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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Joi N. Stirrup,

10 Plaintiff,

11 v.

12 Education Management LLC, et al.,

13 Defendants.

No. CV-13-01063-TUC-CRP

**ORDER**

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15 The Magistrate Judge has jurisdiction over this matter pursuant to the parties'  
16 consent. *See* 28 U.S.C. § 636(c).

17 Pending before the Court are: (1) Defendants' Motion to Compel Arbitration and  
18 Stay These Proceedings Pending Arbitration (Doc. 10); (2) Plaintiff's Combined Response  
19 to Motion to Compel Arbitration and Stay These Proceedings and Motion for Partial  
20 Summary Judgment (Doc. 12); and (3) Plaintiff's Second Motion for Partial Summary  
21 Judgment and Supplemental Response to Defendants' Motion to Compel Arbitration  
22 (Doc. 23). The parties have also filed supplemental briefing regarding newly decided  
23 cases. (Docs. 25, 26, 31, 32). On August 11, 2014, the pending motions came on for oral  
24 argument. For the following reasons, the Court denies Defendants' Motion to Compel  
25 Arbitration and Stay These Proceedings Pending Arbitration and denies Plaintiff's  
26 Motions for Partial Summary Judgment.

27 **BACKGROUND**

28 Plaintiff Joi Stirrup alleges discrimination in the form of constructive discharge  
from her employment in violation of the False Claims Act, 31 U.S.C. § 3730(h), and

1 wrongful termination in violation of A.R.S. § 23-1501(A)(3)(c)(i),(ii). (Complaint (Doc.  
2 1), ¶6). Stirrup alleges that she had been employed by Defendants Education  
3 Management, LLC, and Education Management Corporation (collectively referred to as  
4 “EM”) from December 2008 until the date of her constructive discharge in May 2013.  
5 (*Id.* at ¶¶1-5, 10). At the time of her discharge, Stirrup was employed as the registrar at  
6 The Art Institute of Tucson (“AiTU”), which is owned and managed by EM. (*Id.* at ¶¶5,  
7 11).

8 Stirrup alleges that while working at AiTU, she came to suspect that EM was not  
9 documenting or reporting the cancellations of newly enrolled students in order to keep: (1)  
10 tuition payments from lenders whose loans were insured by the U.S. government and/or  
11 (2) the students’ Pell grant funds; and/or (3) benefits paid for the students by the  
12 Department of Veterans Affairs or the Arizona Department of Economic Security,  
13 “all...of which EM was not entitled to receive or keep when a student timely exercised  
14 their right of cancellation.” (*Id.* at ¶13). Stirrup further alleges that failure to report that a  
15 student withdrew, unlawfully increased the amount of federal and state funding EM  
16 received. (*Id.* at ¶15; *see also id.* at ¶¶ 18, 19 (citing two alleged instances of such  
17 conduct that Stirrup learned about in February 2013)). Stirrup also alleges that EM  
18 overstated “the schedules or case loads of some AiTU students in order to obtain more  
19 federally insured tuition money and federally funded Pell grants.” (*Id.* at ¶17),

20 Stirrup alleges that she spoke to superiors about correcting records regarding the  
21 conduct described above. (*Id.* at ¶20). Stirrup alleges that her superiors denied  
22 wrongdoing and acted toward her with “hostility, which increased to the point where her  
23 working conditions became intolerable by May 14, 2013, and she was compelled to resign  
24 on that day.” (*Id.*; *see also id.* at ¶21 (describing alleged retaliatory conduct)).

25 **DEFENDANTS’ MOTION TO COMPEL ARBITRATION AND STAY THESE PROCEEDINGS**  
26 **PENDING ARBITRATION AND PLAINTIFF’S MOTION FOR PARTIAL SUMMARY**  
27 **JUDGMENT**

28 EM seeks to compel arbitration of Stirrup’s claims and to stay these proceedings

1 pending arbitration. EM argues that in October 2012, Stirrup agreed, pursuant to EM’s  
2 “Alternative Dispute Resolution Policy” (“ADR Policy”), to arbitrate claims of  
3 employment discrimination, harassment, retaliation, or wrongful termination. (Doc. 10,  
4 p.1).

5 In Response, Stirrup filed a combined Opposition to Defendants’ Motion and a  
6 Motion for Partial Summary Judgment (“MPSJ”). (Doc. 12). Stirrup asserts that she  
7 never entered into an arbitration agreement with EM and she was not aware of the ADR  
8 Policy until August 2013, several months after her constructive discharge. (MPSJ, p. 3).

9 After the Motion to Compel Arbitration and MPSJ were briefed, the Ninth Circuit  
10 decided *Davis v. Nordstrom, Inc.*, 755 F.3d 1089 (9<sup>th</sup> Cir. 2014) and the Court requested  
11 supplemental briefing in light of *Davis*. (See Docs. 22, 25, 26). After oral argument,  
12 Stirrup filed a notice of Supplemental Authority Re First Motion for Partial Summary  
13 Judgment (Doc. 31), discussing the recent Ninth Circuit decision in *Nguyen v. Barnes &*  
14 *Noble, Inc.*, \_\_ F.3d \_\_, 2014 WL 4056549 (9<sup>th</sup> Cir. Aug. 18, 2014), and EM filed a  
15 Response to Plaintiff’s Supplemental Authority (Doc. 32).

16 **STANDARD**

17 “The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1, *et seq.* reflects a ‘liberal  
18 policy in favor of arbitration.’” *Davis*, 755 F.3d at 1092 (quoting *AT&T Mobility LLC v.*  
19 *Concepcion*, \_\_ U.S. \_\_, 131 S.Ct. 1740 (2011)). It is well-settled that “‘arbitration is a  
20 matter of contract and a party cannot be required to submit to arbitration any dispute  
21 which [s]he has not agreed so to submit.’” *Samson v. Nama Holdings, LLC*, 637 F.3d 915,  
22 923 (9<sup>th</sup> Cir. 2011) (quoting *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002));  
23 *see also Davis*, 755 F.3d at 1092 (a contract to arbitrate will not be inferred absent a clear  
24 agreement). Further, the “district ‘court’s role under the [FAA]...is limited to determining  
25 (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement  
26 encompasses the dispute at issue. If the response is affirmative on both counts, then the  
27 Act requires the court to enforce the arbitration agreement in accordance with its terms.”  
28 *Samson*, 637 F.3d at 923-24 (quoting *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207  
F.3d 1126, 1130 (9th Cir.2000)).

1           “A motion to compel arbitration is decided according to the standard used by  
2 district courts in resolving summary judgment motions pursuant to Rule 56. Fed.R.Civ.P.”  
3 *Coup v. The Scottsdale Plaza Resort, LLC*, 823 F.Supp.2d 931, 939 (D. Ariz. 2011)  
4 (citations omitted). “If there is doubt as to whether such an agreement exists, the matter,  
5 upon a proper and timely demand, should be submitted to a jury.” *Id.* (quoting *Three*  
6 *Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1141 (9th Cir.1991)).  
7 Thus, “[o]nly when there is no genuine issue of fact concerning the formation of the  
8 agreement should the court decide as a matter of law that the parties did or did not enter  
9 into such an agreement.” *Id.* (quoting *Three Valleys*, 925 F.2d at 1141); *see also Interbras*  
10 *Cayman Co. v. Orient Victory Shipping, Co.*, 663 F.2d 4, 7 (2d Cir. 1981) (“To make a  
11 genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the  
12 agreement had been made was needed, and some evidence should have been produced to  
13 substantiate the denial.”). Where there is a question of fact, and the party alleged to be in  
14 default of the arbitration agreement requests a jury trial, the matter shall be decided by  
15 jury. *See* 9 U.S.C. § 4; *see also Simpson v. Inter-Con Security Sys., Inc.*, 2013 WL  
16 1966145 (W.D. Wash. May 10, 2013) (the court decides the question of whether the  
17 parties agreed to arbitrate on summary judgment if there is no dispute of material fact,  
18 otherwise the court conducts a jury or bench trial).<sup>1</sup>

19           Summary judgment is appropriate when there is no genuine issue as to any material  
20 fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). The  
21 party seeking summary judgment “bears the initial responsibility of informing the district  
22 court of the basis for its motion, and identifying those portions of [the record]...which it  
23 believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v.*  
24 *Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party’s evidence is presumed true and  
25 all inferences are to be drawn in the light most favorable to that party. *Eisenberg v.*  
26 *Insurance Co. of North Amer.*, 815 F.2d 1285, 1289 (9<sup>th</sup> Cir. 1987).

