ARIZONA SUPREME COURT

No. CV-22-0071-CQ

EVA CORNELL,

Plaintiff,

vs.

DESERT FINANCIAL CREDIT UNION,

Defendant.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ARIZONA CHAMBER OF COMMERCE AND INDUSTRY AS *AMICI CURIAE* SUPPORTING DEFENDANT

FILED WITH CONSENT OF PARTIES

DENTONS US LLP
Karl M. Tilleman
Jason Sanders
Douglas D. Janicik
2398 East Camelback Road, Ste. 850
Phoenix, Arizona 85016-9007
Telephone: (602) 508-3900
Facsimile: (602) 508-3914
karl.tilleman@dentons.com
jason.sanders@dentons.com
doug.janicik@dentons.com

Attorneys for Chamber of Commerce of the United States of America

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AMICI CURIAE'S STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("the Chamber") submits this amicus brief in accordance with ARCAP 16(d).[1] The Arizona Chamber of Commerce and Industry (the "ACCI") joins in the brief.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country, including Arizona. The ACCI is a non-profit organization advocating for free-market public policies and working to ensure economic growth and prosperity for all Arizonans.

An important function of the Chamber is to represent the interests of its members before Congress and state legislatures, executive branches, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the nation's business community.

This is one of those cases. Chamber members conduct substantial business online; in 2017, the U.S. economy included an estimated $1 trillion in revenues from electronic transactions in the service industry alone. *See* U.S. Dep't of

[1] Pursuant to Rule 16, undersigned counsel states that no party authored this amici curiae brief, in whole or in part, and that no other person or entity other than the amici curiae identified herein provided financial resources for this brief.

Commerce, E-Stats 2017: Measuring the Electronic Economy 2, www.census.gov/content/dam/Census/library/publications/2017/econ/e17-estats1.pdf (Sept. 23, 2019). And e-commerce transactions in the retail industry added over $461 billion to the economy. *Id.* The enormous, and rapidly expanding, e-commerce sector of the economy relies more and more on online contracts such as the contract here. The enforceability of those contracts is of critical importance to the Chamber and its members, as well as the Nation's economy generally. And because our sustained economic prosperity is possible only where private parties can contract with one another pursuant to reliable and established legal principles, the ACCI joins the Chamber in urging the Court to retain these principles even as electronic communications become the norm for commercial engagement.

Also, many Chamber and ACCI members use arbitration clauses in online contracts, allowing them to resolve disputes promptly, fairly and efficiently while avoiding the higher costs of traditional litigation. Based on the legislative policy reflected in the Federal Arbitration Act, and the U.S. Supreme Court's consistent affirmation of the protection the Act provides for arbitration agreements, amici members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

For the reasons explained below, section 3 of the Draft Restatement of Law, Consumer Contracts ("Restatement") addresses the precise questions certified to this Court, reflects sound legal policy, and establishes that a consumer contract is

modified if the consumer receives notice of the proposed modification and does not reject the modification in a timely fashion.

The alternative test Plaintiff proposes—proof the consumer is aware of the impact of the modification and affirmatively consents to it—is unworkable in today's global, on-line economy. Adopting such a test deprives businesses and consumers of a clear, predictable, and uniform standard for the formation of online contracts. Requiring a "subjective understanding" or "actual reading" of contract terms to which the consumer has notice makes it virtually impossible for businesses to predict whether their online contracts will be enforceable. Such uncertainty threatens to impose massive and unwarranted costs on Arizona businesses that enter transactions in the mobile economy.

ARGUMENT

Plaintiff Eva Cornell signed a standard application agreeing that Desert Financial could change its terms and conditions for maintaining a bank account there, that Desert Financial could send all communications about her account in electronic format, and that "[b]y continuing to maintain your accounts at [Desert Financial] after such changes occur, you agree to be bound by these changes." (App. 083.)[2] When Desert Financial added an arbitration provision to its contract, it notified Cornell of the modification by including a conspicuous banner on her

[2] Cites to "App." are to Desert Financial's Appendix to Supplemental Brief.

next account statement (the "Banner Notice"), which was e-mailed to her and directed her to view the "Dispute Resolution section" of the updated terms. The Banner Notice included a "link" to click to see those terms. (App. 116.)

