

THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBIN VERNON, et al.,

Plaintiffs,

vs.

QWEST COMMUNICATIONS
INTERNATIONAL INC., et al.,

Defendants.

Case No. 08-1516 TSZ

**DEFENDANTS' REPLY IN SUPPORT
OF MOTION TO TRANSFER**

**NOTE ON MOTION CALENDAR:
Friday April 17, 2009**

Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corp., and Qwest Broadband Services, Inc. ("Qwest") submit the following reply in support of their motion to transfer venue:¹

INTRODUCTION

Plaintiffs' Response fails to explain why this suit should remain in this District. Contrary to Plaintiffs' incorrect analysis, Colorado law applies based on both the parties' agreement and pursuant to a choice of law analysis. Moreover the choice of law provision is enforceable and Plaintiffs bring forth no evidence to the contrary. Plaintiffs' are forum-shopping, Colorado has more ties to this litigation, and Colorado is a more convenient forum for the parties. The only tie to Washington -- the residence of two of the Plaintiffs, one of whom was added after the parties

¹ Qwest incorporates its previous briefing on its Motion to Transfer.

1 had already briefed this very motion – is insufficient to maintain this action in this District.²

2 **ARGUMENT**

3 **I. COLORADO LAW APPLIES TO THIS LITIGATION.**

4 **A. Colorado Is the Contractual Choice of Law.**

5 Washington applies the Restatement (Second) of the Conflicts of Laws to determine which
6 state's law applies in light of a contractual choice of law. *McGinnis v. T-Mobile USA, Inc.*, No.
7 C08-106Z, slip op., 2008 WL 2858492, at *3 (W.D. Wash. July 22, 2008). If there is no actual
8 conflict with another state's law, then Washington law applies. *Id.* at *1. The parties agreed that
9 Colorado law applies.³ (High Speed Internet Subscriber Agreement ("Agreement") ¶ 17, Ex. B to
10 Decl. of Travis Leo.) Pursuant to Restatement (Second) Conflict of Laws § 187 (1971), the Court
11 should first analyze whether there is a conflict between Colorado and Washington law. *Id.* If
12 there is a conflict with the contractual choice of law, the Court will enforce that choice so long as
13 it has a substantial relationship to the transaction, or unless another state has a materially greater
14 interest in applying its own law. Restatement § 187.

15 The Ninth Circuit and Washington Supreme Court have held that class action waivers in
16 arbitration agreements are unconscionable. *See, e.g., Lowden v. T-Mobile USA, Inc.*, 512 F.3d
17 1213, 1219 (9th Cir. 2007); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 854, 161 P.3d 1000, 1006
18 (Wash. 2007). Colorado has held the opposite. *Rains v. Found. Health Sys. Life & Health*, 23
19 P.3d 1249, 1255 (Colo. App. 2001). Accordingly, an actual conflicts exists between Washington
20 law and the law chosen by the parties. *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550-51 (W.D.
21 Wash. 2008).

22 Colorado has a substantial relationship to this matter in that, among other things:

- 23 • Qwest is located in Colorado,

24
25 ² Notably Plaintiffs added a second Plaintiff from Washington, when it would have been just as easy to locate and add
26 another Plaintiff from Colorado, Utah, South Dakota or Montana, the states that are most likely to find contractual
class action waivers enforceable.

27 ³ Plaintiffs argue that the Colorado choice of law provision in the Agreement applies only to arbitration. By the
28 terms of the Agreement, the choice of law provision does *not* apply to arbitration. Under the heading "Dispute
Resolution and Arbitration; Governing Law," the operable clause states "[t]he Federal Arbitration Act . . . not state
law, shall govern the arbitration of the dispute. Colorado state law . . . shall otherwise govern and apply to *any and
all claims or disputes.*" (Agreement ¶ 17(A)(1) (emphasis added).)

- 1 • Numerous potential plaintiffs are residents of Colorado,
- 2 • Substantial numbers of witnesses and documents are located in Colorado,
- 3 • Decisions on implementation of the assessments at issue occurred in Colorado,
- 4 • The contract at issue was drafted in Colorado,
- 5 • The customer records relating to this matter are primarily in Colorado, and
- 6 • Customer service representatives whom subscribers dealt with are located in Colorado
- 7 and other states.

