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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THEODORE MICHAELS, Plaintiff and Respondent, v. CITIGROUP INC. et al., Defendants and Appellants.	B272102 (Los Angeles County Super. Ct. No. BC607872)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Stern, Judge. Reversed and remanded with directions.

Kermani, Ramin Kermani-Nejad, Mohamad Ahmad, B. Makoa Kawabata for Plaintiff and Respondent Theodore Michaels.

Jones Day, Fred W. Alvarez, Emilie O. Reeslund and Cindi L. Ritchey for Defendants and Appellants Citigroup Inc. and Banamex USA.

Citigroup Inc. and its subsidiary Banamex USA (collectively Citigroup) appeal the order denying their petition to compel arbitration of Theodore Michaels's employment-related claims. Citigroup contends Michaels agreed to arbitrate employment disputes and the trial court erred in concluding that agreement was unconscionable and unenforceable. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Michaels's Lawsuit*

Michaels worked for Banamex for 18 years and was the executive vice president for credit cards, Internet banking, information technology and corporate marketing when his employment was terminated on June 5, 2014. On January 22, 2016 Michaels filed this lawsuit against Citigroup alleging Labor Code violations for whistleblower retaliation and failure to pay wages due and for wrongful termination in violation of public policy and breach of the implied covenant of good faith and fair dealing. In response Citigroup petitioned to compel arbitration of Michaels's employment-related claims.

2. *The Arbitration Agreement*

In December 2012 Citigroup sent all employees, including Michaels, an e-mail instructing the recipient employee to click an included hyperlink that opened a site on Citigroup's corporate intranet network. The intranet website stated, "When you click on the 'I acknowledge' button below, you are acknowledging that: [¶] You have opened the e-mail that directed you to this Web site. [¶] You have received the Web link to the Employee Handbook. [¶] You understand that it's your obligation to read the Handbook and become familiar with its terms. [¶] Appended to the Handbook is an Employee Arbitration Policy as well as the 'Principles of Employment' that require you and [Citigroup] to submit employment-related disputes to binding arbitration. (See Appendix A and Appendix D.) You understand that it is your

obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver . . . of your or [Citigroup's] right to compel arbitration of employment-related disputes."

"WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY, YOU UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK, NOR THE HANDBOOK ITSELF, IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT YOUR EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. YOU UNDERSTAND THAT YOUR EMPLOYMENT WITH [CITIGROUP] IS AT-WILL, WHICH MEANS IT CAN BE TERMINATED BY YOU OR [CITIGROUP] AT ANY TIME, WITH OR WITHOUT NOTICE, FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW."

"Please click the 'I Acknowledge' button below. Once you acknowledge, you'll have the ability to download and print your copy of the Handbook." When the employee clicked the "I Acknowledge" button, the intranet site generated a receipt confirming the employee had completed Citigroup's electronic certification process.

On December 20, 2012 Michaels clicked both the hyperlink opening Citigroup's internal website and the acknowledgment button generating the receipt. The arbitration policy appended to the handbook stated, "This policy applies to both you and to [Citigroup], and makes arbitration the required and exclusive forum for the resolution of all employment-related disputes . . . ." It also provided, "Your eligibility and consideration for merit increases, incentive retention awards, equity awards, or the payment of any other compensation to you, as well as your acceptance of your employment with [Citigroup], or your

continued employment with [Citigroup], shall constitute consideration for your rights and obligations under this Policy."

3. *Citigroup's Petition To Compel Arbitration*

In its petition to compel arbitration Citigroup argued Michaels had agreed to arbitrate all employment-related claims when he completed the electronic certification process, confirming he understood and agreed to be bound by the terms of the arbitration agreement or, at a minimum, confirmed his acceptance of the agreement by continuing his employment after being informed of the new employment terms. Citigroup included with its petition to compel arbitration a copy of the acknowledgment receipt, as well as a copy of the employment arbitration policy that had been appended to the employee handbook.[1]

4. *Michaels's Opposition to the Petition*

In opposition to Citigroup's petition, Michaels argued his completion of the electronic certification process did not constitute an agreement to arbitrate; his employment was governed by a settlement and release agreement he signed in 2003 that contained an arbitration provision governing pre-2003 disputes only; and, in any event, the arbitration agreement relied on by Citigroup was procedurally and substantively unconscionable. In his declaration Michaels explained that, to access the handbook containing the arbitration policy, he was required to click the acknowledgment icon indicating his receipt of the handbook and policy. Although he clicked the "I acknowledge" button, he never agreed to the terms of the arbitration policy and had never been presented with any requests to confirm his agreement. Michaels also stated Citigroup never provided him with a copy of the American

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[1] Citigroup did not include with its papers supporting its petition to compel arbitration the e-mail it had sent to employees instructing them to open the intranet website.

