IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. 12-001005 DIV. 21

THE BOARD OF TRUSTEES of the
CITY OF HOLLYWOOD POLICE OFFICERS'
RETIREMENT SYSTEM, and VAN SZETO,

Plaintiffs,

and

CITY OF HOLLYWOOD, FLORIDA,
a municipal corporation,

Defendant.
_______________________________________/

DEFENDANT CITY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant, CITY OF HOLLYWOOD, through its counsel, Bryant Miller Olive, and pursuant to Florida Rules of Civil Procedure 1.140(b) and 1.110(f), files this Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief and in support states the following:

PRELIMINARY STATEMENT

1. On January 12, 2012, Plaintiffs filed a three count Complaint against Defendant.[1]

2. Count I is titled as a claim for Failure to Comply with Referendum Approval Requirements. Count II is titled as a claim for Failure to Comply with Other Ordinance Requirements and Count III is titled as a claim for Failure to Comply with Section 447.4095, Florida Statutes.

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[1] On that same date, an almost identical complaint styled as The Board of Trustees of the City of Hollywood Firefighters' Pension System and William Huddleston v. City of Hollywood, Case No. 12-001000 DIV. 05, was filed by the same counsel that filed the instant Complaint. The Complaints are virtually identical. Accordingly, Defendant has filed, contemporaneously herewith, a Motion to Dismiss the above-referenced Complaint and Defendant's Motion to Transfer in Furtherance of Consolidation.

3. While alleging various and novel legal theories, the Complaint asks one thing: That the Court take it upon itself to reverse an election. And not just any election, but a referendum in which the people of the City were asked whether they, in an exercise of direct democracy, wished to enact changes to their City Code. The voters said yes, overwhelmingly. Plaintiffs did not like that. Plaintiffs want the Court to tell the electors that their votes did not count. The people are the ultimate source of power and authority in our government. The Court should not countenance trifling with what one Supreme Court justice called democracy in its most basic function.

4. The Complaint itself is titled as a Complaint for Declaratory and Injunctive Relief, even though there is no separate count for declaratory judgment or injunction.

5. The Court should dismiss the Complaint in its entirety because Plaintiffs improperly incorporate prior counts into successive counts. Therefore, Plaintiffs improperly comingle causes of action.

6. Additionally, the Court should dismiss the Complaint in its entirety because Plaintiffs fail to state a claim for injunctive relief. Specifically, as to every Count, the Complaint fails to make any allegations concerning any of the elements of a claim for injunctive relief. As such, all of the claims for injunctive relief fail as a matter of law.

7. Either of these defects alone calls for dismissal of the entire Complaint as a matter of law. However, even if the Court does not dismiss the entire Complaint on one of both of these bases, there are numerous reasons that the Court should dismiss each Count individually.

8. Specifically, the Court should dismiss Count I because Plaintiffs claim that Article V of the City Charter applies to the election at issue when it does not. Count I is also barred by the doctrine of laches, fails to state a claim as a matter of law, and seeks an unavailable remedy.

9. The Court should dismiss Count II because Count II fails to state a cause of action. Even if Count II did state a cause of action, which it does not, the Court should still dismiss Count II because the issue is not ripe.

10. The Court should dismiss Count III with prejudice because the Court lacks subject matter jurisdiction over Count III, Count III fails to state a cause of action, and the individual Plaintiff has failed to exhaust his administrative remedies.

STANDARD FOR A MOTION TO DISMISS

In ruling upon a motion to dismiss, a court should confine its consideration to the four (4) corners of the complaint, accept all well-pleaded allegations as true (this does not include conclusory allegations) and view the allegations in the light most favorable to the plaintiff. See Alvarez v. E & A Produce Corp., 708 So. 2d 997, 999 (Fla. 3d DCA 1998); Bell v. Indian River Memorial Hospital, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001). To survive a motion to dismiss, a complaint must allege a prima facie case. See Alvarez, 708 So. 2d at 999; see also Wausau Ins. Co. v. Wainer, 683 So. 2d 1123, 1124 (Fla. 4th DCA 1996). Mere conclusions unsupported by specific facts will not suffice to withstand a motion to dismiss. See Dr. Navarro's Vein Centre of Palm Beach, Inc. v. Miller, 22 So. 3d 776, 778 (Fla. 4th DCA 2009). Here, Plaintiffs' attempt at pleading sufficient allegations, exclusive of conclusory allegations falls short of meeting this standard and should be dismissed.

ARGUMENT AND CITATION OF AUTHORITY

POINT I

THE COURT SHOULD DISMISS THE ENTIRE COMPLAINT BECAUSE PLAINTIFFS IMPROPERLY INCORPORATE PRIOR COUNTS INTO SUCCESSIVE COUNTS.

It is an improper pleading practice to draft a complaint, as Plaintiffs have done, where "each succeeding count [incorporates] by reference not only the paragraphs contained in the complaint's preliminary allegations but also all of the paragraphs contained in each of the preceding counts." Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292, 1293 (Fla. 1st DCA 1985); see also Chaires v. North Florida National Bank, 432 So. 2d 183, 185 (Fla. 1st DCA 1983) (stating that incorporating prior counts into successive counts is an improper practice that is a hindrance to the courts and only causes unnecessary confusion and delay).

