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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL VELIZ, et al.,

No. C 03-1180 SBA

Plaintiffs,

ORDER

v.

[Docket Nos. 531, 557]

CINTAS CORPORATION, et al.

Defendants.

_____ /

This matter comes before the Court on the parties' cross-Motions to Confirm in Part and Vacate in Part Arbitrator's Clause Construction Award.

BACKGROUND

This lawsuit was filed in May 2003 as a class action and collective action on behalf of Service Sales Representatives (SSR's) employed by Cintas. The SSR's sought overtime and back pay under the Fair Labor Standards Act (FLSA) and various state laws.

Cintas moved to compel arbitration and, on April 5, 2004, this Court issued an Order compelling 56 of the 65 Plaintiffs subject to Cintas' motion to arbitrate their claims. On May 4, 2005, this Court issued an Order clarifying its April 5 Order. In the clarification, the Court held that requiring Plaintiffs to bear the costs of class or collective arbitration was not unconscionable, because Plaintiffs could vindicate their substantive statutory rights through individual arbitrations if unable to proceed on a class or collective basis. May 4, 2005 Order at 4-6. Further, the Court held that the question of whether the arbitration agreements at issue permit arbitration on a class or collective basis is for the arbitrator, not the Court, to decide in the first instance. *Id.* at 9-10 (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003)).

Approximately 1,900 Plaintiffs opted in to the litigation in the interim. Cintas filed a Motion to Stay further litigation under Section 3 of the FAA as to these Plaintiffs. On February 13, 2006,

1 this Court granted the motion, and stayed further proceedings until each of these Plaintiffs
2 (hereinafter "Stay Motion Plaintiffs") had arbitrated their disputes with Cintas "in accordance with
3 the terms of the agreement" into which they entered.

4 The parties briefed the following issues for the Arbitrator: whether the arbitration agreements
5 signed by the SSR's permit a class or collective action, and which SSR's are presently parties to the
6 arbitration proceeding. Plaintiffs argued that the arbitration agreements do not expressly prohibit a
7 class or collective arbitration, and that Cintas had revised the agreements many times and failed to
8 include such an express prohibition. Thus, class or collective arbitration should be allowed.
9 Goldsmith Decl. Ex. M at 3. Cintas argued that it is Plaintiffs' burden to show that the agreements
10 affirmatively permit class or collective arbitration, and there is nothing in the agreements doing so.
11 Cintas further argued that there are provisions in the agreements that are inconsistent with class
12 arbitration, such as a provision requiring any arbitration to be held in the state and county where the
13 employee last worked for Cintas. *Id.*

14 On July 27, 2006, Arbitrator Bruce Meyerson issued the Clause Construction Award.¹
15 Although the opinion is confusing in many respects, the Arbitrator concluded that the arbitration
16 agreements did not permit class or collective arbitration. He held that "the provision in each
17 arbitration agreement that any arbitration proceeding be held in the location of each SSR's
18 employment with Cintas cannot be reconciled with any claimed ambiguity or Claimants' assertion
19 that the individual arbitration agreements permit a class or collective arbitration." *Id.* at 3.²

20 The Arbitrator also considered whether clauses in the agreements providing that the
21 arbitrator shall apply relevant federal laws could be construed to permit class or collective
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23 ¹Supplementary Rule 3 of the American Arbitration Association's Rules for Class Arbitrations
24 provides that the arbitrator shall determine as a threshold matter "whether the applicable arbitration
25 clause permits the arbitration to proceed on behalf of or against a class." This determination is known
as a Clause Construction Award. *See* Goldsmith Ex. F.

26 ²The Arbitrator acknowledged that in another proceeding he had found that a place-of-arbitration
27 clause did not constitute a bar to collective or class arbitration. However, he pointed out, in that case,
28 the arbitration agreement referred to "claims of employees," "thus making the agreement susceptible
to the interpretation that individual arbitration proceedings could include claims of more than one
employee, thereby creating an inconsistency with the place-of-arbitration provision. In this case, the
arbitration agreement is limited to disputes between individual SSR's and Cintas." *Id.* at 4.

1 proceedings. He held that a sole reference to "federal laws" in the arbitration agreements was not
2 sufficient to find that they permitted class or collective arbitration. In reaching this conclusion, the
3 Arbitrator relied in part on the fact that this Court had held that 'so long as a plaintiff can pursue the
4 substantive statutory rights through individual arbitration, a plaintiff's inability to proceed
5 collectively or on behalf of a class is legally irrelevant.' *Id.* at 4.