Arbitration Association (AAA) rules or the Financial Industry Regulatory Authority, Inc. (FINRA) rules identified in the arbitration policy.[2]

5. *Citigroup's Reply in Support of Its Petition*

In reply Citigroup argued Michaels's representation he was unaware of the arbitration policy was "disingenuous and immaterial" since he had been presented with, and completed, the same electronic certification policy regarding substantially similar arbitration policies in 2009 and in 2010. It also argued Michaels's election to continue his at-will employment after receiving the handbook and arbitration policy signified his assent to the terms of the arbitration policy.

6. *The Court's Order Denying Citigroup's Petition To Compel Arbitration*

After taking the matter under submission, the superior court denied Citigroup's petition to compel arbitration on the ground the agreement was procedurally and substantively unconscionable. Citigroup moved for reconsideration under Code of Civil Procedure section 1008 based on the Supreme Court's decision in *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237 (*Baltazar*), which was decided after the superior court had taken the matter under submission.[3] The superior court found grounds

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[2] The arbitration policy stated that arbitration "shall be conducted" either under the auspices of the FINRA or the AAA and identified those types of disputes subject to FINRA and those required to be submitted to AAA.

[3] In *Baltazar* the Supreme Court held the employer's failure to attach arbitration rules to the arbitration agreement did not increase the agreement's procedural unconscionability. It also held a provision in an arbitration agreement allowing the parties to seek preliminary injunctive relief in court did not unduly favor the employer, and thus did not make the agreement unilateral and substantively unconscionable. (*Baltazar, supra,* 62 Cal.4th at pp. 1246-1247.)

existed under Code of Civil Procedure section 1008 to reconsider its decision but denied relief on the merits, concluding *Baltazar* did not require it to alter its unconscionability analysis.[4]

DISCUSSION

1. *Michaels Agreed To Arbitrate His Employment Claims*

a. *Governing law and standard of review*

The threshold question presented by every petition to compel arbitration is whether an agreement to arbitrate exists. (*American Express Co. v. Italian Colors Restaurant* (June 20, 2013, No. 12-133) 570 U.S. __ [133 S.Ct. 2304, 2306, 186 L.Ed.2d 417] [2013 U.S. Lexis 4700] [it is an "overarching principle that arbitration is a matter of contract"]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 627 [105 S.Ct. 3346, 87 L.Ed.2d 444] ["the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute"]; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*)*, LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) [""a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit""]; *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 787 (*Esparza*) ["[t]here is a strong public policy favoring contractual arbitration, but that policy does not extend to parties who have not agreed to arbitrate"]; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704 [same].)

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[4] The initial minute order states, "The motion [to compel arbitration] is denied. The [c]ourt finds there is a lack of procedural unconscionability." A subsequent order intended to correct the initial order nunc pro tunc did little to clarify the court's findings. That order reads, "The Court finds there is a lack of procedural and substantive unconscionability." During the hearing on the motion for reconsideration, Citigroup asked the court whether its ruling denying arbitration was based on a finding of unconscionability; the court confirmed it was.

The party seeking to compel arbitration bears the burden of proving by a preponderance of the evidence the existence of an agreement to arbitrate. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 240.) Only if an agreement has been proved does the burden shift to the party opposing arbitration to demonstrate a defense to the enforcement of the agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Rosenthal,* at pp. 409-410.)

"'[G]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.'" (*Pinnacle, supra,* 55 Cal.4th at p. 236; *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9 (*Flores*).) "'The words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" [Citation.] Furthermore, "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."'" (*Flores,* at p. 9; see Civ. Code, § 1641.) Consent must be communicated by each party to the other. (Civ. Code, § 1565, par. 3.) "'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.'" (*Esparza, supra,* 2 Cal.App.5th at p. 788; accord, *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173.)