In this case, Plaintiffs' Complaint is the exact type of shotgun pleading the Chaires court addressed. The Complaint comprises three counts and 65 paragraphs. Each preceding paragraph is incorporated into each following count. Complaint, ¶¶ 35, 58, 61. As the Chaires court correctly states:

> [b]y the time the beleaguered reader gets to the [third] count, he is having to cope with presumably [three] causes of action asserted in one count. This practice is an unnecessary hindrance to trial courts' efforts to determine the facial validity of the various causes of action being asserted and serves only to confuse and delay.

Chaires, 432 So. 2d at 185. Because of Plaintiffs' improper pleading, the City is unclear as to exactly how many counts are in the Complaint and what factual allegations apply to which counts. As such, the Court should dismiss the Complaint in its entirety.

POINT II

THE COURT SHOULD DISMISS THE ENTIRE COMPLAINT BECAUSE PLAINTIFFS FAIL TO PLEAD SUFFICIENT FACTS TO ESTABLISH A CLAIM FOR INJUNCTIVE RELIEF.

Under Florida law, a party seeking injunctive relief must allege the following elements:

(1) Irreparable harm;

(2) The absence of an adequate remedy at law;

(3) A clear legal right to the relief requested; and

(4) Public interest considerations to be served by the grant or denial of injunctive relief.

St. Lucie County v. Town Village of St. Lucie Village, 603 So. 2d 1289, 1292 (Fla. 4th DCA 1992). "Since a temporary injunction is an extraordinary remedy, it should be granted sparingly and only after the moving party has *alleged* and proven facts entitling it to relief." Contemporary Interiors, Inc. v. Four Mark's, Inc., 384 So. 2d 734, 735 (Fla. 4th DCA 1980) (emphasis added). Plaintiffs' claims for injunctive relief fail as a matter of law because Plaintiffs have not sufficiently alleged *any* of the required elements to make out a claim for such relief.

A. Plaintiffs Fail To Plead That They Will Suffer Irreparable Harm And That They Have No Adequate Remedy At Law.

In order to obtain an injunction a party must plead that it will suffer irreparable harm and does not have an adequate remedy at law. See Reliance Wholesale, Inc. v. Godfrey, 51 So. 3d 561, 564 (Fla. 3d DCA 2010). Jurisdiction for injunction does not exist unless the injury is of a particular nature such that monetary compensation could not atone for the injury. See Esposito v Horning, 416 So.2d 896, 897 (Fla. 4th DCA 1982) (dismissing the issuance of a temporary injunction because the complaint failed to allege irreparable injury). It is unquestioned that the test for irreparable harm or, for that matter, inadequate remedy at law, is whether a monetary

judgment can be obtained. See Employee Benefit Plans, Inc. v. Radice Corporate Center I, Inc., 593 So. 2d 1125, 1127 (Fla. 4th DCA 1992); Mary Dee's v. Tartamella, 492 So. 2d 815, 816 (Fla. 4th DCA 1986); see also Tri-Plaza Corp. v.Field, 382 So. 2d 330, 331 (Fla. 4th DCA 1980).

In this matter, Plaintiffs fail to plead any facts to suggest that the unspecified harm alleged would be irreparable or that there is an absence of an adequate remedy at law.[2] In Count I, the only reference to the failure of an adequate remedy at law or irreparable harm is the conclusory statement that Plaintiffs have no adequate remedy at law and will suffer irreparable harm. Complaint, ¶ 57. Count I contains only allegations concerning the City's alleged failure to comply with certain referendum requirements. Complaint, ¶¶ 36-57. There is not a single factual allegation concerning injunctive relief. Accordingly, the Court should dismiss Count I.

Counts II and III suffer from the same defect as Count I. Count II consists of only three (3) paragraphs, none of which address any element of an injunction. Instead, Plaintiffs use the WHEREFORE clause and merely ask the Court to issue a permanent injunction. Complaint, WHEREFORE clause, pp. 17-18. This is obviously not sufficient to state a claim for an injunction. Count III also fails to make any substantive allegations concerning an injunction. Count III, just like Count II, uses the WHEREFORE clause to ask the Court to issue a permanent injunction. Complaint, WHEREFORE clause, p. 19. Since Plaintiffs make no allegations in Counts II and III concerning the elements of irreparable harm and no adequate remedy at law, the Court should dismiss Counts II and III.

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[2] The Complaint fails to include a separate count for injunctive relief. Instead, Plaintiffs merely ask for injunctive relief in the WHEREFORE clauses of each of the three counts. For clarity and conciseness, the City addresses this defect of each count in this single Point I of this Motion.

Notably, as to Count III, the individual Plaintiff has an adequate legal remedy that potentially includes money damages. As such, even if he had properly pled his claim for injunction (which he did not), he could not obtain the injunctive relief he seeks.

A court will not issue an injunction when money damages are available. Supreme Serv. Station Corp. v. Telecredit Serv. Ctr., Inc., 424 So. 2d 844, 844 (Fla. 3d DCA 1982). Nor is an injunction appropriate when there exists an adequate alternative legal remedy. E.g., Shaw v. Tampa Electric Co., 949 So. 2d 1066, 1069 (Fla. 2d DCA 2007) (no adequate legal remedy required element for injunction). As discussed in Point V, below, the individual Plaintiff has or had a legal remedy in the form of an unfair labor practice charge – one of which, in fact, has already been filed by the union representing him. The potential remedy available in an unfair labor practice charge could include rescission and, possibly, back pay if any benefits have been lost. In other words, the individual Plaintiff has possible money damages available from an alternative legal remedy. Both of those render injunction unavailable for the individual plaintiff. Accordingly, Count III should be dismissed on this ground as to the individual Plaintiff.

