plaintiffs likewise fail to specify where and when "IBM . . . misrepresented to [Plaintiffs] that they could only maintain their health benefits through COBRA by signing the agreement." PAC ¶ 55. And, as for who made those statements, the Proposed Amended Complaint merely suggests that unidentified "managers and human resource professionals" were involved. PAC ¶¶ 54-44. Thus, these pleadings are plainly insufficient to satisfy the requirements of Rule 9(b). *See, e.g.*, *President Container Grp. II, LLC v. Systec Corp.*, 467 F. Supp. 3d 158, 165 (S.D.N.Y. 2020) (dismissing a fraudulent inducement claim for failure to satisfy Rule 9(b)'s requirements because the plaintiff's "allegations fail[ed] to identify who made these statements and when, [and] where, . . . they were made"); *Schlenger v. Fid. Emp. Servs. Co., LLC*, 785 F. Supp. 2d 317, 352 (S.D.N.Y. 2011) (reaching the same conclusion where the plaintiff had "fail[ed] to name individuals, identify detailed statements, or identify particular dates" on which the allegedly fraudulent statements were made). Accordingly, Plaintiffs' motion for leave to amend is

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direction." PAC ¶ 47. But Plaintiffs did not specify when these "template letters" were sent and what specific statements they contained that allegedly give rise to a fraudulent inducement claim. *Cf. McCormack v. IBM*, 145 F. Supp. 3d 258, 276 (S.D.N.Y. 2015) (finding Rule 9(b)'s requirements met for a fraudulent inducement claim where the plaintiff alleged that another employee, who was identified by name, sent an "email . . . on June 12, 2013, inform[ing] [the plaintiff] that he was 'being terminated as part of a broader fiscally-driven "resource action," identified [by name,] which IBM allegedly was implementing "to streamline operations and increase business productivity"'").

DENIED on the basis of futility — that the Proposed Amended Complaint would not survive a motion to dismiss.

CONCLUSION

For the foregoing reasons, IBM's motion to dismiss Plaintiffs' Complaints is GRANTED. In particular, the Court declines to exercise jurisdiction over the Post-Arbitration Plaintiffs' claims and dismisses Flannery and Corbett's challenges to the Confidentiality Provision as unripe. Additionally, the Court grants IBM's motion to dismiss Flannery's and Corbett's challenges to the Timeliness Provision for failure to state a claim (and declines to grant leave to amend those claims because the defects in the claims are substantive and any amendment would therefore be futile). *See, e.g.*, *Ipsos-Insight, LLC v. Gessel*, 547 F. Supp. 3d 367, 380 (S.D.N.Y. 2021); *Roundtree v. NYC*, No. 19-CV-2475 (JMF), 2021 U.S. Dist. LEXIS 81294, 2021 WL 1667193, at *6 (S.D.N.Y. Apr. 28, 2021) (collecting cases). Finally, Plaintiffs' motion for summary judgment is DENIED as moot, and Plaintiffs' motion for leave to amend is DENIED.

One housekeeping matter remains: The parties filed letter-motions to seal portions of their motion papers. ECF Nos. 26, 33, 35, 41, 60, 72. The Court granted these letter-motions temporarily, pending its decision on the underlying motions. ECF Nos. 32, 36, 42, 63, 74. It is well established that filings that are "relevant to the performance of the judicial function and useful in the judicial process" are considered "judicial documents" to which a presumption in favor of public access attaches.

Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006). Significantly, assessment of whether the presumption in favor of public access is overcome must be made on a document-by-document basis. *See, e.g.*, *Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019). And the mere fact that information is sealed or redacted by agreement of the parties is not a valid basis to overcome the presumption. *See, e.g.*, *United States v. Wells Fargo Bank N.A.*, No. 12-CV-7527 (JMF), 2015 U.S. Dist. LEXIS 84602, 2015 WL 3999074, at *4 (S.D.N.Y. June 30, 2015). Accordingly, **no later than two weeks from the date of this Opinion and Order**, any party that believes any materials currently under seal or in redacted form should remain under seal or in redacted form is ORDERED to show cause in writing, on a document-by-document basis, why doing so would be consistent with the presumption in favor of public access. Any such submission should address the import of Judge Liman's decision in *Lohnn v. International Business Machines Corp.*, No. 21-CV-6379 (LJL), 2022 U.S. Dist. LEXIS 1444, 2022 WL 36420 (S.D.N.Y. Jan. 4, 2022), as well as the documents that have been made public as a result of that decision.

Further, the parties shall consult and comply with Section 7 of the Court's Individual Rules, which requires, among other things, that any party seeking leave to maintain a document in redacted form must simultaneously publicly file on ECF a copy of the document with proposed redactions and also file under seal on ECF (with the appropriate level of restriction) an unredacted copy of the document with the proposed redactions highlighted. Any document for which the parties do not

move for the Court to maintain under seal or in redacted form **within two weeks of the date of this Opinion and Order** shall be unsealed without any further notice to the parties. The parties shall, no later than **three weeks of the date of this Opinion and Order** file a joint letter with the list of the ECF numbers of the filings to be unsealed.

The Clerk of Court is directed to terminate ECF Nos. 27, 33, 38, 47, and 79.

SO ORDERED.

Dated: July 14, 2022
New York, New York

/s/ Jesse M. Furman
JESSE M. FURMAN
United States District Judge

APPENDIX F — *LODI* MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 11, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

July 11, 2022, Decided;
July 11, 2022, Filed

21-cv-6336 (JGK)

PATRICIA LODI,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,

Defendant.

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, Patricia Lodi, brought this action against her former employer, International Business Machines Corp. ("IBM"), seeking declarations that two provisions in an arbitration agreement that the plaintiff entered into with IBM (the "Agreement") are unenforceable. Specifically, the plaintiff seeks a declaratory judgment that a provision in the Agreement that resulted in an arbitrator's conclusion that the plaintiff's claims against IBM under the Age

Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, were time barred is unenforceable because the provision impermissibly extinguished the plaintiff's ability to vindicate the substantive rights protected by the ADEA (the "Timing Provision"). The plaintiff also seeks a declaratory judgment that a confidentiality provision in the Agreement that restricts the plaintiff and similarly situated former employees of IBM from disclosing information relating to the arbitration of their claims against IBM is unconscionable and consequently unenforceable (the "Confidentiality Provision"). The Court previously considered and rejected substantially similar challenges to the Timing Provision and the Confidentiality Provision in a Memorandum Opinion and Order in an action brought by another former IBM employee, with which the Court assumes familiarity. *See Chandler v. IBM*, No. 21-cv-6319, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340 (S.D.N.Y. July 6, 2022).

The plaintiff now moves for summary judgment granting her claims for declaratory judgment pursuant to Federal Rule of Civil Procedure 56. IBM opposes the plaintiff's motion for summary judgment and has moved to dismiss the plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, IBM's motion to dismiss is **granted** and the plaintiff's motion for summary judgment is **denied** as moot.

I.

Unless otherwise noted, the following facts are taken from the complaint and accepted as true for the purpose of resolving IBM's motion to dismiss.

Appendix F

The plaintiff was formerly employed by IBM as a software engineer. Compl. 1 7. On July 31, 2017, IBM terminated the plaintiff's employment and the plaintiff signed the Agreement in exchange for a severance payment from IBM. *Id.* 911 7, 11-12; ECF No. 15-4 at 1 (the "Arbitration Decision"). The Agreement provided that if the plaintiff sought to pursue a claim under the ADEA against IBM, the plaintiff could only do so in an individual arbitration. *Id.* The Agreement included the Timing Provision, which provides:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern though the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

Agreement at 26.[1]

1. Unless otherwise noted, this Memorandum Opinion and Order omits all internal alterations, citations, footnotes, and quotation marks in quoted text.

Appendix F

The Agreement also included the following Confidentiality Provision:

> Privacy and confidentiality are important aspects of arbitration. Only parties, their representatives, witnesses and necessary administrative staff of the arbitration forum may attend the arbitration hearing. The arbitrator may exclude any non-party from any part of a hearing.
>
> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

Agreement at 27.

On October 11, 2018, the plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC")

against IBM alleging age-based discrimination. ECF No. 15-45 (the "EEOC Charge"). The EEOC consolidated the plaintiff's EEOC Charge with the charges of 57 other former IBM employees who alleged that they were subjected to age-based discrimination by IBM. Compl. ¶ 10.

On January 17, 2019, while the EEOC's investigation was pending, the plaintiff filed an arbitration demand advancing claims under the ADEA against IBM. *See* ECF No. 15-3 (the "Arbitration Demand"). On August 12, 2019, the arbitrator dismissed the plaintiff's ADEA claims as time barred. *See* Arbitration Decision. The arbitrator reasoned that under the Timing Provision, the plaintiff's claims were untimely because the plaintiff did not file an arbitration demand within 300 days after her termination. *Id.* at 1-3; *see also* 29 U.S.C. § 626(d)(1)(B). The arbitrator also concluded that under the Agreement, the plaintiff could not take advantage of the so-called "piggybacking rule,"[2] pursuant to which the plaintiff sought to use earlier-filed EEOC charges filed by other former IBM employees to extend the plaintiff's time to file her Arbitration Demand. Arbitration Decision at 2-3.

On August 31, 2020, the EEOC issued a class wide determination in which the EEOC found reasonable

2. As explained in *Chandler*, the piggybacking rule is a judicially created doctrine that excuses plaintiffs who have not filed a charge with the EEOC from doing so if an earlier-filed EEOC charge described "similar discriminatory treatment in the same time frame" to the treatment to which the plaintiff who did not file an EEOC charge was allegedly subjected. *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *3.

cause to believe that IBM discriminated against older employees between 2013 and 2018. Compl. ¶ 10. On July 31, 2021, the EEOC informed the plaintiff that it would not pursue the plaintiff's claim further and issued her a "right to sue" letter. *Id.* ¶ 10 n.1; ECF No. 15-46 (the "Right to Sue Letter").[3]

The plaintiff then attempted to opt into a putative ADEA collective action that another former IBM employee had brought in district court against IBM. *See Rusis v. IBM*, 529 F. Supp. 3d 178 (S.D.N.Y. 2021); Compl. ¶ 16. Judge Caproni ultimately concluded that certain opt-in plaintiffs in that action, including the plaintiff, had waived their right to participate in a class or collective action against IBM under the Agreement. *See Rusis*, 529 F. Supp. 3d at 195. Accordingly, Judge Caproni dismissed the plaintiff from that action.

