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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Guy Pinto,

10 Plaintiff,

11 v.

12 USAA Insurance Agency Incorporated of
13 Texas (FN), et al.,

14 Defendants.

No. CV17-00873-PHX-DGC

ORDER

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16 Defendants have filed a motion to dismiss Plaintiff's third amended complaint
17 ("Complaint") and compel arbitration. Doc. 8. The motion is fully briefed. Docs. 10,
18 14. No party requests oral argument. The Court will grant the motion.

19 **I. Background.**

20 In February 2004, Plaintiff Guy Pinto was hired by Defendant United Services
21 Automobile Association ("USAA"), a provider of insurance products, credit cards,
22 financial planning, investments, and banking products. Doc. 1-2 at 32, ¶ 2. In December
23 2014, USAA terminated Plaintiff's employment. *Id.* At the time of his termination,
24 Plaintiff was a Financial Foundations Relationship Specialist working for USAA's
25 Financial Planning Services Insurance Agency, Inc. Doc. 8 at 2. Plaintiff's Complaint
26 alleges two counts: willful misconduct under A.R.S. § 23-1022(B) (Count One), and
27 "discrimination and/or violations" of the Family Medical Leave Act, 29 U.S.C. § 2615 *et*
28 *seq.* (Count Two). Doc. 1-2 at 40, ¶¶ 43-77.

1 USAA asks the Court to compel arbitration of Plaintiff’s claims and to dismiss the
2 Complaint in its entirety. *See* Doc. 8. USAA submits evidence that, in August 2004,
3 USAA implemented the Dialogue Dispute Resolution Program (“Dialogue”), which
4 provides in part that all employment-related disputes between USAA and its employees
5 (with some exceptions not relevant here) that are not resolved through Dialogue must be
6 submitted to binding arbitration using, where applicable, the Employment Dispute
7 Resolution Rules of the American Arbitration Association. *Id.* at 2. Further, USAA
8 asserts that in June 2004, USAA “posted the Dialogue Program materials on its intranet
9 referred to as ‘Connect,’” and “[s]ince June 2004, Dialogue Program materials including
10 but not limited to the Dialogue Rules and Dialogue Guide have been available to all
11 USAA employees, including Plaintiff, on Connect.” Doc. 14 at 4; Doc. 8 at 3. USAA
12 submits evidence that Plaintiff acknowledged he had received, reviewed, and understood
13 the Dialogue materials and consented to be bound to Dialogue. Doc. 8 at 3-4.

14 Plaintiff argues that he “never agreed to USAA’s Dialogue Program or its
15 arbitration requirement[.]” and “Defendants have produced no signature evidencing
16 Plaintiff’s assent[.]” Doc. 10 at 5-6. Plaintiff also contends that “[t]he Dialogue Program
17 is procedurally unconscionable because it is a contract of adhesion, it is not irrevocable,
18 and because it did not specify what the rules and procedures of arbitration would be.” *Id.*
19 at 9. Plaintiff further argues that “USAA’s actions and inactions demonstrate that if the
20 program even applied to Plaintiff, USAA waived its Dialogue Program by avoiding and
21 proceeding in disregard of its Dialogue program.” *Id.* at 11.

22 **II. Legal Standard.**

23 The Federal Arbitration Act (“FAA”) “provides that arbitration agreements ‘shall
24 be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity
25 for the revocation of any contract.’” *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092
26 (9th Cir. 2009) (quoting 9 U.S.C. § 2). The FAA “leaves no place for the exercise of
27 discretion by a district court, but instead mandates that district courts shall direct the
28 parties to proceed to arbitration on issues as to which an arbitration agreement has been

1 signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). “The court’s
2 role under the [FAA] is therefore limited to determining (1) whether a valid agreement to
3 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at
4 issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000).
5 “If the court finds that an arbitration clause is valid and enforceable, the court should stay
6 or dismiss the action to allow the arbitration to proceed.” *Kam-Ko Bio-Pharm Trading*
7 *Co. Ltd-Australasia v. Mayne Pharma*, 560 F.3d 935, 940 (9th Cir. 2009).

8 **III. Analysis.**

9 Plaintiff does not dispute that Dialogue, if valid, encompasses the dispute at hand.
10 Accordingly, the Court need only decide whether a valid agreement to arbitrate exists.
11 *See Chiron*, 207 F.3d at 1130.

