TENTATIVE RULING

For all the reasons discussed below, defendant has failed to prove the existence of an express agreement to arbitrate. The petition is denied.

Plaintiff Daniel Walls alleges that he worked for CoastHills Credit Union from June 28, 2018 through April 24, 2023, when he was terminated, reportedly as part of a reduction due to the need to reduce expenses. On December 16, 2024, Walls filed a complaint for damages alleging the following causes of action: (1) violation of Labor Code section 970 (inducing a change of residence by means of false representations); (2) fraud; (3) employment discrimination based on religion; (4) employment discrimination based on medical condition; (5) retaliation; and (6) wrongful termination in violation of public policy.

CoastHills moves to compel arbitration of these claims. According to defendant, plaintiff is bound by an agreement, which is part of the CoastHills 2022 Employee Handbook, titled "Alternate Dispute Resolution Agreement" (hereafter, the ADRA). The ADRA provides:

- "CoastHills has an Alternate Dispute Resolution Agreement. This means CoastHills and its employees agree to resolve any employment-related disputes through final, binding arbitration, and not by a court or jury. Each CoastHills employee and former employee is bound by this agreement."
- "The Federal Arbitration Act governs this policy, so there are specific rules. This resolution approach can be used for discrimination, harassment, retaliation, breach of contract, and wrongful termination claims, and claims relating to wages, deductions, hours of work (including meal and rest periods), leaves of absence, trade secrets, unfair competition, and theft, or claims relating to interpretation and enforceability of this policy."
- "An employee may choose to opt-out. To do so, an employee must submit a signed and dated "Dispute Resolution Agreement Opt-Out Form" within 30 days of this going into effect. Nothing will happen to an employee if they opt out. But if an employee doesn't opt out, that means the individual agrees to be bound by the Agreement. The parties can't change the terms of the Alternative Dispute Resolution Agreement unless all parties agree in writing."

  (Garnesy Decl., Exhs. A—pages 91 and 92 of 2022 Employee Handbook; and B—2022 Employee Handbook in full, hereinafter referred to as "Handbook.")

On September 16, 2022, plaintiff acknowledged receipt electronically. (Garnsey Decl., Exh. C.) Exhibit C does not indicate what item or document was acknowledged, but according to the Cheryl Garnsey, Senior Vice President Chief Human Resources Officer at CoastHills Credit Union, "[w]hen the Arbitration Agreement was disseminated, Plaintiff was required to log in to his ADP portal to view the document, thereby acknowledging receipt, The ADP software then registered his "Acknowledgment Status" as "Complete" under Plaintiff's unique Associate ID identifier ("COI4BSTG7")." (Garnsey Decl., ¶ 7.)

CoastHills has the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413.) The 2022 ADRA is the only agreement presented in CoastHill's moving papers. In reply, CoastHills raises *for the first time* that plaintiff was provided with an Employee Handbook in 2018 that also contained an arbitration agreement and relies on facts specific to that agreement in response to arguments made in the opposition. This is procedurally improper. A point raised for the first time in a reply brief will not be considered unless good reason is shown for the failure to present it in the opening brief. (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 459, fn. 18.) This new agreement raised by defendant in reply is not merely elaboration of issues raised in its moving papers or rebuttals to plaintiffs' briefing. It introduces an entirely new contract to consider, without adequate analysis. CoastHills has failed to demonstrate good cause for its failure to raise the 2018 agreement earlier; as the moving party, it had the opportunity to frame the issues in this motion.

Numerous courts have declined to consider issues raised for the first time in a reply. "Obvious considerations of fairness in argument demand that the [moving party] present all of his points in the opening brief. To withhold a point until the closing brief would deprive the [opposing party] of his opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Therefore, the court declines to consider this issue in this motion. In its moving papers, CoastHills sought to prove only that the parties had an agreement to arbitrate the *claims under the 2022 ADRA*; it did not seek to prove the existence of an agreement to arbitrate under the 2018 agreement. Therefore, plaintiff's burden to prove any defenses to the 2018 agreement never arose. The analysis below will proceed accordingly.

