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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

14 PAUL VELIZ, *et al.*, on behalf of
15 themselves and all others similarly
situated.

16 Plaintiffs,

17 vs.

18 CINTAS CORPORATION, an Ohio
19 corporation; PLAN ADMINISTRATOR
for the Cintas Partners' Plan; and DOES
20 1-25, inclusive,

21 Defendants.

Case No. C-03-01180 (RS)

[E-FILING]

CLASS ACTION

**CINTAS' REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT
ON CERTAIN PLAINTIFFS' THIRD
CLAIMS FOR RELIEF**

Date: January 21, 2009

Time: 9:30 a.m.

Courtroom: 4

Judge: Hon. Richard Seeborg

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1 **I. INTRODUCTION AND SUMMARY**

2 Cintas' motion seeks summary judgment as to certain uniform-delivering plaintiffs to
 3 whom the MCA exemption applies because the United States Department of Transportation
 4 ("DOT") had the authority to impose safety regulations on them because their undisputed and
 5 admitted job duties regularly subjected them to operating as the final, intrastate leg of an
 6 organized, integrated interstate product distribution system. There is no question that the DOT
 7 had, and continues to have, such authority. Thus, Cintas is entitled to summary judgment.

8 Plaintiffs' opposition does not contest the material facts that show the DOT's authority,
 9 including that: (1) the 146 Plaintiffs had a duty to transport both new uniforms and direct-sale
 10 catalog goods to their customers as a regular and inseparable part of their regular duties; (2)
 11 those products were in a continuous movement in interstate commerce; and (3) those 146
 12 Plaintiffs' duties that potentially affected the safety of transportation in interstate commerce
 13 were more than *de minimis*.

14 Instead, Plaintiffs argue only that Cintas has not satisfied Plaintiffs' make-believe legal
 15 and evidentiary standards that are contrary to binding Ninth Circuit precedent, the precedent
 16 from every other Circuit that has addressed this issue, and precedent from the United States
 17 Supreme Court. This Court cannot and should not deny Cintas' motion based on Plaintiffs'
 18 attempts to rewrite the law and ignore the facts.

19 **II. CINTAS HAS SATISFIED THE PROPER STANDARD FOR THE MCA**
 20 **EXEMPTION**

21 **A. The MCA Exemption Applies to the Final, Intrastate Leg of Transportation**
 22 **of Goods in the Practical Continuity of Movement in Interstate Commerce**

23 Plaintiffs' main argument in opposition to Cintas' motion is a desperate and highly
 24 inappropriate invitation for this Court to commit clear legal error by entertaining a standard for
 25 the MCA exemption entirely at odds with every court that has addressed this issue over a span of
 26 many years, including the Ninth Circuit. Dkt 1043 (Opp at 8:10-13:12). As Plaintiffs concede
 27 yet try to avoid, this Court is bound by Ninth Circuit precedent holding that the MCA exemption
 28 applies to drivers whose duties subject them to *either* crossing state lines *or* delivering goods in
 the practical continuity of movement from one state to another. *Id.* at 8:21-22; *see, e.g., Klitzke v.*

1 *Steiner*, 110 F.3d 1465, 1469 (9th Cir. 1997). Plaintiffs desperately and repeatedly aggrandize
2 Judge Nygaard’s concurring opinion in *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 254-55
3 (3rd Cir. 2005), which is unsound both as an interpretation of the relevant law and as an
4 unprincipled departure from the bedrock legal principle of *stare decisis*.¹ Plaintiffs’ request for
5 this Court to act as if the United States Supreme Court, every Circuit of the Court of Appeals, and
6 the United States Departments of Labor and Transportation have been misinterpreting a law for
7 years warrants discussion here not because it has any merit at all, but because the legal flaws and
8 misstatements underlying Plaintiffs’ lead argument are replicated, like a virus, throughout
9 Plaintiffs’ opposition.

10 Both Plaintiffs’ proposed theory and their request that this Court could and should
11 disagree with the Ninth Circuit are incorrect. First, Plaintiffs’ argument is premised on their
12 groundless assertion that this Court should expand the FLSA and limit the MCA “because such a
13 construction would best accomplish Congress’ worker-protection objectives under the FLSA.”
14 Dkt 1043 (Opp. at 13:7-12). Plaintiffs’ argument ignores Congress’ intentional balance in favor
15 of protecting the health and safety of all persons and goods – including workers – engaged in
16 interstate commerce. The United States Supreme Court has expressly held that Plaintiffs’ view of
17 a court’s guiding factors in interpreting the interplay between the FLSA and the MCA is wrong.

18 It is uncontested that there can be no concurrent jurisdiction between the DOT, which
19 administers the MCA, and the Department of Labor (“DOL”), which administers the FLSA. *See*
20 *Morris v. McComb*, 332 U.S. 422, 437-38 (1947); *Reich v. American Driver Serv., Inc.*, 33 F.3d
21 1153, 1155 (9th Cir. 1994) (stating that “a motor carrier cannot be subject to the jurisdiction of
22 both the Secretary of Labor and the Secretary of Transportation”). While Plaintiffs would have

23 _____
24 ¹ The majority opinion in *Packard* wrote that “as a general matter, cases sustaining claims of
25 MCA exemption from the FLSA overtime requirements involve patterns of distribution markedly
26 unlike the [passengers and bus driving pattern at issue in *Packard*]. Typically, the carrier’s
27 activity is a clearly identifiable element of an integrated interstate distribution system. Also,
28 typically, the items the carrier is transporting are not passengers but freight.” 418 F.3d at 254.
Thus, the *Packard* majority found the drivers at issue nonexempt, noting that bus drivers are not
integrated into passengers’ interstate travel “to the degree in which many intrastate commercial
drivers are integrated into the interstate movement of commercial goods.” *Id.* at 255. Where, as
here, intrastate drivers are “a clearly identifiable element of an integrated interstate distribution
system,” the *Packard* majority’s analysis would find the MCA exemption applicable.

