

1 Dennis J. Hayes, Esq. (SBN 123576)
2 Tracy J. Jones, Esq. (SBN 263632)
3 **HAYES & ORTEGA, LLP**
4 3625 Ruffin Road, Suite 300
5 San Diego, California 92123
6 Telephone: (619) 297-6900
7 djh@sdlaborlaw.com
8 tjj@sdlaborlaw.com

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10 Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERIK BASKIN; RICHARD
BARRETT; MICHAEL CLINITE;
ALEC FLATOS; SAMUEL RAY
FOX, II; STEVEN GONZALEZ;
ARMANDO GUTIERREZ;
MICHAEL HARRIS; NICHOLAS
HOOVER; JOHN KING; MICHAEL
KING; JODY LARSON; GREGORY
ANDREW LOGAN; JOHN
MACDONALD; DAVID
MARSHALL; JARL NERDRUM;
DAVID PARKER; DEVIN REISS;
DAVID RENNER; SHAYNE
SKOVE; MARK L. VASQUEZ;
JAMES WITT,

Plaintiffs,

vs.

CITY OF SAN LUIS OBISPO, a
California Municipality,

Defendant.

CASE NO.:

**COMPLAINT FOR VIOLATION
OF 29 U.S.C. § 207(a), FAILURE TO
PAY OVERTIME WAGES**

DEMAND FOR JURY TRIAL

1 **I. INTRODUCTION**

2 1. This action is brought to recover from Defendant City of San Luis
3 Obispo's ("City") unpaid overtime compensation, an additional equal amount as
4 liquidated damages, other relief, and reasonable attorney's fees under the
5 provisions of the Act of 1938, 29 U.S.C. sections 201-219, known as the Fair Labor
6 Standards Act ("FLSA").

7 2. This action is also brought to enjoin the City from violating the
8 provisions of section 15(a)(2) of the FLSA, and for a declaratory judgment under
9 28 U.S.C. sections 2201-2202.

10 3. Plaintiffs are Firefighters, Engineers, and Captains employed full-time
11 by Defendant City within its Fire Department.

12 4. Plaintiffs are also members of the International Association of Fire
13 Fighters, Local 3523 ("Local 3523"), which is Plaintiffs' recognized bargaining
14 representative. Local 3523 and the City entered into a Memorandum of Agreement
15 ("MOA") on behalf of the Firefighters, Engineers, and Captains, which was in full
16 force and effect from 2012-2016. Said MOA contained, among other things, a
17 cafeteria benefits plan ("Plan"), which provided a bimonthly contribution for the
18 optional purchase of health, dental, vision, and disability insurance.

19 5. The Plan also allowed employees who have other health insurance to
20 receive a cash payment in lieu of health insurance coverage through the City. The
21 2016-2019 memorandum of agreement provides substantially identical terms with
22 respect to overtime and the Plan.

23 6. Under the FLSA, overtime must be paid at 1.5 times an employee's
24 regular rate of pay. 29 U.S.C. § 207(a)(2). An employee's "regular rate" of pay
25 includes cash payments paid to an employee in lieu of health insurance coverage.
26 *Flores v. City of San Gabriel*, 8242 F.3d 890 (9th Cir. 2016) ("Flores").

27 7. Within three years prior to the filing of this Complaint, Plaintiffs
28 worked overtime and received substantial cash payments in lieu of health

1 insurance. However, the City knowingly and deliberately underpaid Plaintiffs for
2 overtime by excluding cash payments in lieu of benefits in the calculation of the
3 regular rate of pay.

4 8. The City's actions were knowing and deliberate because in 2003, the
5 City had a dispute over this issue with another union who had a similar cafeteria
6 benefits plan. By virtue of that dispute, the City was presented with an opinion of
7 the Department of Labor that clearly set forth the City's obligation to include cash
8 payments in lieu of benefits in calculating "regular rates;" but despite that
9 advanced knowledge of its statutory obligation, the City failed and/or refused to
10 take any action to ensure it accurately paid Plaintiffs.

11 9. Plaintiffs bring this lawsuit to recover for the City's willful violation
12 of the FLSA. Plaintiffs are entitled to recover unpaid overtime for work performed
13 during the entire period of time commencing three years prior to the filing of this
14 lawsuit, as well as, liquidated damages equal to that amount, interest, penalties and
15 attorney's fees, costs, and expenses. Because the City's violation is ongoing,
16 Plaintiffs are also entitled to injunctive relief.

