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THE CINTAS PARTNERS' PLAN
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

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

17 Plaintiffs,

18 vs.

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

21 Defendants.
22

Case No. C-03-01180 (RS)

[E-FILING]

CLASS ACTION

**CINTAS' NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
ON CERTAIN CONSOLIDATED
23 GROUNDS; MEMORANDUM IN SUPPORT**

Date: September 17, 2008

Time: 9:30 a.m.

Courtroom: 4

Judge: Hon. Richard Seeborg
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1 **NOTICE OF CONSOLIDATED MOTION AND CONSOLIDATED MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, PLEASE TAKE
3 NOTICE THAT on September 17, 2008 at 9:30 a.m., or as soon thereafter as the matter may be
4 heard, in Courtroom 4 of the above-entitled Court, located at 280 South 1st Street, Fifth Floor,
5 San Jose, California, Defendant Cintas Corporation (“Cintas”) will and hereby does move the
6 Court for an Order granting the relief sought by this Consolidated Motion. Cintas submits this
7 Consolidated Motion in this format rather than as separate motions, pursuant to the Stipulation
8 Regarding Trial Before Magistrate Judge, and Related Issues dated November 16, 2007 (Dkt.
9 727 at ¶ 2) and the related Order of Judge Sandra Brown Armstrong dated October 4, 2007
10 (Dkt. 710) directing Cintas to file a single consolidated motion combining the motions that
11 were on file at the time of that Order.

12 By this Consolidated Motion, Cintas seeks an Order:

13 1. Pursuant to Fed. R. Civ. P. 56(c) granting summary judgment for Cintas as
14 against 25 plaintiffs’ Third Claim for Relief under the Fair Labor Standards Act (“FLSA”), 29
15 U.S.C. § 201 *et seq.* Under the Motor Carrier Act exemption, those 25 plaintiffs’ FLSA claims
16 are barred because they have admitted that they regularly drove across state lines to make
17 deliveries on their assigned route(s) as part of their duties as Service Sales Representatives.
18 The admitted facts establish that these 25 plaintiffs were exempt from overtime under the
19 FLSA.

20 2. Pursuant to Fed. R. Civ. P. 56(c) granting summary judgment for Cintas on the
21 following issues relating to the application of the limitations period in the FLSA, 29 U.S.C.
22 § 255(a): (a) The two-year limitations period applies against all plaintiffs because plaintiffs
23 cannot meet their burden of proving willfulness and therefore cannot claim the benefit of the
24 three-year period; (b) The two- or three-year limitations period (as individually tolled) bars the
25 FLSA claims of 29 plaintiffs whose last dates of employment with Cintas fall outside the
26 applicable limitations period; (c) Application of the two- or three-year limitations period limits
27 the claims of all plaintiffs, such that they cannot assert claims for employment periods falling
28 outside the relevant limitations period.

3. Pursuant to Fed. R. Civ. P. 56(c) granting summary judgment for Cintas as against plaintiffs Ashcraft, Ricardo Brown and Maxfield on the grounds that they were not Cintas SSRs during the period relevant to this lawsuit and therefore may not pursue claims against Cintas in this action.

This Motion is based upon this Notice of Consolidated Motion, Consolidated Motion and Memorandum of Points and Authorities, the Request for Judicial Notice, the Declaration of Michael W. Kelly, the Declaration of Laura Beall and the Declaration of Brenda Abramovich filed herewith, the Reply papers to be submitted in support of this Consolidated Motion, upon such other or further papers as might be submitted in support of this Consolidated Motion, upon the record in this action, and upon oral argument to be presented to the Court in support of this Consolidated Motion at the hearing on this Consolidated Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY

Plaintiffs’ primary allegation is that Cintas improperly classified plaintiffs as exempt employees. By this Motion, Cintas seeks summary judgment on the following claims and issues for the reasons described below and summarized as follows:

SUMMARY JUDGMENT GROUNDS	PLAINTIFF(S) SUBJECT TO MOTION
<i>Plaintiffs’ Third Claim for Relief Fails As to Those SSRs Who Regularly Drove Across State Lines and Were Exempt From Overtime Under the FLSA</i>	25 Plaintiffs – Ashley, Barnes, Bouchard, Bruck, Bryan, Cummings, Gilliam, Gregory, Hamilton, Johnson, Kellogg, Lee, Michelfelder, Pianowski, Robinson, M.R., Rowse, Santana, Sims, Wagner, Wait, Walker, Washkuhn, Williams, S., Wilson, C. and Zobrist
<i>Because Plaintiffs Cannot Meet Their Burden Of Proving Willfulness, The Two-Year Limitations Period Applies</i>	All 221 Litigating Plaintiffs
<i>Certain Plaintiffs’ FLSA Claims Are Barred Because Their Last Dates Of Employment With Cintas Fall Outside The Applicable Two- Or Three-Year Limitations Period.</i>	29 Plaintiffs –Ashcraft, Ashley, Bockelman, Borden, Bruck, Clayton, Davis, S., Fisher, Franklin, Gorman, Haycock, Herndon, Juarez, Kelly, Klinghagen, Martinez, T., McLeod, Mendoza, Miller, Milligan, Osborne, Pegues, Perez, R., Peters, Romes, Sanbento, Schneider, Staton, and Williams, S.

SUMMARY JUDGMENT GROUNDS	PLAINTIFF(S) SUBJECT TO MOTION
<i>Plaintiffs' Claims for Relief Are Barred Because They Were Not SSRs During The Collective Period</i>	Ashcraft, Brown, R. and Maxfield

The grounds summarized above fall into three general categories: **(1) Crossing state lines:** Claims by plaintiffs who have acknowledged in discovery responses frequently crossing state lines to make deliveries, thereby falling squarely within the Motor Private Carrier exemption to the FLSA (“MCA exemption”) 49 U.S.C. §13501; 29 C.F.R. §782.2; **(2) Statute of Limitations:** Claims eliminated in whole or in part by operation of the two- or three-year limitations period applicable to actions brought under the FLSA; **(3) Plaintiffs outside scope of case:** Claims by plaintiffs who were never employed by Cintas in positions within the scope of this Action. These grounds are discussed in Parts III, IV and V, below, respectively.

II. STANDARDS GOVERNING SUMMARY JUDGMENT

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary judgment must be granted when the moving party demonstrates that there are no genuine issues of material fact. *See Horphag v. Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). An issue is only “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005). An issue is only “material” if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248; *Rivera*, 395 F.3d at 1146.

It is well-settled that a portion of a cause of action may be disposed of on summary adjudication. *Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1441 (9th Cir. 1990) (allowing summary adjudication on issue of collateral estoppel); *First Nat'l Ins. Co. v. F.D.I.C.*, 977 F. Supp. 1051, 1055 (S.D.Cal. 1997) (a "Court may still grant summary adjudication as to specific issues if it will narrow the issues for trial"); *see also Barker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981) ("in cases that involve ... multiple causes of action, summary judgment may be proper as to some

1 causes of action but not as to others, or as to some issues but not as to others, or as to some parties
2 but not as to others.")

3 A party opposing a summary judgment motion cannot merely rely on the pleadings, but
4 must present specific and supported material facts, of significant probative value, to preclude
5 summary judgment. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,
6 586 n. 11 (1986); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002); *Federal Trade*
7 *Comm'n v. Gill*, 265 F.3d 944, 954 (9th Cir. 2001).

