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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Eva Cornell,

10 Plaintiff,

11 v.

12 Desert Financial Credit Union, et al.,

13 Defendants.
14

No. CV-21-00835-PHX-DWL

ORDER

15 In this putative class action, Eva Cornell (“Plaintiff”) alleges that Desert Financial
16 Credit Union (“Desert Financial”) violated certain federal regulations that require clear
17 disclosure of a bank’s overdraft practices. (Doc. 1.) In response, Desert Financial has
18 moved to compel arbitration based on an arbitration clause that it added to its standard
19 terms and conditions several years after Plaintiff opened her account. (Doc. 11.) On
20 October 8, 2021, the Court ordered the parties to file supplemental briefing concerning
21 whether the addition of this clause resulted in a valid contract modification. (Doc. 26.)

22 The Court has now reviewed the parties’ supplemental briefing, as well as Desert
23 Financial’s motion for an evidentiary hearing. (Docs. 29, 30, 31.) As explained below,
24 the Court concludes that the most prudent course of action is to conduct further fact-finding
25 and then seek certification from the Arizona Supreme Court on the unsettled legal issue
26 that lies at the heart of the parties’ dispute.

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28 ...

1 **BACKGROUND**

2 I. Factual Background¹

3 It is undisputed that, when Plaintiff originally opened her account with Desert
4 Financial, there was no arbitration clause in the account agreement. (Doc. 11 at 3; Doc.
5 12-3; Doc. 14 at 6.) However, when signing the relevant applications, Plaintiff agreed to
6 be bound by Desert Financial’s account terms and conditions and agreed that Desert
7 Financial “may change those terms and conditions from time to time.” (Doc. 12-1 at 2;
8 Doc. 12-2 at 2.) Plaintiff also elected to receive monthly bank statements from Desert
9 Financial via email. (Doc. 12 ¶ 7; Doc. 12-8; Doc. 12-9.)

10 It is undisputed that Desert Financial sent Plaintiff’s monthly statement for the
11 period ending on March 20, 2021 “to the primary email address it has on file for [Plaintiff].”
12 (Doc. 12 ¶ 6.)² However, the parties dispute whether Plaintiff opened and reviewed that
13 statement. In a declaration, Plaintiff avows that although she “use[s] Desert Financial’s
14 mobile app to check [her] account balance on [her] mobile device,” she “do[es] not review
15 [her] monthly statements through the app or online” and thus did “not see[] the monthly
16 statement that Desert Financial claims contained a notice of an arbitration clause.” (Doc.
17 18-1 ¶¶ 2-3.) Meanwhile, Desert Financial has now submitted a declaration from Tamara
18 Hunter, its manager of account services, avowing that the “Detail User Activity Report”
19 associated with Plaintiff reveals that a person using Plaintiff’s account credentials
20 “accessed, viewed, and saved [Plaintiff’s] periodic account statements through Desert
21 Financial’s online banking platform” and that, during one such session on April 13, 2021,
22 the person accessing Plaintiff’s account “display[ed] and save[d] her periodic account
23 statement[] for the period[] ending on . . . March 20, 2021.” (Doc. 31-1 ¶¶ 3-4, 6.)

24 ¹ Because Desert Financial proffered additional evidence in response to the call for
25 supplemental briefing, the factual background set forth in the October 8, 2021 order has
been modified to reflect that new evidence.

26 ² Shaun Mitchell, the regional manager of the Desert Financial branch where Plaintiff
27 opened her account, declares under penalty of perjury that Desert Financial “sent copies of
the[] periodic statements to the primary email address it has on file for [Plaintiff].” (Doc.
28 12 at 2.) Although Plaintiff provides her own declaration avowing that she did not *see* the
statement, she does not dispute that Desert Financial *sent* it. (Doc. 18 at 1.) As a result,
there is no dispute as to whether Desert Financial sent the statement to Plaintiff.

1 It is undisputed that the account statement for the period ending on March 20, 2021
2 (which, as noted, Plaintiff may or may not have reviewed) included a graphic inlay that
3 communicated the following:

4 NOTICE
5 Change-in-Terms

6 Effective February 10, 2021, Desert Financial updated its Statements of
7 Terms, Conditions, and Disclosures to change how we will resolve legal
8 disputes related to your accounts at Desert Financial.

9 Please see the Dispute Resolution section of the Statement of Terms,
10 Conditions, and Disclosures on www.desertfinancial.com/disclosures for
11 more information.

