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IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 12-001000 (05)

THE BOARD OF TRUSTEES OF THE CITY
OF HOLLYWOOD FIREFIGHTERS' PENSION
SYSTEM, AND WILLIAM HUDDLESTON,

Plaintiffs,

-vs-

CITY OF HOLLYWOOD, FLORIDA, A
MUNICIPAL CORPORATION,

Defendant.

_____ /

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HEARING BEFORE THE HONORABLE RICHARD D. EADE

MONDAY, SEPTEMBER 10, 2012
BROWARD COUNTY COURTHOUSE, ROOM 1030B
FORT LAUDERDALE, FLORIDA
11:04 A.M. - 12:48 P.M.

Reported By:
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APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

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- - -

1 (Thereupon, the following proceedings were
2 had):

3 THE COURT: Sorry we're starting late, but I
4 got behind on a number of matters and an hour will
5 not be sufficient, so we will have to do this in
6 two parts because an hour won't be sufficient.

7 MR. BERGER: It's a long one.

8 MR. MILLER: I agree with you.

9 MR. ELKINS: That's fine, your Honor.

10 THE COURT: I mean, I've been looking at the
11 material here.

12 MR. BERGER: Do you want to reschedule it for
13 all at once, Judge?

14 THE COURT: No, no, no, no. It would be a
15 waste of your time. You're here, let's do an hour
16 now. Do you have an hour now?

17 MR. BERGER: Absolutely.

18 MR. ELKINS: I think we can probably break it
19 up on the substantive allegations versus the
20 injunctive stuff, that way you can follow.

21 MR. BERGER: It's their motion, Judge. We're
22 at their pleasure.

23 THE COURT: Well, actually, the plaintiff is
24 supposed to sit on this side. Oh, you are the
25 plaintiff.

1 MR. BERGER: That's right. They're moving to
2 dismiss. Your Honor, there are two rules, Judge.
3 Do you know what those are?

4 THE COURT: What?

5 MR. BERGER: Rule number one, the judge is
6 always right. Rule number two, when the judge is
7 wrong refer to rule number one.

8 THE COURT: Why is it that never works at
9 home?

10 MR. MILLER: Different judge.

11 THE COURT: Different judge, a superior court
12 judge, the appellate court.

13 Off the record before we start.

14 (Discussion had off the record.)

15 THE COURT: All right. Appearances for
16 plaintiff.

17 MR. BERGER: All right, your Honor. My name
18 is Mitchell Berger and my colleague Dan Thompson
19 and Alison Bieler are here, your Honor. Alison is
20 with a different firm, that's why I'm struggling
21 with her name. I apologize.

22 THE COURT: Not to me. You can apologize to
23 her.

24 MR. BERGER: I apologize to Alison, exactly.

25 THE COURT: All right. And for the City of

1 Hollywood.

2 MR. MILLER: David Miller, Bryant, Miller,
3 Oliver. With me is Michael Elkins also with
4 Bryant, Miller, Oliver, and with us is Jeffrey
5 Sheffel who is the city attorney for the City of
6 Hollywood.

7 THE COURT: Okay. It's your motion, you have
8 the floor.

9 MR. MILLER: Thank you.

10 THE COURT: How many counts are we dealing
11 with, three?

12 MR. ELKINS: There's four counts, your Honor.

13 THE COURT: Four counts, three are with --

14 MR. ELKINS: Police complaint.

15 THE COURT: There's two plaintiffs.

16 MR. ELKINS: Correct.

17 MR. BERGER: There's two plaintiffs.

18 THE COURT: How many counts are on behalf of
19 each plaintiff?

20 MR. ELKINS: There are two complaints. There
21 are three total plaintiffs, the pension board and
22 then the two individual plaintiffs. The individual
23 plaintiffs are different on each complaint;
24 however -- and the boards are different.

25 MR. BERGER: If it please the Court, the fire

1 case has four counts and the police case has three
2 counts. The difference is in the fire case we
3 claim no actuarial statement was filed with the
4 state board prior to changing the pension plan
5 fund, so there's an additional count in the fire
6 case.

7 THE COURT: Now, we're dealing this morning
8 just with the fire case, aren't we?

9 MR. BERGER: The motion is in both cases. The
10 cases have been consolidated. So it might be
11 helpful to do Count 1, start with Count 1, start at
12 the beginning and work our way through.

13 THE COURT: I'm trying to think of the
14 methodology that's going to be best.

15 MR. MILLER: I concur. I think that's best.
16 Count 1 is the most complex count. It would
17 probably be best to address these count by count
18 and that way we can get to a stopping place that's
19 kind of rational and just go back and forth on the
20 counts, if you would like to do that.

21 THE COURT: All right. Let's try to tackle
22 Count 1, just Count 1 --

23 MR. MILLER: Okay.

24 THE COURT: -- and see how far we go.

25 MR. MILLER: A little context out of the

1 complaint. This is a motion to dismiss. The City
2 declared financial urgency and bargaining impasse
3 under state labor law including sections 447.4095
4 and 447.403. Those are the sections of the Public
5 Employees Relations Act which governs public sector
6 labor law in Florida.

7 The statutes permitted the City to modify the
8 terms of employment, in this case pension, for
9 unionized employees in their fire and police
10 departments. As has been pointed out to you
11 already, there is a pension plan for the fire
12 employees. There's a separate pension plan for the
13 police employees. They have separate boards of
14 trustees. These lawsuits were originally brought
15 by each board in a parallel fashion. They were in
16 two different courts. This was the first one. It
17 was transferred and consolidated. So here we are
18 on that.

19 The pension plans as are most public sector
20 pension plans in Florida set forth as an ordinance
21 in the city code, as a chapter of the city code.
22 The code -- and the legal provisions that we are
23 going to be discussing, a lot of them go two by two
24 by two, fire and police, fire and police, fire and
25 police. If I lapse into the singular, it's because

1 the provisions are very similar. Where there's a
2 distinction to be made, I'll try to remember to
3 make that.