In turn, the immediately viewable Dispute Resolution section contains an arbitration clause in "bolded, partially underlined, all-caps format," making it "stand out from other portions of the document"; the clause spells out that the consumer can "OPT OUT" of arbitration by notifying Desert Financial by a date certain (which Cornell did not do). (App. 102-03.)

That familiar process—used by untold numbers of businesses in Arizona and around the country—satisfies traditional standards for contract formation and modification. Account agreements typically contain an "amendments" or "changes" clause authorizing the bank or vendor to modify the agreement after giving notice to its customers and providing that continued use of the account constitutes acceptance of the changes. Such change-of-terms procedures have been used for decades by banks, credit card issuers, and other companies in a wide variety of industries to help them keep pace with ever-changing financial, regulatory, social, and technological developments and to compete efficiently and effectively with one another. By adopting the Restatement test, this Court can ensure Arizona businesses and consumers continue to enjoy the benefits e-commerce provides.

I. The Restatement test encapsulates generally accepted contract principles in Arizona and around the country and is best-suited for an ever-evolving e-commerce world.

A. The Restatement test reflects sound legal policy.

Adoption of the contract-modification rule in the Consumer Contracts Restatement resolves both certified questions on which this Court accepted review. *In re Sky Harbor Hotel Props.*, 246 Ariz. 531, 533, ¶ 6 (2019) (following Restatement where it "sets forth sound legal policy"); *Spettigue v. Mahoney*, 8 Ariz. App. 281, 283 (1968) (Supreme Court "look[s] to" Restatement "with favor");

The first certified question asks whether there is an effective modification of a consumer contract where notice is sent to the offeree "through a communication channel to which the offeree previously consented," even if the offeree does not respond. (App. 018.) The answer is "Yes."

Where, as here, the offeree expressly elects to receive all notifications from the business via electronic means, and the business e-mails the offeree with notice of a contract modification—which includes a provision giving the consumer adequate time to opt out of the new requirement—that constitutes "reasonable notice," a "reasonable opportunity to review," and a "reasonable opportunity to reject the proposed modified term." (App. 014 (quoting Restatement).)

And subsumed within the first certified question is the fact that the offeree then "manifests assent"—under the Restatement—by "*not* reject[ing] the proposed modified term and *continu[ing] the contractual relationship* after the expiration of

the rejection period provided in the proposal." (App. 014 (emphasis added).) Cornell, upon receipt of the Banner Notice, did not respond and continued to bank with Desert Financial. Indeed, *after* notification that Desert Financial had added an arbitration clause, as the district court found, Cornell used her relationship with Desert Financial to buy a car. (App. 006.)

The Restatement test tracks longstanding contract principles in Arizona. In both the online and offline contexts, acceptance depends on "whether a reasonable person would understand [her conduct] to constitute assent and acceptance of the terms of the offer." 9 Ariz. Prac., Bus. Law Deskbook § 7:6 (2021-22 ed.) (noting "conduct" and "action" are "permissible manifestations of acceptance"). Upon adequate notice of a proposed contract term, the offeree's conduct—such as continued performance—can manifest acquiescence in that term. *Ancell v. Union Station Assocs*., 166 Ariz. 457, 460 (App. 1990); *see Keith v. Aztec Land & Cattle Co.*, 21 Ariz. 634, 644 (1920) (finding acceptance of modification based on "the reasonable and fair deduction to be drawn" from offeree's performance under contract).

With that straightforward analysis, the second certified question becomes obsolete. Cornell's continued use of Desert Financial's services is that "additional showing"—beyond what is expressly stated in the first certified question—to establish a contract modification. Thus, this Court should not adopt any rule that requires a business to show anything beyond what the Restatement requires.