12 Visit DesertFinancial.com/Disclosures

13 (Doc. 12-6 at 2.) It is also undisputed that the cross-referenced website displayed Desert
14 Financial's updated account agreement, which now includes the following arbitration
15 clause:

16 **DISPUTE RESOLUTION; MANDATORY ARBITRATION.**
17 **READ THIS PROVISION CAREFULLY AS IT WILL HAVE A**
18 **SUBSTANTIAL IMPACT ON HOW LEGAL CLAIMS YOU**
19 **AND THE CREDIT UNION HAVE AGAINST EACH OTHER**
20 **WILL BE RESOLVED.**

21 a. Except as expressly provided herein . . . , you agree that any
22 controversy, dispute, or claim ("Claim") between you and Us
23 that arises out of or relates to [this Agreement], your account,
24 and/or the relationships of the parties hereto shall be resolved
25 or otherwise settled by binding arbitration

26 * * *

27 f. **THE PARTIES UNDERSTAND THAT THEY WOULD**
28 **HAVE HAD THE RIGHT TO LITIGATE THROUGH A**
COURT AND TO HAVE A JUDGE OR JURY DECIDE
THEIR CASE. HOWEVER, THEY UNDERSTAND AND
CHOOSE TO HAVE ANY CLAIMS DECIDED

1 **THROUGH AN ARBITRATION. . . .**

2 * * *

3
4 h. Arbitration is not a mandatory condition of you maintaining an
5 account with Credit Union. If you do not want to be subject to
6 this arbitration provision, YOU MAY OPT OUT of this
Arbitration Provision

7 (Doc. 12 ¶ 5; Doc. 12-4 at 6-7.) Finally, it is undisputed that Plaintiff never subsequently
8 opted out of the arbitration provision.

9 **II. Procedural Background**

10 On May 5, 2021, Plaintiff filed the complaint. (Doc. 1.)

11 On June 24, 2021, Desert Financial moved to compel arbitration. (Doc. 11.) That
12 same day, Desert Financial separately moved to dismiss under Federal Rules of Civil
13 Procedure 12(b)(1) and 12(b)(6). (Doc. 13.)

14 On July 26, 2021, Plaintiff filed responses to both motions. (Docs. 18, 19.)

15 On August 24, 2021, Desert Financial filed replies in support of both motions.
16 (Docs. 22, 23.)

17 On October 8, 2021, the Court ordered supplemental briefing with respect to the
18 motion to compel arbitration. (Doc. 26.)

19 On October 22, 2021, the parties filed their supplemental briefs. (Docs. 29, 30.)
20 That same day, Desert Financial filed a motion for an evidentiary hearing. (Doc. 31.)

21 On November 3, 2021, the Court issued a tentative order addressing the parties'
22 supplemental briefing and Desert Financial's request for an evidentiary hearing. (Doc. 34.)

23 On November 16, 2021, the Court heard oral argument.

24 **DISCUSSION**

25 **I. Arizona's Standard For Modification Of Consumer Contracts**

26 In the October 8, 2021 order, the Court solicited supplemental briefing to "address
27 the key legal issue in this case—whether, under Arizona law, it is enough for a party
28 seeking to modify a contract to send notice of the proposed modification to the offeree

1 through a communication channel to which the offeree previously consented . . . or whether
2 the offeror must also show that the offeree had actual, subjective knowledge of the
3 proposed modification.” (Doc. 26 at 13.) Having now reviewed that briefing, the Court
4 concludes, once again, that “none of the cases cited by the parties provide authoritative
5 guidance on how Arizona courts would resolve this issue.” (*Id.* at 9.)

