

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

**PATRICK CHAVEZ, JEANNINE CHAVEZ,  
RUDY CAMPOS, MICHAEL COCCHIOLA,  
and FORTINO ORTEGA  
on behalf of themselves and all other  
City employees who have been paid  
overtime that was improperly determined  
under 29 U.S.C.A. § 207(a)(1) (Section  
7(a)(1) of the Fair Labor Standards Act),**

**Plaintiffs,**

**v.**

**CIV 02-0562 JH/ACT**

**CITY OF ALBUQUERQUE**

**Defendant.**

**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

Defendant, City of Albuquerque, ("Defendant"), pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1 submits its Response to Plaintiffs' Motion for Summary Judgment.

**I. Introduction**

This is not a case involving a waiver of rights under the Fair Labor Standards Act ("FLSA" or the "Act") or a case involving novel interpretations of the Act. Rather, as is readily apparent from Plaintiffs' Cross-Motion For Summary Judgment and Plaintiffs' Response to the City's Motion For Summary Judgment, this case involves Plaintiffs' misunderstanding of not only the City of Albuquerque's (the "City") position but also basic tenants of the FLSA.<sup>1</sup>

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<sup>1</sup> The City's cites to the parties' respective filings as follows: Plaintiffs' Second Amended Complaint as "Pls' 2<sup>nd</sup> Amend. Cmplt., ¶\_\_"; the City's Motion for Summary Judgment, Undisputed Material Facts as "Def.'s Undisputed Stmt. of Facts, ¶\_\_," the City's Motion for Summary Judgment as "Def.'s Mot. For Sum. Judg., p. \_\_," Plaintiffs' Response to the City's Motion for Summary Judgment as "Pls' Response, p. \_\_," Plaintiffs' Statement of Additional

Contrary to Plaintiffs' attempts at misdirection, the City has never argued that Plaintiffs waived or traded their rights under the FLSA by virtue of the unions' collective bargaining agreements or any other agreements. The City is obligated to compensate its employees as required by the FLSA and does just that. Tellingly, Plaintiffs fail to understand that additional payments above and beyond those required by the FLSA are not only permitted but also, in contemplating such payments, the FLSA specifically permits the City to offset (*i.e.*, credit) these additional premium payments against its FLSA obligations. There is absolutely nothing unauthorized or unprecedented about the City's pay practices.

Notwithstanding the abundance of authority supporting the City's pay practices, Plaintiffs misinform the Court through citation to fluctuating workweek cases and salary basis regulations. It is undisputed that the non exempt Plaintiffs which is all this case is about are paid at hourly rates for all hours worked and not annual salaries. Simply put, Plaintiffs' contentions regarding the fluctuating workweek are nothing more than a red herring.

Plaintiffs additionally attempt to misdirect this Court through improper reliance upon the legal conclusions of their purported legal expert in direct contradiction to this Court's prior Order. This Court has already ruled that Judith Wagner lacked the requisite qualifications for rendering legal opinions concerning the City's compliance with the FLSA. *See* 9/26/06 Order, p. 2. As such, Plaintiffs' numerous incorrect, improper legal conclusions attributed to Wagner must be disregarded.

Setting aside Plaintiffs' ostensible attempts to confound the legal issues at hand, the undisputed material facts prove that the City: (1) properly utilizes a FLSA approved formula in

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Material Facts as "Pls' Stmt of Additional Facts ¶\_\_;" the Plaintiffs' Motion for Summary Judgment as "Pls' Mot. For Sum. Judg., p. \_;" the Plaintiffs' Statement of Undisputed Material Facts as "Pls' Stmt of Facts, ¶\_\_."

calculating regular rates of pay; (2) properly includes all required remunerations in calculating regular rates of pay under the FLSA; and (3) properly credits contractual premium payments against statutory overtime payments as provided for under the FLSA.

For these reasons, as further explained below, and those set forth in the City's Motion for Summary Judgment and Reply in support thereof, the City is entitled to judgment as a matter of law and Plaintiffs' motion must be denied.

## **II. The City's Response To Plaintiffs' Statement of Undisputed Facts**

### **A. Plaintiffs' References To Judith Wagner Must Be Disregarded.**

Plaintiffs' Statement of Facts almost exclusively, and improperly, relies upon Judith Wagner's expert report and her deposition testimony. In ruling on motions for summary judgment, a court necessarily may consider only the evidence that would be available at trial. *See Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1216 (10th Cir. 2004) (affirming summary judgment, in light of the available evidence, because "verdicts may not be based on speculation or inadmissible evidence or be contrary to uncontested admissible evidence"). Here, this Court's prior Order specifically found that Plaintiffs' purported expert Judith Wagner ("Wagner") lacked the requisite qualifications for rendering legal opinions concerning the City's compliance with the FLSA and thus, would not be permitted to proceed as an FLSA expert at trial. *See* 9/26/06 Order, p. 2. (Docket No. 197) Despite this clear ruling, Plaintiffs' Statement of Material Facts cites to Wagner "to assist in determining whether or not [the City's calculations of overtime pay] is consistent with the FLSA." *See* Pls' Stmt of Facts ¶1. In their Statement of Facts ¶¶ 1, 9, 10, 11, 12, 14, and 15, Plaintiffs continue to cite to Wagner's Deposition and her purported Expert Report for "legal opinions." Accordingly, Plaintiffs' Facts

¶¶ 1, 9, 10, 11, 12, 14, and 15 are improper and should not be considered in determining the present motion.

**B. The Parties Agree That There Are No Material Facts At Issue And the Court May Decide This Suit As A Matter Of Law.**

Plaintiffs specifically admit that there are no issues of material fact. Plaintiffs concede that the City calculates overtime pay as set forth in its Motion for Summary Judgment and the City's examples set forth therein. *See* Plfs' Mot. Sum. Judg, pp. 5-7; Plfs' Response, pp. 3-4 (conceding that Plaintiffs only dispute Def.'s Undisputed Stmt. of Facts ¶¶ 27, 28, 30, and 31). *See also* Local Rule 56(b) ("all material facts set forth in the statement of the movant will be deemed admitted unless specifically controverted" and "with particularity"). By way of summary, the Parties agree, and hence there are no disputed issues of material fact as to the following:

- The City makes overtime payments in accordance with negotiated collective bargaining agreements with its employees' unions (or in the case of non-union represented employees, the City's written pay policies) or statutory requirements, whichever yields the greater amount for the employee in each workweek. *See* Def.'s Undisputed Stmt of Facts, ¶¶10 – 12, 22. *See also* Pls' Stmt of Facts, ¶¶ 2, 4, 5, and 6.
- The City makes payments under these union negotiated agreements that are in addition to the payments required by the FLSA. *See* Pls' Stmt of Facts ¶¶ 6 and 8; Def.'s Undisputed Stmt of Facts, ¶¶ 13, 21, and 24 (explaining calculations as to fire and police personnel).
- In determining overtime pay under the FLSA, if an employee's actual hours of work exceed forty or if a fire protection and law enforcement employee's ratio of the number of hours worked to the number of days in the work period exceeds the applicable standard under Section 7(k), the City calculates the employee's statutory overtime pay entitlement. *See* Def.'s Undisputed Stmt of Facts, ¶24.
- For employees categorized as exempt and thus not entitled to overtime pay under the FLSA, such as Plaintiff Chavez who is paramedic lieutenant, compensation is calculated only pursuant to the terms of applicable collective bargaining agreements. *See* Def.'s Undisputed Stmt of Facts, ¶26 and Pls' Stmt of Facts, ¶9.

- The City's FLSA calculations are based upon a manual entitled "State and Local Government Employees Under the Fair Labor Standards Act" issued by the Employment Standards Administration, Wage and Hour Division of the Department of Labor as a guideline as FLSA overtime pay calculations. Additionally, the City relied upon the specific examples set forth in Department of Labor Regulations. *See* Def.'s Undisputed Stmt of Facts, ¶25.
- Examples of the City's overtime calculations for contractual overtime and FLSA overtime are set forth in Def.'s Undisputed Stmt of Facts, ¶¶29-30. *See also* Pls' Stmt of Facts, ¶ 13 (incorporating the City's Undisputed Stmt of Facts, ¶¶ 28 – 30).
- Once overtime is calculated under both the FLSA and the applicable negotiated union agreements, the City compares the employee's compensation under the applicable contract or City policy with that due under the Act and pays the employee the greater amount between the two. Def.'s Undisputed Stmt of Facts, ¶¶31-32 and Pls' Stmt of Facts, ¶6.
- If the FLSA requires an additional amount beyond what has already been paid that amount is reflected in the form of an adjustment designated as "FLSA" pay on the employee's paycheck. *See* Def.'s Undisputed Stmt of Facts, ¶31.<sup>2</sup>
- The City's expert, Lloyd Hill -- a 43 year Department of Labor veteran and the former DOL Assistant District Director -- determined that the City's method of pay was proper under the FLSA. Def.'s Undisputed Stmt of Facts, ¶3.

To the extent that Plaintiffs' Wagner references are not disregarded or otherwise stricken, the City denies and disputes Plaintiffs Statement of Facts, ¶¶ 1, 9, 10, 11, 12, 14, and 15 as wholly inaccurate statements of the law and contrary to Plaintiffs' own concessions regarding the City's calculation of overtime pay. Notwithstanding Plaintiffs' admissions as to the City's calculation method and Wagner's lack of legal expertise in this area, Wagner concludes that the City's methodology is not consistent with the Act. Pls' Statement of Facts, ¶14. Although Plaintiffs are paid hourly for all hours worked, including those hours over forty, Wagner erroneously concludes that the law requires that overtime be paid at 2.5 times Plaintiffs' regular

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<sup>2</sup> The only "dispute" that Plaintiffs have with Def.'s Undisputed Stmt of Facts, ¶ 30 is whether the calculations set forth therein are "correct" and ¶ 31 is the statement that "no further payment is required." *See* Pl.'s Response, p. 4.

rate of pay. *See, e.g.*, Pls' Statement of Facts, ¶15. Wagner's conclusions and calculations fly in the face of the FLSA's requirements. *See also*, Section II. A, *supra*.<sup>3</sup>

### **III. The City Properly Calculates "Regular Rates" And Overtime Premiums Pursuant To The FLSA.**

#### **A. The Only Legal Issue Is Whether The City Violated The FLSA And Not Legal Issues Concerning Applicable Collective Bargaining Agreements.**

As the City explained in its Motion for Summary Judgment and Reply in support thereof, Plaintiffs utterly misstate the legal relationship between collective bargaining agreements and the FLSA. The case at hand is not one grounded in contract or brought pursuant to a breach of collective bargaining agreement. Rather, the instant case is solely premised upon alleged violations of the FLSA. *See generally*, 2<sup>nd</sup> Amend. Cmpt. (entitled "Complaint For Violations Of The Fair Labor Standards Act"). Without any legal support (because none exists), Plaintiffs assert that "the FLSA and the City's rules and agreements with its unions require it to pay overtime that includes both the requirements of the FLSA and the terms of the contracts." *See* Plaintiffs' Response, p. 7. *See also* Plfs' Mot. For Sum. Judg., p. 10. Accordingly, Plaintiffs ask this Court to determine whether the City "violates the contracts." *See* Plfs' Mot. For Sum. Judg., p. 9. Whether the City is in violation of an applicable collective bargaining agreement is not a matter before this Court. Plaintiffs' request arises from the fallacy that a collective bargaining agreement may alter the City's obligations under the FLSA, a conclusion that Plaintiffs themselves deny.