8 **III. THE MCA EXEMPTION REQUIRES SUMMARY JUDGMENT AS TO 25** 9 **PLAINTIFFS WHO REGULARLY CROSSED STATE LINES TO MAKE** 10 **DELIVERIES**

11 **A. Background**

12 Cintas manufactures, sells and rents uniforms and apparel and provides many other
13 business products and services to its customers throughout the United States and Canada.
14 Plaintiffs claim they are Service Sales Representatives or “other persons performing a service
15 and/or delivery function on a non-hourly basis” (hereinafter “SSRs”) who are current or former
16 employees of Cintas who “worked for Cintas in facilities throughout the United States.” Request
17 for Judicial Notice in Support of Cintas’ Motion for Summary Judgment on Certain Consolidated
18 Grounds (“RJN”), Ex. 233, Second Amended Complaint (“SAC”) [Dkt. 519] at ¶3. The SAC
19 alleges that Cintas misclassified plaintiffs as exempt from certain federal and state wage and hour
20 laws and as a result allegedly failed to pay overtime due under those statutes. *Id.* at ¶4. The
21 Third Claim for Relief in the SAC purports to assert a collective action under the FLSA, 29
22 U.S.C. §§201 *et seq.*, for failure to pay overtime compensation to those plaintiffs (including the
23 plaintiffs who are the subject of this Motion) who have filed consents-to-sue in this Action. *Id.* at
24 ¶¶122-134.

25 In considering whether to conditionally certify this as a collective action, the Court has
26 already ruled that many individual SSRs would be barred from pursuing a claim under the FLSA
27 because of the Motor Private Carrier exemption to the FLSA (“MCA”):

28 [t]he MCA governs employees who are carrying goods across state
lines. 49 U.S.C. §13501; 29 C.F.R. §782.2. **SSRs who actually**
cross state lines to make deliveries on their route fall squarely

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within the MCA. Because these employees are governed under the MCA, the FLSA does not apply to them and they are not similarly situated. Accordingly, they should be expressly excluded from the proposed class.

RJN, Ex. 1, November 4, 2003 Order [Dkt. 121 at 9:16-20] (emphasis added). The Court also recognized that the MCA exemption would apply to plaintiffs whose activities were *entirely intra-state* if they met a minimal threshold of involvement in interstate activities.¹

To determine which plaintiffs fell within the MCA exemption (and therefore out of the scope of this case), Cintas asked plaintiffs in discovery to confirm that they did, in fact, regularly cross state lines:

INTERROGATORY NO. 4:

State each route number to which you were assigned from January 1, 2000 to the present. If you do not remember the exact information, or do not have documentation showing information that you can use in answering this interrogatory, provide as much information as you recall.

INTERROGATORY NO. 8:

For each route identified in response to Interrogatory No. 4, state how frequently you drove across State lines in the course of performing your job duties. If you do not remember the exact information, or do not have documentation showing information that you can use in answering this interrogatory, provide as much information as you recall.

See e.g. Declaration of Michael W. Kelly (“Kelly Decl.”), Exs. 1-3.

In response to Interrogatory No. 8 above, the 25 plaintiffs who are subject to this part of this Motion admitted that they drove across State lines at least once a month, with virtually all—
23—admitting they drove across State lines once a week or more. Kelly Decl., ¶ 1 and Exs. 1-3. For ease of reference, these 25 plaintiffs are listed on Exhibit 4 to the Kelly Declaration along with a summary of their respective discovery responses.

¹ The Court has already ruled that “[the MCA exemption] applies to SSRs if they fall under one of four categories, all of which are related to the degree a driver participates in distributing goods in interstate commerce. A driver who spends as little as 3.65 percent of this time performing this duty can fall under the MCA exemption so that the FLSA does not apply to him. Morris v. McComb, 332 U.S. 422, 431 (1947).” RJN, Ex. 1, November 4, 2003 Order [Dkt. No. 121] at 7:12-17. One of those four categories is SSRs who crossed State lines.

1 When Cintas made a similar motion in September 2007, identifying 54 plaintiffs who had
2 admitted frequently crossing state lines,² plaintiffs' counsel confirmed their understanding that
3 plaintiffs who regularly crossed state lines as part of their job responsibilities were exempt under
4 the MCA exemption. In an October 1, 2007 e-mail sent shortly after that motion was filed,
5 plaintiffs' counsel stated:

6 [w]e have reviewed the facts and law germane to Cintas' motion for
7 summary judgment based on plaintiffs' crossing state lines. As a
8 result of our analysis regarding those matters, we are now prepared
9 to recommend to the most of the plaintiffs who are subject to
Cintas' motion that they should agree to the voluntary dismissal of
their claims based on the type of stipulated dismissal that we have
previously executed in this case.

10 Kelly Decl., Ex. 5. Of the 54 persons who were the subject of Cintas' September Motion for
11 Summary Judgment, 23 of them have since voluntarily dismissed their claims. *See* Kelly Decl.,
12 ¶¶ 3-6, Exs. 5-7 and Dkts. 735 and 846 (Stipulations for Dismissal With Prejudice of Certain
13 Plaintiffs' Claims Against Cintas Corp. and Orders Thereon).

14 Plaintiffs who are the subject of this motion are (1) plaintiffs from whom plaintiffs'
15 counsel could not obtain consent to dismissal; (2) plaintiffs whom plaintiffs' counsel dispute
16 crossed state lines for some or all of their employment with Cintas (contrary to those plaintiffs'
17 verified interrogatory responses); or (3) plaintiffs who are now subject to summary judgment
18 because of recent legislation correcting 2005 changes to the MCA exemption, which changes—
19 had they not been corrected—might have precluded summary judgment on this ground due to
20 factual issues as to some plaintiffs' entire claims. In any event, there is no legal dispute that
21 plaintiffs who frequently cross state lines as part of their job are covered by the MCA exemption
22 and should not be part of this case.

23 ///

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25 ///

26 _____
27 ² That motion was not heard; the Court ordered Cintas to consolidate that motion with two
28 others then on file, the hearing for which was then vacated—which ultimately led to Cintas
filing this Motion.

1 **B. Cintas Is Entitled to Summary Judgment Under the MCA Exemption Where**
2 **Plaintiffs Have Admitted Frequently Crossing State Lines**

3 **1. The MCA Exemption Covers, At a Minimum, Plaintiffs Who**
4 **Frequently Crossed State Lines to Make Deliveries**

5 Under the MCA exemption, the overtime requirements of the FLSA do not apply to “any
6 employee with respect to whom the Secretary of Transportation (the “Secretary”) has power to
7 establish qualifications and maximum hours of service pursuant to the provisions of section 204
8 of the Motor Carrier Act of 1935.” The Secretary of Transportation has jurisdiction, and thus
9 regulatory authority, over employees transporting goods traveling in interstate commerce where
10 the employees are engaging in activities directly affecting the safety of motor vehicles. 49 U.S.C.
11 § 13501; 29 C.F.R. § 782.2. Thus, in order to invoke the exemption, Cintas need only show that:

- 12 (a) it is a “motor private carrier;”
- 13 (b) the plaintiffs were or could have been engaged in activities
14 that “affect the safe operation of motor vehicles on public
15 highways”;
- 16 (c) the plaintiffs were or could have been called upon to
17 transport goods in interstate commerce.

