

THE HONORABLE THOMAS S. ZILLY

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Robin Vernon, Rory Patrick Durkin, and Bryan Sandquist, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

Qwest Communications International, Inc., a Delaware Corporation; Qwest Services Corporation, a Colorado Corporation; Qwest Corporation, a Colorado Corporation; Qwest Communications Corporation, a Delaware Corporation; and Qwest Broadband Services, Inc., a Delaware Corporation,

Defendants.

NO. 2:08-cv-01516 TSZ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

NOTE ON MOTION CALENDAR: APRIL 17, 2009

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1 **I. INTRODUCTION**

2 In this proposed consumer class action, the corporate defendants (“Qwest”) seek
3 transfer to the District of Colorado, where Qwest’s corporate headquarters are located and it is
4 a major employer. Qwest gives short shrift to named Plaintiffs Robin Vernon and Bryan
5 Sandquist’s residence in this district and downplays that the case is brought on behalf of
6 consumers throughout Washington and the other states where Qwest provides high-speed
7 internet service. Instead, Qwest argues that even though it is the local telephone company for
8 Washington consumers, and has repeatedly initiated litigation in this forum, litigating in the
9 Western District of Washington is inconvenient and compels transfer to Colorado.

10 Qwest fails to meet its burden to show Plaintiffs’ choice of forum should be so lightly
11 disregarded. Qwest fails to identify any non-party witnesses who will be inconvenienced if the
12 action is not transferred. Qwest fails to specify how expenses will be increased in this forum.
13 Qwest fails to show Colorado is the forum most familiar with the governing law. And, Qwest
14 fails to show transfer is compelled by the interests of justice. As detailed below, Qwest’s
15 motion to transfer pursuant to 28 U.S.C. § 1404(a) should be denied.

16 **II. ARGUMENT**

17 **A. Deference to Plaintiffs’ Choice of Forum Weighs Against Transfer**

18 Qwest brings its motion pursuant to 28 U.S.C. § 1404(a), which provides that:

19 For the convenience of parties and witnesses, in the interest of
20 justice, a district court may transfer any civil action to any other
district or division where it might have been brought.

21 Applying this statute, the Ninth Circuit considers ten factors, many of which are interrelated.
22 *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-9 (9th Cir. 2000) (setting forth factors
23 to be considered by courts deciding whether transfer is appropriate under 28 U.S.C. § 1404(a)).¹
24 Paramount to this analysis is an overriding deference to the plaintiff’s choice of forum.

25 _____
26 ¹ The ten *Jones* factors are: (1) the location where the relevant agreements were negotiated and executed; (2) the
27 state that is most familiar with the governing law; (3) the plaintiff’s choice of forum; (4) the respective parties’
contacts with the forum; (5) the contacts relating to the plaintiff’s cause of action in the chosen forum; (6) the
differences in the costs of litigation in the two forum; (7) the availability of compulsory process to compel

1 The Ninth Circuit has long recognized this deference, explaining section 1404(a)

2 . . . carries a strong presumption that plaintiff's choice of forum
3 will not be disturbed. The presumption can be overcome only by
4 a compelling showing that the convenience of parties and
5 witnesses will be served by the transfer. . . . This interpretation of
6 section 1404(a) is consistent with the traditional rule, which gave
7 plaintiff's almost complete power to select the forum . . . and a
8 judicial recognition that, by passing section 1404(a), Congress
9 intended to disturb the plaintiff's choice of forum only for very
10 strong reasons.

11 *In re: American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1546 (9th Cir.
12 1996) (internal citations omitted). *See also Laumann Mfg. Corp. v. Castings USA, Inc.*, 913
13 F. Supp. 712, 721 (E.D.N.Y. 1996) (holding plaintiff's choice of forum should only be
14 disturbed by a § 1404(a) motion if plaintiff's choice of forum is "completely and utterly
15 outweighed by the *severe* inconvenience of the defendant.") (emphasis added).

16 Qwest seeks to avoid application of this well-established rule by claiming less deference
17 should be given to Plaintiffs' choice of forum because this is a class action. Qwest Mot. at 10.
18 But what Qwest fails to address is that not only did Plaintiffs choose this forum, but Ms.
19 Vernon and Mr. Sandquist are Washington residents.² Ms. Vernon and Mr. Sandquist's claims,
20 as well as the claims of thousands of other Washington residents, arose in this forum. Courts in
21 this Circuit have held that in these circumstances, Plaintiffs' choice of forum is still entitled to a
22 strong presumption in their favor even though they seek to represent a class. *See Ellis v.*
23 *Costco Wholesale Corp.*, 372 F. Supp. 2d 530, 544 (N.D. Cal. 2005) (distinguishing *Lou v.*
24 *Belzberg*, 834 F.2d 730 (9th Cir. 1987), cited by Qwest; holding "deference to the choice of

25 attendance of unwilling non-party witnesses; (8) the ease of access to sources of proof; (9) the presence of a forum
26 selection clause; and (10) the relevant public policy of the forum state.

27 ² Qwest also accuses Plaintiffs of engaging in forum shopping. Surely no case has ever held plaintiffs engage in
"forum shopping" when they file in the forum where they reside and where their injuries occurred. Indeed, the
opposite is the case. *See Grubs v. Consol. Freightways, Inc.*, 189 F. Supp. 404, 409 (D. Mont. 1960) (placing
"high significance" on plaintiffs' chosen forum where plaintiffs were "bona fide residents of the judicial district");
Sierra Club v. Van Antwerp, 523 F. Supp. 2d 5, 11-12 (D.D.C. 2007) (holding plaintiffs entitled to a strong
presumption in favor of the chosen forum where at least one of five plaintiffs resided in district where action
filed); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d 66, 71 (D.D.C. 1998) (noting the general rule
of substantial deference to plaintiff's chosen form is "particularly true" where plaintiff is resident of the forum).