Legal Standards

A motion to compel arbitration must "alleg[e] the existence of a written agreement to arbitrate a controversy." (Code Civ. Proc. § 1281(a).) It must state the provisions of the written agreement and the paragraph that provides for arbitration (either verbatim or by copy of the agreement attached to the petition). (CRC, rule 3.1330.) When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court must determine whether the agreement exists by a preponderance of evidence, and if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the moving party bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [CCP] § 1281.2, subds. (a), (b))—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413; see also *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 972.)

Arbitration may be refused where grounds exist for revocation or rescission of the agreement to arbitrate under state law. (9 USC § 2—"grounds as exist at law or in equity for the revocation of any contract;" Code Civ. Pro. § 1281—"grounds as exist for rescission of any contract.") The grounds for rescission or revocation in California include mistake, lack of capacity, undue influence, material failure of consideration, duress, illegality, and fraud. (See Civ. C. §§ 1689, 1566, 39; see also *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.)

FAA Applies

The Agreement specifically provides the Federal Arbitration Act applies. (Garnsey Decl. Exh. B "The Federal Arbitration Act governs this policy, so there are specific rules."].)

This issue is usually irrelevant because both the Federal Arbitration Act (FAA) and the California Arbitration Act (CAA) provide for enforcement of arbitration agreements. (Code Civ. Proc. § 1280 et seq.; 9 USC § 1 et seq.) Moreover, under both the FAA and the CAA, the court may deny an application to arbitrate if it finds the party resisting arbitration did not, in fact, agree to arbitrate. (FAA, § 4[4]; Code of Civ. Proc., § 1281.2.) Even when the FAA applies, however, "the FAA relies on state-law contract principles" in determining whether an arbitration agreement exists. (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466.)

Existence of Agreement

Plaintiff contends there is no agreement to arbitrate. Whether the FAA or the CAA applies, courts "apply general California contract law to determine whether the parties formed a valid agreement to arbitrate their dispute." (*Avery v. Integrated Healthcare Holdings, Inc*. (2013) 218 Cal.App.4th 50, 59-60.) A party's acceptance of an agreement to arbitrate may be express, as where a party signs the agreement. A signed agreement is not necessary, however, and a party's acceptance may be implied in or be effectuated by delegated consent. (*Mendoza v. Trans Valley Transport* (2022) 75 Cal. App.5th 748, 777.)

In *Mendoza v. Trans Valley Transport*, *supra,* 75 Cal. App.5th at 777–797,[1] the court analyzed nearly a dozen decisions that considered whether an agreement to arbitrate existed where an employee had signed an acknowledgment of a handbook containing an arbitration provision. In doing so, it summarized the many factors that courts consider in answering such a question, such as whether the arbitration provision contained a signature line; whether the employee was expected to sign an arbitration clause separate from the handbook; the location of the arbitration clause, its type size and style, and whether it stood out from the rest of the handbook; whether the handbook or acknowledgment contained language that the handbook was intended to be informational not contractual, could be changed by the employer at any time; or did not create a contract of employment; and whether the acknowledgment form mentions arbitration. (*Id.*) Nearly every factor discussed in the court's decision in *Mendoza* supports a finding that there was no express agreement to arbitrate here.

1. Signature

To start, plaintiff had no opportunity to sign the ADRA itself. In this regard, the court in *Mendoza* observed:

> "Unlike [*Romo v. Y-3 Holdings, Inc*. (2001) 87 Cal.App.4th 1153, and *Ajamian v. CantorCO2e, L.P*. (2012) 203 Cal.App.4th 771, two decisions in which the courts held an agreement to arbitrate existed] where the arbitration provisions in the handbook had signature lines, there are no signature lines on either the Arbitration Policy or anywhere else in the Handbook. Like the arbitration provision in [*Sparks v. Vista Del Mar Child & Fam. Servs*., 207 Cal.App.4th 1511 (2012), a decision in which the court held that there was no agreement to arbitrate,] there was no place for Mendoza to

[1] CoastHills argues that plaintiff's reliance on *Mendoza* is unavailing and that his arguments "fail in light of the 2018 Arbitration Agreement signed by Plaintiff." (Reply, p. 6, ll, 28.) As noted, CoastHills forfeited this argument by failing to raise it in its motion. Having cited only provisions from the 2018 Arbitration Agreement in support of its position, and none of the provisions from the 2022 ADRA and Handbook, CoastHills implicitly concedes plaintiff's arguments as advanced in the opposition.

acknowledge the arbitration provision in writing." (*Mendoza, supra,* 75 Cal.App.5th at 783.)

