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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **FOR THE COUNTY OF SAN DIEGO**

10 UTILITY CONSUMERS' ACTION  
NETWORK, and JOSE CASTRO, on behalf  
11 of themselves and all others similarly situated  
and/or the general public,

12 Plaintiff,

13 v.  
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15 CINGULAR WIRELESS, LLC, and DOES 1  
through 50, inclusive,

16 Defendants.  
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**CASE NO. GIC 838040**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION TO COMPEL  
CINGULAR WIRELESS, LLC TO  
COMPLY WITH COURT'S ORDER  
DATED JULY 26, 2005**

Date: April 7, 2006  
Time: 10:30 a.m.  
Dept: 72  
I/C Judge: Hon. Kevin A. Enright

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1           **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2           This motion presents a straightforward question – whether Cingular Wireless LLC  
3 (“Cingular”) must provide previously Court-ordered discovery responses relevant to plaintiff’s  
4 request for preliminary and permanent injunctive relief in light of the appeal of the denial of  
5 Cingular’s motion to compel arbitration, when Cingular’s motion did not and cannot stop plaintiff  
6 from proceeding with his claims for injunctive relief on both an individual and class-wide basis.<sup>1</sup>

7           As detailed below, Cingular must provide the disputed information. The discovery in  
8 dispute is directly relevant to developing an evidentiary record in terms of showing that injunctive  
9 relief is necessary and cannot await final resolution of the arbitration issues. The Court has  
10 already addressed this issue and ordered Cingular provide this information. Cingular has given no  
11 excuse for failing to do so. As a result, full and complete responses without objections and  
12 documents must be provided to plaintiff within 20 days.

13           Plaintiff also requests the Court order Cingular to respond without objections other than as  
14 to claims of privilege and work product, as it has refused to date to provide any responses despite  
15 the deadline for doing so already passed on January 24, 2006, pursuant to, *inter alia*, C.C.P.  
16 §2031.300(a).

17           **II. STATEMENT OF FACTS**

18           **A. Background of Action**

19           This class action is brought by Jose Castro, a Cingular customer who lives in San Diego  
20 County. This action is brought for the benefit of persons in California, primarily residents of San  
21 Diego County who reside or work in the U.S./Mexican border area, who have made or received  
22 local or long distance calls on the Cingular network but have been billed for such calls as if they  
23 were international calls originating from Mexico. The Complaint alleges that if a customer makes  
24 or receives a call in an area within a couple miles of the U.S./ Mexican border, these calls may not  
25 be picked up by local U.S.- based cell towers maintained by Cingular and thus billed as in-

26 \_\_\_\_\_  
27           <sup>1/</sup> As noted below, by agreement, the class certification related discovery has been deferred  
28 pending further discussions between counsel.



1 In addition, on March 25, 2005, plaintiff served Notices of Depositions for Cingular's  
2 persons most qualified to testify on various subjects relating to the class and injunctive relief  
3 issues. Those depositions were initially set to commence on April 11-14, 2005, but were  
4 continued until the Court ruled on the motion to compel arbitration.

5 Plaintiff has consistently indicated he will seek both preliminary and permanent injunctive  
6 relief to prohibit Cingular from continuing to refuse to fix the underlying problem, attempt to  
7 collect the mis-billed amounts at issue from consumers or from refusing to disclose the source of  
8 the mis-billing errors at issue, as well as ordering Cingular correct all mis-billed accounts, provide  
9 a mechanism for appropriate notice and refunds or waivers and/or correct any credit reports or  
10 referrals to collection agencies claiming such amounts were due and owing when they were not, as  
11 well as imposing a constructive trust over all monies improperly mis-billed and collected from  
12 consumers. The discovery sought in Request Nos. 26-46 in the Second Set of Requests for  
13 Production of Documents, as well as several of the scheduled depositions (specifically, Topic  
14 Nos. 1, 2, 4, 5, and 6 and accompanying document request nos. 1- 4 and 7- 9), are related to these  
15 requests for injunctive relief.

