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THE HONORABLE RICHARD A. JONES
Hearing: May 25, 2007
w/o Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CINDY NORDSTROM,

Plaintiff,

v.

QWEST CORPORATION, INC.,

Defendant.

No. 06-2-33535-0KNT

REPLY IN SUPPORT OF DEFENDANT'S
MOTION TO COMPEL ARBITRATION

Defendant Qwest Corporation ("Qwest") respectfully submits this reply in support of its Motion to Compel Arbitration.¹

1. Qwest is not required to file a motion for summary judgment to compel arbitration.

Without citation to any authority, Plaintiff asserts that Qwest should have filed a motion for summary judgment because Plaintiff believes that there are material questions of

¹ This motion was originally noted for May 22, 2007. Qwest did not receive Plaintiff's opposition until 11:57 a.m. on May 21st, the day that Qwest's reply was due. As a result, by the time that Plaintiff's opposition was received, Qwest had already filed its one paragraph reply stating that the Motion to Compel Arbitration was unopposed. Plaintiff's opposition included a motion for continuance, asserting that service was not timely made for consideration of Qwest's Motion on May 22nd. While Plaintiff did not note her motion for continuance, upon receiving Plaintiff's objection to service, Qwest sought to address Plaintiff's concerns by re-noting its Motion for May 25, 2007, which is six court days from when service by mail would be deemed complete under CR5(b)(2). This reply responds to the substantive arguments made in Plaintiff's opposition received by Qwest on May 21st.

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1 fact with respect to whether an agreement to arbitrate exists. Opp. at 5. Plaintiff's argument
2 is internally inconsistent and has no support in the law. It makes little sense to argue that a
3 summary judgment motion is required while simultaneously arguing that there are material
4 questions of fact that would preclude summary judgment.² Moreover, numerous courts have
5 held in other contexts that because an order compelling arbitration is not a determination on
6 the merits, a motion to compel arbitration is not the equivalent of a motion for summary
7 judgment. *See Hamilton v. Shearson-Lehman American Express, Inc.*, 813 F.2d 1532, 1535
8 (9th Cir. 1987); *Merit Ins. Co v. Leatherby Ins. Co.*, 581 F.2d 137, 142-43 (7th Cir. 1978).

9 Fortunately, the Federal Arbitration Act and the Washington Uniform Arbitration Act
10 set forth the procedures for compelling arbitration.³ Under either framework, the proper
11 procedure is to file a motion to compel arbitration. 9 U.S.C. § 4; RWCA § 7.04A.070(4) ("If
12 a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate
13 is pending in court, a motion under this section must be filed in that court."); Washington
14 Practice, Methods of Practice, § 14.19 ("RCWA 7.04.070 provides for a Motion and Order to
15 Compel Arbitration"). If the court, in considering a motion to compel arbitration, determines
16 that there is a factual issue concerning whether the agreement to arbitrate was made, the court
17

18 ² In a related point, Plaintiff argues that Qwest should have requested oral argument because
19 its Motion to Compel Arbitration is a dispositive motion. Opp. at 5. Qwest was unable to find any
20 Washington authority on point. Courts that have considered the issue, however, are split. *See Credit*
21 *Suisse Securities v. Hilliard*, 2007 U.S. Dist. LEXIS 30597, n.9 (D.Neb. April 25, 2007) (collecting
cases). For instance, a number of courts have ruled that a motion compelling arbitration is not
dispositive because even after arbitration the judgment is confirmed, modified or vacated in court
pursuant to the FAA. *Id.*

22 ³ Plaintiff says that federal law is irrelevant. Opp. at 6. Not so. While the Service Agreement
23 generally provides for the application of Colorado law, the arbitration clause specifically provides that
24 arbitrability of claims under the Service Agreement is governed by the Federal Arbitration Act.
25 Declaration of Lucia Beardsley, Ex. A ("The Federal Arbitration Act, not state law, shall govern the
arbitrability of all claims."). As such, the law relating to the Federal Arbitration Act is highly
relevant. Most of the other federal cases cited by Qwest relate to its arguments that challenges to the
arbitration provision are preempted by the Federal Communications Act. Plaintiff has offered no
response to these arguments and has failed to distinguish any of the cases cited in Qwest's Motion.

1 may consider and decide the evidence on that limited issue. 9 U.S.C. § 4; RWCA §
2 7.04A.070(4). If the court determines that an agreement to arbitrate exists, then it must
3 compel arbitration. *Id.* Upon further review of the statutory framework, however, Qwest
4 admits that instead of seeking to have this matter dismissed, it should have styled its motion
5 as one to compel arbitration and stay the litigation, as set forth in the FAA and Washington's
6 Uniform Arbitration Act. 9 U.S.C. § 9; RWCA § 7.04A.070. As such, should this Court
7 compel arbitration, the appropriate remedy is to stay the litigation. A revised proposed order
8 is attached.

9 In sum, the statutory framework sets forth the proper procedure under these
10 circumstances, and Plaintiff's contention that Qwest must file a motion for summary
11 judgment to compel arbitration is without any support.

12 **2. An Agreement to Arbitrate Was Entered Into When Plaintiff Used**
13 **Qwest's Services.**

14 Plaintiff claims that she did not receive the Service Agreement and that she did not
15 accept its terms. Opp. at 6. But, "[t]he rule is well settled that proof that a letter properly
16 directed was placed in a post office, creates a presumption that it reached its destination in
17 usual time and was actually received by the person to whom it was addressed." *Hagner v.*
18 *United States*, 285 U.S. 427, 430 (1932); *see also Boomer v. AT&T Corp.*, 309 F.3d 404, 415
19 n.5 (7th Cir. 2002) (holding that declaration from employee knowledgeable about mailing
20 procedures raised the presumption that the mailing was received by plaintiff).