After being dismissed from the *Rusis* action, the plaintiff filed this action seeking declaratory judgments that the Timing Provision and the Confidentiality

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3. Although the EEOC Charge, the Arbitration Demand, the Arbitration Decision, and the Right to Sue Letter were not attached to the complaint, the Court may consider these materials on this motion to dismiss because all four documents are integral to and were expressly referenced in the complaint. *See, e.g., Bus. Casual Holdings, LLC v. YouTube, LLC*, No. 21-cv-3610, 2022 U.S. Dist. LEXIS 50166, 2022 WL 837596, at *1 n.2 (S.D.N.Y. Mar. 21, 2022); *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *2 n.2. Moreover, the Court may take judicial notice of the EEOC Charge and the Right to Sue Letter as public records of an administrative agency. *See, e.g., Kavowras v. New York Times, Co.*, 328 F.3d 50, 57 (2d Cir. 2003); Fed. R. Evid. 201.

Provision are unenforceable. Compl. at 9-10. The plaintiff represents that if this Court were to grant the requested relief, the plaintiff would move before the arbitrator to reopen the arbitration against IBM and request that the arbitrator reconsider the Arbitration Decision.

II.

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true and all reasonable inferences must be drawn in the plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Where, as here, a motion for summary judgment and a motion to dismiss are both pending, the court may grant the motion to dismiss and deny the motion for summary judgment as moot if the court concludes that the plaintiff's complaint fails to state a claim. *See, e.g., Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 122 (S.D.N.Y. 2021).

Appendix F

III.

A.

The plaintiff argues that the Timing Provision is unenforceable because it extinguishes a substantive, non-waivable right conferred on the plaintiff by the ADEA. The plaintiff also contends that the Confidentiality Provision is unenforceable because it is unconscionable.

This Court's recent decision in *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, is dispositive of the plaintiff's arguments here. The plaintiff in that case, Chandler, was a former IBM employee who had signed the Agreement upon his termination from IBM. 2022 U.S. Dist. LEXIS 118883, [WL] at *1. Chandler did not file a charge against IBM with the EEOC but did file an arbitration demand advancing ADEA claims against IBM more than 300 days after Chandler was terminated. 2022 U.S. Dist. LEXIS 118883, [WL] at *2. An arbitrator ultimately dismissed Chandler's arbitration demand as untimely and concluded that the Timing Provision did not incorporate the piggybacking rule. *Id.* Chandler then filed an action in this Court seeking the same relief that the plaintiff is now seeking, namely, declaratory judgments that the Timing Provision and the Confidentiality Provision are unenforceable. *Id.* at *1.

In sum, the Court found Chandler's arguments with respect to the Timing Provision to be without merit and concluded that (1) "the purported right to take advantage of the piggybacking rule is not a substantive, non-waivable

right protected by the ADEA;" (2) "the piggybacking rule is not a part of the statute of limitations law of the ADEA;" and (3) accordingly, 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 unenforceable. 2022 U.S. Dist. LEXIS 118883, [WL] at *3-7. With respect to the Confidentiality Provision, the Court concluded that because the Confidentiality Provision was neither procedurally unconscionable nor substantively unconscionable under New York law, there was no basis on which to declare the Confidentiality Provision unenforceable. *Id.* at *7-8. The detailed discussions in *Chandler* of all these issues are incorporated here by reference.

There are certain immaterial factual differences between *Chandler* and this case that do not change the conclusion that the Timing Provision is enforceable. The plaintiff here contends that unlike Chandler, she filed a timely EEOC charge and received the Right to Sue Letter in July 2021. Therefore, according to the plaintiff, but for the Agreement and Timing Provision, she would have had the ability to prosecute a timely ADEA claim in court well into 2021.[4] Additionally, like Chandler, the plaintiff

4. The plaintiff alleges in her complaint that she was terminated by IBM "in 2017." Compl. % ¶ 7. In the Arbitration Decision, the arbitrator found that the plaintiff was terminated on July 31, 2017. Arbitration Decision at 1. The plaintiff did not file the EEOC Charge until October 11, 2018, which is more than 300 days after she was terminated. In her motion for summary judgment, the plaintiff represented that she submitted several job applications to IBM between the date of her termination and February 28, 2018.

contends that had the arbitrator and the Timing Provision permitted the plaintiff to piggyback off an earlier-filed EEOC charge, her Arbitration Demand would have been timely.

The fact that the plaintiff could have filed a timely ADEA action in federal court but for the Agreement and the Timing Provision does not render the Timing Agreement unenforceable. As explained in *Chandler*:

> [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." *[Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013)]; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Arbitral forums may adopt different and more restrictive procedures than those available in federal court so long as claimants are provided "a fair opportunity to present their claims" in arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S. Ct. 1647,

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Therefore, according to the plaintiff, the EEOC Charge was timely filed because she filed the EEOC Charge within 300 days of February 28, 2018. The complaint is devoid of any allegation regarding the plaintiff's putative efforts to secure other employment at IBM through February 28, 2018. In any event, for the reasons explained below, the Timing Provision is enforceable irrespective of whether the EEOC Charge was timely filed.

> 114 L. Ed. 2d 26 (1991); *see also id.* (parties may agree to arbitration procedures that are not "as extensive as in the federal courts" and are allowed to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018) (explaining that the FAA directs the federal courts to "respect and enforce the parties' chosen arbitration procedures"). However, the Supreme Court has suggested that provisions in an arbitration agreement that operate as "prospective waiver[s] of a party's right to pursue statutory remedies" could deprive a claimant of a fair opportunity to present their claims in arbitration and would therefore be unenforceable. *Am. Express*, 570 U.S. at 236. In sum, while a waiver in an arbitration agreement of the ability to assert a party's substantive rights may be unenforceable, parties may agree to arbitration procedures that modify or limit the procedural rights that would otherwise be available to them in federal court. *See Gilmer*, 500 U.S. at 26, 31.

Chandler, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *4.

The plaintiff here, like Chandler, 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 ADEA affords other plaintiffs that live in certain states. The plaintiff had a full and fair opportunity to file her Arbitration Demand within the applicable limitations period and simply failed to do so.[5] The fact that the plaintiff may have had more time to file her claim in federal court had she not agreed to arbitrate her ADEA claims is immaterial. Parties may agree to prosecute their claims in arbitral forums with different or more limited procedures than would be available in federal court. *See Gilmer*, 500 U.S. at 31. The 300-day limitations period available under the Timing Provision undoubtedly provided the plaintiff with a "fair opportunity" to seek to vindicate in arbitration the substantive right protected by the ADEA, namely, the right to be free from workplace age discrimination. *See id.; 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009).

The plaintiff's arguments with respect to the piggybacking rule are also without merit. As explained in *Chandler*, because the piggybacking rule is an exception to the exhaustion doctrine and not a substantive right protected by the ADEA, the fact that the Timing Provision did not incorporate that rule does not render the Timing Provision unenforceable. 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *5. Moreover, the piggybacking rule

5. The arbitrator also found that if, as the plaintiff now claims in her motion for summary judgment, her failure to hire ADEA claims actually arose on February 28, 2018, then those claims were untimely because the plaintiff did not assert them in arbitration within 300 days after the plaintiff learned of that alleged discriminatory conduct. Arbitration Decision at 8-9.

is inapplicable where, as here, the plaintiff had already filed an EEOC charge on her own behalf. *Holowecki v. Federal Express Corp.*, 440 F.3d 558, 564 (2d Cir. 2006) ("An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge."). Accordingly, even if the 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.

For these reasons, the plaintiff's arguments that the Timing Provision is unenforceable are without merit. Therefore, IBM's motion to dismiss the plaintiff's claim for a declaratory judgment declaring the Timing Provision unenforceable is granted.

B.

Similarly, all the plaintiff's arguments that the Confidentiality Provision should be declared unenforceable were considered and rejected by this Court in *Chandler*.[6] 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *7-8. Because the Confidentiality Provision is neither procedurally unconscionable nor substantively unconscionable under New York law, IBM's motion to

6. Because the Timing Provision is enforceable, the plaintiff's Arbitration Demand was correctly dismissed by the arbitrator as untimely. The plaintiff's claim for declaratory relief with respect to the Confidentiality Provision is therefore moot. However, for the sake of completeness, the plaintiff's arguments with respect to the Confidentiality Provision are addressed here and are without merit. *See also Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *7 n.4.

dismiss the plaintiff's claim for a declaratory judgment declaring the Confidentiality Provision unenforceable is granted.

Finally, because all the plaintiff's claims were dismissed on IBM's motion to dismiss, the plaintiff's motion for summary judgment granting the requested declaratory judgments is denied as moot.[7]

IV.

"It is the usual practice upon granting a motion to dismiss to allow leave to replead." *Gunst v. Seaga*, No. 05-cv-2626, 2007 U.S. Dist. LEXIS 25257, 2007 WL 1032265, at *3 (S.D.N.Y. Mar. 30, 2007). "However, if an amendment would be futile, a court may deny leave to amend. A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss." *Id.*

The plaintiff has not requested leave to amend her complaint. Moreover, the current dismissal is not based on any inadequacies in the plaintiff's pleading, but instead

7. IBM also argues that its motion to dismiss should be granted because the plaintiff is effectively seeking vacatur of the Arbitration Decision under the guise of this action for declaratory judgment, and that any petition to vacate the Arbitration Decision would be untimely under the FAA. The plaintiff contends that she is not seeking vacatur of the Arbitration Decision and instead would move before the arbitrator to reopen the arbitration if she received a favorable disposition here. Because the plaintiff's claims are without substantive merit, the Court need not resolve whether this action for declaratory judgment was the correct procedural vehicle for the plaintiff to pursue the requested relief. *See also Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *8 n.5.

is based on determinations that the plaintiff's claims are foreclosed by applicable law. Because the problems with the plaintiff's causes of action are "substantive," "better pleading will not cure [them and] repleading would thus be futile." *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). For these reasons, the current dismissals of the plaintiff's claims are with prejudice.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the arguments are either moot or without merit. For the foregoing reasons, IBM's motion to dismiss is **granted** and the plaintiff's motion for summary judgment is **denied** as moot. The Clerk is directed to enter judgment dismissing this case. The Clerk is further directed to close all pending motions and to close this case.