B. Plaintiffs Fail to Plead That They Have a Substantial Likelihood of Success on the Merits and that Public Interest Considerations Favor the Grant of an Injunction.

Plaintiffs entirely omit pleading the third and fourth elements of injunction. Florida courts sometimes appear to combine the third and fourth element for injunctive relief and have held that: "clear legal right means that the plaintiff shows a substantial likelihood of success." Langford v. Rotech Oxygen & Medical Equipment, Inc., 541 So. 2d 1267, 1268 n.2 (Fla. 5th DCA 1989). In fact,

> [p]rior to issuing a temporary injunction, a trial court must be certain that the petition or other pleadings demonstrate a prima facie, clear legal right to the relief requested. It must appear that

> the petition has a substantial likelihood of success on the merits. The establishment of a clear legal right to the relief requested is an essential requirement prior to the issuance of a temporary injunction.

Mid-Florida at Eustis, Inc. v. Griffin, 521 So. 2d 357, 358 (Fla. 5th DCA 1988) (citations omitted).

Further, if the injury complained of is doubtful, eventual or contingent, injunctive relief shall not be afforded. Esposito v Homing, 416 So.2d 896, 898 (Fla. 4th DCA 1982). Accordingly, "a court should sparingly and cautiously grant temporary injunctions and only in clear cases, reasonably free from doubt." Storer Communications, Inc. v. State, 591 So. 2d 238 (Fla. 4th DCA 1991).

Plaintiffs' Complaint ignores the above elements. The Plaintiffs failure to plead these elements is sufficient of itself for this Court to grant City's Motion to Dismiss. Indeed, Counts I, II, and III make only allegations concerning the alleged failures of the City in enacting the Ordinance. Plaintiffs' failure to make any factual allegations concerning whether they have a substantial likelihood of success on the merits or whether the public interest favors an injunction is fatal. Accordingly, the Court should dismiss the Complaint in its entirety for failure to allege any of the elements of a claim for an injunction.

POINT III

THE COURT SHOULD DISMISS COUNT I BECAUSE, INTER ALIA, ARTICLE 5 OF THE CHARTER DOES NOT APPLY TO THE ELECTION IN QUESTION.

Assuming the Court does not dismiss the entire Complaint for the procedural and substantive defects outlined above, the Court should still dismiss Count I. In Count I, Plaintiffs

appear to seek a declaration by this Court that the language of the ballot question whereby the pension plan amendment was approved failed to comply with two City Charter sections and Florida Statutes Section 101.161(1). Count I should be dismissed because Article 5 of the Charter, upon which Plaintiffs rely, does not apply to the election in question and, therefore, the Count fails to state a cause of action as to those sections. Moreover, any purported cause of action based on Section 101.161(1) is untimely based on the doctrine of laches. Plaintiffs' attempt to allege a cause of action that the ballot was improper on essentially two bases: that the language of the ballot was defective in some way and that the City conducted a public relations campaign. As to the first, the language of the ballot was proper as a matter of law. As to the second, the law upon which Plaintiffs rely does not address campaigning at all and, therefore, campaigning of any kind cannot state a cause of action as to those sections. Moreover, invalidation of an election is not an available remedy under that theory.

A. Article V Of The Charter Applies Solely To Repeal Of Measures Upon Voter Petition, Not To Measures Such As The Instant Ballot Question.

Plaintiffs base Count I in part on what they deem to be non-compliance of the ballot language with Sections 5.07 ad 5.08 of the City Charter.[3] However, Article V of the Charter does not address approval of ordinances or other legislative measures of the type before the Court; it governs only matters brought before the voters by petition to seek a measure's repeal.

Article IV of the Charter deals with Initiative, defined as "the power at [the voters'] option to propose ordinances . . . ," initiated by petition. City of Hollywood Charter Art. IV § 4.01 (The City Charter will hereinafter be cited as "Charter § __".). Article V of the Charter

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[3] Plaintiffs refer to these provisions as sections of the City Code. The quotations in the Complaint, however, make it clear that these sections of the Charter are what Plaintiffs intend. Further, the codification of the Charter and Code refer to the whole as the "Code."

deals with Referendum, the corresponding power of the voters to initiate by petition a repeal a measure the commission has passed. Section 5.03 of Article V makes it clear that the only means of invoking the process governed by Article V is via a petition by the voters. Section 5.03 states, in full:

> Upon passage of any measure by the commission, a petition signed by at least fifteen percent (15%) of the total number of registered voters in each of four districts of the city, and at least fifteen percent (15%) of the total number of registered voters of the city as a whole, all as shown by the official registration books, may be filed with the city clerk requesting that such measure, or any section thereof, be repealed or be submitted to a vote of the electors.

There is no other provision in Article V for initiating the referendum process. Read as a whole, as statutory schemes must be, it is clear that the referendum process of Article V refers only to the power of repeal or attempted repeal. Section 5.01 makes it clear that Article V referendum is a power of the electorate, not a vehicle of the City Commission, stating, "The electors shall have *at their option* the power to approve or reject at the polls any measure passed by the commission or submitted by the commission to a vote of the electors, such power being known as referendum." Charter § 5.01 (emphasis supplied). Section 5.03 provides the method – petition by the electors – whereby the commission may submit a measure to the vote.

