

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

3 CITY OF PARMA,)
4 Plaintiff,) Judge Polster
5 vs.) Cleveland, Ohio
6 CINGULAR WIRELESS, LLC,) Civil Action
7 Defendant.) Number 05CV1471

8 - - - - -
9 TRANSCRIPT OF PROCEEDINGS HAD BEFORE
10 THE HONORABLE DAN AARON POLSTER,
11 JUDGE OF SAID COURT,
12 ON THURSDAY, NOVEMBER 2, 2006
- - - - -

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1 Thursday Sessi on, November 2, 2006, at 10:30 A.M.
2 THE COURT: We' re here on Case 1: 05CV1471,
Page 1

3 Parma versus Cingular Wireless. Let's see. For Parma,
4 we've got Mr. Kri slov, Mr. Vander Vliet, Mr. Shaper and Mr
5 Dobeck. And for Cingular Wireless, we've got Mr. McCaffrey
6 and Ms. Kirshner. We're here on a hearing on Cingular
7 Wireless's motion to dismiss this case for lack of case or
8 controversy.

9 I'm not going to summarize the -- everything that's
10 happened over the last year and a half, but I just want to
11 put a few things on the record.

12 This case began, I believe, in April of 2005 when
13 Parma filed its complaint. There are two counts. Parma was
14 seeking in the first count relief for anticipatory breach by
15 Cingular of its lease agreement for a cell tower, and in the
16 second count for declaratory judgment, that the lease did
17 not give Cingular the unilateral right to terminate the
18 contract within the term of the contract for business
19 reasons, or put another way, that the lease was very clear
20 there were only two reasons for which term -- Cingular could
21 terminate the contract; one was Cingular could not get or
22 lost Government approval, and second, if the premises became
23 unacceptable or unusable.

24 And the incident or -- what precipitated the lawsuit
25 was some communications, I believe both orally and in

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1 writing, from a representative or agent of Cingular to
2 Parma, which Parma interpreted as a threat by Cingular to
3 terminate the lease within the lease term. And just so the
4 record's clear, the lease began July of 1997. It was
5 structured in a series of five-year terms with automatic
6 rent escalators.

7 The lease by its terms automatically renews for a
8 succeeding five-year period. However, Cingular has the
9 unilateral option to terminate the lease for any reason at
10 the end of the five years by giving written notice within
11 the five five-year period.

12 And the -- we're in the second five-year period of the
13 lease. The current term ends July 30th of 2007. It's fair
14 to say from the outset, Cingular maintained that there was
15 no case or controversy. That's been Cingular's consistent
16 position, and Parma has consistently maintained there is a
17 case of controversy.

18 The Court expressed some concern as to whether there
19 was a case or controversy, and that was one of the reasons
20 the Court worked so hard to try and mediate a resolution of
21 this matter.

22 As part of those efforts and I suppose further to
23 demonstrate from Cingular's position there was no case or
24 controversy, Cingular sent a letter to Parma, dated July 14,
25 2005, roughly three months after the case was filed. And

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1 the letter succinctly stated, it's addressed to Mr. Dobeck,
2 the law director of Parma. "This letter is to advise you
3 while Cingular Wireless, LLC, does not believe any of its
4 prior communications have indicated otherwise, Cingular will
5 not terminate the leases in any manner inconsistent with the
6 terms of the leases."

7 And the parties have acknowledged that throughout this
8 litigation, that would be from April of 2005 to the present,
9 Cingular has honored its lease obligations by paying its
10 monthly rent in a timely fashion, and Parma has received in
11 cash the rental checks.

12 After the Court mediated what it believed was a
13 settlement and dismissed the case, both sides filed notices
14 of appeal. This would be last fall or the end of the
15 summer. I'm not sure exactly when. Roughly fall of '05,
16 the Court held a telephone conference, advised both sides
17 that if neither side felt there was a settlement agreement,
18 there was no point wasting the time of the Court of Appeals.
19 I would just vacate it and resume the litigation. Parma
20 elected to withdraw its notice of appeal. However,
21 Cingular, which had cross appealed, maintained its cross
22 appeal. And so the case went to the Sixth Circuit. And
23 last month, the Sixth Circuit held that there was no
24 settlement agreement, and the case should be remanded for a
25 prompt hearing on Cingular's motion to dismiss.

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1 And I quickly convened the parties by telephone,
2 determined that neither side was going to seek rehearing or
3 rehearing en banc. So it was not imperative to wait for the
4 mandate in order to get going, and I requested supplemental
5 briefs on the issue, and I directed both parties to address
6 the two facts which have occurred in the roughly 18 months
7 since the case was filed; that being Cingular's July 14th,
8 2005 letter, and the fact that Cingular has continuously
9 honored its lease obligation, paid its monthly rent, and
10 Parma has received in cash the checks.

11 I've received those briefs. They're all well written.
12 I understand the arguments. Nothing surprised me. Cingular
13 continues to maintain there is no case in controversy.
14 Parma continues to maintain there is one. So I've set this
15 for a hearing today. The Court of Appeals wanted me to hold

16 one. I generally don't hold hearings on motions, but since
17 the Court directed it, and I thought it might be helpful,
18 I'm doing it.

19 I really don't need the attorneys to repeat or rehash
20 what they've said in their briefs. I don't think that's a
21 good use of time. Obviously, I've considered everything. I
22 have a few questions, and the issue obviously is whether
23 there is a live case or controversy. If there is, we'll
24 proceed, and I'll have to decide it. If there's not, the
25 law is clear that I don't have jurisdiction. And I guess

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1 what I would like the attorneys for Parma to succinctly
2 state to me is what they believe the current controversy is.

3 Now, as I understand in layman's terms, a controversy
4 has to mean that the two sides are -- have contradictory
5 positions on an issue, an issue of law. It has to be a live
6 controversy, which means that Parma's got to be saying
7 something different than Cingular, and that there's
8 something for the Court to decide. So I would like Parma to
9 succinctly state for me what -- what the controversy is.
10 And it's got to be in the context of the claims you have
11 made in the complaint, which is either anticipatory breach
12 or a construction of the current lease contract. And I'd
13 like to know exactly what -- what Parma claims the
14 controversy is.

15 MR. KRISLOV: Your Honor, do you favor counsel
16 rising or standing?

17 THE COURT: You don't have --

18 MR. KRISLOV: I'll be glad to do either. Just
19 some courtrooms --

20 THE COURT: Whatever is most comfortable. You
Page 5

21 can remain seated, you can stand. You don't have to go to
22 the lectern. I'm relatively informal. We don't have a jury
23 or anything, so whatever works for you.

24 MR. KRISLOV: Clint Krislov, your Honor.

25 The dispute is over whether or not the contract gives

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1 Cingular the right to terminate for overlap of business
2 convenience.

3 Cingular has --

4 THE COURT: Let me just -- let me just stop
5 you there. Whether the contract gives Cingular the right to
6 terminate for?

7 MR. KRISLOV: For overlap or business
8 convenience.

9 THE COURT: And when you say terminate, that
10 would be terminate before the end of the five-year period,
11 correct?

12 MR. KRISLOV: Yes.

13 THE COURT: Because you acknowledge that at
14 the end -- that Cingular can at any time during the five
15 years send you a letter saying this is to notify you that
16 we're not going to renew --

17 MR. KRISLOV: Right.

18 THE COURT: -- come the end?

19 So by terminate, you mean terminate it before the five
20 years is up?

21 MR. KRISLOV: Yes.

22 THE COURT: Okay. That's what -- okay.

23 Now, what I want to know, Mr. McCaffrey and Ms.
24 Kirshner, is Cingular asserting it has that right?

MR. McCAFFREY: No, your Honor. We have

1 never -- the March 10th letter does not say that we are
2 terminating the license agreement for overlap or economic
3 convenience. We have never taken that position, your Honor.

