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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.

Cintas Corporation, et al.,

Defendants.

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On April 22, 2004, the parties appeared telephonically for a case management conference (“CMC”). The Court provided specific instructions regarding facilitated notice and the parties requested that the Court memorialize its instructions to ensure compliance and prevent confusion. Accordingly, the Court sets forth its instructions regarding facilitated notice.

**II. FACILITATED NOTICE**

At the CMC The Court addressed: (1) to whom facilitated notice should be sent; (2) the text of the notice; and (3) timing of the notice.

**A. To Whom Notice Should Be Sent**

In the Joint Case Management Statement, Cintas proposed that the Court limit facilitated notice only to those parties who clearly will be able to litigate their claims in court. Cintas argued that this limitation is appropriate because almost all of the potential class members will have to arbitrate their claims. If they are compelled to arbitrate, then the Court will not have jurisdiction over their FLSA claims. The Court finds that Cintas’ proposal is neither practicable nor fair.

First, the Court’s April 5, 2004 Order was directed only at 60 or so named plaintiffs, not at the entire

1 class. No one can predict whether potential class members will be compelled to arbitrate. While in reality, a  
2 majority may, just as the Court found that some of the named Plaintiffs in the April 5, 2004 Order had been  
3 forced to sign the agreement under unconscionable circumstances, so to may other potential plaintiffs.

4 Second, the potential class is not compelled to arbitrate its ERISA claims. Those claims remain within  
5 this Court's jurisdiction even though many of the potential class members will have to arbitrate their FLSA  
6 claims.<sup>1</sup>

7 Third, the purpose of facilitated notice is to advise potential class members of their right to have their  
8 FLSA claims adjudicated, whether it is through arbitration or litigation. The notice can be tailored to advise  
9 potential class members that under the terms of their individual employment agreements, many of them will be  
10 compelled to arbitrate and it has not yet been determined whether or not they will be required to do so on an  
11 individual or class basis.

12 Fourth, under Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 169 (1989), this Court has the  
13 discretion, "in appropriate cases," to facilitate notice to potential plaintiffs, and the responsibility to manage the  
14 parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions  
15 of the Federal Rules of Civil Procedure.

16 Finally, nothing in the Court's April 5, 2004 Order disturbed its earlier determination that notice could  
17 be issued because the SSRs<sup>2</sup> were similarly situated. The "similarly situated" standard at this stage is lenient,  
18 plaintiff's burden is not heavy, the evidence needed is minimal and the existence of some variations between  
19 potential claimants is not determinative of lack of similarity. See, e.g., E.g., Hipp v. Liberty Nat'l Life Ins. Co.,  
20 252 F.3d 1208, 1217-19 (11th Cir.2001); White v. Osmore, Inc., 204 F. Supp. 2d 1309, 1313-14  
21 (M.D.Ala.2002); Harper v. Lovett's Buffett, 185 F.R.D. 358, 362-64 (M.D.Ala.1999); Tucker v. Labor  
22 Leasing, Inc., 872 F.Supp. 941, 947-48 (M.D.Fla.1994).

23 In the case at hand, the SSRs are still similarly situated; that is, their claims are still identical – FLSA  
24 and ERISA claims based on Cintas' alleged policy of misclassifying workers so that they would be deprived

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26 <sup>1</sup>The Court recognizes that at this stage in the proceedings, the issue of facilitated notice relates only  
27 to the FLSA claims.

28 <sup>2</sup>The Court uses the term "SSRs" to refer to the potential plaintiffs as previously described in the  
Court's December order granting facilitated notice.

1 of overtime pay. The only change is that by the April 5, 2004 Order, the Court determined the circumstances  
2 under which some employees would be compelled to arbitrate and others would be able to litigate. The  
3 circumstances are easily articulated and can be included in the notice. For example, employees who did not  
4 sign an arbitration agreement, employees who are subject to a Collective Bargaining Agreement, and employees  
5 whose agreements are governed by the state of Arkansas will not be compelled to arbitrate.

6 Thus, issuing the facilitated notice will accomplish several things: it will inform SSRs that: (1) they may  
7 have a claim that under FLSA; (2) their FLSA claim may likely be arbitrated on either an individual or class  
8 basis; and (3) under certain specific circumstances they may be able to join a class action to litigate their FLSA  
9 claim.

## 10 **B. Text and Terms of Notice**

11 As the Court stated during the CMC, Plaintiffs must revise the text of the proposed notice to reflect  
12 the content and consequences of Court's April 5, 2004 Order. The proposed notice should, in particular,  
13 advise SSRs of the requirement to arbitrate; the unenforceability of certain provisions in the arbitration clause;  
14 and the future arbitration proceeding Plaintiffs intend to institute.<sup>3</sup>

### 15 **1. The Scope of Arbitration**

- 16 • Cintas filed a motion to compel the named plaintiffs to arbitrate their FLSA dispute. The Court  
17 considered four different versions of Cintas employment agreements and reviewed them under  
18 the applicable law of the following states: Arkansas, California, Colorado, Connecticut, Illinois,  
19 Indiana, Maryland, Michigan, Missouri, New Jersey, New York and North Carolina.
- 20 • The Court held that the majority of the named plaintiffs were compelled to arbitrate because  
21 they had signed an employment agreement that included an arbitration clause.
- 22 • The Court's analysis can be used as a guideline for determining which SSRs are not compelled  
23 to arbitrate their FLSA claims:
  - 24 • SSRs whose employment agreements include an arbitration clause and are governed  
25 by the state of Arkansas are not compelled to arbitrate.

