ARBITRATION PROCEEDING BEFORE THE

AMERICAN ARBITRATION ASSOCIATION

JOSE SALCEDO, A. SHAPPELLE THOMPSON, and CORETTA SILVERS, Claimants, vs. CINTAS CORPORATION, Respondent.	No. 11 160 01119 05
JAMES MORGAN, LARRY HOUSTON, and CLIFTON E. COOPER, Claimants, vs. CINTAS CORPORATION, Respondent.	No. 11 160 00018 06
ROBERT RAMIREZ, Claimant, vs. CINTAS CORPORATION, Respondent.	**ARBITRATOR'S OPINION AND DECISION RE ISSUES OF CLASS ACTION ARBITRATION**

INTRODUCTION

Claimants Jose Salcedo, Coretta Silvers, A. Shappelle Thompson, James Morgan, Larry Houston, Clifton Cooper and Robert Ramirez (Claimants), all former employees of Cintas Corporation (Cintas), seek a "clause construction" determination from the Arbitrator, pursuant to Rule 3 of the American Arbitration Association (AAA) Supplementary Rules for Class Arbitration.[1]

Specifically, Claimants request that the Arbitrator determine, as a threshold issue,[2] whether the arbitration provisions contained in their employment agreements with Cintas allow for arbitration of *class-wide* claims of employment discrimination, or only allow for arbitration of *individual* claims of such discrimination. If they permit arbitration of *class-wide* claims of employment discrimination, a further threshold issue to be determined is the *venue* for any such action – i.e. whether the arbitration must be held in the county in which the employee works or last worked for Cintas.

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[1] Rule 3 provides that "[u]pon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award")."

[2] Claimants are requesting a *partial* final award, *i.e.*, this is a threshold matter involving the interpretation of a contract. The Arbitrator need not address at this time the merits of whether the facts of this case would allow the class to be *certified* (*i.e.*, numerosity, commonality, etc.)

PROCEDURAL HISTORY

On January 20, 2004, Claimants Jose Salcedo, A. Shappelle Thompson, and Coretta Silvers, along with other named plaintiffs, filed individual and class claims of unlawful employment discrimination in the Northern District of California (*Ramirez, et al. v. Cintas Corp.*)[3] On March 22, 2005, the Court ordered Claimants to arbitration under the laws of New York and North Carolina, and stayed their claims pending completion of arbitration. On May 13, 2005, Claimants filed a demand with the American Arbitration Association (AAA) for arbitration and class treatment of their claims.

Claimant James Morgan was a named plaintiff in the above mentioned *Ramirez* action. On November 2, 2005, the Court ordered Claimant Morgan to arbitrate his claims, except to the extent he sought injunctive relief under the California Unfair Competition Law (UCL), and stayed the action as to Claimant Morgan pending completion of the arbitration.

Claimants Larry Houston and Clifton Cooper initially filed their individual and class action claims of employment discrimination against Cintas in a separate lawsuit in the Northern District of California (*Houston, et al. v. Cintas Corp.*) On September 19, 2005, the Court ordered the *Houston* action related to the *Ramirez*

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[3] This case, along with the two subsequent related actions, were assigned to the Honorable Jeffrey White.

case. On November 22, 2005 the Court stayed the *Houston* action based on the parties' stipulation, pending arbitration of their claims, except to the extent they sought injunctive relief under the UCL. On December 29, 2005, Claimants Morgan, Houston and Cooper also filed with the AAA a demand for arbitration and class treatment of their employment discrimination claims.

