

Sherman Declaration

Exhibit A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

J.C. VAN APELDOORN and E T MEIJER, In their Capacity as Trustees in Bankruptcy for KPNQwest N.V., <i>et al.</i> , <i>Plaintiffs,</i> v. QWEST COMMUNICATIONS INTERNATIONAL, INC., JOHN A McMASTER, JOSEPH P. NACCHIO, ROBERT S. WOODRUFF and DEFENDANTS 1-10, <i>Defendants.</i>	Civil Action No. 04-CV-3026 (JCL) BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO COMMENCE DISCOVERY
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The plaintiff trustees in bankruptcy for KPNQwest (“Trustees”) file this Motion to Commence Discovery to follow-up on correspondence with the Court on the same topic. Copies of the correspondence are attached to the Certification of Melvyn H. Bergstein at exhibits B through L.

Initial disclosures and discovery in this action need to be commenced. As set forth more fully in the attached correspondence, the Court has concluded that the Trustees’ claims properly belong in this Court and therefore denied defendants’ motion to stay this action and compel arbitration. Accordingly, just like plaintiffs in any other civil action properly pending before this Court, the Trustees – as well as defendants – are entitled to seek discovery under the Federal and Local Civil Rules.

Many other lawsuits have been filed against defendant Qwest (and the individual defendants), and much discovery in those cases is already underway. Thus, permitting discovery in the instant action will not open floodgates, but rather will introduce the possibility of sensible coordination between this action and numerous related actions. Indeed, as noted in the attached correspondence, the Trustees already are in receipt of hundreds of thousands of Qwest documents as the result of a joint cooperation agreement between Trustees and plaintiffs in a related case (*Grand, et al. v. Nacchio, et al.*, No. C 20025348 (Superior Court of Arizona, County of Pima)).¹

¹ See June 24, 2005 Letter from Melvyn Bergstein (Bergstein Cert. at Exhibit M) at 2; June 30, 2004 Letter from Thomas Curtin (Bergstein Cert. at Exhibit N) at 2. Qwest
(continued...)

Discovery – or at least discovery by Trustees against defendants – is already *de facto* underway.

Thus, the real import of any order by this Court to permit discovery will essentially be limited to the following: (1) Defendants for the first time will be permitted to initiate discovery against Trustees (to which Trustees do not object²); and (2) plaintiffs will be able to better coordinate their discovery with other cases – and will be able to supplement discovery already received through the *Grand* litigation – through additional targeted requests.

It bears repeated emphasis that prejudice from the passage of time poses an extremely significant risk if discovery is not opened now. There is already one critical incident of potentially lost or destroyed data. Defendant McMaster's computer hard drive has now been secured (in the *Grand* case) and thousands of documents restored

(. continued)

and certain of the individual defendants also are or were defendants in several other related cases – including cases in which discovery has occurred and/or is ongoing. *See, e.g., SEC v. Qwest Communications Intl., Inc.* (U.S. District Court, District of Colorado, No. 04-7-2179); *SEC v. Nacchio, et al.* (U.S. District Court, District of Colorado, No. 05-MK-480); *California State Teachers Retirement System v. Qwest, et al.* (California Superior Court, County of San Francisco, No. 415546); *Taft v. Ackermans* (U.S. District Court, Southern District of New York, No. 02-CV-7951); *In re Qwest Communications Intl., Inc. Securities Litigation* (U.S. District Court, District of Colorado, No. 01-RB-1451 (CBS))

² *See* July 1, 2005 Letter from Melvyn Bergstein (Bergstein Cert. at Exhibit O) at 1

– but only at the insistence of Trustees and the *Grand* plaintiffs.³ The preservation of other electronic data – including hard drives of other key players – has not been secured, at least to Trustees’ knowledge. It is imperative that discovery be permitted in order to insure that all relevant electronic records are being appropriately collected and secured.⁴ Indeed, Local Civil Rule 26(d)(1) specifically requires the parties to address these sorts of preservation, production and restoration issues with respect to electronic documents.

³ On January 26, 2005, plaintiffs wrote to the Court to express their concern that – in the course of the *Grand* (Arizona) litigation – defendants had discovered 7,500 pages of material that had been deleted from Defendant McMaster’s computer hard drive. *See* Bergstein Cert. at Exhibit J at 2. McMaster’s counsel responded the next day with a letter to the Court indicating that the material had not been deleted, but had not been copied from McMaster’s hard drive to the CD of documents that McMaster was producing to the Arizona plaintiffs. *See* Bergstein Cert. at Exhibit K at 2. The Trustees then supplied the Court with a portion of a transcript from the Arizona proceedings in which McMaster’s counsel described a “forensic” investigation of McMaster’s hard drive to obtain additional documents. Bergstein Cert. at Exhibit L. While the Trustees do not have a complete understanding of the machinations of that “forensic” effort, we understand that McMaster has since produced (or soon will produce) even more materials (encompassing a total of more than 20,000 pages) from his hard drive. The Trustees obviously have a direct interest in McMaster’s hard drive and any related forensic investigation, and the sooner this and other electronic materials are produced to the Trustees, the greater assurance there will be that all documents are being properly safeguarded.

⁴ Qwest was a telecommunications company and, based on the materials we have received from the *Grand* litigation, it is clear that many of Qwest’s employees – including many of the key witnesses in this case – used e-mail and other electronic media for many of their communications. Accordingly, much of the key discovery in this case is expected to focus on the electronic communications (e-mail) that can still be retrieved from the computers (including laptops) of the key individuals.

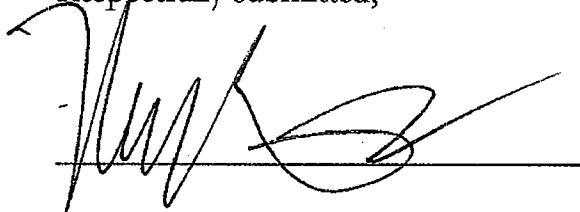
More than a year has passed since the Trustees filed their complaint in this case. Defendant's Answer has not yet been filed but is now overdue, and defendants are in technical default. Apparently, defendants feel somehow entitled to have the case remain in limbo, without any order to that effect from the Court

This Court's initial Order in this case was to direct discovery to proceed. *See* August 23, 2004 Letter Order Pursuant to Rule 16 (Bergstein Cert. at Exhibit A). That Order was for a time extended, somewhat informally. But, now is the time to put this case back into its normal posture and for discovery to proceed under the Federal and Local Rules as it would in any other civil action.

For reasons more fully explained in the attached correspondence, we ask that the Court set firm dates for compliance with the Court's August 23, 2004 Order regarding disclosures and discovery. In particular, we request that the Court order that Rule 26 information be exchanged within thirty (30) days of entry of the proposed Order, that the parties may immediately serve interrogatories and requests for production upon entry of said Order, and then an initial phase of depositions may proceed as necessary to ensure proper preservation of documents and other evidence.

August 9, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Melvyn H. Bergstein', is written over a horizontal line.

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