4 Both code chapters, both pension ordinances
5 provide a slightly different way in each one that
6 to amend these ordinances required some kind of a
7 vote, either a vote by the city commission along
8 with a vote by active members of the plan, that is,
9 the employees, fire police employees; or if that
10 didn't occur, a vote by the commission and a vote
11 by the electors of the City of Hollywood. Under
12 the circumstances it was obvious that this
13 amendment was not going to be approved by the
14 active members of the plan and so the City opted to
15 go with a referendum of the electorate, which was
16 probably the right thing to do under the
17 circumstances in any case. That referendum was
18 held on September 13, 2011. The voters approved
19 both plans.

20 I was faced with a similar situation in a
21 different context a few months ago where a pension
22 board for another municipality, which happens to be
23 represented by Ms. Bieler and her firm as pension
24 board attorneys -- Ms. Bieler is the pension board
25 attorney. These are her outside counsel for both

1 pension boards -- where the City passed an
2 ordinance, the pension board refused to implement
3 it. In that case the City whom I represented sued
4 the pension board and said, implement our
5 ordinance. It went up to the Third DCA and the
6 first question from the Third DCA judges to the
7 pension board was, Pension Board, why do you care?
8 In other words, why are you here, why are you
9 pursuing this?

10 The answer that was given is the same answer
11 that is given to you in their materials. Your
12 Honor, we care because we have to apply this law
13 and we need to apply the correct law and so we need
14 to -- we're refusing to do this because -- we're
15 refusing to implement this ordinance because the
16 City hasn't followed the law. The Third DCA kind
17 of nodded their heads and then held for the City.

18 THE COURT: And then what?

19 MR. MILLER: And then held for the City,
20 thanked the board for their altruism and held for
21 the City, please implement the ordinance. The
22 outcome here should be the same.

23 Count 1 has at least three theories of law or
24 three theories of recovery in it that I can count.
25 The sort of overriding theme is that the ballot

1 language of these elections was misleading and that
2 the City or city officials or someone engaged in
3 improper electioneering and the plaintiffs want the
4 Court to overturn the election.

5 I'm going to address as best I can each of
6 these theories in turn. By the end of Count 1 of
7 the complaint, they all tend to meld a little bit
8 together, but I will try to keep them straight.
9 The initial theory is that the plaintiffs want the
10 Court to invalidate this election for failure of
11 the ballot language to comply with Article V of the
12 city charter, and you will find Article V in your
13 materials at Tab 12 of the City's binder.

14 THE COURT: One minute.

15 MR. BERGER: You've got the City binder right
16 there, the first one you have, that's the one with
17 the tabs.

18 MR. ELKINS: We will use one binder for all
19 future hearings.

20 THE COURT: Article IV. Here's Article V.

21 MR. MILLER: And I'm glad you looked at
22 Article IV first because there's a distinction to
23 be made here. Article IV deals with something
24 called the initiative, which is legislation
25 proposed by the citizenry. Article V deals with

1 referendum but not referendum as we loosely use
2 that term. Referendum is defined in Article V.
3 The entire thrust of referendum, both specific
4 language and the entire sense in context of
5 Article V -- now we're here on a motion to dismiss
6 but I will say it -- the practice of the City
7 throughout, but that's for later. This is a motion
8 to dismiss. Article V, Referendums, are
9 referendums that are initiated by citizen petition
10 with an object of repealing an existing action by
11 the city commission. It's kind of antiquated.
12 It's a little bit out of the ordinary. It does
13 exist elsewhere in Florida law, municipal law, but
14 if you will look section by section by section, you
15 will see that this is the plain import of
16 Article V. I can take you through every single
17 section but I'm just going to give you a few
18 examples.

19 5.01, the very first, the purpose, the
20 electors have at their option the power to repeal,
21 and that's a referendum for purposes of Article V,
22 the power to repeal, at the option of the electors,
23 not something initiated by the city commission as
24 occurred in this case, but a petition brought by
25 the electors to repeal an existing measure.

1 Section 5.02 -- and I mention this only
2 because the plaintiffs have mentioned it in some of
3 their papers -- provides that initiative measures,
4 that's Article IV, something proposed by the
5 voters, initiative measures also can be repealed by
6 referendum, but why would it say that? If the
7 voters have spoken on an initiative, say, in 2000
8 there was an initiative to, you know, sell
9 lollipops at the corner of Hollywood and US-1, and
10 then there's a petition to overturn that, the
11 argument could conceivably be made, well, that's
12 already been voted on, why vote on it again? The
13 voters had their say. It simply clarifies that,
14 no, it's a city law and it can be repealed if
15 there's been a change in circumstances.

16 5.03, this kind of referendum -- this
17 referendum is initiated solely by voter petition.
18 There's no provision there for this sort of an
19 election to be initiated by the city commission.
20 Other sections address the sufficiency of a
21 petition, content of petition.

22 5.07 refers to the language to be used in the
23 petition. This is primarily the section upon which
24 plaintiffs rely. 5.08 says that it's supposed to
25 say for or against the measure. 5.09 uses specific

1 language that referendum applies solely to the
2 appeal of existing --

3 MR. SHEFFEL: Your Honor, would it be okay if
4 I close the door?

5 THE COURT: Yes.

6 MR. MILLER: The full thrust, both specific
7 language and the context of Article V demonstrate
8 that it's used for repeal of an existing city
9 ordinance upon initiative by the electorate through
10 a petition. In contrast, this -- and now I'm
11 reverting to the common and loose use of the word
12 referendum, or I'll say election -- this election
13 was mandated by two sections in the city code in
14 the ordinance chapters. This election was required
15 by city code sections completely away and separate
16 from -- this is the charter -- but completely
17 unrelated to this citizen petition initiative.
18 This election was governed by state law. This
19 Article V does not apply to this election in any
20 way, shape or form. That's the Article V theory.

21 The next theory is that the ballot language
22 was deficient. The plaintiffs argue that the
23 ballot language was deficient both as to the
24 sections that they point to in Article V which,
25 frankly, should not be under consideration at all

1 and as to the standards under state law in Florida
2 Statute, Section 101.161. The complaint refers to
3 and argues and their papers argue Section 101.161,
4 although specific relief is not asked for,
5 referring to that section by name. They refer to
6 state law and the City Code. I'm assuming that
7 they mean 101.161; it's not entirely clear to me,
8 that's what's argued, so that's what I'm going
9 with.