12 **A. Agreement to Arbitrate.**

13 USAA argues that Plaintiff agreed to arbitrate claims when he agreed to
14 participate in Dialogue. Doc. 8 at 3. Plaintiff argues that he never agreed to Dialogue or
15 its arbitration agreement, and USAA has not produced a document containing his
16 signature. Doc. 10 at 5-8. Plaintiff also argues that the arbitration provision is
17 substantively unconscionable, and that USAA has waived its right to proceed under
18 Dialogue. *Id.* at 9-11.

19 **1. Electronic Signature.**

20 Plaintiff argues that “Arizona law requires an electronic signature for a person to
21 assent to a contract via email.” Doc. 10 at 6. The Court does not agree. The statute cited
22 by Plaintiff, A.R.S. § 44-7007, confirms that electronic records can be used to create a
23 contract, and, with respect to signatures, provides only that an electronic signature can
24 satisfy any law that requires a signature:

25 A. A record or signature in electronic form cannot be
26 denied legal effect and enforceability solely because the
record or signature is in electronic form.

27 B. A contract formed by an electronic record cannot be
28 denied legal effect and enforceability solely because an
electronic record was used in its formation.

1 C. An electronic record satisfies any law that requires a
2 record to be in writing or to be retained, or both.

3 D. An electronic signature satisfies any law that requires a
4 signature.

5 E. For the purposes of this section, “law” includes a
6 governmental agency’s policy.

7 A.R.S. § 44-7007 (as amended in 2017 Ariz. Legis. Serv. Ch. 11 (S.B. 1084) (March 14,
8 2017)). Plaintiff identifies no law that requires a signature on an arbitration agreement,
9 and, to the contrary, a party’s signature is not necessary to bind him to arbitration if he
10 was aware of the provision and it was in writing. *See O’Bannon v. United Service*
11 *Automobile Assoc.*, No. 2:15-cv-02231-PHX-SRB at 4 (D. Ariz. June 17, 2016) (“While
12 the FAA requires writing, it does not require that the writing be signed by the parties.”
13 (quoting *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439 (9th Cir. 1994)). “Proof that
14 plaintiff had read the agreement and continued working, has been sufficient to establish
15 consent.” *Id.*

16 The Court finds that there is sufficient evidence Plaintiff was made aware of
17 Dialogue and the arbitration clause. Plaintiff does not dispute that USAA posted
18 Dialogue materials on Connect beginning in June 2004. *See* Doc. 10. Nor does Plaintiff
19 dispute that on May 31, 2005, Plaintiff “signed” an electronic document with his
20 Employee ID (“67015”) and social security number, and agreed to the following:

21 I recognize that I am responsible for reading and understanding the
22 Employee Handbook, and fulfilling the expectations outlined within it. I
23 also understand that it is my responsibility to read and comply with all of
24 USAA’s policies and procedures, including those on the Corporate Policies
25 Index on Connect and as otherwise made available to me.

26 Doc. 8-1 at 6. Nor does Plaintiff dispute that on June 15, 2009, he acknowledged that “I
27 have a responsibility to read and comply with all of USAA’s policies and procedures that
28 establish expectations for employees, including those in the USAA Policy Handbook on
Connect.” *Id.* at 8.

Plaintiff argues that his May 2005 and June 2009 acknowledgments did not link
Dialogue to the employee handbook, implying that they are insufficient to show that he

1 agreed to be bound by Dialogue’s arbitration clause. Doc. 10 at 6. But Plaintiff ignores
2 his clear acknowledgment that it was his responsibility to read and comply with all of
3 USAA’s policies posted on Connect. *See* Doc. 8-1 at 6-8. On these uncontested facts
4 alone, the Court would find sufficient evidence that Plaintiff was made aware and of the
5 written arbitration provision.

