IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| ABDUL A. JALUDI, | : | |
| Plaintiff, | : | CIVIL ACTION NO. 3:15-cv-02076 |
| | : | |
| v. | : | |
| | : | (Mannion, J.) |
| CITIGROUP, | : | (Saporito, M.J.) |
| Defendant. | : | |

## REPORT and RECOMMENDATION

The *pro se* plaintiff, Abdul A. Jaludi ("Jaludi"), filed a complaint (Doc. 1) against Citigroup claiming that his termination from employment with Citigroup as a senior vice president of a global team was in retaliation for exposing Citigroup's ethical violations. He seeks relief under the Sarbanes-Oxley Act of 2002 ("SOX" ), 18 U.S.C. § 1514A, and the civil enforcement provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Citigroup has moved to dismiss the action and to compel arbitration (Doc. 15) of Jaludi's claims pursuant to the terms of the 2009 and 2011 Employment Arbitration Policies (the "2009 Policy," the "2011 Policy," or collectively, the "Policies"). For the reasons that follow, we recommend that Citigroup's motion be granted with respect to Jaludi's RICO claim and denied with

respect to his SOX claim.

## I. Background

Jaludi alleges that he was employed by Citigroup for twenty-four years over the course of twenty-six years, starting as an entry level tape operator to senior vice president managing a global team. (Doc. 1 ¶8). Jaludi's employment was terminated on April 21, 2013. (Id. ¶38). Despite Jaludi's often convoluted factual allegations contained in the complaint, he attempts to allege SOX and RICO claims on the basis that he was terminated in retaliation for making ethical violation complaints against Citigroup to its officers and to regulatory agencies.

On January 22, 2016, Citigroup filed a Rule 12(b)(6) motion to compel arbitration and dismiss or stay. (Doc. 15). In the motion, Citigroup asserts that Jaludi previously agreed to resolve all work-related disputes with Citigroup, including those contained in the complaint, exclusively through binding arbitration. (Doc. 15 ¶2). Further, Citigroup maintains that the binding arbitration is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §1, et seq., and the application of federal case law.

Jaludi argues that the arbitration Policies do not apply to his

circumstances, or in the alternative, if they do apply, the Policies are invalid in that they are unconscionable.

II. Legal Standards

Because "[a]rbitration is a matter of contract between the parties," a judicial mandate to arbitrate must be predicated upon the parties' consent. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir.1980). The FAA enables the enforcement of a contract to arbitrate, but requires that a court shall be "satisfied that the making of the agreement for arbitration . . . is not in issue" before it orders arbitration. 9 U.S.C. §4.

When deciding a motion to compel arbitration, a district court may rely either upon the standards governing motions to dismiss under Fed. R. Civ. P. 12(b)(6) or the standards governing motions for summary judgment supplied by Fed. R. Civ. P. 56. Guidotti v. Legal Helpers Debt Resolution LLC, 716 F.3d 764, 771-76 (3d Cir. 2013). Under Guidotti, the Third Circuit has provided guidance as to which standard may be appropriate under the given circumstances in a particular case as follows:

> When it is apparent, based on the face of the complaint, and documents relied upon in the

> complaint, that certain of a party's claims are subject to an enforceable arbitration clause, a motion to compel arbitration should be considered under a Rule 12(b)(6) standard without discovery's delay. But if the complaint and its supporting documents are unclear regarding the agreement to arbitrate, or if the plaintiff has responded to a motion to compel arbitration with additional facts sufficient to place the agreement to arbitrate in issue, then the parties should be entitled to discovery on the questions of arbitrability before a court entertains further briefing on the question.

Id. at 776 (citation omitted) (internal quotation marks omitted). Despite the length of the complaint, it is devoid of any reference to the employee handbook or the arbitration Policies. Nevertheless, Citigroup attached an affidavit and documents to its motion. Jaludi, in his opposition brief, responded by attaching documents. Accordingly, the Rule 56 standard is appropriate to resolve the motion pending before this court. See Madoner v. Educ. Mgmt. Corp. 18 F. Supp. 3d 652, 658 (W.D. Pa. 2014).

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" only if it might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

(1986). A dispute of material fact is "genuine" only if the evidence "is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S., at 248. In deciding a summary judgment motion, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 512 (3d Cir. 1994).

The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion," and demonstrating the absence of a genuine dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant makes such a showing, the non-movant must set forth specific facts, supported by the record, demonstrating that "the evidence presents a sufficient disagreement to require submission to the jury." Anderson, 477 U.S. at 251-52.

