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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ROBERT RAMIREZ, ROBIN BEASLEY, SANDRA EVANS, ROBERT HARRIS, LUIS POCASANGRE CARDOZA, JOSE SALCEDO, A. SHAPPELLE THOMPSON, CORETTA SILVERS (formerly VICK), BLANCA NELLY AVALOS, and AMY SEVERSON, on behalf of themselves and all other persons similarly situated, Plaintiffs, vs. CINTAS CORPORATION, Defendant.	CASE NO. C04-00281-JSW [RELATED TO CASE NO. C05-03145-JSW] **DEFENDANT CINTAS CORPORATION'S REPLY IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: December 1, 2006 Time: 9:00 a.m. Courtroom: 2, 17th Floor Judge: Hon. Jeffrey S. White Complaint Filed: January 20, 2004
LARRY HOUSTON and CLIFTON COOPER, on behalf of themselves and all others similarly situated, Plaintiffs, vs. CINTAS CORPORATION, Defendant.	CASE NO. C05-03145-JSW [RELATED TO CASE NO. C04-00281-JSW] **DEFENDANT CINTAS CORPORATION'S REPLY IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: December 1, 2006 Time: 9:00 a.m. Courtroom: 2, 17th Floor Judge: Hon. Jeffrey S. White Complaint Filed: August 3, 2005

This Court should vacate the Arbitrator's award, which arrogated to the Arbitrator jurisdiction that the agreements did not confer.

A. <u>An Arbitral Award Asserting Jurisdiction That Does Not Exist Must Be Set Aside</u>.

Respondents first would hide behind a deferential standard of review. But Respondents overstate the standard, and the standard is not dispositive in any event. Some of Cintas' authorities set aside awards in excess of jurisdiction because, however deferential may be the standard, an award cannot survive if it asserts jurisdiction not conferred by the operative agreement. In other cases Cintas has submitted, the court interpreted the jurisdictional limits of the arbitration agreements *de novo* without any deference. *E.g.*, *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989) ("[W]here the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end."). Cintas believes the latter line of cases is the better reasoned, but the standard of review makes no difference. An arbitral award asserting jurisdiction that does not exist must be set aside; an arbitration cannot bootstrap his way to jurisdiction. (*See* Cintas' Notice of Motion and Motion to Vacate 4:25-5:13.)

B. <u>Under *Bazzle*, This Court Determines The Applicability Of The Place-Of-Arbitration Term To Disputes Between Cintas And Absent Class Members</u>.

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), dictates that *this Court* determine the "applicability" of the arbitration agreements of the named Respondents to absent members of the putative class.

Respondents concede that, under *Bazzle*, gatekeeping issues — such as the applicability of an arbitration agreement to the parties' underlying dispute — are for the Court to decide. Respondents argue, however, that the Arbitrator can decide the location of the arbitration. The three cases they cite are irrelevant. First, none of the three was a class action; thus, none involved absent class members who themselves were each individually bound to arbitrate elsewhere. Second, none of the three was a review of an arbitral decision. Those courts were improperly asked *in the first instance* to declare the arbitration agreement unconscionable.

Finally, each of the three presented a situation different from that here. Here, the parties by contract provided that the arbitration hearing would be held in the county where the employee works or last worked. Each of the three cases cited by Respondents, by contrast, involved an agreement requiring the individual to arbitrate far from the location of the dispute. *E.g.*, *Richard C. Young & Co. v. Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004) ("[T]he object of the litigation was to avoid the additional costs [the investment advisor organization] would incur if the arbitration were held in California [where the client resided] instead of Boston."); *Ciago v. Ameriquest Mortgage Co.*, 295 F. Supp. 2d 324, 327 (S.D.N.Y. 2003) (the arbitration agreement signed by a New York employee specified arbitration "at the Company's headquarters in Orange, California"); *Gill v. World Inspection Network Int'l, Inc.*, No. 06-CV-3187 (JFB) (MLO), 2006 WL 2166821, at *1-2 (E.D.N.Y. July 31, 2006) (franchisee in New York sought to bar arbitration in Seattle, Washington, claiming unconscionability).

Thus, in each of the three cases cited by Respondents, arbitral jurisdiction plainly existed over the claims *of the individual*. The only question was where the *individual's* claim should be heard. Here, by contrast, the question is whether the Arbitrator usurped his jurisdiction by ruling that Cintas employees from all over the country, each with a separate agreement to arbitrate in the county where he or she works or worked, can be made to arbitrate their claims in Alameda County. Nothing in *Bazzle* requires this Court to be bound by, or even to defer to, an arrogation of jurisdiction that the arbitration contract denies.