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28           <sup>1</sup> Stirrup has requested a jury trial of the claims underlying her complaint and she  
has requested a jury trial on the issue whether there is a valid arbitration agreement.  
(Doc.1; Doc. 12, p. 15).

1           Only disputes over facts that might affect the outcome of the suit will prevent the  
2 entry of summary judgment, and the disputed evidence must be “such that a reasonable  
3 jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477  
4 U.S. 242, 248 (1986). Thus, if the record taken as a whole “could not lead a rational trier  
5 of fact to find for the nonmoving party,” summary judgment is warranted. *Miller v. Glenn  
6 Miller Prods., Inc.*, 454 F.3d 975, 988 (9th Cir.2006) (quoting *Matsushita Elec. Indus.  
7 Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). If the burden of persuasion at  
8 trial would be on the nonmoving party, the movant may carry its initial burden of  
9 production under Rule 56(c) by producing, “evidence negating an essential element of the  
10 nonmoving party’s claim or defense...,” or by showing, after suitable discovery, that the  
11 “nonmoving party does not have enough evidence of an essential element of its claim or  
12 defense to carry its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co.  
13 v. Fritz Cos.*, 210 F.3d 1099, 1105-1106 (9th Cir. 2000).

14           Because the summary judgment standard applies to the parties’ respective motions,  
15 the Court, in essence, is resolving cross-motions for summary judgment. The Ninth  
16 Circuit instructs that “[w]hen parties file cross-motions for summary judgment, we  
17 consider each motion on its merits. *American Tower Corp. v. City of San Diego*, \_\_ F.3d.  
18 \_\_, 2014 WL 3953765, \*3 (9<sup>th</sup> Cir. Aug. 14, 2014) (citing *Fair Housing Council of  
19 Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9<sup>th</sup> Cir. 2001)). Further,  
20 “the district court [is] required to review the evidence properly submitted in support of  
21 [plaintiff’s cross-motion for summary judgment] as to determine whether [plaintiff]  
22 presented an issue of material fact precluding summary judgment in favor of Defendants.”  
23 *Fair Housing Council of Riverside County, Inc.*, 249 F.3d at 1135 (footnote omitted); *see*  
24 *also id.* at 1134 (“We hold that, when simultaneous cross-motions for summary judgment  
25 on the same claim are before the court, the court must consider the appropriate evidentiary  
26 material identified and submitted in support of both motions, and in opposition to both  
27 motions, before ruling on each of them.”); *Walters v. Odyssey Healthcare Management  
28 Long Term Disability Plan*, 2014 WL 4371284, \*3 (D. Ariz. Sept. 4, 2014) (“when  
multiple parties submit cross-motions for summary judgment, the Court considers each

1 motion on its own merits but must consider all of the evidence presented in determining  
2 whether a genuine issue of material fact exists.”).

3 **EVIDENCE BEFORE THE COURT.** On October 3, 2012, almost 4 years after Plaintiff began  
4 employment with EM, an e-mail was sent to employees notifying them of the adoption of  
5 the ADR Policy and providing a link to the Policy as follows:

6 [EM] has implemented an Alternative Dispute Resolution Policy<sup>[2]</sup> to  
7 promptly and fairly address all work-related disputes. This new policy is  
8 being distributed to all employees and allows for both informal and formal  
9 avenues for resolving concerns. This Policy is a term and condition of your  
continued employment with [EM] Please click here to access the ADR  
Policy.

10 Please acknowledge by clicking here that you received, reviewed and agree  
11 to comply with the Alternative Dispute Resolution Policy. Questions  
12 regarding the Alternative Dispute Resolution Policy should be directed to  
your appropriate Human Resources or Employee Relations Representative.

13 (Doc. 10, p. 3 (quoting Exh. 2, ¶3) (underline in original); *see also* Doc. 10, Exh. 1, ¶4  
14 (Vice President of Employee Relations Trisha Earls stating that on October 3, 2012,  
15 Stirrup received an e-mail with the language set out above)). EM submitted a declaration  
16 from August Thalman IV, the software engineer who wrote the program to distribute the  
17 e-mail<sup>3</sup>, explaining the steps to enter acceptance of the ADR Policy, which included that:  
18 “Plaintiff clicked on the link in the...e-mail and was taken to a login Screen[]” which  
19 required Plaintiff “to affirmatively enter her unique Username and Password<sup>[4]</sup> in order to  
20 enter the ‘Alternative Dispute Resolution Policy Acceptance’ page.” (Doc. 10, Exh. 2, ¶4  
21 & internal exh. A). Thereafter, she had to click the “accept” button to show her agreement  
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24 <sup>2</sup> The ADR Policy provides in relevant part that: “Accepting or continuing  
25 employment with the Company after receipt of this Policy constitutes agreement to abide  
by its terms.” (Doc. 10, p. 2 (quoting Exh. 1, ¶3 (internal exh. A))).

26 <sup>3</sup> At oral argument, Plaintiff’s counsel stated that Stirrup did not dispute that  
Thalman wrote a program that sent out the e-mail.

27 <sup>4</sup> Stirrup was required to change her unique password every 90 days. Thalman  
28 states that prior to October 3, 2012, Stirrup “last reset her password on July 30, 2012 using  
the same Username and IP address she used to accept the ADR [P]olicy.” (Doc. 10, Exh.  
2, ¶8).

1 to the ADR Policy,<sup>5</sup> and she would then be taken to “the Alternative Dispute Resolution  
2 Policy Acceptance Summary Screen” which informed: “Your acceptance has been  
3 successfully recorded.” (*Id.* at ¶¶5-6). Thalman attaches to his declaration “shots” of  
4 computer screens which he says show: (1) Stirrup entered her unique user name and  
5 password into the ADR Policy Acceptance page on October 3, 2012; (2) Stirrup checked  
6 the box indicating she accepted and agreed to the ADR Policy (Doc. 10, Exh. 2 (internal  
7 exh. B)); (3) Stirrup viewed the ADR Policy Acceptance Summary Screen (Doc. 10, Exh.  
8 2 (internal exh. C)). (Doc. 10, Exh. 2, ¶¶4-6). Thalman also attaches a screen shot which  
9 he identifies as a “Result Message” confirming that Stirrup, identified as Employee Profile  
10 Number 85884, accepted the ADR Policy on October 3<sup>6</sup>, 2012 at 16:07 (4:07 p.m.). (*Id.* at  
11 ¶7 & internal exh. D). Thalman states that all the above were completed using the IP  
12 address assigned to the network at AiTU where Stirrup’s work computer is located. (*Id.* at  
13 ¶9). “When Plaintiff electronically accepted the ADR [P]olicy, a record of her acceptance  
14 was automatically entered into a secure database[]” that could only be altered by the  
15 employee’s use of the application. (*Id.* at ¶10). The secure database is password protected  
16 and maintained exclusively by EM’s Information Technology Department. (*Id.*). No one

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18 <sup>5</sup> The Acceptance Screen includes the following language:

19 [EM] has implemented an Alternative Dispute Resolution Policy to  
20 promptly and fairly address all work-related disputes. This policy allows for  
21 both informal and formal avenues for resolving concerns. Please click here  
22 to access the Alternative Dispute Resolution Policy. This Policy is a term  
23 and condition of your continued employment with [EM].