1 this Court interpret the MCA narrowly to expand the jurisdiction of the DOL over drivers, the
2 history and goals of the FLSA and the MCA require that this Court interpret the MCA jurisdiction
3 of the DOT broadly.²

4 In *Levinson v. Spector Motor Serv.*, 330 U.S. 649 (1947), a Supreme Court case relied on
5 in Cintas' motion but entirely ignored by Plaintiffs, the Supreme Court performed an extensive
6 analysis of the history and goals of the MCA and the FLSA and determined that the

7 logic of the situation is that Congress, as a *primary* consideration,
8 has preserved intact the safety program which it and the Interstate
9 Commerce Commission [the prior administrator of the MCA] have
10 been developing for motor carriers since 1936. To do this, Congress
11 has prohibited the overlapping of the jurisdiction of the [DOL] with
12 that of the Interstate Commerce Commission as to maximum hours
13 of service. Congress might have done otherwise. It might have
14 permitted both Acts to apply. There is no necessary inconsistency
15 between enforcing rigid maximum hours of service for safety
16 purposes and at the same time, within those limitations, requiring
17 compliance with the increased rates of pay for overtime work done
18 in excess of the limits set in § 7 of the Fair Labor Standards Act.
19 Such overlapping, however, has not been authorized by Congress
20 *and it remains for us to give full effect to the safety program to
21 which Congress has attached primary importance, even to the
22 corresponding exclusion by Congress of certain employees from the
23 benefits of the compulsory overtime pay provisions of the Fair
24 Labor Standards Act.*

25 330 U.S. at 661-62 (footnote excluded) (emphasis added). Thus, courts interpreting the interplay
26 between the FLSA and the MCA must be guided by the fact that Congress “has attached primary
27 importance to the regulation of employees of carriers in the interests of safety” under the MCA.
28 *Moore v. Universal Coordinators, Inc.*, 423 F.2d 96, 99 (3rd Cir. 1970).

Given that the proper interpretive framework favors jurisdiction of the MCA to protect
public safety in interstate transportation, it is unsurprising that the DOL, the DOT, and every

² Cintas recognizes that this Court has recently ruled that the MCA exemption on and after August 10, 2005 only applied to drivers of vehicles over 10,000 pounds. Dkt 1039 (Nov. 13, 2008 Order). Cintas respectfully disagrees with that holding and submits that the entirety of the 146 Plaintiffs' FLSA claims should be dismissed pursuant to this motion regardless of the date that these Plaintiffs terminated their employment relationship with Cintas. Nonetheless, Cintas has identified 102 Plaintiffs out of the 146 who are subject to this motion whose employment with Cintas terminated before August 10, 2005. Declaration of Andrew Chang in Support of Reply, ¶¶ 2-4. Cintas is in any event entitled to summary judgment as to the portion of the remaining 44 Plaintiffs' FLSA claims before August 10, 2005. Cintas also reserves the right to subsequently move for summary judgment based on the post-August 10, 2005 remainder of those 44 Plaintiffs' claims, if any, based on additional evidence.

1 court that has addressed the issue, agree that the DOT has jurisdiction over intrastate
 2 transportation of goods in a continuous movement from one state to another. *See, e.g., Klitzke,*
 3 *110 F.3d at 1469; Bilyou v. Dutchess Beer Distrib., Inc., 300 F.3d 217 (2d Cir. 2002); DOL*
 4 *Interstate Commerce Requirements of [MCA] Exemption, 29 C.F.R. § 782.2(b)(3); RJN, Ex. 1,*
 5 *DOT Notice of Interpretation, Application of the Federal Motor Carrier Safety Regulations*
 6 *(“DOT Interpretation of the MCA”), 46 Fed. Reg. 37,902 (July 23, 1981). It is also telling that,*
 7 *even after several years, no court has adopted Judge Nygaard’s concurring opinion in Packard.*
 8 *See Walters v. Am. Coach Lines of Miami, Inc., 569 F. Supp. 2d 1270, 1287 n.13 (S.D. Fla. 2008)*
 9 *(declining to follow Judge Nygaard’s concurring opinion in Packard).*

10 Plaintiffs’ argument that DOL and DOT interpretations support them rests on Plaintiffs’
 11 systemic misreading of the term “interstate” throughout their opposition. Dkt 1043 (Opp. at 9:21-
 12 11:3). Plaintiffs read the term “interstate” as used by the DOL and the DOT as solely meaning
 13 “driving across state lines.” Thus, when the DOT says that the MCA exemption applies to drivers
 14 who “could reasonably have been expected to make one of the carrier’s interstate runs,” Plaintiffs
 15 argue that phrase refers only to a “run” that actually crossed state lines. Dkt 1043 (Opp. at 9:21-
 16 10:18 (citing DOT Interpretation of the MCA, 46 Fed. Reg. 37,902)). Such an artificially limited
 17 reading is baseless in light of the fact that the DOT was describing the effect of, among other
 18 cases, *Morris v. McComb, which involves solely intrastate driving.* RJN, Ex. 1, DOT
 19 Interpretation of the MCA, 46 Fed. Reg. 37,902.³ The Supreme Court’s express holding that the
 20 MCA can apply to intrastate transportation also requires this Court to reject Plaintiffs’ contrary
 21 argument. *Morris*, 332 U.S. at 426-27, 432-33.