SO ORDERED.

Dated: New York, New York
July 11, 2022

/s/ John G. Koeltl
John G. Koeltl
United States District Judge

APPENDIX G — *TAVENNER* OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 23, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 21-CV-6345 (KMK)

DEBORAH TAVENNER,

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,

Defendant.

September 23, 2022, Decided
September 23, 2022, Filed

OPINION & ORDER

KENNETH M. KARAS, United States District Judge:

Deborah Tavenner ("Plaintiff" or "Tavenner"), a former employee of International Business Machines Corp. ("IBM"), brings this Action, pursuant to 28 U.S.C. § 2201 (the Declaratory Judgment Act or "DJA"), to declare invalid two provisions of an arbitration agreement Plaintiff signed upon her termination from IBM as unenforceable. (*See generally* Compl. (Dkt. No. 1).) Before

the Court is Plaintiff's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, (*see* Pl.'s Mot. for Summ. J. and Mem. of Law in Supp. ("Pl.'s Mem.") (Dkt. No. 13)), as well as Defendant's Cross-Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), (*see* Not. of Mot. (Dkt. No. 23)).[1],[2] For the reasons stated herein, Defendant's Motion is granted in its entirety and Plaintiff's Motion is denied as moot.

I. Background

A. Allegations and Materials Appropriately Considered

As a threshold matter, the Court must determine whether it may consider either Plaintiff's arbitration agreement, (*see* Decl. of Craig S. Friedman ("Friedman

1. The Motion at Docket Number 13 was filed under seal; its companion was filed at Dkt. No. 16 with necessary redactions for public viewing.

2. Under Local Civil Rule 7.1, all motions are to include "(1) [a] notice of motion . . ., which shall specify the applicable rules or statutes pursuant to which the motion is brought, and shall specify the relief sought by the motion" as well as "(2) [a] memorandum of law . . . ." Local Civ. R. 7.1(a)(1)-(2). Plaintiff did not file a separate notice of motion. However, "[a] district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules." *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (citations omitted). Given such discretion, as well as the Second Circuit's "strong 'preference for resolving disputes on the merits,'" *New York v. Green*, 420 F.3d 99, 104 (2d Cir. 2005) (quoting *Powerserve Int'l, Inc. v. Lavi*, 239 F.3d 508, 514 (2d Cir. 2001)), the Court does not deny Plaintiff's Motion out of hand.

Decl.") (Dkt. No. 27) Ex. A ("Arbitration Agreement") (Dkt. No. 27-1)), or the arbitration award decision resulting therefrom, (*see* Decl. of Shannon Liss-Riordan ("Liss-Riordan Decl.") (Dkt. No. 15) Ex. 4 ("Arbitration Award") (Dkt. No. 15-4)), at this stage of the litigation.

1. Applicable Law

Generally, "[w]hen considering a motion to dismiss, the Court's review is confined to the pleadings themselves," because "[t]o go beyond the allegations in the [c]omplaint would convert the Rule 12(b)(6) motion to dismiss into one for summary judgment pursuant to [Rule] 56." *Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002) (citation omitted). However, "the Court's consideration of documents attached to, or incorporated by reference in the [c]omplaint, and matters of which judicial notice may be taken, would not convert the motion to dismiss into one for summary judgment." *Id.* (citations omitted); *see also Bellin v. Zucker*, 6 F.4th 463, 473 (2d Cir. 2021) (explaining that "when ruling on Rule 12(b)(6) motions to dismiss," courts may "consider the complaint in its entirety . . ., documents incorporated into the complaint by reference, and matters of which a court may take judicial notice" (quotation marks omitted)); *Hu v. City of New York*, 927 F.3d 81, 88 (2d Cir. 2019) ("In deciding a Rule 12(b)(6) motion, the court may consider 'only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which judicial notice may be taken." (alteration omitted) (quoting *Samuels v. Air Transp. Loc. 504*, 992 F.2d 12, 15 (2d Cir. 1993))).

"Moreover, 'where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint.'" *Alvarez v. County of Orange*, 95 F. Supp. 3d 385, 394 (S.D.N.Y. 2015) (alteration omitted) (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010)). As the Second Circuit has reiterated, "a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (emphasis omitted).

The final test for the consideration of extrinsic evidence is the Parties' view on the authenticity thereof. Put simply, "even if a document is 'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document" for it to be considered at the motion to dismiss stage. *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). Relatedly, "[u]nder Federal Rule of Evidence 201, a 'court may judicially notice a fact that is not subject to reasonable dispute.'" *Dixon v. von Blanckensee*, 994 F.3d 95, 102 (2d Cir. 2021) (quoting Fed. R. Evid. 201(b)). "Such facts must either be (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (citation and quotations omitted).

2. Applying the Law

a. Arbitration Agreement

Because "[a] motion brought under Rule 12(b)(6) challenges only the 'legal feasibility' of a complaint," *Goel v. Bunge, Ltd.*, 820 F.3d 554, 558 (2d Cir. 2016) (quoting *Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 155 (2d Cir. 2006)), "[i]n most instances where [the] exception [permitting review of extrinsic documents at this stage] is recognized, the incorporated material is a *contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls*, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the complaint," *Glob. Network Commc'ns*, 458 F.3d at 157 (emphasis added). The Second Circuit has "recognized the applicability of this exception where the documents consisted of emails that were part of a negotiation exchange that the plaintiff identified as the basis for its good faith and fair dealing claim, or consisted of contracts referenced in the complaint which were essential to the claims." *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 107-08 (2d Cir. 2021) (citations omitted) (first citing *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011); and then citing *Chambers*, 282 F.3d at 153 n.4 (2d Cir. 2002)).

Defendant argues that the Court may consider the 6-page Arbitration Agreement attached to its motion papers, (*see* Arbitration Agreement), because it is "incorporated by reference in or 'integral' to the complaint,"

(Def.'s Mem. of Law in Supp. of Def.'s Mot. and Opp. of Pl.'s Mot. ("Def.'s Mem.") 3 n.1 (Dkt. No. 24) (citing *DiFolco*, 622 F.3d at 111)). Plaintiff does not appear to disagree. (*See generally* Pl.'s Response Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. and Opp. of Def.'s Mot. to Dismiss ("Pl.'s Response Mem.") (Dkt. No. 29).) To the contrary, Plaintiff also submits this agreement—albeit as six pages of a 27-page "Separation Agreement," (*see* Liss-Riordan Decl. ¶ 28; Liss-Riordan Decl. Ex. 2 ("Separation Agreement"), at 22-27 (Dkt. No. 15-2))—thereby evincing mutual assent as to the document's accuracy.[3] Moreover, given that the Complaint as well as the Parties' briefing papers quote extensively from the Arbitration Agreement, the Court considers the Arbitration Agreement incorporated by reference and/or integral to the complaint and therefore properly within the Court's consideration at this stage. *See Nat'l Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 910 n.3 (2d Cir. 1988) (holding that the magistrate judge was authorized to treat a letter as incorporated by reference into complaint when, inter alia, the plaintiffs

3. The Court notes that while both Parties refer to the Arbitration Agreement as having been signed or executed, (*see* Liss-Riordan Decl. ¶ 28 (referring to the "Separation Agreement that Plaintiff signed"); Friedman Decl. ¶ 2 (referring to "a true and correct copy of the Separation Agreement executed by Deborah Tavenner")), neither submission actually bears a signature, (*see* Arbitration Agreement 3; Separation Agreement 24). Additionally, the two versions sport different dates. (*Compare generally* Arbitration Agreement (dates provided on the bottom of each page), *with generally* Separation Agreements.) However, given that the substantive provisions are otherwise identical, and given a lack of argument on this issue, the Court nevertheless, considers the terms of the agreement accurate.

"quote[d] the entire text of the [l]etter" in a memorandum of law); *Pincover v. J.P. Morgan Chase Bank, N.A.*, No. 21-CV-3524, 592 F. Supp. 3d 212, 2022 U.S. Dist. LEXIS 51280, 2022 WL 864246, at *5 (S.D.N.Y. Mar. 22, 2022) (considering a deposit agreement as integral to the complaint, which asserted claims for breach of contract that were premised on, inter alia, the deposit agreement's terms); *Cheng v. Canada Goose Holdings Inc.*, No. 19-CV-8204, 2021 U.S. Dist. LEXIS 135023, 2021 WL 3077469, at *5 (S.D.N.Y. July 19, 2021) ("These conference call transcripts are clearly integral to [the] [p]laintiff's [a]mended [c]omplaint here, given that [the] [p]laintiff heavily relies on and quotes many statements made by [certain defendants on the call] in the [a]mended [c]omplaint for both of their claims. [The] [p]laintiff also did not object to [the] [d]efendants citing these transcripts in their memorandum of law supporting their motion to dismiss.").

b. Arbitration Award

Under the Federal Rules of Evidence, a court may take judicial notice of a fact outside of the pleadings provided that the fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Pursuant to this rule, "courts have regularly taken judicial notice of arbitration awards . . . in considering a motion to dismiss . . . ." *Cox v. Perfect Bldg. Maint. Corp.*, No. 16-CV-7474, 2017 U.S. Dist. LEXIS 111202, 2017 WL 3049547, at *3 (S.D.N.Y. July 18, 2017) (collecting cases); *see also Dr.'s Assocs., Inc. v. Patel*, No. 18-CV-2386, 2019 U.S. Dist.