Specifically, any requirement that the consumer have a "subjective understanding" of the contract modification runs afoul of elementary principles of contract interpretation. "Whether there is mutual assent to the terms of a contract is determined by an *objective* test, rather than the subjective intentions of the parties." 1 WILLISTON ON CONTRACTS § 3.4 (4th ed.) (emphasis added); *see also Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 348-49, ¶ 14 (2011) ("Under contract principles … the test is objective: Whether an offer was made turns only on whether a reasonable person would understand that a proposal of terms was made, not on Ballesteros's subjective understanding of the offer form.").

Similarly, "actual receipt" or "actual reading" of a contract modification has never been the rule in Arizona. *Lee v. State*, 218 Ariz. 235, 237, ¶ 10 (2008) (rejecting requirement to show "actual delivery," upholding mail-delivery rule, and noting "long-held understanding that mail properly sent will reach its destination"); *Hagin v. Fireman's Fund Ins. Co.*, 88 Ariz. 158, 162 (1960) ("[W]here all that plaintiffs had to do was to open their mail, they are charged with constructive notice of the knowledge which this letter attempted to convey."). That is also true for standardized contracts. *Harrington v. Pulte Homes Corp.*, 211 Ariz. 241, 247, ¶ 18 (App. 2005) ("where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing … *without*

regard to [his] knowledge or understanding of the standard terms of the writing." (emphasis added)). The Restatement test is the proper test to apply here.

B. Courts all over the country track the Restatement.

Adopting the Restatement test would also put Arizona on an equal playing field with the many other states that have recognized the need for sensible contract formation rules in the e-commerce world. In fact, many of the millions of consumer arbitration agreements in use today were implemented through change of terms procedures. I. Szalai, *Prevalence of Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (Feb. 2019). And given commonsense understandings of how the Internet works, it is unsurprising that a litany of courts find mutual assent in transactions like Cornell's.[3] Thus, "courts

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[3] *E.g.*, *Kurz v. Chase Manhattan Bank*, 319 F.Supp.2d 457, 465 (S.D.N.Y. 2004) (modification enclosed with monthly statement; "plaintiff agreed to the arbitration amendment because use of the credit card account continued … several months after the opt-out deadline passed."); *Briceno v. Sprint Spectrum, L.P.*, 911 So.2d 176, 180 (Fla. App. 2005) ("When an amendment was made, … each invoice stated that the Terms and Conditions were periodically amended and listed two ways" to access the information …. Briceño failed to avail herself of the information presented to her."); *Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190 (N.Y. App. 2004) ("Plaintiff consented to [arbitration clause] by failing to opt out and by continuing to use her credit cards" and "is bound" "even if she did not read it." (internal citations omitted)); *Hart v. Charter Commc'ns*, 814 F. App'x 211, 213-14 (9th Cir. 2020) (plaintiff received notice "in two billing statements," which was "sufficiently clear and conspicuous to provide a reasonably prudent subscriber with constructive notice of the proposed contract terms. … Hart's continued acceptance of TWC's services constituted assent"); *Taylor v. Citibank*, 292 F.Supp.2d 1333, 1338 (M.D. Ala. 2003) ("Since Taylor received the notice of change in terms …, did not reject the changes as allowed, but continued to use the

(Continued …)

have consistently enforced arbitration clauses contained in [Terms of Use] on websites" even where the consumer must make "an extra click to access the TOU." *Oberstein v. Live Nation Entm't, Inc.*, 2021 WL 4772885, at *6 (C.D. Cal.).

Moreover, in 2022, the existence and function of "links"—which direct the consumer to terms and conditions of use—cannot be considered a plausible source of mystery or confusion. As one judge put it almost 10 years ago: "Not so long ago, the Second Circuit could not discuss the hyperlink without defining the innovation for its readers.... Nearly two decades later, it is simply assumed that persons navigating the Internet understand hyperlinks as means of connecting one webpage to another." *Adelson v. Harris*, 973 F.Supp.2d 467, 483 (S.D.N.Y. 2013). What was true in 2013 is all the more true in 2022. Indeed, given the increasing