18 *See* 49 U.S.C. § 31502; *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670 (10th Cir. 1993);
19 *Gerard v. Northern Transportation, LLC*, 146 F. Supp. 2d 63 (D. Me. 2001); *see also Klitzke v.*
20 *Steiner Corp.*, 110 F.3d 1465, 1467-68 (9th Cir. 1997) (describing the application of the MCA
21 exemption). Each of these elements is satisfied here. As the Court has previously ruled in this
22 case:

23 the MCA governs employees who are carrying goods across state
24 lines. 49 U.S.C. § 13501; 29 C.F.R. § 782.2. **SSRs who actually**
25 **cross state lines to make deliveries on their route fall squarely**
26 **within the MCA. Because these employees are governed under**
27 **the MCA, the FLSA does not apply to them.** . . . [and] they should
28 be expressly excluded from the proposed class.

RJN, Ex. 1 [Dkt. 121] at 9:16-20 (emphasis added).

26 **a. Cintas is a “Motor Private Carrier”**

27 A “motor private carrier” is “a person, other than a motor carrier, transporting property by
28 motor vehicle when:” (1) the entity transports goods in interstate commerce; (2) the person is the

1 owner, lessee, or bailee of the property being transported; and (3) the property is being
2 transported for sale, lease, rent, or bailment or to further a commercial enterprise. 49 U.S.C. §
3 13102(15).

4 It is indisputable that Cintas is a “motor private carrier.” Plaintiffs allege in their SAC
5 that “Cintas has been, and continues to be, and ‘employer’ engaged in interstate ‘commerce’
6 and/or in the production of ‘goods’ for ‘commerce.’” RJN, Ex. 233, SAC [Dkt. 519] at ¶123.
7 Plaintiffs further allege that Cintas operates a “uniform supply company which designs,
8 manufactures and delivers employee uniforms and related products to is industrial customers on a
9 regular basis,” and that plaintiffs were employed “to deliver clean uniforms, mats and other
10 products to industrial customers on a daily basis.” *Id.* at ¶¶124-125. Because Cintas is alleged to
11 be the owner of the property it transports and carries in furtherance of a commercial enterprise
12 (i.e., its delivery of products to customers), Cintas qualifies as a “motor private carrier” for
13 purposes of the MCA exemption. *See Friedrich v. U.S. Computer Servs.*, 974 F.2d 409 (3d Cir.
14 1992).

15 **b. Plaintiffs Performed “Safety-Affecting” Activities.**

16 Similarly, it is beyond challenge that Cintas’ SSRs are engaged in activities “affecting
17 safety” on a continuing basis. Both the Supreme Court and lower courts have ruled that drivers, as
18 a matter of law, affect highway safety. *See e.g., Levinson v. Spector Motor Serv.*, 330 U.S. 649,
19 666-68 (1947); *Friedrich v. U.S. Computer Servs.*, 974 F.2d 409, 417-18 (3d Cir. 1992) (driving
20 of passenger vehicles is activity that “affected safety”); *Crooker v. Sexton Motors, Inc.*, 469 F.2d
21 206, 210-211 (1st Cir. 1972) (“[T]he activities of one who drives [a new or used automobile] in
22 interstate commerce, however frequently or infrequently, are not trivial. Such activities directly
23 affect the safety of motor vehicle operations.”); *Barefoot v. Mid-America Dairymen*, 826 F. Supp.
24 1046, 1050 (N.D. Tex. 1993), citing *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022,
25 1026 (10th Cir. 1992). It is undisputed that SSRs drive as a part of their job duties, delivering
26 Cintas products to the facilities of Cintas customers in trucks provided for that purpose by their
27 employer. *See* RJN, Ex. 233, SAC [Dkt. 519] at ¶127. Accordingly, as a matter of law, the SSRs
28 are engaged in safety-affecting activities.

1 **c. Plaintiffs Transported Goods in Interstate Commerce**

2 This “interstate commerce” requirement may be satisfied if: (1) the driver is transporting
3 goods across state lines; or (2) the driver is not transporting goods across state lines but even a
4 small fraction of the goods he or she is delivering are in the “practical continuity of movement” in
5 the flow of interstate commerce. *Klitzke*, 110 F.3d at 1469; *Bilyou v. Dutchess Beer Distributors,*
6 *Inc.*, 300 F.3d 217 (2d Cir. 2002). Each and every plaintiff listed in Exhibit 4 to the Kelly
7 Declaration has admitted that he or she *frequently* drove across state lines to deliver goods for
8 Cintas and thus carried goods in interstate commerce.

9 Even employees who are only “subject to” driving in interstate commerce are covered by
10 the MCA exemption—even though their regular job duties do not require them to cross state
11 lines. In *Chao v. First Class Coach Co.*, 219 F. Supp. 2d 1243, 1248 (M.D. Fla. 2001), for
12 example, the court held that drivers who were expected to be able and available to drive all routes
13 were exempt under the MCA exemption where any driver could be assigned an interstate route at
14 any time. “If the bona fide duties of the job performed by the employee are in fact such that he
15 is . . . called upon in the ordinary course of his work to perform, either regularly or from time to
16 time, safety-affecting activities . . . , he comes within the exemption in all workweeks when he is
17 employed at such job. . . .” 29 C.F.R. § 782.2(b)(3). As one court stated, “if an employer
18 regularly or from time to time calls on a driver to carry goods over state lines, then the MCA
19 exemption applies to ‘all workweeks when he is employed at such job.’” *Gerard v. Northern*
20 *Transportation, LLC*, 146 F. Supp. 2d 63, 67 (D. Me. 2001). For purposes of this Motion, this
21 means that all of the individual plaintiffs who are subject to this Motion are exempt—even for
22 weeks where they made no interstate deliveries—since their admissions make clear that they
23 were, at a minimum, subject to crossing state lines.

24 The Department of Labor’s Wage & Hour Field Operations Handbook states that
25 interstate driving only once *every four months* is sufficient for a driver to fall within the scope of
26 the MCA exemption. RJN, Ex. 2, Field Operations Handbook § 24e01. Even persons who do not
27 regularly deliver goods as part of their job duties are subject to the MCA exemption where they
28 do so “from time to time”—even though all such deliveries are entirely intra-state, so long as the

1 goods are in interstate commerce. *Guyton v. Schwan Food Co.*, Civil No. 03-5523(DWF/SRN),
2 2004 U.S. Dist. LEXIS 4174 at * 17-18 (D. Minn. Mar. 16, 2004).

3 Although each of these 25 plaintiffs admitted driving *interstate*--in other words--across
4 state lines, courts have held that even drivers whose driving is *entirely* within one state are subject
5 to the MCA exemption if they were engaged in some other minimal interstate activities. For
6 example, in *Morris v. McComb*, the United States Supreme Court held that drivers whose driving
7 was entirely within one state were exempt under the MCA exemption because they spent a
8 minimal amount of their time--just three percent (3%)--transporting goods in interstate
9 commerce. *Morris v. McComb*, 332 U.S. 422, 431 (1947).

10 Here, 25 plaintiffs have admitted **regularly crossing state lines** to deliver goods for
11 Cintas on the routes to which they were assigned from January 1, 2000 to the present. Kelly
12 Decl., Exs. 1-3. They also admitted that they drove interstate for Cintas frequently enough to be
13 well above the threshold for application of the MCA exemption. Each of the plaintiffs listed in
14 the chart attached as Exhibit 4 to the Kelly Declaration stated unequivocally, in response to
15 Cintas' First Set of Interrogatories, that performing their job duties—at all times during their
16 employment as an SSR—including carrying goods across state lines at least once a month (over 90
17 percent said they did so at least once a week), which is well within the four-month threshold
18 established by the Department of Labor. Kelly Decl., ¶¶ 1-2 and Exs. 1-4. Accordingly, based on
19 these plaintiffs' admitted interstate activity, their Third Claim for Relief is barred under the MCA.