22 Even if there were no contrary Ninth Circuit precedent and this Court could consider
 23 Judge Nygaard’s concurring opinion, that concurrence is wrong because its and plaintiffs’

24 _____
 25 ³ Plaintiffs’ persistent misreading of “interstate” extends to falsely claiming that *Morris* involved
 26 “delivery runs that crossed state lines.” Dkt 1043 (Opp. at 16:23-25). Actually, the Supreme
 27 Court in *Morris* held the MCA exemption applied to a carrier whose drivers transported goods
 28 *entirely within a single state*, where the drivers were transporting goods to and from boat docks,
 rail terminals, and other interchange shipping points in that state that were destined to, or had
 come from, another state. *Morris*, 332 U.S. at 426-27 n.7, 432-33 (employer transported goods
 “in and about the metropolitan area of Detroit, Michigan, and all within three contiguous counties
 of that State”)(emphasis added).

1 asserted reading of the DOT's jurisdictional statute does not somehow preclude the DOT's,
2 DOL's and courts' numerous and consistent interpretations that intrastate transportation can be
3 subject to the DOT's jurisdiction. Plaintiffs' argument focuses on the language of 49 U.S.C. §
4 13501, which provides that the DOT has jurisdiction, in relevant part, "over transportation by
5 motor carrier and the procurement of that transportation, to the extent that passengers, property,
6 or both, are transported by motor carrier" between "a State and a place in another State." Courts,
7 including the Ninth Circuit, have not ignored this language, but have quoted and interpreted it as
8 applying to *all* legs of a product's continuous transportation from one state to another state,
9 including any final, intrastate leg. *Klitzke*, 110 F.3d at 1469. That interpretation is consistent
10 with the United States Supreme Court's directive that the statutes be read to protect the public
11 safety interests of the MCA. A contrary interpretation would carve out a substantial loophole in
12 the safety regulations governing maintenance and work hours that the DOT put into place to
13 protect the public. *See Levinson*, 330 U.S. at 678, n.20. For example, Plaintiffs' argument would
14 allow product carriers to avoid DOT requirements for driver qualifications, inspection,
15 maintenance, and driving time limitations simply by having drivers stop at state lines and transfer
16 products from one vehicle to another. Plaintiffs' argument is necessarily at odds with the primary
17 purpose of the MCA and should be rejected. *Morris*, 332 U.S. at 431-32 (courts must look to the
18 character of the employee's activities, not the proportion, to determine "the actual need for the
19 [DOT] to establish reasonable requirements with respect to qualifications, maximum hours of
20 service, safety of operation and equipment").

21 Finally, Plaintiffs' assertion that this Court should deviate from Ninth Circuit authority is
22 entirely improper. *United States v. Aguon*, 851 F.2d 1158 (9th Cir. 1988) is inapposite. Judge
23 Reinhardt's criticism of Judge Wallace as to the role of the intermediate federal appellate courts
24 (851 F.2d at 1173-74) does not provide license to allow a district court to avoid controlling
25 precedent and "explain" to the Ninth Circuit why its precedents are "wrong". *Hart v. Massanari*,
26 266 F.3d 1155, 1170 (9th Cir. 2001) ("A district judge may not respectfully (or disrespectfully)
27 disagree with his learned colleagues on his own court of appeal who have ruled on a controlling
28 legal issue....Binding authority within this regime cannot be considered and cast aside; it is not

1 merely evidence of what the law is. Rather, caselaw on point *is* the law.”)

2 Adopting the view expressed by Judge Nygaard would violate the principle of *stare*
3 *decisis*, which has “special force in the area of statutory interpretation.” *CBOCS West, Inc. v.*
4 *Humphries*, 128 S. Ct. at 1958, quoting *John R. Sand & Gravel Co. v. United States*, 128 S. Ct.
5 750 (2008). Plaintiffs concede that “many courts, including the Ninth Circuit” have interpreted
6 the statutory MCA exemption as Cintas does on this motion. Dkt 1043 (Opp. at 11:4). This
7 Court must follow the Ninth Circuit’s *express* rejection of the argument that the MCA does not
8 apply to any intrastate transportation, especially since the Ninth Circuit cited and discussed the
9 very statutory language on which Plaintiffs rely. *Klitzke*, 110 F.3d at 1469.