LEXIS 120799, 2019 WL 3916421, at *2 n.5 (S.D.N.Y. July 19, 2019) (same). Because Plaintiff does not dispute the authenticity of the Arbitration Award—once again, Plaintiff herself submitted it in support of her Motion—the Court is permitted to take judicial notice of the award at this early juncture. *See Purjes v. Plausteiner*, No. 15-CV-2515, 2016 U.S. Dist. LEXIS 16345, 2016 WL 552959, at *4 (S.D.N.Y. Feb. 10, 2016) (collecting cases in which courts have taken judicial notice of arbitration awards); *see also Caldarera v. Int'l Longshoremen's Ass'n, Local 1*, 765 F. App'x 483, 485 n.2 (2d Cir. 2019) (summary order) (finding no error in district court's taking judicial notice of an arbitration award). Accordingly, the Court takes notice of the Arbitration Award for purposes of Defendant's Motion to Dismiss.

B. Factual Background

Unless otherwise stated, the following facts are drawn from the Complaint and are assumed to be true for the purpose of resolving the instant Motion. *See Div. 1181 Amalgamated Transit Union-N.Y. Emps. Pension Fund v. N.Y.C. Dep't of Educ.*, 9 F.4th 91, 94 (2d Cir. 2021) (per curiam).

1. Plaintiff, Her Employer, and Her Termination

Plaintiff, who now resides in Sherrills Ford, North Carolina, worked for IBM for approximately 25 years until 2018. (Compl. ¶¶ 3, 7.) At the time of her termination, Plaintiff was 55 years old and worked for IBM as a Software Client Leader. (*Id.* ¶ 7.)

Appendix G

IBM is a "multinational technology company" based in Armonk, New York, "that offers services and goods ranging from computing" to "cloud platforms" to "advanced analytics tools." (*Id.* ¶ 4.)

Plaintiff alleges that, broadly speaking, "IBM has pushed out thousands of older workers over a several year period, while hiring younger workers . . . in order to better compete with newer technology companies, such as Google [Alphabet], Facebook [now Meta], Amazon, and others." (*Id.* ¶ 9.)[4] "Following a multi-year investigation, on August 31, 2020, the EEOC issued a class[-]wide determination in which it found reasonable cause to believe that IBM discriminated against older employees during the period 2013 to 2018." (*Id.* ¶ 10.) Plaintiff states that she "fell victim" to this "years-long companywide discriminatory scheme." (*Id.* ¶ 8.)

When IBM laid off employees, Plaintiff alleges, it did not provide certain disclosures "as required by the Older Workers' Benefits Protections Act ('OWBPA'), 29 U.S.C. § 626(f)(1)(H)." (*Id.* ¶ 11.) Rather, IBM "offered the employees subject to layoff a very modest severance payment in exchange for a waiver of almost all legal claims, other than a claim under the [Age Discrimination in Employment Act ('ADEA'), 29 U.S.C. § 621 *et seq.*]. The agreement provided, however, that if the employee chose to pursue a claim under the ADEA, it would need to be in individual arbitration." (*Id.*)

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4. Plaintiff notes that this scheme has been laid out in far further detail in another suit against IBM in this district sounding in similar claims, *Rusis et al. v. Int'l Bus. Machs. Corp.*, No. 18-CV-8434 (S.D.N.Y.). (*See* Compl. ¶ 9.)

Appendix G

Plaintiff signed the Arbitration Agreement upon her termination. (*Id.* ¶ 12.) The Arbitration Agreement states:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern through the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

(*Id.* ¶ 13 (the "Timing Provision"); Arbitration Agreement 5.)

The Arbitration Agreement also contains the following provision:

> Privacy and confidentiality are important aspects of arbitration. Only parties, their representatives, witnesses and necessary administrative staff of the arbitration forum may attend the arbitration hearing. The arbitrator may exclude any non-party from any part of a hearing.

> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

(Arbitration Agreement 6 (the "Confidentiality Provision").)

Finally, the Arbitration Agreement provides: "Any issue concerning the validity or enforceability of this Agreement . . . shall be decided only by a court of competent jurisdiction." (Compl. ¶ 14; Arbitration Agreement 3.)

2. Plaintiff's Arbitration, Subsequent Litigation

Plaintiff filed her demand for arbitration on January 18, 2019. (*See* Arbitration Award 2.) The arbitrator dismissed Plaintiff's claim as untimely on July 22, 2019. (*See id.* at 5.) Moreover, the arbitrator decided that Plaintiff's filing deadline was not tolled based on the "piggybacking

doctrine" because the "doctrine's applicability in a court case simply does not apply in an individual arbitration where an individual need not proceed first through the EEOC." (*Id.* at 4.)[5] Thereafter, Plaintiff opted into a separate matter that similarly sought to challenge the enforceability of the provisions at issue in this Action. (*See* Compl. ¶ 16.) That Court—specifically Judge Caproni—

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5. In broad strokes, the "piggyback doctrine" is as follows: under the ADEA, no "civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 29 U.S.C. § 626(d)(1). "The ADEA further requires than an EEOC charge be filed within 180 days, or 300 days for [plaintiffs who live in certain states called 'deferral states'], after the alleged unlawful practice occurred." *Rusis*, 529 F. Supp. 3d at 198. "Thus, while a putative plaintiff is not required to receive authorization to sue from the agency prior to commencing litigation—unlike in the Title VII context—the ADEA nevertheless sets out a statutory administrative exhaustion requirement prior to filing suit." *Id.* at 198-99 (citing *Holland v. City of New York*, No. 10-CV-2525, 2011 U.S. Dist. LEXIS 144941, 2011 WL 6306727, at *4 (S.D.N.Y. Dec. 16, 2011)).

Pursuant to this notice scheme, the Second Circuit has ruled that an EEOC charge exhausts not only the specific claims included in the EEOC charge itself but also all "reasonably related" claims that an EEOC investigation would uncover. *Ximines v. George Wingate High Sch.*, 516 F.3d 156, 158 (2d Cir. 2008) (quoting *Fitzgerald v. Henderson*, 251 F.3d 345, 359-60 (2d Cir. 2001)). The practical effect of this holding is that "a plaintiff who failed to file his or her own EEOC charge . . . can 'piggyback' off of another person's timely filed EEOC charge that alleges 'similar discriminatory treatment in the same time frame,'" thereby allowing certain plaintiffs the ability to file a cause of action beyond the statute of limitations. *In re: IBM Arb. Agreement Litig.*, No. 21-CV-6296, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *2 (S.D.N.Y. July 14, 2022) (quoting *Holowecki v. Fed. Exp. Corp.*, 440 F.3d 558, 564 (2d Cir. 2006)).

held that it could not adjudge the validity of the provision with respect to Plaintiff (or the other IBM employees that similarly joined the case) because the Arbitration Agreement "prohibits the employees from joining a class or collective action." (*Id.* ¶ 17 (citing *Rusis et al. v. Int'l Bus. Machs. Corp.*, No. 18-CV-8434 (S.D.N.Y.) (Dkt. No. 156)).) Plaintiff was subsequently dismissed from that matter. (*See id.* (citing *Rusis* (Dkt. No. 165)).) Following this dismissal, Plaintiff filed this Action.

C. Procedural History

Plaintiff filed her complaint on July 26, 2021. (*See* Compl.) Judges Caproni and Oetken both denied the relatedness of this Action to other cases pending before them, (*see* Dkt. (entry on July 28, 2021 regarding declination as not related)). Subsequently, Judge McMahon retained this Action. (*See* Dkt. (entry on July 28, 2021 regarding case reassignment).) On September 22, 2021, Judge McMahon entered a case management plan and scheduling Order. (Dkt. No. 10.) Pursuant to that Order, Plaintiff submitted her Motion for Summary Judgment and accompanying papers under seal on October 28, 2021, (Pl.'s Mem.; Pl.'s Local Rule 56.1 Statement ("Pl.'s 56.1") (Dkt. No. 14); Liss-Riordan Decl.).[6] Thereafter, Defendant submitted its Motion to Dismiss as well as accompanying papers on November 18, 2021. (Not. of Mot.; Def.'s Mem.; Friedman Decl.) Defendant also submitted its response to Plaintiff's Local Rule 56.1 Statement under seal on

6. The Court notes that Plaintiff submitted redacted public versions of these submissions on the same day. (*See* Dkt. Nos. 16-18.)

that same day. (*See* Def.'s Resp. to Pl.'s 56.1 Statement ("Def.'s 56.1 Resp.") (Dkt. No. 25).)[7] Subsequently, Plaintiff submitted a response in support of her Motion for Summary Judgment and in opposition to Defendant's Motion to Dismiss under seal on December 9, 2021. (*See* Pl.'s Response Mem.)[8] Finally, on December 23, 2021, Defendant submitted its reply. (*See* Def.'s Reply Mem. in Supp. of Def.'s Mot. to Dismiss ("Def.'s Reply Mem.") (Dkt. No. 35).)

Since the completion of motions practice, two developments have occurred. First, on February 1, 2022, Judge McMahon recused from this case. (Dkt. No. 37.) The following day, the Action was assigned to this Court. (*See* Dkt. (entry dated February 2, 2022 regarding notice of case reassignment).) Second, Defendant has submitted five notices of supplemental authority. (*See* Dkt. Nos. 36, 39, 41, 42, 44.) Plaintiff has replied three times. (*See* Dkt. Nos. 38, 40, 43.)

II. Discussion

A. Standard of Review

The Supreme Court has held that while a complaint "does not need detailed factual allegations" to survive a motion to dismiss, "a plaintiff's obligation to provide the

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7. Again, Defendant submitted a redacted public version. (*See* Dkt. No. 26.)

8. Plaintiff submitted a redacted public version several days later. (*See* Dkt. No. 33.)

grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (alteration and quotation marks omitted). Indeed, Rule 8 of the Federal Rules of Civil Procedure "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (alteration and quotation marks omitted). Rather, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, and a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face," *id.* at 570. However, if a plaintiff has not "nudged [his] claim[] across the line from conceivable to plausible, the[] complaint must be dismissed." *Id.*; *see also Iqbal*, 556 U.S. at 679 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (second alteration in original) (citation omitted) (quoting Fed. R. Civ. P. 8(a)(2))); *id.* at 678-79 ("Rule 8 marks a notable and generous departure

from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam), and "draw[] all reasonable inferences in favor of the plaintiff," *Daniel v. T&M Prot. Res., Inc.*, 992 F. Supp. 2d 302, 304 n.1 (S.D.N.Y. 2014) (citing *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012)). Additionally, "[i]n adjudicating a Rule 12(b)(6) motion, a district court must confine its consideration to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99, 107 (2d Cir. 1999) (quotation marks omitted); *see also Wang v. Palmisano*, 157 F. Supp. 3d 306, 317 (S.D.N.Y. 2016) (same).

