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

PAUL VELIZ, et al.,

No. C 03-1180 SBA

Plaintiffs,

ORDER

v.

[Docket No. 45]

Cintas Corporation, et al.,

Defendants.

This matter comes before the court on the motion of Cintas Corporation (“Cintas”) to compel arbitration. Having read and considered the arguments presented by the parties in the papers submitted to the Court, and the arguments presented by counsel at the December 16, 2003 hearing, the Court hereby GRANTS in part and DENIES in part Cintas’ Motion to Compel Arbitration [Docket No. 45]

INTRODUCTION

Whether or not the Court must compel Plaintiffs to arbitrate their employment grievances against Cintas requires a three-step analysis. The first step is to determine whether Plaintiffs are exempt from arbitration under the FAA § 1, which provides that the employment contracts of “seamen, railroad employees, and other workers in interstate and foreign commerce” are not arbitrable under the FAA. As discussed in Section II, Plaintiffs do not fall within this exception.

The second step is to determine whether Plaintiffs’ employment agreements are unconscionable. This requires a review of each agreement under the contract laws of the state in which each Plaintiff signed his agreement. As discussed in Section III, the employment agreement is unconscionable under Arkansas law. While it is a close call whether it is unconscionable under California law, the Court finds that it is enforceable.

1 The Court further finds that in the remaining states, it is also enforceable. There are some exceptions because
2 of the circumstances in which certain Plaintiffs were oppressed into signing the Agreements.

3 The third step is to determine whether the Plaintiffs who signed collective bargaining agreements
4 (“CBAs”) as part of their employment should be compelled to arbitrate. Generally, the Supreme Court favors
5 arbitration, as do federal and state statutes. However, in the context of CBAs, because it is a union and not
6 the individual employee bargaining away certain rights, the CBA must state in clear and unmistakable terms that
7 the right to litigate the statutory claim is being waived in favor of arbitration. Under this third step, the CBA
8 appears unclear because of conflicting terms. The Court will not compel employees who signed the CBA to
9 arbitrate when on its face the agreement is unclear as to whether it applies to them.

10 I. BACKGROUND

11 This case involves over 60 plaintiffs who work or have worked for Cintas Corporation (“Cintas”) in
12 the position of Sales Service Representatives (“SSRs”). SSRs drive from Cintas customer to Cintas
13 customer, delivering items such as uniforms, picking-up dirty uniforms for cleaning, restocking other
14 supplies, and (to varying and controverted degrees) selling additional products. Cintas classifies these
15 SSRs as exempt employees. Exempt employees are not entitled to overtime pay. Plaintiffs allege that
16 Cintas’ classification violates the Fair Labor Standards Act (“FLSA”) and other statutes; that they are not
17 exempt employees; and that they are entitled to overtime pay. How Plaintiffs are classified affects not only
18 overtime pay, but their ERISA benefits as well. Plaintiffs bring this action challenging Cintas’ practice.

19 As part of their employment agreements, Plaintiffs signed an arbitration clause that provides the
20 choice of law as the Federal Arbitration Act (the “FAA”) and the law of the state in which the employee
21 worked for Cintas.

22 In November the Court reviewed several motions filed by the parties in this case. Two of the more
23 substantive motions were Plaintiffs’ Motion for Preliminary Certification of the Class for Facilitated Notice
24 and Defendant’s Motion to Compel Arbitration. In its opposition to Plaintiff’s Motion for Facilitated
25 Notice, Cintas argued that at least some of the SSRs were not entitled to overtime payment under the
26 FLSA because they transported goods in commerce, which meant that they fell under the Motor Carriers
27 Act (“MCA”). At the same time, Cintas was attempting to compel the Plaintiff SSRs to arbitrate the
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1 underlying dispute. Plaintiffs pointed out, however, that if the SSRs did indeed transport goods in interstate
2 commerce, then they arguably fell outside the FAA and could not be compelled to arbitrate. This is
3 because the FAA exempts from arbitration contracts that govern “transportation workers” engaged in
4 interstate commerce.

5 The Court ordered supplemental briefing regarding this issue.

6 II. THE FEDERAL ARBITRATION ACT § 1 EXEMPTION

7 FAA § 1 exempts from coverage all “contracts of employment of seamen, railroad employees, or
8 any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. The Supreme Court
9 last reviewed the exemption in Circuit City Stores Inc. v. Adams, 532 U.S. 105, 110 (2001). In Circuit
10 City, the Court reviewed the phrase “any other class of workers engaged in foreign or interstate commerce”
11 to determine the scope of that exemption. The Court determined that the phrase does not refer to all
12 workers in foreign or interstate commerce, but rather only “transportation workers.” Circuit City, 532 U.S.
13 at 112. It defined “transportation workers,” as “those workers actually engaged in the movement of goods
14 in interstate commerce.” Id. at 112 (internal quotations and citations omitted). Because the term
15 “transportation workers” was not at issue, the Supreme Court did not illuminate what characteristics it
16 considered necessary for an employee to be a transportation worker – e.g. to what degree must the
17 employee’s duties involve transportation? To what degree must the employer’s industry be related to
18 transportation? To what degree must the term “transportation worker” be limited to one who delivers the
19 products of third-parties on behalf of his employer (such as a courier) and to what degree may it include
20 one who delivers the products of his employer as well?

21 In the case at hand, this Court must answer two questions. First, under the FAA, what
22 characteristics make a worker a “transportation worker”? Second, do the SSRs have these
23 characteristics?

24 Cintas argues for an extremely narrow definition of “transportation worker.” Under Cintas’ theory,
25 a “transportation worker” is an employee for an enterprise which is itself in the business of transporting
26 goods, owned by third parties or the general public (i.e., not owned by the employer), for delivery to other
27 third-parties. Thus, under Cintas’ theory, the defining characteristic for a “transportation worker” is that the
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1 worker is employed by a courier or other delivery service. For example, a postal worker would be a
2 transportation worker because “[i]f any workers are ‘actually engaged in interstate commerce,’ the []
3 postal workers are. They are responsible for dozens, if not hundreds, of items of mail moving in ‘interstate
4 commerce’ on a daily basis. Indeed, without them ‘interstate’ commerce as we know it today would
5 scarcely be possible.” American Postal Workers Union, AFL-CIO v. United States Postal Service, 823
6 F.2d 466, 473 (11th Cir. 1987).

7 Unsurprisingly, Plaintiffs argue for a much broader definition. Plaintiffs rely on the enumerated
8 categories of employees in the FAA exemption to argue that a transportation worker is one who has the
9 same characteristics as a seaman or railroad employee. Under the FAA, seamen are the class of
10 employees who work on board a vehicle or vessel in the flow of commerce and perform job duties that
11 contribute to the employer’s mission in operating that vehicle or vessel. Railroad employees perform any of
12 a number of different job functions for companies transporting goods or people in commerce. Under
13 Plaintiffs’ theory, transportation workers are any workers who contribute to the employer’s mission by
14 operating a vehicle in interstate commerce or performing any of a number of different job functions for
15 companies that transport goods or people in commerce. Conceivably, though Plaintiffs have not admitted
16 as much, this broad definition could include every employee from a trucker for a grocery store to a pizza
17 deliveryman.

18 **A. The FAA Exemption Must Be Narrowly Construed**

19 Circuit City mandates that the § 1 exemption be narrowly construed. Circuit City, 532 U.S. at
20 119. This is because policy strongly favors arbitration. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S.
21 20, 25 (1991) (noting that the FAA manifests a liberal federal policy favoring arbitration agreements); Volt
22 Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).
23 Courts examining the FAA § 1 exemption both before and after Circuit City consistently have held the
24 same. “Consistent with Congressional intent that the FAA be broad in scope, the exemption was intended
25 to be a narrow one....” Gadsen Budweiser, 807 S.2d 528, 531 (Ala. 2001) (applying Circuit City). “The
26 history of the treatment of the Arbitration Act in the Supreme Court of the United States reflects a clear
27 disposition to liberalize and expand its application.” Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 601
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1 (6th Cir. 1995).

2 One of the reasons the exemption must be narrowly construed is that at the time that the Arbitration
3 Act was first enacted, the concept of Congressional power over activities which affected interstate
4 commerce had not developed to the extent to which it has since. Tenney Engineering Inc. v United
5 Electrical Radio & Machine Workers of America Local 437, 207 F.2d. 450, 453 (3d Cir. 1953). Thus,
6 the phrase “workers engaged in foreign or interstate commerce” must be understood within the meaning
7 which Congress in 1925 intended to give the phrase. Aspludnh Tree Expert, 71 F.3d at 599.

8 **B. Seamen and Railroad Employees**

9 In 1925, Congress had the power over the activities of seamen and railroad employees. Thus,
10 seamen and railroad employees provide a helpful analogy for determining the necessary characteristics of a
11 transportation worker. As the Court in Circuit City stated, the phrase “engaged in foreign or interstate
12 commerce” must be read to “give effect to the terms ‘seamen’ and ‘railroad employees,’ and should itself
13 be controlled and defined by reference to the enumerated categories of workers which are recited just
14 before it.” Circuit City v. Adams, 532 U.S. at 115. Moreover, as one court explained in reviewing the
15 legislative history, the reference to seamen, railroad employees or any other class of workers engaged in
16 foreign or interstate commerce suggests that, “Congress intended to refer to workers engaged in commerce
17 *in the same way* that seaman and railroad workers are.” DiCrisci v. Lyndon Guar. Bank, 807 F.Supp.
18 947, 953 (W.D.N.Y. 1992) (emphasis added).

19 **1. Seamen**

20 “Seamen” is a term of art. McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 342 (1991).
21 Although the FAA does not define “seamen,” courts have relied on judicial interpretation of the Jones Act,¹
22 such that a seaman under the Jones Act is also a seaman for the purposes of exemption under § 1 of the
23 FAA. See, e.g., Brown v. Nabors Offshore Corp., 339 F.3d 391, 393 (5th Cir. 2003) (applying Circuit
24 City); Buckley v. Nabors Drilling USA Inc., 190 F. Supp. 2d 958, 965 fn. 2 (S.D.Tex. 2002) (applying

25
26 ¹The purpose of the Jones Act was to provide that seamen have the same rights to recover for
27 negligence as other tort victims. McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 342 (1991). The Jones
28 Act was enacted in 1920, five years before the FAA. The Jones Act did not define “seaman” and thus the
Supreme Court in McDermott Int’l, Inc. v. Wilander, defined a “seamen” under the Jones Act by reviewing
the definition under maritime law when the Jones Act was passed. 498 U.S. 337, 342 (1991).

1 Circuit City). Notably, this definition does not limit seamen to the business of transportation. Rather, a
2 “seamen” is a “person [] employed on board a vessel in furtherance of [the vessel’s] purpose.”
3 McDermott Int’l., Inc. v. Wilander, 498 U.S. 337, 346 (1991); see also, Brown v. Nabors, 339 F.3d at
4 393. This definition comports with other pre-1925 federal statutes, in particular, the Shipping
5 Commissioners Act of 1872 (“SCA”). The SCA established commissioners to supervise the hiring, wages
6 and working conditions of seamen, “every person (except apprentices) who shall be employed or engaged
7 to serve *in any capacity* on board” a ship covered by the SCA. SCA § 65 (emphasis added).
8 Accordingly, seamen, whether they are in the business of transporting goods or not, have been found to be
9 exempted from arbitration under the FAA § 1. See, e.g., Brown v. Nabors, 339 F.3d at 393; Buckley,
10 190 F. Supp. 2d at 958.

11 While the definition of “seamen” is broad, seamen is a term of art for a class of workers with a
12 number of unique characteristics. First, they are wards of the admiralty court. Vaughan v. Atkinson, 369
13 U.S. 527, 531 (1962); Buckley, 190 F. Supp. 2d at 958 (applying Circuit City). They are governed by
14 maritime law.² These two characteristics make “seamen” easily identifiable.

15 Moreover, a seaman is a member of a ship’s company. Yamaha Motor Corp., USA v. Calhoun,
16 516 U.S. 199, 213 (1996). “The key to seaman status is [an] employment-related connection to a vessel in
17 navigation.” Wilander, 498 U.S. at 353. What defines a seaman, then, is his connection to the vessel itself.
18 The vessel, in turn, represents the heart of the commercial activity – whether it is fishing, whaling, or
19 transporting goods – a vessel is essential to the commercial activity (one cannot really fish or navigate
20 waterways without a vessel).

21 Finally, Congress has taken a particular interest in regulating seamen. For example, the SCA “was
22 designed for the protection of seamen in the merchant service [because] they had previously been the
23 subject of constant imposition and deception.” Martin J. Norris, The Law of Seamen § 71 (3rd. ed. 1970).

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27 ²“Admiralty and maritime law includes a host of special rights, duties, rules, and procedures.” Lewis
28 v. Lewis & Clark Marine, Inc., 531 U.S. 438, 447 (2001). See also, 46 U.S.C.App. § 721 et seq. (wrecks
and salvage); § 741 et seq. (suits in admiralty by or against vessels or cargoes of the United States); 46 U.S.C.
§ 10101 et seq. (merchant seamen protection and relief).

1 **2. Railroad Employees**

2 Congress took a similar interest in railroad employees. “Because Congress considers it to be of the
3 highest public importance to prevent the interruption of interstate commerce by labor dispute strikes, it
4 enacted the Transportation Act of 1920 to encourage settlement within its shores.” Texas & New Orleans
5 R.R. Co. v. Bhd. of Rv. Steamship Clerks, 281 U.S. 548, 561 (1940). Again, while Congress did not
6 provide a definition of railroad employees, the definition appears to be broad. This is because of the
7 language of FAA § 1 and because of subsequent judicial interpretation of the term “railroad employee” in
8 other federal statutes, such as the Transportation Act of 1920 and the Railway Labor Act of 1926. Like
9 vessels, the heart of the railroad enterprise involves navigation of a vessel, i.e., transportation.

10 **3. Congressional Concern Specific to Seamen and Railroad Employees**

11 While the type of activity an employee who is a seaman or a railroad employee may vary, the
12 enterprise itself involves transportation. Congress has taken particular interest in the transportation industry.
13 “[I]t is a permissible inference that the employment contracts of the classes of workers in § 1 were
14 excluded from the FAA precisely because of Congress’ undoubted authority to govern the employment
15 relationship at issue by the enactment of statutes specific to them.” Circuit City, 532 U.S. at 121. Thus,
16 one of the reasons why Congress enumerated seamen and railroad employees as exempt from the FAA
17 may be that these employee contracts were already governed or would soon be governed by other federal
18 statutes:

19 By the time the FAA was passed, Congress had already enacted federal legislation
20 providing for the arbitration of disputes between seamen and their employers. When the
21 FAA was adopted, moreover, grievance procedures existed for railroad employees under
22 federal law and the passage of a more comprehensive statute providing for the mediation
23 and arbitration of railraod labor disputes was imminent. It is reasonable to assume that
24 Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason
25 that it did not wish to unsettle established or developing statutory dispute resolution
26 schemes covering specific workers.

27 Circuit city 532 U.S. at 121 (internal citations omitted). Excluding the employment contracts of seamen
28 and railroad employees under the FAA did not render those contract inarbitrable.

29 **C. Transportation Workers**

30 Transportation workers must be like “seamen” and “railroad employees.” This brings the Court to
31 the question of whether this means that transportation workers must work directly in the transportation

1 industry, i.e., an industry whose mission it is to move goods.

2 The Court has already reviewed a number of cases and made the following observation in its
3 previous order:

4 The Third Circuit held that the FAA applies to “only those other classes of workers who
5 are actually engaged in the movement of interstate or foreign commerce or in work so
6 closely related thereto as to be in practical effect part of it.” Tenney Eng'g, Inc. v. United
7 Elec., Radio & Mach. Workers of Am., Local 437, 207 F.2d 450, 452 (3d Cir.1953); see
8 also, Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir.1997) (stating
9 that Tenney Eng'g is still good law and that the “only class of workers included within the
10 exception to the FAA's mandatory arbitration provision are those employed directly in the
11 channels of commerce itself.”). Similarly, the Seventh Circuit had previously held that the
12 exclusion “is limited to ‘transportation workers,’ or in other words, workers actually
13 engaged in the movement of goods in interstate commerce....” Matthews v. Rollins Hudig
14 Hall Co., 72 F.3d 50, 53 n. 3 (7th Cir.1995).

15 The most obvious case where a plaintiff falls under the FAA exemption is where the
16 plaintiff directly transports goods in interstate, such as interstate truck driver whose primary
17 function is to deliver mailing packages from one state into another. See Harden, 249 F.3d
18 at 1140 (holding that a truck driver who provided courier service to deliver packages was
19 exempt from the FAA). The harder case is where the plaintiff is one-step removed from
20 the actual transportation [the process of moving the goods]. The Ninth Circuit has not
21 addressed this issue.