## III. Discussion

On the basis of the written submissions of the parties, we are asked to make a recommendation as to (1) whether the arbitration agreement(s)

exist, (2) if so, whether the facts alleged by Jaludi in the complaint fall within the scope of the agreements, and (3) whether the agreements should be enforced despite Jaludi's allegation that they are unconscionable.

In deciding the issues before us, we are guided by the following rules. The FAA provides, in part, as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. It is undisputed that the arbitration Policies evidence a transaction involving commerce.

The FAA "creates a body of federal substantive law establishing and governing the duty to honor agreements to arbitrate disputes." Glover ex rel. Glover v. Darway Elder Care Rehab. Ctr., Civil No. 4:13-cv-1874, 2014 WL 931459, at *5 (M.D. Pa. Feb. 4, 2014); Century Indem. Co. v. Certain Underwriters at Lloyds, London, 584 F.3d 513, 522 (3d Cir. 2009).

Congress enacted the FAA in order "to overrule the judiciary's long standing reluctance to enforce agreements to arbitrate and its refusal to put such agreements on the same footing as other contracts, and in the FAA expressed a strong federal policy in favor of resolving disputes through arbitration." Id. (citations omitted). Because arbitration is a contractual matter, prior to compelling arbitration under the FAA, a court must first determine that (1) an enforceable agreement to arbitrate exists, and (2) the particular dispute falls within the scope of the agreement. Id.; Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009); arbitration should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." First Liberty Inv. Grp. v. Nicholsberg, 145 F.3d 647, 653 (3d Cir. 1998). "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). The scope of the state contract law is the type of matter in which the federal court must apply the law of the state. Northern Health Facilities v. Batz,

993 F. Supp. 2d 485, 494 (M.D. Pa. 2014).

(a) The Policies are Enforceable Arbitration Agreements

To determine whether the parties agreed to arbitrate, we turn to "ordinary state-law principles that govern the formation of contracts." Kirleis, 560 F.3d at 160; see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Because arbitration is a matter of contract, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964), before compelling arbitration pursuant to the FAA, a court must determine that (1) a valid agreement to arbitrate exists, and (2) the particular dispute falls within the scope of that agreement. Trippe Mfg. Co. v. Niles Audio Corp., 401 F.3d 529, 532 (3d Cir. 2005); Quiles v. Fin. Exch. Co., 879 A.2d 281, 283 n. 3 (Pa. Super. Ct. 2005). It is well established that the FAA reflects a "strong federal policy in favor of the resolution of disputes through arbitration." Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 263 (3d Cir. 2003). But this presumption in favor of arbitration "does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002).

Under Pennsylvania law, contract formation requires: (1) a mutual manifestation of an intention to be bound, (2) terms sufficiently definite to be enforced, and (3) consideration. Blair v. Scott Specialty Gases, 283 F.3d 595, 603 (3d Cir. 2002). In the employment context, arbitration agreements will be upheld when they are "specific enough (i.e. unambiguous) to cover the employee's claims" and "the employee has expressly agreed to abide by the terms of [the] agreement." Quiles, 879 A.2d at 285. The Pennsylvania Supreme Court has held that an agreement to arbitrate must be "clear and unmistakable" and cannot arise "by implication." Emmaus Mun. Auth. v. Eltz, 204 A.2d 926, 927 (Pa. 1964). Likewise, the Third Circuit has held that "[b]efore a party to a lawsuit can be ordered to arbitrate . . . there should be an express, unequivocal agreement to that effect." Par–Knit Mills, 636 F.2d at 54.

Jaludi does not contest the existence of the Policies. Both Policies make arbitration the required and exclusive forum for the resolution of all disputes (other than disputes which by statute are not arbitrable) arising out of, or in any way related to, employment based on legally protected rights (i.e. statutory, regulatory, contractual, or common-law rights) that

may arise between Citigroup and its employees. (Doc. 16-2 at 47, 116). Both Handbooks specifically express that the arbitration Policies are contracts. (Id. at 7, 72). Neither does Jaludi contest that he acknowledged them electronically. Jaludi electronically acknowledged the 2009 Policy on December 21, 2008, and the 2011 Policy on December 27, 2010. (Id. at 148, 150). His continued employment constituted the necessary consideration. Thus, we find that the 2009 and 2011 Policies exist.