20 **(1) There is No Dispute that 20 of These 25 Plaintiffs Should**
21 **Be Dismissed**

22 As noted above, plaintiffs' counsel have freely conceded in the course of the parties'
23 meeting and conferring that plaintiffs who frequently cross state lines in the performance of their
24 job duties are exempt under the MCA exemption. In fact, plaintiffs' counsel have specifically
25 conceded that ten of the plaintiffs subject to this Motion should have their FLSA claims
26 dismissed because they were exempt under the MCA when employed as Cintas SSRs.³ Kelly

27 ³ Those identified by plaintiffs' counsel whose FLSA claims should be dismissed are Ashley,
28 Barnes, Bryan, Cummings, Gilliam, Johnson, R., Lee, Michelfelder, Robinson, M.R., and
Wilson, C. See Kelly Decl., Ex. 7, at p. 1, n.1.

1 Decl., Ex. 7 at p.1, n. 1. Over **nine months ago**, after Cintas originally moved as to these
 2 plaintiffs, plaintiffs' counsel informed Cintas that they would seek to obtain from these plaintiffs
 3 consents to dismissal; Cintas is still waiting. *See* Kelly Decl., Exs. 5 and 7. Accordingly, Cintas
 4 moves against them here to avoid further delay in dismissing them from this action.

5 Similarly, there should be no dispute over the additional ten plaintiffs who were not
 6 subject to Cintas' September 2007 Motion for Summary Judgment, each of whom has also freely
 7 admitted crossing state lines at least once a month—and typically more often.⁴ *See* Kelly Decl.,
 8 Ex. 4. An intervening “correction” to the law by Congress has made the application of the MCA
 9 exemption to nine of these ten plaintiffs as clear as it was to those plaintiffs who have voluntarily
 10 dismissed their claims.⁵

11 Cintas did not previously move for summary judgment as to all but one of these ten
 12 because a revision to the MCA to take effect on August 10, 2005 changed the definitions of
 13 “motor carrier” and “motor private carrier” to cover only “commercial” motor vehicle
 14 transportation. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For
 15 Users, H.R. 3, 109th Cong. § 4142(a) (2005) (enacted), RJN, Ex. 3. Thus, because a motor
 16 vehicle was not “commercial” unless the vehicle weighed at least 10,001 pounds, only those
 17 employees driving vehicles weighing over 10,000 pounds appeared to be eligible for the Motor
 18 Carrier Act exemption after August 10, 2005. Accordingly, because each of these nine plaintiffs
 19 were employed by Cintas after August 10, 2005, Cintas did not move as to them because doing so
 20 would have been complicated by the individualized proof as to the types of trucks each of them
 21 was driving.

22 On June 6, 2008, however, Congress passed the “Correction Act,” which retroactively
 23 “corrects” those portions of the August 10, 2005 revisions that had changed the definition of
 24 “motor carrier.” SAFETEA-LU Technical Correction Act of 2008, H.R. 1195, 110th Cong. § 305

25 ⁴ The ten plaintiffs Cintas adds to this motion are Bouchard, Gregory, Hamilton, Kellogg,
 26 Rowse, Sims, Wait, Walker, Washkuhn, and Zobrist.

27 ⁵ Cintas inadvertently left Zobrist out of its 2007 summary judgment motion but includes him
 28 here as he crossed state lines with sufficient frequency to be exempt under the MCA. He was
 unaffected by any 2005 amendments to the MCA because he admits in his consent-to-sue that
 he terminated employment with Cintas in July 2002, long before such amendments had been
 enacted. RJN, Ex. 232.

1 (2008) (enacted), RJN, Ex. 4. Relevant here, the Correction Act retroactively struck the
2 “commercial” vehicle reference from the August 10, 2005 revisions, and retroactively defined
3 “motor carrier” and “motor private carrier” to include non-“commercial” carriers, i.e., to include
4 trucks under 10,000 lbs. *See id.* §§ 121(b), 305(c). Given that the Correction Act is expressly
5 retroactive, plaintiffs who crossed state lines to make deliveries (such as the 25 plaintiffs here) are
6 exempt under the MCA, regardless of the size of the truck they drove.

7 **(2) There is No Legitimate Dispute Over Plaintiffs Bruck,**
8 **Santana, Pianowski, Wagner and Williams**

9 Although plaintiffs’ counsel have claimed in meet-and-confer communications that there
10 are issues of material fact regarding the five remaining plaintiffs, those issues are illusory and for
11 all but one (Bruck, discussed below) depend on disregarding the plaintiffs’ unequivocal (and not
12 withdrawn) sworn interrogatory responses in favor of other—often ambiguous—interrogatory
13 responses or responses to requests for admissions. As a matter of law, these types of discovery
14 responses cannot create a triable issue of material fact and, thus, cannot preclude summary
15 judgment. These so-called fact issues were outlined in a February 6, 2008 letter from plaintiffs’
16 counsel (Kelly Decl., Ex. 7) and rely almost entirely on ambiguous or contradictory discovery
17 responses, which are insufficient to create a genuine issue of fact as a matter of law.

18 Absent appropriate and timely amendment or supplementation, a party is bound by its
19 discovery responses. *Bowman v. Corrections Corp. of America*, 188 F. Supp. 2d 870, 890-91
20 (M.D. Tenn. 2000) (affirming exclusion of evidence for failure to timely supplement discovery
21 responses). A party cannot present in opposition to a motion for summary judgment a factual
22 account that is inconsistent with the facts asserted in his or her discovery responses. *Scott v. City*
23 *& County of San Francisco*, No. C. 89-2781 MHP, 1995 U.S. Dist. LEXIS 18107, at * 7 (N.D.
24 Cal. Nov. 21, 1995); see also *Bushnell v. Vis Corp.*, No. C-95-04256 MHP, 1996 U.S. Dist
25 LEXIS 22572, at * 7- 8 (N.D. Cal. Aug. 29, 1996). The courts will refuse to consider matters
26 raised in opposition to a motion for summary judgment that should have been included in the
27 original—or at least supplemental—answer to discovery requests. *W.G. Pettigrew Distrib. Co. v.*
28 *Borden Inc.*, 976 F. Supp. 1051-52 (S.D. Tex. 1996). Because these plaintiffs have not

1 withdrawn, amended or supplemented their unequivocal statements that they frequently and
2 regularly crossed state lines, they cannot now rely on inconsistent responses to *other* requests, or
3 on new affidavits to contradict those earlier sworn responses.⁶

4 Nonetheless, Cintas addresses each of these arguments as to specific SSRs as follows:

5 **a. Bruck** admitted that she drove across state lines “monthly” while employed as a
6 Cintas SSR. Kelly Decl., Ex. 1 at 62:2. This admission is more than sufficient to meet the DOL
7 minimum of interstate activity only once *every four months* and place her within the scope of the
8 MCA exemption. RJN, Ex. 2, Field Operations Handbook § 24e01.

9 **b. Wagner and S. Williams** admitted weekly interstate driving activity during their
10 employment. Kelly Decl., Ex. 1 at 67:5-9 and at 67:25. Plaintiffs’ counsel may claim (as they
11 did in correspondence to Cintas’ counsel over six months ago) that these admissions are
12 inaccurate, but have not supplemented or amended their clients’ binding admissions and it is too
13 late now to do so.

