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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Dudley Greer, dba Greer Farms,

No. CV-10-0799-PHX-SMM

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Plaintiff,

ORDER

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v.

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T.F. Thompson & Sons, Inc., et al.,

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Defendants.

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T.F. Thompson & Sons, Inc., et al.,

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Counter-Plaintiffs,

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v.

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Dudley Greer, dba Greer Farms,

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Counter-Defendant.

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Before the Court are: (1) Defendant/Counter-Plaintiff Richard Clemenson Sales Co.’s (“Defendant”) Motion for Determination for Choice of North Dakota Law (“Motion for Determination”) (Doc. 36); (2) Plaintiff/Counter-Defendant Dudley Greer, dba Greer Farms’ (“Plaintiff”) Cross-Motion Regarding Non-Application of North Dakota Law on Waiver of Warranties (“Cross-Motion”) (Doc. 38); and (3) Defendant’s Motion for a Rule 56(f) Continuance of the Plaintiff’s Cross-Motion for Summary Judgment Regarding Non-Application of North Dakota Law on Waiver of Warranties (“Motion for Rule 56(f) Continuance”) (Doc. 39).

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1 Plaintiff has responded (Doc. 37) to Defendant’s Motion for Determination (Doc. 36),
2 and Defendant has replied (Doc. 40). Defendant has responded (Doc. 48) to Plaintiff’s
3 Cross-Motion (Doc. 38), and Plaintiff has replied (Doc. 50). Plaintiff has responded (Doc.
4 43) to Defendant’s Motion for Rule 56(f) Continuance (Doc. 39), and Defendant has replied
5 (Doc. 45). Therefore, the motions are fully briefed and ready for decision.

6 BACKGROUND

7 Plaintiff is an Arizona farmer who produces red potatoes and other crops. (Doc. 1 ¶
8 1.) Defendant is a North Dakota corporation that produces seed potatoes. (Doc. 1 ¶ 3.) In
9 2008, Plaintiff, who was in Arizona, agreed during a telephone conversation with
10 Defendant’s agent, who was in North Dakota, to purchase Defendant’s seed potatoes. (Doc.
11 1 ¶ 7.) Plaintiff paid to ship Defendant’s seed potatoes via a third-party from North Dakota
12 to Arizona. (Doc. 36, Exs. B-H.) The seed potatoes arrived between November 2008 and
13 January 2009 (Doc. 36, Exs. B-H), and Plaintiff began planting them on December 11, 2008
14 in fields located in Waddell, Arizona. (Doc. 37 at 2-3.)

15 After Plaintiff began receiving shipments of Defendant’s potatoes, Defendant sent
16 Plaintiff an invoice dated December 19, 2008 (Doc. 36, Ex. I) and another invoice dated
17 February 5, 2009 (Doc. 36, Ex. J). Printed in red ink on both invoices was language that
18 read: “This contract is made in North Dakota and shall be interpreted, governed and
19 construed according to North Dakota law.” (Doc. 36, Exs. I-J.) Under North Dakota Law,
20 licensed “certified seed potato producers[] and wholesale potato dealers . . . make no
21 expressed or implied warranty of any kind as to the quantity or quality of the crop produced
22 from the seed potatoes or through other produce inspected and certified, including
23 merchantability, fitness for a particular purpose, or absence of disease.” N.D. Cent. Code §
24 4-10-12.1. Further, “[n]either the producer, [or] the seller, . . . make any warranty or
25 representation of any kind, express or implied, as to the quantity or quality of the crop
26 produced from certified seed, including merchantability, fitness for a particular purpose, or
27 absence of disease, or varietal or selection identity. The only representation is that the seed
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1 potatoes were produced, graded, packed, and inspected under the seed certification rules and
2 regulations of the North Dakota state seed department.” N.D. Admin. Code § 74-04-01-03.