24 By clicking below, I agree to abide by the terms of the Alternative Dispute  
25 Resolution Policy. I agree that if I have any dispute with the Company  
26 arising out of my employment, I will use the Company’s Alternative Dispute  
27 Resolution Policy as the exclusive means for resolving such dispute. I  
28 further acknowledge that I have been given the opportunity to review the  
terms of the Company’s Alternative Dispute Resolution Policy, as well as  
the opportunity to have any questions about that Policy answered.

(Doc. 10, Exh. 2, (internal exh. B)).

<sup>6</sup> Thalman’s declaration actually states that the “Result Message” was dated  
October 10, 2012, however, EM asserts that reference to October 10, 2012 was a  
typographical error and Thalman’s declaration should instead read that the Result  
Message was dated October 3, 2012. EM points out that the screen shot referenced by  
Thalman reflects an October 3, 2012 date stamp. (Reply (Doc. 18), p. 6 n.1).

1 at AiTU has such access. (*Id.*). No one has requested or received access to change any  
2 such information regarding Stirrup. (*Id.*). Thalman also states that Stirrup received the  
3 October 3, 2012 e-mail. (*Id.* at ¶3).

4 Brian Castle, EM's Database Services Manager reaffirms Thalman's statements  
5 concerning communications received from Stirrup's unique user name, password, and IP  
6 address, and that no one could alter the secure database containing the October 3, 2012  
7 information recorded from Stirrup's computer unless that person had approval from two  
8 different people and no such approval was sought. (Doc. 18, Exh. 4, ¶¶1, 4, 5).

9 EM also submits a declaration from Linda Hunter, Vice President of Human  
10 Resources for the Art Institutes, stating that on January 11, 2013, an e-mail entitled  
11 "Updates to Handbook and HR Policies" was sent to all employee e-mail addresses.  
12 (Defendants' Reply in Support of Motion to Compel Arbitration and Stay of Proceedings  
13 and Response to MPSJ (Doc. 18), Exh. 2, ¶10). The e-mail stated: "Pleased be advised  
14 that the documents listed below have recently been updated.' It then instructed all  
15 employees to 'Please take the time to review the revised content.' The 'documents listed  
16 below' included 'Employee Handbook (revision date, December 2012)['] and the e-mail  
17 contained a link to the revised Employee Handbook which "linked to the e-mail contained  
18 [sic] [EM's] recently implemented [ADR] Policy as pages 20 through 24 of the  
19 Handbook." (*Id.* at ¶¶11, 13, 14).<sup>7</sup>

20 Stirrup submits her sworn declaration statement that she never received "any  
21 notification at any time or in any way during my employment that EM had implemented  
22 or added or imposed any"...ADR Policy and if she had, she would not have assented to it  
23 but would have instead resigned. (Plaintiff's Statement of Facts ("SOF") (Doc. 11), Exh.  
24 1, ¶¶8-10; see also *id.* ¶9). Stirrup explains her rationale for resigning from a job she has  
25 held since 2008, rather than agreeing to arbitration, as follows:

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28 <sup>7</sup> The ADR Policy beginning at p. 20 of the Employee Handbook cited by Hunter indicates the Policy applies to individuals who, *inter alia*, were "employed on or after the Effective Date of this Policy." (Doc. 18, Exh. 2 (internal exh. D at pp. 20-24)).

1 I have a masters [sic] degree in management and would be very concerned  
2 about any limitations upon legal rights I would have in the event of any  
3 dispute with my employer. It's common knowledge in the business world  
4 that employers try to force their employees to give up their rights to file  
5 lawsuits when their legal rights are violated, and divert them into private  
6 non-judicial arbitration where employees' [sic] rarely prevail because the  
7 employers are regular "repeat customers" for the private arbitration  
8 companies, and if the arbitration companies don't favor their "regular  
9 customers" with favorable results, their customers will go elsewhere, to  
some competing arbitration company. One only need look at the fee  
schedules charged by arbitration companies, particularly the AAA  
Employment Dispute Rules. These very high fees provide great income for  
the arbitration companies, which have minimal overhead....

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10 If I had been notified of the [ADR Policy]...at any time before I was  
11 constructively discharged in May, 2013, I would not have assented to or  
12 worked subject to such an [ADR Policy]. If it was imposed upon me on a  
13 "take it or leave it basis", I would have resigned, particularly since in  
14 October 2012, when it was supposedly transmitted to EM employees, I was  
already suspicious about possible illegal activities at EM and the  
consequences to me of doing something about such activities.

15 (Doc. 11, Exh. 1, ¶¶9-10).

16 Stirrup states she has never seen the computer screens that were submitted with  
17 EM's Exhibits. (*Id.* at ¶11). Stirrup also rebuts EM's statement that she received and/or  
18 acknowledged notice of the ADR Policy on Wednesday, October 3, 2012 at 4:07 p.m., by  
19 pointing out that she was not at her desk at that time:

20 [T]hat week was the first week of the new quarter at AiTU, and I recall with  
21 certainty that I was away from my office and computer that afternoon, well  
22 before and well after 4pm, because my duties were to go to each classroom  
that afternoon to personally verify attendance in every single class.

23 (*Id.*, Exh. 1, ¶4).<sup>8</sup>

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25 <sup>8</sup> Attached to Plaintiff's Reply to Response to Her Motion for Partial Summary  
26 Judgment (Doc. 20) are: (1) the "Second Declaration of Plaintiff Joi N. Stirrup"; and (2)  
27 the Sworn Declaration of Sean Baker, who worked at AiTU as an IT specialist from July  
28 2012 to December 2012. (Doc. 20, Exhs. 1, 2). "Ordinarily, a district court will not  
consider evidence in the context of a motion for summary judgment that is submitted for  
the first time in reply. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.1996) ("Where new  
evidence is presented in a reply to a motion for summary judgment, the district court  
should not consider the new evidence without giving the non-movant an opportunity to  
respond") (internal alteration and quotation marks omitted)." *Head v. Kommandit-*

1           Stirrup also denies receiving an e-mail regarding the ADR Policy on January 11,  
2 2013 as alleged in Hunter’s declaration. (Doc. 20, Exh. 1, ¶5). Stirrup stresses that  
3 during her employment, she “read every e-mail I received because all such business  
4 communications were important to me and part of my duties.” (*Id.* at ¶12). Further, the  
5 only employee handbook Stirrup was ever given was revised May, 2011 and she has never  
6 before seen the version of the employee handbook attached to EM’s Response. (*Id.* at  
7 ¶¶10-11).