C. <u>The Arbitrator Did Not Misinterpret The Unambiguous Place-Of-Arbitration Term; He Ignored The Term And Rendered It Meaningless</u>.

Every usurpation-of-jurisdiction case is argued to be merely a "misinterpretation" of the arbitration agreement. But styling the issue that way does not change its substance. The Arbitrator here did not, as Respondents assert, misinterpret the "held in the county" language in the arbitration agreements. The Arbitrator stated:

> [The "held in the county" language] simply directs the employee to *request* an arbitration that is held in the county and state where he or she works or last worked but does not mandate that the arbitration, including a class arbitration, *actually be held* there.

(Arbitrator's Opinion and Decision Re Issues of Class Action Arbitration ("Arbitrator's Award") 15:21-16:2, attached as Exhibit V to the Declaration of Paul Grossman ("Grossman Decl.") (some emphasis in original).)

The Arbitrator thus did not "interpret" the agreement; he wrote a key term out of it. In doing so, he exceeded his powers and found that the agreements give him jurisdiction he does not have: to resolve, in a hearing held in Alameda County, the claims of Cintas employees who contracted to arbitrate their claims elsewhere. "When the arbitrator ignores the unambiguous language chosen by the parties, the arbitrator simply fails to do his job." *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000) (*citing Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union*, 76 F.3d 606, 610 (4th Cir. 1996)).

Despite their protestations about the "ambiguous" and "convoluted" wording of the place-of-arbitration term, Respondents themselves repeatedly and correctly identify the key elements of the provision at issue:

> The operative portion of the sentence reads: "Employee shall . . . submit . . . a written request to have such claim . . . resolved through impartial arbitration [1] conducted in accordance with [AAA rules] . . . and [2] held in the county and state where Employee currently works for Employer. . . ."

(Plaintiffs' Opposition ("Opp.") 3:12-16.) Similarly:

> [An employee's request to initiate arbitration] must contain two requests: (1) arbitration under the AAA Employment Rules, and (2) that the arbitration be held in the county where the employee last worked.

(*Id.* 10:19-21.)

Significantly, Respondents have never challenged the language requiring arbitrations to be conducted in accordance with the AAA rules. Indeed, they have affirmatively asserted that under the agreements, AAA rules control. (*Id.* 2:8-10 ("Pursuant to . . . Rule 3 of the American Arbitration Association ('AAA') Supplementary Rules for Class Arbitration ('Class Arbitration Rules'), Judge Lynch was tasked with 'Clause Construction'. . .").) Respondents cannot have it both ways. If the agreements conclusively required arbitrations to be conducted

under AAA rules, they equally conclusively required arbitrations to be "held in the county" where the employee works or last worked.

D. In Ruling That "Held In The County" Does Not Mean "Held In The County," The Arbitrator Relied On Contractual Language That Does Not Exist.

The Arbitrator stated:

> Notably the phrase at issue does not explicitly provide that the county where the employee works or last worked is the only place the arbitration may be initiated or held. In fact the agreements contain a provision providing that "arbitration could be compelled in any court having jurisdiction", which is inconsistent with Cintas' interpretation and militates against Cintas' interpretation of this phrase.

(Arbitrator's Award 14:19-15:1.) As Cintas pointed out in its opening brief, the language quoted by the Arbitrator does not appear in any of the parties' agreements. The actual language, set forth in the award, states: "A legal action either to maintain the status quo pending arbitration or to enforce the agreement to arbitrate or an arbitration award may be filed and pursued in any court having jurisdiction." (*Id.* 10:8-10.) This actual language merely specifies the limited types of proceedings that parties may bring in court. It does not contradict the parties' agreement that arbitration is to be held in the county where the employee works or last worked.

E. Respondents Rely On Their Own Contract Breach To Justify The Arbitrator's Rationale.

Respondents contend: "Plaintiff Salcedo is arbitrating his claims in San Francisco because Cintas filed a motion to compel in the Northern District of California, a 'court having jurisdiction.'" (Opp. 9:6-8.)