4 THE COURT: All right.

5 I understand you're saying the March 10th letter. I
6 don't want to litigate what the -- what the letter says or
7 doesn't say. And I should say for it -- when I referred to
8 oral or written communications, one of the -- one of the
9 written communications was a March 10th letter from an agent
10 or representative, Cingular to Parma, that I felt was
11 ambiguous. All right.

12 Putting aside the letter, the question is today,
13 November 2, 2006, does -- is Cingular maintaining it has a
14 right to terminate the lease for overlap or business
15 convenience?

16 MR. McCAFFREY: No, no, your Honor.

17 THE COURT: All right.

18 MR. McCAFFREY: We do not have that right with
19 the lease with Parma.

20 THE COURT: Well, quite frankly, that's how I
21 read the lease. The lease doesn't say anything about giving
22 Cingular a right to terminate for overlap or business
23 convenience. It gives Cingular the right to terminate for
24 two specific reasons: One -- it certainly makes sense -- if
25 Cingular can't get or loses the Government permits it needs

1 to operate the tower, it doesn't have any -- or the wireless
2 service has no need for the tower; and two, if the facility

3 becomes unusable for some reason, I suppose. So those are
4 the only two reasons.

5 Well, Mr. Krislov, that's -- I mean as I read the law,
6 there has to be a disagreement. So you're asking for
7 declaratory judgment on the interpretation or meaning of the
8 lease, and you've claimed that this is the disagreement.
9 Cingular is not taking the opposite position. They agree
10 with you.

11 MR. KRISLOV: On -- this is the first day,
12 this is the first instant, your Honor, that they have said
13 that they do not have a right to terminate for convenience
14 or overlap.

15 THE COURT: Well, I don't know about that.

16 MR. KRISLOV: Prior to that, those words have
17 not come out of their mouth. Those words do not appear in
18 their answer, those words do not appear in their motions,
19 those words do not appear in their letter. It is only by
20 this -- by this Court having called them to respond on that
21 point that they today take that position.

22 Prior to that, they have always taken the position,
23 and it has been artfully done, it has always been done,
24 their taking no position on that issue, but to say that when
25 asked by the Court, they indicated that they would not

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1 terminate the agreement other than in accordance with the
2 terms of the agreement. But, they never --

3 THE COURT: Well, I understand. They didn't
4 use these words. The words they used, "We will not
5 terminate the leases in any manner inconsistent with the
6 terms of the leases."

7 Now, there's nothing in the leases that talks about
8 convenience or overlap. I mean I've read this lease upward,
9 backwards, forwards, sideways.

10 MR. KRISLOV: That's why we brought suit
11 because when their person called Parma --

12 THE COURT: I understood. There was an
13 ambiguity in the communication.

14 MR. KRISLOV: No --

15 THE COURT: Well, I disagree. It's ambiguous.
16 The letter was ambiguous.

17 MR. KRISLOV: The letter may have been
18 ambiguous.

19 THE COURT: Okay.

20 MR. KRISLOV: But, as the affidavit submitted
21 by the employee of Parma stated, the threat was not
22 ambiguous. Cingular had hired these two companies --

23 THE COURT: All right. All right. There may
24 have been no question in my mind that Parma perceived it,
25 heard it as a threat to terminate the lease for reasons

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1 other than lack of permit and economic -- well, not -- what
2 was it?

3 MR. KRISLOV: No longer usable.

4 THE COURT: No longer usable. Thank you, Mr
5 Krislov.

6 No question Parma interpreted it, construed it by
7 Cingular as a threat to do that, and that may have been a
8 reasonable impression or apprehension of fear, and construed
9 it, as I would say, a threat -- a threat to -- a threat to
10 breach the contract. All right.

11 But, shortly thereafter, Cingular sent this letter and
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12 they have acted consistent with the lease obligations.
13 They've been paying every month. And to my knowledge, no
14 one has brought anything to my attention that since this
15 case was filed, any conduct, verbal or otherwise, to suggest
16 that Cingular is not going to live up to its lease
17 obligations.

18 MR. KRISLOV: But, your Honor, what we're
19 talking about, with all due respect, is a motion for
20 judgment on the pleadings. Those pleadings asserted the
21 threat. Parma's answer did not -- Cingular's answer did not
22 dispute that the threat had been made. They just took the
23 position that they weren't breaching it.

24 THE COURT: Even if -- even if a threat was
25 made a year and a half ago, we're now a year and a half down

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1 the road. There's been nothing, nothing to suggest that
2 that -- no other threat, no other conduct, Parma -- I'm
3 sorry. Cingular is not asserting a right to terminate that
4 lease prior to July 30, 2007 for overlap or business
5 convenience.

6 MR. KRISLOV: Except they, after -- they have
7 only, only today acknowledged they don't have a right to
8 terminate for overlap or business convenience. Prior to
9 that, they never disavowed that. And --

10 THE COURT: But, they've never asserted it in
11 any pleading filed in this lawsuit.

12 MR. KRISLOV: Yes --

13 THE COURT: Show me where.

14 MR. KRISLOV: In our pleading in the affidavit
15 of the Parma employee, they made the threat.

16 THE COURT: I -- look. That's a -- I'm saying
17 in a pleading filed by counsel in this case since the case
18 was filed. Has Cingular ever asserted it? Have they ever
19 asserted they had that right?

20 MR. KRISLOV: No, but they never -- they never
21 disavowed that either. They only said that they wouldn't
22 terminate, except in accordance with the contract.

23 THE COURT: Well --

24 MR. KRISLOV: What they've done, your Honor,
25 is an artful attempt to moot the claim of the main plaintiff

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1 in order to avoid having to deal with the rest of the class.
2 An as we showed you in our supplemental filing, their SEC
3 filings --

4 THE COURT: All right.

5 I -- you raised the -- the section filings don't say
6 what you claim they say. The SEC filings, as I read them,
7 say hey, we merged with AT&T. We've got towers, they've got
8 towers. We're obviously not going to keep two towers.
9 We're going to reduce the number of towers. It doesn't say
10 they're going to -- they're going to terminate leases
11 inconsistent with leases. These leases, they've got
12 thousands of these things, and they each have different
13 terms and they expire, and I --

14 MR. KRISLOV: With all due respect, only six
15 different forms. None of them have a termination clause
16 that would allow them to do what they're --

17 THE COURT: I know, but they all expire --
18 they're not perpetual leases. They have terms and don't
19 have to renew them.

20 MR. KRISLOV: This is the resolution. There

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25 They were waiting months and months and months. They had no

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1 hearing. All right? There was no question there was a live
2 case or controversy. What happened is as the case -- you
3 know, as months dragged on, the named plaintiffs got their
4 hearings eventually, but there were a whole lot of other
5 people out there in the same boat, waiting months and months
6 and months. So it was clear this was an ongoing problem.
7 There were lots of people out there who were aggrieved.

8 Blankenship is cited. Roe v. Wade, obviously people
9 waiting for an abortion after a certain number of months.
10 The pregnancy is going to end either with an abortion or
11 live birth. So that particular named plaintiff will no
12 longer be -- you know, that controversy with that plaintiff
13 is gone, but there was no question there was a live case or
14 controversy for the named plaintiff when it was filed, and
15 there were lots of other people in exactly the same
16 situation.

17 Same thing with Guarantee National Bank versus Roper
18 In that case, there were a lot of people who claim that the
19 bank's interest was euphonious, but here, there was -- it
20 was always unclear whether there was even a case of
21 controversy with Parma, all right, because Cingular never
22 took the position in this litigation -- from the moment it
23 was filed, they never took the position that they had a
24 unilateral right to terminate that contract.

25 MR. KRISLOV: And they never disavowed it.

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1 And when you point out there may have been a dispute, if
2 there may have been a dispute, there was a dispute.

