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4 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
5 FOR THE COUNTY OF JACKSON

6 **JOSEPH BOVA,**

Case No. 08-1663-E7

7 Plaintiff,

8 vs.

9 **CITY OF MEDFORD**, an incorporated
10 **MICHAEL DYAL**, City Manager
11 of the City of Medford, as an Individual, and
in his official capacity,

Memorandum in Opposition to
Defendants' Motion for Approval
of Purchase of Insurance

12 Defendants.

13 Defendants have moved the court for an order approving the City's purchase of
14 insurance. Defendants ask the court for authority to purchase CIS Insurance for the Class
15 Members as set forth in defendant's Written Plan filed on January 4, 2010. Defendants ask the
16 court to order Class Members to give written authorization for deductions to be made to each
17 individual's paycheck. Defendants contend that under ORS 243.303 the cost of insurance shall
18 be paid by Class Members at the election of the City. If there are no agreements to the contrary,
19 Defendants contend that the Class should bear the full cost of health insurance. If there are
20 agreements imposing caps on the City's obligation to pay health insurance, Defendants argue
21 that the court should order the Class to provide written authorization for payroll deductions that
22 each Class Member owes.
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24 This memorandum responds to Defendants' Motion.
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PAGE 1 - MEMORANDUM IN OPPOSITION TO MOTION FOR APPROVAL TO PURCHASE
INSURANCE

Mem.Opp.Mot.App.docx

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1 **I. This Court Should Deny The Motion Because Defendants' Written Plan Does Not**
2 **Bring The City Into Compliance With ORS 243.303(2)**

3 Plaintiffs have described at length in Plaintiff's Motion for a Finding of Contempt
4 the deficiencies in Defendants' Written Plan. Those deficiencies will be set forth in summary
5 form in this Memorandum. If the court hears Defendants' Motion for Purchase of Insurance in a
6 hearing separate from Plaintiffs' Motion for a Finding of Contempt, plaintiffs will be prepared to
7 offer evidence supporting each of the claimed deficiencies set forth below. If the court joins
8 defendants' Motion for Approval of Purchase of Hearing with Plaintiff's contempt motion,
9 plaintiff will present evidence relating to both motions at the same hearing.

10 **A. The Written Plan Does Not Set Forth The Policies and Procedures The City**
11 **Proposes To Use To Come Into Compliance With ORS 243.303**

12 The Limited Judgment required the City's Written Plan to come into compliance
13 with ORS 243.303 on or before January 2, 2010 and to implement any policies or procedures set
14 forth in that plan by March 2010. Defendants' Written Plan says that the City will change its
15 health insurer to the CIS Insurance Company. The Written Plan contains no information as to
16 policies or procedures will be used to come into compliance.

17
18 First, if the City intends to change its health insurer there will necessarily need to
19 be a change in the City's policies and procedures, if only because there will be new
20 administrative forms that will be used and a different entity that will process health insurance.

21 Second, as discussed below, before any change in health insurers could occur, the
22 City will need to obtain an agreement from the union and certain consents from management
23 employees. Thus, there will be a period of time in which the City is not in compliance with ORS
24 243.303 that transpires before the City can implement any change in health insurers. The
25 Written Plan does not set forth policies or procedures that protect Class Members' rights under
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1 ORS 243.303 during this interim period of time when the City is not in compliance with ORS
2 243.303.

3 Third, there are Class Members who are entitled to their ORS 243.303 election
4 who have already retired. The Written Plan provides no policies or procedures to implement
5 ORS 243.303 for already retired Class Members.

6 Fourth, if the City intends to pursue a change in health insurers for managers, the
7 City will need to promulgate new Rules and Regulations for management employees.
8

9 Because the Written Plan does not set forth any policies or procedures the City
10 will implement to bring the City into compliance and because the City's proposal to change
11 health insurers requires changes in policies and procedures, the Written Plan fails to comply with
12 this court's Limited Judgment.

13 **B. Defendants' Written Plan Fails To Provide For Class Members Who Have**
14 **Retired, Or Who Will Retire, During The City's Period Of Non-Compliance.**

15 There are at least 8 Class Members who have retired since this court enjoined
16 defendants to comply with ORS 243.303. There are likely additional Class Members who retired
17 before the court entered its injunction or after the date when defendants last provided plaintiffs
18 with discovery concerning retirements. There will be additional Class Members who retire
19 before the City obtains health insurance that complies with this court's July 2009 Opinion and
20 Order and the Limited Judgment.
21

22 None of these Class Members have received notice of their right to elect
23 continuation of health insurance under ORS 243.303. For the City to comply with the court's
24 July 2009 Opinion and Order and the court's Limited Judgment, the City's Written Plan needs to
25 provide that all Class Members who have retired will receive notice of their ORS 243.303 rights,
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1 an opportunity to elect participation in the City's group health insurance program, and equitable
2 compensation for any harm suffered by the City's period of non-compliance.

3 Although Class Counsel have found no cases on point under state law relating to
4 class actions, federal cases decided under the employment discrimination laws provide for
5 equitable remedies in the form of back pay as a part of a "make whole" remedy in class action
6 cases. See, *Albemarle Paper Co. v Moody*, 422 US 405, 416 (1974)(holding back pay is
7 equitable remedy for unlawful employment practice); *Williams v Owens-Illinois, Inc.*, 665 F2d
8 918 (9th Cir 1982)(holding back pay may be awarded as equitable relief incidental to injunction
9 in class action under FRCP 32(b)(2).

11 Under Oregon law, in an action seeking specific performance of a duty, it is the
12 function of the court to do full and complete justice. With this principle in mind, the court has
13 broad discretion in framing equitable remedies in order to adapt relief to the circumstances of the
14 case. In *Cameron v Benson*, 295 Or 98, 664 P2d 412 (1983), the Supreme Court stated that there
15 are essentially three remedies available when a court decides that a plaintiff is entitled to specific
16 performance of a duty. First, the can simply award specific performance. Second, the court can
17 award specific performance with equitable compensation to make up for the difference between
18 the performance ordered and the performance received. Third, the court can award specific
19 performance as the primary remedy and also award an alternative money judgment should the
20 defendant fail to perform within a set period of time. *Cameron, supra*, 295 Or at 105.

22 Under Oregon law, compensation as incidental relief is especially appropriate
23 when specific performance is not available and "as an allowance to be made for any deficiency
24 as to the quantity, quality, or description of the property, when it is clear that jurisdiction
25 properly attaches in equity, compensation flows and is inseparable from the proper relief.

1 *Caveny v Asheim*, 202 Or 195,219, 274 P2d 281 (1954); see also, *Wittick v Miles*, 274 Or 1, 545
2 P2d 121 (1976)(equitable compensation may be awarded where full performance cannot be
3 ordered because of a third parties conflicting interests). A plaintiff is not obliged to set forth his
4 request for equitable compensation in the complaint. Rather, plaintiff may obtain compensation
5 at any time during the investigation and before performance. *Caveny, supra*, 202 Or at 110.

6
7 For Class Members who have obtained substitute insurance, the equitable
8 compensation should compensate them for differences in premiums, co-pays, deductibles and
9 coverage between the insurance the Class Member has actually obtained and the insurance the
10 Class Member would have obtained absent the City's violation of ORS 243.303.

11 For Class Members who are uninsured, the Written Plan should require the City to
12 secure comparable health insurance for the Class Members and compensate them for
13 unreimbursed expenses that should have been covered as well as differences in premiums, co-
14 pays, deductibles and coverage between the insurance the City secures for the Class Member and
15 the insurance the Class Member would have obtained absent the City's violation of ORS
16 243.303.

17
18 The equitable compensation provided by the Written Plan should be available
19 through the end of the Class Member's, or their spouse or dependents, statutory eligibility or
20 until the Class Member is enrolled in group health insurance that complies with ORS 243.303.

21 The court should note that Class Counsel's proposal for an equitable remedy
22 whereby the City financially supplements the health insurance available to retirees to make it
23 comparable to what the City has available for active employees is not a new proposal. This
24 equitable remedy is essentially the remedy that City Attorney Sydney Dreyer proposed in 2001
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1 that the City adopt to allow the City to contract with OTET while avoiding a violation of ORS
2 243.303.

3 Since the Written Plan does not address, much less provide for, compliance with
4 ORS 243.303 for those Class Members who have retired during the City's period of non-
5 compliance, the Written Plan is deficient and should not be approved.