The thrust of Jaludi's argument is that the 2011 Policy supersedes the 2009 Policy. (Doc. 19 at 1). In support of his position, he incorrectly directs us to page 11 of Citigroup's U.S. Employee Handbook (the "2011 Handbook"). (Doc. 19 at 1). The provision he cites in his written submission is on page 4 of the 2011 Handbook which reads as follows:

> This Handbook supersedes any Employee Handbooks or Human Resources policies, practices or procedures that may have applied to you and that are inconsistent with and prior to this Handbook's distribution.

(Id. at 72). Nevertheless, the 2011 Handbook further provides that it does not supersede Citigroup's Code of Conduct or any applicable law.

(Id.). Having found that the 2009 Policy and the 2011 Policy exist, we find that the 2011 Policy does not supercede the 2009 Policy; rather, they are mutually exclusive. We must next determine whether the dispute falls within the scope of either Policy or both.

(b) Scope of the Agreement

Jaludi maintains that his SOX claim is not within the scope of the 2011 Policy. He does not dispute that the 2009 Policy expressly requires that SOX claims be submitted to arbitration, only that it is superseded by the 2011 Policy. Also, Jaludi makes no argument that his RICO claims are not covered by both Policies.

A review of both Policies reflects that the 2009 Policy expressly covers SOX claims while the 2011 Policy does not expressly cover them. Neither the 2009 Policy nor the 2011 Policy contain language suggesting that the 2011 Policy supercedes the 2009 Policy. The express terms of the 2009 Policy states that any "[s]uch amendments ... will apply prospectively only." (Doc. 16-2 at 51 ¶26). There is no superseding language in the 2011 Policy. On July 21, 2010, Congress amended the SOX Act, in pertinent part, as follows:

> No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

18 U.S.C. §1514A(e)(2). Apparently, as a consequence of this amendment, Citigroup removed SOX claims subject to arbitration in its 2011 Policy. Thus, we must determine whether Jaludi's SOX claim falls within the scope of the Policies in light of the SOX amendment barring predispute arbitration agreements.

Jaludi's complaint alleges that "in early 2010," in his role as head of the Enterprise Systems Management of North America and as a member of the global problem management committee, Jaludi found that management tickers were being deleted, reclassified to a lower severity, or were not being created at all. (Doc. 1 ¶10). He also alleges that "in early 2010," Jaludi emailed Citigroup's CEO regarding management practices within O & T. (Id. ¶15). Further, "in 2009," Jaludi alleges that he was asked to create a disaster recovery site for the Weehawken command center to address the center's inability to recover from a disaster. (Id. ¶16). He claims that this information was provided to the OCC, the SEC, and members of the Senate Banking Committee. (Id.). He avers that he

was demoted one level "in the 2nd quarter of 2010." (Id. ¶18). He further alleged that "in early 3rd quarter 2010," Jaludi's North America event management and command center automation teams "were taken away from him." (Id. ¶20). "In late 4th quarter 2010," he claims that he was transferred to the Infrastructure Tools and Data Center and "in May 2011," he was demoted "without cause" to an entry level unit administrator. (Id. ¶21).

Throughout 2012, Jaludi claims that he made other recommendations to OCT and CTI. He asserts that eventually, all of these activities resulted in his discharge on April 21, 2013. (Id. ¶38.). Thus, we find that his cause of action accrued as of the date of discharge on April 21, 2013. As the SOX amendment invalidating predispute arbitration agreements was in effect at that time, Jaludi's SOX claim is not subject to arbitration. We will recommend that Citigroup's motion as it relates to Jaludi's SOX claim be denied without prejudice to raising any other appropriate grounds for dismissal, including Jaludi's alleged failure to exhaust his administrative remedies under SOX. (Doc. 24 at 7). However, we will recommend that Citigroup's motion be granted as it relates to

Jaludi's RICO claim. See, Citigroup Glob. Mkts., Inc. v. Preis, No. 14 Civ. 08487 (LGS), 2015 WL 1782135 *5 (S.D. N.Y., April 14, 2015).

(c) Unconscionability

Jaludi contends that the arbitration Policies are unconscionable. Where a party challenges the validity of an arbitration agreement on the ground that it is unconscionable, a threshold question of arbitrability is presented, which must be decided by the court before arbitration is compelled. Quilloin v. Tenet Health Sys. Philadelphia, Inc., 673 F. 3d 221, 228-29 (3d Cir. 2012). Federal courts are to apply state contract law, to the extent that it does not conflict with the FAA, to determine whether an arbitration agreement is unconscionable. Id. at 230. To prove unconscionability under Pennsylvania law, the party challenging the provision bears the burden of proving that the contract was both procedurally and substantively unconscionable. Harris v. Green Tree Fin. Corp., 183 F. 3d 173, 181 (3rd Cir. 1999); Salley v. Option One Mortg. Corp., 925 A.2d 115, 119 (Pa. 2007).