What Respondents omit is that Salcedo had — and breached — a contractual obligation to request an arbitration to be held in Suffolk County, New York. Other Respondents similarly breached the place-of-arbitration terms in their agreements. *With respect to the specific*

named Respondents only, Cintas waived the place-of-arbitration term and enforced the arbitration agreements in the Northern District of California.[1]

Having chosen to violate their arbitration agreements and sue in the Ninth Circuit, presumably seeking tactical advantage, Respondents now disingenuously claim they can drag absent class members into the Northern District as well, and force Cintas to arbitrate, as to them, in a different forum from that designated by contract. This writes out of the contract the limitation that the Alameda County arbitration be limited to employees who work or last worked in that county.

No employee has satisfied what even the Arbitrator acknowledges is a prerequisite to arbitration: requesting an arbitration in the county and state where he or she works or last worked for Cintas.

F. Jurisdiction Cannot Be Achieved, Where It Does Not Exist, By Construing Language Against Either Party.

Respondents argue that the Arbitrator's award should not be vacated because he applied the rule of *contra proferentem*. But there is no ambiguity here, and therefore no cause to elevate hoary construction principles over plain contractual language. An arbitration "held in the county" of work is what Cintas and each of its employees contracted, in separate arbitration agreements, to occur. The Arbitrator lacks authority to resolve, in an arbitration in Alameda County, the claims of persons who do not work there and never have worked there. The Arbitrator cannot create jurisdiction by "construing" unambiguous language.

[1] Most courts hold that "where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4." *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1219-20 (10th Cir. 2005). The Ninth Circuit, however, has not followed the majority view and has held that Section 4 of the Federal Arbitration Act limits this Court to compelling arbitration in this judicial district, despite the parties' agreement regarding the place of arbitration. *Cont'l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968-69 (9th Cir. 1941). Mindful of that Ninth Circuit precedent, in this particular case Cintas chose to move to compel arbitration of these particular individuals' claims in the district in which suit was filed.

G. The Arbitrator In The *Veliz* Matter Found That "Held In The County" Means "Held In The County."

As Cintas discussed in its opening brief, in *Veliz v. Cintas Corp.*, AAA Case No. 11 160 01323 04, an opt-in action under the Fair Labor Standards Act ("FLSA"), Arbitrator Bruce E. Meyerson found that "the place-of-arbitration provision [in the Cintas arbitration agreements] constitutes an explicit understanding between Cintas and its SSR's that arbitration is to occur in the state and county where the employee works." (Clause Construction Award and Ruling on Scope of Arbitration ("*Veliz* Award") 5:1-3, attached as Exhibit W to the Grossman Declaration.) The *Veliz* Award unequivocally held that only those relatively few claimants specifically compelled to arbitration by the federal district court in the Northern District of California could participate in an arbitration proceeding in Northern California. (*Id.* 5:1-4.) The approximately 1900 other opt-in claimants were barred from joining a Northern California arbitration because of each of his or her agreements to arbitrate in the county where he or she works or last worked for Cintas. Arbitrator Meyerson stated:

> Because I have concluded that the Cintas arbitration agreement requires arbitration in the location where SSR's worked, the 1900 opt-in claimants, to the extent they have not been compelled to arbitrate by the District Court in the Northern District of California, may not become parties to this proceeding. . . . [T]he place-of-arbitration provision contained in an enforceable arbitration agreement must be given effect.

(*Id.* 7:20-8:2.)

After filing their Opposition, Respondents filed a motion to submit for this Court's review Arbitrator Meyerson's Order Clarifying Clause Construction Award, dated October 13, 2006 ("Clarifying Order"), in the *Veliz* matter. Respondents contend that this Clarifying Order somehow reinforces Arbitrator Lynch's rationale in ignoring the place-of-arbitration term. In no way did the Clarifying Order, however, change the *Veliz* Award. Indeed, Arbitrator Meyerson explicitly rejected the claimants' request to modify his Award. (Clarifying Order 1:22-23 ("Although Claimants have requested that I reconsider my Award, I believe that a clarification is necessary, not a reconsideration."), attached as Exhibit A to Respondents' Motion to File

Additional Authority in Support of Opposition to Defendant's Motion to Vacate Arbitration Award.)

