UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	:	21-CV-6296 (JMF)
IBM ARBITRATION AGREEMENT LITIGATION	:	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 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

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

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] 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 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

[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.

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 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.

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[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.

[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 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 (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 ground that the Arbitration Agreements they had

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[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).

[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.

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