B. Analysis

Plaintiff argues that the Timing Provision is unenforceable because it extinguishes a substantive, non-waivable right pursuant to the ADEA. (*See* Compl. ¶¶ 21-23; Pl.'s Mem. 11-21; Pl.'s Response Mem. 7-16.) IBM rebuts this argument, asserting that the time limitation is not a substantive right but a procedural right and therefore the timing requirements laid forth in the Arbitration Agreement are enforceable. (Def.'s Mem. 10-23; Def.'s Reply Mem. 2-8.) Plaintiff also argues that

the Confidentiality Provision is unenforceable insofar as its purported "aggressive[] use[]" by IBM severely "impede[s] its former employees from advancing their claims in arbitration under the ADEA." (Pl.'s Mem. 21; *see also id.* 21-30; Pl.'s Response Mem. 18-38.) Defendant contends that the Court should altogether forego addressing the confidentiality issue because Plaintiff's underlying claims are time barred, rendering any such adjudication thereof moot, and because, on the merits, Plaintiff's arguments are lacking. (*See* Def.'s Mem. 23-32.)

Setting aside these arguments momentarily, because "[s]ubject-matter jurisdiction cannot be forfeited or waived," *Iqbal*, 556 U.S. at 671, and because the Court "ha[s] an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), the Court first considers whether it has subject-matter jurisdiction to adjudicate this Action.

Plaintiff invokes only the Court's federal question subject-matter jurisdiction, 28 U.S.C. § 1331, under the DJA, 28 U.S.C. §§ 2201-2202, (*see* Compl. ¶ 5). By statute, the DJA invests the judiciary with the authority to "declare the rights and other legal relations of any interested party seeking such declaration" in "a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201. That the dispute in question has already been effectively put to rest by an arbitrator and that Plaintiff failed to follow the necessary steps to vacate such an award guides the Court's determination that it would

be inappropriate for the Court to exercise its discretion and grant any relief under this provision to Plaintiff. *See In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *3-5 ("declin[ing] to exercise jurisdiction to resolve . . . claims" of similarly situated plaintiffs alleging identical arguments of unenforceability of an identical arbitration award).

1. The DJA

"[T]he fundamental purpose of the DJA is to 'avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued.'" *United States v. Doherty*, 786 F.2d 491, 498 (2d Cir. 1986) (quoting *Luckenbach Steamship Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963)). In other words, a court's power pursuant to the DJA is to issue "[d]eclaratory relief [as] a prospective remedy intended to resolve or mitigate disputes that may yield later litigation." *EFG Bank AG, Cayman Branch v. AXA Equitable Life Ins. Co.*, 309 F. Supp. 3d 89, 99 (S.D.N.Y. 2018).

The Court's authority to mete out such "prospective relief" is not unfettered; rather, like questions of standing, a declaratory judgment demands that the plaintiff demonstrate "a sufficient likelihood that he [or she] will again be wronged in a similar way" as well as "a 'certainly impending' future injury." *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d

675 (1983) (emphasis omitted); then quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)); *see also Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 388 (2d Cir. 2005) (observing that claims "in a declaratory judgment action" are only "ripe[ ]" where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"). "[A] touchstone to guide the probe for sufficient immediacy and reality is whether the declaratory relief sought relates to a dispute where the alleged liability has already accrued or the threatened risk occurred, or rather whether the feared legal consequence remains a mere possibility." *Wilmington Tr., Nat'l Ass'n v. Est. of McClendon*, 287 F. Supp. 3d 353, 364 (S.D.N.Y. 2018) (citation omitted).

Even assuming such requirements are met, the DJA does not confer "an absolute right upon the litigant.'" *John Wiley & Sons, Inc. v. Visuals Unlimited, Inc.*, No. 11-CV-5453, 2011 U.S. Dist. LEXIS 127635, 2011 WL 5245192, at *4 (S.D.N.Y. Nov. 2, 2011) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)). The operative provision reads: a court "*may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). As a result, this provision "has long been understood 'to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136, 127 S. Ct. 764, 166 L. Ed. 2d 604

(2007) (quoting *Wilton*, 515 U.S. at 286). The Second Circuit has echoed this view, stating that "[c]ourts have consistently interpreted [the] permissive language [of the DJA] as a broad grant of discretion to district courts to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear." *In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *4 (alterations in original) (quoting *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003) (per curiam))).

"To decide whether to entertain a declaratory judgment action, courts in this circuit should consider: '(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty.'" *Parker v. Citizen's Bank, N.A.*, No. 19-CV-1454, 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *4 (S.D.N.Y. Oct. 29, 2019) (quoting *Duane Reade*, 411 F.3d at 389); *see also Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1001 (2d Cir. 1969) (endorsing consideration of the same factors).[9] Such considerations

9. The Second Circuit has also implicitly endorsed consideration of additional factors that other circuits have demanded district courts therein consider, including "(1) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (2) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (3) whether there is a better or more effective remedy." *Dow Jones*, 346 F.3d at 359-60 (citations omitted). These additional factors do not change the Court's substantive analysis in this Action; therefore the Court does not expound upon them.

foreclose the possibility of issuing a declaratory judgment "to determine whether rights already adjudicated were adjudicated properly." *Doherty*, 786 F.2d at 498.

2. Applying the DJA in this Action

Given the limitations on the Court's discretionary authority as well as the considerations the Court is to evaluate in choosing whether the exercise its authority where appropriate, the Court finds that "it is not appropriate to entertain jurisdiction over [Plaintiff's] claims." *In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *4. The facts giving rise to this Action—and specifically Plaintiff's actions vis-à-vis the arbitration—bear this out.

Plaintiff was terminated on June 30, 2018. (*See* Arbitration Award 1.) Upon her termination, she signed the Arbitration Agreement, which states that "any issue concerning the validity or enforceability of this Agreement . . . shall be decided only by a court of competent jurisdiction." (Arbitration Agreement 3.) Nonetheless, Plaintiff directed this challenge to the arbitrator, (*see* Arbitration Award 2-4), and did so in an untimely fashion: 180 days from her termination was December 27, 2018, and Plaintiff filed her demand for arbitration on January 18, 2019, (*see id.* at 2). The arbitrator dismissed Plaintiff's claim as untimely on July 22, 2019. (*See id.* at 5.)

Plaintiff then failed to file a vacatur motion challenging the validity of the Timeliness Provision. (Def.'s Mem. 4; *see also* Pl.'s Response Mem. 16-18 (failing to dispute

this point).) Instead, Plaintiff waited for just over two "years after [she] received [her] arbitration decision[] to initiate this [A]ction for declaratory relief challenging the enforceability of two provisions of [her] [A]rbitration [A]greement[]," meaning "the window to challenge those rulings, or the enforceability of the provisions that governed them, has long since closed." *In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *4-5 (citations omitted).

As a result, there exists no possibility of an impending "dispute[] that may yield later litigation," *EFG Bank*, 309 F. Supp. 3d at 99, nor is there any "uncertainty" in the Parties' legal rights that such a judgment would elucidate, *Duane Reade, Inc.*, 411 F.3d at 389. Exercising jurisdiction "may resolve some of the legal relations in issue, [but] it will not resolve them all, nor is it likely to terminate the controversy giving rise to the proceeding." *Am. Home Assurance Co. v. Babcock & Wilcox Co.*, No. 06-CV-6506, 2007 U.S. Dist. LEXIS 89940, 2007 WL 4299847, at *7 (E.D.N.Y. Dec. 6, 2007) (declining to exercise jurisdiction under such circumstances); *see also Wilton*, 515 U.S. at 280-81 (affirming lower courts' decisions to decline declaratory judgment action to avoid piecemeal litigation, forum shopping, and duplicative proceedings); *Panama Processes S.A. v. Cities Serv. Co.*, 362 F. Supp. 735, 738 (S.D.N.Y. 1973) ("[T]he declaratory judgment remedy should not be accorded, however, to try a controversy by piecemeal, or to try particular issues without settling the entire controversy." (quotation marks omitted)). Thus, declaratory judgment would not serve a "useful purpose." *Duane Reade, Inc.*, 411 F.3d

at 389. Because the Court finds such an exercise of its discretionary authority inappropriate, Plaintiff's claims are dismissed. *See In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *5 ("declin[ing] to exercise jurisdiction to resolve [similarly situated plaintiffs'] claims"); *Parker*, 2019 U.S. Dist. LEXIS 187306, 2019 WL 5569680, at *3-5 (declining to exercise jurisdiction over a DJA claim made by a similarly situated plaintiff where the "[d]eclaratory relief [sought] . . . would not resolve any ongoing or impending harm to [the] [p]laintiff vis-à-vis her relationship with [the] [d]efendants" and "would not clarify any uncertainty in the parties' legal relations"); *see also Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 437-39 (S.D.N.Y. 2002) (declining to exercise jurisdiction over a DJA claim because, inter alia, the "[c]ourt [wa]s not persuaded . . . the declaratory relief [sought] would . . . serve a useful purpose in clarifying the legal relations between the parties"), *aff'd*, 346 F.3d 357.[10]

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10. Despite finding that the Court should not exercise its discretion, the Court nonetheless feels it appropriate to proclaim its agreement with multiple other district courts to have concluded that "there is no merit to Plaintiff['s] claim that the Timeliness Provision is unenforceable," *In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *6; *see also Chandler v. Int'l Bus. Machs. Corp.*, No. 21-CV-6319, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *3-7 (S.D.N.Y. July 6, 2022) (concluding that "the plaintiff's argument that the Timing Provision is unenforceable fails"). More specifically, the Court concurs that "the purported right to take advantage of the piggybacking rule is not a substantive, non-waivable right protected by the ADEA" nor is it a "part of the statute of limitations law of the ADEA." *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *4-5; *see also Rusis*, 529 F. Supp. 3d at 192 n.4 ("Former employees who wished to pursue ADEA claims in arbitration pursuant to [the

III. Conclusion

For the foregoing reasons, Defendant's Motion is granted. Accordingly, Plaintiff's Motion for Summary Judgment is denied as moot. *See, e.g., Northwell Health, Inc. v. Lexington Ins.*, No. 21-CV-1104, 2021 U.S. Dist. LEXIS 141326, 2021 WL 3163273, at *1 (S.D.N.Y. July 7, 2021) ("[T]he Court grants the [defendant's] motion to dismiss and denies the [plaintiff's] motion for partial summary judgment as moot."); *Markham v. Rosenbaum*, No. 20-CV-6039, 2020 U.S. Dist. LEXIS 106833, 2020 WL 3316099, at *11 (W.D.N.Y. June 18, 2020) ("Because the Court dismisses the claims . . . [the] [p]laintiff's motion for summary judgment . . . is DENIED AS MOOT.") (capitalization in original), *appeal dismissed*, No. 20-2223, 2021 U.S. App. LEXIS 21514, 2021 WL 3027159 (2d Cir. May 13, 2021).