6 **A. The Parties’ Arguments**

7 In her supplemental brief, Plaintiff argues that “Arizona law permits modification
8 of an already-existing contract only when there is something more than just inquiry or
9 constructive notice. In fact, a unilateral attempt to modify a contract requires an affirmative
10 act of assent by both parties to the contract.” (Doc. 30 at 1.) The primary case on which
11 Plaintiff relies is *Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999), which, according to
12 Plaintiff, holds that “Arizona contract law of generalized application requires affirmative
13 assent” before a contract can be modified. (*Id.* at 2-3.) Plaintiff also argues that three
14 District of Arizona cases—*Vantage Mobility Int’l LLC v. Kersey Mobility LLC*, 2021 WL
15 1610229 (D. Ariz. 2021), *Rose v. Humana Ins. Co.*, 2018 WL 888982 (D. Ariz. 2018), and
16 *Edwards v. Vemma Nutrition*, 2018 WL 637382 (D. Ariz. 2018)—have “analyzed contract
17 modification and determined that proof of affirmative assent to a contract modification is
18 necessary.” (*Id.* at 3-5.) Finally, Plaintiff argues that *Sears Roebuck & Co. v. Avery*, 593
19 S.E.2d 424 (N.C. App. 2004), a North Carolina case that applied Arizona law, provides
20 further support for her position. (*Id.* at 6.)

21 Desert Financial, in contrast, argues that “[n]o published, Arizona decision
22 addresses how to modify standardized consumer contracts.” (Doc. 29 at 1.) Thus, Desert
23 Financial argues that Arizona courts would “follow the Restatement of the Law” and
24 identifies the tentative draft of § 3 of the Restatement of Law, Consumer Contracts as
25 “address[ing] the precise question posed” in this case and establishing that “a standard
26 contract term in a consumer contract” is modified if “the consumer receives reasonable
27 notice of the proposed modification term.” (*Id.* at 2-3.) Desert Financial also points to
28 cases from outside the consumer-contract setting to argue that, under Arizona law,

1 “subjective knowledge is not required to accept an offer or modify a contract.” (*Id.* at 4-5
2 [citing *Hagin v. Fireman’s Fund Ins. Co.*, 353 P.2d 1029 (Ariz. 1960), and *Pinto v. USAA*
3 *Ins. Agency of Tex.*, 275 F. Supp. 3d 1165 (D. Ariz. 2017)].) Finally, Desert Financial
4 argues that Plaintiff’s reliance on *Demasse* is misplaced because *Demasse* “did not involve
5 standardized consumer contracts,” but rather implied employment contracts, and
6 “[e]mployment contracts are entirely different than standardized consumer contracts.” (*Id.*
7 at 6.) Desert Financial concludes that “[t]he Restatement and virtually every court to
8 address this issue have thus only required ‘reasonable notice’ to update standardized
9 consumer contracts, not subjective knowledge . . . [and a] contrary rule requiring subjective
10 knowledge to update standard terms would be untenable.” (*Id.* at 7.)

11 **B. Analysis**

12 The Court has thoroughly reviewed the cases cited by the parties and concludes that
13 none authoritatively establishes a framework for analyzing assent to the modification of a
14 consumer contract under Arizona law.

15 Because both sides discuss the Arizona Supreme Court’s decision in *Demasse*, and
16 because “[i]n determining the law of the state for purposes of diversity, a federal court is
17 bound by the decisions of the highest state court,” *Albano v. Shea Homes Ltd. P’ship*, 634
18 F.3d 524, 530 (9th Cir. 2011), the Court will begin there. In *Demasse*, the plaintiff was
19 one of several hourly workers employed by ITT. 984 P.2d at 1141. ITT had issued five
20 editions of an employee handbook that included a seniority layoff provision. *Id.* Although
21 the “earliest version provided simply that layoffs within each job classification would be
22 made in reverse order of seniority,” the latest version, published in 1989, added new
23 provisions specifying that “nothing contained herein shall be construed as a guarantee of
24 continued employment” and that “[w]ithin the limits allowed by law, [ITT] reserves the
25 right to amend, modify or cancel this handbook, as well as any or all of the various policies,
26 rules, procedures and programs outlined in it” *Id.* “When the 1989 handbook was
27 distributed, ITT employees signed an acknowledgment that they had received, understood,
28 and would comply with the revised handbook.” *Id.* (quotation marks and citations

1 omitted).

2 The dispute arose when ITT terminated Demasse’s employment for performance-
3 related reasons, even though he had seniority over co-workers who were not terminated.
4 *Id.* In response, Demasse brought a breach of contract action in federal district court, which
5 granted summary judgment in the employer’s favor. *Id.* at 1140. Demasse then appealed,
6 and the Ninth Circuit eventually certified the following question to the Arizona Supreme
7 Court: “Once a policy that an employee will not be laid off ahead of less senior employees
8 becomes part of the employment contract . . . as a result of the employee’s legitimate
9 expectations and reliance on the employer’s handbook, may the employer thereafter
10 unilaterally change the handbook policy so as to permit the employer to layoff employees
11 without regard to seniority?” *Id.* The Arizona Supreme Court answered that question in
12 the negative, and the relevant portions of the court’s analysis are worth quoting in full:

13 ITT argues that it had the legal power to unilaterally modify the contract by
14 simply publishing a new handbook. But as with other contracts, an implied-
15 in-fact contract term cannot be modified unilaterally. Once an employment
16 contract is formed—whether the method of formation was unilateral,
17 bilateral, express, or implied—a party may no longer unilaterally modify the
18 terms of that relationship.