3 Plaintiff alleges that the seed potatoes Defendant sold were diseased, causing Plaintiff
4 damages. (Doc. 1 at 5-8). On April 12, 2010, Plaintiff sued Defendant alleging: (1) Breach
5 of Contract/Express Warranty; (2) Breach of Implied Warranty of Merchantability; (3)
6 Breach of Implied Warranty of Fitness for a Particular Purpose; (4) Breach of Implied
7 Covenant of Good Faith and Fair Dealing; (5) Negligence; and (6) Fraudulent Concealment.
8 (Doc. 1 at 5-8.) Defendant filed a Motion for Determination on August 18, 2010, arguing
9 that North Dakota law applies in this case under a choice-of-law provision that the parties
10 allegedly agreed to and because North Dakota has the most significant relationship to the
11 transaction under the Restatement (Second) on Conflict of Laws. (Doc. 36.) Plaintiff
12 contends that he entered no such choice-of-law agreement with Defendant and that Arizona
13 has the most significant relationship to the transaction. (Doc. 37). Plaintiff also filed a
14 Cross-Motion on September 7, 2010, requesting a determination on whether North Dakota
15 law on waiver of warranties applies and raising the issue of whether such a contract term is
16 unconscionable. (Doc. 38.) Defendant on September 10, 2010 filed a Motion for Rule 56(f)
17 Continuance of Plaintiff’s Cross-Motion, alleging that the issues of effectiveness of waivers
18 and unconscionability are fact-intensive and require discovery. (Doc. 39.) After
19 consideration of the issues, the Court finds the following.¹

20 DISCUSSION

21 I. Arizona’s Choice-of-Law Rules

22 In diversity cases, district courts in Arizona must look to Arizona’s choice-of-law
23 rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Arizona courts
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25 ¹ Defendant requested oral argument in connection with their Motion for
26 Determination. (Doc. 36). The parties have had the opportunity to submit briefing.
27 Accordingly, the Court finds the pending motions suitable for decision without oral argument
28 and Defendant’s request is denied. See L.R. Civ. 7.2(f).

1 apply the Restatement (Second) on Conflict of Laws (the “Restatement”) to determine the
2 applicable choice of law in a contract lawsuit. See Patton v. Cox, 276 F.3d 493, 495 (9th Cir.
3 2002); Swanson v. Image Bank, Inc., 77 P.3d 439, 441 (Ariz. 2003). If the parties’ contract
4 contains a choice-of-law provision, the court must decide whether “that choice is ‘valid and
5 effective’ . . . under Restatement § 187.” Cardon v. Cotton Lane Holdings, Inc., 841 P.2d
6 198, 203 (Ariz. 1992). If the parties have not made a valid and effective choice of law, “the
7 contractual rights and duties of the parties are determined by the local law of the state having
8 the most significant relationship to the parties and the transaction.” Cardon, 841 P.2d at 202
9 (1992) (citing Restatement (Second) Conflict of Laws § 188).

10 **II. Whether the Parties Have Made a Valid and Effective Choice of Law**

11 The Court will first determine whether the parties agreed to resolve any problems
12 arising from their contract under North Dakota law. See Restatement (Second) Conflict of
13 Laws § 188 cmt. a. It is undisputed that choice-of-law issues were not discussed when the
14 parties reached an oral agreement on the seed potato sale. Rather, Defendant claims that
15 Plaintiff consented to the application of North Dakota law by not objecting to a choice-of-law
16 provision included in two invoices that Plaintiff received in December 2008 and February
17 2009. (Doc. 36 at 2.)

18 Because the parties did not expressly agree to a choice-of-law provision, the Court
19 must look to the circumstances in which an additional term contained on a written
20 confirmation of an agreement—such as an invoice—functions as an acceptance of that
21 additional term. See Arizona Revised Statutes (“A.R.S.”) § 47-2207(B). In pertinent part,
22 A.R.S. § 47-2207 states that:

23 A. A definite and seasonable expression of acceptance or a written
24 confirmation which is sent within a reasonable time operates as an acceptance
25 even though it states terms additional to or different from those offered or
26 agreed upon, unless acceptance is expressly made conditional on assent to the
27 additional or different terms.