8 *See also Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018, 1025 (N.D. Cal. 2007) ("[I]nternet
9 or phone purchases from an out-of-California manufacturer result in 'sales transpir[ing] outside of
10 California.'" (citation omitted). (*See also* Leo Decl. ¶¶ 11-17.) The Court should, therefore,
11 apply Colorado law unless another state has a "materially greater interest than the chosen state in
12 the determination of the particular issue." *See McGinnis*, 2008 WL 2858492 at *3 (quoting
13 Restatement § 187(b)).

14 The other state's law that might apply in this instance is that of the forum state. Yet
15 Washington has no materially greater "interest in expanding the reach of its consumer protection
16 laws beyond its borders" than Colorado has in applying its own laws to its residents, resident
17 corporations and to those who contract with its corporations. *McGinnis*, 2008 WL 2858492 at *3
18 (citations omitted). Moreover, due to its numerous other contacts, Colorado's interest in
19 determining the rights of its citizens and regulating the corporate actors within Colorado by
20 determining what type of arbitration provisions are valid outweighs any interest Washington
21 might have in determining the same question. Accordingly, the Court should apply the parties'
22 chosen law of Colorado.

23 **B. The Choice of Law Provision Is Enforceable.**

24 Plaintiffs dispute their assent to the Agreement in general and invite the Court to conduct a
25 choice of law analysis and make "factual findings that Plaintiffs agreed to these terms." (Resp. at
26 8.) However, in contrast to Qwest's Motion and supporting Declaration that explained the
27 procedure by which the parties entered into the Agreement, Plaintiffs bring forth no affirmative
28 evidence or offer of proof whatsoever to support their position that they did not assent to the

1 Agreement, including the choice of law provision. Nor do the Plaintiffs make an effort to argue or
2 prove that the choice of law provision was obtained by Qwest improperly. "Unless the choice of
3 law provision itself was obtained by misrepresentation, it will be given effect." *Sparling v.*
4 *Hoffman Constr. Co., Inc.*, 864 F.2d 635, 642 (9th Cir. 1988). In the face of Qwest's Declarations,
5 Plaintiffs have not, and cannot prove that the provision is fraudulent. Plaintiffs cannot avoid by
6 way of unsupported allegations that the choice of law provision contained in the parties' contract
7 is enforceable and that the case should be resolved under Colorado law. Qwest should not lose a
8 significant contract right merely because Plaintiffs baldly allege that they did not assent to the
9 choice of law provision. Qwest will eventually prove that Plaintiffs did assent to the contract and
10 choice of law. Qwest should not be forced to litigate unnecessarily under Washington law in
11 Washington courts when the valid and enforceable contract to which the parties agreed states that
12 Colorado law should apply and the parties' disputes should be resolved in arbitration.

13 Moreover, despite the contention that the Agreement is an adhesion contract, the choice of
14 law provision is enforceable. The Restatement (Second) of Conflict of Laws § 187 comment b
15 makes clear that choice of law provisions in adhesion contracts are typically enforced by the
16 courts. *Burbank v. Ford Motor Co.*, 703 F.2d 865, 866-67 (5th Cir. 1983). Washington law is in
17 accord, so long as the "chosen law does not violate a fundamental public policy of the forum
18 state." *McGill v. Hill*, 31 Wn. App. 542, 548, 644 P.2d 680, 683 (1982). Fundamental policies of
19 a state are typically found in statutes. A court cannot chose not to apply the contractually chosen
20 law "merely because this would lead to a different result than would be obtained under the local
21 law of the state." Restatement § 187, cmt. g. Additionally, the Court should look to the contacts
22 the contract has with the forum in determining whether the forum's policy is so fundamental it
23 should override the contractual choice of law. *Id.*

24 Plaintiffs themselves point out that Washington law with regard to class action waivers
25 "continues to evolve" and is "rapid[ly] develop[ing]." Washington's policy on class action
26 waivers may be important to the residents of Washington but because it is evolving, developing,
27 and uncodified, it should not be given effect over the contractual choice of law. This is especially
28 true in light of the fact that Colorado has substantially more contacts to the contract and the

1 potential plaintiffs are dispersed across fourteen states.