3 THE COURT: No, no. I disagree with you. The
4 fact that there may have been a dispute doesn't mean there
5 was one. And --

6 MR. KRISLOV: Your Honor, there's no -- you
7 cannot be -- you cannot be --

8 THE COURT: All right.

9 So you what, you acknowledge there's no case or
10 controversy between Cingular and Parma?

11 MR. KRISLOV: I do not.

12 THE COURT: What is it? The dispute was what
13 when we walked in court this morning?

14 MR. KRISLOV: Whether or not --

15 THE COURT: You just heard Mr. McCaffrey. So
16 you can see that today, November 2, 2005, there's no dispute
17 between Cingular and Parma.

18 MR. KRISLOV: Judgment should be entered in
19 our favor on that declaratory judgment.

20 THE COURT: Why? No one's ever opposed it.

21 MR. KRISLOV: It was threatened. We called
22 their bluff, we sued them, and it was only as a result of
23 our being here today that they explicitly disavowed the
24 right to terminate for overlap or business convenience. It
25 was only today, never before. Not in their answer, and this

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1 is a motion for judgment on the pleadings. It was never
2 asserted in their answer. If they want to show me where in
3 their answer they disavowed the right to terminate for
4 convenience or overlap, I'll be glad to look at it, but --

5 THE COURT: They never asserted it.

6 MR. KRISLOV: They had to answer our

7 assertion. Sorry, your Honor.

8 THE COURT: Show me -- show me someplace where
9 they've ever asserted it.

10 MR. KRISLOV: Your Honor, where we assert that
11 they --

12 THE COURT: Show me anyplace in this
13 litigation, since April of '05, Cingular has claimed they
14 have a right to terminate the contract for business
15 convenience.

16 MR. KRISLOV: Because they never -- what they
17 did -- they never affirmatively asserted that because they
18 have been doing that. What they tried --

19 THE COURT: Wait, wait a minute. You're
20 saying they've been doing that. They haven't done it with
21 Parma. No proof they've done it with Parma.

22 MR. KRISLOV: There's proof they asserted it,
23 not proof they terminated.

24 There is proof they asserted it, and the affidavit
25 provides that. What didn't happen is they didn't terminate

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1 it. They also never took the position -- they never
2 responded to our assertion that they had no right to
3 terminate for convenience or overlap. What they always
4 answered, always, always, your Honor, it was an artful
5 answer, and it was not direct. They always said they --
6 their letter says they won't terminate, except in accordance
7 with the terms of the contract.

12 was a threat conveyed to Parma that Cingular would terminate
13 for reasons other than the lease, and you sought a
14 declaratory judgment that there is no right to do that.

15 MR. KRISLOV: Right. And so their agreement
16 today that they don't have that right and they don't assert
17 it means that we should have judgment entered on the
18 pleadings for us. If --

19 THE COURT: Why?

20 MR. KRISLOV: Because our complaint was -- and
21 it was --

22 THE COURT: But, the point is your pleadings,
23 you know --

24 MR. KRISLOV: We asked for --

25 THE COURT: -- say that they've breached it,

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1 and you want a judgment that the -- that the lease means
2 what it says.

3 MR. KRISLOV: We -- no, we asked for a
4 judgment that the lease declaration, that the lease does not
5 permit termination for overlap or business convenience.

6 They never responded to that assertion. Their threat
7 was resolved by your Honor's intervention and by their not
8 terminating as a result, and by their not -- and by their
9 eventually today acknowledging that they don't have a right
10 to terminate for --

11 THE COURT: All right. I understand your -- I
12 hear your position.

13 MR. KRISLOV: Your Honor, with all due
14 respect, from the beginning, we have been straight with this
15 Court. We have been direct, and we have been -- we have

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never veered from that point.

THE COURT: So has the other side. They never veered from their position.

MR. KRISLOV: No, your Honor. They have never answered the question until today directly. They have only said we won't terminate except in accordance with our rights under the contract. They never, ever answered until today, until --

THE COURT: Mr. Krislov, you're parsing words. All right. They could have written this letter in a lot of

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different ways, but --

MR. KRISLOV: Why didn't they respond directly? Your Honor, the reason they don't --

THE COURT: We're not going to maintain a litigation over the meaning of this letter. I mean the letter -- you sought a declaratory judgment action on the interpretation of the lease.

MR. KRISLOV: I'll give you the particular provisions, your Honor.

THE COURT: Yes.

MR. KRISLOV: Paragraph 34 of our complaint, "Thus, none of the provisions of the license agreement permit the Defendant to terminate or unilaterally amend the agreement for its benefit."

34, "Cingular denies the allegations contained in Paragraph 34 of the complaint."

THE COURT: There's a lot of stuff in your paragraph. All right? So at no time -- at no time has Cingular maintained, at least since July -- all right, at least since July of 2005, at least from the date they sent

21 that letter, at no time has -- and that -- that's an
22 affirmative statement that the only -- the only basis for
23 terminating your contract is in the lease. All right? So
24 while it may have been ambiguous between April of '05 and
25 July 14th --

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1 MR. KRISLOV: I'm sorry to interrupt. Go
2 ahead.

3 THE COURT: Well --

4 MR. KRISLOV: It's judgment on the pleadings,
5 your Honor. The pleadings, we assert they deny. They now,
6 I guess, retract that denial. We win, your Honor. We -- if
7 there's judgment on the pleadings, we get summary judgment

8 THE COURT: Well, suppose I would grant you
9 summary judgment, what does that do?

10 MR. KRISLOV: It does -- that does a host of
11 things, your Honor. Number 1, it stops them from then
12 asserting, as they will, that they have a right to
13 attorney's fees for our filing something that wasn't a case
14 of controversy. Number 2, it also is potentially usable by
15 other -- by other class members as collateral estopping
16 Cingular from asserting that they have a right to terminate
17 early for overlap or convenience. And that's something that
18 other class members may well want.

19 THE COURT: Well, I believe it's an advisory
20 opinion, unless Cingular today is asserting something
21 different.

22 MR. KRISLOV: Your Honor, it would be too easy
23 for -- in every case, in -- for somebody in Cingular's --
24 and maybe you would have a right to -- maybe you would be

25 well founded to do that if, but only if, the complaint had

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1 been asserted we had not timely moved for class
2 certification. It is not advisory if they just try to moot
3 out the named plaintiff, certainly not after class
4 certification has been moved. It's too easy to do that
5 because they would do that one after another, after another,
6 after another.

7 THE COURT: I agree. And just to remind
8 everyone, I had -- I had, I thought, had the parties'
9 agreement to send -- well, did I have the parties' agreement
10 to send a letter to all the other potential class members?
11 We had an issue over exactly what the letter was to say, but
12 that was to determine if there was anyone else aggrieved or
13 if Cingular had actually terminated any contract. We
14 don't -- we don't know. There's nothing in the record one
15 way or the other as to whether Cingular has actually
16 terminated anyone's contract for --

17 MR. KRISLOV: Well --

18 THE COURT: -- convenience or overlap.

19 MR. KRISLOV: That's what class discovery --

20 THE COURT: I understand that.

21 MR. KRISLOV: Also, there are -- there are
22 examples of it because there was a fire responding unit in
23 Alton, Illinois, which put out a notice on the Internet,
24 which we apprised the Court of, where they were complaining
25 that Cingular had done this, and they were -- they were --

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1 they depended on the money from their antenna lease, and
2 they were being threatened, and they had termed -- they had

3 to chop their lease payments by 50 percent in order to stay
4 on. I mean their record is on the Internet. I don't have
5 it here today, but we had -- I mean that was some evidence
6 And the fact of their SEC filings where they say there's
7 7,000 lease cites and we should complete this project of
8 getting rid of the \$7,000 by the end of the year, the one
9 thing your Honor presumes, which I'm told is not correct, is
10 that the mere fact of overlap does not mean that the cite
11 becomes surplus. The fact is that capacity to move calls is
12 huge, can be hugely profitable. And so having more than one
13 cell site in a particular area doesn't make that necessarily
14 less profitable. It may make it --

15 THE COURT: That's beside the point. What --
16 why they would -- how many citations they want. I'm saying
17 the fact the citing, SEC filing doesn't say we're going out
18 and terminating a bunch of leases before they expire. It
19 says we're going to reduce the number of towers we've got
20 substantially. Okay?