#### **1. The FLSA does not provide a vehicle for breach of contract or violation of collective bargaining agreement claims.**

As a threshold matter, the FLSA does not contain a provision authorizing enforcement of a collective bargaining agreement. As such, whether or not Plaintiffs were properly

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<sup>3</sup> Although not material to the issues of this case, the City denies Plaintiffs' Statement of Facts, ¶3 the normal workweek for most City employees is not generally 40 hours per week.

compensated pursuant to a collective bargaining agreement or some other agreement are claims that are not properly before this Court and must be summarily dismissed. *See Fernandez v. Centerplate/NBSE*, 441 F.3d 1006, 1010 (D.C. Cir. 2006) (granting summary judgment for defendant employer where plaintiff asserted a FLSA violation on grounds that defendant did not pay her overtime compensation for hours worked over eight in a day in violation of an agreement with her union); *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 333 (N.D.Ill. 2000) (“To the extent the officers contend the collective bargaining agreement entitles them to more than the FLSA, this is not the appropriate forum for decision”). Indeed, the City Labor Board has exclusive jurisdiction to hear allegations that the City has violated the terms of a collective bargaining agreement with one of its employees’ unions. *See generally*, Albuquerque Labor-Management Relations Ordinance. The Federal Court in past litigation involving the City and one of Plaintiffs’ attorneys, Paul Livingston, has already so ruled. *See UTU Local 1745 v. Albuquerque* October 3, 2001 Order, attached hereto as Exhibit A.

As with its veiled breach of contract claim, Plaintiffs’ purported violation of public policy is merely a restatement of its argument that collective bargaining agreements may alter the FLSA requirements and even apart from this restatement, it is not properly before this Court and must be dismissed as a matter of law. Where, as here, the FLSA provides an adequate remedy at law (*i.e.*, payment of wages lost, liquidated damages, attorney fees, and costs), any state public policy claim is precluded as a matter of law. *See Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1399 (10th Cir. 1997) (affirming dismissal of public policy claim in FLSA retaliation case).

**2. Collective bargaining agreements do not alter an employer’s FLSA obligations.**

Plaintiffs incorrectly imply that applicable collective bargaining agreements or other agreements alter the City’s obligations under the FLSA. A collective bargaining agreement

cannot alter the City's obligations under the FLSA, a conclusion that Plaintiffs themselves admit in other sections of their argument. *See Dufrene v. Browning-Ferris, Inc.*, 207 F.3d 264, 269 (5th Cir. 2000) (affirming summary judgment for defendant employer where plaintiffs claimed that since the collective bargaining agreement required overtime after eight hours in a day, the FLSA also required overtime pay after an eight-hour day; in so holding, the court stated that "this dispute concerns, at best, a violation of the collective bargaining agreement, not the FLSA"). *See also Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740-41, 101 S. Ct. 1437, 1444-45 (1981) ("we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation agreement); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 463, 68 S. Ct. 1186, 1196 (1948) ("nothing to our knowledge in any act authorizes us to give decisive weight to contract declarations as to the regular rate because they are the result of collective bargaining"); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 167, 65 S. Ct. 1063, 1067 (1945) ("employees are not to be deprived of the benefits of the Act simply because they are well paid or because they are represented by strong bargaining agents"). *Accord Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424-25, 65 S. Ct. 1242 (1945) ("Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts").<sup>4</sup>

The FLSA's general prohibition against waivers (or "trades") was echoed by the City's expert, who explained that a collective bargaining agreement's requirements cannot alter an employer's obligations under the FLSA. *See* Def.'s Undisputed Stmt of Facts, ¶¶ 21, 23, (Hill

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<sup>4</sup> Plaintiffs' arguments regarding determination of "artificial" regular rates is addressed herein, pp. 10-11, *infra*.

Dep. at 36, 55). On account of this fundamental FLSA tenet, and in order to ensure compliance with the FLSA, the City calculates FLSA overtime separate and apart from contractual overtime under collective bargaining agreements for each and every pay period. *See* Def.'s Undisputed Stmt of Facts, ¶¶ 10 – 12, 24-25, 29-30. Once both calculations are complete, the City compares the employee's compensation under the applicable contract or City policy with the amount as calculated under the FLSA. *Id.* at ¶ 31. Then, as Plaintiffs admit, the City pays the employee the greater amount between the two calculations. *Id.* *See also* Pls' Stmt of Facts, ¶6

Although a collective bargaining agreement cannot alter an employee's FLSA rights, the FLSA specifically provides that certain payments made pursuant to collective bargaining agreements may offset the amounts otherwise due to an employee pursuant to the FLSA. *See* Section IV, *infra*, p. 19 (explaining permitted offsets (*i.e.*, credits) and the City's proper use of the same). With regard to City employees, if the City's FLSA calculation indicates that the employee in question is entitled to more than what the collective bargaining, contract calculation yields, then the City pays the employee the FLSA amount and that amount is reflected in the form of an adjustment designated as "FLSA" pay on the employee's paycheck. *See* Def.'s Undisputed Stmt of Facts, ¶¶ 10 – 12, 24-25, 29-30.

Plaintiffs do not deny that additional amounts are reflected in the form of an adjustment on employees' paychecks. Rather, Plaintiffs misinterpret the adjustment as meaning the City does not pay employees pursuant to the FLSA. As explained herein, the City's Motion For Summary Judgment, and the City's Reply in Support of its Motion For Summary Judgment, Plaintiffs misinterpretation is just that – a misinterpretation.

The case, *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 330 (N.D.Ill. 2000), is particularly instructive. In *Nolan*, plaintiff police officers brought an action against defendant

municipality alleging FLSA violations by defendant for its failure to properly include various remunerations in calculating overtime pay. There, defendant admitted that in calculating the FLSA regular rate of pay, it improperly excluded the duty availability payments; however, defendant argued that it was entitled to credit other amounts it paid under the parties' collective bargaining agreement against the amounts it owed under the FLSA. *Id.* at 326-27. Defendant sought credits for extra compensation for overtime payments made where plaintiffs worked more than eight hours in a day, or worked on holidays, or worked on scheduled days off, or on a sixth or seventh day or outside the employee's normal tour of duty. *Id.* at 330. Plaintiffs asserted that defendant should not be allowed to offset its FLSA liability because defendant failed to include the duty availability allowance in the calculation of the regular rate of pay under the FLSA. *Id.* In so arguing, the plaintiffs reasoned that by improperly calculating the FLSA regular rate, the plaintiffs were underpaid pursuant to both the collective bargaining agreement and the FLSA. *Id.* The Court rejected plaintiffs' argument and explained that it was "dealing only with the City's obligations under the FLSA, not whether it violated the CBA." *Id.* The Court further held that pursuant to the FLSA, defendant was entitled to a credit of the amounts it paid under the collective bargaining agreement against its FLSA obligations. *Id.* The *Nolan* case is an example of the interplay between collective bargaining agreements and the FLSA.

In sum, the FLSA does not provide a vehicle for employees to pursue breach of collective bargaining agreements; collective bargaining agreements do not alter an employer's obligations under the FLSA; however, the FLSA does permit certain offsets for premium payments under the FLSA. Consequently, the only issue at hand is whether the City compensates its employees at least as much as is required by the FLSA. The answer to that question is a resounding yes.

**B. The City's FLSA "Regular Rate" Calculations Include All Required Remunerations**

Despite Plaintiffs' red herrings, the types of remunerations that the City includes in calculating regular rates of pay pursuant to the FLSA remains undisputed. Section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times an employee's "regular rate." "Regular rate" is defined to include "all remuneration for employment paid to, or on behalf of, the employee . . ." *with seven exceptions*. 29 U.S.C. § 207(e). The FLSA's exceptions include gifts; payments made for occasional periods when no work is performed; discretionary bonuses, extra compensation provided as an overtime premium; extra compensation provided by a premium rate paid for work on Saturdays, Sundays, holidays, or regular days of rest; extra compensation provided by a premium rate paid pursuant to an employment contract or collective-bargaining agreement; discretionary bonuses; and holiday pay. *Id.* Plaintiffs' conclusion that the City does not include all required remuneration contradicts their admissions as to the facts of this case. Additionally, their contention is based upon incomplete, unauthenticated documents and circular, incomprehensible arguments that "overtime payments appear to be made at different rates of pay" and therefore, do not include all "overtime adjustments."

**1. The City includes all required compensation in calculating regular rates of pay.**

Plaintiffs concede that the City includes shift differential pay, longevity pay, super-longevity pay, bilingual pay, educational pay, and firearms qualifications in its calculation of the regular rate to be used for purposes of paying time-and-a-half pursuant to the FLSA. *See* Def.'s Undisputed Stmt of Facts, ¶¶ 28-31 (citing to (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25; 44)). *See also* Plfs' Mot. For Sum. Judg., pp. 23-24.

On the other hand, payments for vacation days, sick days and other fringe benefits are not "other compensation" and hence, the City properly excludes such payments from the regular rate. *See* 29 C.F.R. § 778.200 (for calculating regular rate for overtime pay, payments for vacation, holiday, illness, retirement, health insurance, or similar benefits are not compensation). Contrary to Plaintiffs' unsupported assertions, holiday pay is properly excluded from an employee's regular rate of pay even if such employee performs work on the holiday in question. 29 C.F.R. § 778.219(a) provides that holiday or vacation pay may be excluded in calculating an employee's FLSA regular rate where the employee is entitled to a paid holiday or vacation but foregoes his time off for the holiday or vacation, performs work for the employer, and is paid at his customary rate (or higher) for hours worked on the holiday or vacation day plus the holiday or vacation pay. The additional specified sum received as holiday or vacation pay may be excluded from the regular rate. *Id.* Accordingly, the City properly excludes such payments. *See also* DOL Opinion Ltr., 2006 DOLWH LEXIS 34 (July 24, 2006) (deciding that holiday payments made to firefighters when they forego holidays are not considered compensation for hours of work, and therefore, need not be included in the regular rate of pay for purposes of computing overtime compensation pursuant to FLSA section 7(e)(2)).

Similarly, the City properly excludes discretionary bonuses, such as the one time "mayoral bonus" paid to employees in October or November 2003. *See* Def.'s Revised Supplemental Response to Pls' First Set of Interrogatories, attached to Def.'s Reply, Exhibit A. *See also* Pls' Response, p.22. It is undisputed that such a bonus had not been paid before nor after the one in question. As the statute specifically provides, discretionary bonuses are properly excluded from an employee's regular rate of pay. 29 USCS § 207(e). A bonus is discretionary within the meaning of the Act if the employer retains discretion both as to the fact of the

payment and the amount of payment. *See* 29 C.F.R. 778.211(c). The mayoral bonus was purely discretionary as it was a one time payment, made at the behest of the mayor, at his discretion for unusual, unexpected and non recurring reasons. *See* Def.'s Revised Supplemental Response to Pls' First Set of Interrogatories, Exhibit 21, attached to Def.'s Reply, Exhibit A.

**2. Plaintiffs' incomplete, unauthenticated documents and circular, incomprehensible arguments cannot create issues of material fact.**

In an attempt to counter the foregoing undisputed facts, Plaintiffs merely speculate as to amounts attributed to certain notations on several employee payroll records. *See* Plfs' Response Exhibits 5-8. Plaintiffs' diversion techniques can neither create issues of material fact nor support Plaintiffs' claim that they are entitled to judgment as a matter of law.

First, the payroll documents relied upon by Plaintiffs are not only unauthenticated but also, are incomplete insofar as they fail to show the employee's identity, the position in question, and any of the explanatory or supporting data. Where, as here, Plaintiffs fail to authenticate or otherwise establish a foundation for the attachments and conclusions drawn from such documents, the Court should not consider the documents. *See Schlusser-Womack v. Chickasaw Tech. Prods.*, 116 Fed. Appx. 950, 953 (10<sup>th</sup> Cir. 2004) (refusing to consider plaintiff's attached documents allegedly containing admissions by defendant where, except for counsel's statement in the brief, the documents were not authenticated); *Harris v. Beneficial Okla., Inc.*, 209 B.R. 990, 993, 995-97 (10th Cir. 1997) (disregarding documents where the court "had no way to test the genuineness of the documents as they were in no way identified by a witness for [the offering party]").

Second, even if not disregarded, the documents upon which Plaintiffs rely do not support their contentions. For instance, Plaintiffs refer to overtime payments for "OT MVD HEAR" and "OT FOR TIME" but fail to adduce evidence or to explain how such notations show that the City

did not include all required remunerations in calculating the regular rate. Their conclusory allegations without supporting evidence are insufficient to create a material issue of disputed fact. *See L & M Enters. v. BEI Sensors & Sys. Co.*, 231 F.3d 1284, 1287 (10th Cir. 2000) ("[u]nsupported conclusory allegations . . . do not create a genuine issue of fact" sufficient to survive summary judgment).

While Plaintiffs only offer speculation and conjecture, the City has produced specific evidence explaining how it calculates FLSA overtime premiums and showing that it includes all required remuneration in calculating employees' regular rates of pay. *See* Def's Mot. For Sum. Judg., Undisputed Material Facts, ¶¶ 22-32. *See also* Plfs' Response, pp. 3-4 (conceding that Plaintiffs only dispute Def.'s Undisputed Stmt. of Facts ¶¶ 27, 28, 30, and 31). Accordingly, even if Plaintiffs' speculation derived from their unauthenticated documents is considered, such conjecture does nothing to counter the City's evidence that it calculates regular rates in accordance with the FLSA.

**C. The City's FLSA "Regular Rate" Properly Divides All Remunerations By An Employee's Total Hours Worked.**

In completing its calculation of the FLSA "regular rate," it is undisputed that the City divides an employee's total remuneration by the total number of hours he or she actually worked during the workweek at issue. *See* Pls' Response, p. 6. Plaintiffs assert that the proper calculation is dividing total remuneration by 40 hours only. *Id.* Plaintiffs' assertion is legally unsupportable.

Without any authoritative support (except unsupported assertions by Wagner), Plaintiffs contend that dividing by all hours worked artificially decreases an employee's overtime premium in violation of the FLSA. *See* Pl.'s Response, p.14. Plaintiffs' contention was rejected by the U.S. Supreme Court over sixty years ago. In *Overnight Motor Transp. Co. v. Missel*, the

Supreme Court held that the method for calculating overtime pay for weekly-wage employee did not violate FLSA simply because regular rate decreased as number of hours worked in a week increased, so long as employee received, as overtime compensation, 150% of his regular rate. 316 U.S. 572, 580, 62 S. Ct. 1216 (1942).

Additionally, the FLSA regulations specifically provide that once all applicable remuneration for the workweek is totaled, the regular rate is calculated by dividing the total remuneration for employment by “*the total number of hours actually worked by him in that workweek for which such compensation was paid.*” 29 CFR 778.109 (emphasis added). By way of illustration, an employer should calculate the regular rate of an employee paid hourly plus a weekly nondiscretionary bonus as follows:

Hourly rate of pay = \$ 6.00 an hour  
 Production bonus = \$ 9.20  
 Total hours worked in workweek = 46 hours  
 (46 hours) x (\$ 6) = \$ 276 + \$ 9.20 = \$ 285.20  
 \$ 285.20 ÷ 46 hours = \$ 6.20 (regular rate)

29 CFR 778.110. *See also Zumerling v. Devine*, 769 F.2d 745, 752 (Fed.Cir. 1985) (firefighters’ regular rates of pay were properly calculated where employer divided total remuneration (except statutory exclusions) in work period by the total number of hours actually worked); DOL Opinion Ltr., 1988 DOLWH LEXIS 25 (Sept. 6, 1988) (rejecting the union’s argument that the 40 hours is the divisor for computing regular rates of pay and accepting employer’s computation, which included all hours worked in the week (48) rather than just the first 40 hours).

Plaintiffs’ argument runs further astray in its reliance upon fluctuating workweek cases. Unlike the case at hand, the case law and regulations cited by Plaintiffs involved determinations of an employee’s regular rate where the employee was paid a salary instead of hourly. Where the employee is salaried and has a fixed workweek, generally the regular hourly rate of pay is

calculated as set forth in 29 C.F.R. § 778.113, which provides that an employee’s salary is to be divided by the number of hours which the salary is intended to compensate. *Compare* 29 CFR 778.109 (total remuneration divided by total hours worked) & 29 CFR 778.110 (hourly employees). Here, it is undisputed that Plaintiffs are paid on an hourly basis for all hours they work. That is, they receive their hourly pay for each hour worked. Accordingly, in calculating the FLSA regular rate of pay, the proper divisor is all hours worked.