22 In the Sixth and Eleventh circuits, the term “transportation worker” contemplates
23 more than drivers, it contemplates a supervisor or other worker who oversees the delivery
24 of goods in interstate commerce. See Bacashihua v. United States Postal Serv., 859 F.2d
25 402, 405 (6th Cir.1988) (exempting from the FAA a parcel post mail distributor at a Bulk
26 Mail Center who did not directly deliver mail or packages); American Postal Workers
27 Union, AFL-CIO v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir.1987)
28 (determining that postal workers, who are “responsible for dozens, if not hundreds, of items
of mail moving in ‘interstate commerce’ on a daily basis, fall within the purview of the FAA's
exemption). The Sixth and Eleventh circuits’ rulings were decided before Circuit City,
however, and it is unclear to what degree these cases remain good law.

At the very least, later cases may limit these two cases to situations in which the
plaintiff was employed in the transportation industry in the [process of the] movement of
goods. For example, where the facts demonstrate that a plaintiff works in the
transportation industry and oversees 30-35 delivery drivers directly responsible for moving
goods, at least one court in an unpublished case has analogized the plaintiff to a delivery
driver and found that she fell under the “transportation worker” exemption. Palko v.
Airborne Express, Inc., 2003 WL 21077048, *4 (E.D.Pa., April 23, 2003).

In contrast, where the transportation of goods is not the bread and butter of the
[employer’s] industry, a plaintiff who does not directly move the goods herself is not
exempt from the FAA. For example, a pre-departure security agent at an international
airport who merely inspected and guarded goods in interstate commerce prior to their
transport, but did not actually transport them, did not fall under FAA's “transportation
worker” exemption. Perez v. Globe Airport Security Serv., Inc. 253 F.3d 1280, 1283-84
(11th Cir.2001), vacated per stipulation, 294 F.3d 1275 (2002). Other courts have
similarly held that a security guard at a train station did not fall under the FAA’s exemption.
Cole v. Burns Int'l Security Serv., 105 F.3d 1465, 1471 (D.C.Cir. 1997). Nor does a
warehouse worker who packages, unloads and loads products onto a distribution truck.

1 Kropfelder v. Snap-On Tools Corp., 859 F.Supp. 952, 958- 59 (D.Md. 1994). Nor
2 does a worker who is merely assigned to a single-transportation related job. Adkins v.
3 Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002).³ Not even a worker who acts as a
4 sales associate, wholesaler, office manager, and vice-president in the packaged products
5 sales department of a company [is] a “transportation worker.” Seus v. John Nuveen &
6 Co., Inc., 1997 WL 325792 (E.D.Pa., Jun. 2, 1997). His activities do not include him
7 physically transporting a good through commerce.

8
9 Thus, reviewing the case law, this Court can see a general trend amongst the
10 circuits. Plaintiffs who are personally responsible for transporting goods, no matter what
11 industry they are in, are “transportation workers” under the FAA exemption. Plaintiffs who
12 oversee the transportation of goods in the transportation industry itself are also
13 “transportation workers” under the FAA exemption. Plaintiffs who both (1) are not directly
14 transporting goods; and (2) are not in the transportation industry itself, are not exempt.

15
16 While Cintas argues that after Circuit City, transportation workers must both (1) be directly
17 responsible for transporting goods; and (2) in the transportation industry itself, it has not provided case law
18 that suggests the same and the Court is reluctant to impose a requirement that an employee in the
19 transportation industry also be required to transport the goods himself to be exempt. Such a requirement
20 would exclude overseers of workers in the transportation industry. It would also exclude workers directly
21 engaged in the process of transporting goods for non-transportation enterprises (e.g. truck drivers for
22 grocery companies). Yet previous courts have found that both these types of workers can fall under the
23 FAA § 1 exemption for workers engaged in transportation.

24
25 Thus, it would appear from both pre and post Circuit City case law, that the more related to the
26 transportation industry an enterprise is, the less necessary it becomes for the employee to be directly
27 transporting goods. This comports with the Court’s earlier discussion of the breadth of seamen and
28 railroad employees. Because those employees are involved directly in the transportation industry, they are
‘actually engaged in the movement of goods in interstate commerce’ as defined by Circuit City. They are
the targeted employees and they do not need to be delivering goods in order to fall under the FAA § 1

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25 ³Adkins does not stand for the proposition, however, that the transportation work must be part of the
26 daily assignment. In Adkins the Fourth Circuit was addressing plaintiffs’ overly broad claim that they were all
27 “transportation workers” in one way or another. The court observed that defendant’s employees worked in
28 the areas of construction, landscaping, warehousing, catering, moving, hotel, stevedoring, and light industrial
markets. Id. at 505. While “[s]ome categories in this laundry list can be construed as including work related
to the interstate transportation of goods” the court refused to apply the FAA exemption because plaintiffs failed
to show that their “daily assignments were in transportation-related industries. In fact, under the apparent
principle of [Plaintiffs’] complaint, if an [] employee had been assigned to even a single transportation-related
job...he should be exempted.” Id.

1 exemption.

2 **D. Characteristics of a Transportation Worker**

3 Based on the foregoing, the Court concludes that the following characteristics are relevant in
4 determining whether SSRs are transportation workers under the FAA:

- 5 • Whether, like seamen or railroad employees, the plaintiff-employee class of workers (the
6 “employee”) is within a class of employees “as to which special arbitration legislation
7 already existed” at the time the FAA was enacted;
- 8 • Whether, like seamen (where the ship is the heart of the enterprise) or railroad employees
9 (where the train is the heart of the enterprise), the vehicle itself is essential to the commercial
10 enterprise of the defendant-employer;
- 11 • The nexus between the employee’s job duties and the vehicle the employee uses in carrying
12 out his duties (i.e. a truck driver whose sole job duty is to deliver goods cannot do so
13 without a truck);
- 14 • Whether the employee is employed in the transportation industry;
- 15 • Whether the employee is directly responsible for the transporting of goods in interstate
16 commerce;
- 17 • Whether a strike by the employee would interrupt interstate commerce. Texas & New
18 Orleans R.R. Co., 281 U.S. at 561.

19 This list is not exhaustive. The Court considers these characteristics to guide its determination of the status
20 of SSRs.

21 To illustrate that these characteristics are relevant in the inquiry, the Court applies them to analyze
22 Palko v. Airborne Express, Inc., 2003 WL 21077048 (E.D.Pa., April 23, 2003), a post Circuit City
23 decision. In Palko, the plaintiff was a supervisor for a courier service. She supervised 30-35 delivery
24 drivers, but did not perform deliveries herself. Plaintiff was not within a class for whom special arbitration
25 provisions had already been legislated. Nor was she directly responsible for the transporting of goods.
26 Nor was she herself a delivery driver. She did work, however, for an enterprise in the transportation
27 industry in which drivers were essential to the commercial enterprise. She supervised those who were
28 directly responsible for transporting goods. And if her class of workers went on strike, it could interrupt

1 interstate commerce. There would be no one to supervise the drivers and oversee the smooth delivery of
2 third-party goods.

3 Similarly, in another post Circuit City case, Gagnon v. Service Trucking Inc., 266 F. Supp. 2d
4 1361, 1363 (M.D.Fla. 2003), the plaintiffs were owner-operators of tractor trailers who had contracted
5 with a motor carrier company for the express purpose of transporting goods across state lines. While
6 Congress has not enacted alternative arbitration or employment legislation for this class of workers, they
7 performed delivery themselves, and their delivery was essential to the commercial carrier company's
8 enterprise. If the Gagnon plaintiffs were to strike, there would be an interruption in interstate commerce as
9 third-party goods meant to be delivered would not be.

10 **E. Application of the Characteristics to SSRs**

11 Turning to the facts in the case at hand, Plaintiffs carry the burden of demonstrating that they fall
12 within the FAA § 1 exemption. The Court is chagrined that despite its specific instructions to Plaintiffs to
13 provide evidence that they are transportation workers (Order Re Supplemental Brief at 6:20-21.), in their
14 opening supplemental brief, Plaintiffs failed to do so. Instead, only after Cintas pointed out Plaintiff's failure
15 to comply with the Court's instructions, did Plaintiffs offer any evidence. This evidence came as a handful
16 of footnotes in Plaintiffs' supplemental reply brief, where Plaintiffs directed the Court's attention to
17 declarations they had submitted in relation to another motion, Plaintiffs Motion for Facilitated Notice.
18 Raising these declarations only in the reply did not give Cintas an opportunity to raise its own evidence to
19 rebut them. The Court does not approve of such tactics, especially because they tax judicial resources. All
20 motions should be self-contained and no reference should be made to papers not included in the actual
21 motion.

22 Nevertheless, the Court took it upon itself to scour the record to find declarations and other
23 evidence that would help resolve the status of SSRs. The Court relies on the declarations Plaintiffs
24 footnoted in their supplemental reply brief. The declarations were made by Eric Anderson, Bryan Cruse,
25 Tom Jaramillo, Amber Kelly, James White, Earl G. Woods, Jr., Aaron Zadnik (the "SSR Declarations"),
26 all of whom worked as SSRs. The Court also relies on the Declaration of Plaintiffs' attorney Theresa M.
27 Traber (the "Traber Declaration"), which attached copies of SSR job postings that described the SSR
28 position. Finally, the Court relies on the declarations of SSRs Matthew Grubba, David Easter, Allen

1 Lamela, Mark Watts, Gilbert Owens, Jeffrey Fagerlie, Rodney Willis and Anthony Wrenn. These
2 declarations were submitted by Cintas in its Opposition to Motion for Facilitated Notice and shall be
3 referred to as the “Cintas Declarations.”

4 The SSR Declarants describe their job duties as driving a delivery truck for delivery and pick-up of
5 supplies from Cintas’ customers and servicing Cintas’ customers’ accounts. See, e.g., Anderson Decl. ¶ 3;
6 Cruse Decl. ¶ 3; Zadnick Decl. ¶ 3. The SSR Declarants also state that sales activity was only a small part
7 of their duties. See, e.g., Zadnik Decl. ¶ 9. Notably, none of the SSR Declarants state that they drove
8 their trucks in interstate commerce. For example, Mr. Anderson and Mr. Zadnick declare that they
9 “[d]rove a route in the state of Illinois.” (Anderson Decl. ¶ 2; Zadnik Decl. ¶ 2.) Similarly, Mr. Jaramillo
10 declares that he “[d]rove a route in the state of Colorado.” (Jaramillo Decl. ¶ 2.)

11 Cintas Declarant Allen Lamela describes his job duties as one of service rather than delivery. He
12 states, “[o]n the average customer call, I drive to my customer stop, find my contact and say ‘good
13 morning.’ I go to the first aid kit and see what they need. Then, for example, if a particular item such as
14 band-aids has run out, I will re-stock the band-aids. Then I tally the stocked items on my sheet and get a
15 signature from my contact.” (Lamela Decl. ¶ 6.) Mr. Lamela believes that he spends “[b]etween 400 and
16 800 miles per week driving.” (Lamela Decl. ¶ 7.)

17 Cintas Declarant Gilbert Owens admits that his SSR route covers five states across the
18 southeastern portion of the United States. (Owens Decl. ¶ 9.) Mr. Owens does not describe his job duties
19 as delivery, however. Rather, he describes his duties as trying to sell supplies to his customers along the
20 route. (Owens Decl. ¶ 8.)

21 The Traber Declaration provides numerous examples of SSR job postings that require “a clean
22 driving record. (Traber Decl. Exh. 7 at 93, 94, 95, 100, 101, 103, 105, 107, 109, and 112). These job
23 postings describe the SSR duties as involving the delivery of product such as clean uniforms and mats on a
24 daily basis and the sale of additional products and services. (Id.) Cintas “provides the route, the truck and
25 insurance.” (Id.) Other postings for SSRs describe the job as a “route delivery position [that] also requires
26 the upselling of current customers in your territory [sic].” (Traber Decl. Exh. 7 at 96.) Some SSR postings
27 require that applicants be able to lift 40-50 pounds. (Traber Decl. Exh. 7 at 97.) A page from Cintas’
28 website emphasizes the customer service aspect of the SSR. SSRs “deliver the products, services and

1 enthusiasm for which we are recognized.” (Traber Decl. Exh. 7 at 126.) “SSRs are the #1 link between
2 our customer and our company operations. To our customers, the Service Sales Representative is Cintas.”
3 (Id.) Cintas provides a fundamental training program that is “followed by advanced training in customer
4 service and selling skills.” (Id.) A successful candidate for the SSR position must have excellent customer
5 skills, a stable work history, a good driving record, a high school diploma or GED, a professional
6 appearance, attention to detail, and an interest in sales. (Id. at 127.)

7 Taken together, the declarations describe a job that entails driving, restocking supplies, and
8 receiving orders or facilitating sales for more supplies. Plaintiffs argue that these job responsibilities qualify
9 SSRs as transportation workers. They rely on dicta from Kropfelder v. Snap-on Tools Corp., 895 F.
10 Supp. at 958, to support this contention. The Court has carefully reviewed Kropfelder, which is a district
11 court case that is not binding on this Court.

12 In Kropfelder, the defendant employer Snap-on Tools described the foundation of its business
13 model as direct sales of tools to professional technicians in automotive service through mobile dealer vans.
14 Id. at 952. The Kropfelder plaintiff was employed as a warehouseman. His primary duties were “to
15 receive products which were trucked to the warehouse from various manufacturers, including Snap-on’s
16 manufacturing facility in Kenosha, Wisconsin, and other manufacturers in various other states.” Id. at 958.
17 In finding that the Kropfelder plaintiff did not fall under the FAA § 1 exemption, the court observed that the
18 plaintiff was not “directly involved in the transportation business, although he has strong, close and rather
19 immediate contact with those who are so involved.” Id. These strong and close ties were to the delivery
20 drivers who trucked goods from third-party manufacturers and the employer itself to the warehouse where
21 the goods would then go out to be sold to third-party customers. From the record, it is unclear whether
22 these truckers were third-party couriers, or were employed by the Kropfelder defendant. In either case, the
23 primary responsibility of these truckers was interstate delivery of goods.

24 In the case at hand, it is not clear that the primary responsibility of SSRs is interstate delivery of
25 goods. While SSRs deliver goods, they also perform customer service functions. They note supply levels
26 at different customer sites and re-stock those supplies. They pick-up used or dirty products such as
27 uniforms and mats and replace them with new ones. These job duties certainly entail driving. They do not,
28 however, entail delivery of product in the same manner that a truck driver does. The primary duty of SSRs

1 is more akin to customer service than it is to a warehouse trucker, railroad employee or seamen.

2 Accordingly, based on the evidence at hand, SSRs are not transportation workers within the meaning of the
3 FAA exemption.

4 Applying the factor test the Court previously set out underscores this conclusion. Congress has not
5 provided separate federal legislation regarding employees who deliver products as part of their customer
6 service duties. Cintas is not in the transportation industry. While the SSRs are directly delivering their
7 employers' goods to customers, it is not clear that the SSRs' vehicles are essential to the transporting of
8 Cintas' goods. Cintas could, for example, employ a different business model involving a third party courier
9 service and no customer service. In other words, the nexus between the SSR's job duties – customer
10 service – is not so close to the SSR's use of the vehicle as to be inextricably intertwined. Nor would a
11 strike by SSRs disrupt interstate commerce. While such a strike would certainly disrupt service to Cintas'
12 customers, it would not otherwise interrupt the free flow of goods to third parties in the same way that a
13 seamen's strike or railroad employee' strike would.

14 **F. Conclusion**

15 Policy dictates that arbitration is to be favored. The FAA § 1 exemption is to be construed
16 narrowly. The party arguing against arbitration carries the burden of demonstrating that a dispute is
17 inarbitrable. In light of these factors, the Court concludes that SSRs are not transportation workers.
18 Although the record is not complete, at this juncture SSRs appear to be more akin to customer service
19 agents. Accordingly, they are not exempt under the FAA § 1.

20 **III. ENFORCEABILITY OF THE ARBITRATION CLAUSE OF THE EMPLOYMENT 21 AGREEMENTS**

22 The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable” unless
23 grounds “exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “To evaluate the
24 validity of an arbitration agreement, federal courts, ‘should apply ordinary state-law principles that govern
25 the formation of contracts.’” Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170 (9th Cir. 2002)
26 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)).

27 Plaintiffs argue that even if SSRs are not exempt under the FAA, the arbitration clauses are not
28 enforceable under relevant state laws. This requires the Court to apply the law of 12 different states to four

1 different forms of arbitration agreements.