On January 20, 2004, Claimant Jose Ramirez, along with other named plaintiffs, filed individual and class claims of employment discrimination in the Northern District of California (*Ramirez, et al. v. Cintas Corp.*) On May 11, 2006 the Court entered an order, based on the parties' stipulation, to transfer his claims to arbitration and be related to the arbitration pending in the *Salcedo* action. Ramirez demanded arbitration of his employment discrimination claims against Cintas on May 25, 2006.[4]

Cintas responded by filing a motion in the Northern District of California to dismiss Claimants Salcedo, Thompson and Silver's claims on the grounds that they had entered into an arbitration agreement with Cintas, and therefore were bound to arbitrate their disputes with Cintas. In the alternative Cintas moved to stay the action and compel arbitration. The Court granted the motion to compel arbitration

[4] Because Ramirez is not subject to an arbitration agreement with Cintas, the parties have stipulated that the arbitration provisions of the Employment Agreement executed by Claimant Salcedo and Cintas will be deemed to apply to the arbitration of Ramirez's claims, and that this 1999 Agreement will be interpreted pursuant to the Federal Arbitration Act and the laws of the state in which Ramirez last worked, *i.e.*, Nevada.

and stayed the action. It ordered the named Claimants to arbitrate their individual claims in the Northern District of California.

Cintas filed a similar motion against Claimant Morgan, and here too the Court granted the motion to compel arbitration, stayed the action, and ordered the Claimant Morgan to arbitrate his individual claims in the Northern District of California. Cintas then entered into a stipulation and order to this effect regarding Claimants Houston and Cooper.[5]

FACTS

Claimants

Claimants are all former employees of Cintas who allege claims of employment discrimination. Claimant Jose Salcedo last worked for Cintas in Central Islip (Suffolk County), New York as a production supervisor. Claimant A. Shappelle Thompson last worked for Cintas in Rochester (Monroe County), New York as a driver. Claimant Coretta Silvers last worked for Cintas in Durham (Durham County), North Carolina as an office clerical employee. Claimant Robert Ramirez last worked for Cintas in Las Vegas (Clark County), Nevada as a driver and production supervisor. Claimant Larry Houston last worked for Cintas in San

[5] Cintas acknowledges that pursuant to Section 4 of the FAA the Judge had no choice but to order arbitration be held in the Northern District of California. Section 4 limits a federal court's jurisdiction to order arbitration proceedings within the district in which the petition to compel arbitration was filed (9 U.S.C. section 4.) However Cintas asserts the Judge made it clear that he was ordering to arbitration only the *individual* claims, leaving the issue of *class* proceedings up to the Arbitrator.

Leandro (Alameda County), California as a driver. Claimant Clifton Cooper last worked for Cintas at three facilities in Los Angeles County (Pico Rivera, El Segundo and Long Beach), California as a service manager. Claimant James Morgan worked for Cintas in San Leandro (Alameda County), California as a driver. However, he and Cintas have agreed that his agreement will be governed by Ohio law.

Thompson, Houston, Silvers, Cooper and Morgan allege they were discriminated against because they are African American. In addition, Salcedo alleges national origin (Dominican Republic) discrimination. Salcedo and Ramirez allege they were discriminated against because they are Hispanic.

Arbitration Clause(s)

All the Claimants were allegedly required to sign, as a condition of employment, employment agreements drafted by Cintas, which contained arbitration clauses. At the time in question (1999-2003), Cintas modified the clause a number of times, but Claimants argue (and Cintas does not dispute) that each version is essentially the same for the purpose of the arguments in this case.

Specifically, each agreement generally provides for arbitration of "any dispute or difference" arising between the employee and the employer. None of the versions specifically exclude class-wide remedies from the relief the Arbitrator is authorized to award. The agreements also provide that "[i]n any arbitration

proceeding, the arbitrator shall apply the terms of this Agreement as written, the Federal Arbitration Act and other relevant federal law and state laws." As to the applicable state law, the agreements provide that "the law of the state in which the employee currently is employed by employer or most recently was employed by employer" governs.[6] Finally, "[a] legal action either to maintain the status quo pending arbitration or to enforce the agreement to arbitrate or an arbitration award may be filed and pursued in any court having jurisdiction."

ANALYSIS

The United States Supreme Court, in *Green Tree Financial Corp. v. Bazzle* (S.C. 2002) 539 U.S. 444 (*Bazzle*) held that when an arbitration agreement is silent regarding class arbitration, it is for *the arbitrator* to decide whether the agreement permits or forbids class arbitration. In other words, the issue of how the arbitration should proceed, *either as individual claims or a class action*, is for the arbitrator, and not a court, to decide. The issue then becomes one of *state-law contract interpretation* (*Green Tree Financial Corp. v. Bazzle, supra,* at p. 451; *see also* Supp. Rule 3.)