We review de novo the superior court's interpretation of an arbitration agreement that does not involve conflicting extrinsic evidence. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra,* 14 Cal.4th at p. 413; *Flores, supra,* 7 Cal.App.5th at p. 9; *Esparza, supra,* 2 Cal.App.5th at p. 787.)

b. Although Michaels's completion of the electronic certification process did not constitute consent to arbitration, his continued employment following

notice that arbitration was a condition of employment did

Citigroup contends Michaels agreed to arbitrate all employment-related disputes in accordance with the company's arbitration policy when he completed the electronic certification process. That is, by clicking the acknowledgment icon, Citigroup argues, Michaels expressly understood and agreed that (1) it was his obligation to read the employee handbook and appended arbitration policy and become familiar with their terms; (2) the arbitration policy required him and Citigroup to submit employment-related disputes to binding arbitration; and (3) with the exception of the arbitration policy, nothing contained in the handbook was to be considered a contract of employment.[5]

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[5] Together with its petition to compel arbitration, Citigroup included the 2012 acknowledgment form and arbitration policy along with a declaration from its former director of human resources Marilyn Burman stating the documents had been obtained by her from Citigroup's electronic database, which Citigroup kept in its ordinary course of business. Although Michaels did not object to any of this evidence in his opposition to the petition to compel arbitration, he argues on appeal (as he did in connection with his opposition to Citigroup's motion for reconsideration) that Burman could not properly authenticate the arbitration policy and acknowledgment form because she had not been employed by Citigroup in 2012.

Michaels's hearsay and foundation objections are, at best, questionable. (See Evid. Code, §§ 1271 [business records admissible under exception to hearsay rule where custodian testifies to identity and mode of preparation]; 1561 [stating requirements for custodian to authenticate records]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1011 [trial court has wide discretion in determining whether sufficient foundation is laid to qualify evidence as a business record].) Whatever their merit, however, because Michaels did not timely object to this evidence, his challenge to the admissibility of the documents has been forfeited. (See Evid. Code, § 353 [judgment not subject to reversal for erroneous admission of evidence absent timely

Michaels contends his completion of the electronic certification process, that is, his acknowledgment of receipt of the handbook and arbitration policy, fell short of an agreement to arbitrate. In support of his position Michaels relies on *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1522 (*Sparks*) in which Division Five of this court held an employee's signed acknowledgment of receiving an employee handbook containing an arbitration provision was insufficient to establish mutual assent to arbitrate: "To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees. At a minimum, there should be a specific reference to the duty to arbitrate employment-related disputes in the acknowledgment of receipt form signed by the employee at commencement of employment." (*Id.* at p. 1522; accord *Mitri v. Arnel Management Co.* (2007) 157 Cal.App.4th 1164, 1173 ["conspicuously absent" from the form containing the employee's acknowledgment of receiving the employee handbook containing an arbitration provision "is any reference to an *agreement* by the employee to abide by the employee handbook's arbitration agreement provision"].)

In contrast to the general acknowledgment forms in *Sparks* and *Mitri,* Michaels's acknowledgment form expressly referred to the arbitration policy appended to the handbook. The acknowledgment form also stated, "With the exception of the employment arbitration policy, you understand that nothing contained in this handbook or the handbook itself is considered a contract of employment. . . ." The negative pregnant of this

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objection in trial court]; *People v. Brown* (2003) 31 Cal.4th 518, 546-547.) Burman's declaration and attached evidence in support of Citigroup's petition to compel arbitration were properly before the trial court and shifted the burden to Michaels to dispute the validity of the agreement.

language, which was absent from the forms in *Sparks* and *Mitri,* is that Citigroup intended its arbitration policy (in contrast to the handbook) to be a contract. Nevertheless, because Michaels did not receive the arbitration policy until after he clicked the acknowledgment button and completed the electronic certification process, his mere completion of the electronic certification process, without more, was insufficient to signify his assent to the policy's terms. (See *Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 421 [a contract is void where a party, before making the agreement, lacks a reasonable opportunity to learn its terms]; *Esparza, supra,* 2 Cal.App.5th at p. 791 ["[c]oupled with the language acknowledging that Esparza had not read the handbook yet (and therefore had not read the arbitration provision), the [arbitration] policy acknowledgment does not support defendants' argument that Esparza agreed to the arbitration provision when she signed the policy acknowledgment"].)

However, Michaels's completed acknowledgment form was not the only evidence Michaels had consented to arbitration. The arbitration policy, highlighted in the acknowledgment form and appended to the handbook, specifically provided that Michaels's continued employment would serve as consideration for the new condition of employment. By continuing to work for Citigroup after receiving notice of that condition, Michaels impliedly consented to the arbitration policy. (See *Pinnacle*, *supra*, 55 Cal.4th at p. 236 [agreement to arbitrate may be express or implied; an employee's continued employment after notification that arbitration was condition of employment constitutes implied agreement to arbitrate]; *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 383 (*Harris*); *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420 [same]; cf. *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 11 [employee's continued employment signaled employee's implied acceptance of changed rules regarding job security].)