2 **A. The Arbitration Agreements**

3 Plaintiffs' employment relationship with Cintas is governed by individual employment agreements
4 that, across the board, are relatively similar (the "Agreement"). There are four different versions of the
5 Agreements. The version applicable to each Plaintiff SSR depends upon the year the SSR became an
6 employee of Cintas.

7 Each version states in some form that the SSR is entering into the agreement in exchange for
8 increases in compensation, promotion, job offers, fringe benefits and other consideration. Each version also
9 contains an express choice of law provision to the effect that the agreements will be interpreted, governed
10 and enforced according to the FAA and the law of the state in which the employee currently is employed
11 by Cintas or was most recently employed by Cintas. (Clendening Decl. Exs. B-III.)

12 In each Agreement, the SSR covenants to maintain confidential information, not to solicit fellow
13 employees, and not to compete with Cintas. See, e.g., Clendening Decl. Exh. U ¶ 3. The SSR agrees that
14 breach of these provisions will cause Cintas irreparable harm. See, e.g., Clendening Decl. Exh. U ¶ 3(e).
15 It grants Cintas the right to obtain a temporary restraining order ("TRO") or preliminary injunction without
16 having to prove damages. See, e.g., Clendening Decl. Exh. U ¶ 3(e).

17 All but five of the Plaintiffs entered into individual employment agreements providing that arbitration
18 under the American Arbitration Association National Rules for the Resolution of Employment disputes
19 ("AAA") would be the exclusive method for resolving employment disputes with Cintas (the "Arbitration
20 Clause"). (Clendening Decl. ¶ 4.)

21 **B. Overview**

22 Plaintiffs argue that under the laws of contract interpretation for each of the relevant states, the
23 arbitration clauses are unenforceable because they (1) are unsupported by legal consideration; (2) lack
24 mutual obligations to arbitrate; or (3) are unconscionable contracts of adhesion. The Court addresses these
25 issues on a global level to resolve those issues that can be resolved universally. It then examines the
26 remaining issues on a state-by-state basis.

27 **C. Legal Consideration**

28 Plaintiff's first contention – that the agreements are unsupported by legal consideration – is

1 unavailing. Where a party is offered employment or chooses to remain employed, there is legal
2 consideration. See, e.g., McClendon v. Sherwin-Williams, Inc., 70 F. Supp. 2d 940, 943 (E.D. Ark.
3 1999) (“by choosing to remain an employee with Sherwin-Williams after having received the employee
4 handbook and by continuing to stay on the job, plaintiff supplied the consideration for the offer.”). See
5 also, Hadnot v. Bay, Ltd., 344 F.3d 474, 477 (5th Cir. 2003) (fact that plaintiff signed arbitration
6 agreement after he had been offered employment did not mean that there was no consideration for the
7 arbitration agreement; fact that offer of employment was contingent upon signing arbitration agreement
8 meant that there was bargained for consideration); Tinder v. Pinkerton Security, 305 F.3d 728 (7th Cir.
9 2002) (even where employee claims there was no arbitration agreement when she was hired, and that she
10 never saw the employee handbook that later introduced the arbitration agreement, employee's continued
11 employment and employer's promise to bind itself to arbitration policy, were sufficient consideration for
12 employee's promise to arbitrate).

13 There is no question that Cintas and the SSRs exchanged consideration. The 1996 Agreement
14 recites:

15 As consideration for this Agreement, [Cintas] agrees to hire Employee or to continue to
16 employ Employee to perform duties assigned by Employer, and if Employee has been
17 employed by Employer prior to the date of execution of this Agreement, Employer also is
18 increasing Employee’s rate of compensation, level of responsibility or employment benefits
19 as consideration for this Agreement.

20 See, e.g., Clendening Decl. Exh. GGG at 1. Similarly, the 1999, 2001 and 2002 Agreements contain a
21 specific “check-off” box to indicate what consideration the employee received: hiring, promotion, raise, or
22 additional fringe benefits.

23 Moreover, where both parties agree to be bound by the arbitration process on at least one issue
24 (e.g. an employee’s grievances against the employer), there is consideration. See, e.g., Michaelski v.
25 Circuit City Stores, Inc., 177 F.3d 634, 636-37 (7th Cir. 1999); Johnson v. Circuit City Stores, Inc., 148
26 F.3d 373 (4th Cir. 1998); Howard v. Oakwood Homes Corp., 516 S.E.2d 879, 882 (N.C. Ct. App.
27 1999). In each version of the Agreement, Cintas and the individual SSR agreed to be bound by the
28 arbitration process for issues arising out of the SSR’s employment grievances. Thus, the parties exchanged

1 consideration.

2 **D. Mutuality**

3 In the context of arbitration agreements, states are split on what the term “mutuality” means. Most
4 states (e.g. Colorado, Illinois, New York) consider an arbitration clause to be mutual if the agreement as a
5 whole evidences an exchange of promises, whatever the promises are. Other states, particularly Arkansas,
6 consider an arbitration clause to be mutual only when each party agrees that all of its claims against the
7 other shall be arbitrable. That is to say, the arbitration must be bilateral. If one party preserves the right
8 not to arbitrate certain claims, then it is not bilateral and there is no mutuality.

9 The Arbitration Clause requires a SSR to submit his grievances to arbitration. It does not require
10 the same of Cintas. Instead, the Agreements provide that:

11 Employee agrees that a breach of any covenant...will cause [Cintas] irreparable injury and
12 damage for which [Cintas] has no adequate remedy...[Cintas] will be entitled to seek an
13 immediate restraining order and injunction to prevent, pending or following arbitration under
Paragraph 5 below, such violation or continued violation, without [Cintas] having to prove
damages.

14 See, e.g., Clendening Decl. Exh. ¶¶ 3(e) (hereinafter the “Irreparable Harm Clause”). Cintas does not
15 specify whether it may seek a TRO through the courts or through arbitration.⁴ Reviewing the language in
16 the agreement, however, it is readily apparent that Cintas means the “courts.” In the Arbitration Clause it
17 specifically uses the term “arbitration” to define such things as “costs.” In the Irreparable Harm Clause,
18 however, it uses the term “litigation” to describe the costs incurred in a TRO or preliminary injunction.
19 Moreover, Cintas adopts the language of the courts in describing its relief as a TRO or preliminary
20 injunction. Under the AAA, such relief is described as “emergency interim relief.” AAA Rule O-4. Cintas
21 does not explain why it has reserved just for itself the right to seek such relief in a court when the same
22 remedy is available to it from the AAA. This means that if an SSR is terminated for allegedly divulging
23 trade secrets, the SSR would be required to arbitrate his termination. In the meantime, however, Cintas
24 could seek an injunction from a court.

25 _____
26 ⁴Just as courts have the power to grant such relief, so the does the AAA. AAA Rule O-4 provides:
27 If after consideration the emergency arbitrator is satisfied that the party seeking the emergency
28 relief has shown that immediate and irreparable loss or damage will result in the absence of
emergency relief, and that such party is entitled to such relief, the emergency arbitrator may
enter an interim award granting the relief and stating the reasons therefor.

1 Other terms in the Irreparable Harm Clause reinforce that the Arbitration Clause is not bilateral. In
2 the context of the TRO or preliminary injunction, Cintas reserves to itself the right to recover by mandate of
3 the court all remedies available to it under law or equity. SSRs do not enjoy the same breadth. The terms
4 of the Agreement also provide that Cintas may resort to the court even after an SSR has left his
5 employment and, arguably, has no employment claims that are arbitrable. For example, Paragraph 3(d) of
6 the Agreement provides that an SSR must return all of Cintas' confidential materials. Assuming that the
7 SSR voluntarily left his job, that he had no grievances against Cintas, but he allegedly took confidential
8 material with him, Cintas would be able to resort to the courts to obtain the confidential materials. It could
9 also, under Paragraph 3(e) obtain other relief, including (though not expressly stated) monetary damages.

10 Accordingly, the Arbitration Clause is not bilateral.

11 **E. Terms Rendering the Agreements Unconscionable**

12 Plaintiffs put forward that the following terms either individually or collectively render the Agreement
13 unconscionable: the unfair bargaining position, the cost of arbitration, the confidential nature of arbitration
14 proceedings before the ABA, the one-year time period limitation in which a SSR may bring his claim, the
15 limitation of an award of attorneys' fees and costs, and the breadth of remedies available to Cintas.

16 Cintas argues that if any of these terms are unconscionable, the Agreement provides that they may
17 be severed.

18 **1. The Unfair Bargaining Position of the Parties**

19 It would be ludicrous to suggest that the SSRs are on an equal footing with Cintas. The SSRs are
20 individuals seeking employment or further benefits from their current employer. Cintas, by its own
21 admission, is a nationwide business enterprise and a leader in its industry. (Clendening Decl. Exh. AAA ¶
22 1.) Cintas is also the drafter of the employment agreement.

23 Just because Cintas enjoys the upper-hand, however, does not mean that the Agreement is void.
24 See, e.g., Martindale v. Sandvik, Inc., 800 A.2d 872, 880 (N.J. 2002) (an employee must show
25 "circumstances more egregious than the ordinary economic pressure faced by every employee who needs
26 the job."); Armendariz v. Foundation Health Pyschcare Services, Inc., 24 Cal. 4th 83, 118 (2000)
27 (recognizing that "parties are free to contract for asymmetrical remedies and arbitration clauses of varying
28 scope."); Chisolm v. Kidder, Peabody Asset Management, Inc., 966 F.Supp. 218, 226 fn.2 (S.D.N.Y.

1 1997) (the unequal bargaining power between an employee and an employer does not render the
2 agreement unconscionable). “[C]ontract law would lose much of its meaning if unfavorable contract
3 provisions could be challenged merely on the basis of relative size of the contracting parties.” Mayflower
4 Transit v. Ann Arbor Warehouse Co., 892 F. Supp. 1134, 1140 (S.D. Ind. 1995).

5 Thus, although the Court is acutely aware of the unequal bargaining power between Cintas and the
6 SSRs, the inequality alone cannot render the Agreements void.

7 2. The Cost of Arbitration

8 The 1996 Agreement requires that “the party losing the arbitration shall bear the fees and expenses
9 of the American Arbitration Association and the impartial arbitrator.” (Pepich Decl. Exh. ¶ 6.) These fees
10 can be expensive. The filing fee is at least \$500. (Pepich Decl. Exh. A. at 14.) Hearing fees can be as
11 much as \$150 per day. (Pepich Decl. Exh. A at 14) and do not include the arbitrator’s daily fees, which
12 range from \$600 to \$1,000 per day. (Pepich Decl. Exh. 1 at 5.) Courts consistently have held that
13 requiring an employee to bear such fees is substantively unconscionable if it would prevent the employee
14 from being able to effectively vindicate his rights. Greentree Financial Corp.-Alabama v. Randolph, 531
15 U.S. 79, 90 (2000); see also, Alexander v. Anthony Intern.L.P., 341 F.3d 256, 270 (3rd Cir. 2003);
16 Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 676-677 (6th Cir. 2003) (finding that where
17 agreement required fee splitting, even if employer later offered to pay all the fees, because “the provision, as
18 drafted, would deter potential litigants, then it is unenforceable, regardless of whether, in a particular case,
19 the employer agrees to pay a particular litigant's share of the fees and costs to avoid such a holding.”); Ingle
20 v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003).

21 This is because while there may be some facial "fairness" to each party bearing the costs of
22 arbitration or for the loser to pay costs in many commercial settings, where parties with equal bargaining
23 power are bargaining at arm's length, the reality in the circumstances of employment contracts is quite
24 different. In employment contracts, “no man in his senses’ would agree to bear costs of a process that he
25 quite clearly could ill afford as compared to his or her employer.” Faber v. Menard, Inc., 267 F. Supp. 2d
26 961, 978 (N.D.Iowa 2003); see also, Ingle v. Circuit City, 328 F.3d at 1175-76. This is all the more true
27 when the dispute involves the employee's livelihood and, hence, the employee's ability to meet daily
28 expenses, let alone the expenses of arbitrating the dispute.

1 In fact, this is why federal anti-discrimination statutes, for example, provide for fee-shifting to
2 prevailing plaintiffs, and much more narrow fee-shifting for prevailing defendants. See, e.g., Sinyard v.
3 Commissioner of the Internal Revenue, 268 F.3d 756, 763 (9th Cir.2001) ("[T]he purpose of fee-shifting
4 provisions, like the one in the ADEA, is not only to permit plaintiffs without resources to pursue claims but
5 to encourage meritorious civil rights litigation by defraying its cost."), cert. denied sub nom. Sinyard v.
6 Rossotti, 536 U.S. 904 (2002).

7 Accordingly, at a global stage the Court is inclined to find that this provision of the 1996 Agreement
8 is unconscionable. It reviews the 1996 Agreements on a state-by-state basis, however, to apply the
9 relevant state's laws to this issue. The Court limits its review to only those Plaintiffs who signed the 1996
10 Agreements. In other words, if no plaintiff in California signed the 1996 Agreement, the Court will not
11 review this issue in California.

12 The Court also reviews the whole of the Agreement and the circumstances under which it was
13 signed to determine whether under applicable state law this unconscionable provision, either standing alone
14 or in combination with other unconscionable provisions, so permeates the 1996 Agreement that the
15 Agreement cannot be enforced, or whether as provided by the 1996 Agreement itself, the Court may sever
16 this provision and enforce the arbitration agreement.

17 The subsequent versions of the Agreement do not impose upon SSRs the burden of these fees.

18 **3. Confidentiality Rules of the AAA**

19 Plaintiffs argue that the AAA rules, which provide that arbitrations shall be confidential, favor Cintas
20 because they make it more difficult for potential plaintiffs to establish intentional misconduct or establish a
21 pattern or practice of misconduct against Cintas. This argument is unavailing. The AAA is a reputable
22 arbitration body and the reasons for confidentiality are designed to protect all parties in a dispute. Cf.
23 Code of Ethics for Arbitrators in Commercial Disputes, Canon VI ("An arbitrator is in a relationship of trust
24 to the parties and should not, at any time, use confidential information acquired during the arbitration
25 proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of
26 another."). Accordingly, the Court does not include the confidentiality requirement in its state-by-state
27 review of unconscionability.

28 **4. Remedial Restrictions**

1 Plaintiffs argue that the 1999 and 2001 versions deprive them of awards to which they are
2 statutorily entitled. These versions preclude employees from bringing any request for arbitration more than
3 one year after the dispute arose or the employee was terminated. The FLSA and applicable state labor
4 law, however provide a statute of limitations of between two or three years. This limitation also limits the
5 amount of back pay award of any plaintiff to one year, rather than the two or three years of back pay that
6 would be allowed under the FLSA’s limitations period.

7 Whether or not such a remedial restriction is unconscionable depends on how courts have
8 interpreted the dicta set forth by the Supreme Court in Mitsubishi Motors Corp. v. Soler
9 Chrysler--Plymouth, Inc., 473 U.S. 614, 628 (1985). In Mitsubishi Motors, the Supreme Court stated
10 that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to
11 the FAA because the agreement only determines the choice of forum. “By agreeing to arbitrate a statutory
12 claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution
13 in an arbitral, rather than a judicial, forum.”

14 The question is whether Mitsubishi should be read literally. Does it stand for the proposition that
15 the only difference between litigation and arbitration is the choice of forum such that the full extent of the
16 remedies that would be available to a plaintiff in court by federal statute should also be available to her in
17 arbitration? Or does it mean only that the substance of the right protected and the type of relief provided
18 by federal statute (e.g. protection against racial discrimination, punitive damages) and not the amount or
19 level of remedies themselves should be identical? Under the first interpretation, parties could not bargain to
20 restrict the statute of limitations. Under the second, parties could. The Circuits are split on which
21 interpretation is the correct one, but at least the First, Third, Seventh, and Eighth Circuits state that this is an
22 issue for the arbitrator to decide. Anders v. Hometown Mortgage Services, Inc., 346 F.3d 1024, 1030-
23 1031 (11th Cir. 2003).

24 **5. Award of Attorneys Fees and Costs**

25 Plaintiffs argue that the 1999 and 2001 Agreements further limit their ability to recover, in
26 contravention of the FLSA. The FLSA requires that a prevailing plaintiff be awarded attorneys’ fees and
27 costs. There is strong public policy behind this – it affords those who could not otherwise pay arbitration
28 costs access to a forum to arbitrate their rights. The 1999 and 2001 Agreements, however, merely give the

1 arbitrator the discretion to award attorneys' fees and costs.