Agreement] were not required to file a charge of discrimination with the EEOC. Plainly, then, the piggybacking doctrine is wholly inapplicable in the arbitration context."). The Court also agrees that Plaintiff's reliance on two sixth Circuit cases is inapposite, as such cases "did not extend to the context of arbitration agreements." *Chandler*, 2022 U.S. Dist. LEXIS 118883, 2022 WL 2473340, at *6 (citing *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 839 (6th Cir. 2019)).

Finally, notwithstanding that this finding would render any discussion of the Confidentiality Provision moot, *see* 2022 U.S. Dist. LEXIS 118883, [WL] at *7 n.4, the Court, engaging in one more layer of hypothetical analysis "for the sake of completeness," *id.*, would find no fault in the reasoning articulated in the *Chandler* decision and would thus adopt the conclusion that "the Confidentiality Provision is neither procedurally unconscionable nor substantively unconscionable under New York law," 2022 U.S. Dist. LEXIS 118883, [WL] at *8.

Plaintiff has not requested leave to amend her complaint nor has she suggested that there exist any additional facts that could remedy the above-mentioned substantive problems; accordingly, Plaintiff's claims are also dismissed with prejudice. *See Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (holding that dismissal with prejudice is proper where there is no indication the plaintiff could provide additional allegations leading to a different result); *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (holding that where the infirmities of a plaintiff's complaint are "substantive," "better pleading will not cure it" such that "[r]epleading would thus be futile"); *see also In re: IBM*, 2022 U.S. Dist. LEXIS 124991, 2022 WL 2752618, at *12 (declining to exercise jurisdiction over all post-arbitration claims, granting the defendant's motion to dismiss, denying as moot the plaintiffs' summary judgment motion, and denying the plaintiffs' motion for leave to amend). The Clerk of Court is respectfully directed to enter judgment for Defendant, terminate all pending Motions, (Dkt. Nos. 13, 16, 23), and close this case.

SO ORDERED.

Dated: September 23, 2022
White Plains, New York

/s/ Kenneth M. Karas
KENNETH M. KARAS
United States District Judge

APPENDIX H — *CHANDLER* OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 6, 2022

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

21-cv-6319 (JGK)

WILLIAM CHANDLER,

Plaintiff,

– against –

INTERNATIONAL BUSINESS MACHINES CORP.,

Defendant.

July 6, 2022, Decided;
July 6, 2022, Filed

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiff, William Chandler, brought this action against his former employer, International Business Machines Corp. ("IBM"), seeking declarations that two provisions in an arbitration agreement that the plaintiff entered into with IBM (the "Agreement") are unenforceable. Specifically, the plaintiff seeks a declaratory

judgment that a provision in the Agreement that resulted in an arbitrator's conclusion that the plaintiff's claims against IBM under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, were time barred is unenforceable because the provision impermissibly extinguished the plaintiff's ability to vindicate the substantive rights protected by the ADEA (the "Timing Provision"). The plaintiff also seeks a declaratory judgment that a confidentiality provision in the Agreement that restricts the plaintiff and similarly situated former employees of IBM from disclosing information relating to the arbitration of their claims against IBM is unconscionable and consequently unenforceable (the "Confidentiality Provision").

The plaintiff now moves for summary judgment granting his claims for declaratory judgment pursuant to Federal Rule of Civil Procedure 56. IBM opposes the plaintiff's motion for summary judgment and has moved to dismiss the plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, IBM's motion to dismiss is **granted** and the plaintiff's motion for summary judgment is **denied** as moot.

I.

Unless otherwise noted, the following facts are taken from the complaint and accepted as true for the purpose of resolving IBM's motion to dismiss.

The plaintiff was formerly employed by IBM as a Channel Sales Executive. Compl. ¶ 7. In 2017, IBM

terminated the plaintiff's employment and the plaintiff signed the Agreement in exchange for a severance payment from IBM. *Id.* ¶¶ 11-12. The Agreement provided that if the plaintiff wanted to pursue a claim under the ADEA against IBM, the plaintiff could only do so in an individual arbitration. *Id.* The Agreement included the Timing Provision, which provides:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator no later than the expiration of the statute of limitations (deadline for filing) that the law prescribes for the claim that you are making or, if the claim is one which must first be brought before a government agency, no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency or the presentation of a concern though the IBM Open Door Program shall not substitute for or extend the time for submitting a demand for arbitration.

Agreement at 26.[1]

The Agreement also included the following Confidentiality Provision:

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1. Unless otherwise noted, this Memorandum Opinion and Order omits all internal alterations, citations, footnotes, and quotation marks in quoted text.

> Privacy and confidentiality are important aspects of arbitration. Only parties, their representatives, witnesses and necessary administrative staff of the arbitration forum may attend the arbitration hearing. The arbitrator may exclude any non-party from any part of a hearing.
>
> To protect the confidentiality of proprietary information, trade secrets or other sensitive information, the parties shall maintain the confidential nature of the arbitration proceeding and the award. The parties agree that any information related to the proceeding, such as documents produced, filings, witness statements or testimony, expert reports and hearing transcripts is confidential information which shall not be disclosed, except as may be necessary to prepare for or conduct the arbitration hearing on the merits, or except as may be necessary in connection with a court application for a preliminary remedy, a judicial challenge to an award or its enforcement, or unless otherwise required by law or judicial decision by reason of this paragraph.

Agreement at 27.

On May 10, 2018, Edvin Rusis, another former IBM employee, filed a class charge with the Equal Employment Opportunity Commission ("EEOC") alleging that:

> IBM is discriminating against its older workers, both by laying them off disproportionately to younger workers and not hiring them for open positions. Indeed, over the last several years, IBM has been in the process of systematically laying off its older employees in order to build a younger workforce. IBM has laid off at least 20,000 employees over the age of forty in the last five years. . . . I believe that I and thousands of other employees have been discriminated against by IBM on the basis of age.

ECF No. 16-5 at 3 (the "Rusis Charge").

On January 17, 2019, the plaintiff filed an arbitration demand advancing claims under the ADEA against IBM. *See* ECF No. 16-3 (the "Arbitration Demand"). On July 19, 2019, the arbitrator dismissed the plaintiff's ADEA claims as time barred. ECF No. 16-4 (the "Arbitration Decision").[2] The arbitrator reasoned that under the Timing Provision, the plaintiff's claims were untimely because the plaintiff did not file an arbitration demand

2. Although the Rusis Charge, the Arbitration Demand, and the Arbitration Decision were not attached to the complaint, the Court may consider these materials on this motion to dismiss because all three documents are integral to and were expressly referenced in the complaint. *See, e.g., Business Casual Holdings, LLC v. Youtube, LLC*, No. 21-cv-3610, 2022 U.S. Dist. LEXIS 50166, 2022 WL 837596, at *1 n.2 (S.D.N.Y. Mar. 21, 2022). Moreover, the Court may take judicial notice of the Rusis Charge as a public record that was filed with an administrative agency. *See, e.g., Kavowras v. New York Times, Co.*, 328 F.3d 50, 57 (2d Cir. 2003); Fed. R. Evid. 201.

within the 300-day deadline provided for under the ADEA. *Id.* at 1; *see also* 29 U.S.C. § 626(d)(1)(B). The arbitrator concluded that under the Agreement, the plaintiff could not take advantage of the so-called "piggybacking rule," pursuant to which the plaintiff could have used the Rusis Charge to effectively extend the time that the plaintiff would have had to file his arbitration demand. Arbitration Decision at 1-2.

The plaintiff then attempted to opt into a putative ADEA collective action that Rusis had brought in district court against IBM. *See Rusis v. Int'l Bus. Machs. Corp.*, 529 F. Supp. 3d 178 (S.D.N.Y. 2021); Compl. ¶ 16. Judge Caproni ultimately concluded that the opt-in plaintiffs in that action, including the plaintiff, had waived their right to participate in a class or collective action against IBM under the Agreement. *See Rusis*, 529 F. Supp. 3d at 195. Accordingly, Judge Caproni dismissed the plaintiff from that action.

After being dismissed from the *Rusis* action, the plaintiff filed this action seeking declaratory judgments that the Timing Provision and the Confidentiality Provision are unenforceable. Compl. at 9-10. The plaintiff represents that if this Court were to grant the requested relief, the plaintiff would move before the arbitrator to reopen the arbitration against IBM and request that the arbitrator reconsider the Arbitration Decision.

II.

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true and all reasonable inferences must be drawn in the plaintiff's favor. *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiff has stated "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Where, as here, a motion for summary judgment and a motion to dismiss are both pending, the court may grant the motion to dismiss and deny the motion for summary judgment as moot if the court concludes that the plaintiff's complaint fails to state a claim. *See, e.g., Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 122 (S.D.N.Y. 2021).

III.

The plaintiff argues that the Timing Provision is unenforceable because it extinguishes a substantive, non-waivable right conferred on the plaintiff by the ADEA. IBM contends that the plaintiff did not waive

any substantive rights protected by the ADEA in the Agreement and advances several additional arguments as to why the Timing Provision should not be declared unenforceable.