16 After various meet and confer discussions, an *ex parte* hearing with the Court on May 17,  
17 2005, and full briefing by the parties, counsel appeared before the Court on June 17, 2005. The  
18 parties agreed on the record that discovery related to the class certification issues contained in the  
19 First Set of Interrogatories, as well as the above-referenced depositions, would be deferred until  
20 the Court ruled upon Cingular's motion to compel arbitration, at which time if agreement could  
21 not be reached plaintiff would ask the Court to rule on the pending motions to compel responses  
22 to such discovery. The parties also asked the Court to rule on plaintiff's motion to compel full  
23 and compete responses to the Second Set of Document Requests relating to the injunction issues.  
24 After argument, the Court took the matter under submission.

25 On July 26, 2005, the Court ordered Cingular provide responses to discovery related to  
26 injunctive issues that are not subject to the pending arbitration motion. The Court ruled as  
27 follows:

1 Plaintiff's Motion to Compel Further Responses regarding the 2nd Set of Requests  
2 for Production of Documents . . . is granted as to RFP #s 26-46.

3 A privilege log is to be produced by Defendant on any documents it claims are  
4 privileged. . . .”

5 After the Court had issued this ruling, counsel for the parties engaged in substantive  
6 settlement negotiations. Counsel agreed to an open extension for responding to this Court-  
7 ordered discovery while Cingular decided if it wanted to proceed with a class-wide settlement.  
8 Counsel have periodically advised the Court of these discussions, and continued the deadline for  
9 these discovery responses, as well as hearings on the arbitration issue and on plaintiff's motion for  
10 preliminary injunction, while counsel focused on these settlement discussions over the last four  
11 months.

12 After these negotiations were terminated by Cingular, plaintiff's counsel advised counsel  
13 for Cingular that plaintiff would be withdrawing the previously agreed-to extension to provide  
14 these discovery responses, which was confirmed in a letter to Cingular's counsel dated January  
15 10, 2006. Plaintiff gave Cingular until January 24, 2006 to provide the responses ordered by the  
16 Court.

17 After the recent Case Management Conference and the argument on Cingular's motion to  
18 compel arbitration, in a letter dated January 18, 2006 to Cingular's counsel, plaintiff's counsel  
19 reiterated that documents and written responses to the discovery ordered by the Court were due no  
20 later than January 24, 2006, and also that counsel should discuss re-scheduling the depositions on  
21 the injunction-related issues.

22 Cingular did not provide the discovery responses by the January 24th deadline, nor  
23 otherwise communicate with plaintiff's counsel after this letter. Instead, on January 31, 2006,  
24 Cingular's counsel sent a letter stating that Cingular was awaiting the decision from the Court on  
25 the motion to compel arbitration and thus would not discuss the class-related discovery. In  
26 addition, despite the California law set forth in *Discover Bank v. Superior Court*, 36 Cal.4th 148  
27 (2005), and other rulings regarding Cingular's own arbitration clause in the *Parrish* litigation,  
28 Cingular intended to appeal the Court's ruling to the Court of Appeal if the Court struck down the

1 arbitration clause (which Cingular has now done), and thus discovery on all issues should not go  
2 forward as currently framed. Cingular’s counsel stated they were willing to discuss how plaintiff  
3 would now propose to limit the discovery previously ordered produced, but only if counsel was  
4 prepared to limit that discovery to Mr. Castro’s individual claims for injunctive relief – even  
5 though Cingular has admitted it could not move to compel arbitration with regard to either the  
6 class or individual claims for injunctive relief, and in fact did not do so.