2 Plaintiffs inflate the significance of this limitation to mean that Cintas has violated the FLSA because
3 giving the arbitrator such discretion makes it conceivable that prevailing plaintiffs will not receive any
4 attorneys' fees or costs. Notably, the clause does not foreclose such an award. Nor does it guarantee it
5 and it is this lack of guarantee where the FLSA would otherwise provide it that concerns the Court. The
6 Supreme Court has mandated that provisions in arbitration clauses cannot deprive plaintiffs of their ability to
7 vindicate their rights. Greentree, 531 U.S. at 90. They need access to a forum. Because this provision
8 does not guarantee that prevailing plaintiffs will be awarded attorneys fees and costs, the Court finds that
9 the provision does limit a plaintiff's ability to recover.

10 In its state-by-state analysis, the Court must consider whether under the applicable circuit's
11 interpretation of Mitsubishi Motors, the absence of guaranteed attorneys' fees and costs is something it
12 must address, or is an issue to be addressed by the arbitrator. As the Court has already observed, at least
13 the First, Third, Seventh and Eight Circuits would consider this issue to be one for the arbitrator to decide.
14 For the remaining circuits, this Court must consider whether it should sever this provision or whether in
15 combination with other unconscionable provisions it renders the Agreement unenforceable.

16 **6. The Scope of Cintas' Ability to Recover**

17 Finally, Plaintiffs argue that the Agreement is unconscionable because it so heavily favors Cintas.
18 At the same time that the Agreement constricts Plaintiffs' remedies, it enhances Cintas. Besides the lack of
19 bilateral arbitration, Plaintiffs point out that the Irreparable Harm Clause heavily favors Cintas to Plaintiffs'
20 detriment. Under the Irreparable Harm Clause, Cintas can seek a TRO or preliminary injunction against an
21 employee for breach of the non-disclosure/trade secrets/non-competition covenant of the employment
22 agreement. Not only does the Irreparable Harm Clause provide Cintas access to the courts for such a
23 remedy, it reduces Cintas' burden to the courts. Specifically, it allows Cintas to obtain a TRO or
24 preliminary injunction without demonstrating damages.

25 Whether the Irreparable Harm Clause so favors Cintas as to be unconscionable, however, requires
26 an analysis into each state's laws regarding the non-disclosure/trade secrets/non-competition covenant. If,
27 the Court finds that under the relevant state law the Irreparable Harm Clause is unconscionable, the Court
28 must determine whether that provision may be severed or whether the unconscionability of this provision,

1 along with others, so permeate the Agreement as to render it unenforceable.

2 **F. Guidelines for Reviewing the Agreements on a State-by-State Basis**

3 With the federal mandate that arbitration agreements are strongly favored, the Court now examines
4 the agreements under the relevant states' laws. As the Court reviews these agreements, it remains acutely
5 aware of the parties' unequal bargaining positions. It is also aware that it has the power to sever provisions
6 it finds unconscionable. "The general rule is that where you cannot sever the illegal from the legal part of a
7 covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created
8 by statute or by the common law, you may reject the bad part and retain the good." McCullough v.
9 Virginia, 172 U.S. 102, 113 (1898); see also, American Ry. Express Co. v. Lindenburg, 260 U.S. 584
10 (1923).

11 The Court asks the following questions for each applicable version of the Agreement in each state
12 for each named Plaintiff:

- 13 1. Does the state require the arbitration be bilateral?
- 14 2. If it does not, must the Court consider the absence of bilateral arbitration in determining
15 unconscionability?
- 16 3. Does the state hold that "Loser Pays" provisions of arbitration agreements are
17 unconscionable?
- 18 4. Does the state permit parties to constrict statutory remedies?
- 19 5. Does the Irreparable Harm Clause unconscionably expand Cintas' rights?
- 20 6. Are the circumstances under which the SSRs signed the Agreement otherwise
21 unconscionable?
- 22 7. Do the factors taken as a whole demonstrate unconscionability? That is, under the
23 applicable state law, would severing the unconscionable provisions render the agreement
24 enforceable, or is the agreement so permeated with unconscionability that the Court should
25 not enforce it?

26 Because the same seven questions are asked for each relevant state, the analysis can at times
27 appear redundant, especially when certain states are aligned by circuit law. The Court believes, however,
28 that the state-by-state analysis is essential. Such analysis reviews the Agreement through the eyes of the

1 state to determine whether or not the state would enforce it.

2 **G. Arkansas**

3 The only plaintiff whose agreement is governed by Arkansas law is Heibling. Heibling signed the
4 1999 version of the Agreement.

5 **1. Arkansas Requires that an Arbitration Clause Be Bilateral**

6 Under Arkansas law, “[m]utuality within the arbitration agreement itself is required.” The Money
7 Place, LLC v. Barnes, 78 S.W.3d. 717 (Ark. 2002). In Showmethemoney, the Arkansas Supreme Court
8 reviewed an arbitration clause in the context of cash-checking services. There, the cash-checking provider,
9 Showme, drafted a one-sided agreement in which it expressly reserved to itself the right to institute legal
10 action "to collect amounts due it." The arbitration clause also contained a limitation of remedies statement
11 that forbade suit against Showme under any circumstances. In finding that the arbitration clause was
12 unenforceable because it was not bilateral, the Arkansas Supreme Court ruled that arbitration clauses
13 “should not be used as a shield against litigation by one party while simultaneously reserving solely to itself
14 the sword of a court action.” Showmethemoney, 27 S.W.3d 361, 366 (Ark. 2000). Subsequent decisions
15 relying on Showmethemoney have also observed that the agreement at issue was explicit as to the drafter’s
16 right to civil litigation while reducing the signatory’s rights only to arbitration. See, e.g., The Money Place
17 78 S.W.3d.at 717⁵; Cash in a Flash Check Advance of Arkansas, LLC v. Spencer, 74 S.W.3d 600 605
18 (Ark. 2000)⁶; E-Z Cash Advance, Inc. v. Harris, 60 S.W.3d 436, 442 (Ark. 2001)⁷.

19 The Cintas-Heibling Agreement is less onerous than the one in Showmethemoney. Where Showme
20 was the only party entitled to attorneys’ fees and costs, the Agreement here provides that should Cintas not

21 _____
22 ⁵The agreement provided, “If the check is returned to us from your financial institution due to insufficient
23 funds, closed account, or a stop payment order, we have the right to all civil remedies allowed by law to collect
24 the Check and shall be entitled to a returned check fee of \$20.00, court costs and reasonable attorney fees
25 pursuant to Act 1216 of 1999 § 6(g).”

26 ⁶The agreement provided, “if payment is not made after written demand, we may go to court and get
27 a judgment against you for the then unpaid amount of your obligation to us. In the event judgment is entered
28 in our favor, we may seek to collect this judgment through all judicial means necessary, including attaching your
non-exempt property, or garnishing your wages...”

⁷The agreement provided, “If the Check is returned to us from your financial institution due to
insufficient funds, closed account, or a stop payment order, we have the right to all civil remedies allowed by
law to collect the Check and shall be entitled to a returned check fee of \$20.00, court costs and reasonable
attorney fees pursuant to Act 1216 of 1999, § 6(g).”

1 prevail in its claims, it will pay Heibling’s litigation costs and attorneys’ fees. (Id.)

2 Like the agreement in Showmethemoney, however, the Irreparable Harm Clause of the Heibling-
3 Cintas Agreement provides that only Cintas has access to the courts. Moreover, it provides that Heibling
4 would be liable to Cintas for “any other remedies” Cintas would “be entitled to at law or equity.” Thus,
5 while the Agreement shields Cintas from litigation brought by Heibling, it provides Cintas the sword of
6 litigation to use against Heibling. This renders arbitration unilateral, not bilateral. Accordingly, in Arkansas
7 the Agreement is unenforceable.⁸

8 2. Conclusion

9 Heibling is not compelled to arbitrate.

10 H. California

11 Plaintiffs Lovett, O’Malley, and Herrera signed the 1999 version of the Agreement in California.
12 Plaintiffs Veliz, White and Rydman signed the 2001 version in California. Plaintiff Montanex signed the
13 2002 version California.

14 1. Does the state require that the arbitration clause be bilateral? If it does not, then 15 is the absence of bilateral arbitration a factor to be considered in determining 16 unconscionability?

17 In California, if the agreement is a contract of adhesion, the employer cannot implicitly reserve to
18 itself the right to litigate but require the employee to arbitrate. Armendariz v. Found. Health Pyschcare
19 Serv., Inc., 24 Cal. 4th 83 (2000). If the agreement is not a contract of adhesion, the fact that an
20 arbitration clause is not bilateral can be a factor in determining unconscionability.

21 The California Supreme Court has articulated a two-pronged standard for determining whether a
22 contract is void for unconscionability. Armendariz, 24 Cal.4th at 114. The first prong addresses the
23 “procedural” aspects of the contract's formation, focusing on “oppression or surprise due to unequal
24 bargaining power.” Little v. Auto Stiegler, Inc., 29 Cal.4th 1064, 1071 (2003). The second prong
25 concerns the “substantive” aspects of an arbitration agreement and looks to “overly harsh or one-sided
26 results.” Ingle v. Circuit City Stores, Inc., 328 F.3d 1168, 1171 (2003). The two prongs operate as a

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28 ⁸The Court cautions that this determination is specific to the law of Arkansas only.

1 “sliding scale.” Id. “The more substantively oppressive the contract term, the less evidence of procedural
2 unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.” Id.

3 **a. Contract of Adhesion**

4 Where an arbitration clause must be signed as a condition of employment, the contract is
5 procedurally unconscionable. Ingle, at 1171 (“Circuit City, which possesses considerably more bargaining
6 power than nearly all of its employees or applicants, drafted the contract and uses it as its standard
7 arbitration agreement for all of its new employees. The agreement is a prerequisite to employment, and job
8 applicants are not permitted to modify the agreement's terms--they must take the contract or leave it.”).

9 Plaintiffs ask the Court to assume, without citing to any evidence, that the California Agreements
10 are procedurally unconscionable merely because Cintas’ bargaining power far outweighed the Plaintiffs’.
11 Where there is no evidence in the record, the Court will not make such an assumption. While it is true that
12 as an employer offering a job, Cintas did have more bargaining power, this does not mean that Cintas’
13 power was so great as to render the Agreement procedurally unconscionable. While Plaintiffs proffered a
14 number of declarations, they did not proffer any for the California Plaintiffs. Without being informed of the
15 circumstances under which the California Plaintiffs signed these Agreements, the Court cannot assume that
16 the Agreements were procedurally unconscionable. The scant evidence in the record suggests that, in fact,
17 they are not unconscionable. At least 12 per cent of Cintas’ SSRs have not signed arbitration agreements,
18 yet are employed by Cintas. (Clendening Decl. ¶ 23.)

19 **b. A Modicum of Bilaterality**

20 “An arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it
21 requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or
22 occurrence or series of transactions or occurrences.” Armendariz, 24 Cal.4th at 120. Thus, arbitration
23 agreements must have a “modicum of bilaterality.” Id. at 118. The “lack of mutuality can be manifested as
24 much by what the agreement does not provide as by what it does provide.” Id. at 120. Accordingly, for
25 there to be a modicum of bilaterality, the employer must assent to arbitrate its claims against the employee.
26 The employer’s silence on such claims is enough to indicate that a modicum of bilaterality does not exist.
27 Id. It renders the arbitration clause unenforceable. Id.

28 The 2001 and 2002 versions contain the identical wording in the Irreparable Harm Clause as found

1 in the 1999 version discussed in the Heibling-Agreement. The agreements require Plaintiffs to arbitrate their
2 employment claims without obligating Cintas to submit its own claims to arbitration.⁹ The Court has already
3 observed that there is scant evidence in the record to suggest that under the first prong, the California
4 Agreements are contracts of adhesion. While recognizing that an employer naturally has far greater
5 bargaining power than an employee, the Court also observes that the evidence does not demonstrate that
6 Cintas as an employer presented the arbitration agreement on a take-it-or-leave-it basis. Cintas has
7 already pointed out that a number of its SSRs are not bound by an arbitration agreement.

8 Recalling that the two prongs operate as a sliding scale, it is not enough for the Court to find that
9 Cintas' agreement lacked a modicum of bilaterality for it to find that the Agreement is unenforceable. The
10 Court does consider, however, the absence of bilateral arbitration in determining whether the Agreement is
11 unconscionable.

12 **2. Does the state hold that “Loser Pay” provisions of arbitration agreements are**
13 **unconscionable?**

14 The “Loser Pay” provision only appears in the 1996 version of the Agreement and thus, is not
15 applicable to these California Plaintiffs.

16 **3. Does the state permit parties to constrict statutory remedies?**

17 Where a remedies provision proscribes available statutory remedies, an arbitration clause is
18 unenforceable. Ingles, 328 F.3d at 1179. In Ingles, the agreement at issue granted the arbitrator the
19 discretion to award (1) injunctive relief, including reinstatement; (2) one year of full or partial back pay,
20 subject to reductions by interim earnings or public or private benefits received; (3) two years of front pay;
21 (4) compensatory damages in accordance with applicable law; and (5) punitive damages up to \$5000 or
22 the equivalent of a claimant's monetary award (back pay plus front pay), whichever is greater. Id. The
23 Ninth Circuit, in finding this limitation unconscionable, noted that the agreement improperly placed limits on
24 an employee's total damages, while federal law limited only the sum of punitive and certain compensatory
25

26 ⁹Under California law, the agreements' silence as to Cintas' obligations to arbitrate its disputes requires
27 a different outcome from analysis of the same agreement under Arkansas law. This is because Arkansas law
28 allows the Court to construe the silence in favor of Plaintiffs and arbitration. Under Armendariz, California
jurisprudence expressly forbids it. Armendariz holds that a court reviewing an agreement that is silent as to the
employer's arbitration obligations for its claims must be understood to lack bilaterality.

1 damages, and contravened federal law by limiting an employee's front-pay award to two years' salary as
2 well as improperly limited the punitive damages award. Id.

3 In Armendariz, the California Supreme Court found that because the arbitration clause excluded
4 punitive damages and attorneys' fees, the agreement violated public policy. Armendariz at 103.

5 Here the issue is much narrower. There are only two limitations being placed on Plaintiffs. The first
6 is a time limitation. It reduces the time period permissible for an SSR to bring a claim to just one year. The
7 question is whether such a time limitation prevents the SSRs from effectively vindicating their statutory cause
8 of action in the arbitral forum. The Court finds that it does.

9 The statute of limitations is of particular importance in the FLSA. This is because while the FLSA
10 generally imposes a two-year statute of limitations, it expands that limitation to three years for an
11 employer's willful violation. 29 U.S.C.A. § 201 et seq. This two-tiered statute of limitations "makes it
12 obvious that Congress intended to draw a significant distinction between ordinary violations and willful
13 violations [of the FLSA]." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132 (1988).

14 The second limitation gives the arbitrator the discretion to award costs and attorneys' fees to the
15 prevailing employee plaintiff. Under the FLSA, a prevailing employee is entitled to such an award. The
16 Court observes that the provision in the 1999 and 2001 Agreements does not exclude attorneys' fees and
17 costs, it merely provides that they are left to the discretion of the arbitrator. Thus, the provision at issue as
18 not as egregious as the one found in Armendariz, where they were expressly excluded. While the
19 Agreements in the case at hand do deprive a prevailing plaintiff of the guarantee that he will be awarded
20 attorneys' fees and costs, the Court finds that this provision does not raise to the same level of
21 unconscionability as the one in Armendariz.

22 Given the unequal bargaining power between the parties, however, the Court has strong concerns
23 that such limitations could so tip the balance in favor of Cintas as to render the entire Agreement
24 unconscionable. What keeps the Court from finding so is that the limitations in the Agreements are far less
25 egregious than those found in Armendariz. They do not entirely eviscerate a SSR's ability to recover.
26 Rather, they affect the ability to recover for wilful violations and they fail to guarantee attorneys' fees and
27 costs to a prevailing employee.

28 Under California law, courts have discretion to sever an unconscionable provision or refuse to

1 enforce the contract in its entirety. Circuit City, 279 F.3d at 895 (citing Cal. Civ.Code § 1670.5(a)). “If
2 the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from
3 the contract by means of severance or restriction, then such severance and restriction are appropriate.” Id.
4 (citing Armendariz, 24 Cal.4th at 124). If “the offending provisions can be excised from the contract ...
5 then the remainder of the contract can be enforced.” Mercuro v. Superior Court, 96 Cal.App.4th 167,
6 184 (2002).

7 Accordingly, the Court exercises its discretion to sever the limit on the statute of limitations and the
8 lack of a guarantee of attorneys’ costs and fees from the Agreements.