Section 5.06, "Election," makes it even clearer that referendum votes arise by action of the voters and not by the commission. Section 5.06 mandates that the commission shall reconsider the measure if the number of signatures on the petition is sufficient. If the commission does not repeal the measure, "as demanded in the petition," then the commission must provide for the referendum vote. Charter § 5.06. There are no exceptions written in this

section and no provision for the commission to submit some measure on its own to a vote of the electors.

Section 5.09 provides that the measure shall remain in force until and unless it is repealed by the referendum. Charter § 5.09(a). Plainly, this section contemplates a measure that has already been duly passed and put into effect – further reinforcing that Article V deals with a method for voter-initiated repeal. Plaintiffs make much of the fact that the ballot measure in this case provided for a "yes" or "no" vote instead of the "for the measure" or "against the measure" language of Section 5.08. However, Section 5.09(b) provides that if the measure "is not adopted by a majority of those voting, it shall be considered repealed . . . ." Thus, Section 5.09 sees the question at issues as whether an existing measure is repealed – not whether a an as yet unadopted measure is enacted. When Section 5.08's "for" or "against" language is read in the context of Article V, it fits perfectly with the concept and structure of referendum as a repeal power and, specifically, of Section 5.09 determining repeal by a failure of a majority to adopt the measure. The voter is either "for" the measure to remain law or "against" the measure that should be repealed. The "yes" or "no" vote is consistent with the idea of "shall the measure pass or not," which is not the purpose or structure of the Article V referendum election.

Article V obviously deals with a voter-initiated means of attempting to repeal a measure passed by the commission. It can be commenced solely by petition. The Complaint admits that the amendments were passed by the City Commission and "presented" to the voters by "special referendum." It does not allege (and could not, since it is not true) that there was any voter petition or any other hallmark of the repeal process set out in Article V. Accordingly, it is clear from the face of the Complaint and the plain language of Article V that Sections 5.07 and 5.08 do

not apply to the ballot measure at issue in this case and cannot for the basis of a cause of action as pled by Plaintiffs. As such, Count I should be dismissed.

B. Count I Is Barred By The Doctrine Of Laches.

Count I alleges defects in the ballot language as a basis to invalidate the will of the voters expressed through the ballot box. Any cause of action on this basis is barred by the doctrine of laches. The Complaint and its Exhibit B show that the ballot language was publicly available well before the election. Therefore, Plaintiffs had every opportunity to challenge the ballot before the election and did not. Now, five months later, after much expense, and after the voters have spoken, Plaintiffs want this Court to reverse the whole process. The Court should not allow it.

Courts should act with great restraint when they are being asked to reverse the directly spoken will of the voters. In just such a situation, Supreme Court Justice Lewis wrote:

> Once again, the judicial system is being asked not only to intervene in a matter that addresses the intent and understanding of Florida voters in connection with the performance of the most basic function in the democratic process, but in so doing, to invalidate the result of a vote after the citizens of Florida have already exercised their franchise and voiced a decision. I am troubled that challenges to matters that are to be submitted to the people for determination fall victim to strategies that produce judicial reversals in matters that have already been submitted to the electorate, when any challenge or controversy could and should have been submitted for judicial determination in a timely manner, providing sufficient time for full review and resolution prior to the day of decision for Florida voters.

Armstong v. Harris, 773 So. 2d 7, 31-32 (Fla. 2000) (Lewis, J., dissenting). In that case, the parties opposing a constitutional amendment had filed ballot challenges prior to the election, but legal maneuvering had delayed consideration by the Supreme Court until about five months after the vote. Id. at 9-10, 32. The action that eventually was considered was filed one month after the

election. Id. at 33. Justice Lewis characterized this delay as rendering the action untimely and constituting laches. Id. at 32-33. Justice Lewis wrote that the concern for clear ballot language must be tempered with the prospect of judicial invalidation of the voters' expressed will, particularly when those seeking invalidation of the vote did not timely present the challenge so it could be resolved prior to the election. Id. He stated:

> I would apply the principle of law that, once an election has been concluded and the result determined, it is the duty of the judicial system to uphold that result, if possible, if the process has been essentially free and fair, the voters have not been essentially deprived of their right to vote due to the alleged defect, and the result has not been so tainted by irregularities as to suggest that the result is not the intent of the electorate.

Id., citing Winterfield v. Town of Palm Beach, 455 So. 2d 359 (Fla. 1984).

In this case, Plaintiffs knew well in advance what the amending ordinance provided and what the ballot summary said. They had months in which to file a challenge. They did not do so. Instead, they sat back, waited, and let the City make large expenditures – in a time of financial crisis – to hold the election. Then, after the voters approved the amendment, Plaintiffs filed suit. They did not file immediately, but waited four months, until January of the next year after the election, to sue. If successful, all that effort and expenditure will have been wasted, not to mention that the clearly expressed will of the electorate will be overturned by judicial fiat.

All the elements of laches – conduct by the defendant to create the situation, failure of the plaintiff to sue, lack of knowledge by the defendant of plaintiff's intent to sue, and prejudice to the defendant if the suit is successful – are present. E.g., Gaines v. Gaines, 870 So. 2d 187 (Fla. 4th DCA 2004). Moreover, there is a third party class who will suffer prejudice – the voters whose decision will be judicially reversed. The ballot language is clear. No one can read that ballot and honestly say it does not convey the chief purpose or is misleading. The voters have

expressed their will and their will is to pass the amendment. Accordingly, this count and the Complaint as a whole are barred by laches and should be dismissed.

C. **The Alleged Defects Of The Ballot Language Are Insufficient As A Matter Of Law To State A Violation.**

Assuming Charter Sections 5.07 and 5.08 to apply (which is not the case, as explained above), the ballot language was to be clear, concise, without argument or prejudice, and to describe the substance of the ordinance. Florida Statutes Section 101.161(1) provides that the ballot title and summary are to be clear and unambiguous and to convey the chief purpose of the measure. Fla. Stat. 101.161(1). The Supreme Court has stated that, fundamentally, the statute requires that the court consider "(1) whether the ballot title and summary, in clear and unambiguous language, fairly inform the voter of the chief purpose of the amendment; and (2) whether the language of the title and summary, as written, misleads the public." Advisory Op. to Attorney Gen. re Fla. Marriage Prot. Amendment, 926 So. 2d 1229, 1236 (Fla. 2006). There is no requirement to set forth the measure in detail or to describe its ramifications, or potential or conditional effects. Advisory Op. to the Attorney Gen. Re Standards for Establishing Legislative Boundaries, 2 So. 2d 175, 185 (Fla. 2009). Further, the Court acknowledges that the voter *"must"* acquaint him or herself with the measure before entering the voting booth. Id.

The Court credits the voter with the ability to understand the written ballot and will not permit semantic games to disqualify a referendum measure. Thus, using different but synonymous terms in the ordinance and ballot does not alone invalidate the ballot. Id. at 185. By the same token, using generally understood terms on the ballot instead of technical or less common terminology used in the ordinance does not invalidate the ballot, but, rather, aids voter understanding, even if the ballot wording is technically incorrect. Id. at 187.

A ballot summary is not misleading merely because it includes subjective statements or words that would elicit support for the measure. People Against Tax Rev. Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373 (Fla. 1991). In that case, the ballot title and summary read as follows:

> "TAKE CHARGE ... IT'S YOUR FUTURE"
> (LOCAL GOVERNMENT INFRASTRUCTURE SALES TAX)
> Shall a one-cent local-option sales tax for capital improvements be levied in Leon County for a period of 15 years in order to construct critical capital improvements; specifically: a court-ordered jail, law enforcement capital projects, road and traffic improvements identified in the Tallahassee-Leon County year 2010 Transportation Plan, and other road and traffic improvements?

Id. at 1375. The title was the campaign slogan used by proponents of the measure. Id. at 1376. The Court noted that the word "critical" lacked neutrality. Nonetheless, "the fact that some questionable language appears on the ballot is not itself enough to invalidate an entire referendum. Rather, the reviewing court must look to the totality of the ballot language, as such language would be construed by a reasonable voter." Id. Clearly with the deference to the will of the voters properly in mind, the Court found the ballot language not misleading.

In this case, Plaintiffs object to the following language in the ballot: "high pension costs"; the use of a "question" with a yes/no option; failing to mention lowering benefits in the "question"; "to lower City pension costs"; failing to disclose that the pension fund will lose state funds; failing to disclose that employees' contribution is reduced; and failing to state that the changes were indefinite.

Plaintiffs demand that the City have made a "determination" that pension costs were or would be "high" and argue that the term is both meaningless and argumentative. "High" is a common word with a commonly understood meaning in relation to costs. Every voter who buys

groceries or pays a gasoline bill knows what "high costs" are. It is not inherently misleading or ambiguous. The same goes for "lower[ing] City pension costs." It is silly to argue that this language is misleading. Plaintiffs argue that this phrase misstates the chief purpose of the measure, which, in their view, was to cut employee benefits – which they also complain should have been stated. The City declared financial urgency, which plainly demonstrates that it was looking for cost reductions, including reducing its high pension costs. Thus, the statement is a statement of the chief purpose. Moreover, employee pension benefits are a cost to the City, so cutting benefits and cutting costs are the same thing. Further, there is no requirement that the chief purpose be reconveyed in every subportion of a ballet summary, as Plaintiffs would have it (they object that the chief purpose was not conveyed in the "question" portion of the ballot, but do not allege that the chief purpose was not conveyed in the balance of the ballot). These objections are word games and do not constitute a violation.

Plaintiffs' insistence that the "question" portion of the ballot is "unauthorized" and somehow a violation stems from the formal provisions of Charter Section 5.08. As explained above, that section does not apply and, thus, there is no violation. Even if it did apply, this divergence would be purely technical and trivial. Stating "yes" or "no" instead of "for" or "against" could not confuse or mislead anyone and cannot justify invalidating an election.

Plaintiffs claim the ballot misleads by not disclosing what they claim will be the loss of state funds and not disclosing that employees' contributions to the system are being reduced (a benefit to the employees). As explained below, it is far from certain that state funds will be lost. Even if they are, that will not occur for many months. Thus, this objection is a contingent, conditional, potential, or uncertain outcome of the measure and failing to mention it is not a violation. The same is true as to the detail that employee contributions are being lowered. That

fact alone is a small detail in a complex ordinance. Plaintiffs' complicated inference that a lowered employee contribution, coupled with the (highly uncertain) loss of state funds means that the high cost "is coming from sources other than the City" and which would be eliminated is the essence of a detail, ramification, or potential effect that cannot be explained in a 75-word ballot summary. As such, it cannot constitute a violation.