In California, for example, (other states are similar), the rules for interpreting the provisions of a contract are well settled. "The whole of a contract

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[6] This is true with the exception of Claimant Morgan. Also, because the Claimants were employed in various states, potentially different rules could apply to their claims.

is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." "Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless." The contract must also be "interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." "Such intent is to be inferred, if possible, solely from the written provisions of the contract." In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. "When determining the intent of the parties, the court will consider a particular provision paramount over a general provision" (*The Ratcliff Architects v. Vanir Constr. Mgmt.* (2001) 88 Cal.App.4th 595, 601-602; citations omitted.)

Claimants argue the Employment Agreements in question contain *broad* language which requires arbitration of "*any and all*" disputes and legal claims of Claimants. Claimants also point to the fact that nothing in the agreements specifically *forbids* class arbitration. Therefore, they argue the Arbitrator should construe the arbitration clause at issue to permit the class treatment of Claimants employment discrimination claims.

Cintas does *not* argue that the agreements by their terms bar *all* class arbitration, and agrees that the agreements do not expressly address that issue. Rather Cintas argues that Claimants have failed to show that the arbitration agreements actually *permit* class arbitration, specifically under the applicable state arbitration laws.[7]

In addition, Cintas maintains that the agreements do *not* allow for a *nationwide class* of employees, who worked or last worked for Cintas in *different counties* from one another, from bringing a claim. In other words, Cintas is arguing that the Arbitrator must determine the potential scope of any class pursuant to what it terms a "place-of-arbitration" restriction placed in the arbitration clause.[8]

Thus the Arbitrator must first determine generally whether pursuant to the language in the parties' Employment Agreements, Claimants may pursue a class action. If the Arbitrator determines class action relief is not available, the seven Claimants may pursue their individual claims in the Northern District of California. However, if the language in the Employment Agreements is construed so as to allow Claimants to proceed with a class action, the Arbitrator must

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[7] Cintas argues that class arbitrations can take place *only* in states which have held class arbitrations may proceed even under those circumstances when the arbitration contract is *silent* on the issue of class arbitration. However, the issue here is one of *contract* interpretation as discussed in *Bazzle*, not state law governing arbitrations. The same can be said of Cintas' argument that most federal courts do not permit arbitration in the absence of an express provision. The cases cited were decided prior to the *Bazzle* decision and are not relevant to the Arbitrator's role here, which is to interpret those specific Employment Agreements pursuant to state contract law.

additionally determine whether the Claimants are required to pursue any class action in the county they last worked for Cintas or whether a nation-wide class action arbitration is permissible.

Both parties agree that in construing the agreements, and specifically the arbitration clause at issue, the Arbitrator must look to generally applicable rules of contract interpretation and construction, and interpret the contract when possible according to its "plain meaning."

The arbitration clause, entitled "Exclusive Method Of Resolving Disputes Or Differences", provides, in pertinent part:

> "Should any dispute or difference arise between Employee and Employer concerning whether Employer or any agent of Employer ever at any time violated any duty to Employee, right of Employee, law, regulation, or public policy or breached this Agreement, Employee and Employer shall confer and attempt in good faith to resolve promptly such dispute or difference. To have a fair, timely, inexpensive and binding method of resolving any such dispute or difference remaining unresolved after Employee and Employer confer in good faith, should Employee desire to pursue Employee's claim, Employee shall, within one year of the date when the dispute or difference first arose or within one year of when Employee's employment ends, whichever occurs first, *submit to Employer a written request to have such claim, dispute or difference resolved through impartial arbitration* conducted in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes *and held in the county and state where Employee currently works for Employer or most recently worked for Employer.*

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[8] Cintas has waived the place of arbitration term with respect to the seven Claimants so their individual arbitrations can be heard in the Northern District of California.