17 **II. PARTIES**

18 10. The City is a political subdivision of the State of California.
19 Defendant is an employer whose employees are engaged in commerce within the
20 meaning of the FLSA. *See* 29 U.S.C. §§ 207(a), 203(d), 203(e)(2)(c). Within three
21 years of filing this Complaint, Defendant City was, and in all but two instances,
22 still is Plaintiffs' employer.

23 11. Plaintiff Erik Baskin resides in the County of San Luis Obispo,
24 California; is employed by the City as an Engineer with the Fire Department; is a
25 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
26 cash in lieu of participation in the City's health insurance program. (MOA, Art.
27 23.) During the applicable statutory time periods, the City did not include that cash
28 payment in Baskin's regular rate of pay for purposes of calculating overtime owed

1 under the MOA and FLSA. The City underpaid Baskin for overtime worked
2 because of its deliberate miscalculation of his regular rate of pay. Baskin sues the
3 City in this consolidated action to recover injunctive relief, wages, liquidated
4 damages, interest, and attorney's fees, costs, and expenses.

5 12. Plaintiff Richard Barrett resides in the County of San Luis Obispo,
6 California; is employed by the City as an Engineer with the Fire Department; is a
7 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
8 cash in lieu of participation in the City's health insurance program. (MOA, Art.
9 23.) During the applicable statutory time periods, the City did not include that cash
10 payment in Barrett's regular rate of pay for purposes of calculating overtime owed
11 under the MOA and FLSA. The City underpaid Barrett for overtime worked
12 because of its deliberate miscalculation of his regular rate of pay. Barrett sues the
13 City in this consolidated action to recover injunctive relief, wages, liquidated
14 damages, interest, and attorney's fees, costs, and expenses.

15 13. Plaintiff Michael Clinite resides in the County of San Luis Obispo,
16 California; is employed by the City as a Captain with the Fire Department; is a
17 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
18 cash in lieu of participation in the City's health insurance program. (MOA, Art.
19 23.) During the applicable statutory time periods, the City did not include that cash
20 payment in Clinite's regular rate of pay for purposes of calculating overtime owed
21 under the MOA and FLSA. The City underpaid Clinite for overtime worked
22 because of its deliberate miscalculation of his regular rate of pay. Clinite sues the
23 City in this consolidated action to recover injunctive relief, wages, liquidated
24 damages, interest, and attorney's fees, costs, and expenses.

25 14. Plaintiff Alec Flatos resides in the County of San Luis Obispo,
26 California; is employed by the City as a Firefighter with the Fire Department; is a
27 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
28 cash in lieu of participation in the City's health insurance program. (MOA, Art.

1 23.) During the applicable statutory time periods, the City did not include that cash
2 payment in Flatos's regular rate of pay for purposes of calculating overtime owed
3 under the MOA and FLSA. The City underpaid Flatos for overtime worked
4 because of its deliberate miscalculation of his regular rate of pay. Flatos sues the
5 City in this consolidated action to recover injunctive relief, wages, liquidated
6 damages, interest, and attorney's fees, costs, and expenses.

7 15. Plaintiff Samuel Ray Fox, II resides in the County of San Luis Obispo,
8 California; is employed by the City as a Captain with the Fire Department; is a
9 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
10 cash in lieu of participation in the City's health insurance program. (MOA, Art.
11 23.) During the applicable statutory time periods, the City did not include that cash
12 payment in Barrett's regular rate of pay for purposes of calculating overtime owed
13 under the MOA and FLSA. The City underpaid Fox for overtime worked because
14 of its deliberate miscalculation of his regular rate of pay. Fox sues the City in this
15 consolidated action to recover injunctive relief, wages, liquidated damages,
16 interest, and attorney's fees, costs, and expenses.

17 16. Plaintiff Steven Gonzalez resides in the County of San Luis Obispo,
18 California; is employed by the City as a Captain with the Fire Department; is a
19 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
20 cash in lieu of participation in the City's health insurance program. (MOA, Art.
21 23.) During the applicable statutory time periods, the City did not include that cash
22 payment in Barrett's regular rate of pay for purposes of calculating overtime owed
23 under the MOA and FLSA. The City underpaid Gonzalez for overtime worked
24 because of its deliberate miscalculation of his regular rate of pay. Gonzalez sues
25 the City in this consolidated action to recover injunctive relief, wages, liquidated
26 damages, interest, and attorney's fees, costs, and expenses.

27 17. Plaintiff Armando Gutierrez resides in the County of San Luis Obispo,
28 California; is employed by the City as a Captain with the Fire Department; is a

1 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
2 cash in lieu of participation in the City's health insurance program. (MOA, Art.
3 23.) During the applicable statutory time periods, the City did not include that cash
4 payment in Gutierrez's regular rate of pay for purposes of calculating overtime
5 owed under the MOA and FLSA. The City underpaid Gutierrez for overtime
6 worked because of its deliberate miscalculation of his regular rate of pay.
7 Gutierrez sues the City in this consolidated action to recover injunctive relief,
8 wages, liquidated damages, interest, and attorney's fees, costs, and expenses.