14 **c. Santana’s** verified responses confirm the following facts: (1) Mr. Santana was
15 employed by Cintas from November 20, 2002 to June 10, 2003. Kelly Decl., Ex. 8 [Santana’s
16 Responses to Cintas’ First Set of Interrogatories No. 2]. (2) Mr. Santana also crossed state lines
17 “weekly” from February 2, 2003 until June 10, 2003. *Id.* [Nos. 5, 8]. In another set of
18 interrogatory responses, Mr. Santana confirmed that he crossed state lines during his training
19 period (i.e., the time between his hire in November 2002 and February 2003 when he was
20 assigned to a route) as well as during the final months of his employment. Kelly Decl., Ex. 8
21 [Supp. Res. To 3d Set of Interrogatories No. 22, at p. 10, No. 8]. In other words, Mr. Santana was
22 crossing state lines the entire time he was employed by Cintas. Even if he were not, however,
23 Mr. Santana’s discovery responses demonstrate that he was, at a minimum, *subject* to crossing
24 state lines during any short period when he might not have been crossing state lines on a weekly
25

26 ⁶ Given that “[e]xclusion of evidence is an appropriate sanction for failure to supplement
27 interrogatory responses,” it is appropriate for plaintiffs to be held to their original responses
28 and not permitted to change them now at the last minute. *Estes v. Campbell Soup Co.*, No.
80-32761981, U.S. App. LEXIS 21311, at *2 (9th Cir. October 16, 1981), citing former Fed.
R. Civ. Proc. 26(e)(2); Fed. R. Civ. Proc. 26(e) advisory committee’s note.

1 basis. After all, he admitted that he crossed state lines *weekly* at the beginning, middle and end of
2 his employment with Cintas. Accordingly, Mr. Santana is subject to the MCA exemption.

3 **d. Pianowski** admitted crossing state lines “Daily.” His lawyers later argued that he
4 is not subject to summary judgment because he did not cross state lines from “January 2002
5 through March 2002.” Kelly Decl., Ex. 7 at p. 4. They also cite his later statement that he did not
6 start to cross state lines until “several months” after he began work. *Id.* But Mr. Pianowski did
7 not begin work with Cintas until February 2, 2002, and he terminated employment on November
8 9, 2002. Declaration of Brenda Abramovich (“Abramovich Decl.”), ¶ 14. Moreover, he admits
9 he drove the same route, number 18, from March 2002 to November 2002. Kelly Decl., Ex. 9
10 [Pianowski Responses to Cintas’ First Set of Interrogatories No. 5]. Cintas’ records show that on
11 Route 18, Mr. Pianowski was assigned to regularly service customers in New Hampshire from his
12 location in Massachusetts. Abramovich Decl., Exs. 8-9.⁷ Thus, the only reasonable conclusion is
13 that Mr. Pianowski crossed state lines beginning in March 2002 on Route 18 and continued to do
14 so “daily,” as he verified he did on that route until his termination, such that he meets DOL
15 minimum of crossing state lines at least once every four months for his entire nine month
16 employment and was exempt under the MCA. RJN, Ex. 2, Field Operations Handbook § 24e01.

17 **IV. SUMMARY JUDGMENT IS APPROPRIATE TO EXCLUDE CLAIMS BARRED**
18 **BY APPLICABLE LIMITATIONS PERIODS**

19 **A. Summary and Background**

20 Employee claims for unpaid overtime compensation under the FLSA are ordinarily
21 subject to a two-year statute of limitations. 29 U.S.C. § 255(a). There is a single exception: a
22 “cause of action arising out of a willful violation may be commenced within three years after the
23 cause of action accrued.” *Id.* Here, because plaintiffs are unable to meet their burden to show
24 willfulness, the Court should rule that the two-year limitations period applies. Applying the two-
25 year limitations period (along with stipulated and court-ordered tolling) results in the claims of 29

26 _____
27 ⁷ These and certain other exhibits to the Abramovich declaration were originally designated
28 highly confidential by Cintas due to the inclusion of certain personal information of the
employees, such as social security numbers. For the Court’s convenience, such confidential
information has been redacted so that this motion need not be filed under seal.

1 plaintiffs being completely barred. In the alternative, if the Court rules that there is a genuine
 2 issue of fact as to whether Cintas acted willfully, the Court should nonetheless grant Cintas
 3 summary judgment that the three-year limitations period, as tolled, represents the outermost limits
 4 of plaintiffs' claims subject to further limitation at such time as the willfulness issue is decided.
 5 Finally, as to two persons (Franklin and Gorman), Cintas is entitled to summary judgment
 6 without regard to any other considerations because both of them were last employed by Cintas
 7 during periods that would be barred by both the two- and three-year limitations periods.⁸

8 **B. Because Plaintiffs Cannot Prove Willfulness, the Two-Year Statute of**
 9 **Limitations Applies to Plaintiffs' Third Claim for Relief.**

10 For the plaintiffs to obtain the benefit of the three-year statute of limitations, they must be
 11 able to prove that "that the employer either knew or showed reckless disregard for the matter of
 12 whether its conduct was prohibited by the statute. . . ." *Trans World Airlines, Inc. v. Thurston*,
 13 469 U.S. 111, 128 (1985); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (adopting
 14 willfulness standard set forth in *Trans World Airlines*). "Even if an employer acts unreasonably,
 15 but not recklessly, in determining its legal obligation under the FLSA, its conduct does not satisfy
 16 the 'willfulness' standard." *Schneider v. City of Springfield*, 102 F. Supp. 2d 827, 836 (1999)
 17 (citation omitted). It is not sufficient for the plaintiffs simply to claim that the employer was
 18 aware of the FLSA and its potential application to the plaintiffs. *McLaughlin*, 486 U.S. at 132-
 19 133. To defeat a summary judgment motion, plaintiffs must come forward with competent
 20 evidence that Cintas knew or showed reckless disregard over whether its conduct was prohibited
 21 by the FLSA. *Long v. Idaho Rural Water Assoc.*, Case No. CV 05-303-5-EJL, 2007 U.S. Dist.
 22 LEXIS 24005, 28-29 (D. Idaho Mar. 29, 2007). Plaintiffs cannot satisfy this standard.

23 Cintas has already summarized to the Court its good faith belief that its SSRs are subject
 24 to various exemptions under the FLSA such as, for example, the MCA exemption and the Outside

25 ⁸ Cintas previously moved for summary judgment as to 73 plaintiffs on the ground that their
 26 claims were barred by the three-year limitations period, which motion was granted by the
 27 Court. RJN, Ex. 5 [Dkt. 623]. Cintas inadvertently omitted plaintiff Franklin from that
 28 Motion. Plaintiff Gorman only recently supplemented his Interrogatory Responses to admit
 facts sufficient to show that his time as an SSR preceded the applicable limitations period.
See Kelly Decl., Ex. 11 at p. 3:5-8.

1 Sales exemption. *See, e.g.*, Dkt. No. 66 (Cintas’ Memorandum in Opposition to Plaintiffs’
2 Motion for Facilitated Notice at 8-14 and 14-18.) And the Court has already ruled that the MCA
3 exemption applies to many Cintas SSRs. As the Court has already ruled:

4 because it is in the business of transporting property such as
5 uniforms for sale, rent or otherwise. It applies to SSRs if they fall
6 under one of four categories, all of which are related to the degree a
7 driver participates in distributing goods in interstate commerce. A
8 driver who spends as little as 3.65 percent of this time performing
9 this duty can fall under the MCA exemption so that the FLSA does
10 not apply to him. Morris v. McComb, 332 U.S. 422, 431 (1947).

11 RJN, Ex. 1, November 4, 2003 Order [Dkt. 121] at 7:12-17.

12 There are different alternative ways that the MCA exemption can exist. Any one of the
13 alternatives is sufficient. The alternative addressed in this motion is that of SSRs crossing state
14 lines. As the Court has ruled:

15 [w]hile there are subtleties to the MCA that the Court cannot
16 review at this juncture [at the time of facilitated notice being
17 allowed], the MCA also establishes some bright line qualifications
18 they should make it easy to identify those SSRs who fall squarely
19 within it. The MCA governs employees who are carrying goods
20 across state lines. 49 U.S.C. § 13501; 29 C.F.R. § 782.2. SSRs
21 who actually cross state lines to make deliveries on their route fall
22 squarely within the MCA. Because these employees are governed
23 under the MCA, the FLSA does not apply to them and they are not
24 similarly situated. Accordingly, they should be expressly excluded
25 from the proposed class.

26 *Id.* at 9:14-20. That alone is sufficient to defeat plaintiffs’ claim that the plaintiffs here were
27 willfully misclassified as exempt. Indeed, plaintiffs’ counsel themselves have recognized over
28 the course of this litigation that it is undisputed that numerous litigating plaintiffs were properly
classified as exempt under the MCA. *See* Kelly Decl., Exs. 5 and 7.

Moreover, one of the “subtleties to the MCA” referred to by the Court in its November 4,
2003 Order is the clear rule that a driver whose driving is entirely within one state may be subject
to the MCA exemption if he or she is even minimally involved in the transportation of goods
moving in interstate commerce. As noted above, Cintas need only show that a plaintiff drove
across state lines once every four months or engaged in other qualifying activities a tiny fraction
of his or her time to be subject to the MCA exemption.⁹ *See* RJN, Ex. 2, Field Operations

⁹ These are but two examples of the myriad of ways to establish that the plaintiffs were

1 Handbook § 24e01; *Morris*, 332 U.S. 422 at 431. Even if there were a unique plaintiff whose
 2 activities were solely intrastate, this would not mean that Cintas was not justified in its belief that
 3 all SSRs engaged in sufficient interstate activities to satisfy the MCA exemption.¹⁰

4 Cintas also could not have acted in willful violation in concluding that its SSRs qualified
 5 for exemption under the so-called outside sales exemption. 29 U.S.C. § 213(a)(1); 29 C.F.R. §
 6 541.500(a). For example, at those Cintas locations where there was or is a Collective Bargaining
 7 Agreement (“CBA”) covering the SSRs, the CBAs that were negotiated with Cintas by the SSRs
 8 through their union representatives expressly provide that the SSRs are exempt from the FLSA
 9 under the “Outside Sales” exemption. *See, e.g.*, Abramovich Decl., Exs. 11 at p. 5 and 12 at p. 4.
 10 Thus, even if there had been a misclassification of all SSRs as is alleged in this case (which
 11 Cintas strongly denies), it could not have been willful on Cintas’ part. The unions representing
 12 SSRs, familiar with and considering the SSR job duties, deemed all the SSRs to be exempt from
 13 the FLSA and they so agreed in the CBAs. This again shows that even if the classification of
 14 SSRs as exempt was incorrect, the misclassification could not have been willful.

15 C. The Two-Year Limitations Period Bars Claims of 29 Plaintiffs

16 Cintas is entitled to complete summary judgment against 29 plaintiffs on the ground that
 17 their claims under the FLSA are barred by the two-year FLSA limitations period as extended by
 18 any applicable tolling.

19 1. Calculating the Limitations Period Including Tolling

20 29 U.S.C. § 255(a) sets the limitations period for a cause of action for unpaid overtime
 21 compensation under the FLSA. Such a cause of action:

22 engaged in interstate commerce for purposes of the MCA exemption, and not an exhaustive
 23 list.

24 ¹⁰ For instance, each of the Named Plaintiffs in this Action who was deposed admitted to
 25 delivering various items that were in the continuous stream of interstate commerce. Most
 26 recently, Daniel Alvis testified that while he was an SSR at Location 525 in West Virginia, he
 27 delivered consumable items such as air fresheners, soap and paper products that were first
 28 delivered to his location in West Virginia from out-of-state suppliers. *See Kelly Decl.*, Ex. 12
 (TR 101:12 - 102:4; *see also* 90:6-11, 98:2-6, 99:2-16, 99:18-24 and 100:2-18.) In addition,
 Alvis testified that he delivered garments to West Virginia that had been laundered in an out-
 of-state facility located in Kentucky. *Id.*, (TR 60:2 - 61:10, 71:20 - 74:2 and 86:3-9).

1 may be commenced within two years after the cause of action
2 accrued, and every such action shall be forever barred unless
3 commenced within two years after the cause of action accrued,
4 except that a cause of action arising out of a willful violation may
5 be commenced within three years after the cause of action accrued.

6 29 U.S.C. § 255(a). As the Court previously ruled in this case, in a putative collective action, such
7 as this one, an action is considered “commenced” in the case of any individual claimant:

8 (a) on the date when the complaint is filed, if he is specifically
9 named as a party plaintiff in the complaint and his written consent
10 to become a party plaintiff is filed on such date in the court in
11 which the action is brought; or

12 (b) if such written consent was not so filed or if his name did
13 not so appear—on the subsequent date on which such written
14 consent is filed in the court in which the action was commenced.

15 RJN, Ex. 5, [Dkt. 623 at p.3] citing 29 U.S.C. § 256; ; *see also Harkins v. Riverboat Servs., Ins.*,
16 385 F.3d 1099 (7th Cir. 2004). Accordingly, each plaintiff’s limitations period must be
17 calculated from the date each individual plaintiff filed a consent-to-sue with the Court. These
18 dates are reflected in Exhibits 13 and 14 to the Kelly Declaration.

19 To calculate the relevant limitations period, the Court must apply certain tolling. Some
20 plaintiffs are entitled to some or all of a six month and nine day stipulated tolling period, or some
21 or all of a court-ordered four-month tolling period. RJN, Exs. 6-8, 5 [Dkt. 33, 60, 126 and 623].¹¹

22 The parties’ stipulated tolling agreement extended the limitations period for most
23 plaintiffs who opted in after August 5, 2003 for up to a maximum of six months and nine days.
24 RJN, Exs. 6-8 [Dkt. 33, 60 and 126]. Accordingly, a plaintiff who opted in on August 6, 2003,
25 would have been entitled to one day of stipulated tolling, while a plaintiff who opted in on
26 February 14, 2004 (the last day of stipulated tolling) would have been entitled to six months and
27 nine days (or 194 days) of stipulated tolling. *See* Kelly Decl., Exs. 13 and 14.

28 In addition, the Court ordered tolling as to certain plaintiffs for the four-month period
from July 23, 2004 to November 23, 2004. **Only** those plaintiffs who were mailed a Corrective
Notice regarding this case were entitled to the four-month tolling ordered by the Court. RJN, Ex.

¹¹ The Court previously rejected the notion that any plaintiffs were entitled to equitable tolling
in this case, ruling that plaintiffs’ arguments in this regard “border[ed] on frivolity.” RJN, Ex.
5 [Dkt. 623 at p. 7:17-24 & 8:11-16].