9 **4. Does the state permit parties to agree to expand one party’s right to remedies?**

10 Armerndariz teaches that while an agreement may favor one party, when it favors the party with
11 greater bargaining power, it should be viewed with suspicion and reviewed carefully. It requires that the
12 Court review the agreement and, if it finds multiple defects, then the fact that it favors one party can make
13 the agreement unconscionable. This is because multiple defects “indicate a systematic effort to impose
14 arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to
15 the employer’s advantage.” Armendariz, 24 Cal.4th at 124. Here, the key provision at issue is the
16 Irreparable Harm Clause, which allows Cintas to seek a TRO without having to prove irreparable harm.

17 In California, “a trade secrets plaintiff who shows likely success on the merits of its claim is not
18 entitled to a presumption of irreparable harm warranting preliminary injunctive relief.” Pacific Aerospace &
19 Electronics, Inc. v. Taylor, 295 F.Supp.2d 1188, 1198 (E.D.Wash. 2003) (citing Campbell Soup Co. v.
20 ConAgra, Inc., 977 F.2d 86, 92-93 (3rd Cir.1992)); Gable-Leigh, Inc. v. North American Miss, 2001
21 WL 521695, *19 (C.D.Cal. 2001) ((citing Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 92-93
22 (3rd Cir.1992)); Symantec Corp. v. McAfee Assoc., Inc., 1998 WL 740798, * 2, n. 6 (N.D. Cal. 1998).

23 Thus, in California the Irreparable Harm Clause eases Cintas’ burden in obtaining a TRO or
24 preliminary injunction. It does not, however, so reduce Cintas’ burden as to render filing for such relief a
25 mere formality. To obtain the TRO, Cintas must still persuade a court that it is likely to succeed on the
26 merits of its trade secret, non-competition covenant claim. Dumas v. Gommerman, 865 F.2d 1093, 1095
27 (9th Cir.1989); Apple Computer Inc. v. Formula Int’l, Inc., 725 F.2d 521, 525 (9th Cir.1984). Thus, for
28 example, Cintas must still demonstrate that it owns trade secrets and that those trade secrets are at risk for

1 disclosure. In other words, while the Irreparable Harm Clause may excuse Cintas from having to make a
2 showing of harm, it does not render an employee helpless to defend himself against Cintas' claim.

3 **5. Are the circumstances under which the SSRs signed the agreement otherwise**
4 **unconscionable?**

5 Plaintiffs did not provide any evidence that the circumstances were unconscionable.

6 **6. Do the factors taken as a whole demonstrate unconscionability? That is, under the**
7 **applicable state law, would severing the unconscionable provisions render the**
8 **agreement enforceable, or is the agreement so permeated with unconscionability**
9 **that the Court should not enforce it?**

10 While this is indeed a close call, the Court finds that the Agreements here do not rise to the level of
11 unconscionability found in Armendariz. There is no evidence that they are contracts of adhesion and the
12 Court has severed the provisions limiting the California SSRs' remedies. Because the Court has been able
13 to cure this defect, it finds that the Agreements are not marred by multiple defects that indicate a systematic
14 effort to impose arbitration as an inferior forum that works to Cintas' advantage. Cf. Armendariz, 24
15 Cal.4th at 124. Finally, in determining that the Agreements are enforceable in California, the Court is
16 persuaded in part by the state court's enforcement of the identical agreement. Vaca v. Cintas Corp., Case
17 No. BC260459, Superior Court of the State of California, County of Los Angeles, Order Granting In Part
18 Defendant's Motion to Compel Arbitration and Stay Judicial Proceedings of October 19, 2001. (Cintas
19 Request for Judicial Notice¹⁰, Exh. C.) The Court observes, however, that had it been reviewing the 1996
20 Agreement, in which losing plaintiffs are required to pay arbitration costs, it would have more likely than not
21 found that the Agreement was indeed unconscionable and unenforceable as a whole. In combination with
22 the other deficiencies discussed herein, the "loser pays" provision would so heavily favor Cintas and would
23 so impair a plaintiff's ability to seek recovery that the Agreement most likely would have been manifestly
24 unfair.

25 **I. Colorado**

26 The parties agree that Plaintiff Jamarillo's signed the 1996 Agreement in Colorado. "Colorado
27

28 ¹⁰The Court previously granted Cintas' Request for Judicial Notice.

1 public policy strongly favors the resolution of disputes through arbitration.” Byerly v. Kirkpatrick Pettis
2 Smith Polian, Inc., 996 P.2d 771, 773 (Colo. Ct. App. 2000). Thus, any doubts about the scope of an
3 arbitration provision are to be resolved in favor of arbitration.

4 **1. Does the state require that the arbitration clause be bilateral?**

5 The issue does not apply. Plaintiffs have not alleged that Colorado requires bilateral arbitration. The
6 Court’s research reveals that Colorado does not require it. The fact that other provisions in the policy afford
7 remedies to defendant, but not to plaintiff, outside the arbitration process does not make the arbitration
8 provision unenforceable. “Under Colorado law, every contractual obligation need not be mutual as long as
9 each party has provided some consideration for the contract.” Rains v. Foundation Health Systems Life &
10 Health, 23 P.3d 1249, 1255 (Colo. 2001); see also McCoy v. Pastorius, 246 P.2d 611 (Colo. 1952);
11 Sedalia Land Co. v. Robinson Brick & Tile Co., 475 P.2d 351 (Colo.App. 1970). Accordingly, an
12 arbitration clause need not be bilateral or mutual as long as the parties have exchanged some form of
13 consideration. Rains, 23 P.3d at 1255.

14 **2. If it does not, then is the absence of bilateral arbitration a factor to be considered in**
15 **determining unconscionability?**

16 Nor does Colorado find the lack of bilateral arbitration a factor to be considered in
17 unconscionability. As long as the parties have mutually agreed to do something, bilaterality is unnecessary.
18 Id.

19 **3. Does the state hold that “loser pay” provisions of arbitration agreements are**
20 **unconscionable?**

21 In Shankle v. B-G Maint. Mgmt. of Co., Inc., 163 F.3d 1230 (10th Cir.1999), the Tenth Circuit
22 found an arbitration agreement unenforceable where a plaintiff was required to pay one-half the costs of
23 arbitration because such a requirement effectively limited access to a forum for resolution of claims.
24 Similarly, in Gourley v. Yellow Transp., LLC, 178 F. Supp. 2d 1196, 1203 (D.Colo. 2001), the court
25 found that an arbitration provision that requires the parties to share the cost of arbitration without providing a
26 severability provision was unconscionable.

27 Under Colorado law, the “loser pay” provision is unconscionable. In contrast to Gourley, however,
28 here the 1996 Agreement provides that any provisions deemed unconscionable or illegal may be severed.

1 Accordingly, the Court has the power to sever it.

2 **4. Does the state permit parties to constrict statutory remedies?**

3 Under Shankle an arbitration agreement is enforceable if it provides for all of the types of relief that
4 would otherwise be available in court. 163 F.3d at 1234. Shankle also cited Graham Oil Co. v. ARCO
5 Prod. Co., 43 F.3d 1244, 1247-48 (9th Cir.1994) for the proposition that arbitration clauses may be
6 rendered unenforceable if they do not provide for all the remedies available under a statute. Shankle, 163
7 F.3d at 1234; Graham, 43 F.3d at 1247-48 (finding arbitration clause unenforceable because it prohibited
8 recovery of exemplary damages, which were specifically available under the statute at issue). This suggests
9 that in the Tenth Circuit, “an arbitration agreement cannot be used to eviscerate the law by removing all but
10 the most meager forms of relief that would be available in the judicial forum.” Clary v. Stanley Works, WL
11 21728865, at *5 (D.Kan. Jul. 24, 2003) (reviewing circuit law). The arbitration agreement must give the
12 prospective litigant the ability to effectively vindicate his statutory cause of action in order for the “the statute
13 [to] continue to serve both its remedial and deterrent function.” Shankle, 163 F.3d at 1234.

14 The Court has already found that the statute of limitations is of particular importance in the FLSA.
15 This is because while the FLSA generally imposes a two-year statute of limitations, it expands that limitation
16 to three years for an employer’s willful violation. 29 U.S.C.A. § 201 et seq; see also, McLaughlin v.
17 Richland Shoe Co., 486 U.S. 128, 132 (1988). The time limitation imposed by Cintas effectively
18 eviscerates Plaintiff Jamarillo’s ability to recover for wilful violations of the FLSA. The Court has also
19 observed that if the Agreement does not guarantee an award of attorneys’ fees and costs, then the employee
20 is impeded from vindicating his rights. Thus, these two provisions under Colorado law are unconscionable.

21 **5. Does the state permit parties to agree to expand one party’s right to remedies?**

22 “The doctrine of unconscionability is directed against one-sided oppressive and unfairly surprising
23 contracts, and not against the consequences per se of uneven bargaining power or even a simple
24 old-fashioned bad bargain.” University Hills Beauty Academy v. Mountain States Tel. & Tel. Co., 554
25 P.2d. 723, 725 (Colo.App. 1976). Parties “should be permitted to enter into contracts that actually may be
26 unreasonable or which may lead to hardship on one side.” Id. at 726.

27 Under this standard, Colorado does not require that an agreement be fair. It can be one-sided.
28 Accordingly, a party like Cintas may draft a contract that favors its interest. Thus, while the Irreparable

1 Harm Clause may favor Cintas, it is not unconscionable under Colorado law.

2 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
3 **unconscionable?**

4 Jamarillo states in his declaration that he was told the he had to sign the Agreement as a condition of
5 being hired; that he felt he had to sign it because he needed the job; and he had only a few minutes to read it.
6 (Appendix of Plaintiffs’ Declarations In Opposition to Cintas Corporation’s Motion to Compel Arbitration,
7 Exh. 11.) Thus, it appears that Jamarillo may have felt pressured to accept the terms of the Agreement
8 because he needed employment. This alone, however, does not rise to the level of, fraud, mistake, duress.
9 See, Rishel v. Pacific Mut. Life. Ins. Co. of Cal., 78 F.2d 881, 884 fn.1 (10th Cir. 1935).

10 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
11 **applicable state law, would severing the unconscionable provisions render the**
12 **agreement enforceable, or is the agreement so permeated with unconscionability**
13 **that the Court should not enforce it?**

14 “It is only where it turns out that one side or the other is to be penalized by the enforcement of the
15 terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result
16 without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in
17 the enforcement of such unconscionability.” University Hills Beauty Academy, 554 P. 2d at 726. The Court
18 has determined that under Colorado law, there are two unconscionable provisions: the “loser pay” provision
19 and the statute of limitations provision. The Court has the option of either severing these provisions to make
20 the 1996 Agreement enforceable, or finding that they render the Agreement so one-sided that they provoke
21 a profound sense of injustice. Because Colorado heavily favors arbitration, the Court exercises its discretion
22 to sever these two provisions. Accordingly, the Jamarillo Arbitration Clause is enforceable. The “loser pay”
23 provision and the statute of limitations provision, however, are severed.

24 **J. Connecticut**

25 Plaintiff Fragola signed the 1999 version of the Agreement in Connecticut.

26 Connecticut has wholeheartedly endorsed arbitration as an effective alternative method of settling
27 disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. Fink v.
28 Golenbock, 680 A.2d 1243, 1260 (Conn. 1996); O & G/O’Connell Joint Venture v. Chase Family Ltd.

1 Partnership No. 3, 523 A.2d 1271 (Conn. 1987).

2 **1. Does the state require that the arbitration clause be bilateral?**

3 This issue does not apply to the analysis. Plaintiffs have not alleged that bilateral arbitration is
4 necessary.

5 **2. If it does not, then is the absence of bilateral arbitration a factor to be considered in**
6 **determining unconscionability?**

7 Connecticut has rejected the notion that the absence of bilateral arbitration is an element of
8 unconscionability. Doctor's Assoc., Inc. v. Distajo, 66 F.3d 438, 451 (2nd Cir. 1995).

9 **3. Does the state hold that "loser pay all" provisions of arbitration agreements are**
10 **unconscionable? If it does, may the Court sever the provision?**

11 Fragola signed the 1999 version so this issue does not apply.

12 **4. Does the state permit parties to constrict statutory remedies?**

13 Connecticut reads Mitsubishi Motors, 473 U.S. 614 to require that a party be able to effectively
14 vindicate her rights in arbitration. Brooks v. Travelers Ins. Co., 297 F.3d 169 (2nd Cir. 2002). This Court
15 has already observed that the time limits imposed by the Agreement prevent a SSR from vindicating a cause
16 of action for wilful infringement of the FLSA. This Court has also observed that the 1999 Agreement does
17 not guarantee a prevailing employee will be awarded attorneys' fees and costs. The FLSA provides such an
18 award because it encourages plaintiffs who can ill-afford such costs an opportunity to vindicate their rights.
19 Accordingly, the Court finds that under Connecticut law, these two provisions are unconscionable.

20 **5. Does the state permit parties to agree to expand one party's right to remedies?**

21 "[T]he basic test is whether, in light of the general commercial background and the commercial
22 needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under
23 the circumstances existing at the time of the making of the contract" Family Financial Services, Inc. v.
24 Spencer, 677 A.2d 479 (Conn.App. 1996).

25 Under the Irreparable Harm Clause, to obtain a TRO or preliminary injunction, Cintas does not have
26 to show irreparable harm. This Clause, however does not expand Cintas' rights in Connecticut. It merely
27 mirrors them. Connecticut's trade secret law provides that an aggrieved party may obtain an injunction
28 without showing irreparable harm. "The rationale underlying [the] rule that the complainant is relieved of his

1 burden of proving irreparable harm and no adequate remedy at law is that the enactment of the statute by
2 implication assumes that no adequate alternate remedy exists and that the injury was irreparable, that is, the
3 legislation was needed or else it would not have been enacted.” Conservation Commission v. Price, 479
4 A.2d 187, 196 (Conn. 1984).

5 Moreover, the Clause does not eviscerate an employee’s defenses. It does not go so far, as to
6 allow Cintas to obtain a TRO without, for example, proving that the employee had engaged in some wrong
7 doing.

8 Accordingly, the Irreparable Harm Clause is not unconscionable.

9 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
10 **unconscionable?**

11 Plaintiff Fragola states that he was told that to remain employed he had to sign the Agreement, that
12 he was given only a few minutes to do this, and that he was not told he had the option of not signing the
13 agreement. (Fragola Decl. ¶¶ 3-4). He was also never told that the agreement contained an arbitration
14 clause. (Id. ¶ 6.) He never received a copy of the agreement after he signed it. (Id. ¶ 7.) Although Fragola
15 was in the weaker position, he nonetheless was under an obligation to read the Agreement before signing it.
16 Benevenuti Oil Co. v. Foss Consultants, Inc., 1999 WL 228938, *2 (Conn.Sup. April 6, 1999). Absent
17 fraud or duress, the failure to read a contract before signing it in no way diminishes its binding force. E & F
18 Construction Co. v. Rissil Construction, 435 A.2d 343
19 , 346 (1980); Batter Building Materials Co. v. Kirschner, 142 Conn. 1, 7 (1954); see also 17A Am.Jur.2d
20 Contracts § 225. The Court does not impute fraud or duress to these circumstances as described by
21 Fragola. While he may not have been told about the arbitration clause, at the very least he should have read
22 the Agreement.

23 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
24 **applicable state law, would severing the unconscionable provisions render the**
25 **agreement enforceable, or is the agreement so permeated with unconscionability**
26 **that the Court should not enforce it?**

27 Reviewing the Agreement under Connecticut law, then, the Court observes that two of the
28 provisions in the Agreement are unconscionable – the statute of limitations provision and the attorneys’ fees

1 and costs provision. They restrict a plaintiff's access to a forum to fully vindicate his rights. Thus, the Court
2 must determine whether the unconscionability of these two provisions so permeates the Agreement as to
3 render the Agreement unenforceable, or whether the Court may simply sever them.

4 Under Connecticut law, "the decision between substituting a new term for the failed provision and
5 refusing to enforce the agreement altogether turns on the intent of the parties at the time the agreement was
6 executed, as determined from the language of the contract and the surrounding circumstances." Zechman v.
7 Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F.Supp. at 1364. "To determine this intent, courts look to
8 the 'essence' of the arbitration agreement; to the extent the court can infer that the essential term of the
9 provision is the agreement to arbitrate, that agreement will be enforced..." Id. Here, there is no doubt that
10 the essential term of the agreement is to arbitrate an employees' claims against Cintas.

11 The doctrine of unconscionability has been employed by Connecticut courts to deny enforcement to
12 harsh and unreasonable contract terms. Leasing Serv. Corp. v. Justice, 673 F.2d 70, 71 (2d Cir.1982); see
13 also, Restatement Second Contracts § 208 (if a contract or term thereof is unconscionable at the time the
14 contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract
15 without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any
16 unconscionable result). Doubts regarding whether or not an issue is arbitrable should be resolved in favor of
17 arbitration. John A. Errichetti Associates v. Boutin, 439 A.2d 416 (1981).