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account by maintaining an account balance, he assented to the arbitration provision and is bound by it."); *Larsen v. Citibank FSB*, 871 F.3d 1295, 1307-08 (11th Cir. 2017) ("[Plaintiff] continued to use his account under the newly revised terms," which constituted assent to arbitration provision); *Campos v. Bluestem Brands, Inc.*, 2016 WL 297429, at *10 (D. Or.) (same; "This conduct, regardless of whether Ms. Campos read, signed, or understood the Agreement, objectively manifested assent to the arbitration provision."); *Reyes v. Equifax Credit Info. Servs.*, 2003 WL 22922190, at *4 (N.D. Ill.) (plaintiff signed agreement, which "stated that its terms could be modified upon 'prior written notice' and that all notices would be sent to the billing address … Reyes has not demonstrated that the arbitration agreement is invalid merely because he did not receive or sign it." (internal citation omitted)); *Joseph v. MBNA Am. Bank*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (plaintiff did not invoke opt-out; "MBNA's method of giving notice—including the amendment in a mailing to card holders—has been upheld by many courts.").

ubiquity of smartphones and other mobile devices, using links to navigate to related pages on the Internet is an everyday occurrence.

Fteja v. Facebook, Inc., 841 F.Supp.2d 829 (S.D.N.Y. 2012), offered an instructive analogy. Imagine a customer takes an apple from a bin with a sign that reads: "By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign." *Id.* at 839. "In those circumstances, courts have not hesitated in applying the terms against the purchaser." *Id.* at 839-40 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991) (upholding forum selection clause in fine print on back of cruise ticket)). There is no reason why the outcome should be different because Desert Financial's terms "appear on another screen rather than another sheet of paper. What is the difference between a hyperlink and a sign on a bin of apples saying 'Turn Over for Terms' …?" *Id.*

Equating assent to a readily-available button linking to a proposed modification to terms of service, along with continued use of the company's services after notice of that modification, is simply the 21st century equivalent of incorporating terms by reference into a form contract—something Arizona courts have long endorsed. *E.g.*, *Bd. of Trustees of Marana Elementary Sch., Dist. No. 6 v. Wildermuth*, 16 Ariz. App. 171, 172 (1972) ("We believe the reference to 'rules' in the contract sufficiently incorporates the [school district personnel] rules … into the contract to make them a part thereof pursuant to the Restatement."); *A.P. Brown Co. v. Superior Ct.*, 16 Ariz. App. 38, 40 (1971) ("The arbitration provision

expressly referred to the rules of the [AAA] as controlling …. Therefore, the AAA's rule as to fees was incorporated into the contract by reference and [the parties] ... *cannot escape their contractual obligation by saying that they had not read the AAA rules*." (internal citation omitted & emphasis added)).

The "law is clear: Mutual arbitration provisions in [e-]contracts—so long as their existence is made reasonably known to consumers—are enforceable." *Selden v. Airbnb, Inc.*, 2016 WL 6476934, at *2, 5 (D.D.C.) ("Notifications to that effect—be they check boxes or hyperlinks—abound. To be sure, few people may take time to actually read the user agreements. But ignorance of the precise terms does not mean that consumers are unaware they are entering contracts by signing up for internet-based services."). This Court should follow this national trend.

C. *Demasse* is not the proper test for standard consumer contracts.

Demasse addressed an issue of unique importance to the employment world – whether a "job security term" (regarding seniority and lay-offs) contained within a personnel handbook given to an employee who might otherwise be dischargeable at will can be unilaterally rescinded by publishing a new handbook.[4] It was

[4] This issue rarely arises anymore—Arizona employers routinely place disclaimers in handbooks and policies to make clear nothing therein should be construed to modify an employee's at-will status. *Demasse v. ITT Corp.*, 194 Ariz. 500, 510, ¶ 30 (1999) ("To those who believe our conclusion will destroy an employer's ability to update and modernize its handbook … the great majority of handbook terms are certainly non-contractual … [and] the existence of contractual terms can be disclaimed in the handbook in effect at the time of hiring.").

"assume[d]" that the handbook "created a contractual provision that *restricted* [the employer's] ability to discharge." 194 Ariz. at 510, ¶ 31 (emphasis added).