10 Very briefly, because the case law on ballot
11 challenges under 101.161 is voluminous, to say the
12 least. The statute requires that the ballot must
13 set forth the chief purpose -- that's the magic
14 word, chief purpose -- of the measure in clear and
15 unambiguous language. The ballot may not mislead
16 and it may not conceal this chief purpose, and that
17 has been explicated through 50 years and God knows
18 how many cases. Every time there's a
19 constitutional amendment that goes up, they apply
20 this kind of language in an automatic fashion.
21 It's a little bit different for constitutional
22 provisions than for referenda but it's close
23 enough, and all of the law is cited back and forth
24 on both, but it is extremely voluminous. Every
25 detail or potential ramification of the measure

1 need not be explained. Inclusion of subjective
2 language will not in and of itself taint a ballot
3 measure. The motives and the intent of the
4 sponsors of the ballot -- of the measure are
5 irrelevant, and the Court is to confine itself in
6 determining whether the ballot language sets forth
7 the chief purpose by looking strictly at the
8 language of the ballot and the language of what it
9 represents in this case are two ordinance
10 amendments.

11 The courts have also over the years -- and
12 I've given you a very small sampling in our motion
13 -- stated that very high regard should be given by
14 the courts to the conclusiveness of elections.
15 There is a doctrine, it's a minor doctrine -- we're
16 not arguing it here at least as to most of this --
17 that technical ballot errors are cured by an
18 election. I would say that if, indeed, this yes,
19 no, for, against matter is to be considered -- and,
20 of course, it's our position that that's Article V
21 language in the charter, it doesn't apply -- if you
22 were to consider that, I would argue that that is a
23 technical issue that was cured by the election.

24 The City's position is that by any standard
25 these ballots were proper under the standing case

1 law. It's a judicial determination. This is not a
2 jury trial. The only facts that are properly under
3 your consideration are the ballot language and the
4 ordinance. Both are here. When I say "here,"
5 meaning the complaint. I think you can make a
6 determination even on a motion to dismiss that as a
7 matter of law these ballots were proper. That's
8 theory number two.

9 Theory number three is what I call the
10 electioneering theory. There are a couple of
11 issues here. I'm going to dispose of, perhaps, the
12 easier one up front. The plaintiffs in their
13 papers object or counter the City's arguments on
14 this point by saying, oh, the statute says that
15 electioneering communications only apply to
16 candidate elections, but there's this other thing
17 called political advertisements and those apply to
18 both candidate or issues elections and the City is
19 quibbling because, well, the complaint only used
20 that term, electioneering communications.

21 Electioneering communications are defined in
22 Chapter 106. They apply only to candidate
23 elections. They do not apply to issues elections.

24 I lay out for you the amendment of the statute
25 that makes that clear. It's in the motion. Is

1 this, as the plaintiffs say, a semantic argument?
2 Well, yes, it is. So is an argument about the
3 language of a ballot a semantic argument? We're
4 here about semantics. It's a simple matter to
5 clearly and properly plead so that the City is on
6 notice of what it is we're arguing about. They've
7 used the term exclusively electioneering
8 communications; doesn't apply. If they mean
9 political advertisements, they need to plead it
10 that way.

11 MR. BERGER: We'll interlineate that.

12 MR. MILLER: Pardon me?

13 MR. BERGER: We'll interlineate election
14 communications and political advertisement.

15 MR. MILLER: So they can amend with your
16 permission.

17 MR. BERGER: We'll interlineate that.

18 MR. MILLER: All right. That's the easier
19 portion. I figured that would be the outcome, no
20 problem.

21 MR. BERGER: We don't need to waste much time
22 on that.

23 MR. MILLER: A more substantive objection to
24 this count under Chapter 106 is that it is
25 basically an allegation that public funds were

1 spent on these -- and from now on I'm going to call
2 them political advertisements, which is addressed
3 by Chapter 106. Chapter 106 contains an elaborate
4 administrative scheme for addressing alleged
5 violations of Chapter 106 which go beyond mere
6 political advertisements. It is commonplace of
7 Florida law that if there is an administrative
8 scheme and particularly an extensive one like this,
9 that the courts will defer to the administrative
10 enforcement, particularly when there is an agency,
11 an expert agency tasked with enforcing that scheme,
12 and of course there is, the Florida Elections
13 Commission.

14 The courts in this sort of a situation may
15 have concurrent jurisdiction and the City is not
16 taking the position that the Court does not perhaps
17 have jurisdiction over this. The City is taking
18 the position that the proper way to address this,
19 if this is the complaint, that there was improper
20 political advertising, the proper way to address it
21 and the legislature's intent for this sort of an
22 allegation to be addressed is through the FEC,
23 through the administrative scheme and with judicial
24 review by the District Courts of Appeal and not in
25 the first instance by having a circuit court

1 duplicate or take over the work that the
2 Legislature designed for the Florida Elections
3 Commission. So this is a classic example of where
4 a court should defer to the administrative
5 enforcement scheme that's in place and designed to
6 address this very sort of allegation.

7 The remedy -- so those are the three
8 substantive theories, as I understand. Mr. Berger
9 and Mr. Thompson are going to tell you that I don't
10 understand them. We'll see how that goes. The
11 remedy that's asked for, your Honor, is
12 invalidation of the election and reversal of the
13 will of the voters as expressed through the ballot
14 box in rather overwhelming numbers. There's no
15 basis for that remedy in what they have alleged
16 with possible exception of Chapter 101, the ballot
17 challenge language, but if that's what they want,
18 they haven't properly pled it, it seems to me.
19 Certainly, there is no cause of action established
20 by Article V, should you consider that article,
21 there's no remedy set forth. There's no
22 enforcement scheme set forth in Article V of the
23 charter.

24 Plaintiffs cite a case, Hudspeth, as authority
25 for the idea that the sorts of challenges they have

1 brought should result in invalidation of the
2 election. Hudspeth doesn't say anything about
3 invalidating elections. Chapter 106, enforcement
4 scheme, doesn't say anything about invalidating
5 elections. It talks about fines. It talks about
6 causes of action brought by the commission. 106
7 does not establish a private cause of action. It
8 says that the commission can bring a civil action,
9 if it wants, or it can refer a civil action, but
10 there's nothing in 106 about a private cause of
11 action.