18 The cases dealing with employment contracts are merely part of the general
19 rule that recognizes no difference in legal effect between an express and an
20 implied contract. . . . As a result, to effectively modify a contract, whether
21 implied-in-fact or express, there must be: (1) an offer to modify the contract,
22 (2) assent to or acceptance of that offer, and (3) consideration.

22 The 1989 handbook, published with terms that purportedly modified or
23 permitted modification of pre-existing contractual provisions, was therefore
24 no more than an offer to modify the existing contract. Even if the 1989
25 handbook constituted a valid offer, questions remain whether the Demasse
26 employees accepted that offer and whether there was consideration for the
27 changes ITT sought to effect.

26 * * *

27 Continued employment after issuance of a new handbook does not constitute
28 acceptance, otherwise the illusion (and the irony) is apparent: to preserve

1 their right under the [existing contract] . . . plaintiffs would be forced to quit.
2 It is too much to require an employee to preserve his or her rights under the
3 original employment contract by quitting working. Thus, the employee does
4 not manifest consent to an offer modifying an existing contract without
taking affirmative steps, beyond continued performance, to accept.

5 There is no doubt that the parties to a contract may by their mutual agreement
6 accept the substitution of a new contract for the old one with the intent to
7 extinguish the obligation of the old contract, but one party to a contract
8 cannot by his own acts release or alter its obligations. The intention must be
9 mutual. If passive silence constituted acceptance, the employee could not
10 remain silent and continue to work. Instead [he] would have to give specific
11 notice of rejection to the employer to avoid having his actions construed as
12 acceptance. Requiring an offeree to take affirmative steps to reject an offer
13 . . . is inconsistent with general contract law. The burden is on the employer
14 to show that the employee assented with knowledge of the attempted
15 modification and understanding of its impact on the underlying contract.

16 To manifest consent, the employee must first have legally adequate notice of
17 the modification. . . . Legally adequate notice is more than the employee's
18 awareness of or receipt of the newest handbook. An employee must be
19 informed of any new term, aware of its impact on the pre-existing contract,
20 and affirmatively consent to it to accept the offered modification.

21 When ITT distributed the 1989 handbook containing the provisions
22 permitting unilateral modification or cancellation, it did not bargain with
23 those pre-1989 employees who had seniority rights under the old handbooks,
24 did not ask for or obtain their assent, and did not provide consideration other
than continued employment. The employees signed a receipt for the 1989
handbook stating that they had received the handbook, understood that it was
their responsibility to read it, comply with its contents, and contact Personnel
if they had any questions concerning the contents. The Demasse employees
were not informed that continued employment—showing up for work the
next day—would manifest assent, constitute consideration, and permit
cancellation of any employment rights to which they were contractually
entitled.

25 * * *

26 In the briefs and at oral argument, as well in the dissents, there was a note of
27 concern that holding that an employer could not cancel existing contractual
28 terms by issuing a new handbook would be a radical departure from Arizona
law. We blaze no new ground in this opinion. It has always been Arizona

1 law that a contract, once made, must be performed according to its terms and
2 that any modification of those terms must be made by mutual assent and for
3 consideration. To those who believe our conclusion will destroy an
4 employer's ability to update and modernize its handbook, we can only reply
5 that the great majority of handbook terms are certainly non-contractual and
6 can be revised, that the existence of contractual terms can be disclaimed in
7 the handbook in effect at the time of hiring and, if not, permission to modify
8 can always be obtained by mutual agreement and for consideration. In all
9 other instances, the contract rule is and has always been that one should keep
10 one's promises.

11 *Id.* at 1144-1148.

12 At first blush, *Demasse* seems to provide support for Plaintiff's position in this case.
13 *Demasse* requires "affirmative steps" to accept an offer to modify an existing contract and
14 places the burden on the offeror to show that the offeree "assented with knowledge of the
15 attempted modification and understanding of its impact on the underlying contract." *Id.*
16 at 1145. *Demasse* also states that legally adequate notice is "more than the employee's
17 awareness of or receipt of the newest handbook. An employee must be informed of any
18 new term, aware of its impact on the pre-existing contract, and affirmatively consent to it
19 to accept the offered modification." *Id.* at 1146. These statements are difficult to reconcile
20 with Desert Financial's position in this case, which is that a valid contract modification can
21 occur simply by emailing notice of the proposed modification to a contractual counterparty,
22 irrespective of whether the counterparty even opens and reads the email or takes affirmative
23 steps to accept the proposed modification. Additionally, although Desert Financial
24 suggests that *Demasse* is an employment-specific case that has no applicability in the
25 context of consumer contracts, several of *Demasse*'s passages can be read as suggesting
26 that the opinion was not intended to be limited to the employment context, but rather was
27 grounded in generally applicable principles of contract law. For example, the court noted
28 that, "as with other contracts, an implied-in-fact contract term cannot be modified
unilaterally" and that "[t]he cases dealing with employment contracts are merely part of
the general rule that recognizes no difference in legal effect between an express and an
implied contract." *Id.* at 1144-45. The court also stated that "[r]equiring an offeree to take

1 affirmative steps to reject an offer . . . is inconsistent with general contract law.” *Id.*
2 at 1146. Finally, the court observed that “the great majority of handbook terms are
3 certainly non-contractual and can be revised In all other instances, the contract rule is
4 and has always been that one should keep one’s promises.” *Id.* at 1148. Given these
5 statements, there is a fair argument that *Demasse* should be read as articulating a general
6 rule of contract modification that the Arizona Supreme Court then happened to apply to a
7 dispute arising in the employment context.

8 On the other hand, although *Demasse* does not explicitly cabin itself to employment
9 contracts (and, as noted, contains various passages that suggest it should not be so cabined),
10 it also does not explicitly state that its holding should extend *beyond* employment.
11 Additionally, some aspects of the court’s analysis seem to be rooted in employment-
12 specific considerations. For example, the court concluded that “affirmative steps” should
13 be required to accept a modification offer because “otherwise . . . plaintiffs would be forced
14 to quit” and “[i]t is too much to require an employee to preserve his or her rights under the
15 original employment contract by quitting working.” 984 P.2d at 1145 (citation and internal
16 quotation marks omitted). But such considerations are arguably not present in the context
17 of consumer contracts, such as Plaintiff’s contract with Desert Financial to open and
18 maintain a bank account.

19 This is only one of several reasons to suspect the Arizona Supreme Court might
20 apply a stringent modification requirement in the context of employment contracts while
21 allowing consumer contracts to be modified more easily. The Arizona Supreme Court has
22 elsewhere deemed standardized contracts “essential to a system of mass production and
23 distribution” and endorsed the notion that “those who make use of a standardized form of
24 agreement neither expect nor desire their customers to understand or even to read the
25 standard terms. On the other hand, customers trust to the good faith of the party using the
26 form [and] . . . understand that they are assenting to the terms not read or not understood,
27 subject to such limitations as the law may impose.” *Darner Motor Sales v. Universal*
28 *Underwriters Ins. Co.*, 682 P.2d 388, 391 (Ariz. 1984). And whatever concerns prompted

1 the Arizona Supreme Court to endorse the standardization and rapid execution of contracts
2 in 1984 may be even more pertinent today. For example, in 1984, almost no Arizonans
3 were online—today, nearly all of them are.

4 In a related vein, and as discussed in the order soliciting supplemental briefing, it
5 appears that “California has a well-developed body of law concerning electronic consumer
6 agreements” under which “courts apply the theories of ‘constructive notice’ and ‘inquiry
7 notice,’ which may result in a finding of acceptance even when a consumer does not have
8 actual notice of a contract’s terms.” (Doc. 26 at 9.) Although Arizona is, of course, free
9 to adopt rules and legal doctrines that differ from those followed in neighboring states, it
10 is not obvious that Arizona has made an intentional choice to deviate from California’s
11 approach in this area and adopt a rule that makes it more difficult to modify consumer
12 agreements.

13 Desert Financial’s invocation of the tentative draft of the Restatement of the Law,
14 Consumer Contracts provides another reason to question whether the Arizona Supreme
15 Court would apply *Demasse*’s stringent modification rule in the context of consumer
16 contracts. Section 3(a) of that portion of the Restatement provides as follows:

- 17 (a) A standard contract term in a consumer contract governing an ongoing
18 relationship is modified if:
- 19 (1) the consumer receives a reasonable notice of the proposed
20 modified term and a reasonable opportunity to review it;
 - 21 (2) the consumer receives a reasonable opportunity to reject the
22 proposed modified term and continue the contractual
23 relationship under the existing term, and a reasonable notice of
24 this opportunity; and
 - 25 (3) the consumer either (A) manifests assent to the modified term
26 or (B) does not reject the proposed modified term and
27 continues the contractual relationship after the expiration of the
28 rejection period provided in the proposal.

26 Restatement of the Law, Consumer Contracts § 3 (Am. Law. Inst. Tentative Draft 2019).
27 As Desert Financial notes in its supplemental brief, there is a strong argument that the
28 proposed modification effort in this case would be considered valid under § 3(a). *See also*

1 *id.* cmt. 2, illus. 1 (“A consumer opens a checking account with a bank and signs a user
2 agreement. The bank seeks to change the terms of the agreement occasionally and sends
3 notices to the consumer in advance of each such change. Each change of terms is a
4 proposed modification under this Section . . .”). The potential conflict between *Demasse*,
5 which sets forth a relatively stringent modification requirement, and § 3(a) of the
6 Restatement, which calls for a less onerous requirement, presents a dilemma because,
7 “[a]bsent controlling authority to the contrary,” Arizona courts “generally follow the
8 Restatement when it sets forth sound legal policy.” *In re Sky Harbor Hotel Props., LLC*,
9 443 P.3d 21, 23 (Ariz. 2019). *See also In re Krohn*, 52 P.3d 774, 779 (Ariz. 2002) (“We
10 have long followed the rule that where not bound by our previous decisions or by legislative
11 enactment, we would follow the Restatement of the Law.”) (cleaned up).³

12 The parties’ supplemental briefs also contain citations to an array of decisions by
13 federal district courts and other courts applying Arizona law. As an initial matter, because
14 those decisions simply represent attempts to discern the law the Arizona Supreme Court
15 would deem applicable in this circumstance (an exercise the Court is repeating here), they
16 are not dispositive. Additionally, many of the parties’ cited cases are inapposite.⁴ Finally,
17 and most important, although the parties have been able to identify certain authorities that
18 tend to support their respective positions,⁵ the overall takeaway is that other courts have

19 ³ Although the provision cited by Desert Financial appears in a tentative draft of the
20 Restatement, Arizona’s general policy of following the Restatement seems to apply to
21 tentative provisions, too. *See, e.g., Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216,
22 1222 (Ariz. 1977) (“We hold the standard adopted in the Tentative Draft of the American
23 Law Institute, Restatement (Second) of Torts . . . is the standard to be followed in this
24 State.”).

23 ⁴ The inapposite cases include *Vantage Mobility*, *Edwards*, and *Hagin*. *Vantage*
24 *Mobility* stands for the uncontested proposition that “a contract cannot be unilaterally
25 modified nor can one party to a contract alter its terms without the assent of the other
26 party,” but it does not discuss assent with the level of specificity that this case demands.
27 2021 WL 1610229 at *13-14. *Edwards* analyzes whether an arbitration agreement was
28 agreed to, but it is factually inapposite because the original contract was never modified.
2018 WL 637382. *Hagin* is a 1960 Arizona Supreme Court case that applies a theory of
inquiry notice to insurance policies, 353 P.2d 1029, but if the 1999 *Demasse* opinion
establishes universal principles of contractual modification, it would overrule anything to
the contrary in *Hagin*.

⁵ For example, in *Taleb v. AutoNation USA Corp.*, 2006 WL 3716922 (D. Ariz. 2006),
the court held that “[t]he holding of the Arizona Supreme Court in *DeMasse* is limited to
situations in which an employer attempts to unilaterally modify a contract that creates an

1 reached conflicting and difficult-to-reconcile conclusions about the current state of
2 Arizona’s law of contract modification. In the Court’s view, this lack of unanimity is
3 further evidence that the legal issue presented in this case is unsettled and would benefit
4 from clarification.

5 To that end, Desert Financial now argues that “[i]f this Court believes that the
6 Arizona Supreme Court would not follow the Restatement, it should certify this question
7 to the Supreme Court.” (Doc. 29 at 4 n.1.)⁶ The Court agrees. In *Sears Roebuck*, the North
8 Carolina Court of Appeals was asked to decide the enforceability of an agreement to
9 arbitrate under Arizona law. 593 S.E.2d at 424. It correctly observed that “Arizona’s
10 appellate courts have not squarely addressed the issue presented by this appeal” and was
11 forced to rely on *Demasse* and fill in the cracks with California caselaw. *Id.* at 431. Over
12 15 years have passed since that decision, yet the legal landscape is no clearer today. Rather
13 than continue to guess at the Arizona Supreme Court’s perspective, the Court is inclined to
14 simply certify a question to that court (after engaging in further fact-finding as discussed

15 _____
16 expectation of job security.” *Id.* at *5. In contrast, in *Rose*, the court did not seem to view
17 *Demasse* as being limited in this fashion. There, the issue was whether an insurance
18 company had validly modified its “Producer Agreement” with one of its brokers by
19 emailing a notice to the broker, 11 years after the agreement was originally signed,
20 announcing the addition of an arbitration clause. 2018 WL 888982 at *1. Citing *Demasse*,
21 the court concluded that the insurance company’s modification attempt was unsuccessful
22 because “even if . . . Humana’s evidence of sending the email is accepted as true, it shows
23 only that an email was sent to Plaintiff and not rejected by her server. It does not show
24 that Plaintiff read the email or the allegedly attached amendments, and it does not show
25 that she understood the email and assented to the arbitration agreement it contained.” *Id.*
26 at *3. Unlike in *Taleb*, there was no discussion of whether the broker’s contract with the
27 insurance company created an expectation of job security and whether the presence of such
28 an expectation had any bearing on the contract-modification analysis.

⁶ During oral argument, Desert Financial clarified that it doesn’t believe certification
is ultimately necessary because “there is no Arizona law specifically on this issue of how
to modify a standardized consumer contract” and “if there’s unsettled law Arizona courts
follow the Restatement.” The difficulty with this argument is that Arizona courts don’t
automatically follow the Restatement whenever the law is unsettled—rather, Arizona
courts may follow the Restatement when there is no “controlling authority to the contrary.”
In re Sky Harbor Hotel Props., 443 P.3d at 23. Thus, when an Arizona court is faced with
the task of determining whether it is bound by a prior precedent, and there are unsettled
questions about the scope of the prior precedent, the court is not free to disregard the
potentially binding precedent (without resolving the unsettled questions about its scope)
and uncritically follow the Restatement. *See, e.g., Powers v. Taser Int’l, Inc.*, 174 P.3d
777, 782 (Ariz. Ct. App. 2007) (“[W]e do not follow the Restatement blindly and will come
to a contrary conclusion if Arizona law suggests otherwise.”) (citations omitted).

1 in Part II below).

2 “Through certification of novel or unsettled questions of state law for authoritative
3 answers by a State’s highest court, a federal court may save time, energy, and resources
4 and hel[p] build a cooperative judicial federalism.” *Arizonans for Off. Eng. v. Arizona*,
5 520 U.S. 43, 77 (1997) (citations and internal quotation marks omitted). *See also Harris*
6 *v. Arizona Indep. Redistricting Comm’n*, 993 F. Supp. 2d 1042, 1068 (D. Ariz. 2014) (“A
7 basic prerequisite for a court to certify a question to the Arizona Supreme Court is the
8 existence of a pending issue of Arizona law not addressed by relevant Arizona
9 authorities.”). The Arizona Supreme Court may accept a request for certification only if
10 the question to be resolved “may be determinative of the cause then pending in the
11 certifying court and as to which it appears to the certifying court there is no controlling
12 precedent in the decisions of the supreme court and the intermediate appellate courts of
13 this state.” A.R.S. § 12-1861.

14 These requirements are satisfied here. As described above, this case presents a
15 “novel or unsettled question[] of state law” as to which “there is no controlling precedent”
16 from the Arizona appellate courts. *Arizonans for Off. Eng.*, 520 U.S. at 77; A.R.S. § 12-
17 1861. Additionally, the disputed issue “may be determinative of the cause then pending in
18 the certifying court.” A.R.S. § 12-1861. If, as Desert Financial contends, Plaintiff’s claims
19 in this action are subject to arbitration, there will be no occasion for the Court to address
20 the merits of her claims.

