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15 UNITED STATES DISTRICT COURT  
16  
17 NORTHERN DISTRICT OF CALIFORNIA

18 In re CINTAS CORP. OVERTIME PAY ) No. M:06-cv-01781-SBA  
ARBITRATION LITIGATION )  
19 \_\_\_\_\_ ) DATE: January 23, 2007  
TIME: 1:00 p.m.  
20 COURTROOM: 3

21 DEFENDANTS/RESPONDENTS' MEMORANDUM IN RESPONSE TO  
22 COURT ORDERED BRIEFING; MOTION TO DISMISS; AND MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS 70 MDL CASES

23 [CORRECTED]  
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**NOTICE OF MOTION AND MOTION**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on January 23, 2007 at 1:00 p.m., or as soon thereafter as the matter may be heard, in Courtroom 3 of the above-entitled Court, located at 1301 Clay Street, Third Floor, Oakland, California, defendants in the 70 MDL-transferred cases (“respondents”) will and hereby do move the Honorable Sandra Brown Armstrong, the MDL transferee court in the above-captioned matter, for an Order granting the relief sought by this motion.

By this motion, respondents request that the Court dismiss the 70 petition cases that the Judicial Panel on Multidistrict Litigation ordered transferred to this Court on August 18, 2006, on the grounds that: (i) the 70 petition cases fail to state a claim under Federal Arbitration Act (“FAA”) §4, 9 U.S.C. §4, because there has been no “refusal to arbitrate,” as demonstrated from the face of the petitions and from matters already in the record (Fed. R. Civ. P. 12(c) and 12(b)(6)); (ii) the sole question sought to be resolved by the 70 petitions is for the arbitrator, not the courts, to decide in the first instance – whether the arbitration agreements permit all respondents to arbitrate collectively in a single arbitration in this district so these petitions should be dismissed for lack of subject matter jurisdiction and improper venues in the Federal courts (Fed. R. Civ. P. 12(b)(1) and 12(b)(3)); and (iii) Cintas has consented to have this clause construction issue litigated and resolved in the pending arbitration and should be precluded and judicially estopped from pursuing 70 petitions that would interfere with the arbitrator’s ability to resolve the contract clause construction issue in this district.

This motion is based upon this Notice of Motion; the Memorandum of Points and Authorities contained herein; the Declaration of Steven W. Pepich (“Pepich Decl.”) filed herewith; any further briefing permitted or requested by the Court; the files and records in *Veliz, et al. v. Cintas Corporation, et al*, Case No. 03-01180 SBA (“*Veliz*”); the files and records in the pending San Francisco arbitration entitled *Veliz, et al. v. Cintas Corporation, et al.*, Case No. 11 160 01323 04 (“*Veliz Arbitration*”), and upon such oral argument as is permitted or requested by the Court. The accompanying memorandum supports this motion **and** responds fully to the two questions posed by the Court in its October 26, 2006 Order.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Respondents are the 1,850 Cintas employees who filed Consent to Sue forms in *Veliz* pursuant to this Court’s November 4, 2003 *Hoffman-La Roche* Order, and who subsequently sought to arbitrate their federal and state overtime claims in the pending *Veliz* Arbitration. Respondents file this consolidated memorandum pursuant to the Court’s October 26, 2006 Order requesting briefing on two issues identified in the August 18, 2006 transfer order of the Judicial Panel on Multidistrict Litigation (“MDL Panel”) and also in support of respondents’ concurrently filed motion to dismiss the 70 transferred district court cases.<sup>1</sup>

Following the MDL Panel’s transfer order, the Court’s October 26, 2006 order directed the parties to file briefs in support of their respective positions on two issues:

The MDL Panel’s Transfer Order states that resolution of these actions will require the Court to determine: “i) whether the parties named in each motion to compel are refusing to arbitrate within the meaning of §4 of the Federal Arbitration Act, and/or ii) whether the parties are complying with that obligation by seeking to arbitrate collectively in an arbitration proceeding already occurring in the Northern District of California involving a subset of the *Veliz* plaintiffs.”

See October 26, 2006 Order at 1.

Respondents are not “refus[ing] to arbitrate” within the meaning of FAA §4. They are actively seeking to arbitrate in the Northern District of California in connection with the presently pending arbitration before the Honorable Bruce Meyerson. This undisputed fact is explicitly (and correctly) alleged in each of Cintas’ 70 petitions and is a fact that the Court can judicially notice based upon filings in the arbitration and in the parties’ cross motions to confirm/vacate the arbitrator’s clause construction award – all of which establish that respondents have diligently been seeking to participate in the pending arbitration. Where a party is not refusing to arbitrate and the

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<sup>1</sup> Respondents’ counsel contacted Cintas’ counsel on September 15, 2006, before all 70 MDL cases had been physically transferred to this Court, to discuss a schedule for filing this motion to dismiss. See Pepich Decl., ¶2, Ex. A. Respondents’ counsel informed Cintas that the Court Clerk had instructed respondents to wait for the Court’s procedural ruling before filing any motion. *Id.* The Court’s first procedural ruling in connection with these MDL transferred cases was the October 26, 2006 Order. Thus, respondents are filing this motion to dismiss at the first available opportunity under the schedule set forth in the October 26 Order.

1 only dispute is over where the arbitration will be conducted, FAA §4 does not permit the courts to  
2 interfere with the arbitrator's exclusive power to construe the contract to determine where that  
3 arbitration should occur. Because Cintas cannot establish a "refusal to arbitrate," the 70 petitions  
4 must be dismissed for Cintas' failure to satisfy a key element of a petition to compel arbitration  
5 under FAA §4.