12 Remedy is drastic and if you look at the case
13 law dealing with Chapter 101 cases, ballot
14 challenge elections, you will then see judges of
15 the Supreme Court frequently weighing in on this
16 saying that election invalidations are very harsh
17 and should not be taken lightly by any court
18 including themselves. We are reversing the will of
19 the people here and that has to be taken very
20 seriously.

21 Finally, and as to not merely Count 1,
22 although this is where I'm going to address it, but
23 to all of these counts, why have the boards waited
24 so long? We're talking about elections, number
25 one, to which there was no prior challenge, no

1 preelection challenge. We're talking about
2 elections which the courts have said, don't reverse
3 those things, it's not a good idea unless it's
4 clear and compelling. Well, I won't use -- I'm not
5 arguing that as an evidentiary standard, but unless
6 it's clear and conclusively established that the
7 ballot was tainted, don't reverse elections. We're
8 talking about something -- and, again, it's a
9 motion to dismiss, but I think it's reasonably
10 inferable from what you've got in front of you,
11 millions and millions and millions, tens of
12 millions of dollars here that if reversed -- God
13 knows what's going to happen with that, if this
14 election was reversed -- why have we waited months
15 since September 13th? Why was there no preelection
16 challenge to try to now after all this reliance by
17 the City, after the City's budget has been balanced
18 and so on, on the basis of these savings, why is
19 this coming up now?

20 Plaintiffs have objected that laches is an
21 affirmative defense and shouldn't be granted on a
22 motion to dismiss. Well, there's also the equally
23 well known doctrine that if the defense laches --
24 statute of limitations even -- appears on the face
25 of the papers, it can be granted on a motion to

1 dismiss.

2 Thank you, your Honor.

3 MR. BERGER: May it please the Court.

4 Mr. Thompson and Ms. Bieler and I represent the
5 pension funds for the City of Hollywood for their
6 police and fire along with Mr. William Huddleston
7 and Mr. Van Szeto. The principle in this case that
8 plaintiffs wish to protect are best enunciated by
9 the Fourth District Court of Appeals in People
10 Against Tax Revenue versus Hudspeth. In that
11 case the court --

12 THE COURT: What year was that?

13 MR. BERGER: 1989, your Honor, and I'm going
14 to give you authority as to why we had to wait
15 until after the election to challenge the Supreme
16 Court authority, which they cited the dissent in
17 their papers. The majority in the Supreme Court
18 said, it's unfortunate there's no pre-ballot
19 clearance for these types of things. In that case
20 the case is dismissed before the election and taken
21 after the election and the Supreme Court then took
22 appropriate remedy. I will discuss that as I move
23 along.

24 THE COURT: What's the cite of that case
25 again? I know it's in the material but I want

1 to --

2 MR. BERGER: Hudspeth is 547 So.2d, and the
3 Supreme Court --

4 THE COURT: What pages?

5 MR. BERGER: At 154.

6 THE COURT: 154.

7 MR. BERGER: And Armstrong versus Harris,
8 which is the Supreme Court case which my opponent
9 cited the dissent but not the majority, which said
10 that the appropriate challenge is after the
11 election. I'll give you that citation in a moment,
12 your Honor.

13 The point in Hudspeth, which I find this
14 language compelling: If government, with its
15 relatively vast financial resources, access to the
16 media and technical know-how, undertakes a campaign
17 to favor or oppose a measure placed on the ballot,
18 then by doing so government undercuts the very
19 fabric which the constitution weaves to prevent
20 government from stifling the voice of the people.
21 An election which takes place in the shadow of
22 omniscient government is a mockery -- an exercise
23 in futility -- and therefor a sham.

24 There's no dispute that the City of Hollywood
25 electioneer, it's not even in the argument that's

1 being made. These words enunciating the American
2 legal constitution of tradition and principle that
3 the government cannot use tax dollars to perpetuate
4 itself and its policies has been codified in
5 Florida in Statute, Section 106.113(2).

6 THE COURT: Wait a minute, Section what?

7 MR. BERGER: 106.113(2). A local government
8 or a person acting on behalf of their local
9 government may not expand or authorize the
10 expenditure of, and a person or group may not
11 accept, public funds for a political advertisement
12 or electioneering communication -- we apologize for
13 not quoting the statute in full -- concerning an
14 issue, referendum, or amendment, including any
15 state question that is subject to a vote of the
16 electors. This is Florida law.

17 There's no question they did this. The
18 argument that 106.113(2) does not apply to a local
19 government's communications about issues is almost
20 offensive to the traditional principles of
21 constitutional government and it certainly violates
22 116.113(2). Our allegations that 106.113(2) was
23 violated is plainly set forth in paragraphs 53
24 through 60 of the complaint. There is no dispute
25 that the City engaged in this advocacy. We

1 attached some of the advocacy to the complaint.

2 There is also no dispute that this government
3 expenditure was made in the face of an opinion from
4 the deputy city attorney explaining to the vice
5 mayor of the City in relevant part, you have the
6 right to express your support for the ballot
7 questions as long as you do so without expending
8 City funds, any use of City resources and
9 expenditure of City funds; in other words, you must
10 insure that you express your support for the ballot
11 questions without using any City resources.

12 We then go into this argument that the City's
13 charter did not apply to the City's referendum. Of
14 course it did. If you read 5.01, Defined: The
15 electors shall at their option to approve or reject
16 at the polls any measure passed by the commission
17 or submitted by the commission to a vote of the
18 electors.

19 Same thing with the next paragraph, 5.02:
20 Measures submitted to the commission by initiative
21 petition and passed by the commission -- all of
22 this was done, passed by the commission. There
23 were two or three readings, however many they do
24 their -- without change or passed in the amended
25 form shall be subject to referendum in the same

1 manner as other measures.