28 B. The additional terms are to be construed as proposals for addition to the
contract. Between merchants such terms become part of the contract unless:

1. The offer expressly limits the terms of the offer.
2. They materially alter it; or

1 provision would also function as a waiver of warranties, including a waiver of “fitness for
2 a particular purpose.” N.D. Cent. Code § 4-10-12.1; N.D. Admin. Code § 74-04-01-03. By
3 contrast, the law in Arizona, which tracks the language of Article 2 of the Uniform
4 Commercial Code, is that warranties of merchantability and fitness for a particular purpose
5 are generally implied in the contracts for the sale of goods. A.R.S. §§ 47-2314-2316. The
6 Court makes no findings as to the existence or non-existence of any warranties or other
7 limitations on liability as they pertain to this case. However, the North Dakota statutes cited
8 above include the type of language that would “normally ‘materially alter’ the contract.”
9 A.R.S. § 47-2207 cmt. 4. Further, the Court agrees with the District Court in Trans-Tec
10 Asia that a majority of courts have found choice-of-law provisions under a variety of
11 circumstances to be a material alteration. 435 F. Supp. 2d at 1025. Therefore, the Court
12 finds that the choice-of-law provision contained in Defendant’s invoice constitutes a material
13 alteration that renders that provision ineffective.

14 **III. Whether Arizona or North Dakota Has the Most Significant Relationship to**
15 **the Transaction and Parties**

16 In determining whether Arizona or North Dakota law applies to the contract between
17 Plaintiff and Defendant, the Court will look to which state “has the most significant
18 relationship to the transaction and the parties under the principles of § 6.” Restatement
19 (Second) Conflict of Laws § 188(1); see also Aries v. Palmer Johnson, Inc., 735 P.2d 1373,
20 1381 (Ariz. Ct. App. 1987). Under Restatement § 6, the Court should consider the following
21 factors when addressing any choice-of-law decision: “(a) the needs of the interstate []
22 systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested
23 states and the relative interests of those states in the determination of the particular issue, (d)
24 the protection of justified expectations, (e) the basic policies underlying the particular field
25 of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination
26 and application of the law to be applied.” Id. § 6. When applying the principles of § 6 to
27 contracts cases, the Court should consider the following factors: “(a) the place of
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1 contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the
2 location of the subject matter of the contract, and (e) the domicile, residence, nationality, place
3 of incorporation and place of business of the parties.” Id. § 188(2). “The contacts are to be
4 evaluated according to their relative importance with respect to the particular issue.” Id. §
5 188(2).

6 The Court will first look at the factors set forth in Restatement § 188(2). As the
7 parties acknowledge, the (a) place of contracting and (b) place of negotiation are not
8 pertinent factors, as the agreement was reached while Plaintiff was in Arizona, and
9 Defendant and its agent were in North Dakota. (Doc. 36 at 7; Doc. 37 at 15); see also
10 Restatement (Second) Conflict of Laws § 188(a)-(b), cmt. subsec. (2)(e) (“This [place of
11 negotiation] contact is of less importance when there is no one single place of negotiation and
12 agreement, as, for example, when the parties do not meet but rather conduct their
13 negotiations from separate states by mail or telephone.”) The (e) domicile, residence,
14 nationality, place of incorporation and place of business of the parties also provides scant
15 guidance, as Plaintiff and his business are based in Arizona and Defendant is based in North
16 Dakota. (Doc. 1 at 1); Restatement (Second) Conflict of Laws § 188(2)(e). Both parties
17 agree that Defendant performed by shipping the potatoes from North Dakota. (Doc. 36 at
18 7, Doc. 50 at 9.) Though the act of performing payment apparently required Plaintiff and his
19 bank to initiate payment in Arizona so that payment could be received by Defendant and its
20 bank in North Dakota, payment was ultimately made in North Dakota. Restatement (Second)
21 Conflict of Laws § 188(2)(c).

22 The last Restatement § 188(2) factor that the Court will consider when determining
23 whether Arizona or North Dakota “has the most significant relationship to the transaction
24 and the parties” is “(d) the location of the subject matter of the contract.” See Restatement
25 (Second) Conflict of Laws § 188(2)(d). The comment regarding Restatement § 188(2)(d)
26 holds:

