

THE HONORABLE THOMAS S. ZILLY

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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' MOTION TO  
TRANSFER

**NOTE ON MOTION CALENDAR:  
FRIDAY, APRIL 17, 2009**

**ORAL ARGUMENT REQUESTED**

Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corp., and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest") submit the following Motion to Transfer to the United States District Court for the District of Colorado.

**INTRODUCTION**

Pursuant to 28 U.S.C. § 1404(a), this purported fourteen-state class action case should be transferred to the United States District Court for the District of Colorado where each of the Defendants maintains its principal place of business, the vast majority of witnesses, evidence, and other sources of proof reside, for the convenience of the witnesses and parties, and in the



1 Ex. A.) Qwest's principal place of business and corporate headquarters is located in Denver,  
2 Colorado. (Am. Compl. ¶¶ 4-8.) The product group is located in Colorado. (Leo Decl. ¶ 11).  
3 Significant decisions concerning Qwest's consumer policies and communications and Qwest's  
4 pricing and billing are made in Denver. (*Id.* ¶ 15.)

5 A consumer can order Qwest's high speed internet service on the telephone or over the  
6 internet. (Am. Compl. ¶ 12; Leo Decl. ¶¶ 18, 20.) Colorado is the location of more of Qwest's  
7 consumer care and consumer sales call centers than anywhere else in the country, and no such  
8 call centers are located in Washington. (*Id.* ¶ 12.) Additionally, the computers that store  
9 Qwest's customer records are located primarily in Colorado and Nebraska. (*Id.* ¶ 14.)

10 Plaintiffs each subscribed to Qwest's high speed internet service. (Am. Compl. ¶¶ 18,  
11 25, 29.) Plaintiff Durkin resides in Minnesota and Plaintiffs Vernon and Sandquist reside in  
12 Washington. (*Id.* ¶ 3.) In 2008, Plaintiffs each terminated their internet services. (*Id.* ¶¶ 19,  
13 26, 30.) Each of the named Plaintiffs had signed up for a two-year term with Qwest and  
14 obtained the resulting discount from the standard price of their internet service. (Leo Decl.  
15 ¶ 26.) Qwest's High Speed Internet Subscriber Agreement ("Subscriber Agreement"), which  
16 specifies Colorado law in a choice-of-law provision and was drafted in Colorado, provides that  
17 if such customers terminate their service prior to the expiration of the term, they are required to  
18 pay a termination liability assessment for their breach of the contract. (Subscriber Agreement  
19 ¶¶ 12(c), 17; Leo Decl. ¶ 13, Ex. B.)

20 Plaintiffs filed a multiple-state putative class action alleging that they did not enter into  
21 long term contracts with Qwest or that if they did enter into such contracts, the termination  
22 liability assessment charged is an unenforceable penalty. (Am. Compl. ¶¶ 21, 26, 28, 35, 36,  
23 45.) Plaintiffs also allege that Qwest deceives consumers about the existence and substance of  
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25 Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah,  
Washington, and Wyoming.

1 the contracts in violation of state consumer protection acts in fourteen states. (*Id.* ¶¶ 54-64.)

2 Plaintiffs challenge Qwest's assertions that they entered into multiple-year contracts.  
3 (*Id.* ¶¶ 21, 26, 28, 31, 69.) The Qwest employees who can explain the process flow during an  
4 internet service order and the design, training, and implementation for disclosures of the multi-  
5 year term and related termination liability during sales and order calls are located in and will  
6 testify concerning documents located in Colorado. (Leo Decl. ¶¶ 11, 14-17.)

7 Once a customer has ordered high speed internet service for a multi-year term, the  
8 customer's order is confirmed with a welcome letter and with a notation on the customer's bill.  
9 (*Id.* ¶¶ 22-23). Additionally, new subscribers receive an installation CD that requires  
10 subscribers to agree to the Subscriber Agreement in order to configure their modem for  
11 Qwest's high speed internet services. (*Id.* ¶ 21.) These disclosures, which are relevant to the  
12 contract formation that the Plaintiffs challenge, were developed in Denver, Colorado.