18 Here, there is no doubt that the essential term of the Agreement is to arbitrate an employees' claims
19 against Cintas. Connecticut favors arbitration. The Agreement provides a severability provision. If the
20 Court severs the two provisions it finds unconscionable, the Agreement becomes enforceable, a result that
21 Connecticut's policy favors. Accordingly, the Court severs the statute of limitations provision and the award
22 of attorneys' fees and costs provision so that the FLSA rules on these two issues fully apply. Having done
23 so, the Agreement as a whole is not unconscionable. The Court enforces it.

24 **K. Illinois**

25 Wasmer, Zadnick, Jay, Chainuck, Anderson and Carson signed their employment agreements in
26 Illinois. None signed the 1996 version.

27 "[The] plaintiff bears the burden of establishing that the arbitration clause is unenforceable." Stewart
28 v. Molded Plastic's Research of Ill., Inc., No. 01 C 4232, 2001 WL 1607464, *1 (N.D.Ill. Dec. 17,

1 2001), (citing Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987). “In assessing
2 whether a contractual provision should be disregarded as unconscionable, Illinois courts look to the
3 circumstances existing at the time of the contract's formation, including the relative bargaining positions of the
4 parties and whether the provisions' operation would result in unfair surprise.” Cognitest Corp. v. Riverside
5 Pub. Co., 107 F.3d 493, 499 (7th Cir.1997) (citing J.D. Pavlak, Ltd. v. William Davies Co., 351 N.E.2d
6 243, 246 (Ill.App.Ct.1976)). “A contract is unconscionable when, viewed as a whole, ‘it is improvident,
7 oppressive, or totally one-sided.’” We Care Hair, 180 F.3d 838, 843 (7th Cir. 1999) (quoting Streams
8 Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1232 (Ill.1983)).

9 **1. Does the state require that the arbitration clause be bilateral?**

10 Illinois courts often invalidate arbitration agreements when they possess "earmarks of an adhesive
11 contract," or, in other words, they "lack mutuality of remedy and [are] the result of unequal bargaining
12 positions in which the [signatory] has little opportunity for arm's length negotiation." Parker v. Am. Family
13 Ins. Co., 734 N.E.2d 83, 85 (Ill.App.Ct. 2000). This does not, however, impose a requirement that the
14 arbitration clause be mutual. The parties' obligations need not be identical. Hofmeyer v. Willow Shores
15 Condo. Ass'n, 722 N.E.2d 311, 315 (Ill.App.Ct. 1999).

16 **2. If it does not, then is the absence of bilateral arbitration a factor to be considered in**
17 **determining unconscionability?**

18 The absence of bilateral arbitration may reflect unequal bargaining power, but that alone does not
19 render the Agreement unenforceable.

20 **3. Does the state hold that “loser pay all” provisions of arbitration agreements are**
21 **unconscionable?**

22 This issue is not applicable to these agreements.

23 **4. Does the state permit parties to constrict statutory remedies?**

24 “Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to
25 arbitrate or if the claims are within the scope of that agreement” challenges regarding limitation on statutory
26 remedies must be decided by the arbitrator. Hawkins v. Aid Association for Ltuehrans, 338 F.3d 801, 807
27 (7th Cir. 2002). Thus, the arbitrator, not this Court interpreting Illinois contract law, shall determine whether
28 the Arbitration Clause’s time limitation is permissible. It is not within the Court’s prerogative to find the

1 statute of limitations or award of attorneys' costs and fees provisions unconscionable.

2 **5. Does the state permit parties to agree to expand one party's right to remedies?**

3 "The presence of a commercially unreasonable term, in the sense of a term that no one in his
4 right mind would have agreed to, can be relevant to drawing an inference of unconscionability but cannot be
5 equated to it." Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970
6 F.2d 273, 281 (7th Cir.1992); Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 522 (7th Cir.1986)).

7 "A restrictive covenant may be held enforceable only if the time limit and geographic scope are
8 reasonable, trade secrets or confidential information are involved, and the restriction is reasonably necessary
9 for the protection of a legitimate business interest." Lee/O'Keefe Ins. Agency v. Ferega, 516 N.E.2d 1313,
10 1319 (Ill.App.Ct. 1987). Under the Irreparable Harm Clause, Cintas may obtain a TRO or Preliminary
11 Injunction from a court without making a showing of irreparable harm. Cintas must still meet the state's
12 other requirements for obtaining such relief, however, including demonstrating that it owns trade secrets and
13 that those trade secrets are involved in the dispute. Thus, the Irreparable Harm Clause is not commercially
14 unreasonable. It does not, for example, allow Cintas to obtain a TRO without proof of its trade secrets, nor
15 does it prohibit an employee from asserting that the covenant is overbroad and unreasonable, in violation of
16 Illinois law.

17 Thus, while the Irreparable Harm Clause favors Cintas, the Court does not find that in the
18 context of the entire Agreement, the Clause is so unreasonable that no one in his right mind would have
19 agreed to it.

20 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
21 **unconscionable?**

22 The Illinois Plaintiffs allege that they signed the Agreement without knowing about the Arbitration
23 Clause. (Plaintiffs' Exh. 1, Anderson Decl. ¶ 4; Exh. 5-6, Chainuck Decl. ¶ 5; Exh. 12, Jay Decl. ¶ 2;
24 Exh. 18, Wasmer Decl. ¶ 2; Exh. 21, Zadnick Decl. ¶ 3-5.) However, "[a] party cannot close his eyes
25 to the contents of a document and then claim that the other party committed fraud merely because it
26 followed this contract." Northern Trust Co. v. VIII Michigan Associates, 657 N.E.2d 1095, 1104
27 (Ill.App. 1995). The Court cannot construe the circumstances as unconscionable where all that Plaintiffs
28 allege is that they failed to read what they should have made an effort to read.

1 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
2 **applicable state law, would severing the unconscionable provisions render the**
3 **agreement enforceable, or is the agreement so permeated with unconscionability**
4 **that the Court should not enforce it?**

5 Reviewing the Agreements under Illinois Law, the Court observes that the Agreement certainly
6 favors Cintas, but that is not enough to render it unconscionable. Both parties are bound to arbitrate the
7 employee’s statutory claims. Both parties are bound to the arbitrator’s decision. The arbitrator will
8 decide the appropriateness of the remedies provisions, including the limitations on them. Viewed as
9 whole, then, the Court finds that the Agreement is not improvident, oppressive or one-sided.

10 **L. Indiana**

11 Plaintiffs Cruz and Coomer signed the Agreements in Indiana.

12 **1. Does the state require that the arbitration clause be bilateral?**

13 Plaintiffs rely on Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir.
14 1997) and Geiger v. Ryan’s Family Steak House, Inc., 134 F. Supp. 2d 985, 1000 (S.D.Ind. 2001) for
15 the proposition that Indiana requires an arbitration clause to be bilateral. A careful review of those two
16 cases, however, demonstrates that Indiana does not impose a per se rule. Rather, what Indiana requires
17 is that there be consideration and an exchange of promises. In Gibson, the Seventh Circuit observed
18 that the plaintiff-employee had agreed to arbitrate her claims while the employer made no such
19 agreement and had not offered any other kind of consideration either. Accordingly, those two factors
20 voided the agreement.

21 In Geiger the court found an arbitration agreement unenforceable because it was biased,
22 imposed arbitration fees on the employee-plaintiffs, the employee-plaintiffs did not understand the terms
23 of the agreement, the employer-defendant retained the right to change the agreement at will, and the
24 exchange of consideration was illusory. Thus, Gibson and Geiger do not require that an arbitration
25 clause be bilateral. It is merely one of a number of factors a court considers in determining whether or
26 not an agreement is unconscionable or otherwise unenforceable.

27 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
28 **considered in determining unconscionability?**

1 Just as Geiger and Gibson considered the absence of bilateral arbitration a factor, so too may
2 this Court.

3 **3. Does the state hold that “loser pay all” provisions of arbitration agreements are**
4 **unconscionable? If it does, may the Court sever the provision?**

5 This issue is not applicable to the Indiana Plaintiffs’ Agreements.

6 **4. Does the state permit parties to constrict statutory remedies? If it does not,**
7 **may the Court sever the provision?**

8 The Seventh Circuit mandates that the arbitrator, not this Court shall determine whether the
9 Arbitration Clause’s time limitation is permissible. Hawkins v. Aid Association for Lutherans, 338 F.3d
10 801, 807 (7th Cir. 2002).

11 **5. Does the state permit parties to agree to expand one party’s right to remedies?**

12 “When a party can show that the contract...was in fact an unconscionable one, due to a
13 prodigious amount of bargaining power on behalf of the stronger party, which is used to the stronger
14 party's advantage and is unknown to the lesser party, causing a great hardship and risk on the lesser
15 party, the contract ...should not be enforceable....” Weaver v. Am. Oil Co., 276 N.E.2d 144, 146 (Ind.
16 1971).

17 The one provision that appears to favor Cintas is the Irreparable Harm Clause. It relieves
18 Cintas from demonstrating irreparable harm.

19 In Indiana, noncompetition agreements or covenants not to compete are in restraint of trade and
20 are not favored by the law. 92 Burk v. Heritage Food Service Equipment, 737 N.E.2d 803
21 (Ind.Ct.App.2000). They are strictly construed against the employer and are enforced only if
22 reasonable. Id. Covenants must be reasonable with respect to the legitimate interests of the employer,
23 restrictions on the employee, and the public interest. Id. “In determining the reasonableness of the
24 covenant, we examine at the outset whether the employer has asserted a legitimate interest that may be
25 protected by a covenant. If the employer has asserted a legitimate, protectible interest, then we
26 determine whether the scope of the agreement is reasonable in terms of time, geography, and types of
27 activity prohibited.” Titus v. Rheitone, Inc., 758 N.E.2d 85, 92 (Ind.Ct.App. 2001). “The employer
28 bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances.”

1 Id. The employer must demonstrate, in other words, that "the former employee has gained a unique
2 competitive advantage or ability to harm the employer before such employer is entitled to the protection
3 of a noncompetition covenant." Burk, 737 N.E.2d at 811 (quoting Slisz v. Munzenreider, 411 N.E.2d
4 700, 705 (Ind.Ct.App. 1980) (citations omitted)).

5 The Irreparable Harm Clause is not so thoroughly one-sided as to be unduly burdensome.
6 Although Cintas is excused from demonstrating irreparable harm, to obtain a TRO or preliminary
7 injunction, Cintas still bears the burden of demonstrating its rights and that the covenant is necessary in
8 light of the circumstances.

9 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
10 **unconscionable?**

11 The Indiana Plaintiffs have not submitted any evidence on this issue.

12 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
13 **applicable state law, would severing the unconscionable provisions render the**
14 **agreement enforceable, or is the agreement so permeated with unconscionability**
15 **that the Court should not enforce it?**

16 Reviewing the Agreement under Indiana law, the Court observes that the Agreement is not
17 bilateral and that it favors Cintas. While the Irreparable Harm Clause favors Cintas, it does not do so in
18 a manner that is unconscionable or oppressive. Plaintiffs have not been deprived of a forum to vindicate
19 their rights – they have one. The arbitrator and not this Court must decide the scope of an employee’s
20 remedies. Both Plaintiffs and Cintas are bound by the decision of the arbitrator. The Agreements are,
21 therefore, enforceable.

22 **M. Maryland**

23 Plaintiffs Acker, Bailey, Brennan, Bridges, Broadnax, M. Brown, R. Brown, Brumfield,
24 Coleman, Frederique, Greene, Gumbs, Handy, Locke, Mackall, Madden, Mimms, Murphy, Roberts,
25 Sullivan, Watson, Weekes, West, and Wood signed the Agreement in Maryland. Of these plaintiffs, all
26 but Plaintiff Coleman signed either the 1999 or 2001 Agreements, in which the award of attorneys’ fees
27 and costs was left to the discretion of the arbitrator.

28 **1. Does the state require that the arbitration clause be bilateral?**

1 Maryland has rejected the requirement that an arbitration clause be bilateral. Rather, it requires
2 that for an arbitration clause to be mutual, the parties must agree to be bound by the results of the
3 arbitration. Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 378-79 (4th Cir.). “An agreement to
4 ‘be bound by the arbitration process’ does not necessarily mean an agreement to submit the employer’s
5 claims to arbitration; rather, it more likely means that the employer agreed, with respect to any claims the
6 employer has agreed should be submitted to arbitration, to be bound by the rules of the arbitration
7 procedure and to be bound by its results.” Id.

8 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
9 **considered in determining unconscionability?**

10 Although cases before Johnson have considered the absence of bilateral arbitration as a factor,
11 Holmes v. Coverall N. Am., 649 A.3d 365 (Md. 1994); Shotto v. Laub, 632 F.Supp. 516 (D.Md.
12 1986), later cases have not determined to what degree if any Johnson overruled bilateral arbitration as a
13 factor. Because the status is unclear, the Court includes it in its analysis.

14 **3. Does the state hold that “loser pay” provisions of arbitration agreements are**
15 **unconscionable?**

16 This issue does not apply to the Maryland Plaintiffs.

17 **4. Does the state permit parties to constrict statutory remedies?**

18 Maryland reads Mitsubishi Motors, 473 U.S. 614 to require that a party be able to effectively
19 vindicate her rights in arbitration. Etokie v. Carmax Auto Superstores, Inc., 133 F. Supp. 2d 390, 393-
20 394 (D.Md. 2000); Hooters of America Inc. v. Phillips, 39 F. Supp. 2d 582, 613 (D.S.C. 1998). This
21 Court has already observed that the time limitation imposed by the Agreement prevents an employee
22 from vindicating a cause of action for wilful infringement of the FLSA. Accordingly, under Maryland law
23 it is unconscionable .

24 Similarly, FLSA policy provides an award of attorneys’ fees and costs to prevailing plaintiffs in
25 order to encourage plaintiffs to vindicate their rights. Because the 1999 and 2001 versions of the
26 Agreement leave this award to the arbitrator’s discretion, the Court finds that this provision
27 unconscionable. It does not comply with the FLSA.

28 **5. Does the state permit parties to agree to expand one party’s right to remedies?**

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If it does not, may the Court sever the provision?

The "mere fact that one party to a contract is larger than the other cannot be the basis of a finding of unconscionability of an arbitration clause in a contract." Stedor Enter., Ltd. v. Armtex, Inc., 947 F.2d 727 (4th Cir.1991). When there are multiple one-sided provisions, then a court may strike the agreement as being unconscionable. Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582, 614 (D.S.C. 1998) (interpreting a South Carolina contract).

Here, the Irreparable Harm Clause allows Cintas to seek a TRO or preliminary injunction without showing irreparable harm. In the Fourth Circuit, irreparable harm is presumed when a trade secret or customer list are at issue. PHP Healthcare Corp. v. EMSA Ltd. Partnership, 14 F.3d 941, 946 (4th Cir. 1993). Thus, the Irreparable Harm Clause merely mirrors the presumption that the Fourth Circuit already provides. Accordingly, the Irreparable Harm clause is not so one-sided as to be oppressive.

6. Are the circumstances under which the SSRs signed the agreement otherwise unconscionable?

Here the Court considers: (1) the nature of the injuries suffered by the party sought to be held to the contract; (2) whether that party is a substantial business concern; (3) disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the contract's terms; and (6) the conspicuousness of the terms. Carlson v. General Motors Corp., 883 F.2d 287 (4th Cir.1989).

There is no question that the parties have disparate bargaining power, or that the SSRs are far less sophisticated in legal matters than Cintas, a corporation. At the same time, however, arbitration does not prevent the SSRs from obtaining relief for their injuries and the terms of the Arbitration Clause are as conspicuous as the rest of the terms.

Of the Maryland Plaintiffs who submitted declarations, Plaintiff Broadnax admits that he was told about the arbitration clause. (Plaintiffs' Exh. 2, Broadnax Decl. ¶ 2.) Plaintiff West complains that he was not informed about the arbitration clause and felt that he was being rushed to sign it. (Plaintiffs' Exh. 19, West Decl. ¶ 3-4.) These allegations alone do not demonstrate that the circumstances of the signing were unconscionable. The terms of the arbitration clause were as conspicuous as all of the other terms

1 and “being rushed” is not the equivalent to being tricked.

2 In contrast, the circumstances surrounding Plaintiff’s Brown signing of the Agreement render the
3 signing unconscionable. Brown requested that he be able to take the Agreement home for his or an
4 attorney’s review. (Plaintiffs’ Exh. 3, Brown Decl. ¶ 4.) After Brown refused to sign the Agreement, he
5 was called into his supervisor’s office and was told that he was required to the sign it. (Brown Decl. ¶
6 5.) Brown again refused. (Id.) His supervisor responded that it “would have to get done.” (Id.)
7 Brown felt threatened. (Id.) Although Brown took an evening to think about it, he eventually capitulated
8 and signed the Agreement. (Brown Decl. ¶ 6.) Considering the enormous bargaining power Cintas
9 wields as the employer, and considering that Cintas thwarted Brown in his attempt to have the
10 Agreement reviewed by an attorney, the Court finds that the circumstances during the formation of the
11 Brown-Cintas Agreement were unconscionable.