2 **C. Colorado Law Applies Absent the Contractual Provision.**

3 Even if the Court were to determine the contractual choice of law to be unenforceable, a
4 choice of law analysis under Washington law dictates the same result. Again, the Court
5 determines if there is an actual conflict between Washington and another state's law. *Kelley*, 251
6 F.R.D. at 550. Only if no conflict exists does the Court apply Washington law. As discussed
7 above, an actual conflict exists between Washington and Colorado law.

8 The Court next determines which state has the most significant relationship to the case and
9 applies that state's law. *Id.* at 551. To determine most significant relationship, the Court looks to
10 (1) where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the
11 residence or place of incorporation of the parties; and (4) the place where the relationship is
12 centered. *Id.* citing Restatement § 145. The Court may also consider the place where the plaintiff
13 acted in reliance upon the defendants' misrepresentations or where defendant made the
14 misrepresentations. *Id.* at 552 citing Restatement § 148(2).

15 First, in applying these factors, the "place of injury is of lower importance in a case of
16 deceptive trade practices." *Id.* If the class is certified the alleged injury will have occurred in 14
17 states. Next, the location where the action causing the alleged injury occurred is most important.
18 *Id.* That location is Colorado where Qwest is headquartered and where all corporate decisions
19 related to the contract, services, and termination liability assessments occurred. Third, the
20 residence of the Plaintiffs is of less import where they are only three of potentially thousands of
21 plaintiffs scattered across 14 states. Fourth, Colorado is the location where the relationship is
22 centered in that the operable contract was drafted and entered into in Colorado. *See Omstead*, 473
23 F. Supp. 2d at 1025.

24 In *Kelley*, this District determined that the law of the defendant's state, as an important
25 corporate actor there, applied to a class action regarding unfair trade practices. That court
26 analyzed the above factors and determined that Washington law would apply to a nationwide class
27 action on the grounds that Washington was the location where defendant Microsoft's bad acts
28 occurred and where Microsoft "one of Washington's largest corporate citizens" is located. *Kelley*,

1 251 F.R.D. at 553. Other states had less significant contacts because the class action plaintiffs
2 were in all fifty states. Similarly, this Court should apply the law of Colorado, the state in which
3 the corporate actor is located and the state that would have the greatest interest in regulating the
4 actions of its corporate citizens.

5 Because Colorado law applies to this matter pursuant to either analytical approach, the
6 Court should transfer the case to Colorado. As Plaintiffs concede, Colorado courts are in a better
7 position than this Court to apply Colorado law.

8 **II. THE § 1404 FACTORS FAVOR TRANSFER.**

- 9 • "[P]laintiff's choice of forum is discounted where the action is a class action." *Saleh*, 361
10 F. Supp. 2d at 1157. Plaintiffs cite no case that contradicts this rule.
- 11 • Plaintiffs have failed to answer the allegation of forum shopping and have not asserted
12 reasons for filing in Washington.
- 13 • This action's contacts with Colorado favor transfer. *See e.g., Saleh v. Titan Corp.*, 361 F.
14 Supp. 2d 1152, 1159 (S.D. Cal. 2005) (holding that general connection to a forum does not
15 create a connection to the forum relevant to the instant litigation).
- 16 • Despite technology, the location of proof is important in determining a motion to transfer.
17 *Ellis*, 372 F. Supp. 2d at 541 (declining to transfer venue to where few records kept).
- 18 Qwest has identified five categories of witnesses who will be needed to testify. (Mot. at 4,
19 7.) Further the Qwest employees who will be needed to testify are listed in Qwest's Fed.
20 R. Civ. P. 26(a)(1) disclosures. (*See* Defs.' Rule 26(a)(1) Discl. at 2-3, attached hereto as
21 Ex. K.) Even when witnesses are employees, costs of litigation are reduced when witness
22 travel is reduced. *See, e.g., Ellis*, 372 F. Supp. 2d at 543-44.

23 **CONCLUSION**

24 For the reasons stated above and in Qwest's Motion to Transfer, Defendants respectfully
25 request this Court to transfer venue to the District of Colorado pursuant to 28 U.S.C. § 1404(a).

26 DATED this 17th day of April, 2009.

27 BROWNSTEIN HYATT FARBER SCHRECK, LLP

28 By s/ Peter J. Korneffel, Jr. _____

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 17th day of April, 2009, I caused the preceding document to be served on counsel of record in the following manner:

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