13 Plaintiffs allege that Qwest misleads consumers when it advertises internet services on  
14 local phone bills, the internet, and television and by mailing promotional materials throughout  
15 its service area. (Am. Compl. ¶ 11.) Qwest's marketing and advertising departments are  
16 located in Denver, Colorado, and thus the witnesses and documents related to such marketing  
17 and advertisements will be located in Denver, Colorado. (Leo Decl. ¶ 16.)

18 Plaintiffs further allege that the termination liability assessment that is charged when a  
19 subscriber breaches the agreement with Qwest constitutes an unlawful penalty. (Am. Compl.  
20 ¶¶ 44-49.) In the event such claims are not dismissed, testimony and documents regarding  
21 such matters will come from Qwest employees and document in the high speed internet  
22 product group and pricing group in Colorado. (Leo Decl. ¶¶ 11-16.) Finally, though the case  
23 lacks merit that would lead to damages assessments, the witnesses and records that would  
24 reflect matters related to such questions are generally located in Denver, Colorado. (*Id.*)

1 **ARGUMENT**

2 **THE DISTRICT OF COLORADO IS THE MORE**  
3 **APPROPRIATE AND CONVENIENT FORUM FOR THIS CASE.**

4 This matter should be transferred to the United States District Court for the District of  
5 Colorado. The federal statute that permits transfer of venue authorizes such a transfer when  
6 the matter might have brought in the transferee court and "[f]or the convenience of parties and  
7 witnesses, in interest of justice." 28 U.S.C. § 1404(a). With each of the Defendants  
8 maintaining its principal place of business in Colorado and many of the challenged actions  
9 taking place in Colorado, there can be no dispute this case "might have been brought"  
10 originally in Colorado. *Id.*; *see also* 28 U.S.C. § 1391.

11 This District and the Ninth Circuit have applied the following factors when reviewing  
12 requests for transfer:

- 13 (1) the location where the relevant agreements were negotiated and executed,  
14 (2) the state most familiar with the governing law, (3) plaintiff's choice of  
15 forum, (4) the respective parties' contacts with the forum, (5) the contacts  
16 relating to the plaintiff's cause of action in the chosen forum, (6) the differences  
17 in the costs of litigation in the two forums, (7) the availability of compulsory  
18 process to compel attendance of unwilling non-party witnesses, and (8) the ease  
19 of access to sources of proof.

20 *Longview Fibre Paper & Packaging, Inc., v. U.S. Corrug., Inc.*, No. C-08-5229BHS, 2008 WL  
21 3875412, at \*3 (W.D. Wa. Aug. 18, 2008) (granting motion to transfer to Iowa, citing *Jones v.*  
22 *GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000)).<sup>2</sup> The majority and most  
23 compelling of these factors weigh in favor of transfer.

24 **A. Differences In The Costs Of Litigation Between The Two Forums And Ease**  
25 **Of Access To Sources Of Proof Strongly Favor Colorado.**

Litigation costs and ease of access to sources of proof both weigh heavily in favor of  
transfer. The vast majority of witness and documents relevant to Plaintiffs' claims are located

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<sup>2</sup> Because orders on motions to transfer venue are infrequently published, Qwest cites in this motion to several unpublished opinions.

1 in Colorado. While Plaintiffs Vernon and Sandquist are located in Washington, they have  
2 already disclaimed receiving any contract, and named plaintiffs in class action cases generally  
3 contribute little to the development of their case. *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152,  
4 1157 (S.D. Cal. 2005). Plaintiffs Vernon and Sandquist add no more to this case than would  
5 named plaintiffs from Colorado. That two named Plaintiffs reside in Washington does not  
6 change the fact that little to no sources of proof are located in Washington.