6 USAA also provides evidence that, on October 5, 2007, Plaintiff agreed to be
7 bound by Dialogue. *See* Doc. 8 at 3-4; Doc. 8-2 at 8. As an exhibit to the declaration of
8 Mr. Michael Pompa, Senior Business Integration Analyst at USAA and Custodian of
9 Records maintained on USAA’s HR website, USAA presents an email sent from
10 Plaintiff’s employee ID number which acknowledged:

11 I have received the Dialogue Description and Rules for Arbitration and
12 Mediation, the Dialogue explanatory guide, and the USAA Legal
13 Assistance Plan. I understand that I have until October 10, 2007 to review
14 the materials and execute this acknowledgement and agreement. I agree to
15 be bound by the terms and provisions of Dialogue. I understand that any
16 dispute covered by Dialogue that cannot be resolved by mutual agreement,
17 and which involves a legally protected right, must be submitted to final and
binding arbitration, instead of to the court system. This includes disputes
relating to my employment and any termination of my employment. . . . I
understand that this means that USAA and I are waiving any right we may
have to bring a lawsuit in court and to a jury trial concerning any dispute
covered by the Program.

18 Doc. 8-2 at 8. Plaintiff does not deny the authenticity of this email. Instead, he argues
19 that the email is attached to a declaration by Mr. Pompa that “is not made only on Mr.
20 Pompa’s personal knowledge as required by Fed. R. Civ. P. 56(c)(4), and no other
21 authority allows a party to rely upon hearsay or other inadmissible evidence in support of
22 a motion.” Doc. 10 at 6. Plaintiff’s objection is unpersuasive.

23 Mr. Pompa’s declaration describes the method by which USAA prepares and
24 maintains its reports. Doc. 8-2 at 2-3. He explains that “[t]he record is created
25 automatically, at or around the time the employee clicks on the ‘I agree’ button, without
26 any manual intervention,” and “[t]he data that is recorded in the USAA HR Web database
27 includes: (a) the employee ID number . . . (b) the topic of the acknowledgement . . . and
28 (c) the date and time that the employee clicked the button[.]” *Id.*, at 3, ¶ 7. Plaintiff

1 makes no challenge to these assertions, which show that the records are made and
2 retained in the normal course of business. The Court finds Mr. Pompa's declaration and
3 attachments admissible for purposes of this motion. Fed. R. Ev. 803(6).

4 The Court finds that Plaintiff was aware of Dialogue and the arbitration provision,
5 and specifically agreed to be bound by them. This is sufficient to make Plaintiff subject
6 the arbitration obligation. *See O'Bannon*, No. 2:15-cv-02231-PHX-SRB at 4.

7 **2. Unconscionability.**

8 Unconscionability is a generally applicable contract defense that may render an
9 arbitration provision unenforceable under the FAA, *Doctor's Associates, Inc. v.*
10 *Casarotto*, 517 U.S. 681, 687 (1996), and is determined according to the laws of the state
11 of contract formation, *Chalk*, 560 F.3d at 1092. Under Arizona law, the plaintiff bears
12 the burden of proving the unenforceability of the arbitration provision, and the
13 determination of unconscionability is made by the Court as a matter of law. *Maxwell v.*
14 *Fidelity Financial Services, Inc.*, 907 P.2d 51, 56 (Ariz. 1995); *Taleb v. AutoNation USA*
15 *Corp.*, 2006 WL 3716922, at *2 (D. Ariz. Nov. 13, 2006) ("Because a court order
16 compelling arbitration is the functional equivalent of a summary disposition on the issue
17 of the enforceability of the Arbitration Agreement, the burden is properly upon the
18 plaintiff to produce specific facts showing that . . . a triable issue exists."). The Court
19 concludes as a matter of law that Plaintiff has not met the "high bar" necessary to
20 demonstrate unconscionability. *Longnecker v. American Express Co.*, 23 F. Supp. 3d
21 1099, 1108 (D. Ariz. 2014).

22 **a. Procedural Unconscionability.**

23 Procedural unconscionability arises from unfairness in the bargaining process. It
24 "is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of
25 important facts or other things that mean bargaining did not proceed as it should."
26 *Maxwell*, 907 P.2d at 57-58.

27 Plaintiff argues that the arbitration agreement is procedurally unconscionable
28 because it is a contract of adhesion. Doc. 10 at 9. Even if it is, a contract of adhesion is

1 not automatically unconscionable under Arizona law. *See Longnecker*, 23 F. Supp. 3d at
2 1109 (“But even if the arbitration agreements were contracts of adhesion that would not
3 mean that they are procedurally unconscionable. Contracts of adhesion are not *per se*
4 unenforceable.”); *Perry v. NorthCentral University, Inc.*, 2011 WL 4356499, at *5 (D.
5 Ariz. Sept. 19, 2011) (same); *R & L Limited Investments, Inc. v. Cabot Investment*
6 *Properties, LLC*, 729 F. Supp. 2d 1110, 1115 (D. Ariz. 2010) (“it does not appear that
7 there is any Arizona law supporting the assertion that a finding of adhesion equates to a
8 finding of procedural unconscionability”). Indeed, Arizona law recognizes that a contract
9 of adhesion is valid and enforceable unless it is otherwise unconscionable or beyond the
10 range of reasonable expectations. *Broemmer*, 840 P.2d at 1016; *see also, AT&T Mobility*
11 *LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) (Supreme Court rejected the idea that
12 arbitration agreements are *per se* unconscionable when found in adhesion contracts.).
13 Judges of this Court have twice found that the USAA arbitration agreement at issue here
14 is not procedurally unconscionable. *See O’Bannon*, CV-15-02231-PHX-SRB at *1
15 (“[T]he arbitration agreement in the Dialogue program is not a procedurally
16 unconscionable contract of adhesion.”); *Russ v. United Servs. Auto. Ass’n*, No. CV-16-
17 02787-PHX-PGR, 2017 WL 1953458, at *1-2 (D. Ariz. May 11, 2017) (same). The
18 undersigned judge agrees.

19 **b. Substantive Unconscionability.**

20 Substantive unconscionability is concerned with the fairness of the contract terms.
21 *Maxwell*, 907 P.2d at 58. “Indicative of substantive unconscionability are contract terms
22 so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in
23 the obligations and rights imposed by the bargain, and significant cost-price disparity.”
24 *Id.* at 59.

25 Plaintiff argues that the arbitration agreement is substantively unconscionable
26 because “USAA reserves the right to amend the Dialogue Program on thirty days’ notice
27 to current employees” and “affords no equivalent power to its employees.” Doc. 10 at 9-
28 10. This argument relies on the Ninth Circuit’s holding in *Ingle v. Circuit City Stores*,

1 328 F.3d 1165, 1179 (9th Cir. 2003). Doc. 10 at 9. *Ingle* held that a 30-day “notice is
2 trivial when there is no meaningful opportunity to negotiate the terms of the agreement.”
3 328 F.3d at 1179. But the Ninth Circuit’s decision was premised on California contract
4 law. *Id.* Courts applying Arizona law have reached conflicting conclusions on whether
5 an employer’s right to modify an arbitration agreement is substantively unconscionable.
6 *Compare Batory v. Sears, Roebuck & Co.*, 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006)
7 (finding a non-mutual modification/termination provision substantively unconscionable),
8 *with Equal Employment Opportunity Comm’n v. Cheesecake Factory, Inc.*, No. 08-cv-
9 1207-PHX-NVW, 2009 WL 1259359, at *3 (D. Ariz. May 6, 2009) (“Under Arizona
10 law, however, when an employer changes the terms of at-will employment, it essentially
11 makes a new offer of employment, and the employee may accept the new offer by
12 performance, thus forming a new unilateral contract”).

13 The more recent decisions, and those the Court finds most persuasive, hold that
14 the “amendment and termination provisions such as those found in the Dialogue Program
15 are not substantively unconscionable under Arizona law when, as with the plaintiff’s
16 employment here, employment is on an at-will basis.” *Russ*, 2017 WL 1953458, at *4
17 (citing *O’Bannon*, No. 2:15-cv-02231-PHX-SRB (concluding that the modification
18 provisions in USAA’s Dialogue program were not substantively unconscionable because
19 Arizona law views changes in the terms of an at-will employment relationship to be a
20 new offer that an employee may accept by performance or reject by leaving the job)); *see*
21 *also Cheesecake Factory*, 2009 WL 1259359, at *4-5. Because Plaintiff’s employment
22 was at-will, the modification provision was not substantively unconscionable.