Demasse's procedural posture removed it from the vast majority of employment cases where employment is purely at-will and terminable at the leisure of *either* the employer *or* the employee. *Id*. at 504-05, ¶¶ 11-12 ("The difference is dispositive with regard to methods necessary for modification."). And like Cornell's banking relationship with Desert Financial, at-will employment contracts "are unilateral and typically start with an employer's offer of a wage in exchange for work performed; subsequent performance by the employee provides consideration to create the contract." *Id*. at 505, ¶ 12. And of particular significance to the typical consumer contract,

> [B]efore performance is rendered, the offer can be modified by the employer's unilateral withdrawal … and substitution of a new one … with different terms and the employee again accepts the new offer by performance (such as continued employment).

Id. Acceptance in an at-will relationship, like the one Cornell and Desert Financial enjoyed—does not require the employee to be "aware of the new term's impact on the pre-existing contract" or "affirmatively consent to the modification."

Demasse is "limited to" employer attempts to unilaterally modify a "job security" contract. *Taleb v. AutoNation USA Corp*., 2006 WL 3716922, at *5 (D. Ariz.). The district court cases citing *Demasse* in non-employment contexts (Pl.'s

Supp. Br. 20-23) are distinguishable—in particular, none involved an offeree's continued use of a company's services after notice *and* an opt-out period.[5]

The countless businesses that engage in mobile transactions, in Arizona and across the nation, need clear and uniform standards governing the formation of agreements with consumers and other users of their websites or mobile applications. Implementing an onerous contract-modification approach like that laid out in *Demasse*—which was designed to protect rare promises of job security in the employment context and which has no application to the modern realities of transactions on the Internet—fails to provide such guidance.

The lack of clarity and predictability in the *Demasse* approach is especially problematic in the context of arbitration, given "Congress' intent" in the FAA "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008). The inevitable result of the uncertainty created by the *Demasse* approach, if extended to cover consumer contracts, would be to invite collateral, time-consuming litigation over the design of websites and mobile applications any time a business moves to compel arbitration. Did the consumer navigate to the correct site? Why not? Did

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[5] In *Rose v. Humana Ins. Co.*, 2018 WL 888982, at *3 (D. Ariz.), unlike Desert Financial, the company "fail[ed] to produce the actual email it sent" or "describe its contents." And *Vantage Mobility v. Kersey Mobility*, 2021 WL

(Continued …)

she read the new provision? How and when? Did she understand how it changed prior terms? Did she even know the prior terms? Did she consult an attorney? Depositions and discovery would become part and parcel of every effort to compel arbitration, "in the process undermining the [FAA]'s pro-arbitration purposes and breeding litigation from a statute that seeks to avoid it." *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001).

It is implausible to assume a user who signs up to use services on the Internet would not know that (i) the transaction is governed by terms and conditions that may change from time to time, and (ii) those terms are available via a link to a web page. And that is especially so when the user signs an agreement acknowledging the first fact and receives an email regarding updated terms pursuant to her election to receive all such notices by that very means.

II. Adding an arbitration clause is consistent with Arizona's reasonable expectations doctrine.

A. Modifying a standardized contract to add an arbitration clause does not improperly waive a plaintiff's right to a jury trial.

Cornell asserts that adding an arbitration clause was "troubling" because it amounted to "a prospective waiver of [her] constitutional right to a jury trial." As such, according to her, the waiver must be "clearly apparent in the contract and its

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1610229 (D. Ariz.), held inaction constitutes assent where "an offeree takes the benefit of offered services with reasonably opportunity to reject them." *Id.* at *15.

language must be unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties." (Supp. Br. 27-28.) That is contrary to Arizona law.[6]

The seminal Arizona case as to reasonable expectations for standardized contracts is *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co*., 140 Ariz. 383 (1984), in which this Court adopted the Restatement (Second) of Contract § 211. Under the Restatement, if modification to a standard contract falls within the reasonable expectations of the parties, it is valid.

In *Harrington*, *supra* at 7-8, applying *Darner*, the Arizona Court of Appeals recognized a jury-trial waiver is the expected result of agreeing to arbitration:

> [T]o predicate the legality of a consensual arbitration agreement upon the … express waiver of jury trial would be as artificial as it would be disastrous. … [T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate….