7 In response, plaintiff’s counsel advised counsel for Cingular on February 1, 2006 that as  
8 Cingular had not timely responded to the Court-ordered discovery all objections had been waived;  
9 that counsel had reviewed the discovery ordered by the Court and still believed it was all  
10 injunction-related discovery over which the parties had already briefed the issue with the Court;  
11 and that the Court had already ordered Cingular to provide responses to that discovery. Thus,  
12 there was nothing for counsel to limit. Even after meet-and-confer efforts subsequent to the *ex*  
13 *parte* hearing setting this motion (where the Court may recall Cingular’s counsel indicated  
14 Cingular wanted to engage in further discussions), Cingular was steadfast in its refusal to provide  
15 any meaningful discovery and none relevant to any class-wide claims for injunctive relief.  
16 Counsel for both parties agreed this issue needed to be presented to the Court for resolution.

17 **C. Cingular Must Respond to Nos. 26-46 of the Second Set Of Document**  
18 **Requests.**

19 The Court has already found that Request Nos. 26-46 are relevant and necessary so that  
20 this Court can have a complete record to determine whether injunctive relief (which Cingular  
21 cannot resolve in arbitration) is appropriate, both individually and on a class-wide basis. The only  
22 question now is why Cingular is still refusing to respond.

23 **1. Cingular Must Respond To The Discovery Relevant To the**  
24 **Issues of Injunctive Relief**

25 There is no bar that prevents Cingular from complying with this Court’s Order to respond  
26 to the Second Set of Document Requests addressing the issues of injunctive relief (Nos. 26-46).  
27 The California Supreme Court held in *Broughton v. Cigna Health Plans*, 21 Cal.4th 1066, 1080-  
28

1 82 (1999), that claims for injunctive relief cannot be compelled to arbitration due to the public  
2 nature of the relief requested. As detailed below, Cingular’s motion to compel arbitration *did not*  
3 seek to compel the claims for injunctive relief to arbitration. Rather, it only sought a stay of such  
4 claims. Thus, these claims will only be determined before this Court.

5 The Court previously found such discovery should now proceed despite Cingular’s claims  
6 to the contrary in its Opposition to the Motion to Compel Discovery, based on Cingular’s claim  
7 such injunctive relief claims should be stayed. Nothing has changed since that original ruling in  
8 terms of the injunctive relief requested that contradicts this conclusion. The issues raised in  
9 connection with plaintiff’s request for preliminary and permanent injunctive relief addresses  
10 important issues regarding, *inter alia*, Cingular’s obligation to fix the underlying technical  
11 problem and to correct improper internal reports and reports to collection agencies that may  
12 currently be adversely affecting Mr. Castro’s and other consumers’ credit histories. This is not an  
13 issue that can wait for resolution for over a year while Cingular frivolously appeals the denial of  
14 its arbitration motion, particularly in a State where it has never won this issue. The only reason  
15 such discovery had been placed on hold for months was based on Cingular’s assurances this  
16 matter could be informally resolved – which it now refuses to discuss. Granting this motion is the  
17 only way to compel Cingular to promptly provide full and complete responses to the Second Set  
18 of Document Requests that Cingular refuses to answer.

19 If such discovery is not allowed to proceed, Cingular will have successfully filed a motion  
20 contrary to the current State of California law, which by law can only be directed to one form of  
21 relief, refused to respond to discovery on issues that are not subject to such a motion, then held  
22 up such discovery for months if not a year while it pursues a frivolous appeal, stopping this case  
23 in its tracks. If Cingular prevails on such a request, the need for injunctive relief may well  
24 become moot, creating and prolonging the very irreparable harm plaintiff seeks to stop. Thus,  
25 Cingular will have succeeded in its goal, even though its clause is illegal under California law,  
26 specifically in light of *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005). Equity does not  
27 countenance such an absurd result.