6
7 **C. The City's Written Plan Attempts To Pass On To The Class Harm Resulting
8 From The City's Violation Of ORS 243.303**

9 The City argues that no law requires the City to provide health insurance to its
10 employees. The City contends that ORS 243.303 authorizes the City to choose to pay for the
11 cost of making retiree insurance available. The City points to ORS 243.303 which states:

12 "The local government may pay none of the cost of making that coverage
13 available or may agree, by collective bargaining agreement or otherwise, to pay
14 part of all of that cost."

15 ORS 243.303(2).

16 The City says it declines to pay for the cost of making retiree insurance available;
17 and, as a result any increase in premiums resulting from the court's injunction is the
18 responsibility of employees. Furthermore, the City argues that it may have collective bargaining
19 agreements with unions whereby the parties have agreed that health insurance costs that exceed a
20 certain "cap" should be split between employees and the City. If employees are not totally
21 responsible for any increase in costs, the City argues, employees should bear at least 50% of the
22 costs above the cap pursuant to the collective bargaining agreement.

23 The City's argument fails because any increased costs the City incurs to comply
24 with the court's injunction are costs that are caused by the City's violation of ORS 243.303.
25 They are not "costs of making [retiree] coverage available" under ORS 243.303. As a result,
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1 under *Cameron, Caveny, and Wittick*, the City should be held responsible for these increased
2 costs as a part of equitable compensation incidental to compliance with the court's injunction.

3 The City's decisions in 1990 and 2001 to move portions of its workforce into a
4 health insurance plan that does not comply with ORS 243.303 has caused harm to the Class.
5 This court should preclude the City from attempting to pass onto the Class costs arising from the
6 City's violation of ORS 243.303. Because the City has caused harm to the Class, the court
7 should require the City, not the Class, to bear any increased costs resulting from the violation of
8 ORS 243.303.
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10 The City's decisions in 1990 and 2001 have harmed the Class in three different
11 ways. First, health insurance premium rates for any pool of individuals are based upon the
12 pool's claims experience. When the City contracted for health insurance through entities other
13 than OTET, the pool consisted of all, or nearly all, City employees. The City received claims
14 information for the pool and was able to contract with one provider for the pool. Once the City
15 contracted with OTET for health insurance, the City no longer received claims information for
16 the pool. This is due to the fact that OTET does not provide claims experience for the pool.
17 Thus, the City has no claims experience for police since 1990 and no claims experience for the
18 rest of its employees insured through OTET from 2002 through the present. The lack of claims
19 experience results in limitations in the market for the Class' business and higher premiums from
20 those health insurers who compete for the Class' business.
21

22 Second, one major provider of health insurance, Blue Cross/Blue Shield, will not
23 compete for the Class' business because of the City's decision to contract with OTET. Since
24 Blue Cross/Blue Shield is the Claims Administrator for OTET, Blue Cross/Blue Shield will not
25 compete against OTET for the Class' business. As a result, once the City began contracting with
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1 OTET, the City lost one of the largest and most competitive carriers for health insurance. The
2 loss of Blue Cross/Blue Shield as a carrier was particularly important because there are a limited
3 number of health insurers that serve the Southern Oregon geographic area.

4 Finally, the City's decision to break up the pool has placed Class Members at a
5 distinct disadvantage in the marketplace. Since the court ordered the City to comply with ORS
6 243.303, the City has not pursued an aggressive marketing strategy designed to get the City and
7 Class Members the best deal for health insurance. To obtain the best deal for health insurance,
8 the City should package all of its employees as one pool and request proposals from multiple
9 health insurers including OTET. This would give the City leverage in negotiating the best price
10 and best terms for its employees from all carriers. The City's collective bargaining agreements
11 with the Teamsters may preclude the City from obtaining the "best deal" for the Class simply
12 because the union has the ability to compel maintenance of the "status quo" with respect to
13 health insurance pending a lengthy arbitration process.