23 Plaintiff also argues that the arbitration agreement is substantively unconscionable
24 because “USAA is not obligated to arbitrate all ‘Disputes’ and the list of covered
25 ‘Disputes’ consist only of ‘claims against the Company’ and between employees to the
26 exclusion of claims that USAA may initiate against its employees[.]” Doc. 10 at 10.
27 Plaintiff provides no explanation or support for this argument. The Court finds nothing
28 to indicate that Dialogue is “so one-sided as to oppress or unfairly surprise [Plaintiff],” or

1 that it creates “an overall imbalance in the obligations and rights imposed by the bargain,
2 and significant cost-price disparity.” *See Maxwell*, 907 P.2d at 59.

3 **B. Waiver.**

4 The FAA recognizes that a party can waive its right to insist on arbitration if it
5 fails to properly invoke that right. 9 U.S.C. §§ 3, 4. The Ninth Circuit has stated that a
6 federal court presented with a motion to compel arbitration may consider whether the
7 moving party waived its right to arbitrate. *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th
8 Cir. 2016). A party waives the right to insist on arbitration, for example, by refusing a
9 request to arbitrate a claim or by actively litigating the claim. *See id.* at 1124-28.

10 The Ninth Circuit recently explained the standard for determining whether waiver-
11 by-conduct has occurred:

12 The right to arbitration, like other contractual rights, can be waived. A
13 determination of whether the right to compel arbitration has been waived
14 must be conducted in light of the strong federal policy favoring
15 enforcement of arbitration agreements. Because waiver of the right to
16 arbitration is disfavored, any party arguing waiver of arbitration bears a
17 heavy burden of proof. As such, a party seeking to prove waiver of a right
to arbitration must demonstrate: (1) knowledge of an existing right to
compel arbitration; (2) acts inconsistent with that existing right; and
(3) prejudice to the party opposing arbitration resulting from such
inconsistent acts.

18 *Id.* at 1124 (internal citations and quotation marks omitted).

19 Plaintiff argues that USAA waived its right to enforce the arbitration provision by:
20 engag[ing] in a continuous and consistent pattern[] of conduct that
21 demonstrated USAA avoided and proceeded in disregard of its Dialogue
22 Program with respect to Plaintiff, such as refusing to take necessary actions
23 to reasonably accommodate his known disabilities on a continuous basis
and refusing to investigate Plaintiff’s Complaint made to HR about sexual
harassment and a hostile work environment or refer his Complaint to
Dialogue.

24 Doc. 10 at 11.

25 Plaintiff fails to show waiver. Plaintiff’s only citation to the record is to his own
26 declaration, which alleges that he was not informed of Dialogue in 2013 when he lodged
27 a sexual harassment complaint against a co-worker. Doc. 10-1, ¶¶ 17-18. Even if this is
28 true, the Court does not find such inaction inconsistent with arbitration of this dispute.

1 Plaintiff also alleges that he asked about dispute resolution after his termination in
2 December 2014, but was told by the HR department that it was not available. *Id.*, ¶¶ 21-
3 22. The Court does not view this single incident as sufficient to show USAA’s knowing
4 waiver of its arbitration rights, and Plaintiff makes no attempt to show prejudice from this
5 action. *Martin*, 829 F.3d at 1124. Moreover, Plaintiff makes no assertion that USAA
6 refused a proper request to arbitrate, *cf. Brown v. Dillard’s, Inc.*, 430 F.3d 1004, 1012
7 (9th Cir. 2005), or otherwise consented to litigate this dispute, *cf. Martin*, 829 F.3d at
8 1125-26. Nor did USAA unreasonably delay in seeking to compel arbitration; its motion
9 was filed less than one month after the action was removed to this Court. In short,
10 Plaintiff has not carried his “heavy burden” of showing waiver. *Martin*, 829 F.3d at
11 1124.

12 **C. Conclusion.**

13 Plaintiff has failed to show the arbitration agreement invalid or unconscionable, or
14 that it was waived by USAA. Accordingly, arbitration must be compelled under to the
15 FAA. 9 U.S.C. § 4. The Court will grant USAA’s motion to dismiss this action.

16 **IT IS ORDERED:**

- 17 1. USAA’s Motion to Dismiss and Compel Arbitration (Doc. 8) is **granted**.
18 2. The Rule 16 Case Management Conference set for July 27, 2017 at 4:30
19 p.m. is **vacated**.
20 3. The Clerk of the Court is directed to terminate this action.

21 Dated this 26th day of July, 2017.

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25 _____
26 David G. Campbell
27 United States District Judge
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