10 **B. The *De Minimis* Exception to the MCA Exemption Does Not Apply to Drivers**
11 **Whose Regular Duties Subject them to Transporting Goods in Interstate**
12 **Commerce**

13 A driver whose regular duties subject him to transporting even a minimal amount of goods
14 in interstate commerce falls under the MCA exemption, even if the driver never actually does so.
15 DOL Requirements for [MCA] Exemption in General, 29 C.F.R. § 782.2 (a driver is exempt so
16 long as his *bona fide* duties subject him to operating in interstate commerce, regardless of
17 proportion of time or activities spent actually doing so); RJN, Ex. 1, DOT Interpretation of the
18 MCA, 46 Fed. Reg. 37,902 (“[e]ven a minor involvement in interstate commerce as a regular part
19 of an employee’s duties will subject that employee to the jurisdiction of the [Federal Highway
20 Safety Administration]”); *Badgett v. Rent-Way, Inc.*, 350 F. Supp. 2d 642, 654 (W.D. Pa. 2004).

21 The United States Supreme Court and the lower courts have established that -- contrary to
22 Plaintiffs’ argument – the MCA exemption does not require any kind of “percentage of out-of-
23 state goods” test whatsoever. *See, e.g., Levinson*, 330 U.S. at 674-75 (it is the character of the
24 activities, *not the proportion*, that determines whether an employee is subject to DOT
25 jurisdiction); *Morris*, 332 U.S. at 431-32 (courts must look to the character of the employee’s
26 activities, not the proportion); *Badgett*, 350 F. Supp. 2d at 654-55 (in determining application of
27 the MCA exemption, “it is the *nature* of the employee’s regular job duties that is most important,
28 not necessarily the *percentage* of the employee’s” involvement in interstate commerce) (emphasis
in original). This is especially true of drivers because the very nature of their duties substantially

1 impacts interstate commerce. *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 417 n.10 (3rd
 2 Cir. 1992)(“[a] number of courts have held that drivers should seldom, if ever, fall within [the] *de*
 3 *minimis* exception”).

4 **1. The *De Minimis* Exception Does Not Apply to Drivers Whose Primary**
 5 **Duties Require Transporting Interstate Commerce Products**

6 The *de minimis* exception, which Plaintiffs argue precludes summary judgment here,
 7 generally only exists for employees who only handle freight before or after loading it onto a
 8 vehicle driven by another, because those non-drivers’ tasks “may be too ‘trivial, casual or
 9 occasional’ to affect safety and bring them under the MCA’s authority.” *Friedrich*, 974 F.2d at
 10 416-17 (quoting *Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 708 (1947)). This is
 11 because the *de minimis* exception must be read in light of the overarching purpose of the MCA,
 12 which is to ensure safety on public roads by providing the DOT with the authority to regulate
 13 safety in interstate commerce over employees who will likely have an effect on that safety. *See*,
 14 *e.g.*, *Morris*, 332 U.S. at 431-32 (“factually speaking, not the amount of time an employee spends
 15 in work affecting safety, but what he may do in the time thus spent whether it be large or small
 16 determines the effect on safety. Ten minutes of driving by an unqualified driver may do more
 17 harm on the highway than a month or a year of constant driving by a qualified one”), quoting
 18 *Levinson*, 330 U.S. at 674-75.

19 Courts applying the *de minimis* exception focus on whether an employee’s duties have a
 20 *de minimis* effect on the safety of interstate transportation, either because: (1) as in the case of the
 21 freight handlers in *Friedrich*, those duties are so removed from driving that they do not actually
 22 impact the safe transportation of goods in interstate commerce; or (2) the employee’s regular
 23 duties do not subject him to the possibility of affecting safety of interstate commerce, but
 24 incidental, minor duties may involve interstate commerce in extraordinary circumstances. *See*,
 25 *e.g.*, *Masson v. Ecolab, Inc.*, Case No. 04 Civ. 4488 (MBM), 2005 U.S. Dist. LEXIS 18022, *33-
 26 36 (S.D.N.Y. Aug. 18, 2005).

27 As to the first category above, courts are clear that drivers who reasonably can be
 28 expected to drive goods that are in interstate commerce directly impact the safety of

1 transportation and should seldom, if ever, be subject to the *de minimis* exception. *See, e.g.,*
2 *Friedrich*, 974 F.2d at 417 n.10; *Morris*, 332 U.S. at 433-34 (holding group of drivers exempt
3 where actual trips delivering goods that were in interstate commerce ranged from none to only 97
4 in a year); *Badgett*, 350 F. Supp. 2d at 647-48, 656-57 (rejecting plaintiffs' *de minimis* claim
5 because "regardless of the number of interstate/intrastate trips they actually made, at all relevant
6 times, they could have been called upon in the regular course of their employment to make trips
7 affecting interstate commerce") (emphasis in original); *Guyton v. Schwan Food Co.*, Civil No.
8 03-5523(DWF/SRN), 2004 U.S. Dist. LEXIS 4174 at *2-3, 17-18 (holding managers fell under
9 the MCA exemption although they only drove routes containing goods that were in interstate
10 commerce when training drivers regularly assigned to those routes or when such a driver was sick
11 or on vacation); DOL Requirements for [MCA] Exemption in General, 29 C.F.R. § 782.2 (driver
12 is exempt so long as *bona fide* duties subject him to operating in interstate commerce, regardless
13 of proportion of time or activities spent actually doing so); RJN, Ex. 1, DOT Interpretation of the
14 MCA, 46 Fed. Reg. 37,902 (July 23, 1981) ("[e]ven a minor involvement in interstate commerce
15 as a regular part of an employee's duties will subject that employee to the jurisdiction of the
16 [Federal Highway Safety Administration]").