21 Certification seems particularly appropriate here because it will promote values of
22 comity and federalism. This case presents a pure issue of contract law that is likely to
23 recur. “Contract law is,” at its essence, “a set of policy judgments concerning how to
24 decide the meaning of private agreements, which private agreements should be legally
25 enforceable, and what remedy to afford for their breach.” *Am. Airlines, Inc. v. Wolens*, 513
26 U.S. 219, 247-48 (1995) (O’Connor, J., concurring and dissenting in part). It promotes
27 judicial federalism to allow state courts to “decide [whether] to force parties to comply
28 with a contract,” given that they are most qualified to determine whether “state policy, as

1 expressed in its contract law, will be advanced by that decision.” *Id.* See also *Walker v.*
2 *BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1005 (11th Cir. 2013) (certifying question to
3 the Oklahoma Supreme Court concerning whether an arbitration agreement was
4 incorporated by reference into a consumer contract and explaining that “[i]t is particularly
5 appropriate for the state court to define the law here because of the possibility that it will
6 be influenced by state policy concerns relating to consumer contracts”).

7 II. Motion For An Evidentiary Hearing

8 Desert Financial has filed a motion for a “two-hour evidentiary hearing pursuant to
9 9 U.S.C. § 4.” (Doc. 31.) Under 9 U.S.C § 4, if there is a factual dispute regarding “the
10 making of the arbitration agreement . . . the court shall proceed summarily to the trial
11 thereof.” Plaintiff, in her response to Desert Financial’s motion to compel arbitration,
12 accepts the premise that “[i]f, after review of the parties’ arguments, there is a factual
13 question regarding the formation of the agreement to arbitrate, the Court must deny the
14 motion and resolve the dispute through an evidentiary hearing or mini-trial.” (Doc. 18
15 at 4.)

16 Desert Financial has established the presence of a factual question regarding the
17 formation of the agreement to arbitrate. Specifically, although Plaintiff avows that she
18 does “not review [her] monthly statements through the app or online” and thus did “not
19 see[] the monthly statement that Desert Financial claims contained a notice of an arbitration
20 clause” (Doc. 18-1 ¶ 2), Desert Financial has proffered evidence that Plaintiff “accessed,
21 displayed, and saved the March 2021 statement (and other statements) less than a month
22 before filing this lawsuit.” (Doc. 31 at 4, citing Doc. 31-1 ¶¶ 3-4, 6.) Because Plaintiff’s
23 subjective notice or knowledge of the March 2021 account statement may be relevant to
24 whether a valid contract modification occurred, further proceedings to resolve the parties’
25 factual dispute on that issue are warranted.⁷

26 ⁷ To be clear, the presence or absence of subjective awareness of the modification
27 proposal may ultimately prove irrelevant. Under *Demasse*, “awareness of or receipt of”
28 the proposed modification is alone insufficient—instead, the offeree must also
“affirmatively consent to . . . the offered modification.” 984 P.2d at 1146. Nevertheless,
it is possible the Arizona Supreme Court will conclude that, even if affirmative consent
isn’t required to modify a consumer contract, subjective awareness of the modification

1 56 style briefing” in lieu of (or, perhaps, in advance of) an evidentiary hearing. As
2 discussed at the conclusion of oral argument, the Court will order the parties to meet and
3 confer about these issues and then file a joint notice setting forth their respective positions.
4 After reviewing the joint notice, the Court will provide further guidance.

5 Accordingly,

6 **IT IS ORDERED** that:

7 (1) Desert Financial’s motion for an evidentiary hearing (Doc. 31) is **granted in**
8 **part.**

9 (2) The parties shall, by December 1, 2021, file a joint notice setting forth their
10 respective positions (with citations to legal authorities, if necessary) on the following
11 issues: (a) whether they should be allowed to engage in limited, expedited discovery; (b) if
12 so, which specific discovery steps should be authorized (along with proposed deadlines);
13 (c) following the conclusion of the discovery process, whether the Court should proceed
14 directly to an evidentiary hearing or allow the parties to submit summary judgment-style
15 briefing; and (d) a proposed date (or dates) for the evidentiary hearing and/or briefing
16 schedule.

17 Dated this 17th day of November, 2021.

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21 _____
22 Dominic W. Lanza
23 United States District Judge
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