12 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
13 **applicable state law, would severing the unconscionable provisions render the**
14 **agreement enforceable, or is the agreement so permeated with unconscionability**
15 **that the Court should not enforce it?**

16 Maryland strongly disfavors nullifying agreements:

17 Fearing the disruptive effect that invocation of the highly elusive public policy principle
18 would likely exert on the stability of commercial and contractual relations, Maryland
19 courts have been hesitant to strike down voluntary bargains on public policy grounds,
20 doing so only in those cases where the challenged agreement is patently offensive to the
21 public good, that is, where the common sense of the entire community would ...
22 pronounce it invalid. This reluctance on the part of the judiciary to nullify contractual
23 arrangements on public policy grounds also serves to protect the public interest in having
24 individuals exercise broad powers to structure their own affairs by making legally
25 enforceable promises, a concept which lies at the heart of the freedom of contract
26 principle.

27 Maryland-National Capital Park and Planning Comm'n v. Washington National Arena, 386 A.2d 1216
28 (1978) (quotations and citations omitted).

1 Maryland law strongly favors enforcing contracts. The Maryland Agreements provide a
2 severability clause. Thus, the Court severs the two provisions in the Maryland Agreements it finds
3 unconscionable – the statute of limitations clause and the failure to guarantee attorneys’ fees and costs
4 clause. With these two unconscionable provisions severed, the Maryland Agreements are enforceable.

5 The Court finds that the circumstances of the Brown-Cintas Agreement are unconscionable, not
6 because of the terms of the Agreement, but because of the manner in which Brown was pressured to
7 sign it. Accordingly, the Court does not compel Plaintiff Brown to arbitrate his grievances. It does,
8 however, compel the remaining Maryland plaintiffs to arbitrate.

9 **N. Michigan**

10 Plaintiffs Hodge, Woods, Ratcliff, Lightfoot, Krol, Abney, Seath, DeGraaf, Van Koevering, and
11 Wise signed the Agreements in Michigan.

12 **1. Does the state require that the arbitration clause be bilateral?**

13 While Michigan requires an agreement to be mutual, it does not require an arbitration clause to
14 be bilateral. Rather, courts reviewing arbitration clauses have found a lack of mutuality where the
15 “arbitration provision []may be unilaterally changed by the employer at any time in the employer's sole
16 discretion....” Smith v. Chrysler Financial Corp., 101 F. Supp. 2d 534, 538 (E.D.Mich. 2000). No
17 courts have found a lack of mutuality where the arbitration clause was also not bilateral. Nor have these
18 courts considered it as a substantive factor.

19 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
20 **considered in determining unconscionability?**

21 Plaintiffs have not cited to a single case that mandates that this factor be considered in an overall
22 analysis.

23 **3. Does the state hold that “loser pay” provisions of arbitration agreements are**
24 **unconscionable? If it does, may the Court sever the provision?**

25 This issue does not apply to the Michigan Plaintiffs.

26 **4. Does the state permit parties to constrict statutory remedies? If it does not,**
27 **may the Court sever the provision?**

28 The Sixth Circuit holds that “provisions in arbitration agreements that limit the remedies available

1 in the arbitral forum, compared to those remedies available in the judicial forum, are also
2 unenforceable.” Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 653 (6th Cir. 2003). The time
3 limitation, which shortens the statute of limitations provided by the FLSA, effectively eviscerates a
4 plaintiff’s ability to recover for wilful violations of the FLSA. Accordingly, the Court finds it
5 unconscionable.

6 Additionally, the lack of a guarantee of attorneys’ fees and costs to a prevailing employee
7 impairs an aggrieved employee’s ability to pursue his case. Accordingly, the Court finds it
8 unconscionable.

9 **5. Does the state permit parties to agree to expand one party’s right to remedies?**
10 **If it does not, may the Court sever the provision?**

11 The Irreparable Harm Clause favors Cintas. Under Michigan law to determine whether it is
12 unconscionable “the basic test [is] in the light of the general commercial background and commercial
13 needs of the particular trade, [are] the clauses involved [] so one-sided as to be unconscionable under
14 the circumstances existing at the time of the making of the contract.” Gianni Sport Ltd. v. Gantos, Inc.,
15 391 N.W. 2d 760, 762 (Mich.App. 1986). “The principle is one of prevention of oppression and unfair
16 surprise and not of disturbance of allocation of risks because of superior bargaining power.” Id. In
17 other words, “if a [] clause appears reasonable to this Court, disparity in bargaining power between the
18 parties will not make the clause unenforceable.” Michigan Ass'n of Psychotherapy Clinics v. Blue Cross
19 & Blue Shield of Michigan, 301 N.W.2d 33, 40-41 (Mich.App. 1980), modified on other grounds 306
20 N.W.2d 101 (1981).

21 Cintas uses the clause to protect what it deems vital – its trade secrets. The Sixth Circuit has
22 observed that irreparable harm clauses are not uncommon in employment agreements, and are not
23 prohibited by the Sixth Circuit. Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1134 (6th
24 Cir. 1990) (“Employment [] contracts, where a departing employee agrees not to compete or to reveal
25 trade or other company secrets learned in the course of employment for separate consideration, are not
26 uncommon....”).

27 Accordingly, this Court finds that the Irreparable Harm Clause is reasonable and the uneven
28 bargaining power of the parties does not render it unenforceable.

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6. Are the circumstances under which the SSRs signed the agreement otherwise unconscionable?

Plaintiffs have not submitted evidence on this issue.

7. Do the factors taken as a whole demonstrate unconscionability? Under the applicable state law, would severing the unconscionable provisions render the agreement enforceable, or is the agreement so permeated with unconscionability that the Court should not enforce it?

Taken as a whole, the Court observes the following about the Michigan Agreements. The parties' respective bargaining power is uneven, but the Agreements themselves are mutual. They require each party to be bound by the arbitrator's decision. The Irreparable Harm Clause favors Cintas but is not unreasonable. Two provisions of the Agreements are unconscionable because they limit an employee's ability to recover and to bring a claim – the statute of limitations and the lack of a guarantee of attorneys' fees and costs. The Agreements provide a severability clause. The Court, therefore, severs these two provisions. Once severed, the Agreements as a whole are enforceable.

O. Missouri

Plaintiff Cruse signed the Agreement in Missouri. "An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair." Swain v. Auto Services, Inc., 2003 WL 22890022, at *3 (Mo.App.Ed. Dec. 9, 2003).

1. Does the state require that the arbitration clause be bilateral?

Plaintiffs do not suggest that Missouri law does.

2. If it does not, then is the absence of bilateral arbitration a factor to be considered in determining unconscionability?

Plaintiffs do not suggest that Missouri law does.

3. Does the state hold that "loser pay all" provisions of arbitration agreements are unconscionable? If it does, may the Court sever the provision?

The Missouri Plaintiff did not sign the 1996 Agreement. This issue does not apply.

4. Does the state permit parties to constrict statutory remedies? If it does not, may the Court sever the provision?

1 Questions regarding limitations on remedies in arbitration are to be addressed by the arbitrator,
2 not this Court. Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., 334 F.3d 721, 726 (8th Cir.
3 2003) (“[T]he party seeking to void the provisions [in an arbitration agreement] waiving punitive
4 damages and other relief ha[s] to address those arguments to the arbitrator.”); Larry’s United Super,
5 Inc. v. Werries, 253 F.3d 1083, 1086 (8th Cir. 2001) (“Whether federal public policy prohibits an
6 individual from waiving certain statutory remedies is an issue that may be raised when challenging an
7 arbitrator’s award.”).

8 **5. Does the state permit parties to agree to expand one party’s right to remedies?**
9 **If it does not, may the Court sever the provision?**

10 The one clause that favors Cintas is the Irreparable Harm Clause. “An employer may only seek
11 to protect certain narrowly defined and well-recognized interests, namely its trade secrets and its stock
12 in customers.” Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 453 (Mo.App. E.D.1998).
13 Courts in Missouri will not always find irreparable harm when an employee has allegedly violated a non-
14 compete or trade secret clause. Carboline Co. v. Lebeck, 990 F.Supp. 762, (E.D.Mo. 1997) (for
15 purposes of preliminary injunction, finding no irreparable harm to employer; former employee would be
16 harmed by being denied opportunity to practice profession with no counterbalancing harm to former
17 employer). This is because “covenants not to compete are considered restraints on trade, they are
18 presumptively void and are enforceable only to the extent that they are demonstratively reasonable.”
19 Armstrong v. Cape Girardeau Physician Associates, 49 S.W.3d 821, 826 (Mo.App. E.D. 2001);
20 Orchard Container Corp. v. Orchard, 601 S.W.2d 299, 303 (Mo.App. E.D. 1980). Thus, the
21 employer carries the burden of demonstrating that the clause is reasonable. Armstrong, 49 S.W.3d at
22 826.

23 Reviewing the Irreparable Harm Clause under Missouri law, it allows Cintas to obtain a TRO or
24 preliminary injunction without having to show harm. In some cases, this will mean that even where there
25 would be no harm to Cintas and great harm to an employee, the employee will still be subjected to the
26 TRO or preliminary injunction.

27 Given that the Irreparable Harm Clause so heavily favors Cintas and Missouri law disfavors such
28 clauses, the Court must ask whether the Irreparable Harm Clause reflects “an inequality so strong,

1 gross, and manifest that it must be impossible to state it to one with common sense without producing an
2 exclamation at the inequality of it" or constitute an unduly harsh term of the contract. State, Missouri
3 Department of Social Services, Division of Aging v. Brookside Nursing Center, Inc., 50 S.W.3d 273,
4 277 (Mo. banc 2001) (citing the Restatement (Second) of Contracts and the Uniform Commercial Code
5 definitions of "unconscionability").

6 The Court finds that it does not. Admittedly, it reduces Cintas' burden in obtaining a TRO or
7 preliminary injunction. A review of recent rulings from the Missouri courts, however, does not
8 demonstrate that a Missouri court will always render such a clause unenforceable. Rather, the courts
9 look to the circumstances and apply general principles to fact specific scenarios. Compare Washington
10 County Memorial Hosp. v. Sidebottom, 7 S.W.3d 542, 543- 44 (Mo.App. E.D. 1999) (covenant not
11 to compete reasonable and necessary to protect hospital's interest in "its patient base, as income from
12 patient billings constitutes its primary source of revenue."); Superior Gearbox Co. v. Edwards, 869
13 S.W.2d 239 (Mo.App. 1993) (five year non-compete clause enforceable); Long v. Huffman, 557
14 S.W.2d 911, 915 (Mo.App. W.D. 1977) (a covenant not to compete for five years within a radius of
15 60 miles of the City of Butler was reasonable, given that it did not impose a restriction greater than that
16 necessary to protect employer's private practice); Willman v. Beheler, 499 S.W.2d 770, 775 (Mo.
17 1973) (Missouri has no per se rule against enforcing covenants not to compete between medical
18 practitioners); with Show-Time Video Rentals, Inc. v. Douglas, 727 S.W.2d 426 (Mo.App. 1987)
19 (holding that noncompete covenants contained in contracts which are terminable at will should not be
20 enforced unless termination is in good faith).

21 In addition, to obtain the TRO Cintas must demonstrate to a court that the covenant is
22 reasonable and that the subject matter at issue involves trade secrets. Nor does the Clause effectively
23 prevent an employee from mounting a defense against the TRO or preliminary injunction. Thus, the
24 Clause is not unconscionable.

25 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
26 **unconscionable?**

27 Plaintiff Cruse's declaration does not demonstrate that he was badgered or misled into signing
28 the Agreement. While he may not have been told about the terms of the Agreement, he does not

1 demonstrate that this is because Cintas was attempting to mislead him. He does not state, for example,
2 that his questions were ignored. “The parties voluntarily entered into the contract in question, and each
3 is held to know its terms and to have agreed to be bound thereby.” Furniture Mfg. Corp. v. Joseph,
4 900 S.W.2d 642, 647 (Mo.App.W.D. 1995).

5 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
6 **applicable state law, would severing the unconscionable provisions render the**
7 **agreement enforceable, or is the agreement so permeated with unconscionability**
8 **that the Court should not enforce it?**

9 Based on the foregoing, the Court observes that the parties bargaining power is unequal, that the
10 limitation on a plaintiff’s remedies are something to be decided by the arbitrator, that the Agreement
11 favors Cintas, but that it is not unconscionable. Accordingly, Plaintiff Cruse is compelled to arbitrate.

12 **P. New Jersey**

13 Plaintiffs Edwards, Kelly, Huertas, Samuels, Williams, Charles and Qureshi signed the
14 Agreements in New Jersey. Plaintiffs Huertas, Samuels, Williams and Qureshi signed the 1996 version.
15 New Jersey has a “well-recognized policy” and an “established State interest...favoring arbitration.”
16 Martindale v. Sandvik Inc., 800 A.2d 872, 877 (N.J. 2002). The New Jersey Supreme Court has held
17 that the creation of an employment relation is sufficient consideration to create a binding contract. Id. at
18 879.

19 **1. Does the state require that the arbitration clause be bilateral?**

20 Plaintiffs admit that New Jersey does not require arbitration to be bilateral.

21 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
22 **considered in determining unconscionability?**

23 Plaintiffs do not suggest that New Jersey takes the absence of bilateral arbitration into
24 consideration.

25 **3. Does the state hold that “loser pay all” provisions of arbitration agreements are**
26 **unconscionable? If it does, may the Court sever the provision?**

27 Plaintiffs Huertas, Samuels, Williams and Qureshi signed the 1996 version. The Court has
28 already observed that the fees for arbitration can be expensive. Neither New Jersey nor the Third

1 Circuit has spoken on the issue. Dabney v. Option One Mortg. Corp., 2001 WL 410543, *3
2 (E.D.Pa. 2001). The Supreme Court has acknowledged, however, that large arbitration costs could
3 preclude a litigant from effectively vindicating federal statutory rights. Green Tree Financial Corp.
4 Alabama v. Randolph, 531 U.S. 79 (2000). Thus, the party seeking to avoid arbitration bears the
5 burden of establishing that likelihood of incurring such prohibitive costs. *Id.* at 522. The Third Circuit
6 has invalidated an arbitration agreement where it found three fundamental defects, one of which was the
7 “loser-pay” provision. Alexander v. Anthony Intern., L.P., 341 F.3d 256, 263 (3rd.Cir. 2003).

8 Because the loser-pay provision can be prohibitively expensive, the Court finds that this
9 provision is unconscionable.

10 **4. Does the state permit parties to constrict statutory remedies? If it does not,**
11 **may the Court sever the provision?**

12 In the Third Circuit, the limitation on remedies is an issue to be decided by the arbitrator. Great
13 Western Mortgage Corp. v. Peacock, 110 F.3d222, 232 (3d Cir. 1997) (“The availability of punitive
14 damages is not relevant to the nature of the forum in which the complaint will be heard. Thus availability
15 of punitive damages cannot enter into a decision to compel arbitration.”). Thus, the arbitrator, not this
16 Court, shall decided the appropriateness of the time-limitation and the lack of guarantee of attorneys’
17 costs and fees.

18 **5. Does the state permit parties to agree to expand one party’s right to remedies?**
19 **If it does not, may the Court sever the provision?**

20 The one provision that strongly favors Cintas is the Irreparable Harm Clause. It allows Cintas to
21 obtain a TRO or preliminary injunction from a court without first proving irreparable harm. New Jersey
22 courts have struck down or modified non-competition agreements when they have been over broad.
23 Ingersoll-Rand Search Term End Co. v. Ciavatta, 542 A.2d 879 (N.J. 1988) (court found employee
24 invention holdover agreement was unreasonable and unenforceable where invention was not product of
25 work done by former employee while employed at company nor incorporated company's trade secrets);
26 Coskey's Television & Radio Sales & Serv., Inc. v. Foti, 602 A.2d 789 (N.J. App.Div.1992) (court
27 modified overbroad agreement to preclude former employee from interfering with employer's successful
28 contract bids that former employee had negotiated). New Jersey courts will find a covenant reasonable,

1 however, if it “simply protects the legitimate interests of the employer, imposes no undue hardship on the
2 employee and is not injurious to the public.” Whitmyer Bros., Inc. v. Doyle, 274 A.2d 577, 581 (N.J.
3 1971). Whether a non-competition agreement will be enforced is a fact-sensitive inquiry. Graziano v.
4 Grant, 326 741 A.2d 156 (N.J.Super.A.D. 1999).