8           Stirrup asserts that her password information was known to all EM IT employees  
9 including Thalman and Stacy Genchie, who is the EM Regional IT Director and who used  
10 Stirrup’s password information when attempting to correct a software issue. (Doc. 11,  
11 Exh. 1, ¶12), and “the new [Art Institute] IT female employee (whose name I do not  
12 recall, who assumed her job shortly before I left [in May 2013]) told me to write my  
13 password down (during my last 2 weeks), because the AiTU Director (CEO) Ralph  
14 William Van Zwol III wanted me to use a laptop instead of my desktop. I did as  
15 instructed and my password/log-in information was there for anyone to see in plain view  
16 at my workstation.” (*Id.*). Stirrup also submits a declaration from AiTU IT specialist and  
17 co-worker Sean Baker that employees have given him and other IT technicians their  
18 passwords to resolve equipment issues, and he recalls asking Plaintiff “at one point in  
19 time...” for her password for work purposes and she supplied it. (Doc. 20, Exh. 2, ¶¶6-

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22 *Gesellschaft MS San Alvaro Offen Reederei GMBH & Co.*, \_\_\_ F.3d. \_\_\_, 2014 WL 688645,  
23 \*6 n.11 (W.D. Wash. Feb. 21, 2014). Since the filing of Stirrup’s Reply and additional  
24 exhibits, the parties have briefed Plaintiff’s Second Motion for Partial Summary Judgment  
25 and have filed supplemental memoranda regarding recently decided cases. At no time has  
26 EM objected to Stirrup’s submission of the additional declarations or requested leave to  
27 file a sur-reply or additional evidence in response. “[B]y failing to object to or otherwise  
28 challenge the introduction of the [evidence submitted in reply] in the district court, [the  
non-moving party has] waived any challenge on the admissibility of th[e] evidence.” *Getz*  
*v. Boeing Co.*, 654 F.3d 852, 868 (9<sup>th</sup> Cir. 2011); *see also Head*, \_\_\_ F.3d. at \_\_\_, 2014 WL  
688645 at\*6 n.11 (“Because [plaintiff] has not objected to [defendant’s] introduction of an  
additional declaration in reply, the court may in its discretion consider this evidence when  
deciding [defendant’s] motion for summary judgment.”). Given that EM has seen no  
reason to object to the submission of additional declarations with Stirrup’s Reply, the  
Court will exercise its discretion to consider this evidence in resolving the pending  
motions. *See id.*

1 7). Further, there is no formal process for requesting and receiving such passwords. (*Id.* at  
2 ¶6).

3 **DISCUSSION.**

4 At the outset, the Court addresses Stirrup’s challenges to the documents attached at  
5 A through C to Thalman’s declaration and upon which EM relies to support its position  
6 that Stirrup received and assented to the ADR Policy. (Doc. 12, pp. 5-9). According to  
7 Stirrup, the exhibits “are basically blank screens or views that depict absolutely nothing.”  
8 (*Id.* at p. 7). Stirrup further argues that the declarations submitted by Thalman and Earls  
9 lack foundation and are hearsay given that they “offer no proof as to how either Declarant  
10 would know for certain...” that Stirrup received the e-mail, especially given that  
11 “[n]either Declarant alleges they were present with Stirrup when such e-mail(s) were sent  
12 or received....” (*Id.* at p. 8).

13 Stirrup’s argument is well-taken with regard to Earls’ Declaration. Earls, who states  
14 that she was responsible for assisting all of the EM “schools in rolling out the ADR Policy  
15 to all existing employees” (Doc. 10, Exh. 1, ¶2), does not provide any basis whatsoever to  
16 support her statement at paragraph 4 of her declaration that Stirrup received the October 3,  
17 2012 e-mail, and the Court will not consider this statement.

18 Thalman, on the other hand, states that he personally wrote the program that sent the  
19 “bulk e[-]mail to employees of the Art Institute...”, including Stirrup, on October 3, 2012.  
20 (*Id.*, Exh 2, ¶3). While the screen shots attached to Thalman’s Declaration may require  
21 some explanation, Thalman’s Declaration does just that. He also avows that the screen  
22 shots he references are true and accurate. (*Id.* at ¶¶ 4-7). Moreover, EM also submits the  
23 Declaration of Database Services Manager Brian Castle confirming that “the record  
24 reflecting Ms. Stirrup’s agreement to the ADR Policy was submitted using her unique  
25 Username and Password from [her assigned] IP address....[T]he record has not been  
26 changed since it was recorded and stored in the secure database on October 3, 2012 at 4:07  
27 p.m. and I can confirm that the record is a true and accurate reflection of the record  
28 submitted utilizing Ms. Stirrup’s unique Username and Password from [her assigned] IP  
address....” (Doc. 18, Exh.4, ¶¶4-5)).

1 With regard to summary judgment, a party does not necessarily have to produce  
2 evidence in a form that would be admissible at trial, as long as the party satisfies the  
3 requirements of Rule 56. *Celotex*, 477 U.S. at 324 (“We do not mean that the nonmoving  
4 party must produce evidence in a form that would be admissible at trial in order to avoid  
5 summary judgment.”). Plaintiff does not argue that the screen shots “cannot be presented  
6 in a form that would be admissible in evidence.” Fed.R.Civ.P. 56(c)(2). A fair reading of  
7 Thalman’s and Castle’s declarations supports the conclusion that the records submitted  
8 qualify as business records falling within the hearsay exception at Fed.R.Evid. 803(6). *See*  
9 *e.g. U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1043-45 (9<sup>th</sup> Cir.  
10 2009) (citations omitted). Further, Fed.R.Evid. 901 “states that for authentication there  
11 must be ‘evidence sufficient to support a finding that the matter in question is what its  
12 proponent claims.’” *United States v. Workinger*, 90 F.3d 1409, 1415 (9<sup>th</sup> Cir 1996). “A  
13 document can be authenticated by the testimony of a witness with knowledge.” *Id.*  
14 (citation omitted). The proponent of the evidence “need only make a prima facie showing  
15 of authenticity ‘so that a reasonable juror could find in favor of authenticity or  
16 identification.’” *Id.* (quoting *United States v. Chu Kong Yin*, 935 F.2d 990, 996 (9<sup>th</sup>  
17 Cir.1991)). “Once the prima facie case for authenticity is met, the probative value of the  
18 evidence is a matter for the jury.” *Id.* Knowledge may be inferred from a declarant’s  
19 professional position. *In re Kaypro*, 218 F.3d 1070, 1075 (9<sup>th</sup> Cir. 2000). On the instant  
20 record, Thalman’s declaration and attached screen shots are properly considered in  
21 resolving the pending motions. However, Thalman’s statements that Stirrup received the  
22 e-mail and/or that she was the person who clicked on the various links and accept box are  
23 unsupported. Thalman only has knowledge that someone using Stirrup’s username and  
24 password made the entries from the IP address assigned to AiTU where Stirrup’s work  
25 computer was located, and the Court considers Thalman’s statements mindful of this  
26 limitation.