7 It is simple logic that "litigation costs are reduced when venue is located near most of  
8 the witnesses expected to testify or be deposed." *Nordquist v. Blackham*, No. C06-5422 FDB,  
9 2006 WL 2597931, at \*4 (W.D. Wa. Sept. 11, 2006); *see HSD Corp.*, 2006 WL 1075207, at \*4  
10 (same); *Italian Colors Rest. v. Am. Express Co.*, No. C 03-3719 SI, 2003 WL 22682482, at \*5  
11 (N.D. Cal. Nov. 10, 2003). For example, in *Italian Colors* the court transferred a putative class  
12 action brought by California merchants in a California court to a court in New York, where the  
13 defendants maintained their principal place of business. The court found that because the  
14 plaintiffs purported to bring a class on behalf of similarly-situated individuals across the  
15 nation, interchangeable plaintiffs could be found in the transferee district. *Id.* at \*4. The court  
16 noted that "the cost of litigation will be substantially lessened if the action is venued in the  
17 same district where most of the documentary evidence is found" and that the plaintiff "can be  
18 expected to contribute comparatively little documentary evidence to the action." *Id.* The court  
19 also found that the "litigation cost" factor weighed heavily in favor of transfer because "most  
20 of the witnesses will be the defendants' employees" who were located at the defendants'  
21 principal place of business in the district of the proposed transferee court. *Id.*

22 The same logic applies to this case and the result should also be the same: a transfer to  
23 the district of the Defendants' principal place of business. *See also Howell v. Shaw Indus.*, No.  
24 Civ. 93-2068, 1993 WL 387901, at \*5 (E.D. Pa. Oct. 1, 1993) (granting transfer to venue of  
25 defendants' headquarters and finding that in a class case, plaintiff's testimony is minimal and

1 the critical evidence will come from defendants).

2 Related to litigation cost, the intangible factor of witness convenience "is often the  
3 most important factor when determining which forum would be the most convenient."  
4 *Nordquist*, 2006 WL 2597931, at \*4 (citations omitted); *Bolton v. Tesoro Petroleum Corp.*,  
5 549 F. Supp. 1312, 1315 (E.D. Pa. 1982)) (granting transfer to district of defendant's  
6 headquarters and holding availability and convenience of witnesses is "perhaps the paramount  
7 consideration" in evaluating a transfer). The United States District Court for the District of  
8 Colorado is located approximately one-third of a mile from Qwest's corporate headquarters  
9 where the majority of likely witnesses in this case work. Whereas this Court is approximately  
10 1331 miles distant.

11 The majority of the witnesses likely to testify in this case and the bulk of documents  
12 relevant to Plaintiffs' allegations are located in Colorado. The broadband product group is  
13 located in Colorado. (Leo Decl. ¶ 11.) The persons involved in developing the termination  
14 liability assessment and related discounts; developing the content and flow of Qwest's website,  
15 including the order flow; providing training for Qwest's call representatives, including training  
16 related to the disclosure of termination liability assessments and the recording of consumers'  
17 agreements to multi-year terms; and developing and maintaining the installation discs shipped  
18 to new subscribers all reside in Colorado. (*Id.*) It would be more convenient for these  
19 witnesses and other Qwest employees who are likely to testify if the case were transferred. (*Id.*  
20 ¶¶ 11-16.)

21 Concomitantly, the costs of this litigation would be decreased if these witnesses, along  
22 with Qwest's corporate representatives, were not required to fly to Washington for the trial and  
23 other evidentiary hearings, including hearings on class certification. Plaintiffs have identified  
24 several witnesses from Washington who have general information concerning Qwest's business  
25 practices and the Subscriber Agreement. However, there is no indication that these witnesses

1 have any more information than would a similar witness from any other of the fourteen states  
2 purportedly represented.