1 9 [Docket 363 at 3, fn. 1 and 5, fn. 3.]; and Ex. 5 [Dkt. 623 at p. 5:17-25] These plaintiffs,
2 however, were entitled only to the tolling that had “accrued” prior to their filing of a consent-to-
3 sue. Thus, for example, a person who filed a consent-to-sue on July 23, 2004 would be entitled to
4 only a single day of court-ordered tolling. Those plaintiffs who are entitled to claim court-
5 ordered tolling, along with the number of tolling days they can claim, are set forth in Kelly Decl.,
6 Exs. 13 and 14; Beall Decl., ¶¶ 1-5.

7 **2. Plaintiffs’ Admissions as to Positions Held and Dates of Service**

8 Plaintiffs’ admissions, and/or Cintas’ business records, establish the dates that plaintiffs
9 were employed by Cintas and, thus, whether their claims are barred by the applicable limitations
10 period.

11 Plaintiffs’ consents-to-sue purport to state the dates during which they were employed by
12 Cintas, and constitute judicial admissions. The consent-to-sue of each plaintiff subject to this
13 motion on this ground filed with the Court is included as Exhibits 12 to 232 to Cintas’ Request
14 for Judicial Notice. The dates stated on the consents-to-sue filed by the 29 plaintiffs whose
15 claims are completely barred by the statute of limitations are summarized in Exhibit 25 to the
16 Declaration of Michael Kelly.

17 Each plaintiff was also required to answer an interrogatory setting forth his or her dates of
18 employment with Cintas. Kelly Decl. ¶ 1. The answers given by the 29 plaintiffs whose claims
19 are completely barred by the statute of limitations are summarized in Exhibit 25 to the
20 Declaration of Michael Kelly and the interrogatory responses themselves are included as exhibits.
21 Kelly Decl., ¶ 1, Exs. 15-24.

22 **3. Cintas is Entitled to Summary Judgment As to the 29 Plaintiffs Whose** 23 **Claims Are Barred by the Two-Year Limitations Period.**

24 Cintas is entitled to complete summary judgment against 29 plaintiffs on the basis of the
25 two-year statute of limitation. As to two of these, plaintiffs Franklin and Gorman, Cintas is also
26 entitled to summary judgment under *either* a two-year or three-year limitations. Franklin has not
27 been employed with Cintas since September 1996--more than eight years before he filed his
28 consent-to-sue, and Gorman was only employed by Cintas as an SSR until June 2000—more than

1 four years before he filed his consent-to-sue. RJN, Ex. 82; and Kelly Decl., Ex. 11 [Gorman Am.
2 Resp. to Cintas' First Set of Interrogatories No. 2] and RJN, Ex. 89.

3 For 25 of the 29 plaintiffs whose claims are barred, there is no material discrepancy
4 between the consents-to-sue and their interrogatory responses. Kelly Decl., Ex. 25. Each of these
5 plaintiffs' last date of employment with Cintas was more than two years, six months and nine
6 days before the plaintiff filed his or her consent-to-sue. Because this is the maximum amount of
7 tolling any of these plaintiffs was entitled to, their claims are barred, and Cintas is entitled to
8 summary judgment.

9 As to the four remaining plaintiffs, the following demonstrates that there is no triable
10 issue of fact that their claims are barred:

11 1. **Ashcraft:** Mr. Ashcraft's consent-to-sue and Cintas' business records both show
12 that Mr. Ashcraft's termination date was November 26, 2001. *See* RJN, Ex. 19 and Abramovich
13 Decl., Exs. 4 and 5. Mr. Ashcraft's interrogatory response, however, states that his last date of
14 employment was November 2006. *See* Kelly Decl., Ex. 16 at 7:3. Given that Mr. Ashcraft
15 served his interrogatory responses in May 2006 (i.e. seven months before November 2006) and
16 given Cintas' business records, Mr. Ashcraft's reference to 2006 must have been a typographical
17 error. *Id.*

18 2. **Klinghagen:** Plaintiff Klinghagen stated in his consent-to-sue that his last date of
19 employment with Cintas was December 2001. RJN, Ex. 114. This is consistent with Cintas'
20 business records. Abramovich Decl., Ex. 10. In his interrogatory responses, however, Mr.
21 Klinghagen stated inexplicably that his last date of employment was in October 2003. Kelly
22 Decl., Ex. 18 at 14:24-25. This too is likely a typographical error.¹² But if not, plaintiffs' counsel
23 themselves recently pointed out to Magistrate Judge James, when Cintas moved to compel
24 accurate responses to Cintas' interrogatories, their view that these types of mistakes (common in
25 plaintiffs' responses) were caused by plaintiffs' bad memories. They do not give rise to genuine

26 ¹² Dozens—if not hundreds—of such errors are strewn throughout plaintiffs' discovery
27 responses. Plaintiffs' counsel have refused, however, to correct most such errors, arguing
28 instead that they are the result of plaintiffs' imprecise memories. *See* RJN, Ex. 10 [Dkt. 876
at 5].

1 issues of fact, especially in light of Cintas' business records. RJN, Ex. 10 [Dkt. 876].

2 3. **Borden:** Plaintiff Borden accurately stated his separation date from Cintas as
3 December 2002. As of December 17, 2001, however, Borden was paid hourly and was not an
4 SSR classified as exempt from overtime. Abramovich Decl. ¶¶12-13 & Ex. 7. Accordingly,
5 Borden's claim is barred.

6 4. **Romes:** Plaintiff Romes stated under oath that he left Cintas in October 2000.
7 Kelly Decl., Ex. 15 at 12:16. Cintas business records, on the other hand, show a termination date
8 of October 2001. Abramovich Decl., Ex. 10. In either case, his claim is barred by the two-year
9 limitations period (as tolled). Mr. Romes' clearly incorrect consent-to-sue (stating that he left
10 Cintas in October 2002) contradicts his sworn interrogatory response and Cintas' business records
11 and thus does not create a genuine issue of material fact.

12 **D. Partial Summary Judgment Must Be Granted As To Any Periods Barred by**
13 **the Two- or Three-Year Limitations Period (as Individually Tolled)**

14 While not completely eliminating their claims, the two-year limitations period (as
15 individually tolled) bars the claims of some individuals for periods of certain weeks, months or
16 years during which they were employed by Cintas. Any claims that arose before the two-year
17 limitations period (which in most instances is two years, six months and nine days before the
18 consent-to-sue was filed) are barred. Cintas is therefore entitled to partial summary judgment,
19 limiting the claims of all plaintiffs to only those workweeks that occurred within the two-year
20 limitations period (as individually tolled) or after the consent-to-sue was filed. Alternatively,
21 however, if the Court determines that there is a triable issue of fact as to willfulness, the Court
22 should grant Cintas summary judgment at this time as to any workweeks before the three-year
23 limitations period (as individually tolled), subject to further limitation when the willfulness issue
24 is decided.

25 Each of the FLSA claims of the plaintiffs listed in Exhibit 13 [Two-year analysis] and
26 Exhibit 14 [Three-year analysis] to the Kelly Declaration are limited by the application of either
27 the two- and/or three- year limitations period. Next to each litigating plaintiff's name is the date
28 that that person filed a consent-to-sue in this action and any applicable stipulated or court-ordered

1 tolling. Using the two- and three-year limitations period plus the relevant tolling, the Exhibit
2 shows the calculation of the earliest possible date that each individual could have a claim.¹³

3 As demonstrated above, because plaintiffs cannot prove willfulness, the outermost limits
4 of their claims are governed by the two-year limitations period. Accordingly, the Court should
5 rule that the dates shown in the “2 Year SOL + Tolling Claim Start Date” column of Kelly
6 Exhibit 13 represent the earliest possible dates that any claims could have arisen for the plaintiffs.
7 If, however, the Court decides not to grant summary judgment as to the 2 year statute analysis,
8 the Court should rule that the dates shown in the “3 Year SOL + Tolling Claim Start Date”
9 column of Kelly Exhibit 14 are the earliest possible dates, and limit plaintiffs’ claims accordingly,
10 subject to further limitation when the willfulness issue is decided.