26 **EM’s Motion to Compel Arbitration.** EM argues that Stirrup has not established a  
27 question of fact as to whether she assented to the ADR Policy. According to EM,  
28 arbitration is mandated by the fact that Stirrup continued working at AiTU after the

1 October 2012 notification to employees about implementation of the ADR Policy. (Doc.  
2 18, p. 3<sup>9</sup>). To support this position, EM relies heavily on a decision from this District in  
3 *EEOC v. Cheesecake Factory*, 2009 WL 1259359 (D. Ariz. May 6, 2009). In *Cheesecake*  
4 *Factory*, the court recognized that: ““At-will employment contracts are unilateral and  
5 typically start with an employer's offer of a wage in exchange for work performed;  
6 subsequent performance by the employee provides consideration to create the contract.””  
7 *Cheesecake Factory*, 2009 WL 1259359, at \*4 (quoting *Demasse v. ITT Corp.*, 194 Ariz.  
8 500, 984 P.2d 1138, 1142-43 (Ariz.1999)). Moreover, because an at-will employment  
9 relationship can be modified at any time, the employer has the right to change the  
10 arbitration agreement and exercising that right would merely create a new offer of  
11 employment for the future, and the employee may accept that new offer by performance—  
12 i.e., continuing to work for the employer. *Id.* (citations omitted); *see also Davis*, 755 F.3d  
13 at 1094 (under California<sup>10</sup> law, where an employee continues in his or her employment  
14 after being given notice of the changed terms or conditions, she has accepted those new  
15 terms or conditions). EM also relies on *Cheesecake Factory* for the premise that there is no  
16 requirement that the employee affirmatively assent to the arbitration policy. However, EM  
17 overlooks that *Cheesecake Factory* did not involve the question whether the employees had  
18 notice of such policy. In *Cheesecake Factory*, the employees signed a two-page document  
19 stating they had received the employee handbook and initialed paragraphs about the  
20 arbitration policy. Instead, the issue in *Cheesecake Factory*, concerned whether the  
21 arbitration agreement was unconscionable. Likewise, *Batiste v. U.S. Veterans Initiative*,  
22 2012 WL 300729, \*1 (D. Ariz. Feb. 1, 2012), also cited by EM for premise that the  
23 employee did not have to assent to the arbitration policy, is distinguishable because  
24 although it is not clear whether employee signed any agreement containing the arbitration

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25  
26 <sup>9</sup> Reference to page numbers correlate to the page number assigned by the CM/ECF  
System appearing at the top of each page of Doc. 18.

27 <sup>10</sup>Stirrup has not disputed EM’s assertion that “[t]here is no meaningful difference  
28 between the Arizona state contract law principles applicable in this case and the California  
state contract law principles applied by the *Davis* court.” (Supplemental Brief (Doc. 25),  
p. 2)

1 provision, there was no dispute that he read the Employee Handbook containing the  
2 mandatory arbitration provision.

3 EM also argues that even if Stirrup “failed to read...[the October 2012 and January  
4 2013<sup>11</sup>] e-mails, their distribution to Plaintiff is sufficient to bind her.” (Doc. 18, pp. 9-10  
5 (citing *Coup*, 823 F.Supp.2d 931 (citing *Darner Motor Sales Inc. v. Universal*  
6 *Underwriters Insur. Co.*, 140 Ariz. 383, 394, 682 P.2d 388, 399 (Ariz. 1984)); *Ellerbee v.*  
7 *GameStop, Inc.*, 604 F.Supp.2d 349, 354 (D. Mass. 2009)). However, it was undisputed in  
8 *Coup* and *Ellerbee* that the respective plaintiffs received notice of the arbitration policy.  
9 *See e.g. Coup*, 823 F.Supp.2d at 949 (“there is no evidence that Plaintiffs’ were not given  
10 a copy of [defendant’s] arbitration procedures...”). Instead, the issue in *Coup* involved the  
11 plaintiffs’ failure to read the employee manual containing the arbitration policy and the  
12 employer’s alleged failure to provide adequate time to do so. *Id.* Likewise, in *Ellerbee*,  
13 the issue did not involve whether the plaintiffs received notice of the policy, but rather  
14 whether their refusal to sign the rules prevented the plaintiffs from being bound by the  
15 arbitration policy. *Ellerbee*, 604 F.Supp. 2d at 355. Unlike the plaintiffs in *Coup* and  
16 *Ellerbee* who did not dispute that they received the arbitration policy, Stirrup denies that  
17 she received the ADR Policy at issue. As such, *Coup* and *Ellerbee* are inapposite.

18 In contrast to cases cited by EM where the parties had in fact received the  
19 arbitration policy, the issue here is whether Stirrup had notice of the ADR Policy. In  
20 *Davis*, the Ninth Circuit determined that under California law, the employer was required  
21

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22  
23 <sup>11</sup> EM’s distribution of the January 2013 e-mail notice about the “Update to Handbook and  
24 HR Policies” (Doc. 18, Exh. 2, ¶10), alone, (*i.e.*, without prior notice of the ADR Policy),  
25 is not sufficient to bind Stirrup. Nothing in the content of the e-mail alerted employees  
26 about implementation of the ADR Policy, which modified the conditions of their at-will  
27 employment. *See e.g. Davis*, 755 F.3d. at 1092-93 (finding sufficient notice where a letter  
28 was sent to employees informing them about the modification and where a copy of the  
dispute resolution policy, including a copy of the arbitration provision, was enclosed).  
Moreover, in light of the steps EM took to inform employees of implementation of the  
ADR Policy in October 2012, EM’s argument that the January 2013 e-mail constituted  
sufficient notice fails.

1 to provide employees with “reasonable notice” of the modification.<sup>12</sup> *Davis*, 755 F.3d at  
2 1093 (also noting that if an employer has a prescribed method of notice of modification, it  
3 is incumbent upon the employer to follow such method). The *Davis* court held that the  
4 employer “satisfied the minimal requirements under California law for providing  
5 employees with reasonable notice of a change to its employee handbook by sending a  
6 letter to...” the employees informing them of the modification, *id.* at 1094, together with  
7 “a copy of the entire Dispute Resolution Program, including the arbitration provision.” *Id.*  
8 at 1092 (also holding that under California law the employer was not required to inform  
9 the employee that continued employment constituted their assent to the arbitration  
10 provisions).

11 EM argues that Stirrup presents nothing but speculation to support her opposition  
12 to the Motion to Compel Arbitration. Although Stirrup states that Thalman and Genchie  
13 had access to her password information, she does not specify when they had such access.  
14 She submits an affidavit from EM IT specialist Baker that during his employment at AiTU  
15 from July 2012 to December 2012, employees including Stirrup gave him their passwords  
16 to resolve computer issues. She also states that during her last two weeks of employment  
17 in May 2013, she was required to write her password down and her “password/log-in  
18 information was there for anyone to see in plain view at my work station.” (Doc. 11, Exh.  
19 1, ¶12). Of course, this latter instance occurred after October 3, 2012 and, thus, is  
20 irrelevant to the matter at hand. Even assuming that Thalman and Genchie or other IT  
21 employees, like Baker, had access to Stirrup’s password information during the relevant  
22 time, Stirrup provides no rationale whatsoever as to why one of them would have accessed  
23 her e-mail on October 3, 2012 and accepted the ADR Policy. “Lack of motive bears on  
24 the range of permissible conclusions that might be drawn from ambiguous evidence....”  
25 *Matsushita*, 475 U.S. at 596. Although Stirrup states in her declaration that by October  
26 2012 she had suspicions “about possible illegal activities” at EM (Doc. 11, Exh. 1, ¶10),  
27 she does not cite any instances of such alleged illegal activity occurring until 2013 (*see*

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28 <sup>12</sup> The parties do not dispute that there is no meaningful difference between California law discussed in *Davis* and Arizona law.

1 Doc. 1 at ¶¶18-19), and she does not allege or state that she reported her suspicions to her  
2 superiors close in time to October 3, 2012.

3 However, speculation based on circumstantial evidence that someone else who had  
4 access to her computer login information might have entered her assent to the ADR Policy  
5 on October 3, 2012 is not all that Stirrup offers. She also submits her declaration that she  
6 “never received any notification at any time or in any way during my employment that  
7 EM had implemented or added or imposed any...” ADR Policy. (Doc. 11, Exh. 1, ¶8; *see*  
8 *also id.* at ¶6 (“The first time [Stirrup] ever knew of or heard of the...” ADR Policy was  
9 after she had left EM’s employ)). Stirrup also states that she would not have assented to  
10 the ADR Policy in October 2012 because of her belief that arbitration favors employers  
11 and because by that time she had suspicions about possible illegal activity at EM and the  
12 consequences she might face if she reported it. (*Id.* at ¶¶9-10). She also states that she  
13 was not at her computer at the time when Thalman says she responded to the e-mail. (*See*  
14 Doc. 20, Exh. 1, ¶4).