9 18. Plaintiff Michael Harris resides in the County of San Luis Obispo,
10 California; is employed by the City as an Engineer with the Fire Department; is a
11 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
12 cash in lieu of participation in the City's health insurance program. (MOA, Art.
13 23.) During the applicable statutory time periods, the City did not include that cash
14 payment in Harris's regular rate of pay for purposes of calculating overtime owed
15 under the MOA and FLSA. The City underpaid Harris for overtime worked
16 because of its deliberate miscalculation of his regular rate of pay. Harris sues the
17 City in this consolidated action to recover injunctive relief, wages, liquidated
18 damages, interest, and attorney's fees, costs, and expenses.

19 19. Plaintiff Nicholas Hoover resides in the County of San Luis Obispo,
20 California; is employed by the City as a Firefighter with the Fire Department; is a
21 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
22 cash in lieu of participation in the City's health insurance program. (MOA, Art.
23 23.) During the applicable statutory time periods, the City did not include that cash
24 payment in Hoover's regular rate of pay for purposes of calculating overtime owed
25 under the MOA and FLSA. The City underpaid Hoover for overtime worked
26 because of its deliberate miscalculation of his regular rate of pay. Hoover sues the
27 City in this consolidated action to recover injunctive relief, wages, liquidated
28 damages, interest, and attorney's fees, costs, and expenses.

1 20. Plaintiff John King (“J. King”) resides in the County of San Luis
2 Obispo, California; is employed by the City as an Engineer with the Fire
3 Department; is a member of Local 3523; and is subject to the MOA. Under the
4 MOA, he opted for cash in lieu of participation in the City’s health insurance
5 program. (MOA, Art. 23) During the applicable statutory time periods, the City did
6 not include that cash payment in J. King’s regular rate of pay for purposes of
7 calculating overtime owed under the MOA and FLSA. The City underpaid J. King
8 for overtime worked because of its deliberate miscalculation of his regular rate of
9 pay. J. King sues the City in this consolidated action to recover injunctive relief,
10 wages, liquidated damages, interest, and attorney’s fees, costs, and expenses.

11 21. Plaintiff Michael King (“M. King”) resides in the County of San Luis
12 Obispo, California; is employed by the City as a Captain with the Fire Department;
13 is a member of Local 3523; and is subject to the MOA. Under the MOA, he opted
14 for cash in lieu of participation in the City’s health insurance program. (MOA, Art.
15 23.) During the applicable statutory time periods, the City did not include that cash
16 payment in M. King’s regular rate of pay for purposes of calculating overtime owed
17 under the MOA and FLSA. The City underpaid M. King for overtime worked
18 because of its deliberate miscalculation of his regular rate of pay. M. King sues the
19 City in this consolidated action to recover injunctive relief, wages, liquidated
20 damages, interest, and attorney’s fees, costs, and expenses.

21 22. Plaintiff Jody Larson resides in the County of San Luis Obispo,
22 California; is employed by the City as a Captain with the Fire Department; is a
23 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
24 cash in lieu of participation in the City’s health insurance program. (MOA, Art.
25 23.) During the applicable statutory time periods, the City did not include that cash
26 payment in Larson’s regular rate of pay for purposes of calculating overtime owed
27 under the MOA and FLSA. The City underpaid Larson for overtime worked
28 because of its deliberate miscalculation of his regular rate of pay. Larson sues the

1 City in this consolidated action to recover injunctive relief, wages, liquidated
2 damages, interest, and attorney's fees, costs, and expenses.

3 23. Plaintiff Gregory A. Logan resides in the County of San Luis Obispo,
4 California. Logan was employed by the City's Fire Department within the last
5 three years, but is now retired. He is a member of Local 3523 and subject to the
6 MOA. Under the MOA, he opted for cash in lieu of participation in the City's
7 health insurance program. (MOA, Art. 23.) During the applicable statutory time
8 periods, the City did not include that cash payment in Logan's regular rate of pay
9 for purposes of calculating overtime owed under the MOA and FLSA. The City
10 underpaid Logan for overtime worked because of its deliberate miscalculation of
11 his regular rate of pay. Logan sues the City in this consolidated action to recover
12 injunctive relief, wages, liquidated damages, interest, and attorney's fees, costs, and
13 expenses.