2 If they didn't even pass the referendum to the
3 Commission, then this Article V wouldn't apply, but
4 they chose to do that. Article V now applies. So
5 5.07 now requires that the ballot measure be free
6 of argument or prejudice, descriptive of the
7 substance, 5.07(b) and (c). So this section
8 applies, Judge, unless you want to read the "or"
9 out of the code and you want to ignore the fact
10 that they had three readings in Hollywood to comply
11 with the way they get things on the ballot.

12 So there is also no dispute that this unlawful
13 advocacy was undertaken in connection with ballot
14 language. Now, the question is, was the ballot
15 language misleading? But certainly we believe that
16 the ballot language -- and, certainly, this might
17 be an issue of fact, but we believe that the ballot
18 language along with this electioneering violates
19 the City Code 5.07, and it certainly violates
20 Section 101.161(1).

21 THE COURT: Hold on a minute.

22 MR. BERGER: I'm sorry, your Honor.

23 THE COURT: Let me understand. You're saying
24 that Article V applies because this ordinance that
25 was voted upon by the electors of Hollywood, this

1 amended ordinance which the voters approved was
2 passed by the city commission, correct?

3 MR. BERGER: Yes.

4 THE COURT: And then it's placed on the ballot
5 for approval through the referendum process,
6 correct?

7 MR. BERGER: Correct.

8 THE COURT: And Article V by its very
9 definition talks in terms of the electors shall
10 have the power at their option to approve or reject
11 at the polls any measure passed by the commission,
12 which it was --

13 MR. BERGER: Right.

14 THE COURT: -- or submitted by the commission
15 to a vote of the electors, which is what happened
16 here, right?

17 MR. BERGER: Correct.

18 THE COURT: Such power being known as a
19 referendum.

20 MR. BERGER: Correct, your Honor.

21 THE COURT: That by the very definition of
22 5.01 this is what happened.

23 MR. BERGER: Correct, your Honor.

24 Now, as my colleagues say, there might be some
25 expert testimony or something of the nature that

1 shows this is not what they really did all the
2 time.

3 THE COURT: We're at a pleading stage, we're
4 not at a summary judgment hearing.

5 MR. BERGER: We agree, your Honor.

6 THE COURT: I'm not here about experts
7 testifying as to what, if it's being permitted, as
8 to what the legislative history was or what it was
9 meant, if that's even permissive. We're at a
10 pleading stage.

11 MR. BERGER: The plain reading of the statute
12 says it applies, and they acted, they went through
13 the readings and they said they were putting it on
14 the ballot and now they're saying the "or" doesn't
15 count.

16 THE COURT: What "or"?

17 MR. BERGER: The "or" submitted by the
18 commission.

19 THE COURT: It says, "or" submitted by the
20 commission to a vote.

21 MR. BERGER: Right. They did all these
22 things, Judge, and that was repeated throughout
23 Section V. It's in 5.07, it's in 5.02; that
24 language is repeated in the series, Judge.

25 THE COURT: All right.

1 MR. BERGER: So 5.07 requires a clear and
2 concise statement without argument or prejudice on
3 the ballot. In 101, the Florida Statute requires a
4 clear and unambiguous statement, 101.161(1). So
5 our pleading is that under 5.07 and 101 and 106 the
6 election laws were violated.

7 I think that except for our error in not
8 putting in political advertisement it's a pretty
9 clear pleading. Plaintiffs have asserted
10 specifically that the ballot language's stated
11 purpose for the referendum regarding the pension
12 was to -- and this is on the ballot -- address the
13 City's high pension costs, and it is improper
14 advocacy and misleading only enhanced by the
15 expenditure of government resources in favor of the
16 initiative. Government should never appear to be
17 shading a ballot summary to favor one position or
18 another. People Against Tax Revenue Mismanagement
19 versus Leon County. One person's high -- you know,
20 Judge, it's like one person's terrorist is another
21 person's freedom fighter -- one person's high
22 pension benefit is another person's parsimonious
23 expenditure. Identifying the City's pension costs
24 as high is clearly designed to shade the ballot
25 summary to favor an affirmative vote to reduce it.

1 As defined in the Cambridge English Dictionary,
2 "high-cost" means expensive, and Webster's "high"
3 is expensive and costly. The City admittedly
4 intended to convey to voters by using the adjective
5 "high" to modify the noun "cost" that the City's
6 then current pension costs were too expensive.
7 This is ballot language which clearly advocates
8 support of the measure.

9 All of this is clearly alleged in the
10 complaint. So it is clear the statutes and the
11 codes prescribed the conduct the City is alleged to
12 have undertaken. There is also no dispute that the
13 conduct alleged to have been undertaken is pled and
14 set forth in our complaint.

15 So now what else is offered to us as reasons
16 to dismiss our complaint? Laches. Well, as we all
17 know, that is essentially factual, but the essence
18 of the laches argument is that the plaintiffs
19 should have taken action before the election. We
20 took action within 60 days of the election. We
21 brought a complaint on the referendum and cannot
22 now take action after the election on the
23 referendum, that's the essence of the argument.
24 The argument that the law in constitutional
25 republics should not favor the overturning of

1 elections even when the government used its
2 resources and power to manipulate the outcome of
3 the election, the argument is not supported by the
4 Supreme Court of Florida and it's decisional law,
5 specifically Armstrong versus Harris, which
6 specifically rejected the argument. Armstrong,
7 your Honor -- and I have the cite for you --
8 Armstrong versus Harris, your Honor, is 773 So.2d
9 7, and Justice Pariente's concurrence starts on
10 page 25, which is also instructive.

11 THE COURT: What year is Armstrong?

12 MR. BERGER: Armstrong is December 5th of
13 2000. They were pretty busy during that month.

14 Okay. Specifically, Armstrong versus Harris
15 which specifically rejected the argument that a
16 favorable referendum vote bars any subsequent
17 challenge to the amendment thereby enacted. The
18 action for declaratory relief in Armstrong was
19 filed after the vote. The pre-vote lawsuits were
20 dismissed without prejudice, including a petition
21 before the Supreme Court was dismissed without
22 prejudice. The court held that a vote only serves
23 to cure technical and minor defects in the form of
24 submission of the ballot referendum, page 18, and
25 I'll concede the for and against, yes and no is

1 technical and that's the type of thing they're
2 talking about in Armstrong, the for and against,
3 yes and no, but not the high pension costs.