15 EM argues that “[w]hile Plaintiff’s self-serving statements do establish that  
16 Plaintiff is willing to swear to absolutely anything in an effort to further her position in  
17 this litigation, they do not create a genuine dispute as to whether Plaintiff is bound by the  
18 ADR Policy. No reasonable fact-finder would credit Plaintiff’s self-serving after-the-fact  
19 fictional account in the face of EM[]’s substantial objective evidence establishing that, on  
20 October 3, 2012, she acknowledged receipt of the ADR Policy.” (Doc. 18, p. 7).  
21 Defendant overlooks “the long-standing rule that credibility may not be resolved by  
22 summary judgment....” *McLaughlin v. Liu*, 849 F.2d 1205, 1207 (9<sup>th</sup> Cir. 1988) (citing  
23 *Anderson*, 477 U.S. at 255). Stirrup’s statements that she did not receive the e-mail, was  
24 never notified about the ADR Policy, and was away from her computer at the relevant  
25 time are “direct evidence of the central fact in dispute. [Stirrup] does not ask that  
26 inferences be drawn in [her] favor, but that [her] testimony be taken as true.” *Id.* at 1208.  
27 As the respondent to EM’s Motion, Stirrup’s evidence is to be believed. *Leslie v. Groupo*,  
28 *ICA*, 198 F.3d 1152, 1157 (9<sup>th</sup> Cir. 1999). Thus, the Ninth Circuit has “specifically  
rejected the notion that a court could disregard direct evidence on the ground that no

1 reasonable jury would believe it.” *Id.* at 1159 (citing *T.W. Elec. Serv., Inc. v. Pacific Elec.*  
2 *Contractors Ass’n.*, 809 F.2d 626, 631 n.3 (9<sup>th</sup> Cir. 1987)); *see also McLaughlin*, 849 F.2d  
3 at 1208 (“We have upheld summary judgment on the basis of *Matsushita’s* ‘implausibility’  
4 standard only where the non-movant relied on inferences from circumstantial evidence.”)  
5 (footnote omitted). “If the nonmoving party produces direct evidence of a material fact,  
6 the court may not assess the credibility of this evidence nor weigh against it any  
7 conflicting evidence presented by the moving party. The nonmoving party’s evidence  
8 must be taken as true.” *T.W. Elec. Contractors Ass’n.*, 809 F.2d at 631.

9 EM’s argument that Stirrup’s statements are self-serving is unavailing. *See United*  
10 *States v. Shumway*, 199 F.3d 1093, 1104 (9<sup>th</sup> Cir. 1999) (stating plaintiff’s “affidavit was  
11 of course ‘self-serving,’ ...[a]nd properly so, because otherwise there would be no point in  
12 his submitting it” when reversing entry of summary judgment against plaintiff where  
13 district court rejected affidavit as self-serving). “That an affidavit is self-serving bears on  
14 its credibility, not on its cognizability for purposes of establishing a genuine issue of  
15 material fact.” *Id.* Further, “[i]f the affidavit stated only conclusions, and not ‘such facts  
16 as would be admissible in evidence,’ then it would be too conclusory to be cognizable,  
17 but...”, *id.* (footnote omitted), here Stirrup does state material facts based on her personal  
18 knowledge.

19 EM also attempts to undermine Stirrup’s credibility and ability to accurately  
20 remember events by challenging Stirrup’s statement that in May or June of 2013, EM  
21 Human Resources Manager Shannon Fulmer e-mailed her a copy of the employee  
22 handbook, “and the handbook said nothing about any arbitration process or the...” ADR  
23 Policy. (Doc. 11, Exh. 1, ¶16). EM submits Fulmer’s declaration denying Stirrup’s  
24 statement that Fulmer e-mailed Stirrup the employee handbook; instead, Fulmer states she  
25 sent the Code of Conduct, which referenced EM’s non-retaliation policy. (Doc. 18, Exh.  
26 3, ¶5; *see also id.* internal Exh. A (e-mail correspondence from Fulmer to Stirrup)). EM  
27 argues that if Stirrup “misrepresents to this Court the document she received in May 2013,  
28 just a few months prior to filing her Complaint, one must question her ability to credibly

1 represent to this Court that she never received the October 3, 2012 e-mail...” notifying her  
2 of the ADR Policy. (Doc. 18, p. 5).

3 “It is for the trier of fact to determine the credibility of plaintiff’s testimony.”  
4 *LaMarr v. American Bankers Life Assurance Co.*, 2006 WL 1160098, \*2 (D. Ariz. May 1,  
5 2006) (denying summary judgment where plaintiff submitted statements that he never  
6 received the information that would have put him on notice of insurance policy’s  
7 limitations). Because Stirrup’s sworn statements constitute direct evidence of a material  
8 fact, Stirrup has satisfied her burden as the respondent to EM’s Motion to Compel  
9 Arbitration by pointing to evidence that creates a genuine issue of material fact. *See e.g.*  
10 *Id.*; *McLaughlin*, 849 F.2d at 1209 (“Because [defendant’s] sworn statement...was direct  
11 evidence of a material fact...the district court erred in granting summary judgment...” in  
12 favor of plaintiff) (internal quotation marks and citation omitted)). Consequently, EM’s  
13 Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration is denied  
14 to the extent that the issue must proceed to a jury trial in accordance with §4 of the FAA.

15 **PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT.** In addition to asserting that  
16 she never received the October 2012 e-mail about implementation of the ADR Policy,<sup>13</sup>  
17 Stirrup argues that the “blast” e-mail in this case did not provide sufficient notice.  
18 Plaintiff cites cases where courts have found insufficient notice when employees were  
19 notified of arbitration agreements via e-mail. (Plaintiff’s Supplemental Brief (Doc. 26)  
20 citing *Campbell v. General Dynamics Gov’t. Sys. Corp.* 407 F.3d. 546 (1<sup>st</sup> Cir. 2005);  
21 *Hudyka v. Sunoco, Inc.*, 474 F.Supp.2d 712 (E.D. Pa. 2007)). These cases, however, did  
22 not hold that mass e-mail notice of arbitration policies was insufficient in and of itself. In  
23 fact, the First Circuit stressed that the use of mass e-mail is not determinative to the  
24 appropriateness of the notice. *Campbell*, 407 F.3d at 556. It was the content that rendered  
25 the notice insufficient in both *Campbell* and *Hudyka*. *See e.g. Campbell*, 407 F.3d at 557;  
26 *Hudyka*, 474 F.Supp.2d at 716-17. Like the Court in *Campbell*, this Court declines to hold

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27  
28 <sup>13</sup> Stirrup also challenges the January 2013 blast e-mail referenced in Hunter’s  
declaration. As discussed *supra* that e-mail, alone, does not constitute sufficient notice of  
the ADR Policy under *Davis*.

1 that notice of an arbitration policy made by mass e-mail in and of itself is per se  
2 unreasonable and/or otherwise insufficient.