17 As to the second category, Plaintiffs cite two cases holding drivers not exempt under the
18 MCA, both of which are inapposite here. In *Goldberg v. Faber Indus.*, 291 F.2d 232 (7th Cir.
19 1961), the Court held drivers who picked up meat scraps within a state for delivery to a rendering
20 plant in the same state did not fall under the MCA exemption because *none* of the goods those
21 drivers had a duty to transport were in the practical continuity of interstate commerce. *Id.* at 234.
22 *Goldberg*, therefore, has no application here.

23 The *Masson* Court held that it could not determine, at that time, whether the employees --
24 dishwasher maintenance and repair workers who drove to their customer locations -- transported
25 replacement and repair products in the practical continuity of interstate commerce. *Masson*, Case
26 No. 04 Civ. 4488 (MBM), 2005 U.S. Dist. LEXIS 18022, *3-4, 30-31. Further, the *Masson* Court
27 refused to consider such items on summary judgment because of factual disputes as to whether
28 transportation of those products occurred only under extraordinary circumstances rather than in

1 the ordinary course of the employees' duties.⁴ *Id.* at *32-33. The employer in *Masson* had also
 2 argued that, on occasion, the repair workers picked up checks from some customers that were
 3 ultimately bound for another state. *Id.* at *9. The *Masson* Court found, however, that where the
 4 employee's primary responsibility was not the transportation of products, but was the repair and
 5 maintenance of dishwashers, the transportation of checks was "a minor, non-essential part of
 6 plaintiffs' duties as Route Managers, especially where it appears that with a few exceptions,
 7 customers themselves mailed their payments to" the employer's out-of-state offices. *Id.* at *35-
 8 36. *Masson*, therefore, also has no application here, where *Plaintiffs do not contest that one of*
 9 *the primary duties of each of the 146 Plaintiffs was to transport products in the practical*
 10 *continuity of interstate commerce, including new uniforms and direct-sale goods, to Cintas'*
 11 *customers.* See Dkt 1011 (Motion at 11:7-14:27).

12 **2. The "Actual" Proportional "Mix" of Interstate and Intrastate Goods**
 13 **in Each Plaintiff's Deliveries Is Not Relevant to this MCA Analysis**

14 In arguing that the 146 Plaintiffs' duty to transport new uniforms and direct-sale goods to
 15 specific customers in interstate commerce was *de minimis*, Plaintiffs again ignore the appropriate
 16 standard discussed above, which requires that the Court analyze the character of the employee's
 17 duties, not the proportion of the goods in interstate commerce. Instead, Plaintiffs argue that a
 18 driver is subject to the MCA *only* if the employer proves that the particular driver *actually*
 19 delivered at least some fixed percentage of interstate goods -- by weight, volume, or price -- each
 20 week. Dkt 1043 (Opp. at 13:13-17:19). There is no authority to support Plaintiffs' argument that
 21 the only way to prove the application of the MCA is to satisfy such a test.⁵ Indeed, this Court has

22 ⁴ Contrary to Plaintiffs' representation, the *Masson* Court did *not* hold "that the employer failed
 23 to meet its summary judgment burden where its affidavits reflected that no more than 10-11% of
 the plaintiffs' deliveries consisted of items in interstate commerce." Dkt 1043 (Opp. at 15:16-23).

24 ⁵ Plaintiffs falsely assert that Cintas agreed that this is the only test relevant to the MCA
 25 exemption analysis. Dkt 1043 (Opp. at 14:15-21). Rather, Cintas identified one of numerous
 26 ways that it *could* prove the MCA applied to the SSRs, but did not state that it was the *only* way
 27 the MCA exemption could be proven. Indeed, Cintas explicitly stated then, as it does here, that it
 28 is the *character* of an employee's activities, not the proportion, that is relevant to the MCA
 exemption analysis, and that even minor involvement in interstate commerce as a regular part of
 an employee's duties is sufficient for the MCA exemption. Dkt 66 (Cintas' Opp. to Pl.s' Mtn for
 Facilitated Notice at 9:22-28), citing *Peraro ex rel. Castro v. Chemlawn Servs. Corp.*, 692 F.
 Supp. 109, 114 (D. Conn. 1988); *Hutson v. Rent-A-Center, Inc.*, 209 F. Supp. 2d 1353, 1359

1 explicitly rejected Plaintiffs' tortured interpretations in favor of the law's well-precedented "four
 2 month test." Dkt 1039 (Nov. 13, 2008 Order at 9:10-10:23). Rather than addressing Cintas'
 3 evidence that these uniform-delivering SSRs were subject to delivering goods as the final leg in
 4 an integrated system of interstate transportation from out-of-state Distribution Centers to the
 5 specific Plaintiffs' customers, Plaintiffs have attempted to distract the Court by arguing about
 6 other evidence not relevant to Cintas' proof in this motion.