6 However, the Arbitrator stated that the place-of-arbitration clause did not apply to those
7 SSR's ordered by this Court to arbitrate their claims in the Northern District of California. *Id.* at 5.

8 Finally, the Arbitrator addressed the scope of the arbitration. Plaintiffs sought a
9 determination that all SSR's who filed consents to opt in to the litigation should be considered
10 claimants in the arbitration. *Id.* Cintas contended that only those 55 individuals identified in the
11 original order compelling arbitration were proper parties to the arbitration, and the approximately
12 1,900 opt-in Plaintiffs should not be considered claimants in the arbitration. *Id.* The Arbitrator held
13 that the original 55 SSR's, as well as another small group of SSR's whom the parties stipulated
14 would engage in arbitration, were subject to arbitration. The total group consists of 102 SSR's who
15 are claimants in an arbitration in this District. *Id.* at 6. The Arbitrator held that because this Court
16 has ordered these SSR's to arbitrate in this District, "there is nothing else in the Cintas arbitration
17 agreement that would prevent these employees . . . from being part of a FLSA collective action or
18 class action under various state minimum wage laws." *Id.* With respect to the 1,900 opt-in
19 claimants, to the extent they have not been compelled to arbitrate by this Court in this District, the
20 Arbitrator ruled that they could not become parties to this arbitration. *Id.* at 7. In reaching this
21 conclusion, the Arbitrator reasoned that the place-of-arbitration provision in the agreement must be
22 given effect. However, he dropped a footnote stating that he expressed no opinion on whether the
23 1,900 SSR's may be bound by any class determinations in this arbitration.

24 In sum, the Arbitrator stated, "there are 102 SSR's who are claimants in an arbitration in the
25 Northern District of California. Whether that arbitration may be found to be a class or collective
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1 arbitration will await the next stage of these proceedings.³ The Stay Motion Plaintiffs' claims under
2 the FLSA may not be made part of the arbitration proceeding in the Northern District of California."
3 *Id.* at 8.

4 Plaintiffs filed a Motion for Reconsideration of the Clause Construction Award, and the
5 Arbitrator held oral argument on that motion. On October 13, 2006, the Arbitrator issued an Order
6 Clarifying the Clause Construction Award. The Arbitrator stated: "[i]n the Award I found that the
7 place-of-arbitration provision in the arbitration agreements did not permit SSR's to opt in to a
8 collective arbitration that was not in the county where they currently or more recently worked. I did
9 not explain fully in the Award that because a class arbitration, in contrast to a collective arbitration
10 under the Fair Labor Standards Act (the "FLSA"), does not require class members to become a party
11 to another proceeding, there was nothing inconsistent between the place-of-arbitration provision and
12 participation in a class arbitration held in a locale other than the county where an SSR worked."

13 The Arbitrator also explained that his decision was, in large part, based on this Court's May
14 4, 2005 Order, which stated that so long as a plaintiff can pursue substantive statutory rights through
15 individual arbitration, a plaintiff's inability to proceed collectively or on behalf of a class is legally
16 irrelevant. The Arbitrator interpreted this statement to mean that there was no inconsistency
17 between the place-of-arbitration provision and the arbitrator's obligation to apply federal law (such
18 as the FLSA, which would permit an employee to become a party plaintiff in a collective action).
19 The Arbitrator stated that, "if the District Court's ruling on this point does not deprive me of my role
20 in interpreting the arbitration agreement to determine whether it permits a collective arbitration, I
21 would find that the arbitration agreements contain inconsistent terms. One term, the place-of-
22 arbitration provision, requires the arbitration to be held in the county of the employee's residence.
23 Another term, grants to a Cintas employee the right to have federal law apply, to include, therefore,
24 the right to be a party plaintiff in a collective arbitration, which may be held elsewhere. Such an

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26 ³The "next stage of proceedings" is apparently a demand for classwide arbitration. Under
27 Supplementary Rule 4 of the AAA's Rules for Class Arbitrations, if the Arbitrator construes the
28 arbitration agreement to permit classwide arbitration, then he must make a determination as to whether
the arbitration should proceed as a classwide arbitration, taking into consideration factors essentially
the same as those set out in Federal Rule of Civil Procedure 23 (numerosity, commonality, typicality,
etc.).