Here, the ADRA contains no signature line. (Garnsey Decl., Exh. B, p. 91.) To the extent the employee is expected to acknowledge receipt of the Handbook, the acknowledgment insufficiently identifies its function as acceptance of the ADRA. (See *infra.*)

2. Location and Style of Arbitration Clause

"Some courts consider the location of the arbitration clause, its type size and style, and whether it stood out from the rest of the handbook." (*Mendoza, supra,* 75 Cal.App.5th at 783-784—"The Arbitration Policy was not prominently distinguished from the other clauses in the Handbook, was not specifically highlighted, [and] did not stand out from other sections in the Handbook visually or in its use of language.") Here, the ADRA uses the same font size, style, and bolding as every other section of the Handbook. In the table of contents, CoastHills identifies each new section by title, which is in bolded and capitalized font. The ADRA is section 11 of 13 sections. It is in no way emphasized or distinguished either in the table of contents or the Handbook itself. (Garnsey Decl., Exh. B generally)

3. Language of Intent in Handbook

Mendoza noted "[c]ourts that found no agreement to arbitrate relied on language in the handbook or acknowledgement forms that indicated that the handbook was intended to be informational, not contractual; could be changed by the employer at any time; or did not create a contract of employment." (*Mendoza, supra,* 75 Cal.App.5th at 784.) These factors are present here.

Both the Handbook and Acknowledgement suggest the provisions therein are informational and not contractual, and they clearly state no contract of employment was created. (Garnsey Decl., Exh. B, p. 94— "Employee Handbook outlines CoastHills' employment policies and procedures" and ". . . nothing in this handbook is intended to constitute a contract of employment, express or implied." [Emphasis added.]; see also p. 11—" Nothing in this Employee Handbook is intended to create or creates an employment agreement, express or implied. Nothing contained in this or any other document provided to the employee is intended to be, nor should be, construed as a contract that employment or any benefit will be continued for any time period. . . . By signing the Employment Handbook Acknowledgement, each employee acknowledges their understanding that employment with CoastHills is at will, and that nothing in this handbook is intended to constitute a contract of employment, express or implied.") While the Handbook does not expressly so say, it's clear that the Handbook could be changed by CoastHills at any time. (Garnsey

Decl., Exh. B, p. 8—"If we ever make changes to the handbook, we will put them in writing and ask you to review and acknowledge them;" and p. 94—"CoastHills and I agree that none of these policies and procedures can be amended, modified, or altered in any way, except by written notification.")

4. Acknowledgment

Another factor courts consider in determining whether the parties have agreed to arbitrate is whether the acknowledgement form mentions arbitration. (*Mendoza, supra*, 75 Cal.App.5th at 785-786.) One court rejected the employer's argument that the employee's signature on an acknowledgement form created an agreement to arbitrate, noting that "[c]onspicuously absent" from the acknowledgment form was any reference to an "agreement to abide by the handbook's arbitration provision." (*Mitri v. Arnel Management Co*. (2007) 157 Cal.App.4th 1164, 1173.) A contract provision that the employee would be bound by the employer's policies "then in effect" did not create an agreement to arbitrate because it did not "specifically state she would be bound by any arbitration agreement or even mention arbitration at all." (*Ajamian, supra*, 203 Cal.App.4th at p. 805.) Although the acknowledgment form in *Esparza* mentioned arbitration as an employer policy, it did not create an agreement to arbitrate because it did not say the employee agreed to abide by the arbitration provision and expressly recognized that she had not yet read the handbook. (*Esparza, supra*, 2 Cal.App.5th at pp. 783, 790,) Conversely, in the acknowledgement form in *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373—where the court found an agreement to arbitrate—the employee expressly acknowledged receipt of the employer's "Alternative Dispute Resolution Agreement." (*Harris, supra*, 248 Cal.App.4th at p. 377; see also *24 Hour Fitness v. Superior Court* (1998) 66 Cal.App.4th 1199, 1215 [mutual assent where acknowledgement form referred to arbitration provision in handbook].) In *Mendoza*, the court held:

> "Nothing in the acknowledgment forms notified Mendoza either that the Handbook contained an arbitration clause or that his acceptance of the Handbook constituted a waiver of his right to a judicial forum in which to resolve his wage and hour claims . . . Since the Handbook "was informational rather than contractual" and FTU failed to call attention to the arbitration requirement in the acknowledgment form, Mendoza should not be required to arbitrate. . . . Merely agreeing to abide by all applicable rules and policies and to "read, observe and abide by" the contents of the Handbook that "is designed for quick reference and general information" does not constitute a contract and does not bind the employee to arbitration."
>
> (*Mendoza, supra,* 75 Cal.App.5th at 785-786.)