14 24. Plaintiff John MacDonald resides in the County of San Luis Obispo,
15 California; is employed by the City as a Captain with the Fire Department; is a
16 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
17 cash in lieu of participation in the City's health insurance program. (MOA, Art.
18 23.) During the applicable statutory time periods, the City did not include that cash
19 payment in MacDonald's regular rate of pay for purposes of calculating overtime
20 owed under the MOA and FLSA. The City underpaid MacDonald for overtime
21 worked because of its deliberate miscalculation of his regular rate of pay.
22 MacDonald sues the City in this consolidated action to recover injunctive relief,
23 wages, liquidated damages, interest, and attorney's fees, costs, and expenses.

24 25. Plaintiff David Marshall resides in the County of San Luis Obispo,
25 California; is employed by the City as a Captain with the Fire Department; is a
26 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
27 cash in lieu of participation in the City's health insurance program. (MOA, Art.
28 23.) During the applicable statutory time periods, the City did not include that cash

1 payment in Marshall's regular rate of pay for purposes of calculating overtime
2 owed under the MOA and FLSA. The City underpaid Marshall for overtime
3 worked because of its deliberate miscalculation of his regular rate of pay. Marshall
4 sues the City in this consolidated action to recover injunctive relief, wages,
5 liquidated damages, interest, and attorney's fees, costs, and expenses.

6 26. Plaintiff Jarl Nerdrum is a resident of Idaho. In the last three years,
7 Nerdrum worked for the City's Fire Department, but is now retired. He was a
8 member of Local 3523; and prior to his retirement, subject to the 2012-2015 MOA.
9 Under the MOA, he opted for cash in lieu of participation in the City's health
10 insurance program. (MOA, Art. 23.) During the applicable statutory time periods,
11 the City did not include that cash payment in Nerdrum's regular rate of pay for
12 purposes of calculating overtime owed under the MOA and FLSA. The City
13 underpaid Nerdrum because of its deliberate miscalculation. Nerdrum sues the
14 City in this consolidated action to recover injunctive relief, wages, liquidated
15 damages, interest, and attorney's fees, costs, and expenses.

16 27. Plaintiff David Parker resides in the County of San Luis Obispo,
17 California; is employed by the City as an Engineer with the Fire Department; is a
18 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
19 cash in lieu of participation in the City's health insurance program. (MOA, Art.
20 23.) During the applicable statutory time periods, the City did not include that cash
21 payment in Parker's regular rate of pay for purposes of calculating overtime owed
22 under the MOA and FLSA. The City underpaid Parker for overtime worked
23 because of its deliberate miscalculation of his regular rate of pay. Parker sues the
24 City in this consolidated action to recover injunctive relief, wages, liquidated
25 damages, interest, and attorney's fees, costs, and expenses.

26 28. Plaintiff Devin Reiss resides in the County of San Luis Obispo,
27 California; is employed by the City as a Firefighter with the Fire Department; is a
28 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for

1 cash in lieu of participation in the City's health insurance program. (MOA, Art.
2 23.) During the applicable statutory time periods, the City did not include that cash
3 payment in Reiss's regular rate of pay for purposes of calculating overtime owed
4 under the MOA and FLSA. The City underpaid Reiss for overtime worked because
5 of its deliberate miscalculation of his regular rate of pay. Reiss sues the City in this
6 consolidated action to recover injunctive relief, wages, liquidated damages,
7 interest, and attorney's fees, costs, and expenses.

8 29. Plaintiff David Renner resides in the County of San Luis Obispo,
9 California. Renner is employed by the City as a Firefighter with the Fire
10 Department. He is a member of Local 3523 and subject to the MOA. Under the
11 MOA, he opted for cash in lieu of participation in the City's health insurance
12 program. (MOA, Art. 23.) During the applicable statutory time periods, the City
13 did not include that cash payment in Renner's regular rate of pay for purposes of
14 calculating overtime owed under the MOA and FLSA. The City underpaid Renner
15 for overtime worked because of its deliberate miscalculation of his regular rate of
16 pay. Renner sues the City in this consolidated action to recover injunctive relief,
17 wages, liquidated damages, interest, and attorney's fees, costs, and expenses.

18 30. Plaintiff Shayne Skove resides in the County of San Luis Obispo,
19 California; is employed by the City as an Engineer with the Fire Department; is a
20 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
21 cash in lieu of participation in the City's health insurance program. (MOA, Art.
22 23.) During the applicable statutory time periods, the City did not include that cash
23 payment in Skove's regular rate of pay for purposes of calculating overtime owed
24 under the MOA and FLSA. The City underpaid Skove for overtime worked
25 because of its deliberate miscalculation of his regular rate of pay. Skove sues the
26 City in this consolidated action to recover injunctive relief, wages, liquidated
27 damages, interest, and attorney's fees, costs, and expenses.