> In any arbitration proceeding, the arbitrator shall apply the terms of this Agreement as written, the Federal Arbitration Act and other relevant federal and state laws, including time limits on claims.
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> *Except for Employee's worker's compensation claim or unemployment benefits claim*, the impartial arbitration proceeding, as provided in this Paragraph 5, shall be the exclusive, final and binding method of resolving any and all claims of Employee against Employer. . . A legal action either to maintain the status quo pending arbitration or to enforce the agreement to arbitrate or an arbitration award may be filed and pursued in any court having jurisdiction . . . "(Emphasis added.)[9]

First, the provision does *not* contain an express waiver. It is *silent* on the issue of *class* arbitration and contains *no* language *specifically* forbidding class arbitration. The ordinary principles of contract interpretation cited above preclude an arbitrator from adding to the plain language of an agreement. If the Arbitrator were to conclude that the agreements forbid class arbitration, this would appear to run afoul of the above stated rules of contractual interpretation, because it would in effect be *adding* a *significant* term to the parties' agreements.

In addition, it also appears significant that the clause *excludes* workers compensation or unemployment benefits claims from arbitration, and then emphasizes that "except for the above mentioned exceptions," arbitration "shall be the final and binding method of resolving *any and all claims*" of the employee

against the employer. (Emphasis added.) Both this clause and the arbitration clause Cintas has with its rental customers (*see* discussion below) indicate that had Cintas wanted to bar *all* class arbitrations, it certainly knew how to do so and could have included an express waiver.

Claimants point out that the arbitration clause found in the form rental agreement Cintas uses with its rental customers contains language which does appear to prohibit class actions. It provides that "[a]ny such dispute shall be determined on an *individual* basis, shall be considered unique as to its facts, *and shall not be consolidated in arbitration or any other proceeding with any claim or controversy of any other party*." (Emphasis added.) (Exhibit 28.) In contrast, in Claimants' arbitration clauses, there is *nothing* limiting Claimants to bringing *individual* claims.

Second, the clause is very broad, applying to "*any* dispute or difference" between the employer and employee. This also suggests an interpretation that the clause was intended to encompass class-wide relief. *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, by analogy, also lends support to this interpretation. In *Mastrobuono*, the U.S. Supreme Court, in deciding whether the arbitrator was authorized to award punitive damages, found similar broad language

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[9] This language is taken from the 1999 Employment Agreement Claimant Salcedo signed with Cintas, and is representative of the clauses contained in the other Claimants Employment Agreements.

persuasive. The Court explained: "Were we to confine our analysis to the plain language of the arbitration clause, we would have little trouble concluding that a contract clause which bound the parties to 'settle' 'all disputes' through arbitration conducted according to rules which allow any form of 'just and equitable' 'remedy of relief' was sufficiently broad to encompass the award of punitive damages. Inasmuch as agreements to arbitrate are 'generously construed,' [citation] it would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award." (*Id.* at p.61, fn.7.)

Also, although not binding on the Arbitrator, Claimants cite to other AAA arbitrators that have concluded agreements which contain broad language requiring arbitration of "all disputes and/or claims" must be read to include class arbitrations.

Third, the agreements provide that the Arbitrator will apply relevant federal and state laws in any arbitration, and have the authority to award "appropriate relief" as available "under relevant laws," the same as if the matter were proceeding in court. The agreements also contain language which incorporates the AAA National Rules for the resolution of employment disputes, giving the Arbitrator the power to grant *any* remedy or relief that would have been available

to the parties had the matter been heard in court. As Claimants assert, giving the above phrases their plain and ordinary meaning, does suggest that if the Arbitrator has the authority to award all appropriate relief, class action relief would be thus included. In fact if Claimants had proceeded in court, class action relief would be available (FRCP 23; CA Code Civ. Proc. 382.)

Therefore, mindful of the application of the above cited rules of contractual interpretation, the Arbitrator concludes that the "plain meaning" of the arbitration clause in the context of the entire agreement generally permits class arbitration.