Here, any mention of arbitration is conspicuously absent from the Acknowledgment form. It states: "CoastHills Credit Union and I agree that the Employee Handbook outlines CoastHills' employment policies and procedures and represents and defines the terms and conditions of employment. CoastHills and I agree that none of these policies and procedures can be amended, modified, or altered in any way, except by written notification. [¶] By your signature below, you acknowledge your understanding that your employment with CoastHills is at will, and that nothing in this handbook is intended to constitute a contract of employment, express or implied. [¶] I hereby acknowledge receipt of the CoastHills Employee Handbook. Please note that you will acknowledge receipt of the Employee Handbook, and attest that you understand and agree to abide by its policies, procedures and rules." (Garnsey Decl., Exh. B, p. 94.) As in *Mendoza*, while Walls agreed to abide by the Handbook's policies and procedures, the agreement is insufficient to create an arbitration contract.

5. Separate Agreement:

Courts consider whether there was language in the arbitration clause or the handbook that indicated that the employee was expected to sign an arbitration agreement that was separate from the handbook. Such language, if present, would suggest that the Handbook was not itself an arbitration agreement. (*Mendoza, supra,* 75 Cal. App.5th at 783.) This is the only relevant factor weighing in favor of finding that an agreement to arbitrate existed in this case. The court finds this is not enough to outweigh the other factors as delineated above. In these circumstances, CoastHills is not in a position to assert that the ADRA and Handbook are capable of being construed as a contract to arbitrate when it repeatedly emphasized that the Handbook did not create a contract of employment.

6. Sophistication of Employee

CoastHills argues that the court should consider the sophistication of the employee in determining whether a contract was formed. Specifically, it argues that plaintiff was a sophisticated, experienced executive hired into a high-level role as Chief Credit Officer at CoastHills, and then quickly promoted to Executive Vice President, Chief Credit Officer. In *Mendoza,* in contrast, the plaintiff's highest level of education was sixth grade in El Salvador. (*Mendoza, supra,* 75 Cal.App.5th at 784.) CoastHills concludes: "Unlike *Mendoza*, Plaintiff cannot argue he did not understand the Arbitration Agreement and, based thereon, did not mutually assent." No such argument appears. In fact, Walls seems to concede that he understood the potential impact of the ADRA because he expressed concern to Garnsey about signing the Handbook even though he did not agree with some of the items in it, such as the ADRA. Garnsey assured Walls "that by not signing and dating the document, [he] was not "agreeing to the terms of the ADRA," [he] was simply acknowledging receipt." (Walls Decl., ¶ 9.) Garnsey states "I do not recall

ever telling Plaintiff that . . . that is not something I would have said to Plaintiff or any [CoastHills Credit Union] employee, because that contradicts the plain terms of the 2022 Arbitration Agreement." (Garnsey Supp. Decl., ¶ 8.) Garnsey's failure to recall the conversation does not foreclose the possibility that Walls' recollection is correct. Indeed, there is no evidence that Walls ever acknowledged the 2022 Handbook by original signature. Therefore, her declaration is not dispositive.[2]

For all the above reasons, the court concludes that defendant has failed to prove the existence of an express agreement to arbitrate. The petition is denied.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

[2] To be clear, this reported conversation does not impact the court's analysis under *Mendoza*. It is thus unnecessary to resolve whether it in fact occurred. It is worth observing, however, that a more appropriate response by Garnsey, in response to plaintiff's inquiry, would have been this: plaintiff's signature meant he agreed to the arbitration, and plaintiff would be required to follow the opt-out procedure to decline arbitration. But Garnsey does not indicate she gave such a response – or any, for that matter. Garnsey's declaration does not show that her version of events is credible.