The same division of this court that decided *Sparks, supra,* 207 Cal.App.4th 1511, recognized this fundamental principle in *Harris, supra,* 248 Cal.App.4th 373, when it distinguished *Sparks* and found mutual assent to the employer's arbitration policy. In *Harris* a new employee transferring from a related entity signed a document acknowledging receipt of the employee handbook and the arbitration policy contained in the handbook. The arbitration policy stated, "'The Company has adopted mandatory binding arbitration as a means of dispute resolution regarding any and all employment related claims that may exist between the Company and an employee, and vice versa. Confirmation of receipt and agreement to this policy is an absolute prerequisite to your hiring by, and continued employment with, the Company. . . . [¶] . . . [¶] If, for any reason, an applicant fails to execute the Agreement to Arbitrate yet begins employment, that employee will be deemed to have consented to the Agreement to Arbitrate by virtue of receipt of this Handbook.'" (*Harris*, at pp. 377-378.)[6]

The *Harris* court distinguished its earlier holding in *Sparks* on two grounds. First, unlike the arbitration policy buried in an employee handbook, the acknowledgment form in *Harris* specifically identified the arbitration policy and confirmed the employee's receipt. (See *Harris, supra,* 248 Cal.App.4th at p. 384 ["[u]nlike the situation in *Sparks,* the arbitration agreement here was specifically highlighted in the signed acknowledgment form"].) Second, the arbitration policy contained a provision expressly deeming an applicant's acceptance of employment (or

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[6] The arbitration provision also applied to existing employees: "'If Employee voluntarily continues his/her employment with TAP [Worldwide, LLC,] after the effective date of this Policy [or January 1, 2010], Employee will be deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth herein without exception.'" (*Harris, supra,* 248 Cal.App.4th at p. 379.)

an existing employee's continued employment after a certain date) acceptance of the arbitration terms. (*Id.* at p. 384 [unlike the purported arbitration agreement in *Sparks,* here the arbitration policy stated "agreement to the mandatory arbitration policy is 'an absolute prerequisite' to hiring and continued employment"].) The same reasons for distinguishing *Sparks* and *Mitri* identified in *Harris* exist in the instant case.

Neither *Esparza*, *supra*, 2 Cal.App.5th 781 nor *Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497 (*Gorlach*) alters our analysis. Addressing the effect of an arbitration provision in an employee handbook that included language stating the handbook was not intended to establish an agreement or create any legally enforceable obligations, the *Esparza* court found there was no mutual assent to arbitrate. (*Esparza,* at pp. 790-791 [without any language indicating the employee's consent to arbitrate, the arbitration policy contained in the handbook was "informational" rather than contractual].) The *Esparza* court also rejected the employer's argument that an implied agreement to arbitrate existed based on the employee's continued employment. Distinguishing *Harris,* the *Esparza* court found plaintiff lacked notice that continued employment would signify agreement to the arbitration policy. (*Esparza*, at p. 791.) As discussed, the arbitration policy Michaels received was highlighted in the acknowledgment form and provided adequate notice that the arbitration policy was intended to be a condition of continued employment.

Gorlach is also inapposite. There, the court found an employee's continued employment following the employer's notice of a new arbitration policy as a condition of continued employment insufficient to create an implied contract to arbitrate. Central to the court's decision was that the handbook containing the arbitration policy informed employees that all team members "must sign the Mutual Agreement to Arbitrate Claims." The court explained, "[T]he handbook told employees

that they must sign the arbitration agreement, implying that it was not effective until (and unless) they did so. Because Gorlach never signed the arbitration agreement, we cannot imply the existence of such an agreement between the parties." (*Gorlach, supra,* 209 Cal.App.4th at p. 1509.) No similar requirement was contained in the materials Michaels received.