D. Plaintiffs' Allegations Regarding The City's Informational Efforts Does Not Describe A Violation Or A Cause Of Action And, Even If It Did, The Remedy Of Invalidation Of The Election Is Not Available.

Plaintiffs rely on Charter Sections 5.07 and 5.08 and on Florida Statutes Section 101.161(1). They allege that the City conducted an improper public relations campaign and, because of this, the election should be invalidated. Neither the Charter sections nor the statutory section have anything whatsoever to do with election campaigning. The Charter sections address the form of referendum (as defined above) ballots. Section 101.161(1) likewise addresses ballot language requirements. Accordingly, Count I fails to state a cause of action based on violation of those sections because campaigning or electioneering is not addressed by those sections.

Plaintiffs cite as their only authority for the idea that the City's informational campaign was improper the case of Palm Beach County v. Hudspeth, 540 So. 2d 147 (Fla. 4th DCA 1989). Plaintiffs admit that the case stands for the proposition that a local government has an affirmative obligation to inform the public about election issues. Complaint, ¶ 28. They argue that the City's campaign was not fair and ask that the Court use that as a basis to invalidate the election. As explained above, the Supreme Court views the invalidation of an election as an extreme remedy. Hudspeth provides no basis for such a remedy. The Hudspeth the court made no findings regarding campaigning at all and, merely suggested that there might be some money remedy – but not the invalidation of the election. Id. at 154; see also People Against Tax

Revenue Mismanagement, Inc. v. Leon County Canvassing Bd., 573 So. 2d 31 (Fla. 1st DCA 1991) (citing distinguishing Hudspeth on grounds that the question in Hudspeth was not that of voiding an election, as under the election contest law). The remedy Plaintiffs seek – invalidating the election – simply is not available based on their theory of improper campaigning. Further, *Hudspeth* does not stand for the proposition that election campaigning constitutes a cause of action or a basis for a declaratory judgment action. The Court's entire discussion of electioneering is dictum, as it reaches no holding on the matter. Therefore, Count I fails to state a cause of action and should be dismissed.

POINT IV

THE COURT SHOULD DISMISS COUNT II BECAUSE PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION AND BECAUSE THE CLAIM IS NOT RIPE.

The Court should dismiss Count II. The allegations fail to state a cause of action. Assuming that the count could state a cause of action, which it cannot, that cause is unripe.

Count II alleges that the provisions of the amendment of the pension fund fail to meet the minimum requirements of Florida Statutes Chapter 175 and, therefore, violate sections of the City Code requiring compliance with that Chapter. The complaint alleges that this purported violation of the City Code constitutes a basis for this Court to declare the ordinance amending the pension fund in violation of the Code and "must thereby be stricken."

A. The Amending Ordinance Does Not Violate With Any Other Portion Of The City Code Because The Ordinance Repealed Any Conflicting Portion.

The entire basis of Count II is that the amending ordinance violates other City Code sections. Plaintiffs, who attached the amending ordinance to the Complaint, apparently overlooks section 9 of the ordinance, which provides that any section or part of a section of the

City Code that conflicts with the amending ordinance is repealed. So, assuming arguendo that the amending ordinance does conflict with any other section of the City Code (which is not the case in actuality), such conflicting section or portion of a section was repealed when the amending ordinance took effect. Accordingly, Count II is baseless as a matter of law and should be dismissed.

B. Plaintiffs Seek To Have This Court Displace An Existing Administrative Scheme For Determining The Plan's Compliance With Florida Statutes.

Plaintiffs allege that the pension amendments put the pension plan out of compliance with Florida Statutes Chapter 185 and, therefore, the amendments violate City Code sections requiring compliance with Chapter 185.

Plaintiffs apparently would have this Court make a determination as to whether the pension plan is in compliance with Chapter 185. Chapter 185 establishes a comprehensive system of provisions governing plans that participate in its program. Those provisions include minimum retirement benefits such as the permissible minimum accrual factor, the years of service and age necessary for normal retirement, eligibility for early retirement and benefit reductions attendant thereto, employee contributions, how and by how much employee contributions may be increased and what must go along with such increases, optional forms of payment of benefits, the components of compensation that count toward calculation of the benefits, and others. The Chapter's requirements include the composition of the plan boards of trustees, provisions for permitted "extra" benefits, death benefits, benefits for beneficiaries, and limits on disability retirement benefits. The Chapter, in short, essentially sets out all the provisions of a full-blown defined benefit retirement plan in all its depth and complexity.

Plaintiffs want the Court to engage in a parsing of Chapter 185 side by side with the amending ordinance to judge whether the plan remains in compliance with the statute.

However, Chapter 185 also includes Section 185.23. That section provides that the State Division of Retirement shall monitor the compliance of all participating plans with the provisions of the Chapter and, if a plan does not comply, it shall withhold the funds to be disbursed from the program to the plan. Fla. Stat. § 185.23 (2011). Any interested party, including the pension board or the City, may contest the Division's action through informal settlement discussions with the Division. Failing that, the interested party may file an administrative complaint with the Division that is referred to the Department of Administrative Hearings for a hearing and quasi-judicial determination that is ultimately reviewable by the courts.