4 Importantly for the issue raised in the motion
5 to dismiss, Justice -- importantly for this,
6 Justice Pariente joined a prior call by Justice
7 Overton in prior Supreme Court cases for the
8 legislative bodies to establish time limits or
9 other procedures for challenging a ballot title and
10 summary prior to the elections to limit situations
11 in which courts have to make determinations on
12 them.

13 Unfortunately, the City of Hollywood did not
14 do that here. They had their second reading five
15 days before the election. So they jammed it on,
16 they didn't make any time period for this to be
17 challenged before or passing the ordinance. If
18 you're going to challenge this, do this before the
19 election, which is what Justice Pariente suggested
20 was a better way to handle these things. So we are
21 following how the Supreme Court said to do this in
22 Armstrong versus Harris.

23 The premise of the City's argument that
24 whatever the facts, a person cannot legally
25 challenge a referendum election after a vote is not

1 the law; and that we're here on a motion to
2 dismiss, it is the premise only of a dissenting
3 opinion by Justice Lewis in Armstrong, and if you
4 read their papers they quote Justice Lewis's
5 dissent, and they say -- they quote it accurately,
6 they say it is a dissent. I'm not suggesting
7 otherwise, but that's not the law, it's the
8 dissent.

9 So why else should the plaintiffs' complaint
10 be dismissed? The plaintiffs have asked for
11 declaratory and injunctive -- and Armstrong says
12 that the remedy for non-technical violations needs
13 to be fashioned by the judge, and they fashioned a
14 remedy in Armstrong and amongst the remedies are
15 the invalidation of the election. That might not
16 be able to be decided here now but certainly we can
17 ask for that. So what else -- and our colleagues
18 have admitted that under all these statutes the
19 courts have concurrent jurisdiction, but it's not
20 the statutes themselves that we're asking about,
21 it's the penumbras and emanations of this problem:
22 The electioneering, the ballot initiative saying
23 "high-cost" and 5.07 of their code saying you can't
24 do that. You would then try these issues or
25 summary judgment these issues, if we can stipulate

1 to the fact, and you would decide what the
2 appropriate remedy is.

3 We have asked for declaratory relief because
4 we are the ones that administer these funds. If we
5 administer them incorrectly people can make claims
6 against us or our individual plaintiff, if he gets
7 the wrong funds -- and this has happened in the
8 Florida pension system -- he might be subject to
9 having those funds recalled.

10 So for all of these reasons we have asked for
11 declaratory relief to insure that the boards will
12 administer the plans lawfully and the individuals
13 who receive the money will not be subject to
14 reallocation or recapture from which they can be if
15 the money is being administered incorrectly. No
16 monetary relief is requested. This is all plainly
17 set forth in paragraphs 3 through 13 of the
18 complaint, amplified in paragraphs 9 and 10.

19 Interestingly, with respect to Count 1, the
20 City has made no effort whatsoever to claim the
21 amended complaint fails to state a cause of action
22 for declaratory relief and, accordingly, the City
23 has waived its claim for dismissal as to
24 declaratory relief for any count of the amended
25 complaint, Florida Rule of Civil procedure

1 1.140(h). The waiver as to the essential component
2 of the relief sought, which is declaratory, is
3 grounds for the Court to deny the motion in its
4 entirety, and that's the Ballas case, Ballas versus
5 Lay, it's an old case, it's a 1930 case. Our
6 friend, Henry Trawick cites it all the time, but
7 they say if you determine that -- the Supreme Court
8 said if you determine the essential element wasn't
9 asked for to dismiss the complaint, then the entire
10 rest of the motion should fail.

11 You know, look, the issues for injunctive
12 relief have not been tried but they have been pled:
13 Irreparable harm, likelihood of success, no
14 adequate remedy at law and serving the public
15 interest.

16 MR. MILLER: If I may -- and I'm sorry to
17 interrupt at this point -- we were focusing on
18 Count 1. We're now talking about injunction.

19 THE COURT: Isn't injunction in Count 1?

20 MR. MILLER: It is. We have challenged it in
21 our motion as a separate portion applicable to the
22 whole thing. We're talking about the --

23 MR. BERGER: I didn't mean to overstep and I
24 was --

25 THE COURT: All right. Well, we'll go to the

1 injunction.

2 MR. BERGER: I mean, I'm saying we've pled
3 these things.

4 THE COURT: That's part 2 of Count 1, the
5 injunction.

6 MR. BERGER: Okay. I didn't mean to overstep
7 what I thought I was supposed to be arguing.

8 THE COURT: Okay. We'll get to injunction.
9 We'll see what's enjoined.

10 MR. BERGER: The only other thing, Judge, that
11 I think is important, they mentioned a case before
12 the Third DCA, which wasn't in their materials,
13 where they said the judges said to them, we're not
14 going to overturn the election, whatever it was. I
15 don't know what the issues were that were raised in
16 that case.

17 THE COURT: I don't know but it's an urban
18 legend.

19 MR. BERGER: It's an urban legend.

20 THE COURT: Conventional wisdom. We all know
21 it's very difficult to overturn the vote of the
22 people at the ballot box. It's rare. It's a heavy
23 burden the plaintiff has.

24 MR. BERGER: We have a heavy burden. We have
25 a heavy burden.

1 THE COURT: You already know that.

2 MR. BERGER: Yes, your Honor. As I said, we
3 have a heavy burden but it's also -- we start with
4 Hollywood advertising against the --

5 THE COURT: But let's be clear, though, we're
6 not at a summary judgment stage.

7 MR. BERGER: Yes, your Honor.

8 THE COURT: We're still at a pleading stage.
9 Did you make out enough at the pleading to go
10 forward? Even though you have -- if you do, you
11 still have a very heavy burden.

12 MR. BERGER: Correct, your Honor, I believe we
13 do in Count 1. I mean, it's all there.

14 THE COURT: Right now so just confine your
15 arguments to the dec portion. We'll get to the
16 injunctive relief portion of Count 1 in a few
17 minutes.