3 In challenging the sufficiency of notice, Stirrup relies heavily on *Campbell*, which  
4 she argues is indistinguishable from the instant case. (Doc. 26, p. 7). However, *Campbell*  
5 involved arbitration of claims under the American with Disabilities Act (“ADA”), and  
6 Stirrup’s action does not. In the First Circuit, which decided *Campbell*, “[w]hen a party  
7 relies on the FAA to assert a contractual right to arbitrate a claim arising under a federal  
8 employment discrimination statute, the court must undertake a supplemental inquiry...” to  
9 determine whether “Congress, in enacting a particular statute, intended to preclude a  
10 waiver of a judicial forum for certain statutory claims.” *Campbell*, 407 F.3d at 552. The  
11 First Circuit determined that “[t]he appropriateness of enforcing an agreement to arbitrate  
12 an ADA claim hinges on whether, under the totality of the circumstances, the employer's  
13 communications to its employees afforded ‘some minimal level of notice’ sufficient to  
14 apprise those employees that continued employment would effect a waiver of the right to  
15 pursue the claim in a judicial forum.” *Id.*; see also *Kummetz v. Tech Mold Inc.*, 152 F.3d  
16 1153, 1155 (9<sup>th</sup> Cir. 1998) (an agreement to arbitrate disputes arising under the ADA or  
17 Title VII “must at least be knowing, which means that [t]he choice must be explicitly  
18 presented to the employee and the employee must explicitly agree to waive the specific  
19 right in question.[.]”) (internal quotation marks and citation omitted). In contrast, *Davis*  
20 where the ADA was not at issue, the Ninth Circuit found notice was reasonable where the  
21 employer sent a letter notifying the employee that modifications had been made and  
22 included a copy of the alternative dispute resolution policy and the arbitration provision.  
23 *Compare with Hudyka*, 474 F.Supp. 2d 712 (e-mail notice was insufficient where, *inter*  
24 *alia*, there was no evidence that employees received a copy of the policy). Because  
25 Stirrup does not advance a claim under the ADA or other federal employment  
26 discrimination statute, *Campbell* is distinguishable. See e.g. *Awuah v. Coverall North*  
27 *America, Inc.*, 703 F.3d 36, 45-46 (1<sup>st</sup> Cir. 2012) (“*Campbell* limited its holding to  
28 ‘purported waiver[s] of the right to litigate ADA [Americans with Disabilities Act]  
claims.’”) (citing *Campbell*, 407 F.3d at 559).

1           Stirrup also takes specific issue with the fact that EM used a link to provide access  
2 to the ADR Policy. (*See e.g.* Doc. 31). Certainly, an obscure link could tend to support a  
3 finding against the employer. *See e.g. Campbell*, 407 F.3d at 548-49 (finding fault with  
4 link embedded at the bottom of the e-mail); *Specht v. Netscape Communications Corp.*,  
5 306 F.3d 17, 23 (2d Cir. 2002) (declining to enforce terms of use that “would have  
6 become visible to plaintiffs only if they had scrolled down to the next screen”). In  
7 addition to *Campbell* and *Specht*, Stirrup also cites the Ninth Circuit’s recent decision in  
8 *Nguyen*, addressing agreements to arbitrate in the consumer context over the internet,  
9 which held that even if a website uses a “conspicuous hyperlink on every page of the  
10 website but otherwise provides no notice to users nor prompts them to take any  
11 affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant  
12 buttons users must click on—without more—is insufficient to give rise to constructive  
13 notice.” *Nguyen*, \_\_\_ F.3d. \_\_\_, 2014 WL 4056549 at \*6. In contrast to the cases upon  
14 which Stirrup relies, the October 3, 2012 e-mail, which consisted of two paragraphs,  
15 reflects the link to the ADR Policy was by no means obscure, but was contained within  
16 the message language itself, appearing as the last sentence of the first paragraph: “Please  
17 click here to access the ADR Policy.” (Doc. 10, Exh. 2, ¶3). Upon clicking the link, the  
18 user would have access to the entire ADR Policy. Moreover, EM also required employees  
19 to enter acceptance of the ADR Policy and employees were informed that the ADR Policy  
20 was a term and condition of continued employment.

21           Stirrup also argues, “[f]or notice of this importance, EM could or should  
22 have...used e-mail which it sent directly to the employee and then confirm receipt by  
23 requiring an e-mail response from the employee (which EM did not do, and EM has no e-  
24 mail confirmation from Stirrup)...” (Doc. 26, p. 6). Stirrup’s suggested procedure for  
25 notice is essentially what EM contends occurred in this case. First, as discussed *supra*, the  
26 case law does not reject notice merely because it was distributed by mass e-mail. Further,  
27 EM did in fact require the employee to affirmatively “accept” the ADR Policy. *Compare*  
28 *Hudyka*, 474 F.Supp. 2d 712 (e-mail notice was insufficient where, *inter alia*, the  
employee was not required to manifest his intention to be bound by the agreement).

1 Requiring the employee to click on the “accept” box is akin to Stirrup’s suggestion that  
2 the employee send an e-mail confirming receipt and acceptance, and Stirrup articulates no  
3 meaningful difference between the two methods.<sup>14</sup> The procedure employed by EM in  
4 October 2012 case is not significantly different from the process Stirrup suggests  
5 constitutes adequate notice.

6 Stirrup submits her sworn statements that she never received the e-mail, she never  
7 was informed about the ADR Policy while working at EM, and that she was not at her  
8 computer when the e-mail was sent and when an acceptance was entered using her  
9 password and unique user name. Stirrup also states that other EM employees had access  
10 to her computer log-in information, though she provides no motive why these employees  
11 would access her e-mail in October 2012 and enter her acceptance of the ADR Policy.

12 While all inferences are to be drawn in EM’s favor as the non-moving party  
13 responding to Stirrup’s motion, EM must produce evidence to support its claim or defense  
14 by more than simply showing “there is some metaphysical doubt as to the material facts.”  
15 *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. EM has produced evidence that management  
16 had “significant discussions around the topic of ensuring...that the ADR Policy was  
17 distributed to *all* employees’ e-mail addresses.” (Doc. 18, Exh. 2, ¶12) (emphasis in  
18 original). In furtherance of that goal, Thalman wrote the program that would send the e-  
19 mail to all Art Institute employees on October 3, 2012. (Doc. 10, Exh. 2, ¶13). EM has  
20 submitted copies of screen shots, which Thalman attests are true and accurate, indicating  
21 that Stirrup’s unique user name and password were entered from AiTU’s IP network

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22  
23 <sup>14</sup> Stirrup has not pointed to binding authority supporting the conclusion that for  
24 notice to be valid in the employment context, the employee must indicate his or her  
25 acceptance of the provision. For example, in *Davis*, there was no mention of any such  
26 acceptance on the employee’s part. Nor was the employer required to inform the  
27 employee that continued employment constituted acceptance. *Davis*, 755 F.3d. at 1094.  
28 Stirrup cites *Nguyen v. Barnes & Noble, Inc.*, \_\_\_ F.3d. \_\_\_, 2014 WL 4056549, which held  
that notice of an arbitration provision was not sufficient in the context of consumer  
transactions over the internet where the website did not provide notice to users of the term  
nor prompted users to take any affirmative action to demonstrate assent. *Nguyen* may be  
distinguished because it does not involve the employment context. Moreover, because  
EM did require the employee to indicate acceptance, whether assent is required for notice  
to be reasonable is not at issue here.

1 address, in order to: (1) access the ADR Policy acceptance page; and (2) place a check  
2 mark in a box indicating the ADR Policy was accepted. (*Id.* at ¶¶4-5 (internal exhs. A,B).

3 As discussed, *supra*, EM also challenges Stirrup’s ability to recall events by  
4 submitting Fulmer’s declaration that she did not send Stirrup the employee handbook, as  
5 Stirrup contends, but, instead, Fulmer sent Stirrup the Code of Conduct. (Doc. 18, Exh. 3,  
6 ¶5; *see also id.* internal Exh. A (e-mail correspondence from Fulmer to Stirrup)).