**D. The City Properly Pays Employees Their Regular Rate Plus One-Half Of Their Regular Rate For All Hours Worked Over Forty.**

Once an employee’s regular rate is determined for an hourly employee, his or her overtime premium for all hours worked over forty may be determined. The City’s formula for calculating overtime premiums is not disputed and is set forth at length in Defendant’s Motion for Summary Judgment, pp 15-18. Plaintiffs, however, contend that the calculation is incorrect because the City multiplies the employees’ regular rate times .5 instead of 1.5. Plaintiffs’ position has been squarely rejected by the courts and the Department of Labor because it results in double counting.

The City pays FLSA overtime pay at an overtime rate equal to one and one-half times the employee’s “regular rate.” Def.’s Undisputed Stmt. of Facts ¶28, (Hollyfield Dep. at 10); (Hill Dep. at 25). The employee’s regular rate consists of the employee’s “hourly” rate *plus any nondiscretionary additional pays*. Def.’s Undisputed Stmt. of Facts ¶28, (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25). The City correctly calculates the regular rate, as in the following example:

Hourly rate	\$15.00/hour
Hours worked	48
Bonus pay (per week)	\$16.35

Total straight time pay	\$736.35
Regular rate	\$15.34/hour

Def.’s Undisputed Stmt. of Facts ¶29, (Hollyfield Dep. at 10, 22); (Hill Dep. at 24-25; 44).

The City correctly calculates total overtime pay, as in the below continuation of the same example.<sup>5</sup>

Bonus rate (\$ 16.35/48 hours)	\$ .340625/ hour
Bonus for 40 hours (\$ .340625 per hour x 40 hours)	\$13.625
+ Bonus for overtime hours (+ \$.340625 per hour x 8 hours)	<u>+ \$ 2.725</u>
= Total Bonus	\$ 16.35
Straight time regular pay (40 hours x \$15.00 per hour)	\$ 600.00
Straight time bonus pay (40 hours x \$.340625/ hour)	<u>\$ 13.63</u>
Total straight time pay	\$ 613.63
Total overtime pay (8 hours x 1.5 times the regular rate of \$15.34)	\$ 184.08
Straight time pay + overtime pay = Total Pay	\$613.86 + \$ 184.08 = \$ 797.71

Def.’s Undisputed Stmt. of Facts ¶30, (Hollyfield Dep. at 13-14, Hollyfield Dep. Ex. 1A).

In contrast, Plaintiffs continue to advocate for a calculation method that both the Department of Labor and courts have consistently held is incorrect under the FLSA because it “double counts” bonuses and regular pay, such that the employer would be paying above and

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<sup>5</sup> Section 7(k) of the Act provides a partial overtime pay exemption for fire protection and law enforcement personnel, including correctional officers, who are employed by public agencies on a work period basis.

beyond what the FLSA requires. By way of example, Plaintiffs *correctly* calculate the regular rate as follows:

Hourly rate	\$15.00/hour
Total hours worked	48
Bonus pay (per week)	\$16.35
Total straight time pay	\$736.35
Regular Rate	\$15.34/hour

*Id.*, (Hollyfield Dep. at 18-21, Hollyfield Dep. Ex. 1D). *See also* Def.’s Mot. For. Sum. Judg., pp. 16-18 (Hollyfield Dep. at 12-14, Hollyfield Dep. Ex. 1A).

However, Plaintiffs then *incorrectly* calculate the total overtime pay, as in the below continuation of the example:

Straight time pay	\$736.35
Overtime rate (1.5 times the regular rate)	\$23.01/hour
Hours worked over 40	8
Total overtime pay (8 hours x 23.01/ hour)	\$184.08
Straight time pay + overtime pay = Total Pay	$\$736.35 + \$184.08 = \$ 800.43$

*See also* Def.’s Mot. For. Sum. Judg., pp. 16-18 (Hollyfield Dep. at 13-16, Ex. 1B, 1C).

Plaintiffs’ method is incorrect because the employee is compensated twice for the overtime hours, and for the portion of bonus pay attributable to the overtime hours. Regular pay and bonus pay were paid at the outset in the “straight time pay” sum of \$736.35. Then, when the 8 hours above 40 were multiplied by time-and-a-half the regular rate – straight time was paid again for those same hours, despite the fact that it had already been paid (*i.e.*, “double

counting”). Def.’s Mot. For. Sum. Judg., pp. 17-18, (Hollyfield Dep. at 17, 48); (Hill Dep. at 30-31). Because the employee has already been paid straight time for those 8 hours, only the half time need be added for FLSA overtime. Courts have consistently held that such “double counting” is incorrect and not required by the FLSA. See *Wisnewksi v. Champion Healthcare Corporation*, 2000 WL 1474414 at \*7, n.11, 12 (D.N.D. 2000), *aff’d Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 726 (8th Cir. 2001); see also *Frank v. McQuig*, 950 F.2d 590, 595, 597 n.9 (9th Cir. 1991) (citing *Brooks v. Weinberger*, 730 F. Supp. 1132 (D.D.C. 1989); *Federation of Gov’t Employees, Local 3721 v. District of Columbia*, 732 F. Supp. 1, 4 (D.D.C. 1989)).

Similarly, the City’s employees in question have received their hourly pay and nondiscretionary bonuses (e.g., longevity pay) for all hours worked, including those hours worked over forty in a workweek (or work period). Hence, only an additional one-half is due and owing because “the employee has already been compensated at 100 percent for all his hours in his tour of duty” and hence, by receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed.” See *Devine*, 769 F.2d 745 at 752 (explaining overtime compensation is one-half the employee’s regular rate rather than one and one-half the rate). See also 29 CFR 778.110 (further illustrating that the employee in question is entitled to be paid a total wage of \$ 303.80 for 46 hours (46 hours at \$ 6.20 plus 6 hours at \$ 3.10)). *Accord Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464, 68 S. Ct. 1186 (1948) (“If [an] overtime premium is included in the weekly pay check that must be deducted before the division. . . . To permit [the] overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium -- -- a pyramiding that Congress could not have intended”).