18 MR. BERGER: Well, they didn't move to dismiss
19 the dec portion, it's that simple, they didn't move
20 to dismiss it. They said there's no -- and
21 certainly declaratory relief is different than
22 injunctive relief.

23 MR. MILLER: And your Honor --

24 THE COURT: Wait a minute. Have you finished
25 your argument for now? Because I want to go on a

1 little bit longer.

2 MR. BERGER: Well, your Honor, in terms of --
3 the only other -- I guess I don't know where one
4 begins and the other ends so, I mean, they kind of
5 merge to me and the only other thing, they say
6 we're entitled -- I don't know if this goes to
7 injunction about damages, but I think we've pled
8 that there's no adequate remedy at law, and I'll go
9 on about damages if anyone would like me to.

10 THE COURT: Not quite yet. All right.

11 MR. MILLER: My feeling, your Honor, is it's
12 our motion. We should have the opportunity to
13 address injunction. Mr. Elkins is going talk to
14 about that. He's going to talk about the dec
15 judgment request, so I would like you to hear
16 him -- I would have liked you to hear him before
17 all that. If I may rebut a few things that I heard
18 and then --

19 THE COURT: Are they still going at war in the
20 courtroom, if you know?

21 THE CLERK: He needs you.

22 THE COURT: They need me?

23 THE CLERK: He sent out a message.

24 MR. MILLER: If you'll give me five minutes I
25 can wrap this up.

1 THE COURT: Go ahead now.

2 MR. MILLER: Thank you, your Honor.

3 THE COURT: Address one of the issues right
4 now where he says it's clear because of the "or" in
5 Article V.

6 MR. MILLER: Sure.

7 THE COURT: Article V according to the
8 plaintiff does apply on its face to this ballot.

9 MR. MILLER: Article V has to be read as a
10 whole and the "or" that is celebrated, "or" in
11 Section 5.01, is not dispositive of the issue. If
12 you look at Section 5.03 -- in addition to the
13 arguments that I made earlier, if you look at
14 Section 5.03, upon the passage of any measure by
15 the commission a petition may be submitted if it's
16 proper and so on and so forth, the entire thrust of
17 Article V is that this sort of a referendum as
18 defined herein is initiated by petition, not
19 initiated by submission of the commission of some
20 measure to a referendum. The entire thrust of the
21 article, if you look at 5.01 where it says, or
22 submitted by the commission to a vote of the
23 electors, how can that happen? It can only happen,
24 says 5.03, when there's a petition asking for it.
25 If there's a petition, then the clerk has some

1 things to do, the commission has some things to do,
2 and in the end the voters have some things to do.
3 Article V deals with referendums to repeal matters
4 that already exist and is initiated by petition of
5 the voters. It is not initiated solely by the City
6 Commission of its own accord. Moreover more to the
7 point, these elections were based on requirements
8 in the pension chapters.

9 THE COURT: I'm sorry. Repeat that.

10 MR. MILLER: These elections or this
11 election -- there was a referendum with three
12 questions on it, so sometimes I think of it as one
13 election, sometimes I think of it as three. This
14 referendum arose from the requirements in the
15 pension chapters of the city code to submit this
16 matter to the voters for an up or down vote. It
17 did not arise from a petition by voters asking that
18 something be repealed. This was not an existing
19 measure that was going to be repealed. This was an
20 existing measure that had been voted on first and
21 second hearing that was not going to go into effect
22 until it was approved.

23 Certainly there was time before the election
24 to challenge the election before it began.
25 Plaintiffs could have filed for an injunction.

1 They could have filed it on an emergency basis,
2 could have filed it before the matter even was read
3 for the second time, if there was something to
4 challenge at that point. I've been there. I'm
5 certain -- Mr. Berger was talking about his
6 experience -- I'm certain he's been there. I've
7 been before in a courtroom with an election coming
8 up in three days arguing about injunctions to stop
9 the election. Certainly it's possible to challenge
10 them ahead of time.

11 There was a statement both in his papers and
12 in Mr. Berger's argument that the City does not
13 dispute that there was electioneering. If we
14 didn't dispute there was electioneering or
15 political advertising or whatever it is that
16 they're complaining about, we wouldn't be here.
17 This is a motion to dismiss. We have to assume
18 that everything they say in their complaint is
19 true. Certainly, there's a dispute of fact as to
20 whether these laws were violated as to whether what
21 is attached here constitutes something that's a
22 violation or not but, as you pointed out, that's
23 not why we're here. We're here to see whether
24 these pleadings are legally sufficient or not.

25 Additionally, we do dispute that the city

1 attorney opinion that was attached to their
2 memorandum of law means what they say it means.
3 They have cited that opinion as some sort of
4 admission that what was subsequently done was
5 illegal. Not at all, that's a matter of fact,
6 that's not what we're here on today. In fact, the
7 city attorney letter may be a matter of evidence,
8 may not be a matter of evidence, but it wasn't
9 attached to the pleadings and it's not under your
10 consideration.

11 It is not the City's position as it was
12 misstated that all post-election challenges are
13 illegal. The position is, frankly, what your Honor
14 stated, that plaintiffs bear an exceedingly heavy
15 burden to reverse a vote by a majority of the
16 people, that's what that quotation from the dissent
17 in Armstrong is in there for and that's what it
18 illustrates, and I think that you have seen that.

19 And then I will say one last thing before we
20 move on to the next point, I guess, and that is
21 that plaintiffs' memorandum of law frequently tries
22 to reframe what the City's positions are as stated
23 in its own memorandum. That's a good rhetorical
24 device. It's kind of a distraction. I would urge
25 the Court to look to our own words to discern what

1 we mean rather than what plaintiff says we've said.
2 If you would like, your Honor, we can move to
3 Count 2.

4 MR. BERGER: Your Honor --

5 THE COURT: We still have Count 1. Isn't the
6 injunctive request in Count 1?

7 MR. ELKINS: With respect to the injunction,
8 your Honor, they requested injunction as to each
9 and every count. It's pled in the wherefore clause
10 after each and every single one of their counts.