7 Drawing all inferences in favor of EM supports the conclusion that EM has pointed  
8 to evidence that calls Stirrup’s credibility into question. Credibility determinations are the  
9 province of the trier of fact. Consequently, EM has set forth facts upon which a rational  
10 jury might return a verdict in its favor based on the evidence. *See T.W. Electrical Serv.,*  
11 *Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 631 (9<sup>th</sup> Cir. 1987) (citing  
12 *Anderson*, 477 U.S. at 257). As such, Stirrup’s MPSJ is denied.

13 **ARIZONA’S ELECTRONIC TRANSACTION ACT.** Stirrup also argues that the October 3,  
14 2012 e-mail failed to comply with the Arizona Electronic Transactions Act (“AETA”),  
15 A.R.S. § 44-7001, *et seq.* (Doc. 12, pp. 7-8). AETA provides in pertinent part:

16 If the parties to a transaction have agreed to conduct the transaction by  
17 electronic means and a law requires a person to provide, send or deliver  
18 information in writing to another person, the requirement is satisfied if the  
19 information is provided, sent or delivered, as the case may be, in an  
20 electronic record that is capable of retention by the recipient at the time of  
21 receipt. An electronic record is not capable of retention by the recipient if  
22 the sender or the sender's information processing system inhibits the ability  
23 of the recipient to print or store the electronic record.

24 A.R.S. §44-7008(A). There is no showing that the e-mails sent by EM failed to comply  
25 with AETA. EM submits Castle’s declaration statement that “Ms. Stirrup was able to  
26 retain, print, and store a copy of the ADR Policy and the screen confirming her agreement  
27 to the ADR Policy if she chose to do so.” (Doc. 18, Exh. 4, ¶6). Stirrup cites four  
28 additional requirements: (1) the recipient must be given an opportunity to print out and be  
provided with a hard copy; (2) the employee must be informed of the hardware and  
software required to access and receive such information; (3) the employee must be  
informed how to withdraw consent to receiving documents in electronic form; and (4) the

1 employee must be told how to obtain a hard copy of the electronic document. (Doc. 12, p.  
2 7). EM correctly asserts that these four “requirements” are not found in AETA. (Doc. 18,  
3 p. 9). Stirrup fails to establish a genuine issue of material fact on this issue and her MPSJ  
4 as it pertains to AETA is denied.

5 **PLAINTIFF’S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT**

6 Stirrup argues that her claims are not subject to arbitration in light of the Dodd-  
7 Frank Act. In 2010, Congress passed the Dodd–Frank Act which, in part, amended the  
8 Sarbanes–Oxley Act (“SOX”) to bar the arbitration of whistleblower claims. *Wong v.*  
9 *CKX, Inc.*, 890 F.Supp.2d 411, 421 (S.D.N.Y. 2012). In light of that amendment, SOX  
10 now provides:

11 No predispute arbitration agreement shall be valid or enforceable, if the  
12 agreement requires arbitration of a dispute arising under [the Sarbanes–  
Oxley whistleblower protection provision].

13 *Id.* (quoting 18 U.S.C. § 1514(e)(2)). SOX sets out “six categories of employer conduct  
14 against which an employee is protected from retaliation for reporting: violations of 18  
15 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1348 (securities  
16 fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud  
17 against shareholders.” *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dep’t.*  
18 *of Labor*, 717 F.3d 1121, 1130 (10<sup>th</sup> Cir. 2013) (discussing 18 U.S.C. § 1514A(a)(1)). The  
19 Ninth Circuit has made clear that “[a] plaintiff seeking whistleblower protection under  
20 SOX must first file an administrative complaint with OSHA...” not later than 90 days  
21 after the date on which the violation occurs. *Coppinger-Martin v. Solis*, 627 F.3d 745,  
22 749(9<sup>th</sup> Cir. 2010); *see also Lockheed Martin Corp.*, 717 F.3d at 1128, (plaintiff bringing  
23 claim under SOX first filed administrative complaint with OSHA); *Wong*, 890 F.Supp.2d  
24 411 (same).

25 Stirrup argues that her claims are protected under SOX because they “contain all  
26 the elements of at least three of the specific offenses listed in 18 U.S.C. [§] 1514A(a)...”,  
27 such as: 18 US.C. § 1341 (frauds and swindles); 18 U.S.C. § 1343 (wire fraud); and 18  
28 U.S.C. § 1344 (bank fraud—“student loans from banks based upon misrepresentations by

1 EM”). (Plaintiff’s Second Motion for Partial Summary Judgment (“MPSJ2”) (Doc. 23),  
2 pp. 4-8). However, Stirrup also asserts that she was not required to exhaust administrative  
3 remedies under SOX, because she “does not present any claim under SOX; her Complaint  
4 plainly states she is seeking relief solely upon her claims for relief for (1) Discrimination  
5 (constructive discharge) in violation of the False Claims Act, 31 U.S.C. [§] 3730(h), and  
6 (2) and [w]rongful termination of employment...in violation of Arizona law.” (MPSJ2  
7 Reply (Doc. 29), p. 2; *see also id.* at pp. 3-5).

8 The Dodd-Frank Act amended the whistleblower provisions of SOX. *James v.*  
9 *Conceptus, Inc.*, 851 F.Supp.2d 1020, 1029-30 (S.D. Tex. 2012) “Dodd-Frank did not  
10 similarly amend the False Claims Act’s antiretaliation provision under which [Plaintiff]  
11 sues.” (*Id.*). (“Dodd–Frank’s antiarbitration amendments to other statutes cannot be  
12 extended by implication to the antiretaliation provisions of the False Claims Act,  
13 especially when Dodd–Frank amended other parts of the False Claims Act but not the  
14 provision at issue.”) “When Congress amends one statutory provision but not another, it  
15 is presumed to have acted intentionally.” *Id.* at 1030 (quoting *Gross v. FBL Fin. Servs.,*  
16 *Inc.*, 557 U.S. 167 (2009)). Stirrup has framed her claims under the False Claims Act and  
17 Arizona law. As such, her claims do not qualify for the Dodd-Frank antiretaliation  
18 amendment to SOX, and Plaintiff’s MSPJ2 arguing otherwise is denied.

19 **CONCLUSION**

20 Stirrup has presented evidence sufficient to establish a genuine issue of material  
21 fact so as to defeat EM’s Motion to Compel Arbitration and to require a jury to determine  
22 whether a valid arbitration agreement exists. Likewise, EM has presented evidence  
23 sufficient to establish a genuine issue of material fact so as to defeat Stirrup’s Motion for  
24 Partial Summary Judgment on the issue of whether a valid arbitration agreement exists.  
25 Additionally, Stirrup fails to establish that she is entitled to summary judgment under  
26 Arizona’s Electronic Transaction Act or the Sarbanes-Oxley Act. Therefore, Plaintiff’s  
27 motions for partial summary judgment are denied.  
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Accordingly, IT IS ORDERED that:

- (1) Defendants' Motion to Compel Arbitration and Stay These Proceedings Pending Arbitration (Doc. 10) is DENIED to the extent that the matter must proceed to jury trial on the issue whether a valid arbitration agreement exists;
- (2) Plaintiff's Motion for Partial Summary Judgment (Doc. 12) is DENIED; and
- (3) Plaintiff's Second Motion for Partial Summary Judgment (Doc. 23) is DENIED.

IT IS FURTHER ORDERED that this matter is SET for a status conference **THURSDAY, OCTOBER 16, 2014 AT 1:45 P.M.** in Courtroom 5F.

Dated this 16th day of September, 2014.

  
**CHARLES R. PYLE**  
**UNITED STATES MAGISTRATE JUDGE**