28

1 31. Plaintiff Mark L. Vasquez resides in the County of San Luis Obispo,
2 California; is employed by the City as a Captain with the Fire Department; is a
3 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
4 cash in lieu of participation in the City's health insurance program. (MOA, Art.
5 23.) During the applicable statutory time periods, the City did not include that cash
6 payment in Vasquez's regular rate of pay for purposes of calculating overtime
7 owed under the MOA and FLSA. The City underpaid Vasquez for overtime
8 worked because of its deliberate miscalculation of his regular rate of pay. Vasquez
9 sues the City in this consolidated action to recover injunctive relief, wages,
10 liquidated damages, interest, and attorney's fees, costs, and expenses.

11 32. Plaintiff James Witt resides in the County of San Luis Obispo,
12 California; is employed by the City as a Firefighter with the Fire Department; is a
13 member of Local 3523; and is subject to the MOA. Under the MOA, he opted for
14 cash in lieu of participation in the City's health insurance program. (MOA, Art.
15 23.) During the applicable statutory time periods, the City did not include that cash
16 payment in Witt's regular rate of pay for purposes of calculating overtime owed
17 under the MOA and FLSA. The City underpaid Witt for overtime worked because
18 of its deliberate miscalculation of his regular rate of pay. Witt sues the City in this
19 consolidated action to recover injunctive relief, wages, liquidated damages,
20 interest, and attorney's fees, costs, and expenses.

21 33. Pursuant to Section 16(b) of the FLSA (29 U.S.C. § 216(b)), the
22 named Plaintiffs herein have executed and hereby file with the Court their consents
23 in writing to become Plaintiffs in this action, which are appended hereto. Should
24 additional plaintiffs similarly situated join this action, their consents will be filed
25 with the Court.

26 34. At all times relevant to this complaint, each Plaintiff named herein has
27 been entitled to the rights, protections and benefits provided under the FLSA.
28 Plaintiffs are non-exempt under 29 U.S.C. section 213. (29 C.F.R. § 541.3(b)(1);

1 *Morrison v. County of Fairfax*, VA, 826 F.3d 758 (4th Cir. 2016) (hourly fire
 2 captains non-exempt); *Mitchell v. Lubin, McGaughy & Assoc.*, 358 U.S. 207, 218
 3 (1958) (FLSA exemptions are to be narrowly construed in order to further
 4 Congress' goal of providing broad federal employment protection).

5 35. During the applicable statutory time periods, Plaintiffs were members
 6 of Local 3523, which is an employee organization within the meaning of
 7 Government Code section 3501(a). At all times relevant, Local 3523 is and was
 8 recognized by the City of San Luis Obispo as the exclusive bargaining
 9 representative of various classifications of the City's Fire Department employees
 10 including, but not limited to, Firefighters, Engineers, and Captains. (MOA, Art. 2;
 11 Appx. A.)

12 **III. JURISDICTION AND VENUE**

13 36. Jurisdiction of this action is conferred on this court by 28 U.S.C.
 14 section 1337 and by 29 U.S.C. sections 216(b) and 217.

15 37. This Court has personal jurisdiction over the City because the City is a
 16 subdivision of the State of California residing in California. *Gray v. Valenzuela*,
 17 No. 2:13-cv-0190, 2013 U.S. Dist. Lexis 16286 (E.D. Cal. 2013).

18 38. The Central District of California is the proper venue for this action
 19 because the City is located in the Central District. 28 U.S.C. § 1391(b)(1). Venue
 20 is also proper because a substantial part of the events or omissions giving rise to
 21 Plaintiffs' claims occurred in the Central District as that is where Plaintiffs are or
 22 were employed. 28 U.S.C. § 1391(b)(2).

23 **IV. FACTUAL ALLEGATIONS**

24 **A. AS EARLY AS 2003, THE CITY KNEW IT SHOULD
 25 HAVE BEEN INCLUDING CASH PAYMENTS IN LIEU
 26 OF BENEFITS IN CALCULATING OVERTIME RATES.**

27 39. The FLSA requires payment for overtime hours under a collective
 28 bargaining agreement at one and half times an employee's regular rate of pay. 29

1 U.S.C. § 207(a)(2). Regular rate is defined as “all remuneration for employment
 2 paid to, or on behalf of, the employee...” 29 U.S.C. § 207(e). The FLSA excludes
 3 remuneration provided to employees under a bona fide plan providing for old-age,
 4 retirement, life, accident, or health insurance or similar benefits for employees. 29
 5 U.S.C. § 207(e)(4).