The parties' dispute surrounding the Timing Provision centers around the piggybacking rule, which is a judicially created doctrine that is relevant in the context of certain claims arising under the ADEA. Under the ADEA, no "civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." 29 U.S.C. § 626(d)(1). "The ADEA further requires than an EEOC charge be filed within 180 days, or 300 days for [plaintiffs who live in certain states], after the alleged unlawful practice occurred." *Rusis*, 529 F. Supp. 3d at 198. "Thus, while a putative plaintiff is not required to receive authorization to sue from the agency prior to commencing litigation - unlike in the Title VII context - the ADEA nevertheless sets out a statutory administrative exhaustion requirement prior to filing suit." *Id.* at 198-99.

In addition to claims that are expressly alleged in an EEOC charge, "a timely filed EEOC charge also satisfies the exhaustion requirement for any claims that are reasonably related to conduct alleged in the EEOC charge." *Id.* at 199. Accordingly, an EEOC charge administratively exhausts "not only those claims expressly included in the EEOC charge but also all claims based on conduct that would fall within the scope of the EEOC investigation that can reasonably be expected to grow out of the EEOC charge." *Id.* Therefore, if an individual has

not filed an EEOC charge, but that individual's claims arise out of similar discriminatory treatment in the same time frame that was described in another individual's timely filed EEOC charge, then the individual who did not file an EEOC charge may "piggyback" off the timely filed EEOC charge. *Id.* at 199-200; *see also Holowecki v. Fed. Express Corp.*, 440 F.3d 558, 564 (2d Cir. 2006). Accordingly, such individuals may file suit in federal court alleging violations of the ADEA even though they did not strictly comply with the exhaustion requirements of the ADEA and file an EEOC charge on their own behalf.

In this case, the plaintiff did not file an EEOC charge or the Arbitration Demand within 300 days after his termination. The Timing Provision provides in relevant part that the "the filing of a charge or complaint with a government agency . . . shall not substitute for or extend the time for submitting a demand for arbitration." Agreement at 26. In the arbitration, the arbitrator concluded that under this provision, the plaintiff's claims were time barred because they were not brought within the 300-day limitations period under the ADEA. Although the plaintiff argued before the arbitrator that his claim would be timely if he were permitted to piggyback off the Rusis Charge, the arbitrator determined that the Timing Provision did not incorporate the piggybacking rule. The plaintiff now argues that the Timing Provision is unenforceable because it deprived the plaintiff of the ability to take advantage of the piggybacking rule and therefore operated as an improper waiver of the substantive rights afforded to the plaintiff by the ADEA.

Appendix H

Under the Federal Arbitration Act ("FAA"), courts "must rigorously enforce arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). Therefore, provisions 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.* at 235; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Arbitral forums may adopt different and more restrictive procedures than those available in federal court so long as claimants are provided "a fair opportunity to present their claims" in arbitration. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 31, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *see also id.* (parties may agree to arbitration procedures that are not "as extensive as in the federal courts" and are allowed to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018) (explaining that the FAA directs the federal courts to "respect and enforce the parties' chosen arbitration procedures"). However, the Supreme Court has suggested that provisions in an arbitration agreement that operate as "prospective waiver[s] of a party's right to pursue statutory remedies" could deprive a claimant of a fair opportunity to present their claims in arbitration and would therefore be unenforceable. *Am. Express*, 570 U.S. at 236. In sum, while a waiver in an arbitration agreement of the ability to assert a party's substantive rights may be unenforceable, parties may agree to arbitration

procedures that modify or limit the procedural rights that would otherwise be available to them in federal court. *See Gilmer*, 500 U.S. at 26, 31.

The plaintiff's arguments that the Timing Provision should be declared unenforceable are without merit for several reasons. First, the purported right to take advantage of the piggybacking rule is not a substantive, non-waivable right protected by the ADEA. The substantive right protected by the ADEA is the "statutory right to be free from workplace age discrimination," *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), 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. *See Gilmer*, 500 U.S. at 31. Under the Timing Provision, the plaintiff had 300 days to file an arbitration demand with his ADEA claim, 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 ADEA affords other plaintiffs that live in certain states. The plaintiff had a full and fair opportunity to file his arbitration demand within the applicable limitations period and simply failed to do so. *See Rusis*, 529 F. Supp. 3d at 194 n.8 (observing that the "simplest way" in which similarly situated former IBM employees could have avoided issues relating to the Timing Provision "would have been to file timely arbitration demands in the first instance; Plaintiffs do not identify any obstacle, let alone one imposed by IBM, that prevented [them] from filing an arbitration demand on their ADEA claims within the

180- or 300-day deadline established by the separation agreements."); *see also Smith v. Int'l Bus. Machs. Corp.*, No. 1:21-cv-03856, 2022 U.S. Dist. LEXIS 95934, 2022 WL 1720140, at *7 (N.D. Ga. May 27, 2022) (rejecting a substantially identical argument from a former IBM employee and explaining that "the simplest way for Plaintiff to vindicate her ADEA claim was to file a timely demand for arbitration, which she did not do."). The plaintiff's inability to take advantage of the piggybacking rule in arbitration did not prevent the plaintiff from filing an arbitration demand within the 300-day limitations period and seeking to vindicate the substantive rights protected under the ADEA in a timely manner.

Second, the plaintiff's arguments that the piggybacking rule is substantive and non-waivable are based on the premise that the piggybacking rule is a statute of limitations doctrine designed to ensure that ADEA plaintiffs have enough time to file their claims. But the piggybacking rule is not part of the statute of limitations law of the ADEA. Instead, the piggybacking rule is an exception to the exhaustion doctrine that excuses plaintiffs from notifying their employer and the EEOC of their claims and filing an EEOC charge when those parties are already on notice of the facts surrounding the plaintiff's claims from an earlier filed EEOC charge. As the Court of Appeals for the Second Circuit has explained:

> The purpose of the administrative charge requirement is to afford the agency the opportunity to seek to eliminate any alleged unlawful practice by informal methods of

> conciliation, conference, and persuasion. If the agency charged with that task is satisfied that a timely filed administrative charge affords it sufficient opportunity to discharge these responsibilities with respect to similar grievances, it serves no administrative purpose to require the filing of repetitive ADEA charges . . ..

Tolliver v. Xerox Corp., 918 F.2d 1052, 1057 (2d Cir. 1990); *see also Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1197 (10th Cir. 2004) ("The act of filing a charge is deemed 'useless' in situations in which the employer is already on notice that plaintiffs may file discrimination claims, thus negating the need for additional filings."); *Rusis*, 529 F. Supp. 3d at 192 n.4 ("[T]he piggybacking doctrine neither 'tolls' the statute of limitations nor is it intended to permit otherwise time-barred claims to proceed in litigation."). The conclusion that the piggybacking rule is not a statute of limitations doctrine extending the time for ADEA plaintiffs to file their claims is underscored by the fact that piggybacking is not available to a plaintiff who filed an untimely EEOC charge on their own behalf even if that plaintiff would otherwise have been able to piggyback off a timely filed EEOC charge of a different plaintiff. *See Holowecki*, 440 F.3d at 564-65.

For these reasons, the plaintiff's argument based on the Older Workers' Benefits Protection Act ("OWBPA") are without merit. The OWBPA provides that an "individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." *Estle v. Int'l Bus.*

Machs. Corp., 23 F.4th 210, 213 (2d Cir. 2022) (citing 29 U.S.C. § 626(f)(1)). "If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer must provide certain information to the individual for the waiver to be knowing and voluntary." *Id.* The plaintiff argues that he could not have waived his right to take advantage of the piggybacking rule through the Timing Provision because IBM allegedly did not provide the plaintiff with the disclosures required under the OWBPA before the plaintiff signed the Agreement. But the Court of Appeals for the 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." *Id.* at 214; *see also id.* (reiterating that the substantive right protected by the ADEA is the "right to be free from workplace age discrimination"). And as explained above, the piggybacking rule is a procedural exhaustion doctrine, not a substantive right protected by the ADEA. *See also Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886, 891 (2d. Cir. 1995) (concluding that the ADEA's statutory filing period is "procedural," not "substantive"). Accordingly, any alleged disclosure failure by IBM under the OWBPA does not render the Timing Provision unenforceable.

Finally, the plaintiff relies on two inapposite decisions of the Court of Appeals for the Sixth Circuit. In *Thompson v. Fresh Products, LLC*, 985 F.3d 509 (6th Cir. 2019), a provision in the plaintiff's employment contract purported to waive the statute of limitations otherwise available under the ADEA and provided that

any claims must be filed in court within six months after the incident giving rise to the claims. The Court of Appeals concluded that the provision was unenforceable and wrote that "the limitations period in the [ADEA] give rise to substantive, non-waivable rights." *Id.* at 521. In so holding, the *Thompson* court relied on an earlier ruling by the Court of Appeals for the Sixth Circuit that invalidated a similar contractual provision that purported to shorten the limitations period for bringing claims in court arising under Title VII. *See Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 833 (6th Cir. 2019). The plaintiff contends that these cases demonstrate that because the Timing Provision operated as a waiver of the piggybacking rule and shortened the limitations period for bringing an ADEA claim, it extinguished a substantive, non-waivable right.

The plaintiff's argument is unpersuasive because neither *Thompson* nor *Logan* addressed the relevant question here, which is 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. Indeed, the *Logan* court explicitly wrote that its holding did not extend to the context of arbitration agreements. 939 F.3d at 839 ("We find that a contractually shortened limitation period, *outside of an arbitration agreement*, is incompatible with the grant of substantive rights and the elaborate pre-suit enforcement mechanisms of Title VII.") (emphasis added). And the *Logan* court further recognized that its decision did not disturb an earlier ruling by the Court of Appeals for the Sixth Circuit that upheld a provision in an arbitration

agreement that shortened the time period for prosecuting Title VII claims in arbitration. *Id.* at 837-38; *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003) (explaining that the plaintiffs "failed to show that the [shortened] limitations period in the [arbitration] agreement unduly burdened her or would unduly burden any other claimant wishing to assert claims arising from their employment." (citing *Gilmer*, 500 U.S. at 31)); *see also Howell v. Rivergate Toyota*, 144 F. App'x 475, 480 (6th Cir. 2003) (concluding that a provision in an arbitration agreement that required ADEA claims to be brought in arbitration within 180 days was enforceable because that deadline was "not unreasonably short").