3 For these reasons, courts often transfer putative class actions to the forum where the  
4 defendant's corporate headquarters are located, and Defendants respectfully submit that the  
5 same result should obtain here. *See Bolton*, 549 F. Supp. at 1315-17 (granting transfer,  
6 collecting cases transferred to the court of defendants' headquarters, and noting that "it is  
7 enormously helpful in the litigation of a complex matter to have the trial judge sitting in the  
8 district where most of the documents and witnesses are located"); *Manoochehr Fallah*  
9 *Moghaddam v. Dunkin Donuts*, No. 02-60045-CIV-ZLOCH, 2002 WL 1940724, at \*1 (S.D.  
10 Fla. Aug. 13, 2002) (transferring class action to court in jurisdiction where defendant's  
11 headquarters are located and holding convenience of witnesses is "a primary, if not the most  
12 important factor") (citation omitted).

13 **B. Availability Of Compulsory Process Favors Colorado.**

14 Qwest is not currently aware of any witness with information relevant to this case that  
15 would be unwilling to testify. Logic dictates, however, that to the extent that such witnesses  
16 exist, they are likely individuals associated with or formerly employed by Qwest and it is more  
17 likely that such witnesses would be in Colorado rather than in Washington.

18 **C. Location Where Agreements Were Negotiated And Executed Favors  
19 Colorado.**

20 The location of the negotiation and execution of the contracts either tips in favor of  
21 Colorado or is neutral. The Subscriber Agreement was drafted in Colorado. (Leo Decl. ¶¶ 11,  
22 15-17.) When customers call to order internet service over the telephone, they are told about  
23 and asked to confirm their acceptance of the contract by the sales representative. (*Id.* ¶¶ 18-  
24 19.) More of Qwest's customer sales centers are located in Colorado than in any other state.  
25 None are in Washington. (*Id.* ¶ 12.) Additionally, the records regarding customers' contracts  
and contacts with Qwest reside primarily in or can be accessed from Colorado. (*Id.* ¶¶ 8-10.)

1 The class that Plaintiffs seek to represent includes customers who accepted the terms of  
2 Qwest's Subscriber Agreement from their homes in fourteen states, including Colorado. The  
3 Plaintiffs accepted the contracts in Minnesota and Washington. Thus, this factor favors  
4 Colorado, or, at worst, is neutral. *See Italian Colors*, 2003 WL 22682482, at \*5 (granting  
5 transfer and holding that where plaintiff purported to represent a class "there is nothing unique  
6 or probative about" the plaintiff's location); *Nordquist*, 2006 WL 2597931, at \*3 (granting  
7 transfer to Texas and finding that where one party executed contract in forum state and one  
8 party executed contract in proposed transferee state, factor concerning location of execution of  
9 contract did not weigh heavily for or against transfer).

10 **D. State That Is Most Familiar With The Governing Law Favors Colorado.**

11 Per the Subscriber Agreement and a choice of law analysis, Colorado law applies, and  
12 Colorado courts are most familiar with Colorado law. The Subscriber Agreement states that  
13 "Colorado state law . . . shall otherwise govern and apply to any and all claims or disputes."  
14 (*See Ex. B ¶ 17(a)(1).*) This factor favors transfer to Colorado. *See Nordquist*, 2006 WL  
15 2597831, at \*3 (finding choice of law provision applying law of state of proposed transferee  
16 court favored transfer).

17 Alternatively, Plaintiffs purport to state claims under the laws of fourteen states  
18 including Colorado (Am. Compl. ¶¶ 46, 55), such that no favor should be given to this forum.

19 **E. Plaintiffs' Choice Of Forum.**

20 Plaintiffs' choice of forum is entitled to little deference because Plaintiffs purport to  
21 bring a fourteen-state class action, because the Plaintiffs have likely engaged in forum-  
22 shopping, and because the actions complained of were largely conducted in or directed from  
23 Colorado.

24 First, "[a]lthough great weight is generally accorded plaintiff's choice of forum, when  
25 an individual brings a derivative suit or represents a class, the named plaintiff's choice of