A contract is substantively unconscionable when it "unreasonably favors the party asserting it." Quilloin, 673 F.3d at 230. Jaludi

maintains that the facts upon which he relies to establish Citigroup's substantive unconscionability relate to:

> [C]itigroup's lax internal controls, hidden system problems affecting thousands of customers and billions of dollars, the possibility a catastrophic system failure preventing the millions of customers from accessing their funds or the practice of rewarding unethical behavior while punishing those who come forward with information protected by Sarbanes-Oxley and critical to the health of the United States economy.

(Doc. 19 at 3). Other than these allegations, Jaludi offers no evidence that the Policies unreasonably favor Citigroup. Jaludi neither has alleged nor provided any evidence that there was a disparity in bargaining power. A contract is substantively unconscionable where it alters or limits the rights and remedies available to a party in the arbitral forum. Quilloin, 673 F.3d at 230.

It is apparent that Jaludi was able to read, write, and understand the English language. Further, he was employed by Citgroup for twenty-four years. He was familiar with the arbitration Policies as he twice electronically acknowledged receipt of their provisions. He has not

presented any evidence that he protested or questioned supervisory personnel about the consequences of failing to electronically acknowledge receipt of the Policies nor of his unwillingness to submit employment-related disputes to arbitration. Thus, Jaludi has failed to satisfy his burden of proving that the Policies were substantively unconscionable.

A contract is procedurally unconscionable when there was a "lack of meaningful choice" in the contract, which was formed through "oppression and unfair surprise." Quilloin, 673 F.3d at 235. "Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language." Harris, 183 F.3d at 181 (applying Pennsylvania law). "A contract is procedurally unconscionable where 'there was a lack of meaningful choice in the acceptance of the challenged provision.'" Quilloin, 673 F.3d at 235. In deciding procedural unconscionability, we consider the "take-it-or-leave-it" nature of the standardized form of the arbitration agreement, the parties' relative bargaining positions, and the degree of economic compulsion motivating the adhering party. Id. at 235-36.

The arbitration Policies appear to be "take-it-or-leave-it" documents that the employee was required to sign in order to continue employment with Citigroup. The 2009 Policy made "[a]rbitration the required and exclusive forum for the resolution of all disputes arising out of or in anyway related to employment based on legally protected rights." (Doc. 16-2 at 47). The 2011 Policy made "[a]rbitration the required and exclusive forum for the resolution of all disputes (other than disputes which by statute are not arbitrable) arising out of or in any way related to employment based on legally protected rights." (Id. at 116). Moreover, the introduction to the Handbook contains a set-out in black ink surrounded by a pink box that reads in pertinent part as follows:

> This Handbook contains a policy that requires you to submit employment-related disputes to binding arbitration (See Appendix A). Please read it carefully.

(Id. at 7, 72). Further, in the electronic acknowledgment receipts sent by Jaludi, he acknowledged, in pertinent part, the following:

> Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you 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, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.

(Id. at 148, 150).[1]

The plaintiff has not carried the burden of showing that there was a lack of meaningful choice in the Policies which was formed through oppression or unfair surprise.

## IV. RECOMMENDATION

Based upon the foregoing, it is respectfully recommended that:

1. Citigroup's motion to compel arbitration and stay (Doc. 15) be GRANTED IN PART and DENIED IN PART.

2. Citigroup's motion to compel arbitration be GRANTED with respect to Jaludi's RICO claim;

3. Citigroup's motion to compel arbitration be DENIED with respect to Jaludi's SOX claim and without prejudice to Citigroup to raise any other appropriate grounds for dismissal;

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[1] The 2011 acknowledgment contained the word "subject" for "submit." In all other respects, they are identical.

4. The parties be directed to proceed to arbitration on the RICO claim raised in the instant action pursuant to the terms of the 2009 and 2011 arbitration Policies; and

5. The parties be directed to provide the court with quarterly reports commencing September 1, 2016, informing the court of the status of the arbitration proceedings.

***s/ Joseph F. Saporito, Jr.***
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

Dated: June 21, 2016

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**NOTICE**

**NOTICE IS HEREBY GIVEN** that the undersigned has entered the foregoing Report and Recommendation dated June 21, 2016.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge

> or recommendations made by the magistrate judge. The judge, however need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his ir her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

*s/Joseph F. Saporito, Jr.*
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

Dated: June 21, 2016