21 MR. KRISLOV: It's an ongoing project, and
22 they've hired MD7 and Black Dot. And based on what we
23 can -- what we have submitted along the course of this
24 litigation, they hired MD7 and Black Dot to deal with these
25 people. How -- what they did in terms -- and they have, and

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1 we understand that they compensate MD7 and Black Dot, and
2 they believe, we believe, it compensates their people based
3 upon how many people you convince to chop their leases or to
4 chop their lease payments in exchange for new leases, I mean
5 as we pointed out in our complaint and as documented by
6 their SEC, by the letters and commentary that went out at

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the time of the merger.

THE COURT: Let me just say -- the problem, the problem with my position, with your position is, as I see it, Mr. Krislov, is this:

What you're really saying, although they're not saying this overtly, this is how I'm hearing it, "Judge, I acknowledge there's no case or controversy with Parma now. All right. And so this is not a case -- we're not going to be litigating anticipatory breach with Parma or the interpretation of Parma's lease with Cingular. But, what there may be out there, Judge, is other people who don't need -- you know, aren't going to be litigating anticipatory breach or declaratory judgment. These are people who have actually had their -- you know, have been coerced into getting up money in some way or maybe -- or maybe in the future." Okay. But if there is, those people can bring a different lawsuit somewhere.

MR. KRISLOV: It's not feasible, your Honor.

THE COURT: No, wait a minute. It absolutely

25

is feasible. If there are people out there who have been coerced into -- let me go back. There is nothing wrong, although it may be -- it may be somewhat strong-handed tactics, there's nothing wrong with Cingular coming to someone and saying look, we merged with AT&T, we're not going to need all these. Come the end of this lease, we're probably not going to renew you, but if you want to be renewed, we want a concession now. Let's have a negotiation. There's nothing wrong with that. And the party can say hey, you know, we don't want to reduce the rent for the next year or two. We'll take our chances when

12 the lease expires, or they can say well, we'll have this
13 discussion, and if you'll -- if you will -- we'll
14 renegotiate the lease. If you agree to continue it now for
15 the next five years, we'll give you a rent concession.
16 There's nothing wrong with that.

17 MR. KRISLOV: Your Honor, if they had --

18 THE COURT: What is -- I mean what is wrong,
19 and what could be actionable is if Cingular comes to someone
20 and say look, you know, we know your lease has two more
21 years to run, we're just going to cut it off cold turkey
22 next month unless you reduce the rent 20 percent or 30
23 percent. All right. That's actionable.

24 MR. KRISLOV: 50 percent, your Honor.

25 THE COURT: Whatever; 1 percent would be

26

1 actionable. Okay?

2 Now, there may be people, there may be people for whom
3 that's been done. That's not -- you know, that wouldn't be
4 an anticipatory breach or declaratory judgment. That would
5 be an actionable, live actionable case or controversy by
6 those people against Cingular. If they -- if there is one
7 such person, they can -- they would have been free to bring
8 that case. If there's a group, they can bring that case. I
9 don't know if it exists.

10 MR. KRISLOV: It's not feasible to bring on
11 that basis, your Honor.

12 THE COURT: Fine. It may be feasible to bring
13 as a Class Action, but I don't see it here -- I understand
14 that, I understand that, but we're here now in November of
15 '06, and Parma's lease has only nine -- a little less than

16 nine months to run, and there's no reason whatsoever to
17 believe that Cingular's going to do anything other than pay
18 the rent every month. So nothing I -- if I were to dismiss
19 this case for lack of case of controversy, it certainly has
20 no bearing on the rights of anyone else. I'm not in any way
21 judging whether anyone else in the country has or did have
22 an action, a case of controversy with Cingular. There's
23 nothing binding. Anyone else is free individually or
24 collectively to bring whatever case they bring. But,
25 what -- you're asking me to keep this -- to keep this

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1 particular lawsuit alive with just -- Parma is the only
2 class representative, whether it is crystal clear that
3 today, November 2, 2006, there is no case or controversy
4 between Parma and Cingular.

5 MR. KRISLOV: Your Honor, if that were the --
6 the manner, Number 1 --

7 THE COURT: And something else.

8 There's been no -- there's been no representation by
9 Cingular that they -- that they're asserting -- well, that
10 they're asserting an overlap or business convenience right
11 with anyone else.

12 MR. KRISLOV: Your Honor, that's discovery.
13 That's what we get from discovery. And we believe -- we
14 believe based on the information we've received, that there
15 were threats to other people, that that's generally how MD7
16 and Black Dot operated. The remand --

17 THE COURT: Well, my view, if you can -- if
18 you can find other cities, lessors, you can bring another
19 case.

20 MR. KRISLOV: No, your Honor. That's not
Page 23

21 how -- with all due respect, your Honor, that's not how the
22 process is to work, because why wouldn't, in that situation,
23 we file on behalf of another one, Cingular says no, we're
24 not going to -- and you don't enter judgment today, then
25 Cingular says on that case, no, we're not going to --

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1 THE COURT: No, you would find someone for
2 whom it's already happened.

3 MR. KRISLOV: Your Honor, we're not supposed
4 to go out soliciting plaintiffs just to keep a case alive.

5 THE COURT: No, not just to keep a case alive.
6 To find an actual controversy. Remember, it was unclear --
7 it was -- it was never clear, unlike in these other cases,
8 there was an actual case or controversy when the case was
9 filed. We had an agent -- we had an agent that made various
10 communications, but in this lawsuit, the moment it was
11 filed, from the moment it was filed, there has never been
12 any filing by Cingular which asserted a right to terminate
13 other than as set forth in the lease. Cingular has never
14 asserted that.

15 MR. KRISLOV: And what about their denial in
16 the answer, that Cingular especially requests the Court
17 dismiss the complaint against it, that they be awarded all
18 costs and fees?

19 THE COURT: Mr. McCaffrey you want to respond
20 to that last argument? I don't have the answer in front of
21 me. I certainly have Paragraph 34.

22 MR. McCAFFREY: I'm not sure. There's been a
23 lot put on the record here.

24 THE COURT: No, just this last -- I mean --

MR. McCAFFREY: The last argument that --

1 THE COURT: Paragraph 34 of the complaint
2 says, "Thus, none of the provisions of the lease agreement
3 permit Defendant to terminate or unilaterally amend the
4 agreement for its benefit."

5 MR. McCAFFREY: Your Honor, as your Honor
6 pointed out, this is a self-renewing agreement, and we can
7 at the end of the term terminate that agreement by not
8 renewing it. That's what that was geared at. I would
9 direct the Court to right up above, I mean, Parma has set
10 out the two grounds for termination under the contract, and
11 we have consistently --

12 THE COURT: Wait a minute. What did Cingular
13 say in its answer to Paragraph 33? 33, in the complaint
14 just sets out --

15 MR. McCAFFREY: The contract speaks for
16 itself. The agreement is the agreement between the parties.

17 THE COURT: All right. Is that -- that's what
18 it says, that's Cingular's answer?

19 MR. McCAFFREY: Has the right to terminate the
20 agreement at the end of the term by providing the City with
21 written notes.

22 THE COURT: Yes, I want the answer.

23 MR. McCAFFREY: Before the end of the term --
24 what -- looking at Paragraph 33 of the answer.

25 THE COURT: Yeah, yeah, what -- what does

1 Paragraph 33 of your answer say?

2 MR. McCAFFREY: It states, your Honor,
Page 25

3 Cingular denies the allegation inside Paragraph 33 of the
4 complaint but admits that Paragraph 8 of the agreement
5 contains the language quoted therein. That's the language
6 quoted in the amended complaint.