In other words, such action by the Division is subject to the Florida Administrative Procedure Act, Chapter 120, Florida Statutes. In short, there is an entire administrative scheme in place to deal with exactly the circumstances alleged by Plaintiffs to exist in this case. If the Division of Retirement should decide that the plan does not comply with Chapter 185, it will withhold the state funds. If anyone should care to contest that determination, the process described above is available. The determination of compliance with Chapter 185 rests with the administrative agency that is charged with monitoring and enforcing Chapter 185, not with this Court via a declaratory judgment action.

As such, Count II should be dismissed and, because there is no set of facts that will cure this defect, Count II should be dismissed with prejudice.

C. Even If It Were Proper For This Court To Determine The Plan's Compliance With Florida Statutes, The Question Is Not Ripe.

Plaintiffs base Count II entirely on the idea that the plan does not comply with Florida Statutes Chapter 175. However, this claim is not ripe. The concept of ripeness in the context of a declaratory judgment action is expressed as the requirement of the existence of a present controversy between the parties. See, e.g., Florida Dep't of Ins. v. Guarantee Life Ins. Co., 812 So. 2d 459, 460-61 (Fla. 1st DCA 2002). In that case, insurance companies brought a declaratory judgment action seeking to have declared invalid a statute dealing with insurance rate-setting. Id. at 459-61. The insurance companies did not at the time of the suit have rate proposals pending before the state agency in question, but alleged that future such applications could be subject to disapproval based on what they alleged were the invalid aspects of the law. Id. The appellate court held that the case presented no present controversy. Id. The court stated that declaratory judgment is not appropriate when there is alleged the possibility of legal injury based on facts that have not yet arisen. Id. at 460-61.

In this case, Plaintiffs claim, on their own authority, that the amendments have put the plan out of compliance with Chapter 185. However, as explained above, compliance with Chapter 185 is determined through the normal monitoring processes of the Division of Retirement. There will not be even a preliminary suggestion of non-compliance until and unless the Division advises that it intends to withhold Chapter funds. Chapter funds are not even due to be disbursed until July of each year or later, depending on circumstances. Assuming that the Division advises it may withhold funds, there will be a period of discussion and possible settlement. If that is unsuccessful, an order forfeiting funds could be issued. That order would be subject to review and appeal through the administrative process and the judicial process. All

of this is months and years in the future. As such, there is no existing controversy on this basis and cannot be for months, if ever. Accordingly, Count II should be dismissed.

POINT V

THE COURT SHOULD DISMISS COUNT III WITH PREJUDICE BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION, COUNT III FAILS TO STATE A CAUSE OF ACTION AND THE INDIVIDUAL PLAINTIFF FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

The Court should dismiss Count III with prejudice. This Court lacks jurisdiction over the subject matter; the Count fails to state a cause of action; and the individual plaintiff has failed to exhaust his administrative remedies.

A. The Court Lacks Subject Matter Jurisdiction Over The Claim.

Plaintiffs allege that the ordinance amending the pension plan violates Florida Statutes Section 447.4095 ("Section 4095"). Section 447.4095 is a part of the Public Employees Relations Act, which governs collective bargaining rights and other aspects of labor relations between Florida public employers and labor unions representing their employees. Section 4095 states:

> **447.4095 Financial Urgency.** – In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

Plaintiffs ask the Court to "[d]eclare that the Ordinance was enacted in violation of state law and must therefore be stricken . . . ." In order to grant this relief, the Court must necessarily construe Section 4095. The interpretation and enforcement of Section 4095 is outside this Court's jurisdiction.

As stated recently, "[PERC] decides the appropriate use of the financial urgency provisions of the collective bargaining law." IUPA v. City of Fort Pierce, 38 FPER ¶ 232 (PERC 2011). Further, the "statutory interpretation of the financial urgency provision" is within PERC's exclusive jurisdiction. Id.; see also Manatee Educ. Ass'n v. Sch. Bd. of Manatee County, 62 So. 3d 1176 (Fla. 1st DCA 2011) (holding that PERC has primary responsibility for interpreting financial urgency); CWA v. Indian River County School Board, 888 So. 2d 96 (Fla. 4th DCA 2004). In IUPA, the union had attempted to force the city to arbitration over whether it had properly applied Section 4095. PERC dismissed the charge, noting that it had exclusive jurisdiction over the interpretation of Section 4095 and that the arbitrator had no authority to construe it. Likewise, in the CWA case, the court held that an arbitrator had no authority to rule on matters relating to Section 4095 because that authority was reserved exclusively to PERC. CWA, 888 So. 2d at 100.

PERC's exclusive jurisdiction over the interpretation of Section 4095 is merely a part of its general exclusive jurisdiction over essentially the entirety of collective bargaining law. See generally, Local Union No. 2315, International Association of Firefighters v. City of Ocala, 371 So. 2d 583, 585 (Fla. 1st DCA 1979); see also Maxwell v. School Board of Broward County, 330 So. 2d 177, 179 (Fla. 4th DCA 1976); Public Employees Relations Commission v. Fraternal Order of Police, 327 So. 2d 43, (Fla. 2d DCA 1976). In fact, the pension board Plaintiff lacks

standing even to raise the issue of Section 4095, because such a challenge is subject to PERC's exclusive jurisdiction and the board could not be a proper party in any action before PERC.