In sum, in light of Michaels's undisputed receipt of the new arbitration policy and notice that such policy was a condition of his continued employment, Michaels's consent to be bound by the arbitration policy is properly inferred from his continued employment, whether or not he actually read the policy. (See *Craig v. Brown & Root, supra,* 84 Cal.App.4th at p. 422; see generally *Pinnacle, supra,* 55 Cal.4th at p. 236 [arbitration clause may be binding "even if the party never actually read the clause"].) The trial court did not err in concluding an agreement to arbitrate existed in this case.

c. *Michaels's 2003 settlement agreement does not prohibit an implied contract to arbitrate*

Michaels contends his employment was governed exclusively by a 2003 settlement agreement and release with Citigroup in which, in exchange for a negotiated increase in annualized salary to $200,000, Michaels released all known and unknown claims he might otherwise have against Citigroup for cancellation of an earlier salary continuation agreement. The settlement agreement provided, in the event the release was deemed invalid or unenforceable, claims falling within the terms of the release would be submitted to arbitration pursuant to any applicable company arbitration policy or agreement. It also provided, "No amendment or modification to the Agreement shall be valid unless made in writing and signed" by both Michaels and the company. Emphasizing both the limited arbitration clause applicable to released claims following a determination the release was invalid and the modification clause, Michaels argues any agreement to arbitrate future employment-related claims

had to be in writing and signed by both parties.

Michaels's reliance on the 2003 settlement agreement as his "governing employment agreement" is misplaced. The settlement agreement expressly affirmed Michaels's at-will status and specified it was not a contract of employment.[7] By its terms, the settlement agreement and release was an integrated agreement limited to "the matters contained herein"— Michaels's annualized $200,000 salary, his at-will status, and his release of all then-existing claims—and superseded prior agreements "regarding those matters." The 2012 arbitration agreement does not modify any of those terms. Nothing in the 2003 agreement prohibited supplemental terms of employment concerning matters not encompassed by that agreement.

Stymied by the limited reach of the 2003 agreement, Michaels seeks to expand its scope by arguing he successfully bargained for the removal of a provision requiring arbitration of future employment-related disputes as part of the negotiations preceding his execution of that agreement. Michaels cites as evidence his declaration and a 1997 salary continuation agreement that contained an arbitration clause. But this extrinsic evidence, purportedly proffered to demonstrate a latent ambiguity in the 2003 agreement, cannot be used to contradict express language limiting the scope of that agreement to the matters it specifically identified: Michaels's new salary and the release of his claims relating to the termination of his prior salary agreement. (See generally *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1365-1366 [the process outlined in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Company, Inc.* (1968) 69 Cal.2d 33 that permits provisional

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[7] The 2003 settlement agreement stated, "[N]othing contained in this Agreement should be considered or construed to be a guarantee or promise of employment or compensation for any definite period of time. Your employment with the Company is always on at 'at-will' basis."

consideration of extrinsic evidence to determine whether an integrated agreement contains a latent ambiguity is "not a cloak under which a party can smuggle extrinsic evidence to add a term to an integrated contract, in defeat of the parol evidence rule"].) The 2003 agreement does not address future employment-related claims, and the parties remained free to agree, expressly or impliedly, to a new dispute resolution process for future claims.

2. *The Arbitration Agreement Was Not Unconscionable*

a. *Governing law and standard of review*

A petition to compel arbitration, whether the contract is governed by the California Arbitration Act (CAA) (Code Civ. Proc., § 1280 et seq.) or, as here, by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), is properly denied when grounds exist to revoke the agreement. (See Code Civ. Proc., §§ 1281, 1281.2; *Sonic–Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1143 ["FAA 'permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" [citation] including "'generally applicable contract defenses, such as fraud, duress, or unconscionability"'"].)

Unconscionability "refers to an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. [Citation.] As that formulation implicitly recognizes, the doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results." (*Baltazar*, *supra*, 62 Cal.4th at p. 1243 [internal quotation marks omitted]; *Pinnacle, supra,* 55 Cal.4th at p. 246 [same].)

"'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that

involve surprise or other sharp practices lie on the other end of the spectrum. [Citation.] Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation] contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching." [Citation.]' [Citation.] [C]ourts must be 'particularly attuned' to this danger in the employment setting, where economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.'" (*Baltazar*, *supra*, 62 Cal.4th at p. 1244.)

Both procedural and substantive unconscionability must be present for the court to refuse to enforce a contract under the doctrine of unconscionability although they need not be present to the same degree. (*Baltazar*, *supra*, 62 Cal.4th at p. 1243; *Pinnacle*, *supra*, 55 Cal.4th at p. 246.) Essentially the court applies a sliding scale to the determination: "'The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Pinnacle*, at p. 247; accord, *Baltazar*, at p. 1244.)

"The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement." (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911-912; see *Baltazar*, *supra*, 62 Cal.4th at p. 1245 ["[c]ommerce depends on the enforceability, in most instances, of a duly executed written contract[;] [a] party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was unfair or a bad bargain"].)