7 Cingular further shows that Cingular has the right to
8 terminate the agreement at the end of a term by providing
9 the City with written notice of termination before the end
10 of the term and effect. See the complaint, Exhibit 2,
11 Paragraph 2. The agreement is what governs the relationship
12 between the parties. Now Mister --

13 THE COURT: I don't see anything in that -- in
14 that answer that creates a controversy.

15 MR. McCAFFREY: I don't either, your Honor.
16 And the letter addressed to the Law Director of the City of
17 Parma on July 14th of last year made that very clear. And
18 Mr. Krislov has been around a long time, your Honor. He's a
19 very clever lawyer. He understood exactly what Cingular
20 meant. He is not, you know -- he did not not understand
21 what that provision meant. We --

22 THE COURT: The fact I understood it, it was
23 in response to a -- I wanted to determine if there was a
24 case or controversy with Parma, and this to me was a direct
25 response. It says, "Hey, the lease is the lease, and we've

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1 got -- we're not claiming any right outside the lease to do
2 anything with your contract."

3 MR. McCAFFREY: If the Court recalls, this
4 letter came as a result of one of the conferences we had
5 with the Court. It was essentially verbatim of what the
6 Court directed Cingular to send. And that's what we did,

7 your Honor.

8 THE COURT: Well, I guess the --

9 MR. McCAFFREY: But, let's be clear about
10 another thing, your Honor. If this Court dismisses Parma's
11 case, it does not have any effect on any other potential
12 individuals out here, out there, who may have a case similar
13 to what Parma is claiming. For Mr. Krislov to suggest
14 otherwise is just not -- it's a misstatement, your Honor,
15 misstatement of law. And --

16 THE COURT: No, I don't -- to be fair, I don't
17 think Mr. Krislov has suggested that if I were to dismiss
18 this case, saying there was no case or controversy with
19 Parma, that it somehow res judicata or impacts on anyone
20 else. I don't think he said that.

21 MR. McCAFFREY: Estoppel, he was the one
22 that --

23 THE COURT: I thought he said if I gave
24 summary judgment in his favor, it might have collateral,
25 affirmative collateral estoppel. He's never -- he's not

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1 making the argument if I were to grant your motion, somehow
2 that would adversely affect the class and, therefore, it's
3 unfair or improper for me to grant your motion. Is that
4 right, Mr. Krislov; you're not saying that, are you?

5 MR. KRISLOV: The only thing -- no, I'm not
6 saying that. The only thing it will do is it will tell
7 people Cingular will be out there telling people -- and you
8 can bet your last dollar on this -- they'll say look, you
9 want to fight us, you want to spend a lot of money, tens of
10 thousands of dollars to fight us, you can fight us and maybe
11 we'll let you get away, but, you know, your net cost is

12 going to be net negative.

13 THE COURT: Well, wait, Mr. Kri slov. To be --
14 to be very fair, that isn't what was going to happen in this
15 case. The Court had mediated what I thought was a
16 resoluti on, whi ch wou ld have resul ted in Ci ngul ar sendi ng a
17 letter they didn't want to send but they agreed to send to
18 everyone else out there, having the same -- the same
19 statement as in this letter, July 14th, and giving them the
20 opti on to undo, undo anything that had happened.

21 MR. KRI SLOV: Right, right, as a result of
22 this case, and that's what --

23 THE COURT: That would have happened, that
24 wou ld have happened.

25 MR. KRI SLOV: And we went along with that.

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1 MR. McCAFFREY: Your Honor --

2 THE COURT: Well, the point is -- that would
3 have happened. So to say that if I were to dismiss after a
4 year and a half later, now that everyone's going to have the
5 idea, hey, you go to -- you know, go to the net with
6 Ci ngul ar, they're going to spend money and knock you out,
7 and there's no point doing it, I think is -- I mean someone
8 can draw that, but it wouldn't be accurate.

9 MR. McCAFFREY: Your Honor, it's effectively
10 happened because I queried Mr. Kri slov's web site, and on
11 the web site, and he's had it for some time, he's had your
12 order, and the form letters out there on his web site for
13 what has been a year now since this has happened, since the
14 Court issued that order, and those form letters, trolling
15 for potenti al plai nti ffs.

16 MR. KRISLOV: Objection to the term -- we
17 weren't trolling.

18 MR. McCAFFREY: Well -- and, your Honor, if he
19 had somebody that was in the same shoes as Parma, he would
20 be bringing that forth before the Court rather than that
21 silly affidavit that he put on this record about some
22 confidential informant. There is no one else out there like
23 Parma, your Honor.

24 MR. KRISLOV: Your Honor, that's a
25 representation that I would like discovery to back up.

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1 THE COURT: Well, hold it, hold it. This is
2 speculation. It's argument. All right. You can say what
3 you want to say.

4 MR. KRISLOV: But, he's making an assertion of
5 fact, your Honor.

6 THE COURT: He's drawing an inference from
7 something. You can refute the inference, but it's -- you
8 know --

9 MR. KRISLOV: Your Honor, had we not brought
10 this case, they would have never been ordered to send out
11 that letter. Had we not brought this case, they would never
12 have finally today --

13 THE COURT: Mr. Krislov, all that may be the
14 case, all that may be true, but the question is whether
15 there's a case or controversy today.

16 MR. KRISLOV: With all due respect, your
17 Honor, the issue today is whether there was a case or
18 controversy on the pleadings. There was, as you indicate --

19 THE COURT: There may be, there may not have
20 been. It's ambiguous.

21 MR. KRISLOV: Obviously, there was.

22 THE COURT: No, no, no. When you filed your
23 complaint, you allege that there was.

24 MR. KRISLOV: Yes.

25 THE COURT: All right? As soon as we got into

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1 this case, Cingular from the very outset says there's not,
2 that those letters, those communications are misconstrued,
3 we're not asserting that right.

4 MR. KRISLOV: They never -- they never, your
5 Honor, until today, acknowledged they didn't have a right to
6 terminate. If they had to terminate for overlap or
7 convenience, and had they really been asserting that, they
8 would have answered the question directly. They would have
9 said on Day 1 filing their answer, "We never had an
10 intention to terminate for those two reasons."

11 THE COURT: All right. I understand. I mean
12 I understand -- I understand your argument.

13 MR. KRISLOV: Based on that, your Honor, we
14 would ask that summary judgment be entered in our behalf on
15 the declaratory count, and we go from there.

16 However we go or don't go, Parma is entitled to that
17 They have spent the money, they have spent the time, they
18 have gone through great effort to establish that, and it is
19 only today that Cingular acknowledges that it does not have
20 the right to terminate under those -- for those causes
21 that's on the pleadings. We're entitled to judgment.

22 MR. McCAFFREY: Your Honor, one fact that Mr
23 Krislov continues to run away from because he can't address
24 it head on is the very fact that before the March 10th

25 letter, after the March 10th letter, and before they filed

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1 their lawsuit, Cingular continued to pay under the license
2 agreement and has always paid under the license agreement.
3 And that's a fact they don't take on.

4 MR. KRISLOV: We'll take that head on. Maybe
5 we're not entitled to anticipatory breach. Maybe we're not
6 entitled to declaratory judgment that they breached. So what? This
7 is Federal Court. This is not state court, and the fact
8 that one count may fail doesn't mean that the other count --

9 THE COURT: I agree, I agree. So we're
10 focusing on the declaratory -- focusing on the declaratory
11 judgment portion, which is the interpretation of the lease
12 But, again, I mean that to me is clear. It seems to me I've
13 had cases like this. They often involve policies of
14 insurance, typically the ones I get, where you've got
15 disagreement as to whether an exclusion applies or something
16 else, and the parties are taking different positions, and
17 the Court is -- it is discretionary with the Court whether
18 to entertain those. I don't have to.

19 Declaratory judgment is always discretionary with the
20 Court, but if there's certain rules to apply, but -- that's
21 where it's clear that the parties are -- have a disagreement
22 over either what the words mean or the application of the
23 meaning to the facts of this case.

24 I don't -- I don't hear one today. And it was never
25 clear to me that there was one because even from -- even

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1 from the first time we were on the phone and in court --
2 well, I guess we were on the phone. And in all the

3 pleadings back and forth, I never heard anything and I never
4 saw anything where Cingular was asserting that this --
5 anything in this license agreement gave them the right to
6 terminate for overlap or business justification.