Accordingly, the Court lacks subject matter jurisdiction over the allegations of Count III. There is no set of facts that could be alleged that could cure this defect. Therefore, amendment is futile and Count III should be dismissed with prejudice. E.g., Florida Nat'l Organization for Women v. State, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) (dismissal with prejudice proper if amendment would be futile).

B. The Claim Fails To State A Cause Of Action Because It Misstates The Requirements Of Section 4095.

It is bedrock collective bargaining law that an employer may not modify the terms and conditions of employees represented by a union without first bargaining to agreement or going through impasse proceedings.[4] E.g., IAFF Local 2886 v. Village of Royal Palm Beach, 14 FPER ¶ 19304 (PERC 1988). Absent this, the employer is required to maintain terms and conditions as they exist, a condition called the "status quo."

Section 4095 provides a method whereby an employer may open negotiations during the term of a labor contract and, if necessary, force modifications to the contract in order to meet a financial crisis. In other words, Section 4095 offers an entre into impasse proceedings so that the employer may alter the status quo. The method for forcing such modifications is set forth in Section 447.403. Briefly, that section provides for a hearing before a special magistrate, who makes non-binding recommendations to the public employer's governing body. The governing body – the City Commission, in the case of Hollywood – then holds a hearing and may impose modifications.

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4 Additionally, there is a labor law doctrine of "financial exigency" that may permit a unilateral change to the status quo, but that doctrine has no application in these cases.

Significantly, for purposes of Plaintiffs' claims in this lawsuit, modifications imposed through this impasse process become the new "status quo" for the terms and conditions of employment for the affected employees and remain in place until they are changed through bargaining. See, e.g., CWA v. City of Gainesville, 20 FPER ¶ 25226 (PERC 1994); Sch. Bd. of Hernando County v. Hernando Classroom Teachers Ass'n, 8 FPER ¶ 13178 (PERC 1982). In other words, when terms and conditions of employment are changed through impasse and imposition, those changes are permanent until they are modified through later bargaining. This has been the law of Florida for 30 years and more and Plaintiffs' legal theory is simply uninformed.

Plaintiffs state that, because the changes to the pension plan extend beyond one fiscal year, that "the City has not complied with the necessary condition precedent in Section [4095] that would allow the City to modify the collective bargaining agreement beyond the 2012 fiscal year." Plaintiffs are taking the position that the City must declare financial urgency and go through the impasse process annually in order to maintain the change to the pension plan. This is nonsense.

In the first place, the City has complied with every requirement under Section 4095. In the second, there is no requirement to either to declare financial urgency for each and every year that a modification may persist, nor is there a requirement that modifications made under Section 4095 must be limited to a single fiscal year. Modifications to terms and conditions of employment made through the impasse process become status quo and must remain in place until changed by bargaining or some later impasse proceeding. Finally, and as explained in section A, above, this sort of interpretation of Section 4095 is outside the Court's jurisdiction and is a matter exclusively for PERC and for any judicial review that might follow. Accordingly, Count

III should be dismissed and, because there is no set of facts that could be alleged to cure its defect, it should be dismissed with prejudice.

C. The Individual Plaintiff Has Failed To Exhaust His Administrative Remedies.

The individual Plaintiff has failed to exhaust his administrative remedies. A party seeking review of administrative action – such as the change in the pension benefits at issue in the instant case – must first exhaust available administrative remedies before seeking court review. Failure to do so deprives the court of subject matter jurisdiction. Dist. Bd. of Trustees of Broward Community Coll. v. Caldwell, 959 So. 2d 767, 769-70 (Fla. 4th DCA 2007). In that case, the plaintiff was discharged by the College. She initially pursued, then abandoned the administrative appeal process. She filed suit in the circuit court, alleging breach of her employment contract. The appeals court held that her failure to exhaust her administrative remedy deprived the court of jurisdiction. Id. at 767-70.

In the instant case, Plaintiff had available to him the administrative remedy of filing an unfair labor practice charge with the Commission. In fact, the union representing the bargaining unit covering his position has filed such a charge, which is midstream in the administrative process before PERC. Judicial review will be available upon issuance of a final administrative order.

Beyond the question of subject matter jurisdiction, the action brought by the individual Plaintiff before this Court presents a opportunity for inconsistent adjudication by either the Commission or the District Court of Appeal with this Court. Plaintiff's failure to exhaust his administrative remedies deprives this Court of subject matter jurisdiction and it should dismiss this count with prejudice as to the individual plaintiff.

CONCLUSION

Based on the foregoing the City respectfully requests that the Court grant the instant Motion and dismiss Plaintiffs' Complaint in its entirety.

DATED this 22nd day of February, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished, via email only, per agreement of the parties, this 22d day of February, 2012, to Mitchell W. Berger, Esq. (mberger@bergersingerman.com), 350 E. Las Olas Blvd., Suite 1000, Fort Lauderdale, Florida 33301; Daniel H. Thompson, Esq. (dthompson@bergersingerman.com), 125 S. Gadsden St., Suite 300, Tallahassee, Florida 32301; and Steven H. Cypen, Esq. (scypen@cypen.com), 777 Arthur Godfrey Rd., Suite 320, Post Office Box 402099, Miami Beach, Florida.

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