1 ambiguity would be construed against Cintas and therefore my Award would have been different."

2 On September 5, 2006, Cintas filed the instant Motion to Confirm in Part and Vacate in Part
3 the Arbitrator's Clause Construction Award. On October 6, 2006, Plaintiffs filed an ex parte
4 application to extend the briefing schedule on Cintas' Motion, in light of the fact that they had filed a
5 Motion for Reconsideration before the Arbitrator. On October 13, 2006, this Court granted the
6 application, and set a briefing schedule permitting Plaintiffs to file a cross-motion to confirm or
7 vacate the Arbitrator's award by November 14, 2006. Cintas' Motion and Plaintiffs' cross-motion
8 were set for hearing on December 12, 2006.

9 LEGAL STANDARD

10 Section 9 of the FAA provides that a party to an arbitration may apply "for an order
11 confirming the award, and thereupon the court must grant such an order unless the award is vacated,
12 modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Section 10
13 provides that an award may be vacated for various reasons including fraud, corruption or misconduct
14 by the arbitrator, or "where the arbitrators exceeded their powers, or so imperfectly executed them
15 that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §
16 10.

17 The Ninth Circuit has held that arbitrators exceed their powers "not when they merely
18 interpret or apply the governing law incorrectly, but when the award is 'completely irrational,' or
19 exhibits 'a manifest disregard of law.'" *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341
20 F.3d 987, 997 (9th Cir. 2003) (citations omitted). In other words, the FAA gives courts "an
21 extremely narrow review authority." *Id.*

22 Defendant argues that courts may vacate arbitral awards that are not faithful to the parties'
23 contract. They cite *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593
24 (1960), but that case actually held that "so far as the arbitrator's decision concerns construction of
25 the contract, the courts have no business overruling him because their interpretation of the contract
26 is different from his." *Id.* at 599. Indeed, the arbitrator's award "must draw its essence from the
27 contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as
28 the arbitrator is even arguably construing or applying the contract and acting within the scope of his

1 authority, that a court is convinced he committed serious error does not suffice to overturn his
2 decision." *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

3 **ANALYSIS**

4 Two threshold issues must first be addressed: timeliness of Plaintiffs' Motion, and the
5 effect of the Arbitrator's clarification.

6 **a. Timeliness**

7 In its opposition to Plaintiffs' Cross-Motion to Confirm in Part and Vacate in Part the
8 Arbitrator's award, Cintas argues that Plaintiffs' motion must be denied as it was untimely under
9 FAA Section 12. That statute provides that "notice of a motion to vacate, modify, or correct an
10 award must be served upon the adverse party or his attorney within three months after the award is
11 filed or delivered." 9 U.S.C. § 12. The Award (as opposed to the clarification) was signed on July
12 27, 2006, mailed to counsel on August 1, 2006, and presumably received a few days later. Thus,
13 Defendants argue, the three-month limitations period expired no later than November 7, 2006, and
14 Plaintiffs' Cross-Motion was untimely.

15 The Court rejects this argument. Plaintiffs filed their Cross-Motion on November 14, 2006,
16 in accordance with the briefing schedule set by this Court. Although Defendants argue that the
17 Court's order did nothing to extend the limitations period, and "[i]t was up to the plaintiffs and their
18 counsel to keep abreast of the applicable limitations period, not the Court," Plaintiffs should not be
19 punished for diligently seeking an extension of the briefing schedule and then complying with the
20 Court's order. Further, Plaintiffs did, in a sense, give timely notice to opposing counsel that they
21 planned to file a cross-motion by serving them with the ex parte application to extend the briefing
22 schedule on October 6, 2006. In addition, Plaintiffs offer authority for the proposition that the
23 limitations period is not jurisdictional. *See Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986).
24 Courts have applied equitable tolling to find that motions to vacate were timely under section 12.
25 *See Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 687 F. Supp. 7, 9 (D.D.C. 1988). Equitable
26 tolling is warranted here because Plaintiffs were simply following this Court's briefing schedule,
27 which the Court had inherent authority to issue. *See Fed. R. Civ. P. 16(b)*.