7 **a. The MCA Can Apply Without Any Actual Delivery**

8 As shown above, the MCA exemption has been applied to employees in a variety of
 9 factual contexts, and proof that a particular employee was subject to transporting products in
 10 interstate commerce has also been varied. The DOT has identified the type of evidence sufficient
 11 to establish a driver is subject to its jurisdiction, which this Court and other courts have accepted:

12 The [Federal Highway Administration] view is that in order to
 13 establish jurisdiction under [the MCA] the carrier must be shown to
 14 have engaged in interstate commerce within a reasonable period of
 15 time prior to the time at which jurisdiction is in question. The
 16 carrier's involvement in interstate commerce must be established by
 17 some concrete evidence such as *an actual trip in interstate*
 18 *commerce* or proof, in the case of a 'for hire' carrier, that interstate
 business had been solicited. If jurisdiction is claimed over a driver
 who has not driven in interstate commerce, evidence must be
 presented that the carrier has engaged in interstate commerce and
 that the driver *could reasonably have been expected to make one of*
the carrier's interstate runs.

19 RJN, Ex. 1, DOT Interpretation of the MCA, 46 Fed. Reg. 37,902 (emphasis added); *Morris*, 332
 20 U.S. at 433-34 (holding group of drivers exempt where actual trips delivering goods that were in
 21 interstate commerce ranged from *none* to only 97 in a year); *Badgett*, 350 F. Supp. 2d at 647-48,
 22 656-57 (rejecting plaintiffs' *de minimis* claim because "regardless of the number of
 23 interstate/intrastate trips they actually made, at all relevant times, *they could have been called*
 24 *upon in the regular course of their employment to make trips affecting interstate commerce*")
 25 (emphasis in original); Dkt 1039 (Nov. 13, 2008 Order at 9:19-10:13).

26 _____
 27 (M.D. Ga. 2001). The indisputable evidence on this motion is that the 146 SSRs at issue all were
 28 ordinarily engaged in and were subject to engaging in interstate commerce activities. Nowhere
 has Cintas stated that the *only* way for the MCA to apply was to prove that it reached a magical
 minimum proportion of interstate goods delivered.

1 Thus, contrary to Plaintiffs' position that Cintas must prove what each Plaintiff actually
 2 delivered each day, under at least one test used by both the DOT and the courts, an employer can
 3 prove a driver is subject to DOT jurisdiction even if that driver *never* drove goods that were in
 4 interstate commerce by presenting evidence that the carrier has engaged in interstate commerce,
 5 which is undisputed here, and "that the driver could reasonably have been expected" to transport
 6 products in interstate commerce, which is also undisputed here. *Id.* Cintas has introduced
 7 extensive evidence to satisfy that test and Plaintiffs have failed to introduce any evidence to the
 8 contrary. Plaintiffs proffer evidence to try to contradict a fact that Cintas did not have to and did
 9 not try to prove in this motion -- the exact number of days the 146 Plaintiffs "actually" delivered
 10 interstate products. The *Badgett* Court rejected a similar attempt to impose an unnecessarily high
 11 evidentiary burden on employers proving application of the MCA. 350 F. Supp. 2d at 653.

12 Because Rent-Way has not documented each interstate transport of
 13 its merchandise, Plaintiffs claim we should assume that no such
 14 transportation occurred. However, in opposing Rent-Way's motion
 15 for summary judgment, Plaintiffs must designate specific facts
 16 showing that there is a genuine issue for trial. *Celotex Corp. v.*
 17 *Catrett*, 477 U.S. 317, 323-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548
 18 (1986). It is not sufficient to "simply show that there is some
 metaphysical doubt as to material facts." *Matsushita Elec. Indus.*
Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d
 538, 106 S. Ct. 1348 (1986). An employer's proof of entitlement to
 the motor carrier exemption must be "plain and unmistakable," but
 this does not mean proof beyond all doubt.

19 *Id.* Similarly, Plaintiffs here have failed to introduce any evidence to dispute that the 146
 20 Plaintiffs could reasonably have been expected to transport products in interstate commerce at
 21 any time during their employment with Cintas.

22 **b. The "Mix" or "Percentage" or "Proportion" of Interstate and**
 23 **Intrastate Goods is Irrelevant to the Applicable Test**

24 Plaintiffs also argue that Cintas did not answer another unnecessary question -- identifying
 25 what "percentage" of each Plaintiff's deliveries consist of interstate and intrastate products. Dkt
 26 1043 (Opp. at 15:16-17:19); Dkt 1042 (Notice of Manual Filing, including of Decl. of Hyun
 27 Nam). Plaintiffs' argument is based on their false assumption that Cintas must prove *any* specific
 28 proportion rather than showing that the 146 Plaintiffs could have been reasonably expected to

1 deliver goods in interstate commerce as part of their regular duties.⁶ Indeed, courts hold that
 2 drivers are within the MCA exemption in every case the parties cite involving a mix of intrastate
 3 and interstate transportation, even where no specific information was provided for particular
 4 plaintiffs and even where particular plaintiffs were shown not to have made any interstate
 5 commerce trips. *See, e.g., Morris*, 332 U.S. at 433-34 (holding group of drivers exempt where
 6 actual trips carrying goods in interstate commerce ranged from none to only 97 in a year);
 7 *Badgett*, 350 F. Supp. 2d at 647-48, 656-57 (rejecting plaintiffs’ *de minimis* claim because
 8 “regardless of the number of interstate/intrastate trips they actually made, at all relevant times,
 9 *they could have been called upon in the regular course of their employment to make trips*
 10 *affecting interstate commerce*”) (emphasis in original); *Guyton*, Civil No. 03-5523(DWF/SRN),
 11 2004 U.S. Dist. LEXIS 4174 at *2-3, 17-18 (holding MCA exemption applies to managers who
 12 only drove routes containing goods in interstate commerce when training drivers regularly
 13 assigned to those routes or when such a driver was sick or on vacation).