#### IV. The FLSA Entitles The City To Credits/Offsets

Plaintiffs erroneously contend that City's dual calculation system and taking of credits for payments made under applicable collective bargaining agreements violate the FLSA. As explained in the City's Motion for Summary Judgment and Reply, both of which are expressly incorporated herein, the FLSA provides that if an employer pays an employee compensation in the form of "premium rate" pay as described in 29 U.S.C. § 207(e)(5), (6), and (7) such sums "shall be creditable toward overtime compensation payable pursuant to this section." 29 U.S.C. § 207(h)(2). Premium rate pay is compensation at a rate in excess of the regular hourly rate paid for work performed outside of or in excess of regular working hours or in excess of eight hours per day or the applicable maximum work week or on weekends or holidays. *See* 29 U.S.C. § 207(e)(5), (6), and (7).

Plaintiffs, however, misrepresent the City's position. Contrary to Plaintiffs' assertions, the City does not credit collective bargaining agreement compensation for non-work time as a credit so as to avoid paying compensation required by the FLSA. The City acknowledges that payments for time not worked cannot be creditable towards FLSA overtime compensation. *See* 29 C.F.R. § 778.320. Rather, the City's credits fall squarely within the sums set forth in subsections (5) – (7).

In setting up their straw man, Plaintiffs rely almost entirely upon *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005) (holding that the defendant did not qualify for the credits permitted pursuant to 29 U.S.C. §§ 207(e), 207(h)). The *Wheeler* case, however, is wholly inapposite and not controlling precedent. In *Wheeler*, *unlike here*, the defendant calculated plaintiffs' overtime premiums pursuant to the collective bargaining agreement only because the defendant erroneously believed that the parties had waived their respective rights under the

FLSA by entering into a collective bargaining agreement. *Id.* at 243. Here, in stark contrast, the City does not contend that any party waived their respective rights under the FLSA; rather, the City properly calculates overtime premiums pursuant to both the collective bargaining agreement and the FLSA and then pays the higher of the two as provided under Section 7(e) and (h) of the Act. *See* Def.'s Stmt. of Undisputed Facts, ¶¶ 10-12. As such, the City's employees receive an amount equal to or greater than what is required by the FLSA. Significantly, in *Wheeler*, unlike here, the collective bargaining agreement provided for less remuneration than required by the FLSA. *Id.* Additionally, in *Wheeler*, the defendant erroneously concluded that it was permitted to offset its exclusion of incentive/expense pay from an employee's base hourly rate with the amounts it paid the employee for days not worked, such as holiday pay. *Id.* The City has never made such an argument.

Here, in contrast, the City does not take credits for holiday pay if the holiday is not worked. *See* Def.'s Stmt. of Undisputed Facts, ¶¶ 29-30. Subsection (6) of the Act describes "extra compensation provided by a premium paid for work by the employee on . . . holidays where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days." *See also* 29 C.F.R. § 778.203. By way of illustration, an employee works 48 hours in a holiday week but is paid for 56 hours, 16 hours of which consisted of overtime compensation at the rate of at least one and one-half the hourly rate. The City takes a credit for the 16 hours of overtime compensation paid to the employee but does not take any credit for the unworked holiday pay received by the employee. *Id.* Because the premium payments to Plaintiffs for work on holidays is at least one and one-half their normal hourly rate, these amounts are creditable against the City's FLSA liability. *See* Def.'s Stmt. of Undisputed Facts, ¶ 31. Plaintiffs cannot and have not pointed to any type of

subsection (6) overtime where they received less than time and a half their regular rate of pay. Therefore, it is undisputed that the City is entitled to a credit for all such payments. In short, *Wheeler* does not apply to the undisputed facts at hand.

The other cases relied upon by Plaintiffs fair no better. In *Dunlop v. Gray-Goto, Inc.*, 528 F.2d 792, 793 (10<sup>th</sup> Cir. 1976), for instance, defendants did not pay any overtime to plaintiffs but rather argued that paid leave benefits and other fringe benefits offset any liability under the FLSA. The Tenth Circuit emphasized that the employees involved and the defendant employer had an express understanding before any employer-employee relationship was ever entered into that there would be no overtime pay for hours worked in excess of forty hours per week, and that in lieu thereof they would receive the fringe benefits. *Id.* at 794. As would be expected, the Tenth Circuit viewed such a private agreement as circumventing the overtime pay requirements of the FLSA. *Id.* at 794-94. Here, unlike there, there is no “mutual understanding” that Plaintiffs would receive fringe benefits in lieu of overtime pay. While the Plaintiffs assert that the City calculates the FLSA overtime premiums incorrectly, Plaintiffs admit that the City pays FLSA overtime premiums. Furthermore, Plaintiffs do not dispute the types of offsets taken by the City. *See, e.g.*, Pl.’s Response, p. 2. Such undisputed facts clearly show that City has never sought a credit for paid leave or other fringe benefits. As such, *Dunlop* is irrelevant to the case at hand.<sup>6</sup>

Not only is Plaintiffs’ reliance upon *Wheeler* and *Dunlop* misplaced as the issue at hand neither involves FLSA waivers nor offsets of paid fringe benefits but also, Plaintiffs blatantly ignore Expert Hill’s determination that the City properly credited payments as well as DOL

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<sup>6</sup> The third case to which Plaintiffs cite, *Kohlheim v. Glynn County, Georgia*, 915 F2d 1473 (11<sup>th</sup> Cir. 1990), supports the City’s use of credits. In *Kohlheim*, the court held that “under the Act the county is entitled to set off all previously paid overtime premiums, not just those of at least 1 1/2 times the regular rate, against any overtime compensation found to be due and owing during the damages phase of the trial.”