6 Second, the question of whether respondents are "complying" with their obligation to  
7 arbitrate is a disputed question of contract interpretation regarding whether Cintas' arbitration  
8 agreements permit class or collective arbitration. Only the arbitrator can make this threshold  
9 determination. As the Court recently ruled in *Veliz*, the "interpretation of the agreements is within  
10 the sole authority and responsibility of the Arbitrator, pursuant to *Green Tree Financial Corp. v.*  
11 *Bazzle*." See December 5, 2006 Order at 8. Thus, the second issue at the heart of Cintas' 70  
12 petitions is not one for this Court (or any of the other 70 federal district courts) to decide. This  
13 clause construction issue is for Arbitrator Meyerson to decide.

14 The central issue raised by Cintas' 70 petitions, *i.e.*, whether the pending arbitration in the  
15 Northern District of California can include all arbitrating opt-in plaintiffs, is the very same issue this  
16 Court recently remanded to Arbitrator Meyerson to decide, "with the instruction that the Arbitrator  
17 has the sole authority to interpret the agreements." December 5, 2006 Order at 8. This Order  
18 confirms respondents' basic arguments here, that there has been no refusal to arbitrate, and that  
19 whether respondents can collectively arbitrate in the pending arbitration is being decided, and can  
20 only be decided, by Arbitrator Meyerson.

## 21 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### 22 **A. The San Francisco Arbitration Demand Sought A Collective and** 23 **Classwide Arbitration That Includes Respondents' Claims**

24 After this Court compelled 55 plaintiffs in the *Veliz* action to arbitration on April 5, 2004,  
25 Paul Veliz and 54 other current and former employees of Cintas Corporation submitted their  
26 Demand for Classwide Arbitration to the AAA office in San Francisco. Pepich Decl., Ex. N. This  
27 initial group of arbitrating plaintiffs brought claims in their May 4, 2004 Arbitration Demand:

28 "individually and as a collective action under the Fair Labor Standards Act (FLSA),  
29 U.S.C. §216(b), and as a class action under Fed. R. Civ. P. 23(b)(3) and

1 applicable state labor laws, on behalf of current and former Cintas employees . . .  
 2 who worked as Service Sales Representatives, Commission Route Salespersons,  
 3 Commission Route Sales Representatives, Route Drivers and other persons  
 4 performing a service and/or delivery function on a non-hourly basis.”

5 *Id.* at 2. Respondents’ Demand was expressly made on behalf of the individuals who had already  
 6 filed and would file Consents to Sue in *Veliz*, and specifically contemplated inclusion of the  
 7 additional respondents whom this Court concluded needed to resolve their claims in arbitration.  
 8 Demand at 1-2. Specifically, the Demand asserted claims “on behalf of all individuals who filed, or  
 9 who hereafter file, Consents to Sue in *Veliz*, except those whom Judge Armstrong has ruled may  
 10 litigate their FLSA claims in federal court.” *Id.* at 1.

11 **B. Cintas’ Answer to the Arbitration Demand Admitted that the Scope  
 12 of Arbitration Issue Would be Decided in the San Francisco  
 13 Arbitration**

14 Cintas recognized in its Answer to Demand for Classwide Arbitration, filed July 9, 2004, that  
 15 the Arbitration Demand included collective and classwide allegations on behalf of all current and  
 16 future opt-in plaintiffs and Cintas admitted that the arbitration in San Francisco was the appropriate  
 17 venue for determining the scope of the arbitration. Cintas’ Answer admitted, for example, that the  
 18 arbitration demand was brought by “115 current or former Cintas employees presently, ***and***  
 19 ***potentially thousands to come in the next few months.***” Pepich Decl., Ex. O at 1 (emphasis added).  
 20 Cintas projected that, because thousands of potential opt-in plaintiffs would soon receive notice of  
 21 their right to join the federal action and because this Court had indicated that most of them would be  
 22 compelled to arbitrate, the “Demand for Arbitration could soon involve opt-in claimants from Cintas  
 23 locations in hundreds of counties throughout up to 42 different states.” *Id.* at ¶9.

24 Cintas’ Answer explicitly acknowledged that the “Clause Construction” phase of the putative  
 25 class and collective arbitration could and would be decided in the pending San Francisco arbitration.<sup>2</sup>  
 26 Although Cintas took the position that its agreements precluded the arbitration of any SSR’s claims

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27 <sup>2</sup> Under the AAA’s Class Arbitration Rule 3, the question to be decided at the clause  
 28 construction phase is “whether the applicable arbitration clause permits the arbitration to proceed on  
 behalf of or against a class.” *See* December 5, 2006 Order at n.1.

1 in any forum other than the county where the SSR last worked, Cintas conceded that Clause  
2 Construction determination should occur in San Francisco, stating:

3 Solely to the extent that an arbitral tribunal or arbitrator holds a clause  
4 construction proceeding pursuant to Supplementary Rule 3, however, *Cintas*  
5 *consents to the place of that proceeding being San Francisco . . . .*

6 *Id.* at ¶42. Thus, from the outset of the San Francisco arbitration, Cintas has acknowledged that the  
7 key issue raised by the 70 petition cases – namely, whether the 1,850 opt-in plaintiffs can pursue  
8 their claims on a collective and/or class basis in the pending San Francisco arbitration – would be  
9 decided in the San Francisco arbitration.

10 **C. Cintas Again Acknowledged in July 2004 that the Clause  
11 Construction Issues Were Properly before the San Francisco  
12 Arbitrator**

13 On July 9, 2004, following a conference call with counsel for the parties, AAA Case  
14 Manager Karen Fontaine sent a letter to counsel, describing the four phases of arbitration under the  
15 AAA’s Class Action Rules. According to the letter, the first phase of the arbitration is the clause  
16 construction phase, and the Case Manager noted claimants’ request that the arbitration be held in San  
17 Francisco, California, and confirmed that “*Respondent [Cintas] does not object to the locale for*  
18 *The Clause Construction Phase.*” Pepich Decl., Ex. P (emphasis added). The AAA then  
19 commenced the process of selecting an arbitrator by distributing a list of potential arbitrators. On  
20 November 1, 2004, the parties selected the Hon. Bruce Meyerson, a retired judge of the Arizona  
21 Court of Appeals, as their arbitrator. *Id.*; Pepich Decl., Ex. Q. Cintas fully participated in the  
22 arbitrator selection process and unmistakably consented to having Arbitrator Meyerson resolve the  
23 clause construction issue in the San Francisco arbitration.

24 **D. Respondents Join the San Francisco Arbitration**

25 On November 14, 2005, respondents submitted another letter to the arbitrator, further  
26 updating the status of the arbitration following the Court’s oral ruling staying respondents’ claims,  
27 and requesting that the arbitrator promptly schedule the Clause Construction phase of the arbitration.  
28 Pepich Decl., Ex. R. Respondents’ counsel reported that Judge Armstrong had orally ruled that all  
plaintiffs with arbitrable claims who had opted into the federal court action by June 9, 2004 were  
compelled to arbitrate their claims under FAA §4, and that, with respect to Cintas employees who

1 opted in after June 9, 2004, the Court had stayed their claims pending arbitration without further  
 2 compelling arbitration (this ruling was confirmed in writing on February 14, 2006).<sup>3</sup> Respondents'  
 3 counsel's November 14, 2005 letter also attached an updated list of those claimants who had been  
 4 ordered to arbitration (*id.* at Ex. A, attached thereto) and those claimants whose claims had been  
 5 stayed and who were seeking to join the arbitration as opt-in plaintiffs (*id.* at Ex. B). All arbitrating  
 6 plaintiffs then requested that "all arbitrations proceed in San Francisco before Arbitrator Meyerson"  
 7 and requested a schedule for briefing on clause construction issues. *Id.*

8 **E. Cintas Seeks to Avoid Clause Construction in Arbitration by Filing 70**  
 9 **Petition Cases**

10 During a conference call on January 2, 2006, the arbitrator scheduled January 26, 2006 as the  
 11 date for respondents to file their opening clause construction brief, and suggested a follow-up status  
 12 conference shortly thereafter to set a date for Cintas' response. Pepich Decl., Ex. S. After obtaining  
 13 a brief extension, respondents submitted their clause construction brief, seeking a determination by  
 14 the arbitrator under Rule 3 of the AAA's Supplementary Rules for Class Arbitration that the  
 15 arbitration agreements permit class-wide and collective actions and that all of the opt-in arbitrating  
 16 plaintiffs could participate in that arbitration. Pepich Decl., Ex. T (Clause Construction Opening  
 17 Brief, filed February 9, 2006). After Cintas received respondents' opening clause construction brief  
 18 on February 9, 2006, it protested that it needed a considerable time to respond, representing to the  
 19 Arbitrator that Cintas' counsel were unavailable and too busy to file an opposition to respondents'  
 20 pending clause construction motion at any time prior to April 7, 2006, two months after respondents'  
 21 filing. Arbitrator Meyerson granted Cintas' request and set a clause construction hearing date of  
 22 May 9, 2006.

23 Cintas used the extended response time it had negotiated to prepare, file and personally serve  
 24 on almost 2,000 respondents its petitions to compel arbitration in 70 different U.S. District Courts.

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25  
 26 <sup>3</sup> The Court ruled on February 14, 2006 that "[t]he parties agreed at the hearing that, by virtue  
 27 of this Court's Order of April 5, 2004 and the Stipulation and Order of June 9, 2004, all opt-in  
 28 plaintiffs with arbitrable claims, who had filed consents to sue prior to June 9, 2004 would be  
 compelled to arbitration." February 14, 2006 Order at 2 n.1. As to the opt-in plaintiffs who filed  
 consents to sue after that date, the Court stayed their claims pending arbitration. *Id.* at 3.

1 The petitions filed on or about March 10, 2006 signaled Cintas' attempt to force arbitration in 70  
2 districts, regardless of what the arbitrator might rule with respect to the propriety of a single  
3 arbitration for all arbitrating plaintiffs. Hoping to avoid a single venue, and despite having agreed to  
4 have the determinative clause construction issue decided by Arbitrator Meyerson, Cintas instead  
5 decided to circumvent arbitration and seek court rulings requiring respondents to proceed in those 70  
6 districts. Cintas' attempted end-run around the arbitration proceedings, coupled with its decision to  
7 personally serve each respondent individually (despite plaintiffs' counsel's repeated request that  
8 service be effected on counsel instead) was a transparent attempt to harass and intimidate the  
9 plaintiffs, to drive up the costs of litigation, and to sabotage plaintiffs' right to have the clause  
10 construction issues resolved by the arbitrator, as the law requires and as Cintas itself had previously  
11 agreed.<sup>4</sup>

12 **F. The MDL Panel Transfers Cintas' 70 Petitions to this Court**

13 The opt-in plaintiffs responded to Cintas' 70 separate filings by petitioning the MDL Panel  
14 on March 31, 2006 to transfer all of Cintas' newly-filed petitions to this Court. In its Transfer Order  
15 dated August 18, 2006, the MDL Panel agreed that multidistrict centralization in this Court was  
16 appropriate, explaining that:

17 Resolution of the actions in this docket will require each of the 70 district courts  
18 where Cintas brought suit to construe identical contractual arbitration clauses to  
19 determine i) whether the parties named in each motion to compel are refusing to  
20 arbitrate within the meaning of § 4 of the Federal Arbitration Act, and/or ii) whether  
the parties are complying with that obligation by seeking to arbitrate collectively in  
an arbitration proceeding already occurring in the Northern District of California  
involving a subset of the *Veliz* plaintiffs.

21 Pepich Decl., Ex. K at 1. Thus, the MDL Panel's transfer order recognized that Cintas' 70 petitions  
22 "would require . . . constru[ing] identical contractual arbitration clauses" in order to address the two  
23 common issues that warranted centralized pre-trial proceedings. *Id.* The MDL Panel also ruled

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25 <sup>4</sup> Indeed, by filing 70 petition cases in its attempt to dodge the Arbitrator's ability to decide the  
26 clause construction issue, Cintas has unnecessarily multiplied litigation in violation of 28 U.S.C.  
27 §1927, which provides that an attorney "who so multiplies the proceedings in any case unreasonably  
and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and  
attorneys' fees reasonably incurred because of such conduct."

28

1 “each of the 70 courts in the actions brought by Cintas may also be required to address identical  
2 factual and legal arguments asserted in defense of those actions. Centralization under §1407 is  
3 necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and  
4 conserve the resources of the parties, their counsel and the judiciary.” *See id.* at 2.

5 **G. Arbitrator’s Clause Construction Award and Court’s Remand Order**

6 On April 7, 2006, Cintas submitted to Arbitrator Meyerson its own separate Motion for  
7 Clause Construction. Cintas’ motion requested a ruling that no class or collective action could be  
8 pursued under the arbitration agreements between Cintas and the 15 former employees whom Cintas  
9 characterized as the only “Named Claimants” in the pending arbitration. In that motion, Cintas  
10 disputed that any other Cintas employees were proper parties to the arbitration and argued that the  
11 arbitrator had no jurisdiction to decide anything related to any other claimants. Pepich Decl., Ex. U,  
12 Cintas’ Clause Construction Motion at 1-4. Substantial responsive briefing was filed by both sides,  
13 and Arbitrator Meyerson held several lengthy hearings on clause construction issues.

14 On July 27, 2006, Arbitrator Meyerson issued his Clause Construction Award, which he  
15 clarified on October 17, 2006, after additional briefing and argument. The parties then filed cross-  
16 motions in this Court seeking to confirm in part and vacate in part the Clause Construction Award.  
17 On December 5, 2006, the Court remanded the Clause Construction Award for further clarification  
18 by the arbitrator. Regardless of the ultimate outcome on the Clause Construction Award, it is clear  
19 that the Award addresses, and will continue to address as a matter of contract construction, whether  
20 there can be a single arbitration in this district encompassing all respondents’ claims.

21 **H. Timing of Motion to Dismiss and Briefing Schedule Set by the Court**

22 Following the MDL Panel’s August 18, 2006 transfer order, respondents’ counsel contacted  
23 the Clerk of the Court to determine whether transfer of all 70 petition cases had yet occurred and to  
24 inquire regarding a potential schedule for filing motions to dismiss these petitions. Pepich Decl., ¶2.  
25 The Clerk on September 14, 2006 informed respondents’ counsel that all 70 petitions had not yet  
26 been transferred and explained that once this occurred, the Court would issue a pretrial order, after  
27 which it would be appropriate for respondents to file any motions. Respondents’ counsel conveyed  
28

1 this information to Cintas' counsel and proposed to stipulate to a proposed briefing schedule on such  
2 motions. Cintas' counsel never responded. Pepich Decl., ¶2; Ex. A.

3 Cintas filed its motion in this Court relating to these MDL cases on October 20, 2006 – three  
4 days after Arbitrator Meyerson issued his October 17, 2006 order clarifying his clause construction  
5 award. On October 26, 2006, the Court denied Cintas' pending motion as moot and directed the  
6 parties to brief the two issues identified in the MDL transfer order. On November 21, 2006, in  
7 response to the briefing that the Court had requested in its October 26 order, Cintas re-filed the same  
8 motion the Court had previously denied as moot. Respondents' counsel immediately contacted  
9 Cintas' counsel to notify them that respondents too would file their pretrial motions on the schedule  
10 set by the October 26 order. Pepich Decl., Ex. B. Cintas responded on December 1, 2006, objecting  
11 to respondents filing their motion under this schedule and contending that any such motion would be  
12 untimely. Pepich Decl., Ex. C. Respondents' counsel wrote back that there was no factual or legal  
13 basis for contending respondents' anticipated motion was untimely, because respondents were  
14 simply following the Court's scheduling order. Pepich Decl., Ex. D.

15 **III. THERE HAS BEEN NO REFUSAL TO ARBITRATE AND THE 70**  
16 **PETITIONS SHOULD BE DISMISSED ON NUMEROUS GROUNDS**

17 An FAA §4 petition to compel arbitration requires a “refusal to arbitrate” before such a  
18 petition can be properly stated. 9 U.S.C. §4 (“A party aggrieved by the alleged failure, neglect, or  
19 refusal of another to arbitrate under a written agreement for arbitration may petition . . .”). In this  
20 MDL proceeding there has been no refusal to arbitrate, and the 70 petitions must therefore be  
21 dismissed on the pleadings under Fed. R. Civ. P. 12(c) or 12(b)(6), because Cintas' petitions each  
22 demonstrate on their face that respondents are *not* refusing to arbitrate.

23 It is well-settled that an action to compel arbitration under the FAA may *only* be asserted  
24 when a claimant unequivocally refuses to arbitrate, and not where there is simply a dispute about the  
25 proper location of the arbitration. *Kim v. Colorall Technologies, Inc.*, No. C-00-1959-VRW, 2000  
26 U.S. Dist. LEXIS 12321, at \*2 (N.D. Cal. Aug. 18, 2000) (“[T]he Ninth Circuit has held that a  
27 prerequisite to accrual of a cause of action under section 4 of the Federal Arbitration Act is a  
28 respondent's unequivocal refusal to arbitrate.”); *PaineWebber, Inc. v. Faragalli*, 61 F.3d 1063, 1065

1 (3d Cir. 1995) (same); *Broadcort Capital Corp. v. Dutcher*, 859 F. Supp. 1517, 1520 (S.D.N.Y.  
2 1994) (where party agrees to arbitrate in one venue, opposing party is not “aggrieved” for purposes  
3 of §4 because that party will not arbitrate in a different venue); *Aacon Auto Transport, Inc. v.*  
4 *Barnes*, 603 F. Supp. 1347, 1349 (S.D.N.Y. 1985) (a party must be “aggrieved by the alleged failure,  
5 neglect or refusal of another to arbitrate under a written agreement for arbitration” before §4 is  
6 invoked); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 812 F. Supp. 1217 (M.D. Fla. 1993)  
7 (suit challenging arbitration forum, not arbitration itself, did not constitute refusal under §4); *Scan-*  
8 *Graphics, Inc. v. Photomatrix Corp.*, No. 91-4402, 1991 U.S. Dist. LEXIS 18868, at \*5-\*7 (E.D. Pa.  
9 Dec. 31, 1991) (where party has not refused to arbitrate – in fact has agreed to proceed with  
10 arbitration in one state – but merely fails to agree with an opposing party on the choice of the  
11 arbitration venue, the opposing party is not aggrieved under §4 and cannot compel arbitration  
12 elsewhere); *Dr. Pepper Bottling Co. of Texas, Inc. v. Presidential Life Ins. Co.*, No. 3-01-CV-2168-  
13 R, 2002 U.S. Dist. LEXIS 4196, at \*11-\*12 (N.D. Tex. Mar. 11, 2002) (where party has not failed or  
14 refused to arbitrate a party is not “aggrieved” within the meaning of §4).

15 Cintas asserts in each of its 70 petitions that “Plaintiffs in the Northern California Action  
16 (including the Respondents thereto) **did not deny that they were required to arbitrate** their FLSA  
17 claims against Cintas.” *E.g.*, Petition for Order Directing Arbitration to Proceed, filed March 10,  
18 2006 in *Cintas Corp. v. Jeffrey Aybar, et al.*, Case No. 06-CV-0569 (N.D. Ga.), at ¶10 (emphasis  
19 added) (Pepich Decl., Ex. V). In each petition Cintas further acknowledges that counsel for  
20 plaintiffs have “stated on the record in the Northern California Action that **they would seek to have**  
21 **the claims heard in arbitration** in Northern California.” *Id.* at ¶18 (emphasis added).

22 Thus, the allegations of Cintas’ own petitions demonstrate that there is **no** present dispute  
23 about whether respondents are refusing to arbitrate. Respondents are in fact pursuing their claims  
24 through arbitration. Further, Cintas has explicitly acknowledged in its Answer that respondents were  
25 seeking to join that arbitration proceeding and that the propriety of respondents’ joinder would be  
26 addressed in the clause construction ruling. In compliance with the phased procedure under the  
27 AAA rules, the arbitrating respondents have actively litigated the proper extent of their participation  
28

1 in that arbitration in connection with the clause construction award that this Court has now remanded  
2 for further clarification.

3 A refusal to arbitrate is a foundational element to an FAA §4 petition to compel arbitration.  
4 Because respondents are clearly not refusing to arbitrate, but affirmatively seeking to arbitrate their  
5 claims in the San Francisco arbitration, the 1,850 claimants who are respondents in these  
6 consolidated actions are entitled to judgment on the pleadings.<sup>5</sup>

7 **IV. BECAUSE THE ISSUE OF WHETHER RESPONDENTS ARE**  
8 **PERMITTED TO ARBITRATE ON A COLLECTIVE BASIS IS FOR THE**  
9 **ARBITRATOR, THE PETITIONS SHOULD BE DISMISSED FOR LACK**  
10 **OF JURISDICTION AND IMPROPER VENUE**

11 Cintas' admissions in its 70 petitions and in its Answer to the arbitrating plaintiffs' Demand  
12 for Arbitration conclusively establish Cintas' knowledge that it does not have to "compel"  
13 respondents to arbitrate their claims. These admissions plainly expose Cintas' scheme to use its  
14 FAA §4 petitions, not to compel litigating employees to arbitration, but to force respondents to  
15 abandon their efforts to participate in the San Francisco arbitration. Because the issue of *where*  
16 respondents may arbitrate is squarely within the authority of the arbitrator construing the Cintas  
17 arbitration agreements, it is wholly improper to submit this issue to the 70 federal courts where

18 <sup>5</sup> In its briefing of these issues, Cintas argues that respondents refused to arbitrate because they  
19 originally sought to litigate their claims. But Cintas ignores the present procedural posture of the  
20 case. First, the Court order-facilitated notice invited respondents with potentially arbitrable claims to  
21 opt-in to *Veliz*. See May 25, 2004 Order at ¶2 and Notice attached to Order at ¶6. Second, by the  
22 time Cintas filed its 70 petitions, respondents were actively seeking to arbitrate following the Court's  
23 stay order finding they had valid arbitration agreements. Cintas also argues respondents are refusing  
24 to arbitrate because they are not seeking to arbitrate individually in the locations that Cintas suggests  
25 are required under its strained reading of the arbitration agreements. But respondents' legal position  
26 does not constitute a refusal to arbitrate, and Cintas is simply contesting the type of arbitration  
27 allowed under its agreements – a clause construction issue not resolvable by an FAA §4 petition to  
28 compel arbitration.

24 Finally, Cintas urges that attempts to discuss a resolution of all opt-in plaintiffs' claims  
25 evidences their refusal to arbitrate. To support this argument, Cintas refers to a discussion of  
26 counsel regarding the scope of the *Veliz* mediation and a proposed stipulation, which Cintas  
27 suggested. The stipulation allowed the parties to discuss all claims while ensuring that anything said  
28 or done at the mediation would not waive the stay of Court proceedings against the respondents.  
Pepich Decl., Ex. W, ¶14. Thus, the proposed stipulation actually ensured the arbitration  
proceedings would not be impacted by a discussion aimed at resolving all alleged claims.

1 Cintas filed its petitions. Even if Cintas were permitted to maintain its 70 actions in the face of  
2 respondents' diligent efforts to arbitrate in San Francisco, this Court would have to dismiss these  
3 actions because, except where FAA §4's venue provision applies, federal courts lack the power to  
4 decide the location for arbitration, which is a fundamental issue of contract interpretation left to the  
5 arbitrator. Thus, the 70 petition cases here may in the alternative be dismissed for lack of subject  
6 matter jurisdiction under Fed. R. Civ. P. 12(b)(1), because neither this Court nor any of the 70 courts  
7 where these petitions were originally filed has subject matter jurisdiction to decide in the first  
8 instance the clause construction issue at the heart of Cintas' 70 petition cases.<sup>6</sup> *See Hartford*  
9 *Accident & Indem. Co. v. Equitas Reinsurance Ltd.*, 200 F. Supp. 2d 102, 104 (D. Conn. 2002)  
10 (dismissing petition to compel arbitration under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction  
11 where party had not failed, neglected or refused to arbitrate).<sup>7</sup>

12 The Court could also dismiss the 70 petition cases under Rule 12(b)(3), deferring to the  
13 arbitral forum and finding that Cintas has chosen the wrong venue to pursue its arguments.  
14 *Continental Casualty Co. v. American National Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005) (case  
15 dismissed under Rule 12(b)(3) because forum selection clause in the contract required arbitration).  
16 "Where parties to a contract have agreed to arbitrate disputes arising from that contract, dismissal  
17

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18  
19 <sup>6</sup> The objection that a federal court lacks subject-matter jurisdiction "may be raised by a party,  
20 or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of  
21 judgment." *Arbaugh v. Y & H Corp.*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 1235, 1240 (2006). "Commonly it is  
22 said that 'jurisdictional' questions, particularly concerning the court's power to deal with the subject  
23 matter, may be raised at any stage or in a collateral attack." *Yakus v. United States*, 321 U.S. 414,  
24 473, n.23 (1944). "[N]o action of the parties can confer subject-matter jurisdiction upon a federal  
court. Thus the consent of the parties is irrelevant." *Insurance Corp. of Ireland, Ltd. v. Compagnie*  
*des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). The parties' agreement, however, cannot create  
subject matter jurisdiction nor waive its absence. *United States v. Ceja-Prado*, 333 F.3d 1046, 1049  
(9th Cir. 2003).

25 <sup>7</sup> *See also Morgan Stanley Dean Witter Reynolds, Inc. v. Gekas*, 309 F. Supp. 2d 652 (M.D.  
26 Pa. 2004) (refusing to exercise jurisdiction and dismissing petition to compel arbitration with  
27 prejudice where issue was presently before state court); *American Reliable Ins. Co. v. Stillwell*, 212  
28 F. Supp. 2d 621, 627 (N.D. W.Va. 2002) (granting motion to dismiss FAA §4 petition, noting party  
clearly looking for "proverbial 'two bites of the apple' by filing a motion to compel arbitration in  
both the state and federal court").

1 pursuant to Rule 12(b)(3) is appropriate.” *Kay v. Board of Education of Chicago*, No. 06 C 368,  
2 2006 U.S. Dist. LEXIS 53539, at \*4 (N.D. Ill., July 12, 2006) (holding that venue must be decided  
3 by the arbitrator, not the Court); *see also Metropolitan Life Ins. Co. v. O’Malley*, 392 F. Supp. 2d  
4 1042, 1044-45 (N.D. Ill. 2005) (same); *Camp v. TNT Logistics Corp.*, No. 04-cv-1358, 2005 U.S.  
5 Dist. LEXIS 39690, at \*23-25 (C.D. Ill. 2005) (recommending dismissal under Rule 12(b)(3) instead  
6 of 12(b)(1), where party had argued consistently that the claims belong before an arbitrator in  
7 Florida, not a district court in Illinois); *Local 73, Service Employees International Union v. Argonne*  
8 *National Laboratory*, No. 05 C 2772, 2006 U.S. Dist. LEXIS 9674, at \*5-6, 9 (N.D. Ill. Feb. 10,  
9 2006) (“the proper venue for this dispute is before an arbitration panel, and not in the United States  
10 District Court”), *recon. denied*, 2006 U.S. Dist. LEXIS 25928 (N.D. Ill. Mar. 13, 2006).

12 Whether the Court relies on Rule 12(b)(1), 12(b)(3), 12(b)(6) or 12 (c), however, it is plain  
13 that Cintas’ 70 petitions are improper. This Court’s February 14, 2006 Order clearly established that  
14 the 1,850 respondents must arbitrate their claims, and it stayed their claims pending such an  
15 arbitration. The only question for respondents was *where* they must arbitrate. Cintas contends that  
16 respondents cannot arbitrate in this district, because the arbitration agreement purportedly requires  
17 them to arbitrate individually in the location where they last worked for Cintas. Respondents  
18 disagree. The answer to this dispute turns on contract interpretation – a matter which, according to  
19 controlling case law and this Court’s rulings, falls squarely within the purview of the arbitrator.  
20 *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003).

23 A district court’s task in construing an arbitration agreement is limited to determining  
24 “gateway” matters, “such as whether the parties have a valid arbitration agreement at all or whether a  
25 concededly binding arbitration clause applies to a certain type of controversy.” *Bazzle*, 539 U.S. at  
26 452. “[W]hat *kind of arbitration proceeding* the parties agreed to” is not one of these matters. *Id.*  
27 (emphasis in original); *see also Pedcor Management Co. Welfare Benefit Plan v. Nations Personnel*  
28

1 of *Texas, Inc.*, 343 F.3d 355, 359 (5th Cir. 2003); *Garcia v. Direct TV Inc.*, 115 Cal. App. 4th 297,  
2 302-03 (2004). Questions of “contract interpretation and arbitration procedures” are beyond the  
3 purview of the district court, once the court has satisfied itself that the contract is valid and the  
4 dispute is arbitrable. *Bazzle*, 539 U.S. at 452. The proper interpretation of an arbitration venue  
5 clause must be left to the arbitrator, and not decided by the Court, because it “raises not a question of  
6 arbitrability but a procedural question.” *Richard C. Young & Co. v. Leventhal*, 389 F.3d 1, 4 (1st  
7 Cir. 2004). The issue of how to construe Cintas’ putative “place of arbitration” clause is a question  
8 for the arbitrator. *Richard C. Young*, 389 F.3d 1; *Bazzle*, 539 U.S. at 452-53. No decision-maker  
9 other than the arbitrator has jurisdiction to decide the foundational issue of whether respondents can  
10 proceed in the pending arbitration, and no federal district court has the power to review that decision  
11 other than this Court, which originally compelled the San Francisco arbitration.<sup>8</sup>

12  
13  
14 Cintas cannot escape the plain holding and import of *Bazzle* that arbitrators, not courts,  
15 decide “what kind of arbitration proceeding” the parties agreed to. *Id.* at 452; *see also John Wiley &*  
16 *Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (once it is determined the parties must arbitrate,  
17 procedural questions should be left to the arbitrator); *Richard C. Young*, 389 F.3d at 4-5  
18 (interpretation of purported forum selection clause must be left to arbitrator); *Ciago v. Ameriquest*  
19 *Mortgage Co.*, 295 F. Supp. 2d 324, 330 (S.D.N.Y. 2003) (interpretation of forum selection and fee-

20 <sup>8</sup> Cintas argues that *Bear, Stearns & Co. v. Bennett*, 938 F.2d 31 (2nd Cir. 1991), and *Sterling*  
21 *Fin. Inv. Group v. Hammer*, 393 F.3d 1223 (11th Cir. 2004), support its claim that it may now move  
22 to compel respondents to arbitrate under FAA §4 in 70 different courts. But nothing in those cases  
23 suggests that there were disputed contract interpretation issues regarding arbitral venue, and neither  
24 case undercuts *Bazzle*’s and *Richard C. Young*’s holdings that the arbitrator must decide such  
25 contract interpretation issues in the first instance. In *Sterling*, the argument that an arbitration venue  
26 clause was invalid was held waived because it was not raised in the lower court. 393 F.3d at 1226.  
27 *Bear Stearns* not only predates *Bazzle*, but no argument was made in that case that an FAA §4 action  
28 was unfounded because there was no refusal to arbitrate. *Bear Stearns* also has no bearing on this  
case, because the Second Circuit recently recognized that no FAA §4 action to compel arbitration  
can be stated without a refusal to arbitrate, as opposed to a mere dispute over arbitration procedures.  
*Jacobs v. USA Track & Field*, 374 F.3d 85, 89 (2nd Cir. 2004), citing *Aacon Auto Transport, Inc. v.*  
*Barnes*, 603 F. Supp. 1347, 1349 (S.D.N.Y. 1985) (where the AAA determined that arbitration  
should be conducted in Maryland, a party could not compel arbitration in New York pursuant to §4  
of the FAA because the adverse party was willing to arbitrate in Maryland and therefore “ha[d] not  
failed, neglected, or refused to arbitrate”).

1 splitting provisions must be left to arbitrator); *Tarulli v. Circuit City Stores, Inc.*, 333 F. Supp. 2d  
2 151, 158 (S.D.N.Y. 2004) (“The Supreme Court has held that once a district court determines that  
3 the arbitration agreement is valid and the parties have agreed to arbitrate, the arbitrator should  
4 determine the meaning of the specific provisions of the arbitration agreement at issue.”) (citing  
5 *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002)); *Blimpie Int’l, Inc. v. Blimpie of the Keys*,  
6 371 F. Supp. 2d 469, 474 (S.D.N.Y. 2005)) (whether arbitration clauses permit consolidation of  
7 arbitration must be decided by the arbitrator).

8 Cintas’ own actions with respect to the San Francisco arbitration undermine its attempts to  
9 circumvent the Arbitrator’s clause construction authority to decide the location and scope of the San  
10 Francisco arbitration. Cintas acknowledged in its July 9, 2004 Answer to plaintiffs’ arbitration  
11 demand that respondents were seeking to arbitrate their claims as part of the San Francisco  
12 arbitration and agreed to have all “clause construction” issues decided in the San Francisco  
13 arbitration. Cintas fully participated in briefing and argued its position to the Arbitrator in  
14 connection with the clause construction phase. Cintas has embraced the power of the Arbitrator to  
15 make decisions about whether respondents can arbitrate in the San Francisco arbitration, and its  
16 simultaneous efforts to usurp that authority by seeking rulings from 70 different federal courts in 37  
17 states must be rejected as improper under Rule 12(b)(1) and (3).