21 Here, Qwest has provided competent evidence that its business practice is to send the
22 Service Agreement out to each new customer of a service on the next business day after the
23 service has been ordered. Beardsley Declaration at ¶ 3. This is an automated and
24 computerized process that occurs thousands of times each business day. Second Beardsley
25 Declaration at ¶ 3. A confirmation letter that includes a copy of the applicable Service

1 Agreement is generated using the customer information from the account records. *Id.* At ¶ 4.
2 Each business day transaction files are extracted and transferred to a vendor who prepares the
3 confirmation letters. *Id.* The confirmation letter is customized with the customer information
4 from the files and with information specific to the service the customer has ordered. *Id.* Once
5 complete, the confirmation letter and applicable Service Agreement are then placed into
6 envelopes and mailed by pre-sorted first class mail.⁴ *Id.* Such evidence demonstrates
7 Qwest's mailing procedures, and Qwest is entitled to the presumption that Plaintiff received
8 the Service Agreement.

9 Moreover, Plaintiff accepted the terms and conditions of the Service Agreement by
10 using Qwest's services. *See* Restatement (Second) of Contracts § 19 ("The manifestation of
11 assent may be made . . . by written or spoken words or by other acts or by failure to act."); *Id.*
12 § 69 (silence or inaction operate as acceptance "where an offeree takes the benefit of offered
13 services with a reasonable opportunity to reject them and reason to know that they were
14 offered with the expectation of compensation."); *Haberl v. Bigelow*, 855 P.2d 1368, 1374
15 (Colo. 1993) (citing Restatement (Second) of Contracts §§ 19 & 69)). And, contrary to
16 Plaintiff's assertion, failure to read the Service Agreement does not mean that it does not exist
17 or that it is not enforceable. *See Boomer*, 309 F.3d at 415 ("Boomer had a reasonable
18 opportunity to reject AT&T's offer, but nonetheless continued to use his AT&T services. . .
19 Under these circumstances, Boomer's silence constituted an acceptance."); *Ragan v. AT&T*
20 *Corp.*, 824 N.E.2d 1183, 1188-89 (Ill. App. Ct. 2005) ("Plaintiffs' silence and inaction upon
21 receipt of the CSA constituted an acceptance of defendant's offer presented in the CSA.");

22
23 ⁴ There is no hard copy of the Service Agreement sent to each new customer retained in some
24 massive central filing system; rather, coding on each customer's account tells Qwest what Service
25 Agreement would have been sent. *Id.* at ¶ 4. A copy of Plaintiff's account records, redacting certain
personal information for privacy reasons, is attached to the Second Beardsley Declaration. As such,
to the extent, if any, that the Beardsley Declaration could be deemed hearsay for describing the
Plaintiff's account records rather than attaching them, Opp. at 7-8, such arguments are moot.

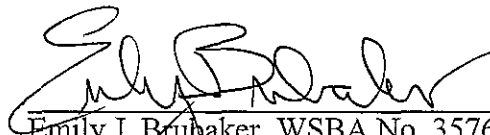
1 *Tsadilas v. Providian Nat'l Bank*, 786 N.Y.S.2d 478, 480 (N.Y. Sup. Ct. 2004) (“Plaintiff
2 consented to it by failing to opt out and by continuing to use her credit cards. Plaintiff is
3 bound by the arbitration provision even if she did not read it.”). “A contrary rule would, of
4 course, invite unacceptable uncertainty into the day-to-day world of commercial and other
5 business dealings.” *Herko v. Met. Life Ins. Co.*, 978 F. Supp. 141, 146 (W.D.N.Y. 1997).

6 Because Qwest is entitled to a presumption that Plaintiff received the Service
7 Agreement and because Plaintiff’s use of Qwest services constituted acceptance, there is a
8 valid contract between Qwest and Plaintiff. The terms of that contract are as provided by the
9 terms and conditions of the Service Agreement, which includes the arbitration provision.⁵

10 As set forth in Qwest’s Motion to Compel Arbitration, all of the prerequisites to
11 compel arbitration are met. There is a written agreement to arbitrate for services involving
12 interstate commerce and the claims fall within the scope of the arbitration clause. 9 U.S.C. §
13 2. As such, Qwest’s motion to compel arbitration and dismiss Plaintiff’s case should be
14 granted.

15 DATED this 24th day of May, 2007.

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20 Emily J. Brubaker, WSBA No. 35763
21 Attorneys for Defendant Qwest Corporation

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23 ⁵ Plaintiff appears to suggest that because she canceled her 360 Mexico plan several months
24 after it began and after she incurred approximately \$20,000 in charges that she is not subject to the
25 arbitration provision. Opp. at 7. The duty to arbitrate, however, attaches to disputes arising from the
services received before Plaintiff cancelled her service. See *Qubty v. Nagda*, 817 So. 2d 952, 956 (Fla.
Ct. App. 2002) (“[I]t is clear that the duty to arbitrate does not necessarily end when a contract is
terminated, as long as the dispute concerns matters arising under the contract.”).

DEFENDANT’S REPLY IN SUPPORT OF MOTION TO
COMPEL ARBITRATION – 5

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