The Arbitrator turns next to Cintas' argument that the Arbitrator must determine the potential scope of the class pursuant to what it terms a "place-of-arbitration" clause. Cintas argues that the "plain meaning" of the language in the employment agreements, *i.e.*, specifically the sentence ending with "*and held in the county and state where Employee currently works for Employer or most recently worked for Employer,*" means exactly what it says. Thus Cintas argues that even assuming some type of class arbitration is permissible pursuant to the Claimants' employment agreements, the above language prohibits class arbitration broader in geographic scope than the county in which an employee works or last worked for Cintas.

Cintas further argues that allowing a class-wide arbitration which would include Claimants from a variety of states would nullify other material provisions

of the agreements, including that the arbitrations be conducted by a local arbitrator in a local place in accordance with local law. Cintas urges the Arbitrator not to rewrite the terms the parties agreed upon between themselves.

Claimants assert that this sentence was *not* intended to limit the *venue* for an arbitration, but was intended to set forth the venue for *initiating* an arbitration proceeding.[10] Claimants urge the Arbitrator to interpret this language as an "arbitration initiation" provision and not a "forum selection" provision.

Again, the Arbitrator is guided by the familiar rules of contractual interpretation stated above. Thus if possible the language should be construed according to its plain meaning and the intent of the parties, and in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless."

First, the Arbitrator finds the *choice of language* to militate against finding this provision to be a venue restriction. Notably the phrase at issue does not explicitly provide that the county where the employee works or last worked is the *only* place the arbitration may be initiated or held. In fact the agreements contain a provision providing that "arbitration could be compelled in any court having jurisdiction", which is inconsistent with Cintas' interpretation and militates against

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[10] Claimants also assert that this term is irrelevant here because arbitration was initiated by order of the Court after Cintas moved to compel and then stipulated to arbitration in the Northern District of California.

Cintas' interpretation of this phrase. Thus as Claimants assert, when read in context, *i.e.*, in light of the sentence surrounding the phrase -- it appears that the provision only concerns the process of initiating arbitration, not the location of the proceeding thereby initiated.

Second, the Arbitrator finds the *location* of this phrase within the arbitration clause to also militate against interpreting it to place any restriction on the venue for a class arbitration. Assuming this was the intent of the parties and an important point, it at least could have been set forth in a separate sentence. Instead, it was placed at the end of a very lengthy and convoluted sentence dealing with initiation of the arbitration process. Nothing more is said concerning the location of the arbitration. Certainly if in fact Cintas was bargaining to have all arbitrations held where an employee works or last worked it could have separately, clearly, and unambiguously set out that *all* arbitrations *must* be held where an employee works or last worked.

It appears, therefore, that giving this language its plain and ordinary meaning, it simply directs the employee to request an arbitration that is held in the

county and state where he or she works or last worked but does *not* mandate that the arbitration, including a class arbitration, actually be held there.[11]

In addition, to the extent this clause is *ambiguous*, all of the relevant state's contract laws (Ohio, California, New York and North Carolina) have adopted the principle that ambiguities in contract language are to be construed against the drafter, *i.e.*, Cintas.

CONCLUSION

The Arbitrator therefore finds that a straightforward application of the rules of contract interpretation results in the conclusion that the Cintas Employment Agreements permit class-wide arbitration, and there is no limitation to where the class action may be heard by virtue of a claimed "place of arbitration" clause.

The proceedings shall be stayed following the issuance at the Clause Construction Award for 30 days to permit any party to move a court of competent jurisdiction to confirm or vacate the Clause Construction Award. Once all parties inform the undersigned in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that

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[11] Cintas raises a number of arguments regarding the suitability of these arbitrations for class treatment, *i.e.*, convenience of witnesses, location of evidence, etc., that do not bear on the interpretation of the arbitration clause but to the later determination of class certification.

it has done so, this matter shall proceed to a determination of class certification. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings until the arbitrator is informed of the ruling of the court.

I Eugene F. Lynch do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my partial final award.

DATED this 16 day of August, 2006,

The Hon. Eugene F. Lynch (Ret.)
Arbitrator