11 **V. PLAINTIFFS WHO WERE NOT SSRS ARE NOT WITHIN THE SCOPE OF**
12 **THIS ACTION**

13 Cintas is entitled to summary judgment as to the entire claims of three plaintiffs because
14 they have admitted, or Cintas’ business records show, that they were not SSRs and are, therefore,
15 not within the scope of this Action. The Court’s Notice of Collective Action tracked the language
16 of its November 4, 2003 Order and limited the participants in this lawsuit to “Service Sales
17 Representatives, Commission Route Salespersons, Commission Route Sales Representatives,
18 Route Drivers or other persons performing a service and/or delivery function on a non-hourly
19 basis. . . .” RJN, Exs. 11 [Dkt. No. 159] at 1:17-24 and 1 [Dkt. No. 121] at 10:4-7].

20 Plaintiffs Maxfield and Brown admitted in discovery that their positions between March
21 2000 and their termination dates were not as SSRs.¹⁴ Kelly Decl., Exs. 15 at 11:16-19 and 18 at
22 13:16-17. This is confirmed by Cintas business records. Kelly Decl., ¶ 17; Abramovich Decl., ¶¶
23 1-10, Exs. 1-3. Further, Cintas’ business records confirm that plaintiff Ashcraft was a production
24 supervisor—not an SSR—from 1999 to the time he left the company in November 2001.

25 _____
26 ¹³ Several plaintiffs were hired by Cintas after the commencement of the periods shown in Kelly
27 Decl., Exhibits 13 and 14. Of course, because their claims only started running when they
28 were hired, this ruling will not affect them.

¹⁴ The Complaint in this Action was filed on March 19, 2003. Accordingly, the *earliest* claim
for relief under the FLSA, even under a three-year limitations period, is March 19, 2000.

1 Abramovich Decl., ¶¶ 1-10, Exs. 4-6.

2 **A. Darold Maxfield Admitted and Cintas’ Business Records Show He Was Not**
3 **An SSR During The Relevant Period.**

4 Plaintiff Maxfield’s discovery responses and Cintas’ business records show unequivocally
5 that he was not an SSR from February 2000 to the time he ceased his employment at Cintas. As
6 noted above, the Court’s November 4, 2003 Order limited participation to persons who performed
7 a “Service and/or Delivery Function on a Non-hourly Basis . . . from March 2000 to the present.”
8 RJN, Ex. 1, [Dkt. 121] at 10:4-7. Mr. Maxfield does not qualify.

9 In response to Cintas’ Interrogatory No. 2, Mr. Maxfield provided the following positions
10 and dates:

11	Service Sales Representative	July 26, 1999 [to] Feb.2000
12	Production Supervisor	February 1, 2000 [to] May 22, 2000
13	Facility Outside Sales	May 22, 2000 [to] Aug. 2001
14	Proactive Sales Trainer	Aug. 2001 [to] Mar. 2002

15 Kelly Decl., Ex. 15, at 11:16-19.

16 Cintas’ records confirm that Mr. Maxfield was not an SSR during the relevant period.
17 Abramovich Decl., ¶¶5-6, Exs. 1-3. None of these positions he held during the relevant period
18 were included in the conditional collective notice because they do not involve persons performing
19 a service and/or delivery function on a non-hourly basis. Abramovich Decl., ¶ 7. Summary
20 judgment must be entered for Cintas as against Mr. Maxfield on each of his claims for relief.

21 **B. Ricardo Brown Admitted and Cintas’ Business Records Show He Was Not**
22 **An SSR During The Relevant Period.**

23 As discussed above, the Court’s November 4, 2003 Order limited this action to
24 individuals employed by Cintas as SSRs on a non-hourly basis from March 2000 to the present.
25 RJN, Ex. 1, [Dkt. 121] at 10:4-7. To the extent someone worked as an SSR earlier than March
26 2000 (*i.e.*, over three years before the Complaint in this Action was filed), any claims before that
27 date are barred as well beyond *any* applicable limitations period.

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1 The May 25, 2004 Order also expressly excluded from this Action individuals who
2 worked for Cintas as “Service Training Coordinators” unless such persons were also SSRs during
3 the relevant period. RJN, Ex. 1, [Dkt. 121] at 10:11-13. Plaintiff Ricardo Brown has admitted
4 that he was a Service Training Coordinator (“STC”)/Group Leader from July 1995 to May 2005.
5 Kelly Decl., Ex. 18 at 13:16-17. He has also admitted that the period when he was an SSR was
6 from only August 1994 to July 1995. *Id.* Thus, Mr. Brown has not been a Cintas SSR since July
7 1995 – long prior to the period relevant to this action. Summary judgment in favor of Cintas
8 must therefore be granted.

9 **C. Cintas’ Business Records Show That Ashcraft Was Not An SSR During The**
10 **Relevant Period.**

11 Cintas is entitled to summary judgment against plaintiff Ashcraft because he was not an
12 SSR during the relevant period. According to Cintas’ business records, in September 1999 Mr.
13 Ashcraft was promoted to a Production Supervisor. Abramovich Decl., Ex. 4. In September
14 2000 he signed an Employment Agreement with Cintas that is used for managers and supervisors,
15 and not used for SSRs. *Id.*, at ¶ 10 and Ex. 6. And Mr. Ashcraft remained a supervisor until his
16 termination on November 26, 2001. *Id.*, Ex. 5. Accordingly, Mr. Ashcraft is ineligible to
17 participate in this action because he was not employed as an SSR during the relevant period of
18 “March 2000 to the present.” RJN, Ex. 1, [Dkt. 121] at 10:4-7. Like Messrs. Maxfield and
19 Brown discussed above, Mr. Ashcraft may not pursue any claims against Cintas in this case and
20 summary judgment must be awarded against Mr. Ashcraft on his all of his claims.

21 **VI. CONCLUSION**

22 For all the foregoing reasons, Cintas respectfully requests this Court to grant this motion
23 for summary judgment on the Third Claim for Relief as against the 25 plaintiffs identified in
24 Exhibit 4 to the Kelly Declaration who admittedly drove across state lines regularly in
25 performance of their job duties. Cintas further requests this Court to grant this motion as to the
26 application of the two-year statute of limitations period to plaintiffs’ FLSA claims contained in
27 their Third Claim for Relief and to find that the claims of the 29 plaintiffs identified in Exhibit 25
28 to the Kelly Declaration are therefore time barred and, in any event, that the claims of plaintiffs

1 Franklin and Gorman are time barred under either limitation period. Cintas further requests this
2 Court to limit the Third Claim for Relief of the remaining litigating plaintiffs and bar any claim
3 for weeks worked prior to two years or in the alternative, three years, subject to further limitation
4 when willfulness is addressed, (in any case plus tolling) earlier than their opt-in dates. Finally
5 Cintas requests this Court to grant this motion for summary judgment against plaintiffs Maxfield,
6 Ricardo Brown and Ashcraft on each of their claims for relief, on the grounds that they are not
7 within the scope of this action.

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Dated: August 13, 2008

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY L.L.P.

By: _____ /s/
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