14 The MCA applies because, in all of those cases, a driver could have been asked to
 15 transport at least some goods in interstate commerce at any time. Dkt 1043 (Opp. at 23:16-
 16 24:23). Cintas has shown, and Plaintiffs agree, that the 146 Plaintiffs did and could reasonably
 17 expect to deliver goods in interstate commerce at any time and for numerous reasons. Nor is
 18 there any principled reason under the MCA or the FLSA to treat a trip transporting a mixture of
 19 interstate/intrastate products as anything other than a trip carrying goods in interstate commerce.
 20 RJN, Ex. 4, DOL Field Operations Handbook § 24c06(a) (“If it is known that some portion of a
 21 particular load is moving in interstate commerce, whether or not this is an identifiable portion of
 22 the load, the trip will be viewed as an interstate trip and therefore subject to the jurisdiction of the
 23 DOT.”); RJN, Ex. 5, Jan. 13, 2006 DOL Opinion Letter (finding that “drivers who regularly

24 ⁶ The Nam Declaration contains extensive factual errors, as among other things it falsely assumes
 25 that the *only* goods in interstate commerce were uniforms and direct sale items. That is not so,
 26 but the other goods that *were* in interstate commerce are beyond the scope of and irrelevant to this
 27 motion, which is predicated on the uncontested evidence that the 146 Plaintiffs were responsible
 28 for the interstate deliveries described in this motion. Further, Plaintiffs’ assertion that Cintas can
 not prove exactly what was in the back of a truck on a particular day, or the exact date of a
 delivery rather than that a driver was scheduled to deliver a new uniform or direct sale item on a
 given day, are irrelevant because such proof issues, even if established by Plaintiffs, would not
 alter Cintas’ substantial evidence that the drivers were at all times *subject to* such deliveries.

1 transport pallets,” only one percent of which were destined for out-of-state suppliers, and
 2 transport kegs destined for out-of-state suppliers, which kegs constitute only one percent of total
 3 products transported, “appear easily to fall within DOT’s jurisdiction, which applies for a four-
 4 month period”).

5 Drivers and vehicles making trips affect highway safety. As long-settled United States
 6 Supreme Court and other precedent establishes, analyzing the public safety considerations of trips
 7 with mixes of interstate and intrastate products shows why such “mixed” trips must be treated as
 8 interstate trips. *Levinson*, 330 U.S. at 661-62; *Moore*, 423 F.2d at 99. Any trip including any
 9 transportation of interstate products presents the same risk to public safety as a trip consisting
 10 entirely of interstate products. That is why courts are compelled to analyze the potential effect on
 11 public safety based on the *character* of an employee’s activities and not any set percentage or
 12 proportion of the employee’s time or activities spent in interstate commerce. *Morris*, 332 U.S. at
 13 431-32 (courts must look to the character of the employee’s activities, not the proportion, to
 14 determine “the actual need for the [DOT] to establish reasonable requirements with respect to
 15 qualifications, maximum hours of service, safety of operation and equipment”); *Levinson*, 330
 16 U.S. at 674-75 (“[t]en minutes of driving by an unqualified driver may do more harm on the
 17 highway than a month or a year of constant driving by a qualified one”).⁷

18 **C. The DOT’s Once-in-Four-Month Standard Applies to the 146 Plaintiffs**

19 There is also no question that Cintas need only show that the 146 Plaintiffs’ duties
 20 subjected them to the possibility of delivering goods in interstate commerce once every four
 21 months, although Cintas has shown that duty existed throughout Plaintiffs’ employment.
 22 Plaintiffs’ artificially circumscribed reading of “interstate,” as discussed above, is also the genesis

23 _____
 24 ⁷ For the same reason, this Court must reject Plaintiffs’ irrelevant argument that the interstate
 25 character of a trip is somehow limited because the interstate commerce products Cintas identifies
 26 would only have been delivered on a given day prior to an SSRs’ final leg of the trip returning to
 27 his location. Dkt 1043 (Opp. at 4:9-5:1). Based on the analysis above, and as recognized by the
 28 DOL, the whole trip represents the same risk to public safety, regardless of whether any products
 were transported back from the customers. *See, e.g.*, RJN, Ex. 4, DOL Field Operations
 Handbook, § 24c06(b) (“[i]f a driver employed by a manufacturer makes a trip by motor vehicle
 from the plant to a railhead or other transportation terminal to pick up or deliver goods moving in
 interstate commerce, the transportation is subject to the jurisdiction of the DOT regardless of the
 fact that the employee may make stops along the way in connection with production activities”).