7 MR. KRISLOV: But, that is exactly what the
8 Parma employees' affidavit said, that they had directly
9 threatened that. That's why this case was filed in the
10 first place.

11 THE COURT: I'm not -- I'm not -- I'm not
12 questioning why the case was filed, Mr. Krislov, or
13 suggesting it was filed in bad faith or improperly. I'm
14 determining -- I'm saying whether there was -- whether --
15 that was Parma's impression, Cingular very quickly corrected
16 that as soon as the litigation was filed.

17 MR. KRISLOV: They didn't correct that.

18 THE COURT: Well, I disagree with that.

19 MR. KRISLOV: Why didn't they answer the
20 question directly, your Honor? Why didn't they deal with
21 those two things? To say we won't terminate is like an
22 insurance company saying --

23 THE COURT: No, no. I don't think it is
24 because you -- because you were -- you were -- you were
25 asserting that Parma reasonably construed statements of

38

1 Cingular and its agents to mean something else.

2 MR. KRISLOV: Right.

3 THE COURT: That we've got a right. We
4 Cingular, have a right to terminate this contract for other
5 reasons, things not in the lease.

6 MR. KRISLOV: Well, but --

7 THE COURT: Things not in the lease; i.e.,
8 business overlap or --

9 MR. KRISLOV: Overlap or business convenience.

10 THE COURT: Overlap or business convenience,
11 words not in the lease, not anywhere in the lease that
12 Cingular is either saying they're somewhere in here or
13 they're, you know, we've got the right no matter what.
14 We've got that right.

15 MR. KRISLOV: And we --

16 THE COURT: And Cingular has said consistently
17 the lease governs the agreement, and we are not claiming or
18 contending we've got a right to do anything other than what
19 the lease gives us the right to.

20 MR. KRISLOV: But, that's why if an insurance
21 company says if we sue under the policy and say that you
22 don't have a right to terminate this policy, the insurance
23 company comes up and says look, we don't like it, we're not
24 being there -- your health insurers try to do this all the
25 time; say look, you know you're not a healthy person. We're

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1 not going to renew you, and the person sues for declaratory
2 action that they are obligated to renew, and they don't have
3 a right to terminate for convenience. And the company says
4 we're not going to terminate except in accordance with the
5 contract.

6 And so we say where in the contract does it give you
7 this right, and they say we're not going to terminate except
8 in accordance with the contract. It's a nonanswer response.
9 It does not address the assertion directly. Had they said
10 right at the beginning, right from the get go, we never
11 asserted a right to terminate for overlap or business

12 convenience, then they might have had that. They might have
13 been able to assert, and certainly if they had done it
14 before, before class certification, you know, if they had
15 answered and said we never -- we never have, never will
16 assert the right to terminate for those --

17 THE COURT: I hear what you're saying. Mr.
18 McCaffrey, you want to respond?

19 MR. McCAFFREY: Yes.

20 Just in closing, your Honor, I think it's a matter of
21 Mr. Krislov not wanting to hear what Cingular was having to
22 say. It's very clear that this agreement is the document
23 that governs the relationship between Parma and Cingular,
24 and our response was consistent with, and referred to, that
25 agreement.

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1 Now, maybe that wasn't what he wanted to hear, but
2 that's what we were saying to him. There is no ambiguity
3 here, your Honor. There is no live case or controversy.
4 There is no substantial disagreement between the parties,
5 such that the declaratory judgment is appropriate.

6 THE COURT: Mr. Krislov, what -- I mean I've
7 had cases like that. Insurance companies are particularly
8 prone to that. When they're doing something, they're
9 claiming they're doing it in accordance with the agreement
10 They never take the position, Judge, you know, yes, here's
11 the contract of insurance, but we don't care about it.
12 We're just going to terminate this person. They always say
13 we're terminating it, and they'll often cite a provision,
14 and they'll cite, you know, exclusion or a definition or
15 whatever. And the other -- the other side will say that

16 doesn't apply, and they'll say it does. All right.

17 And then I'll have to -- that's the controversy. All
18 right? They never take the position that we don't have to
19 follow our own agreement.

20 MR. KRISLOV: Exactly, your Honor. And you --

21 THE COURT: But, here, Parma asserted that
22 Cingular's agents or representatives were doing just that.
23 They were calling you up and threatening to say hey, I know
24 we've got this lease, but we don't have to follow it. We
25 can cut you off.

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1 MR. KRISLOV: They don't have to say --

2 THE COURT: I know, but they can say, you
3 know, we can cut you off.

4 MR. KRISLOV: We can terminate for these
5 reasons. Don't have to refer to the contract or anything;
6 just have to say if you don't do this, we're going to
7 terminate for.

8 Now, your Honor, I -- you recognized, at least, the
9 ambiguity in what their letter said and the possible
10 ambiguity in what they were telling people, even if it was
11 as they represented it. And, your Honor, I appreciate the
12 time you're spending today because my inclination is that --
13 or, you know, I believe that the Court is really trying to
14 find a way through this.

15 THE COURT: I've spent a lot of time on this
16 case, probably more time than I would have spent if I just
17 turned you all loose last April, okay, but, you know --

18 MR. KRISLOV: It's fine with us to have them
19 send out the letter. In fact, we weren't trolling for
20 plaintiffs. We don't need to troll for plaintiffs when they

21 have asserted a good case and we have a motion for class
22 certification.

23 We don't need -- I mean there's a misperception out
24 there once you got -- once you have a good named plaintiff,
25 who's got a claim that will stand, that.

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1 You then want to solicit other people. It's not true.
2 The whole concept of a Class Action is that somebody has
3 been harmed or has a dispute that is replicable for the
4 whole class, and it's much easier, or it's the only way to
5 address these issues for class members whose individual
6 claims would be too small to support individually bringing
7 the case, that the Court certifies the case and may proceed
8 forward.

9 THE COURT: My view is this: That there may
10 be people out there, cities, whatever, who have been
11 aggrieved, but I haven't seen anyone. And this case was
12 brought on anticipatory breach and declaratory judgment.
13 Anticipatory breach, I think we all agree -- I mean, it
14 hasn't materialized. It's been 18 months, and Cingular has
15 done nothing other than honor its obligation --

16 MR. KRISLOV: Your Honor --

17 THE COURT: Maybe, maybe not, but even so --

18 MR. McCAFFREY: The lawsuit was filed -- pay
19 on the lease --

20 THE COURT: Cingular never said hey, we are
21 not sending you your check. All right. You think -- I'll
22 show you, we're not sending you the -- the April check or
23 the May check.

24 MR. KRISLOV: These people are not dumb, your

25 Honor. What I've accused them of various times has never

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1 been stupidity or being crude. They have a business, highly
2 profitable. They were looking to save \$900 million, and
3 believe me, if it were -- if I had \$900 million to save, I'd
4 spend a few million to do that.

5 THE COURT: Look, this is -- this is the
6 Court's view, and I -- I've -- I mean I spent a lot of time
7 with this case last, you know, spring and through the
8 summer, and then I didn't spend any time in the roughly one
9 year. The Circuit had it, and I've been spending a lot of
10 time from the moment I got the Sixth Circuit's ruling.

11 In this Court's considered judgment, there is no live
12 case or controversy between Parma and Cingular today,
13 November 2, 2006. And I don't believe there has been one
14 since very shortly after this case was filed. And this
15 Court -- this ruling has no bearing on the issue of whether
16 or not there may be lessors who have been aggrieved by
17 Cingular in some fashion. And if there are people, they can
18 bring their case individually or as a Class Action. And if
19 there's a Class Action with one of the named plaintiffs in
20 this District, it can be filed in this District and it
21 would -- it should be assigned to me. I mean because it's
22 related to this one.