6 40. The Department of Labor provides guidance in the form of federal
 7 regulations concerning what is a “bona fide plan” for purposes of the FLSA:

8 The plan must not give an employee...the option to receive any part
 9 of the employer’s contributions in cash instead of the benefits under
 10 the plan...[provided, however] That if a plan otherwise qualified as a
 11 bona fide benefit plan under section 7(e)(4) of the Act, it will still be
 12 regarded as a bona fide plan even though it provides, as an incidental
 13 part thereof, for the payment to an employee in cash of all or part of
 14 the amount standing to his credit...during the course of his
 15 employment under circumstances specified in the plan and not
 16 inconsistent with the general purposes of the plan to provide the
 17 benefits described in section 7(e)(f) of the Act.
 18

19 29 C.F.R. § 778.215.

20 41. On July 2, 2003, the United States Department of Labor’s Wage and
 21 Hour Division (“DOL”) issued opinion letter FLSA 2003-4. In that opinion, the
 22 DOL established the conditions under which cash paid to employees under a
 23 cafeteria benefits plan in lieu of benefits should be included in calculations of an
 24 employee’s overtime wage rate. Cafeteria benefits plans specify the payment of a
 25 certain amount of money by the employer for the employee’s election to purchase
 26 benefits, often including health, vision, dental, disability, or life insurance. Under
 27 certain conditions, an employee who opts out of the cafeteria benefit plan may
 28 receive cash back in lieu of benefits.

29 42. The DOL determined that cash in lieu of benefits under cafeteria
 30 benefits plans must be included in the calculation of an employee’s “regular rate of
 31 pay” if the payments are more than incidental. The DOL opined that if such cash
 32 payment was over twenty percent (20%) of the total of the employer’s contribution
 33 for benefits under the cafeteria benefits plan, it was not incidental and should be

1 included in calculating the employee's regular rate of pay. Such payments are not
2 made pursuant to a bona fide plan, and therefore, not exempt from inclusion under
3 29 C.F.R. section 778.215(a) ("Section 778.215").

4 43. In 2003, the City was provided with DOL Opinion Letter FLSA 2003-
5 as part of a dispute with the San Luis Obispo Police Officers' Association
6 ("SLOPOA") over the same issue. The SLOPOA is the bargaining representative
7 for the City's non-sworn Police Department employees. In 2003, the City and
8 SLOPOA's MOA contained a cafeteria benefits plan that did not qualify as *bona*
9 *fide* benefits plan under Section 778.215 because it permitted employees to receive
10 over 24 percent (24%) of the total contributions in cash for opting out of the City's
11 health insurance. Therefore, the cash payments were more than incidental and the
12 City should have been including them in the calculation of SLOPOA members'
13 overtime pay rates.

14 44. In the DOL's July 2003 opinion letter, which was provided to the City
15 and used by SLOPOA, its 2003-2005 grievance and arbitration described what an
16 incidental cash payment is under a benefits plan. That opinion specified that if the
17 cash payment is more than twenty percent (20%) of the employer's total
18 contribution amount under the cafeteria plan, it is not incidental, and therefore the
19 cash payment should be included in overtime calculations.

20 45. Although the City was provided with a copy of said DOL letter, the
21 City nevertheless refused to voluntarily change its overtime formula to include cash
22 payments in lieu of benefits. SLOPOA filed a grievance in October 2004 and the
23 dispute between the parties was submitted to arbitration. The arbitrator did not
24 decide the merits of the grievance because he concluded he did not have
25 jurisdiction. However, by virtue of DOL Opinion Letter FLSA 2003-4, the City
26 was put on notice that it was obligated to include non-incidental cash payments
27 made under cafeteria benefits plans in calculating regular rates of pay of its
28 employees.

1 **B. THE MOA ALLOWED FOR A SUBSTANTIAL CASH**
 2 **PAYMENT IN LIEU OF BENEFITS**

3 46. Local 3523 and the City entered into a Memorandum of Agreement
 4 ("MOA") effective January 1, 2012 through December 31, 2015. A true and
 5 correct copy of the MOA is attached hereto as Exhibit "B". The MOA requires the
 6 City provide Firefighters, Engineers, and Captains overtime for hours worked in
 7 excess of the employees' regular schedule at a rate of 1.5 times the employees'
 8 regular rates of pay. (Ex. B, MOA, Art. 17.)