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28 <sup>3</sup>This language is intended as an outline, not a script; the parties will need to meet and confer to draw-up appropriate language.

- 1 • SSRs whose employment is governed by a collective bargaining agreement are not  
2 compelled to arbitrate.
- 3 • SSRs who did not sign an employment agreement, or whose agreement does not  
4 include an arbitration clause are not compelled to arbitrate.
- 5 • Those SSRs who signed the arbitration agreement under circumstances that are  
6 unconscionable are not compelled to arbitrate.
- 7 • The parties have agreed that the following states have law similar to Arkansas and therefore  
8 employees whose agreements are governed under these states are not compelled to arbitrate:  
9 [The parties have agreed to provide a list of such states]
- 10 • Under the Court’s analysis in the April 5, 2004 Order, a large number or majority of SSRs  
11 whose employment agreements include an arbitration clause will likely be compelled to  
12 arbitrate their FLSA claims. Unless they meet the qualifications for litigation as described  
13 supra, they will be compelled to arbitrate their FLSA claims.

## 14 **2. Enforceability of Certain Provisions of the Arbitration Clause**

15 SSRs should also be informed that the Court has determined that under the laws of certain states, some  
16 of the provisions appearing in one or more than one of the versions of the Cintas employment agreement are  
17 unconscionable. Plaintiffs should clearly indicate which provisions appearing in which versions are  
18 unconscionable. In general, the Court found that the “loser-pay” provision was unconscionable across the  
19 board and severed it. It also found that those versions of the agreements that failed to guarantee attorneys’ fees  
20 to a prevailing plaintiff or provided a narrower statute of limitations than the FLSA were unconscionable under  
21 the laws of the Second, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh circuits.

## 22 **3. Class-Wide Arbitration**

23 The facilitated notice should also inform SSRs that although Plaintiffs will seek a class-wide arbitration  
24 for those SSRs who are compelled to arbitrate, there is no guarantee that an arbitrator will determine that class-  
25 wide arbitration is appropriate. Accordingly, SSRs should be aware that they may be required to file individual  
26 arbitrations.

27 SSRs should be given 90-days to opt-in to the proceedings. As Plaintiffs collect the opt-ins, Plaintiffs  
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1 should be sure to divide them into those whom, pursuant to the guidelines provided by the Court's April 5,  
2 2004 Order, will not be compelled to arbitrate, those who will be, and those who may have a claim that the  
3 arbitration clause as applied to them is unconscionable. Those claiming that the arbitration clause is  
4 unconscionable should submit a declaration setting forth the circumstances of their signing the agreement for  
5 the Court's determination. Plaintiffs should bring forward a motion and submit these declarations in bulk so  
6 that the Court may consider them in a single instance.

### 7 **C. Issues of Timing**

8 Given the Court's April 5, 2004 Order, this case will proceed on parallel tracks. Those SSRs who  
9 are not compelled to arbitrate their FLSA claims will litigate them (potentially as a class action) before the  
10 Court. Those that are, will proceed before a AAA arbitrator (either individually, or as a class, depending on  
11 how the AAA rules on class status).<sup>4</sup> This leads to a question of when to time the notice and when to time filing  
12 a motion to proceed as a class before the AAA.

13 On the one hand, if Plaintiffs issue a notice before the AAA determines class status, then the process  
14 may become overly complicated. If notice regarding the litigation issues to all SSRs, and then the AAA grants  
15 class status, then Plaintiffs will have to issue a second notice related to the AAA proceeding, under the direction  
16 of the AAA arbitrator, and the SSRs may become confused regarding which forum they are to proceed. In  
17 addition, the notice that the arbitrator directs may be different in content from the one this Court has directed.

18 On the other hand, distribution of notice triggers equitable tolling. If the Court does not permit notice  
19 to issue shortly, then certain SSRs may be foreclosed from pursuing legitimate claims because the statute-of-  
20 limitations has run. In addition, there may be a number of SSRs who, for different reasons including a finding  
21 of unconscionability, will litigate their claims in this purported class action. In other words, distributing notice  
22 to the SSRs is not an exercise in futility – there will likely be SSRs who would otherwise be compelled to  
23 arbitrate but for the circumstances surrounding their signing the agreement. The Court must review and make  
24 a finding regarding those claims of unconscionability so that the SSR can be informed as to how to proceed.

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28 <sup>4</sup>Until the parties stipulate as to who is compelled to arbitrate or the Court makes a determination as to who is compelled to arbitrate, it has jurisdiction over all the opt-in SSRs.



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- Instructed Cintas to provide a mailing list within 30 days of the order approving the proposed facilitated notice;
- Granted Plaintiffs 30 days from receipt of the mailing list to issue notice to the SSRs;
- Ordered Plaintiffs to file a motion for class-wide arbitration before the AAA by June 15, 2004.

IT IS SO ORDERED.

/s/ Sandra Brown Armstrong

Dated: April 23, 2004

SAUNDRA BROWN ARMSTRONG  
United States District Judge

**United States District Court**

For the Northern District of California

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