The trial court's unconscionability determination, absent conflicting extrinsic evidence, is a question of law subject to de novo review. (*Pinnacle*, *supra*, 55 Cal.4th at p. 236; *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1468-1469.)[8]

b. *There is little, if any, procedural unconscionability*

Michaels contends the arbitration agreement was procedurally unconscionable because it was effected by surprise: He had no opportunity to read the terms of the agreement before he completed the electronic certification process. However, our finding of mutual assent is based not on completion of the electronic certification process but on Michaels's continued employment after receiving notice of the arbitration terms. Once Michaels received the written arbitration policy, he was charged with reading it. His failure to do so does not make the agreement procedurally unconscionable. (*Pinnacle, supra,* 55 Cal.4th at p. 236.)

Michaels also emphasizes that the policy stated arbitration would be conducted in accordance with AAA rules but failed to include a copy of those rules with the agreement. However, Michaels does not identify any aspect of the AAA rules that surprised him or that was unfair or one-sided. As the *Baltazar* Court explained, absent some claim that a rule was artfully hidden through incorporation by reference, the failure to attach the AAA rules does not make the agreement either procedurally

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[8] Because there was no statement of decision, Michaels argues we must presume every disputed fact in favor of the court's unconscionability finding. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132.) The doctrine of implied findings has no application here because the extrinsic evidence is not in conflict. There are no disputed facts, and the interpretation of the arbitration agreement is a legal question subject to de novo review. (*JSM Tuscany, LLC v. Superior Court* (2011) 193 Cal.App.4th 1222, 1235; *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 703.)

or substantively unconscionable. (*Baltazar, supra,* 62 Cal.4th at pp. 1246-1247.)

Finally, citing Citigroup's inherent superior bargaining power, Michaels contends the arbitration agreement is adhesive. That contention is somewhat dubious since Michaels was apparently able to negotiate a significant salary increase. Nonetheless, the adhesive nature of an agreement, standing alone, does little to tilt the balance toward invalidating an arbitration agreement. (See *Baltazar, supra,* 62 Cal.4th at pp. 1245 ["[t]he adhesive nature of the employment contract requires us to be 'particularly attuned' to her claim of unconscionability [citation], but we do not subject the contract to the same degree of scrutiny as '[c]ontracts of adhesion that involve surprise or other sharp practices'"].)

c. *The agreement is not substantively unconscionable*

Michaels's claim of substantive unconscionability, which rests on a single clause concerning provisional relief that he argues unfairly favors Citigroup, is also without merit. That clause provides, "Nothing in this Policy shall prevent you or Citi[group] from seeking from any court of competent jurisdiction injunctive relief in aid of arbitration or to maintain the status quo prior to arbitration." According to Michaels, employers are more likely than employees to seek preliminary injunctive relief to prevent competition, making the clause one-sided and the agreement unconscionable.

Code of Civil Procedure section 1281.8 (section 1281.8) expressly permits any party to an arbitration agreement to obtain a provisional court remedy, including a temporary restraining order or preliminary injunction (§ 1281.8, subd. (a)), when "the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." (§ 1281, subd. (b).) The Supreme Court has held that an arbitration agreement that does no more than confirm those statutory rights is not unconscionable even assuming the right to a provisional

court remedy favors the employer. (*Baltazar, supra,* 62 Cal.4th at pp. 1247-1248.)

Attempting to distinguish *Baltazar,* Michaels contends the provisional relief clause in the instant arbitration agreement is broader than the authorization in section 1281.8 because it permits a party to the arbitration agreement to obtain an injunction "in aid of arbitration." Michaels does not explain why that phrase makes the agreement broader than the statute, nor do we interpret it that way. On its face the phrase "in aid of arbitration" merely affirms that the judicial remedy is provisional, one that temporarily assists, not supplants, the parties' intent to arbitrate the controversy. There is no material difference between the provisional remedy clause approved in *Baltazar* and the instant provision. (See *Aanderud v. Superior Court* (2017) 13 Cal.App.5th 880, 894 [arbitration clause that allows parties to arbitration agreement to seek "'provisional remedies in aid of arbitration from a court of competent jurisdiction'" is consistent with, and permissible under, section 1281.8].)

The Citigroup arbitration agreement is neither procedurally nor substantively unconscionable. The trial court erred in denying the petition to compel arbitration.

DISPOSITION

The order denying Citigroup's petition to compel arbitration is reversed, and the matter remanded to the trial court with directions to enter a new and different order granting Citigroup's petition to compel arbitration. Citigroup is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.