5 Thus, under New Jersey law, while the Irreparable Harm Clause excuses Cintas from
6 demonstrating irreparable harm, it does not excuse Cintas from having to prove ownership of its trade
7 secrets. Nor does it excuse Cintas from having to demonstrate that the clause is reasonable. Under
8 these circumstances, it is not an entirely unreasonable or one-sided provision.

9 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
10 **unconscionable?**

11 Absent a showing of fraud or oppression, an agreement will not be deemed unconscionable.
12 Martindale v. Sandvik, 800 A.2d at 880.

13 Plaintiffs Edwards, Huertas, and Samuels each asked to take the Agreements home with
14 them and were told that they could not, that they had to sign the Agreements immediately. Given the
15 imbalance in bargaining power, these tactics are unacceptable. These three plaintiffs are not compelled
16 to arbitrate.

17 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
18 **applicable state law, would severing the unconscionable provisions render the**
19 **agreement enforceable, or is the agreement so permeated with unconscionability**
20 **that the Court should not enforce it?**

21 With respect to the remaining New Jersey Plaintiffs, reviewing the Agreements, the Court
22 observes the following. New Jersey has a strong policy favoring arbitration. Although the Irreparable
23 Harm clause favors Cintas at the preliminary stage of a litigation, it does not so favor Cintas as to be
24 unconscionable. The employee can, for example, argue that the trade secrets at issue in the dispute are
25 not truly trade secrets. The “loser-pay” provision, however, is unconscionable because they impair an
26 employee’s ability to vindicate his rights. The Agreements provide a severability clause. The Court
27 hereby severs that provision. Thus, the remaining New Jersey Plaintiffs are compelled to arbitrate.

28 **Q. New York**

1 Plaintiffs Nazareth and Perez signed the Agreements in New York.

2 **1. Does the state require that the arbitration clause be bilateral?**

3 Plaintiffs do not suggest that New York law does.

4 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
5 **considered in determining unconscionability?**

6 Plaintiffs do not suggest that New York law does. In fact, New York appears to have rejected
7 this factor. Ball v. SFX Broad, 236 A.D.2d 158, 161 (N.Y. App. Div. 1997).

8 **3. Does the state hold that “loser pay all” provisions of arbitration agreements are**
9 **unconscionable? If it does, may the Court sever the provision?**

10 The New York Plaintiffs did not sign the 1996 Agreement. This issue does not apply.

11 **4. Does the state permit parties to constrict statutory remedies? If it does not,**
12 **may the Court sever the provision?**

13 The Second Circuit reads Mitsubishi Motors, 473 U.S. 614 to require that a party be able to
14 effectively vindicate her rights in arbitration. Brooks v. Travelers Ins. Co., 297 F.3d 169 (2nd Cir.
15 2002). The time limits imposed by the Agreement prevent a SSR from vindicating a cause of action for
16 wilful infringement of the FLSA. The Agreement also fails to guarantee a prevailing employee attorneys’
17 costs and fees. Accordingly, under New York law these two provisions are unconscionable.

18 **5. Does the state permit parties to agree to expand one party’s right to remedies?**
19 **If it does not, may the Court sever the provision?**

20 The one clause that favors Cintas is the Irreparable Harm Clause. In the Second Circuit,
21 restrictive covenants such as non-disclosure agreements and non-compete clauses will be enforced if
22 reasonably limited temporally and geographically, and then only to the extent necessary to protect the
23 employer from unfair competition which stems from the employee's use or disclosure of trade secrets or
24 confidential customer lists. Columbia Ribbon & Carbon Mfg. v. A-1-A Corp., 369 N.E.2d 4 (N.Y.
25 1977). The Irreparable Harm Clause provides that for Cintas to obtain a TRO or preliminary injunction,
26 it need not show irreparable harm. This does not mean Cintas is also excused from meeting the other
27 prerequisites for obtaining such relief. It does not mean, for example, that Cintas is excused from
28 demonstrating that the rights it claims are in fact trade secrets or that the non-compete clause is

1 reasonably limited. Accordingly, though the Irreparable Harm Clause may favor Cintas, it does not do
2 so unreasonably.

3 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
4 **unconscionable?**

5 Plaintiffs have not presented evidence to suggest that the circumstances under which they signed
6 the Agreements were unconscionable.

7 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
8 **applicable state law, would severing the unconscionable provisions render the**
9 **agreement enforceable, or is the agreement so permeated with unconscionability**
10 **that the Court should not enforce it?**

11 Based on the foregoing, the New York Plaintiffs are compelled to arbitrate.

12 **R. North Carolina**

13 Plaintiff Carroll signed the Agreement in North Carolina.

14 **1. Does the state require that the arbitration clause be bilateral?**

15 North Carolina does not require bilateral arbitration. For an agreement to be mutual, there must
16 be an exchange of promises. An employer's and an employee's agreement to arbitrate only certain
17 grievances is still a mutual agreement because both parties have agreed to be bound by that arbitration.
18 Howard v Oakwood Homes Corp., 516 S.E.2d 879, 881 (N.C.Ct.App. 1999).

19 **2. If it does not, then is the absence of bilateral arbitration a factor to be**
20 **considered in determining unconscionability?**

21 In Howard, the North Carolina Court of Appeals rejected the bilateral requirement. Id.

22 **3. Does the state hold that "loser pay all" provisions of arbitration agreements are**
23 **unconscionable? If it does, may the Court sever the provision?**

24 This issue does not pertain to the North Carolina Plaintiffs.

25 **4. Does the state permit parties to constrict statutory remedies? If it does not,**
26 **may the Court sever the provision?**

27 The Fourth Circuit reads Mitsubishi Motors to require that a party be able to effectively
28 vindicate her rights in arbitration. Hooters of America Inc. v. Phillips, 39 F. Supp. 2d 582, 613 (D.S.C.

1 1998). The time limits imposed by the Agreement prevent a SSR from vindicating a cause of action for
2 wilful infringement of the FLSA. The lack of a guarantee of attorneys' fees and costs may discourage
3 potential plaintiffs. Accordingly, the Court finds that under North Carolina law, these two provisions are
4 unconscionable.

5 **6. Does the state permit parties to agree to expand one party's right to remedies?**
6 **If it does not, may the Court sever the provision?**

7 An agreement that favors one party is unconscionable when there is "fraud, coercion, undue
8 influence, misrepresentation, inadequate disclosure, duress, and overreaching...and is harsh, oppressive,
9 and one-sided." King v. King, 442 S.E.2d 154, 157 (N.C.App. 1994). In the Fourth Circuit,
10 irreparable harm is presumed when a trade secret or customer list are at issue. PHP Healthcare Corp.
11 v. EMSA Ltd. Partnership, 14 F.3d 941, 946 (4th Cir. 1993). Thus, the Irreparable Harm Clause
12 merely mirrors the presumption that the Fourth Circuit already provides. Accordingly, Plaintiffs must
13 demonstrate fraud, coercion, undue influence or the like for this Court to find that the Irreparable Harm
14 Clause renders the Agreements unenforceable. The Parties have not identified evidence of such fraud.

15 **6. Are the circumstances under which the SSRs signed the agreement otherwise**
16 **unconscionable?**

17 Plaintiffs have not offered evidence of the circumstances.

18 **7. Do the factors taken as a whole demonstrate unconscionability? Under the**
19 **applicable state law, would severing the unconscionable provisions render the**
20 **agreement enforceable, or is the agreement so permeated with unconscionability**
21 **that the Court should not enforce it?**

22 Viewing the Agreement as a whole, the Court observes the following. North Carolina law
23 favors arbitration. The parties have unequal bargaining power. The Fourth Circuit provides a
24 presumption that trade secrets involve an irreparable harm. Two provisions in the Agreement impair an
25 employee's ability to vindicate his rights – the time limitation provision and the lack of a guarantee of
26 attorneys' fees and costs. The Agreement allows the Court to sever such provisions and the Court
27 chooses to do so. Having severed those two provisions, the Agreement is not unconscionable. Thus,
28 the North Carolina Plaintiff is compelled to arbitrate.

1 **S. Conclusion**

2 Based on the foregoing discussion, the following parties are not compelled to arbitrate:
3 Plaintiff Heibling of Arkansas, Plaintiff Brown of Maryland, and Plaintiffs Edwards, Huertas, and
4 Samuels of New Jersey.

5 In addition, the “loser pays” provision of the 1996 Agreement is severed.

6 Finally, the time limitation imposed by the Agreement and the lack of a guarantee of attorneys’
7 costs and fees are severed in the California, Connecticut, Colorado, Maryland, Michigan, New Jersey,
8 New York, and North Carolina Agreements. Instead, these two provisions of those Agreements shall
9 be read to comport with the FLSA.

10 **IV. COLLECTIVE BARGAINING AGREEMENTS**

11 Finally, Cintas contends that Plaintiffs Lloyd, Smith, Lightfoot and Seath, are or were employed
12 subject to terms of Collective Bargaining Agreements (“CBAs”) between Cintas and the International
13 Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. (Clendening Decl.
14 Exhs. KKK, LLL.) The arbitration provision in Article VI of the CBAs, in combination with Article IV
15 of the CBAs expressly referencing the FLSA, require these parties to arbitrate. Plaintiffs argue that they
16 cannot be compelled to arbitrate, despite their CBA agreements because a union may never waive an
17 individual’s right to arbitrate statutory claims.

18 The Supreme Court, in Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 77 (1998), left
19 open the issue of whether a union may waive individual employees’ statutory forum rights. “[W]e find it
20 unnecessary to resolve the question of the validity of a union-negotiated waiver [of the right to bring an
21 ADA claim in court], since it is apparent to us...that no such waiver has occurred.” Wright, 525 U.S. at
22 77. The Court did state, however, that even if a CBA could waive an employee’s right to a judicial
23 forum, it must do so in a “clear and unmistakable” manner. Id.

24 After Wright was decided, the Ninth Circuit reviewed a CBA that waived an individual’s right to
25 bring a FLSA claim in federal court. Collins v. Lobdell, 188 F.3d 1124, 1127 (9th Cir. 1999), cert
26 denied, 529 U.S. 1107 (2000). Without any reference to Wright, the Ninth Circuit relied on earlier
27 Supreme Court precedent and held that a union could never waive an individual’s right to a federal
28 claim. Subsequent, unpublished Ninth Circuit decisions have mentioned Wright in passing for the

1 proposition that at the very least, a CBA cannot waive a federal claim unless that waiver is clear and
2 unambiguous. Twentieth Century-Fox Film Corp. v. Beckum, 36 Fed.Appx. 271, * 1 (9th Cir. 2002)
3 (unpublished).

4 The Court of Appeals for the State of California has held that unless the CBA waiver is clear
5 and unambiguous, pre-Wright precedent precluding arbitration of an individuals' statutory rights prevails.
6 "Under Wright, the basic rule of Alexander, Barrentine, and McDonald remains intact, and a labor
7 arbitration can have preclusive effect on a subsequent statutory claim, only if the CBA contained a clear
8 and unmistakable waiver of the employee's right to file a lawsuit on the statutory claim." Taylor v.
9 Lockheed, 6 Cal.Rptr.3d 358, 386 (Cal.App.2003).

10 In contrast, other circuits have more clearly articulated their interpretation of Wright. The Sixth
11 Circuit, relying on Wright has held that a CBA may in fact waive the right to a judicial forum for a
12 statutory claim. Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999). The Second Circuit,
13 reviewing Wright has held that Wright may have opened the door to compelling such arbitration, but
14 nevertheless declined to do so. "In this Circuit, we have reached the question left open by Wright and
15 held that an arbitration clause in a union collective bargaining agreement is not enforceable against an
16 individual employee's ADA and Family and Medical Leave Act claims." Fayer v. Town of Middlebury,
17 258 F.3d 117, 123 n. 2 (2nd Cir. 2001) (citing Rogers v. New York University, 220 F.3d 73, 75 (2d
18 Cir.2000)).

19 Reviewing these cases, the Court observes that at the very least, Wright's impact on arbitration
20 provisions in a CBA is ambiguous at best. With no clear guidance from the Ninth Circuit, this Court
21 refrains from either adopting or rejecting the reasoning of the Sixth Circuit. Instead, it finds the analysis
22 used by the Second Circuit in Fayer helpful. That is, this Court asks, assuming that a CBA could waive
23 a right to litigate, is the waiver in the Cintas CBA clear and unmistakable? The Court finds that it is not.

24 Reviewing the Cintas CBA, Article IV states that the SSRs "are 'outside salesmen' within the
25 meaning of the Fair Labor Standards Act, and that the commissions earned by and payable to such
26 persons shall not be deemed to be a part of the basic wage of such persons for the purpose of
27 computing overtime pay." Article VI states that "any claim of violation fo this Agreement, charge of
28 discrimination, grievance or dispute" arising out the Agreement shall be arbitrated. This language leads

1 to an ambiguity.

2 Article IV refers to SSRs as “outside salesman” and yet also discusses “overtime payment.”
3 Under the FLSA, employees who work 40 hours in any work week must be paid overtime for hours
4 worked beyond that 40. 29 U.S.C. § 207(a)(1). The FLSA, however, exempts from overtime an
5 employee who is an “outside salesman.” Given this ambiguity, the Court does not construe Article VI’s
6 reference to any disputes under the CBA as being clear and unmistakable. At the very least, the CBA
7 does not make clear who would qualify under Article IV – SSRs who are outside salesman who are also
8 paid overtime? Or SSRs who are outside salesman who might be paid overtime even if Cintas has never
9 done so? This is especially confusing since the heart of Plaintiffs litigation is that they were illegally
10 categorized as “exempt” employees and deprived of overtime.

11 At the December 16, 2003 hearing, the Court raised this issue. Cintas was unable to provide an
12 adequate answer. Plaintiffs argued that this ambiguity underscored that the waiver was not clear and
13 unmistakable. The Court agrees. If neither the Court nor the sophisticated attorneys representing the
14 parties are able to reconcile the ambiguous language in the CBA, then how can Plaintiffs, who are not
15 trained in the law, be expected to understand to whom the waiver applies? The CBA on this issue is
16 ambiguous, not clear and unmistakable.

17 Accordingly, Plaintiffs who are parties to this CBA are not compelled to arbitrate.

18 CONCLUSION

19 Based on the foregoing, the Court GRANTS in part and DENIES in part Cintas’ Motion to
20 Compel Arbitration. The Court finds that:

- 21 • The SSRs are not “transportation workers” as defined by the FAA § 1 exemption.
- 22 • The FAA governs these Agreements.
- 23 • The Following Plaintiffs are not compelled to arbitrate:
 - 24 • Plaintiff Heibling of Arkansas
 - 25 • Plaintiff Brown of Maryland
 - 26 • Plaintiffs Edwards of New Jersey
 - 27 • Plaintiff Huertas of New Jersey
 - 28 • Plaintiff Samuels of New Jersey

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- The confidentiality rules of the AAA are not unconscionable.
- The “loser pays” provision of the 1996 Agreements in Colorado and New Jersey are unconscionable and are, therefore, severed.
- Under the laws of California, Colorado, Connecticut, Illinois, Indiana, Maryland, Michigan, Missouri, New Jersey, New York, and North Carolina, the Irreparable Harm Clause is not unconscionable.
- Under the laws of California, Colorado, Connecticut, Maryland, Michigan, New Jersey, New York, and North Carolina, the provision in the Agreements limiting the time in which an employee may bring an FLSA claim and the provision not guaranteeing attorneys’ fees and costs to a prevailing plaintiff are unconscionable. The Court severs these two provisions in these Agreements in these states. Instead, these two provisions shall be read to comport with the FLSA.
- Under the laws of Illinois, Indiana and Missouri, the validity of the limitation on the FLSA remedies is an issue to be determined by the arbitrator.
- Plaintiffs who are parties to the CBA are not compelled to arbitrate.

IT IS FURTHER ORDERED THAT the parties shall appear **telephonically** for a Case Management Conference on **Thursday, April 15, 2004 at 3:45 p.m.** Among the issues the parties should be prepared to discuss is whether or not the Court’s Order Granting Facilitated Notice of the FLSA Claims should be modified in accordance with the Court’s findings regarding arbitration in this Order. Plaintiffs shall set up the **telephonic** conference call with all the parties on the line and call chambers at (510) 637-3559 at the time designated above. **NO PARTY SHALL CONTACT CHAMBERS DIRECTLY WITHOUT PRIOR AUTHORIZATION OF THE COURT.**

IT IS SO ORDERED.

Dated: April __5__, 2004

/s/Saundra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge

United States District Court

For the Northern District of California

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