1 forum for the entire class should be preserved, because a named plaintiff has brought the action
2 in the judicial district with which she has had the most extensive contacts.”).³

3 Given the breadth of Qwest’s business operations in this district and throughout
4 Washington, Qwest’s complaints about the inconvenience of litigating in Washington are
5 unconvincing. *See AMF, Inc. v. Computer Automation, Inc.*, 532 F. Supp. 1335, 1344 (S.D.
6 Ohio 1982) (noting “Defendant’s original choice to transact business in a forum distant from its
7 main office detracts somewhat from its present unsupported allegations of financial burden”);
8 *Country Maid, Inc. v. Haseotes, Inc.*, 312 F. Supp. 1116, 1118 (E.D. Pa. 1970) (finding
9 defendants’ decision to conduct substantial activities in area removed from corporate
10 headquarters prevented them from attaching compelling significance to that fact in moving for
11 transfer). Not only does Qwest conduct an enormous amount of business in this forum, it has
12 repeatedly initiated actions in this forum as a plaintiff.⁴ Given these realities, Qwest cannot
13 make the “strong showing” required to transfer this action. *See Decker Coal Co. v.*
14 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (noting “a strong showing of
15 inconvenience” required to “upset[] the plaintiff’s choice of forum”).

16 While Qwest’s extensive business in this forum is readily apparent, Qwest cannot show
17 the named Plaintiffs have any connection to Colorado. This forum is obviously more
18 convenient for Ms. Vernon and Mr. Sandquist, because they reside in Washington and their
19 claims arose here. As for Mr. Durkin, a Minnesota resident, he chose to bring his claims in this
20 forum and Qwest cannot demonstrate it would be more convenient for Mr. Durkin to litigate in
21

22 ³ Qwest’s other cases are similarly distinguishable. *See, e.g., Italian Colors Rest. v. Am. Express Co.*, 2003 WL
23 22682482 at *4, 7 (N.D. Cal. Nov. 10, 2003) (holding transfer appropriate because plaintiffs filed suit three times
24 in different forums, dismissing cases when a forum proved less than ideal, and the court “rationally infer[red]
forum shopping”); *Trout Unlimited v. Lohn*, 2006 WL 2927737 at *2-3 (W.D. Wash. Oct 10, 2006) (transferring
case to Oregon because majority of plaintiffs resided or worked there).

25 ⁴ *See, e.g., Qwest Corporation v. Anovian Inc., et al.*, Case No. 2:08cv-01715 (W.D. Wash., filed Nov. 26, 2008);
26 *Qwest Communications International, Inc. v. Sony Corporation*, Case No. 2:06cv00020 (W.D. Wash., filed Jan. 6,
27 2006); *Qwest Corporation v. Centillion Data Systems LLC, et al.*, Case No. 2:04cv01088 (W.D. Wash., filed Ap.
15, 2002); *Qwest Communications International, Inc. v. Dataqwest Inc.*, Case No. 3:04cv05295 (W.D. Wash.,
filed May 21, 2004).

1 Colorado. At best, this factor is neutral as to Mr. Durkin. Similarly, with respect to the
2 proposed class members, Qwest has not shown Colorado is a more convenient forum than this
3 Court. In sum, Qwest has failed to make a “strong showing” that the parties’ convenience
4 weighs in favor of transfer to Colorado. Plaintiffs’ choice of forum should prevail.

5 **B. The Other Relevant *Jones* Factors Do Not Support Transfer**

6 **1. The Convenience of the Witnesses**

7 In order to demonstrate the convenience of the witnesses weighs in favor of transfer, a
8 party moving under § 1404(a) is required to list the inconvenienced witnesses and explain how
9 their testimony is material. *Asymetrix Corp v. Lex Computer & Mgmt. Corp.*, 1995 WL 843059
10 at *4 (W.D. Wash. Jan 24, 1995) (denying transfer where defendant failed to identify
11 inconvenienced witnesses). Qwest fails to identify a single non-party witness who can only be
12 compelled to attend trial if this action is venued in Colorado. While Qwest speculates such
13 witnesses may exist, this is insufficient to satisfy Qwest’s burden of demonstrating witness
14 convenience favors transfer. *See Saperstone v. Kapelow*, 279 F. Supp. 781, 783 (S.D.N.Y.
15 1968) (“defendants have not shown that the testimony of their nonparty witnesses in Texas will
16 relate to vital questions or that depositions would be insufficient.”)

17 Indeed, the only potentially inconvenienced witnesses Qwest identifies are its *own*
18 *employees*. But, courts give little weight to companies seeking transfer under 1404(a) by citing
19 their own employees’ inconvenience. *Gardipee v. Petroleum Helicopters, Inc.*, 49 F. Supp. 2d
20 925, 929 (E.D. Tex. 1999) (“Where, as here, the key witnesses of the party seeking transfer are
21 employees of that party, their convenience is entitled to less weight because that party will be
22 able to compel their testimony at trial.”); *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 730-
23 31 (S.D. Tex. 2002) (“[T]hese witnesses are entitled to less deference since most are
24 [defendant’s] employees.”). Qwest can readily produce its own employees for trial.

25 Finally, transfer is not appropriate if doing so would merely shift the purported
26 inconvenience from one party to another. *See Decker Coal Co.*, 805 F.2d at 843 (denying
27