9 47. The MOA also provides benefits under a cafeteria benefits plan.
 10 Under the MOA, the City contributed \$424.50 bi-monthly for the purchase of
 11 health, dental, vision, and disability insurance ("Plan"). (MOA, Art. 23.) That
 12 amount can increase if the cost of available insurance plans increases. (*Id.*)

13 48. If the employee has medical insurance through some other means, like
 14 their spouse's employer, the Plan provides the employee the option of receiving
 15 cash back as follows:

16 The City has elected to participate in the PERS Health Benefit
 17 program with the "unequal contribution option" at the Minimum
 18 Employer Contribution rate, currently \$112.00 per month for active
 19 employees and \$106.40 per month for retirees. The City's
 20 contribution toward retirees shall be increased by five (5%) percent
 21 per year of the City's contribution for the active employees until such
 22 time as the contribution for employees and retirees are equal. The
 23 City's contribution will come out of that amount the City currently
 24 contributes to employees as part of the Cafeteria Plan provided to
 25 employees in their various MOA's. The cost of the City's
 26 participation in PERS will not require the City to expend additional
 27 funds toward health insurance beyond what is already provided for in
 28 the various bargaining agreements. In summary, the cost and any
 increases will be borne by the employees.

24 (MOA, Art. 23(B).)

25 49. In November 2016, the City and Local 3523 entered into a new
 26 memorandum of agreement that has similar provisions concerning overtime and
 27 benefits.

1 50. The City is required to follow the terms of the MOA. 29 C.F.R.
2 §778.102. The MOA is also subject to all applicable laws, including the FLSA.

3 **C. PLAINTIFFS WERE UNDERPAID FOR OVERTIME**

4 51. Within the three years prior to the filing of this Complaint, Plaintiffs,
5 and each of them:

- 6 a. Worked overtime;
- 7 b. Opted out of health insurance through the City in favor of a cash
8 payment under the MOA;
- 9 c. Were compensated for overtime at 1.5 times their base regular
10 rates of pay; but,
- 11 d. Were under compensated for overtime because the City did not
12 include the amount of the cash payments Plaintiffs received due
13 to opting out of health insurance when it calculated their regular
14 rates of pay.

15 **D. THE CITY'S VIOLATION OF THE FLSA WAS WILLFUL**

16 52. Under the FLSA, a violation is willful if the employer knew or showed
17 reckless disregard for the matter of whether its conduct was prohibited by the
18 FLSA. *Flores, supra*, 824 F.3d at 906. An employer's violation is willful when it
19 is on notice of its FLSA requirements, yet takes no affirmative action to assure
20 compliance with them. *Id.*

21 53. The City's conduct was willful because:

- 22 a. The City actually knew it was violating the FLSA by virtue of
23 the DOL's July 2003 opinion letter which was sent to the City
24 and used by SLOPOA its 2003-2005 grievance and arbitration;
25 and
- 26 b. The City failed to ensure compliance, which is a sufficient basis
27 to support a finding of willful conduct.

28 See *Flores, supra*, 842 F.3d at 892.

54. The City knew, and intentional and deliberately disregarded, for over a decade, that it should have included the cash payments in calculating the Plaintiffs' overtime rate of pay. *Flores, supra*, 842 F.3d at 892.

55. The cash payments provided to Plaintiffs in lieu of benefits under the MOA are not an incidental portion of the City's total benefits contribution as they amount to almost the entirety of the employer's total contribution amount under the cafeteria plan.

8 56. Since 2003, the City knew that if it paid employees greater than twenty
9 percent (20%) of its total contribution in cash it needed to include those amounts in
10 overtime rates pursuant to the July 2003 DOL opinion. It was fully aware that the
11 MOA between it and Local 3523 provided for cash payments in excess of twenty
12 percent (20%) of its total contributions for those opting out of health insurance.
13 However, the City willfully, deliberately and intentionally disregarded the law for
14 calculating overtime rates paid to Plaintiffs by excluding cash payments in lieu of
15 benefits.

16 57. The City's failure to include cash paid in lieu of benefits in the
17 calculation of Plaintiffs' regular rate of pay was willful, meaning that the three-year
18 statute of limitations applied and Plaintiffs are entitled to liquidated damages.
19 *Flores, supra*, 824 F.3d at 906; *see also* 29 U.S.C. §§ 216(b), 255(a).

**Violation of the Fair Labor Standards Act,
Failure to Pay Overtime Wages
29 U.S.C. § 207(a)(2)**

23 58. All above allegations are incorporated by reference as though set forth
24 here.

25 59. The City is engaged in commerce and the production of commerce
26 within the meaning of the FLSA. *See* 29 U.S.C. § 207(a)(1).

27 60. Firefighters, Captains, and Engineers are non-exempt employees under
28 the FLSA and are entitled to overtime wages at 1.5 times their regular rate of pay.