18 **V. CINTAS IS JUDICIALLY ESTOPPED FROM SEEKING ARBITRATION**  
19 **IN 70 OTHER JURISDICTIONS**

20 The Court should alternatively dismiss the 70 petition cases because the doctrine of judicial  
21 estoppel prevents Cintas from avoiding arbitration of the clause construction issue in San Francisco.  
22 “Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by  
23 asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.”  
24 *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001), citing *Rissetto v.*  
25 *Plumbers & Steamfitters Local, 343*, 94 F.3d 597, 600-01 (9th Cir. 1996) and *Russell v. Rolfs*, 893  
26 F.2d 1033, 1037 (9th Cir. 1990). The doctrine bars litigants from asserting inconsistent positions in  
27 the same litigation, as well as in two different cases. *Hamilton*, 270 F.3d at 782-83. Because the  
28 doctrine is intended to protect the integrity of the judicial process, judicial estoppel “is an equitable

1 doctrine invoked by a court at its discretion.” *Russell*, 893 F.2d at 1037. A court may consider three  
2 factors in determining whether to apply the doctrine of judicial estoppel: (1) “a party’s later position  
3 must be ‘clearly inconsistent’ with its earlier position;” (2) “whether the party has succeeded in  
4 persuading a court to accept that party’s earlier position, so that judicial acceptance of an  
5 inconsistent position in a later proceeding would create the perception that either the first or the  
6 second court was misled;” and (3) “whether the party seeking to assert an inconsistent position  
7 would derive an unfair advantage or impose an unfair detriment on the opposing party if not  
8 estopped.” *Hamilton*, 270 F.3d at 782-83 (quoting *New Hampshire v. Maine*, 532 U.S. 742 (2001))  
9 (internal quotations and citations omitted). Here, each of these requirements is satisfied.

10 First, Cintas’ current position that the clause construction issue should be resolved in 70  
11 different jurisdictions is clearly inconsistent with its previous position that the clause construction  
12 issue should be decided in the San Francisco arbitration. At the time Cintas answered the Demand  
13 for arbitration, it acknowledged that the demand was made on behalf of all plaintiffs who would file  
14 consents to sue in the Court and/or to whom the Court would ultimately rule must arbitrate their  
15 claims. Paragraph 42 of Cintas’ Answer states: “Solely to the extent that an arbitral tribunal or  
16 arbitrator holds a clause construction proceeding pursuant to Supplementary Rule 3, however, *Cintas*  
17 *consents to the place of that proceeding being San Francisco . . . .*” Pepich Decl., Ex. O (emphasis  
18 added). Although Cintas has tried to narrow the scope of the current arbitration through its recent  
19 submissions, its Answer, which is legally binding upon Cintas, acknowledged the broad character of  
20 the arbitration initiated by respondents and that the clause construction issue should be decided in  
21 that forum.

22 Second, Cintas succeeded in persuading the Court to deny reconsideration of its April 5,  
23 2004 Order compelling arbitration, by arguing that only the Arbitrator may decide the scope of  
24 arbitration issues.<sup>9</sup> Cintas now wants to send the same clause construction issue to 70 different

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25  
26  
27 <sup>9</sup> Cintas argued in its Opposition to Plaintiffs’ Motion to Reconsider the original order  
28 compelling arbitration (Dec. 14, 2004) that the scope and place of arbitration is beyond the reach of  
this Court:

1 jurisdictions, to be decided by 70 different district court judges because it is not happy with the  
2 results of the Arbitrator's clause construction analysis.

3 Third, Cintas would derive an unfair advantage and impose an unfair detriment on the opt-in  
4 plaintiffs if it is not estopped from seeking to have the clause construction issue decided in 70 other  
5 jurisdictions. Simply filing and serving those petition cases was harassing enough but forcing  
6 respondents to address this issue in 70 different courts and/or before 70 different arbitrators would  
7 give Cintas an unfair advantage and impose an unfair detriment on respondents by exponentially  
8 increasing costs and inefficiencies.

## 9 **VI. CONCLUSION**

10 For the reasons stated above, because respondents have not refused to arbitrate, the Court  
11 should enter judgment on the pleadings against Cintas on all its petitions under FAA §4. Even if  
12 judgment were not appropriate at this time, however, the Court must reject Cintas' attempt to have  
13 70 different federal courts issue orders undermining the San Francisco Arbitrator's authority to  
14 decide the central issue of contract interpretation here – whether respondents may participate in the  
15 collective and class action arbitration pending in San Francisco. Cintas' 70 petition cases may also  
16 be dismissed under Rule 12(b)(1) or (3), because the 70 federal courts where the petitions were filed  
17 lack jurisdiction to construe the arbitration clauses at issue and are the wrong forums for doing so.  
18 Even if Cintas' approach were generally valid, moreover, it would not be available to Cintas, which  
19  
20

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21 Under *Green Tree Fin. Corp. v. Bazzle* (“*Bazzle*”), 539 U.S. 444, 452-53 (2003), this  
22 Court cannot involve itself in disputes over whether class arbitration is or is not  
allowed. The Court must, therefore, leave this issue to the arbitrator to decide.

23 Cintas Opp. Brief at 1-2. Presumably, Cintas took that position to avoid a ruling that such a  
24 prohibition would render the arbitration agreements unconscionable and unenforceable under  
25 applicable law. The Court noted that even if Cintas had argued that its agreements precluded class  
26 arbitrations, it would still be for the arbitrator, not the Court, to determine such issues. *See* May 4,  
27 2005 Order at 9 n.7 (“Cintas . . . says that it ‘does not claim that any language in the arbitration  
28 agreements necessarily precludes all class arbitration.’ Even if Cintas had argued that class or  
collective arbitration were precluded, *Bazzle* dictates that this Court defer to the decision of the  
arbitrator. *Bazzle*, 539 U.S. at 452-53.”). Having so vigorously made these arguments, Cintas’  
attempt to send the scope of arbitration issue to 70 courts is disingenuous at best.

1 must be judicially estopped from contending that the federal district courts should be construing its  
2 arbitration agreements, rather than the San Francisco Arbitrator in whom Cintas explicitly vested  
3 authority over clause construction issues.

4 DATED: December 12, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2006 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ STEVEN W. PEPICH  
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## **Mailing Information for a Case M:06-cv-01781-SBA**

### **Electronic Mail Notice List**

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### **Manual Notice List**

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)