

United States District Court
For the Northern District of California

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E-FILED 2/19/09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PAUL VELIZ, et. al.,

NO. C 03-1180 RS

Plaintiffs,

**ORDER GRANTING IN PART
AND DENYING IN PART
MOTION TO SUPPLEMENT
PLAINTIFFS' EXPERT REPORT
AND TO COMPEL
PRODUCTION OF USABLE
PAYROLL RECORDS**

v.

CINTAS CORPORATION, et. al.,

Defendants.

_____ /

Pursuant to Rule 26(e)(1) of the Federal Rules of Civil Procedure, plaintiffs move to: (1) supplement the report of their damages expert; (2) compel the production of proper and readable payroll records; and (3) extend the expert discovery deadline. Cintas Corporation (“Cintas”) opposes the motion. For the reasons stated below, plaintiffs’ motion will be granted in part and denied in part.

A. Expert Report Supplement

On March 22, 2007, Cintas produced its first set of payroll records up to March 2006, from their old payroll vendor. Beginning in April 2006, Cintas switched payroll vendors to Hewitt Associates (“Hewitt”) and produced subsequent payroll information on a rolling basis every six to eight months. The most recent production in October 2008, contained complete pay information for thirty of the litigating plaintiffs. On September 17, 2007, plaintiffs’ damages expert, Dr. Richard Drogin (“Drogin”), submitted his report of Cintas' pay practices based on information provided before September 2007.

1 Plaintiffs contend that the production of new payroll records since September 2007, and the
2 reduction in the number of litigants necessitates supplementation of Drogin's report. Cintas argues
3 that plaintiffs are barred from submitting what amounts essentially to a new expert report that fixes
4 previous errors, because the new material comes from payroll records already in plaintiffs'
5 possession for several months. Under Rule 26(e)(1)(A), a party must supplement an expert report if
6 it learns that the disclosure or response is incomplete or incorrect. Fed. R. Civ. P. 26(e)(1)(A). A
7 party may not rely on Rule 26(e)(1) as a way to remedy a deficient expert report or as a means of
8 producing a new report. *See Talbert v. City of Chicago*, 236 F.R.D. 415, 424 (N.D. Ill. 2006)
9 (stating that supplemental reports offering completely new expert opinions are excluded); *Akeva*
10 *LLC v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (determining that supplementation
11 does not cover an expert's inadequate or incomplete preparation); *Keener v. United States*, 181
12 F.R.D. 639, 641 (D. Mont. 1998) (rejecting supplemental report when expert did not examine, test,
13 or review information for the original report).

14 Despite Cintas' arguments to the contrary, it has not pointed to any specific prejudice it
15 would suffer if plaintiffs are permitted to supplement Drogin's report. New payroll records not
16 included in the original September 2007 report came in on a rolling basis through October 2008.
17 This new data is relevant to update plaintiffs' damages calculations. Moreover, based on the
18 disposition of substantive motions and stipulations of dismissals, the number of plaintiffs has
19 decreased dramatically since Drogin's initial report. This reduction in the number of litigating
20 plaintiffs should be reflected in a new supplement. Accordingly, Drogin shall file his supplemental
21 report within twelve days of the date of this order. Within ten days of the filing of Drogin's
22 supplement, Cintas may conduct a further deposition to address any substantive or procedural
23 differences from the original report.

24 B. Payroll Records

25 As noted above, plaintiffs allege that because Cintas' records are unusably formatted, they
26 are unable, without a great amount of difficulty, to gather intelligible payroll records from the data
27 as it is presented currently. Plaintiffs seek an order compelling Cintas to produce an intelligible set
28 of payroll records for the period after April 2006 when Hewitt began producing records. A party

1 must produce documents as they are kept in the usual course of business. Fed. R. Civ. P.
2 34(b)(2)(E)(i). Here, from April 2006 through September 2007, Drogin included Hewitt's payroll
3 data in his expert report that plaintiffs now claim are unusable and not kept in Cintas' ordinary
4 course of business. Cintas represents that the material was produced as it was kept in the usual
5 course of business, and plaintiffs present no reason to doubt Cintas' representation in that regard.¹
6 This portion of plaintiffs' motion, therefore, is denied.

7 IT IS SO ORDERED.

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9 Dated: February 19, 2009


RICHARD SEEBORG
United States Magistrate Judge

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¹ Cintas further argues that plaintiffs should have raised discovery issues before the discovery judge when the payroll records first were produced. In light of the ruling above, this argument is moot.

1 **THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN GIVEN TO:**

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24 Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the Court's CM/ECF program.

25 **Dated: 2/19/09**

Richard W. Wieking, Clerk

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By: _____ Chambers

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