regulations and on-point case law permitting the very credits taken by the City. For instance, in *Bell v. Iowa Turkey Growers Cooperative*, a class of former and current hourly production workers moved for partial motion for summary judgment alleging, *inter alia*, that defendant violated the FLSA by not including “shift differentials” in calculating their regular rates of pay. 407 F.Supp. 2d 1051, 1054-56 (S.D. Iowa 2006). Although defendant did not dispute that the FLSA required that shift differentials be included in calculating regular rates, defendant argued that pursuant to 29 U.S.C. §207(e)(6), it was entitled to a credit for the overtime payments it had previously paid its employees for working a sixth day in a workweek. *Id.* at 1057. Plaintiffs countered that no credit was available because defendant improperly excluded shift differentials in calculating the regular rate. *Id.* The court rejected plaintiffs’ argument and held that defendant may properly take such credits. *Id.* See also *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 523 (E.D. Tex. 2005) (granting summary judgment to defendant where, assuming *arguendo* that Plaintiffs’ claims are compensable under the FLSA and not *de minimis*, defendant was entitled to a credit or offset for premium wages it paid plaintiffs for hours worked in excess of eight per shift). *Accord Laboy v. Alex Displays, Inc.*, 2003 U.S. Dist. LEXIS 8638, \*10-11 (N.D.Ill. May 30, 2003) (holding that defendant was entitled to take credits for bonuses paid because “so long as the overtime compensation is contingent upon the employee having worked in excess of eight hours in a day or in excess of the specified number of hours in the workweek, whether the extra compensation is at a rate greater than, less than, or at one and one-half times the base rate, the extra premium compensation may be credited toward statutory overtime payments”) (internal citations omitted).

Indeed, a case to which Plaintiffs’ cite, *O’Brien v. Town of Agawam*, 350 F.3d 279 (1<sup>st</sup> Cir. 2003), provides additional support for the City’s position. Although Plaintiffs cite to the

portion of *O'Brien* addressing the “fluctuating workweek” method -- an issue not before the Court,<sup>7</sup> *O'Brien* fully supports the City’s use of credits. There, the Court explained that contractual overtime payments may be offset against any statutory overtime liability. *Id.* at 287. The *O'Brien* court provided the following example: “If an employee is paid \$ 5/hour for handling cargo during an eight-hour workday and time-and-a-half (\$ 7.50/hour) for work outside of that eight-hour day, the extra \$ 2.50/hour is considered "overtime" compensation and may be credited towards any statutory overtime liability due in the same week. See 29 C.F.R. § 778.206.” 350 F.3d at 287.

Accordingly, the City’s dual method of pay calculations and the City’s use of offsets or credits under the FLSA are proper as a matter of law.

**V. This Case Does Not Concern Exempt Status.**

In Plaintiffs’ Motion for Summary Judgment, Plaintiffs essentially assert that because the City did not move for summary judgment as to whether certain opt-in Plaintiffs are exempt from the overtime requirements, Plaintiffs are entitled to summary judgment. While Plaintiffs’ recitation of the FLSA exemptions are accurate, Plaintiffs’ argument necessarily fails. To begin with, Plaintiffs’ argument surprisingly ignores four essential facts:

- 1) This case has, by agreement of counsel, proceeded exclusively on the issue of the calculation of overtime due non-exempt employees. This agreement of counsel was repeatedly referred to in discovery requests and responses;
- 2) The City’s agreement on the sending of notice to prospective opt-in plaintiffs was contingent on the addition of non-exempt employees who would be similarly

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<sup>7</sup> In *O'Brien*, unlike here, plaintiffs argued that under the applicable collective bargaining agreement, their compensation varied with the number of hours worked but that no "clear mutual understanding" existed that they would be paid according to the fluctuating workweek method. 350 F.3d at 287.

situated to non-exempt employees relative to the calculation of overtime. *See* 12/14/04 Court Order, Docket No. 106. This issue is not relative to exempt employees whose status is subject to an individual by individual fact intensive inquiry. Absolutely no discovery has been undertaken by either side on any exempt status issue;

3) This Federal Court denied Plaintiffs' motion to amend the complaint to add exempt status as an issue. *See* 4/26/06 Order, Docket No. 175.

4) A motion for summary judgment challenging exempt status was denied as to Fire Command personnel on a full record in *Staeden v. Albuquerque* (Civ. 87-1226 J.B. 12/11/89 Memorandum Order).

At the very least, Plaintiffs have waived this issue at this stage of the litigation.

Furthermore, a party seeking summary judgment bears the initial responsibility of informing the Court the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986). Here, Plaintiffs do not even attempt to meet this initial responsibility. Plaintiffs simply contend that they are entitled to summary judgment because the City did not move for summary judgment as to whether certain opt-in Plaintiffs are exempt from the FLSA's overtime requirements. While it is the City's ultimate burden of proving exemptions, Plaintiffs cannot simply assert, without any evidentiary support, that they are entitled to summary judgment particularly as to an issue that is not before the Court. *See Fed. R. Civ. P. 56(c)*. As such, Plaintiffs' motion for summary judgment must be denied.

**VI. Conclusion**

In sum, Plaintiffs do not dispute that they were paid for all hours they worked and they were paid time and one half of their regular rates of pay as calculated by the City for all hours worked. Additionally, as set forth herein and in the City opening brief, the FLSA clearly permits the City's calculation of regular rate and its crediting of amounts paid under the collective bargaining agreements. The plaintiffs seek an unsupported and unwarranted windfall which, like the Court in *Iowa Turkey Growers, supra.*, the Court should reject. Accordingly, there is but one conclusion: The City is entitled to Summary Judgment as a matter of law.

Respectfully submitted:

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