1 for their argument that the DOT's four-month rule this Court recently held applicable here
 2 applies only to drivers who cross state lines. Dkt 1039 (Nov. 13, 2008 Order Granting in Part and
 3 Denying in Part Motion for Summary Judgment at 9:19-10:22). This Court's Order relied on the
 4 same DOT Notice of Interpretation discussed above, which provides that the four-month rule
 5 should apply to a driver where there is "evidence of driving in interstate commerce or being
 6 subject to being used in interstate commerce." *Id.*, citing *Reich v. Am. Driver Serv., Inc.*, 33 F.3d
 7 1153, 1156 (9th Cir. 1994); 46 Fed. Reg. 37,902, 37,903 (1981). As discussed below, Plaintiffs
 8 do not contest that the 146 Plaintiffs were under a duty to transport goods in the practical
 9 continuity of movement in interstate commerce during their entire employment. Plaintiffs
 10 provide no authority to distinguish the application of this rule where the drivers' interstate
 11 commerce requirement is based on intrastate transportation of interstate products. To the
 12 contrary, this Court's Order relied upon authority applying the four-month rule to drivers who
 13 delivered out-of-state shipments to in-state customers. *See Molina v. First Line Solutions, Inc.*,
 14 566 F. Supp. 2d 770, 782-83 (N.D. Ill. 2007); *see also* RJN, Ex. 5, Jan. 13, 2006 DOL Opinion
 15 Letter (finding drivers that transported pallets and kegs intrastate destined for out-of-state
 16 suppliers "appear easily to fall within DOT's jurisdiction, which applies for a four-month
 17 period"). Regardless, Cintas has shown through uncontested evidence that the 146 Plaintiffs were
 18 subject to the same duties to transport interstate products through their entire employment period.

19 **D. Plaintiffs Cannot Contest that Cintas' Evidence as to the Six Named Plaintiffs**
 20 **is Illustrative as to the 146 Plaintiffs To Whom This Motion is Addressed**

21 Cintas provided detailed evidence as to all six named Plaintiffs who are subject to this
 22 motion based on the fact that they admitted delivering uniforms and they did not work in states
 23 where any Cintas Distribution Center was located.⁸ These six are Michael Clayton, Dennis Fedor,

24 _____
 25 ⁸ Cintas introduced evidence showing, among other things, the percentage of work days SSRs
 26 ordered goods in interstate commerce and the percentage of their work days goods were shipped
 27 to their locations from out-of-state for delivery to the customers assigned to those SSRs. Dkt
 28 1011 (Motion at 16:25-18:80). Plaintiffs take issue with the sufficiency of this evidence, but
 evidence that a product is ordered and shipped for specific customers between 42% and 89% of
 the workdays of those six Plaintiffs is further evidence that uniform-delivering SSRs had a duty
 to transport products that were ordered and shipped for their customers in interstate commerce.

1 Drew Fuehring, Wilfredo Huertas, Jr., Daniel Peterson, and Kelly Smith. Given Plaintiffs’ own
 2 judicial admissions in the Second Amended Complaint, filed after all other plaintiffs had opted-in,
 3 Plaintiffs cannot dispute that the six named Plaintiffs are representative of Plaintiffs *as a whole*.⁹
 4 Plaintiffs wrongfully accuse Cintas of “cherry-picking” the six illustrative plaintiffs for this
 5 motion. Dkt. 1043 (Opp. at 3:5-7). Plaintiffs’ counsel have forgotten their own pleading, filed
 6 *after* all other Plaintiffs had opted in to the case as Plaintiffs. The six illustrative Plaintiffs in this
 7 motion are the six remaining named representative Plaintiffs, who have admitted being on
 8 uniform-delivering routes located outside the state of their locations’ Distribution Centers.
 9

10 Cintas does not agree that representative evidence can be used to prove the case as a
 11 whole. But these six named Plaintiffs can and do illustrate the substantial nature and the frequent
 12 timing of the products that uniform-delivering Plaintiffs were responsible for delivering in
 13 interstate commerce, based solely on the limited facet of the MCA defense on which this motion
 14 relies. Individual questions would continue to preclude collective resolution of all aspects of the
 15 case as to these 146 Plaintiffs if this motion were not to be granted. But these 146 Plaintiffs’
 16 FLSA claims fall to summary judgment for the reasons set forth by Cintas in this motion.
 17

18 **III. CONCLUSION**

19 Cintas respectfully requests this Court to grant this motion for summary judgment.

20
 21 Dated: November 21, 2008

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY L.L.P.

By: _____/s/
 Michael W. Kelly

Attorneys for Defendants
 CINTAS CORPORATION and
 PLAN ADMINISTRATOR FOR
 THE CINTAS PARTNERS’ PLAN

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 28 ⁹ Dkt. 519-1 at ¶59 (plaintiffs admit they “have substantially similar job requirements”); Dkt. 519-1 at ¶¶ 56, 58; Dkt. 519-1 at 1:26-2:1; and Dkt 519-1 at ¶¶ 29,31,32,34,36,45 and 47.

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PROOF OF SERVICE

I, REGINA ARROYO, am employed in the County of San Francisco, State of California.
I am over the age of 18 and not a party to the within action; my business address is One Maritime Plaza, Third Floor, San Francisco, California 94111-3492.

On November 21, 2008, I served the foregoing document described as:

CINTAS' REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON CERTAIN PLAINTIFFS' THIRD CLAIMS FOR RELIEF

Via United States District Court Electronic Filing Service on the parties as set forth below:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on November 21, 2008, at San Francisco, California.

/s/
REGINA ARROYO