1 overruled Cingular’s objections to this discovery, other than privilege, once before. Thus, it has  
2 no basis to assert such objections again. Second, Cingular was given notice its responses were  
3 due on January 24, 2006, but has failed to provide any written responses or substantive  
4 documents– and still, two months later, has failed to do so. By failing to serve a timely response  
5 or provide documents, Cingular has waived any remaining objections to this Court-ordered  
6 discovery, other than as to privilege or work product. C.C.P. § 2031.331(a). Cingular cannot now  
7 claim such discovery is burdensome, oppressive, overbroad, or any of its other form objections.  
8 Finding waiver is mandatory, absent a motion by Cingular seeking relief from the waiver. And  
9 since Cingular has neither filed such a motion nor subsequently served a response that is in  
10 substantial compliance with the Court’s prior order, Cingular must be ordered to respond without  
11 asserting such objections, as well as provide an appropriate privilege log.

12 No substantial justification or other circumstances exist that would justify excusing such a  
13 failure to respond. Mansfield Decl., ¶ 14. Cingular’s appeal is contrary to the state of the law on  
14 the class-wide arbitration waiver issue in California, as set forth in *Discover Bank*, and as noted in  
15 our Motion to Compel Arbitration Opposition, Cingular is now 0-for-10 in the California courts  
16 on this issue. Cingular’s class action arbitration waiver clause has already been struck down by  
17 both the Court of Appeal and Supreme Court in the *Parrish v. Cingular Wireless* action.  
18 Remittitur issued in *Parrish* on December 21, 2005, making that decision final. Cingular has  
19 previously asserted the same arguments for its refusal to respond to this same discovery, claiming  
20 such discovery should be stayed pending final resolution of the arbitration issue in connection  
21 with the Court’s prior order compelling discovery. Those arguments were rejected. Cingular  
22 therefore ignored the deadline provided by plaintiff’s counsel to provide all relevant documents  
23 and responses. Finally, Cingular failed to provide responses consistent with the Court’s previous  
24 order. The Court by statute should consider whether to invoke the provisions of C.C.P.  
25 § 2031.310(a); finding that all objections other than privilege should not be asserted would be  
26 consistent with the requirements of this Code provision.

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1 which the Supreme Court precedent is based is on appeal, thereby thwarting the underpinning of  
2 *Broughton*, based on this one sentence. Second, and more significant, throughout its brief –  
3 indeed, in the very heading for the Section in which this sentence is contained – Cingular  
4 consistently says that what it is requesting from this Court is a ruling that the inarbitrable  
5 injunction claims be stayed. This stay request was also the rationale cited by Cingular to the  
6 Court when it explained why the Court should not compel responses to the injunction-related  
7 discovery – Cingular was moving to stay such claims, so such discovery should not proceed. The  
8 Court rejected that request, and Cingular did not seek writ review of that ruling. It is too late to  
9 seek reconsideration of that ruling.

10 This is a critical distinction, because a ruling on a request for a stay **is not an appealable**  
11 **order**. Such a ruling is only subject to an extraordinary writ, being that it is an interlocutory order  
12 within the Court’s discretion to issue due to the continuing nature of judicial oversight, since at  
13 some point there will be a trial and judgment on such claims. C.C.P. § 923; *Chase v. Brooks*, 187  
14 Cal.App.3d 657, 661 (1986). C.C.P. § 904.1 lists the types of orders that are subject to appeal,  
15 and an interlocutory order denying a stay request is not among them. Thus, even if Cingular could  
16 concoct a theory for ignoring the holding of *Broughton* and ignoring the injunctive claims while it  
17 pursued its frivolous appeal, Cingular’s request in its Motion was in fact only to stay the  
18 injunction claims pending resolution of the arbitration issue. Thus, the C.C.P. § 916(a) stay does  
19 not apply to the injunction-related claims, which Cingular admitted were inarbitrable but should  
20 be stayed pending the outcome of the arbitration. The Court can order Cingular to comply with its  
21 prior ruling.

22 **V. CONCLUSION**

23 Based on the foregoing, the Court must order Cingular to comply with the Court’s prior  
24 order and provide documents and responses to Requests Nos. 26-46 in the Second Set of

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1 Document Requests within 20 days of the Court's ruling on this Motion, as well as order such  
2 other and further relief as the Court may find appropriate.

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DATED: March 13 , 2006.

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