211 Ariz. at 249, ¶ 27 (internal citations omitted).

Moreover, "the lack of a conspicuous and explicit waiver to a jury trial *does not mean* the arbitration clause was beyond a party's reasonable expectations." *Id* (emphasis added). The court thus rejected the argument that "an arbitration clause

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[6] It also contradicts the FAA and Supreme Court precedent: "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1428 (2017). A "clear-statement rule [that] fails to put arbitration agreements on an equal plane with other contracts" violates the Act and is preempted. *Id.* at 1426–27.

can only be effective through knowing and voluntary consent. *Id.* (arbitration clause was consistent with the parties' reasonable expectations).

Cornell also suggests Desert Financial acted in bad faith by adding the arbitration provision. (Pl's Supp. Br. 28.) But arbitration clauses are highly favored under both Arizona state and federal law, and they are governed by the same state-law contract principles that apply to *all* contract provisions, such as those applying to an increase in overdraft fees. *Harrington*, 211 Ariz. at 248, ¶ 21.

Especially given Arizona's policy favoring arbitration, waiver of a right to jury trial to participate in arbitration is not uncommon or undesirable. *Pima Cnty. v. Maya Constr. Co.*, 158 Ariz. 151, 154 (1988) ("Arizona's public policy [is] that arbitration is a highly desirable method of resolving disputes"). Indeed, parties have always been able to waive their right to a jury trial with relative ease. *E.g.*, *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (loss of jury-trial right "is a necessary and fairly obvious consequence" of arbitration agreement); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1260 (Del. Super. 2001) ("arbitration agreements, even in adhesion contracts, can effectively waive" right); *Vigil v. Sears Nat. Bank*, 205 F.Supp.2d 566, 572-73 (E.D. La. 2002) (applying Arizona law) (adding arbitration clause to standardized account agreement is "neither outside the reasonable expectation of the plaintiff nor unconscionable").

Because Arizona law is settled on this subject, resort to the inapposite, non-Arizona cases cited by Cornell is unnecessary. *Badie v. Bank of America*, 67

Cal.App.4th 779 (1998), suggests unilaterally incorporating an arbitration clause—with no opt-out opportunity—may be inconsistent with the implied covenant of good faith and fair dealing. Similarly, in *Sears Roebuck & Co. v. Avery*, 163 N.C. App. 207 (2004), the court opined that, under Arizona law, a unilateral change in terms to add an arbitration provision that was simply mailed to consumers (without a reasonable opt-out opportunity) potentially violated the covenant.

But here, Cornell (i) agreed at the beginning of the parties' contractual relationship that contract terms could be modified under certain conditions, and (ii) received and downloaded a change in terms regarding the dispute-resolution provisions to include an arbitration clause, *with* an opportunity to opt out. In Arizona, that process is consistent with the reasonable expectations doctrine. To the extent *Badie* or *Avery* stands for the proposition that a business cannot ever add a new provision to its contract using such procedures, it conflicts with Arizona law.

Indeed, *Badie* and *Avery* were decided *before* the Arizona Court of Appeals' decision in *Harrington*, which engaged in a detailed analysis of *Darner*'s reasonable expectations doctrine for standardized contracts. Where, as here, a business does not undermine the consumer's "reasonable expectations," it complies with the implied covenant. *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, ¶ 13 (App. 2002) (obligation of good faith and fair dealing "'guarantees the protection of the parties' reasonable expectations.'" (quoting 3A CORBIN ON CONTRACTS § 654A, at 105)).

In fact, the Restatement includes additional provisions that protect consumers from business overreach. Section 3(c) puts a meaningful limit on the scope of contract amendments: they cannot "have the effect of undermining an affirmation or promise made by the business that was made part of the basis of the original bargain between the business and consumer." Restatement § 3(c). Moreover, section 5 prohibits unconscionable terms, both procedural and substantive. *Id.* § 5. Section 6 ensures that terms adopted "as a result of a deceptive act or practice by the business" are unenforceable. *Id.* § 6. These provisions ensure a contract modification is within the consumer's "reasonable expectations."