23 If the plaintiff or plaintiffs are somewhere else, in
24 some other federal district, the case should be filed there.
25 And by aggrieved plaintiffs, I would mean someone who is --

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1 who is currently being threatened that Cingular will
2 terminate their lease prematurely unless they reduce the

3 rent or whatever, or someone who has already succumbed to
4 that threat and has lost money as a result. But, if there
5 are those people, they're certainly free individually,
6 collectively or part of a class to bring a lawsuit anywhere
7 where there's jurisdiction. And, again, I'll say if it
8 turns out that a case of that nature is filed in this
9 District, when one or more of the named plaintiffs are here,
10 the case should be assigned to me as related to this one.

11 MR. KRISLOV: Here's the problem with that,
12 your Honor.

13 What happens -- supposing hypothetically we go out --
14 and that's why this isn't supposed to proceed that way -- we
15 find somebody ethically who hires us to assert the claim.
16 We file the complaint, Cingular says oh, no, we already
17 said, or whatever, we don't assert that right. And against
18 this person, that's moot. So every person that we
19 supposedly have, a thousand of them one after another, they
20 come in, file the complaint, Cingular says no, we're not --
21 we've not terminated that person yet, and we're not
22 threatening to terminate that person, another one down.

23 There's no way that under ruling that way, there's no
24 way you can prevent that from occurring. And the fact is
25 unless the first one to bring it as a Class Action can bring

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1 it that way, there's no incentive for each person to spend
2 the time and trouble on their individual claim to litigate a
3 case like this.

4 Realistically, your Honor, there -- you know, the
5 lease that's 500 a month, 5,000 a month, the legal fees
6 would consume any benefit. There is no basis for an

7 individual's ability to bring this claim. And, indeed, it's
8 sort of the reverse of consumer fraud because although in
9 consumer fraud, there's a fee-shifting provision there to
10 provide an incentive, here, the -- under legal terms, it
11 like rolls over where the person receiving the money is the
12 one complaining, so that it makes it doubly hard. It's just
13 not a feasible case a bring individually, and they would
14 like it to be brought individually because then they can
15 moot out each one, one after another.

16 Now, if your Honor instead entered summary judgment
17 for us on the pleadings, then that would accomplish the
18 salutatory effect. It would prevent Cingular from going on
19 and telling people that they had the right to do that and
20 escaping judicial scrutiny. Still escape judicial scrutiny
21 in many cases, but at least there would be a published,
22 public document that said that they did not -- that they
23 withdrew any assertion. They were not asserting that right.

24 That would collaterally estop them, and for the time
25 and effort Parma has sent, a determination of that based on

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1 these pleadings would be -- it would be worthwhile for Parma
2 to obtain, and it would be worthwhile, any other class
3 member could then assert that against Cingular who might
4 assert that against them. It would be hugely beneficial to
5 whatever party --

6 THE COURT: I don't know about that, but I
7 don't have a problem, you know, putting in my order that,
8 you know, that the basis for it is Cingular has never
9 asserted that they had a right -- has never asserted in this
10 litigation affirmatively they had a right to terminate other
11 than in accordance with the lease, and they stated

12 unequivocally in court that they didn't.

13 MR. KRISLOV: On November --

14 THE COURT: Right, on today, November the 2nd,
15 2006.

16 MR. McCAFFREY: Under this lease, your Honor
17 I mean there are other leases out there with other
18 terminations.

19 THE COURT: Right, I don't -- you know --

20 MR. KRISLOV: But, the problem, your Honor,
21 is --

22 THE COURT: I'll put that in my order, that --
23 I mean all I have is this lease, Mr. Krislov. I mean it
24 wouldn't --

25 MR. KRISLOV: We submitted the other six, I

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1 believe, during the course -- because they were asserting
2 class certification that there were all these -- and their
3 supplemental brief is amazing, all these things about class
4 certification without regard to the record. Only apparently
5 six lease forms.

6 THE COURT: Whatever. I'm only viewing -- I'm
7 only dealing with the lease I got between Cingular and
8 Parma. All right?

9 MR. KRISLOV: Differ in that respect.

10 THE COURT: My guess is they don't, okay. So
11 I will -- you know, I'll put in my order that those words,
12 what I just said, that at no point since this lawsuit was
13 filed in April of 2005 has Cingular affirmatively asserted a
14 right to terminate other than in accordance with the lease,
15 and today, in open court, on November 2, 2006, Cingular

16 affirmatively admitted that with respect to this lease, they
17 have no such right. So I'll -- and I'll put that in my
18 order, and that's the basis for my ruling. And then --

19 MR. KRISLOV: That would be -- that's what we
20 get declaratory judgment about. That's what we're -- that's
21 what we were seeking, a declaration that they do not have
22 the right to terminate.

23 THE COURT: I understand that, Mr. Krislov,
24 but the Court -- declaratory judgment is discretionary, and
25 the very first -- the very first thing that the Court's got

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1 to look at is is there a case or controversy. If there's no
2 case or controversy, I don't get there. And even if there
3 is one, would this resolve a real controversy between the
4 parties.

5 MR. KRISLOV: Your Honor, they brought this in
6 state court under the declaratory judgment action, not like
7 there's discretion to take it or not take it.

8 THE COURT: It was removed. Once it was
9 removed, I follow federal law.

10 MR. KRISLOV: I understand that, and you have
11 the right to decline supplemental jurisdiction, but the
12 problem you have is under the Class Action Fairness Act, you
13 wind up, my sympathy, but you wind up getting these dumped
14 in your lap where the Defendant wants to remove it to
15 federal court. That's their prerogative. We obviously
16 didn't dispute that.

17 If Mr. McCaffrey has authority to make statements for
18 Cingular, they could have made this statement before. This
19 is a declaration of --

20 THE COURT: I've issued my ruling. I will
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21 have -- I will issue it in writing, and I will put what I --
22 what I just said in the -- in my ruling as the -- as the
23 basis for it.

24 MR. KRISLOV: And we also have Mr. McCaffrey
25 acknowledge -- well, we've run into this problem, actually

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1 the problem is if it is Mr. McCaffrey's assertion or if it
2 is Cingular's assertion.

3 If he represents that -- I mean I -- while I disagree
4 with your Honor's resolution, I do believe that Mr.
5 McCaffrey ought to go on the record that he -- that he is
6 making this statement as a statement for Cingular. This is
7 a Cingular statement, not just his argument or his
8 interpretation, and I think we're entitled to that at least.

9 The problem is there have been -- there have been in
10 other cases assertions by attorneys.

11 THE COURT: Well, Mr. Krislov, I know Mr.
12 McCaffrey. He stood up and said something. I mean I --
13 I've come to know you over the litigation. I -- I am
14 assuming that you speak for your client. All right. Your
15 client's there. They're looking at you. If they think you
16 weren't, they'd do something. Okay.

17 MR. KRISLOV: His client is not here, and we
18 want -- we want it to be --

19 THE COURT: I'm putting in my -- when I say
20 Cingular, I'm not putting John McCaffrey, Esquire, of
21 Cleveland says. I'm putting Cingular says. All right?

22 MR. KRISLOV: Okay.

23 MR. McCAFFREY: With respect to this lease,
24 with this --

1 MR. McCAFFREY: One lease.

2 THE COURT: Right. As I said, I'm not saying
3 John McCaffrey, Esquire, says such and such on November 2nd,
4 Cingular.

5 MR. KRISLOV: Other leases on this form,
6 this --

7 MR. McCAFFREY: This case is -- see, Judge,
8 it's --

9 THE COURT: The order will be clear. I'm
10 construing this case of controversy, which is this lease
11 between Cingular and Parma. All right? And that's --
12 that's the statement, the admission, whatever, that is being
13 made. And it will be reflected in my order.

14 MR. McCAFFREY: And it's only one lease that's
15 been attached to that amended complaint, and there's only
16 one lease that has been discussed in this case.

