

FILED

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 18 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EVA CORNELL, individually and on behalf
of all others similarly situated,

Plaintiff-Appellee,

v.

DESERT FINANCIAL CREDIT UNION,

Defendant-Appellant.

No. 23-16144

D.C. No. 2:21-cv-00835-DWL

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Dominic Lanza, District Judge, Presiding
Argued and Submitted September 12, 2024
Phoenix, Arizona

Before: RAWLINSON and COLLINS, Circuit Judges, and FITZWATER,**
District Judge.

Defendant Desert Financial Credit Union (“Desert Financial” or the “credit union”) appeals from the denial of its motion, under § 4 of the Federal Arbitration Act, 9 U.S.C. § 4, to compel arbitration of the claims asserted by Plaintiff Eva Cornell in her putative class action complaint. We have jurisdiction over Desert Financial’s timely appeal of the district court’s denial of the motion to compel

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

arbitration. *See* 9 U.S.C. § 16(a)(1)(B). Reviewing de novo, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014), we affirm.

Cornell’s class action complaint asserts that Desert Financial violated federal and state law with respect to how it assessed overdraft fees on accounts at the credit union. Desert Financial contends that these claims must be submitted to arbitration, because Cornell is assertedly bound by an arbitration provision that Desert Financial added to its terms of service *after* Cornell began banking with the credit union.¹ The district court ultimately certified two questions to the Arizona Supreme Court regarding when contract modifications are enforceable against consumers under Arizona state law. The Arizona Supreme Court thereafter issued an opinion in which it clarified the standards for modification of contracts governing “an on-going, at-will, business-consumer relationship” by generally adopting the requirements set forth in § 3 of the Restatement of the Law, Consumer Contracts. *Cornell v. Desert Fin. Credit Union*, 524 P.3d 1133, 1135, 1140 (Ariz. 2023) (citing RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 3 (AM. L. INST., Tentative Draft No. 2, 2022) (“RESTATEMENT DRAFT”)); *see also* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 3 (AM. L. INST. 2024) (“RESTATEMENT”) (finalizing the language of § 3, with changes that are immaterial to this case). The district court then applied the Arizona Supreme Court’s *Cornell*

¹ The arbitration provision also contains a class-action waiver.

decision and held that the arbitration provision was not enforceable because the modification that purportedly added it did not comply with § 3's requirements. The court therefore denied Desert Financial's motion to compel arbitration.

We agree with the district court that Desert Financial's purported modification adding the arbitration provision failed to comply with Restatement § 3(a), as construed in *Cornell*. Section 3(a) requires a business seeking to modify a "consumer contract governing an ongoing relationship" to show, *inter alia*, that (1) "the consumer received reasonable notice of the proposed modified term and a reasonable opportunity to review it"; and (2) "the consumer received a reasonable opportunity, including reasonable notice of the opportunity, to reject the proposed modified term and continue the contractual relationship under the existing term." 524 P.3d at 1139 (quoting RESTATEMENT DRAFT, *supra*, § 3(a)(1)–(2)); *see also* RESTATEMENT, *supra*, § 3(a)(1)–(2) (using nearly identical language). *Cornell* held that, "[a]t minimum, 'reasonable notice' requires that the initial terms or the notice of the proposed modification expressly indicate the consumer's ability to opt out and that failure to do so manifests the consumer's binding assent." *Id.* at 1140. Here, the "initial terms" did not "expressly indicate the consumer's ability to opt out," and therefore the "*notice of the proposed modification*"—as opposed to the proposed modification itself—had to "expressly indicate" that opt-out ability. *Id.* (emphasis added). Desert Financial's "*notice of the proposed modification*"

consisted of a colorful banner prominently displayed on a billing statement emailed to Cornell, which stated that “Desert Financial updated its Statement of Terms, Conditions, and Disclosures to change how we will resolve legal disputes related to your accounts” and which directed her to a web address to obtain “more information.” Nowhere, however, does this “notice of the proposed modification expressly indicate the consumer’s ability to opt out and that failure to do so manifests the consumer’s binding assent.” *Id.* at 1140. As such, it did not comply with § 3(a) as construed in *Cornell*, and the purported modification adding the arbitration provision was therefore ineffective under Arizona law.

Desert Financial alternatively contends that it effectively modified the terms of its agreement with Cornell under § 3(b) of the Restatement. This contention also fails. Section 3(b) states:

A consumer contract governing an ongoing relationship may provide for a reasonable procedure for adoption of modified terms under which the business may propose a modification of the standard contract terms but may not, to the detriment of the consumer, exclude the application of subsection (a), except that the established procedure may replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.

RESTATEMENT, *supra*, § 3(b); *see also* RESTATEMENT DRAFT, *supra*, § 3(b) (containing identical language). On its face, § 3(b) does not permit a business to “exclude the application of subsection (a),” with the sole exception that, in

accordance with the provisions of § 3(b), the business “may *replace* the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.” *Id.* (emphasis added). However, Desert Financial here never sought to “replace” § 3(a)’s reasonable opportunity to *opt-out* with a reasonable opportunity to *terminate*. Accordingly, § 3(b) is simply irrelevant to this case, and the requirements of § 3(a) continue to apply. As we have explained, the latter requirements were not met.

AFFIRMED.