In this case, the Timing Provision afforded the plaintiff ample time and the full limitations period explicitly provided for under the ADEA - 300 days - to file an arbitration demand, which is longer than the Court of Appeals for the Sixth Circuit found to be permissible in *Howell*. Moreover, for the reasons explained above, the Timing Provision did not shorten the ADEA statute of limitations by not adopting the piggybacking rule because that rule is an exhaustion doctrine, not an aspect of the ADEA statute of limitations, and the plaintiff in this case was not required to exhaust any administrative remedies.[3]

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3. The plaintiff also points to cases including *Castellanos v. Raymours Furniture Co., Inc.*, 291 F. Supp. 3d 294 (E.D.N.Y. 2018), in support of his argument that provisions in an arbitration agreement that purport to shorten the statute of limitations for filing claims may be unenforceable. But the provision at issue in *Castellanos* dealt with claims arising under the Fair Labor Standards Act ("FLSA"), 9 U.S.C. § 201 *et seq.*, not the ADEA. Under the FLSA, an employee

See Rusis, 529 F. Supp. 3d at 192 n.4 ("Former employees who wished to pursue ADEA claims in arbitration pursuant to [the Agreement] were not required to file a charge of discrimination with the EEOC. Plainly, then, the piggybacking doctrine is wholly inapplicable in the arbitration context.").

For all these reasons, the plaintiff's argument that the Timing Provision is unenforceable fails. Accordingly, IBM's motion to dismiss the plaintiff's claim seeking a declaration that the Timing Provision is unenforceable is granted.

IV.

The plaintiff also seeks a declaration that the Confidentiality Provision is unconscionable and therefore is unenforceable.[4]

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with a timely claim "can recover damages for pay periods" only "as far back as the statute of limitations reaches." *Id.* at 299-300. Accordingly, the court concluded that a provision that shortened the applicable statute of limitations had a substantive impact on the scope of the plaintiff's claim and the damages that the plaintiff could obtain. *Id.* at 301-02. Because the plaintiff here has not argued that there is any comparable rule governing the damages available for an ADEA claim, *Castellanos* is inapposite.

4. Because the Timing Provision is not enforceable, the plaintiff's Arbitration Demand was correctly dismissed by the arbitrator as untimely. The plaintiff's claim for declaratory relief with respect to the Confidentiality Provision is therefore moot. However, for the sake of completeness, the plaintiff's arguments with respect to the Confidentiality Provision are addressed here and, for the reasons explained below, are without merit.

Appendix H

The Agreement includes a New York choice of law provision and neither party disputes that the Confidentiality Provision should be interpreted in accordance with New York law. Accordingly, whether the Confidentiality Provision is unconscionable must be determined with reference to New York law.

The plaintiff contends 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. In New York, a provision in an arbitration agreement is unconscionable if "it is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable [sic] according to its literal terms." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010) (quoting *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009)). Generally, there must be a showing that such a contract is both procedurally and substantively unconscionable. *Id.* A showing of both procedural and substantive unconscionability is required in all but "exceptional cases" in which a provision is "so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." *Gillman v. Chase Manhattan Bank N.A.*, 73 N.Y.2d 1, 534 N.E.2d 824, 829, 537 N.Y.S.2d 787 (N.Y. 1988). "The procedural elements of unconscionability concern the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract." *Ragone*, 595 F.3d at 121-22.

The plaintiff does not argue that the Confidentiality Provision or the Agreement as a whole is procedurally unconscionable. In any event, the Agreement provides that the plaintiff had 21 days to review the Agreement before signing it. Agreement at 10. Moreover, the Agreement explicitly advised the plaintiff to consult with an attorney prior to executing the Agreement. *Id.* at 24. Accordingly, there is no indication that the circumstances surrounding the execution of the Agreement were coercive or that the plaintiff "lacked a meaningful choice" to enter into the Agreement. *See Nayal*, 620 F. Supp. 2d at 572.

With respect to substantive unconscionability, the plaintiff contends that the Confidentiality Provision gives IBM an unfair advantage over claimants in arbitration. Among other things, the plaintiff claims that the Confidentiality Provision hampers the plaintiff's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations. The plaintiff cites several cases that the plaintiff contends supports these arguments, but none of those cases involved the application of New York law. By contrast, under New York law, confidentiality provisions in arbitration agreements are not substantively unconscionable where, as here, the terms of the confidentiality provision "are not one-sided." *See, e.g., Suqin Zhu v. Hakkasan NYC LLC*, 291 F. Supp. 3d 378, 392 (S.D.N.Y. 2017) ("Here, all of the terms of the Arbitration Agreement — including those in the confidentiality clause — apply equally to Plaintiffs and Defendants, and Defendants bear all of the arbitration costs. For this reason, the confidentiality clause cannot be said to render the Arbitration Agreement substantively

unconscionable."); *see also* Agreement at 26 ("IBM shall pay 100 percent of the required arbitration administration fee in excess of [the filing fee]."). Moreover, the plaintiff's argument is undercut by the fact that if the plaintiff had filed a timely arbitration demand, he would have had the opportunity to obtain relevant discovery from IBM within the confines of the arbitration. Agreement at 27 ("Each party also shall have the right to make requests for production of documents to any party and to subpoena documents from third parties to the extent allowed by law."); *see also Kopple v. Stonebrook Fund Mgmt., LLC*, No. 600825/04, 21 Misc. 3d 1144(A), 875 N.Y.S.2d 821, 2004 NY Slip Op 51948(U), 2004 WL 5653914, at *3 (N.Y. Sup. Ct. July 12, 2004) (concluding that a confidentiality clause in an arbitration agreement "in no way inhibit[ed] an [employment discrimination plaintiff] from preparing his case" because the arbitration agreement "expressly acknowledge[d] that the parties may engage in discovery"). Accordingly, the plaintiff's arguments with respect to substantive unconscionability are without merit.

In sum, the Confidentiality Provision is neither procedurally unconscionable nor substantively unconscionable under New York law. There is therefore no basis on which to conclude that the Confidentiality Provision is unenforceable. For these reasons, IBM's motion to dismiss the plaintiff's claim for a declaratory judgment regarding the Confidentiality Provision is granted.[5]

5. IBM also argues that its motion to dismiss should be granted because the plaintiff is effectively seeking vacatur of the Arbitration Decision under the guise of this action for declaratory

Additionally, because all the plaintiff's claims were dismissed on IBM's motion to dismiss, the plaintiff's motion for summary judgment granting the requested declaratory judgments is denied as moot.

V.

"It is the usual practice upon granting a motion to dismiss to allow leave to replead." *Gunst v. Seaga*, No. 05-cv-2626, 2007 U.S. Dist. LEXIS 25257, 2007 WL 1032265, at *3 (S.D.N.Y. Mar. 30, 2007). "However, if an amendment would be futile, a court may deny leave to amend. A proposed amendment to a pleading would be futile if it could not withstand a motion to dismiss." *Id.*

The plaintiff has not requested leave to amend his complaint. Moreover, the current dismissal is not based on any inadequacies in the plaintiff's pleading, but instead is based on determinations that the plaintiff's claims are foreclosed by applicable law. Because the problems with the plaintiff's causes of action are "substantive," "better pleading will not cure [them and] repleading would thus be futile." *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). For these reasons, the current dismissals of the plaintiff's claims are with prejudice.

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judgment, and that any petition to vacate the Arbitration Decision would be untimely under the FAA. The plaintiff contends that he is not seeking vacatur of the Arbitration Decision and instead would move before the arbitrator to reopen the arbitration if he received a favorable disposition here. Because the plaintiff's claims are without substantive merit, the Court need not resolve whether this action for declaratory judgment was the correct procedural vehicle for the plaintiff to pursue the requested relief.

Appendix H

VI.

There are several outstanding letter motions to seal materials that were filed in this case that contain or discuss arbitration materials that are covered by the Confidentiality Provision. Because the Confidentiality Provision is enforceable, the outstanding sealing requests (ECF Nos. 22, 30, and 32) are granted.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the arguments are either moot or without merit. For the foregoing reasons, IBM's motion to dismiss is **granted** and the plaintiff's motion for summary judgment is **denied** as moot. The Clerk is directed to enter judgment dismissing this case. The Clerk is further directed to close all pending motions and to close this case.

SO ORDERED.

Dated: New York, New York
July 6, 2022

/s/
John G. Koeltl
States District Judge

APPENDIX I — *IN RE IBM* DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-three.

Docket No: 22-1728

IN RE: IBM ARBITRATION
AGREEMENT LITIGATION

GREGORY ABELAR, WILLIAM ABT, BRIAN BROWN, BRIAN BURGOYNE, MARK CARLTON, WILLIAM CHASTKA, PHILLIP CORBETT, DENISE COTE, MICHAEL DAVIS, MARIO DIFELICE, JOSEPH DUFFIN, BRIAN FLANNERY, FRED GIANINY, OM GOECKERMANN, MARK GUERINOT, DEBORAH KAMIENSKI, DOUGLAS LEE, COLLEEN LEIGH, STEPHEN MANDEL, MARK MCHUGH, SANDY PLOTZKER, ALEXANDER SALDARRIAGA, RICHARD ULNICK, MARK VORNHAGEN, JAMES WARREN, AND DEAN WILSON,

Plaintiffs-Appellants,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant-Appellee.

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/S/ Catherine O'Hagan Wolfe

APPENDIX J — *LODI* DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-1737

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-three.

PATRICIA LODI,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellee.

ORDER

Appellant, Patricia Lodi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX K — *TAVENNER* DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 22, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-2318

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-three.

DEBORAH TAVENNER,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,

Defendant-Appellee.

ORDER

Appellant, Deborah Tavenner, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix K

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX L — *CHANDLER* DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 12, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-1733

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of October, two thousand twenty-three.

WILLIAM CHANDLER,

Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant-Appellee.

ORDER

Appellant, William Chandler, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix L

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/

APPENDIX M — RELEVANT STATUTE

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this

chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of

whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion; unlawful practice

(1) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(A) within 180 days after the alleged unlawful practice occurred; or

(B) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

(2) Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory

compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written

in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.