28 Accordingly, the Court treats Plaintiffs' Cross-Motion as timely filed.

1 **b. Effect of the Arbitrator's clarification**

2 Cintas argues that this Court should essentially ignore the Arbitrator's clarification, because
3 under the FAA as interpreted in *Kyocera*, a court may only review an arbitration award under certain
4 specific standards, and "has no business reviewing the Arbitrator's 'thought process,' even where the
5 parties or indeed the arbitrator requests such a review." Opposition at 20. According to Cintas, this
6 Court should review the Award, and only the Award.

7 The Arbitrator expressly stated that he was clarifying, not reconsidering, his award.⁴
8 Unfortunately, the Arbitrator's "clarification" actually muddied the waters, and although the he
9 claimed not to be changing the award, he did exactly that.⁵ As a result, it is unclear whether this
10 Court should review the Award, or the Award as modified by the clarification. Further, the role of
11 the court in evaluating an Arbitrator's award is extremely limited, and thus the Arbitrator's
12 implication that the parties could "receive feedback from the District Court" based on his
13 clarification was incorrect. The FAA specifies that an arbitration award should be confirmed, unless
14 it is vacated or modified pursuant to the very specific criteria enumerated in the statute. *See* 9
15 U.S.C. § 9. A court's only other option is remanding to the arbitrator: "remanding to the arbitrator
16 for clarification and interpretation is not unusual in judicial enforcement proceedings." *McClatchy*,
17 686 F.2d 734 n.1.

18 This Court may not allow the arbitrator to "redetermine an issue which he has already
19 decided." *McClatchy*, 686 F.2d at 734 n.1. However, "recommitting an issue to an arbitrator for

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21 ⁴Thus, the Arbitrator stated, the doctrine of *functus officio* does not apply. This common law
22 doctrine holds that once an arbitrator has made an award, his authority is exhausted and he can do
23 nothing more in regard to the subject matter of the arbitration. *McClatchy Newspapers v. Central Valley*
24 *Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982). However, "it has been recognized in
25 common law arbitration that an arbitrator can correct a mistake which is apparent on the face of the
26 award, complete an arbitration if the award is not complete, and clarify an ambiguity in the award." *Id.*
27 at 734 n.1.

28 ⁵For example, the Arbitrator stated in the Award that the agreements do not permit class or
collective arbitration, but he stated in the clarification that "my ruling interpreting the parties' arbitration
agreements did not preclude the possibility of a class arbitration (as distinguished from a collective
arbitration under the Fair Labor Standards Act)." Thus, the clarification does appear to change the
award, which stated that the agreements did not permit class or collective arbitration. Accordingly, the
Arbitrator arguably violated the doctrine of *functus officio*. Plaintiffs appear to admit that the
Arbitrator's second ruling was more than a mere clarification: "[a]lthough denominated a clarification,
this second ruling changed the playing field significantly." Reply at 4.

1 clarification and interpretation does not effectuate an appeal to the arbitrator, a new trial, or an
2 opportunity to relitigate the issue." *Id.* The Court is within its authority to remand to the Arbitrator
3 for clarification, with the instruction that interpretation of the agreements is within the sole authority
4 and responsibility of the Arbitrator, pursuant to *Green Tree Financial Corp. v. Bazzle*. See
5 *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, 109 F.3d 1409, 1411
6 (9th Cir. 1997) (noting that an arbitrator can either clarify or complete his award; "[T]he completion
7 exception to the doctrine of *functus officio* applies when an arbitration award fails to resolve an issue
8 or specify the remedy in definite terms. The ambiguity exception, in contrast, applies when the
9 award, although seemingly complete, leaves doubt whether the submission has been fully executed")
10 (citations omitted).

11 **CONCLUSION**

12 Based on the foregoing, IT IS HEREBY ORDERED THAT this matter is REMANDED to
13 the Arbitrator for clarification of the Award, with the instruction that the Arbitrator has the sole
14 authority to interpret the agreements.

15 IT IS FURTHER ORDERED THAT both parties' Motions to Confirm in Part and Vacate in
16 Part the Arbitrator's Clause Construction Award [Docket Nos. 531, 557] are DENIED AS MOOT
17 without prejudice to re-filing after the Arbitrator issues a clarified Award.

18 IT IS SO ORDERED.

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20 Dated: 12/5/06

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22 SAUNDRA BROWN ARMSTRONG
23 United States District Judge
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