In dicta, Arbitrator Meyerson suggested that in a non-FLSA class arbitration, he might have ruled differently because of the absence of the FLSA and/or because federal rules would govern. (*Id.* 2:5-9 ("I did not fully explain in the Award that because a class arbitration, in contrast to a collective arbitration under the Fair Labor Standards Act . . ., does not require class members to become a party to another proceeding, there was nothing inconsistent between the place-of-arbitration provision and participation in a class arbitration held in a locale other than the county where an SSR worked.").) This "clarification" is clearly erroneous for at least two reasons. First, there is no such thing as a "collective arbitration under the Fair Labor Standards Act." The FLSA only creates a collective "action" which "may be maintained" "in any **Federal or State court** of competent jurisdiction." 29 U.S.C. § 216(b) (emphasis added). Second, the federal rules do not govern AAA arbitrations. *Pike v. Freeman*, 266 F.3d 78, 92 n.17 (2d Cir. 2001) ("[T]he Federal Rules of Civil Procedure do not apply in arbitrations before the American Arbitration Association."); *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264, 268 (2d Cir. 1999) ("'The federal rules do not govern the procedure in the hearings before the arbitrators.'").

In short, the Clarifying Order does not change the Award in *Veliz*, and does not change the reasons why the Court should vacate the Arbitrator's award in this case.[2]

[2] In the *Veliz* action, and prior to Cintas making this motion to vacate Arbtrator Lynch's Award in this matter, Cintas moved to confirm Arbitrator Meyerson's Award as subsequently quoted in this motion by Cintas (both in Cintas' opening brief and in this reply). Cintas moved in the *Veliz* action to vacate Arbitrator Meyerson's interpretation of the arbitration agreements of a relatively few persons which allowed a putative class arbitration to proceed to the next stage beyond the clause construction stage, albeit limited to those relatively few persons who had been compelled to arbitration by the District Court for the Northern District of California. Cintas originally noticed its motion in *Veliz* for hearing on October 31, 2006 before U.S. District Court Judge Saundra Brown Armstrong. The hearing on Cintas' motion in the *Veliz* action was subsequently rescheduled by the Court for hearing on December 12, 2006.

H. Respondents Err In Contending That The Venue Rules Do Not Apply To Class Actions.

Finally, Respondents argue that "a nationwide class arbitration can proceed on the independent ground that venue restrictions do not apply to absent class members." (Opp. 13:14-17.) In support of their argument, Respondents cite several cases dealing with class actions under the Federal Rules of Civil Procedure, not class arbitrations pursuant to arbitration agreements containing different place-of-arbitration provisions. None of Respondents' authorities is applicable because, in lawsuits under the federal rules, venue is not jurisdictional.[3] Arbitration, by contrast, is a creature of contract, not rule, and the arbitrator's jurisdiction is only as broad as the contract that conferred it. In arbitration, then, each place-of-arbitration provision in each contract has jurisdictional force.

The issue is jurisdiction — namely, whether the Arbitrator exceeded his jurisdiction under the parties' agreements to the extent he (i) decided each of the absent class members may disregard his or her contractual promise, and (ii) thereby discarded Cintas' substantive contractual right and Cintas' substantive statutory right under the Federal Arbitration Act for each such person to arbitrate claims in the county where he or she works or last worked.

I. Conclusion

Respondents concede that Cintas could file in the appropriate jurisdictions petitions to compel arbitration with respect to every putative class member who either opts in or chooses not to opt out of an Alameda County arbitration (*i.e.*, if an employee who works in Dade County, Florida seeks to participate in the Alameda County arbitration, Cintas could file a petition to compel arbitration in Florida). Respondents are correct that Cintas could do so. The jurisdictional issue in the specific circumstances of this case, however — whether the Arbitrator in these specific circumstances has jurisdiction under the arbitration agreements of the named

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[3] *E.g.*, *U.S. v. Trucking Employers, Inc.*, 72 F.R.D. 98, 100 (D.D.C. 1976) ("The central function of venue generally is to regulate the forum in which a party may appear or may force another party to appear personally, in a suit in which the court would otherwise have jurisdiction."); *Bywaters v. U.S.*, 196 F.R.D. 458, 464 (E.D. Tex. 2000) ("Venue does not relate to the power to adjudicate, but to the place where that power is to be exercised . . . .").

Respondents to resolve disputes of Cintas employees who did not work in Alameda County — should be resolved by this Court. The proper resolution is to give full effect to the contract language which requires that the arbitration be "conducted in accordance with American Arbitration Association's National Rules for the Resolution of Employment Disputes" (a provision Respondents' counsel like, and indeed assert) and be "held in the county and state where Employee . . . most recently worked . . . ." (a provision of equal dignity, located in the same place in the employment agreement, which Respondents' counsel do not like, and struggle to ignore). Accordingly, Cintas respectfully requests that the Court grant its Motion.

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Respectfully submitted,

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