14 Instead of using an aggressive marketing strategy, the City has broken its work
15 force into small units and pursued separate, more costly agreements for health insurance.
16 Indeed, to Class Counsel's knowledge, since the court granted partial summary judgment, the
17 City has approached only one carrier, CIS, and solicited a quote only for its 115 management
18 level employees.
19
20

21 This court should require the City to assure in its Written Plan that employees do
22 not bear increased costs resulting from the City's violation of ORS 243.303 as a form of
23 equitable compensation to the Class. Because the City's Written Plan proposes to pass along to
24 Class Members costs arising from the City's decision to violate ORS 243.303, the court should
25 decline to approve the Written Plan.
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1 **D. The CIS Proposal Does Not Provide Insurance For Retirees And Current**
2 **Employees Other Than Managers.**

3 While the City's Written Plan seeks approval to change its health insurer to CIS
4 and to charge employees for all or part of the increased costs of securing the health insurance,
5 discovery the City has provided to plaintiff shows that the CIS quote is only a quote for
6 management employees and is only a quote for active employees, not for retirees.

7 Since the CIS quote only covers managers and does not include retirees, the
8 Written Plan does not address how the City will comply with ORS 243.303 for current and
9 retired employees represented by the Teamsters and does not address how the City will comply
10 with ORS 243.303 for Class Members who have already retired. Since the Written Plan does not
11 articulate what the City's plan will be for those employees who are represented by the Teamsters
12 and since the City's Written Plan does not include Class Members who are retired, the Written
13 Plan does not bring the City into compliance with ORS 243.303.

14 **E. Any Change In Health Insurer Needs To Be Agreed To By The Union And**
15 **Any Increase In Costs Needs To Be Consented To In Writing By Managers.**

16 Finally, under ORS 652.610(3), money cannot be deducted from an individual's
17 paycheck without the individual's written consent. For management employees, ORS
18 652.610(3) means that each individual manager must consent to a payroll deduction before any
19 money is deducted from their pay. When the individual is represented by a union, the union may
20 give consent on the individual's behalf. See, *Coos Bay Lumber Co. v International*
21 *Woodworkers of Amer.*, 203 Or 342 (1955)(holding that collective bargaining representative may
22 consent to deductions from pay for represented employees).

23 There are five collective bargaining agreements under which the City has agreed
24 to provide OTET health insurance for employees represented by Teamsters. If the City proposes

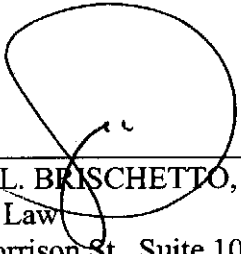
1 to change health insurers for the Teamsters represented employees and is unable to obtain
2 agreement from the union, the *status quo* in terms of health insurance benefits will remain in
3 place until such time as the City and the Teamsters resolve their dispute through arbitration.

4 To comply with the law, the City's Written Plan necessarily needs to provide that
5 any change in health insurers for represented employees will not take place until agreement is
6 reached with the union. If there is to be a change in health insurers and the court approves any
7 increase in charges to managers for health insurance¹, the Written Plan should provide that there
8 will be no change in individual manager's pay without the consent of each individual manager².
9
10 Until such time as the City reaches agreement with the unions and obtains managers consent, the
11 Written Plan should provide that the City will continue to compensate retiring managers through
12 equitable compensation.

13 SUMMARY

14 For the reasons set forth above, this court should deny the City's motion to
15 approve the Written Plan. Rather, the court should grant the remedies set forth in plaintiff's
16 Motion to Find the City in Contempt.

17 DATED this 10th day of August, 2010.

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23 ¹ If the court agrees with plaintiffs that any increase in premium costs are the City's
24 responsibility because the increases are the result of the City's non-compliance, there would be
25 no need for managers to consent to changes the makes come into compliance with ORS 243.303.
26 ² To obtain the consent of managers, the court should require the City to obtain approval from
the court for any communication with managers and provide notice to Class Counsel of the
proposed communication.

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CERTIFICATE OF SERVICE

I hereby certify that I served MEMORANDUM IN OPPOSITION TO MOTION FOR APPROVAL TO PURCHASE INSURANCE on:

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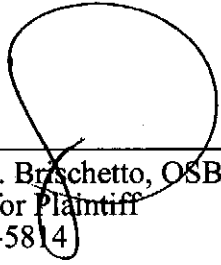
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Of Attorneys for Interested Persons and Group of Respondent Class Members

by delivering this date to said attorney(s) a true copy thereof as stated above. I further certify that said documents were contained in sealed envelopes, addressed as above stated, to the last-

known addresses of said attorney(s). Documents delivered by mail were deposited in the post office at Portland, Oregon with postage thereon prepaid.

DATED: August 10, 2010.



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