1 29 U.S.C. § 207(a)(2).

2 61. Plaintiffs, and each of them, have, during the applicable statutory time
3 periods, performed work for which they have not been compensated as required
4 under the FLSA. Plaintiffs worked overtime hours under the MOA within three
5 years of filing this Complaint.

6 62. Specifically, Plaintiffs were compensated for overtime hours at their
7 base regular rate of pay, without including the cash payments made by the City in
8 lieu of health insurance benefits. The City is required to include those payments in
9 calculating the regular rate of pay owed to Plaintiffs under the MOA for overtime
10 hours worked. *Flores, supra*, 824 F.3d at 903.

11 63. The failure of the City to compensate Plaintiffs at one and one-half
12 times the Plaintiffs' regular rate for such excess hours is a violation of Section 7 of
13 the FLSA. Such violation is redressable by the Plaintiffs as affected employees
14 under Section 16(b) of the FLSA.

15 64. Plaintiffs, and each of them, have, during the applicable statutory time
16 periods, performed work for which they have not been compensated as required
17 under the FLSA. More particularly, each Plaintiff has worked in excess of the
18 statutory maximum number of hours provided in the FLSA without receiving
19 compensation for such excess hours at a rate of one and one-half times the regular
20 rate at which each Plaintiff is employed.

21 65. The City's failure and/or refusal to accurately calculate Plaintiffs'
22 regular rate of pay resulted in significant underpayment for overtime hours worked.
23 The employment and work records for Plaintiffs are in the exclusive possession,
24 custody and control of the City. Therefore, Plaintiffs are unable to state precisely
25 at this time the amounts owed to them as a result of the City's violation of the
26 FLSA. However, the City is under a duty imposed by FLSA and the United States
27 Department of Labor to maintain and preserve payroll and other employment
28 records with respect to Plaintiffs from which the amount of the City's liability can

be ascertained. 29 U.S.C. § 211(c). Plaintiffs can seek leave of Court to amend the Complaint to insert the exact sums owing to Plaintiffs when the same is ascertained.

4 66. The City knew the cash payments in lieu of benefits should have been
5 included in Plaintiffs' regular rate, but purposefully failed and/or refused to include
6 them, even though it had actual knowledge of its obligation by virtue of the dispute
7 over the same issue that arose with SLOPOA, who had a similar cafeteria benefits
8 plan.

9 67. The City's failure and/or refusal to pay Plaintiffs for overtime at the
10 correct rates is an ongoing violation of the FLSA. The City will continue to violate
11 the FLSA unless enjoined and restrained by the Court. Plaintiffs request injunctive
12 relief to remedy the City's continuing unlawful conduct.

13 68. Plaintiffs are entitled to recover the overtime wages that the City
14 intentionally avoided paying. The City's willful violation also entitles Plaintiffs to
15 liquidated damages under the FLSA and three years' worth of back-owed overtime
16 wages. Additionally, Plaintiffs are entitled to recover interest and their attorney's
17 fees, costs, and expenses.

PRAYER

19 || Wherefore, Plaintiffs pray:

20 1. For Judgment declaring that the Defendant has willfully, recklessly, and
21 wrongfully violated their statutory and legal obligations, and deprived each Plaintiff
22 of his/her rights, protections, and entitlements under federal law, as alleged herein;

23 2. For Judgment enjoining and restraining Defendant, its officers, agents,
24 servants, employees, and attorneys, and all persons acting or claiming to act in
25 Defendant's behalf and interest, from violating the provisions of FLSA, both
26 permanently and during the pendency of this action;

27 3. For an Order for a complete and accurate accounting of all the
28 compensation to which Plaintiffs are entitled;

4. For Judgment against Defendant awarding each Plaintiff monetary damages in the form of back pay compensation in a sum according to proof, together with an equal sum of liquidated damages as provided under the FLSA, and interest on all amounts awarded;

5. Injunctive relief preventing the City from continuing to underpay Plaintiffs for overtime hours worked;

6. An award of penalties and injunctive relief pursuant to Section 226;

7. For pre-judgment interest to the extent permitted by law;

8. An award of reasonable attorney's fees;

9. For the costs incurred in filing and prosecuting this action under the FLSA and Section 226(g); and

12 || 10. For such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

15 Pursuant to Federal Rule of Civil Procedure 38, Plaintiffs demand a jury trial
16 concerning all issues arising from this Complaint.

18 | Dated: November 30, 2016

HAYES & ORTEGA, LLP

By: s/ Dennis J. Hayes
DENNIS J. HAYES
TRACY J. JONES

Attorneys for Plaintiffs