17 MR. KRISLOV: Your Honor, what they're going
18 to do, I guarantee you, whether it comes before you or some
19 other Judge or nobody, this is what they're looking for, is
20 the ability to say that was only on that lease with Parma,
21 Ohio. You got a different lease.

22 MR. McCAFFREY: That's all that's before this
23 Court.

24 MR. KRISLOV: And that's exactly what they're
25 going to do. And that's --

1 THE COURT: Then some Judge can look at those
2 two leases. And if there's a difference, there's a

3 difference. And if there's not, there's not. All right?

4 MR. KRISLOV: We have to go through all this
5 to get to that point.

6 THE COURT: That isn't very much.

7 MR. KRISLOV: I appreciate the effort you
8 spent, and I appreciate your resolution, and I sincerely do
9 appreciate the ability to wrestle with you on this.

10 If we -- but, it shows you there was a case or
11 controversy at least at the beginning, and there is -- there
12 certainly was on the pleadings, and that's why we believe
13 the appropriate resolution is for declaratory judgment on
14 this lease to be entered. And I -- I won't -- I won't
15 sandbag you in this respect. Our -- we will, like I told
16 you when we appealed the last time when we appealed, based
17 on our concern that your belief was there was not a case or
18 controversy that would deprive you of jurisdiction for
19 anything you had done that would enable them to declare it
20 void and, Number 2, when we went through the letters, and we
21 appealed, we told you that we were going to appeal because
22 your finding no case or controversy meant that you -- you
23 made your jurisdiction to do anything vulnerable because if
24 you hadn't had subject matter jurisdiction which they were
25 asserting, then they were asserting that your --

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1 THE COURT: Mr. Krislov, I was never going to
2 issue a finding I didn't have jurisdiction. I was going to
3 enforce the settlement agreement over a case I thought I had
4 jurisdiction over, or arguably --

5 MR. KRISLOV: I was on your side on that
6 resolution. We differed on the form of the letter. And as

7 I --

8 THE COURT: I don't think the Sixth Circuit
9 reversed me and told me I didn't have jurisdiction. They --
10 they reversed me on my conclusion that the parties had
11 reached an agreement. They looked at -- they looked at two
12 people arguing and said guess what, Judge, I don't think
13 they agreed.

14 MR. KRISLOV: Right. I mean we've been --
15 I've been straight with you in the past, and we said that we
16 would appeal. We appeal on two points and two points only
17 And on this case, you know, I -- I don't -- I'm not -- it's
18 not going to be a surprise that we will appeal this
19 resolution. But, we do believe that the appropriate fashion
20 would be to enter declaratory judgment rather than this
21 resolution.

22 Other than that, your Honor, it's been a terrific
23 pleasure to wrestle through this with you, and I must tell
24 you I have thoroughly enjoyed the opportunity to do that.

25 THE COURT: All right. Well, I appreciate

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1 that, Mr. Krislov. This has actually been -- I generally
2 don't have hearings on motions. I've done so on a few
3 occasions where -- hearings where I thought a dialogue,
4 question-and-answer, give-and-take would be helpful. And
5 this has been useful. So it may be that --

6 MR. McCAFFREY: Hope your Honor will be
7 present this afternoon and hear the recommendation made.

8 THE COURT: There are times when it's -- it's
9 useful. I think hearings suggest, evidentiary
10 presentations, people make speeches, I think a give-and-take
11 can be helpful. So I appreciate -- we had very prepared

12 counsel, both in writing and orally, and I think this --
13 this has been a good use of everyone's time. So I'm sure
14 I'll see counsel again. And, you know, this goes up to the
15 Sixth Circuit, I may still have this case or if not, another
16 one, so.

17 MR. KRISLOV: Your Honor, what's the -- what's
18 happening this afternoon?

19 THE COURT: Oh, Mr. McCaffrey -- we have a --
20 in our District, we have something called an advisory
21 Committee. The Court appointed a group of attorneys to give
22 advice to the Court generally on matters of procedure. And
23 some of those attorneys have urged the Court to amend the
24 local rules to specifically have a motion day once a month,
25 whatever, where there would be arguments on motions. And,

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1 you know, without breaching any confidences, there's --

2 MR. McCAFFREY: It's a hot topic.

3 THE COURT: Not many of -- not many of us do
4 it. Okay? While although I know in the Southern District,
5 I have a number of colleagues, one of my colleagues always
6 has a hearing on a summary -- every summary judgment motion,
7 up in our district, that is certainly not the case. So
8 we're having a dialogue with the attorneys. I think some of
9 them feel that either it will -- it will promote more prompt
10 resolution, and/or more informed resolution, and so they've
11 suggested that the Court put that in -- create a motion day
12 in the local rules.

13 I guess some districts have one. So Mr. McCaffrey is
14 on the Advisory Committee and it just happens at 4:00, we
15 have a meeting. And I think that's one of the items on the

16 agenda. So I can say well, I've done it once. And at
17 least, at least in this case, it was a good thing to do.

18 MR. KRISLOV: Thank you, your Honor.

19 I think there are cases -- and I know the District
20 Judges that I've been before around the country vary, but
21 the Northern District has had -- the Northern District of
22 Illinois has had -- it varies really with the Judge.
23 Although the hearings on motions is rare, one of the
24 procedures that I found to be valuable for both the bench
25 and the bar has been a practice I saw in California where

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1 the Judges hold -- I mean there are some motions that
2 don't -- are never going to meet here, but many of the
3 Judges issue a tentative resolution.

4 THE COURT: And they send it -- give it to the
5 parties. I know some of my colleagues have done that, and
6 so that -- that -- to prompt this kind of, you know,
7 give-and-take, so it's not just in a vacuum.

8 MR. KRISLOV: Or as you did also, which is
9 helpful, is to say counsel, I read the stuff, I have -- here
10 are two questions that are troubling me that I'd like you to
11 address. And then -- because I know the Judges hate to just
12 do this, of course, in every case because while we love to
13 hear ourselves speak, it's less of a --

14 THE COURT: Well, I think that that's helpful
15 to the parties. I know when I sat on the Circuit, I mean
16 the good Appellate Judges do that. They get right to the
17 questions that, you know, they've read the briefs. If they
18 have a question, they ask it, and the argument is not just a
19 show-and-tell, rehashing the briefs. It's the colloquy with
20 the Judges, the lawyers that is helping answer the Judge's

21 questions, and that's what -- that's what a good oral
22 argument is. So I -- this was more of a -- I find it's
23 helpful to me.

24 So again, I want to thank counsel. Everyone was very
25 well prepared, and --

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1 MR. KRISLOV: Thank you, your Honor.

2 MR. McCAFFREY: Your Honor, Mr. Balser would
3 have been here today. He regrets the opportunity not to
4 appear before you but got called away yesterday with an
5 emergency.

6 THE COURT: Okay.

7 MR. KRISLOV: Your Honor, can I apologize for
8 once, and this would be the last time for awhile, in that
9 last phone conversation when I was -- when I know that I
10 asked for it to be held a little later in the day, and then
11 I was late on the phone conference. The reason is I was
12 attending a lecture by Judge Lefko of our Northern District
13 of Illinois. Judge Lefko was, you probably know, about
14 or --

15 THE COURT: Yes.

16 MR. KRISLOV: -- husband and her mother. And
17 so Judge Lefko is, while not a social friend, Judge Lefko is
18 a personal, professional friend. And when her talk went on
19 longer than --

20 THE COURT: It would have been pretty impolite
21 to walk out in the middle, and I wouldn't have expected you
22 to do that. So I --

23 MR. KRISLOV: That's why.

24 THE COURT: That's fine.

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MR. KRISLOV: That's why I was unable to take

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1 the phone call timely the last time.

2 THE COURT: Thank you. We are adjourned.

3 MR. KRISLOV: Thank you, your Honor.

4 MR. McCAFFREY: Thank you, your Honor.

5 (Proceedings adjourned.)

6 C E R T I F I C A T E

7 I certify that the foregoing is a correct
8 transcript from the record of proceedings in the
9 above-entitled matter.

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