B. Consumer arbitration clauses serve an important purpose.

Contrary to Cornell's assertion, the addition of an arbitration clause to a standard account agreement is not an unreasonable "exploitation" of consumers. (Pl.'s Supp. Br. 29.) In fact, the use of change of terms procedures to add an arbitration clause benefits account holders in at least three significant ways.

First, empirical research confirms arbitration is faster and less expensive and produces better results for consumers than court litigation. For example, a 2022 study by the U.S. Chamber Institute for Legal Reform concluded that:

> **1. Consumers … who initiate cases are more likely to win in arbitration than in court.** From 2014-2021, consumers initiated and prevailed in 41.7% of arbitrations that terminated with awards compared to 29.3% of litigations that terminated with awards.
>
> **2. Consumer-claimants … typically receive higher monetary awards in arbitration than in litigation**. From 2014-2021, consumers who initiated and prevailed in arbitration were awarded an average of $79,945 ($20,356 in median) compared to an average of $71,354 ($6,669 in median) in litigation.

> **3. Arbitration is, on average, quicker than litigation.** From 2014-21, consumers who initiated and prevailed in arbitration spent an average of 321 days (median 265 days) to resolve their claim compared to an average 439 days (315 days in median) in litigation.[7]

Also, because arbitration involves far fewer procedures and complexities, arbitration is usually "cheaper for both parties than going to court." *Id.*[8]

Second, arbitration enables banks, credit card companies, and other financial services businesses to mitigate the ever-spiraling costs of litigation, and those savings are passed on to customers. Arbitration lowers dispute-resolution costs because, among other things: it utilizes a nationally uniform set of procedures, thus saving interstate businesses the costs of adapting to different procedural rules in different states; it reduces the amount of time and money the parties spend on discovery; it typically takes place on an individual, bilateral basis; and there is only limited appellate review.[9] Consumers benefit in the form of lower prices for goods and services. *E.g.*, *Metro E. Ctr. for Conditioning & Health v. Quest Commc'ns Int'l*, 294 F.3d 924, 927 (7th Cir. 2002) ("benefits of arbitration are reflected in a

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[7] U.S. Chamber Institute for Legal Reform, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, at p.4 (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp.

[8] *See* Consumer Fin. Prot. Bureau Arbitration Study: Rpt. to Congress, pursuant to Dodd Frank Wall Street Reform & Consumer Protection Act 1028(a) (Mar. 2015), consumerfinance.gov/data-research/research-reports, § 4 (AAA caps consumer's share of administrative/arbitrator fees at $200); § 5 (average recovery was 166 times as much as average class member's recovery); § 6 (individual consumer arbitration is up to 12 times faster than consumer class action litigation).

[9] Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90-91 (2001).

lower cost of doing business that is passed along to customers"). Conversely, without arbitration, companies' litigation costs increase, and there is a corresponding need to increase revenue or reduce value, so customers pay more or get less. *E.g.*, U.S. Chamber Institute for Legal Reform, *Unstable Foundation: Our Broken Class Action System & How to Fix It*, at 3 (Oct. 2017) (litigation costs are "inevitably passed on to customers, shareholders, or other innocent parties").[10]

Third, there are important intangibles associated with arbitration. For example, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the cold, intimidating formalities of a courtroom and the rigid court rules governing procedure and evidence.[11] They can also choose arbitrators with expertise in the subject matter of the dispute. Unlike most court trials, scheduling of arbitration hearings is flexible and accommodates the needs and availabilities of the parties. Consumers can even participate by telephone or virtually while thousands of miles away. Such conveniences and efficiencies are more available today than they once were but still often do not exist in court, which can be daunting and frustrating to non-lawyers.

CONCLUSION

This Court should answer the federal district court's certified questions by adopting the Restatement test for modifications to consumer contract.

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[10] Available at https://instituteforlegalreform.com/research.

[11] *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (benefits of arbitration includes its "simplicity" and "informality")

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DENTONS US LLP

By ___s/ Karl M. Tilleman___________
Karl M. Tilleman
Jason Sanders
Douglas D. Janicik

Attorneys for Chamber of Commerce of the United States of America