11 THE COURT: Okay.

12 MR. ELKINS: Our papers state that they
13 haven't pled any ultimate facts in any count to
14 warrant the granting of an injunction. So what we
15 have done is we have provided substantive bases,
16 separate and apart from their request for relief as
17 to dismissals for Counts 1, 2, 3 and 4, and those
18 substantive bases we contend are dismissals that
19 are dispositive. So we were having your Honor
20 address the dispositive issues first and then we
21 can go back and address whether or not they have
22 pled sufficient facts for an injunction, which
23 would not necessarily be dispositive because as
24 your Honor correctly pointed out earlier, they
25 could amend and add additional facts.

1 MR. BERGER: If it please the Court, a brief
2 rebuttal on this Article V issue, if the Court
3 would like.

4 THE COURT: All right.

5 MR. BERGER: This is the ballot that says it's
6 a referendum ballot.

7 THE COURT: Is this part of the complaint?

8 MR. BERGER: Yes, your Honor. And, your
9 Honor, quite simply, Article V, if you look at the
10 title of Article V, it's not called repeal
11 referendums, it's called referendums. And if you
12 read Article V, the first thing is how they define
13 it is in 5.01 and the "or" is in 5.01; and then in
14 5.03 it is "petition," which is another subsection.

15 MR. ELKINS: What exhibit is that? I'm sorry.

16 MR. THOMPSON: It's Exhibit 3 to the
17 complaint. It's referendum ballot.

18 MR. BERGER: Right. It's called a referendum
19 and referendum is what Article V is about, 5.01
20 defines a referendum. Certainly, there are various
21 types of referendums, including appeal referendums,
22 which is discussed in 5.03, but this is a
23 referendum that was placed on the ballot by the
24 commission after two readings and it's governed by
25 Article V. It might not have been the practice of

1 the City of Hollywood but, you know, if you skip
2 through the definition 5.01 to go down to 5.03 to
3 explain your position, it's subject to how it's
4 defined. 5.03 is a different type of referendum,
5 which is also governed by 5.07 and 5.08 and all the
6 rest, but this referendum --

7 MR. MILLER: Your Honor, I think they're
8 not --

9 THE COURT: What about 5.02?

10 MR. BERGER: I'm sorry, your Honor?

11 THE COURT: 5.02 talks about measures
12 submitted to the commission and passed by the
13 commission without change or passed in an amended
14 form shall be subject to the referendum. Isn't
15 that alluding to the "or" in Section 5.01?

16 MR. BERGER: Yes, yes, but measures submitted
17 to the commission by initiative petition and passed
18 by the commission without change or passed in an
19 amended form -- again, by the commission, I'm
20 reading that in -- shall be subject to a referendum
21 in the same manner as other measures.

22 THE COURT: But it's talking about submitted
23 to the commission by initiative petition. So it
24 appears that the trigger of Article V, it's where
25 the citizens submit an initiative petition, it's

1 either approved by the commission or they might
2 amend it and if it's amended or even approved in
3 its initial form, then it's subject to a
4 referendum. Is there any mechanism -- so I believe
5 the City is saying, look, if you're going to read
6 the submitted by the commission to a vote of the
7 electors, you've got to read that in pari materia
8 with Section 5.02; I think that's their argument,
9 and that's measures submitted by initiative, done
10 by the citizens.

11 MR. BERGER: But 5.01 is how it's defined and
12 then if you read 5.07(c), I mean, if we're going to
13 -- 5.01 is how it's defined, Judge. I mean,
14 everything else then goes through different
15 variations. If you look at 5.07(c), the question
16 shall be submitted by the committee of the
17 petitioners if for an initiative, to the city clerk
18 for preparation and placement on the ballot or, if
19 a referendum measure, also submit to the city clerk
20 for preparation and placement on the ballot. Both
21 are discussed in 5.07.

22 THE COURT: So Your point being that under
23 5.07 it really speaks in the alternative.

24 MR. BERGER: Yes.

25 THE COURT: But it's done by initiative by

1 some of the citizens --

2 MR. BERGER: Correct.

3 THE COURT: -- or if it's a referendum
4 measure.

5 MR. BERGER: Correct.

6 THE COURT: To give any meaning to it as a
7 referendum measure, that can be -- where it was
8 initiated only by the city commission.

9 MR. BERGER: Correct, your Honor, which is
10 what 5.01 --

11 THE COURT: Otherwise I would be reading that
12 out of the -- I have to give meaning to that
13 language.

14 MR. BERGER: Correct, or you're reading 5.01
15 out too, which is where it's defined.

16 MR. MILLER: May I address that point, your
17 Honor?

18 THE COURT: Not yet.

19 MR. BERGER: 507(b) of that section, the exact
20 section we're complaining about, is where it says
21 it cannot be done without argument or prejudice.
22 So it's in that section where both types of
23 referendum are discussed and, you know, I
24 appreciate that the City is desperate to avoid its
25 code here because of the other things that have

1 occurred and, yes, the code is stronger for us than
2 the statute and the case law because the code is
3 very specific, and that's why the City is desperate
4 to avoid its code, but it cannot. It applies to
5 both types of things that are put on the ballot,
6 and there's no question that it does, and this
7 whole fumblerooski argument that this is really
8 about --

9 THE COURT: Fumblerooski? You're dating
10 yourself.

11 MR. BERGER: You leave the ball on the ground
12 and you dance around.

13 THE COURT: I know. Don't know how many
14 people do.

15 You're too young, fumblerooski.

16 MR. SHEFFEL: And I'm 53. I'm not that young.

17 MR. BERGER: You leave the ball on the ground
18 and you say that it's about the state pension fund
19 and let's dance around ignoring what the city code
20 says and the city code is clearly --

21 THE COURT: I want to hear another
22 counterargument on Article V. Interesting.

23 MR. MILLER: Look at 5.07(c) which was just
24 made much of, and I may not come up with colorful
25 football origins, although I do remember the

1 original fumblerooski play. If you read that
2 sentence through, as you did, or if a referendum
3 measure also submitted to the city clerk, there's
4 no subject there. The plaintiffs are trying to
5 read in the subject city commission. Reading that
6 sentence, the antecedent subject for submit is
7 committee of the petitioners. It still refers to
8 petitioners. The entire code must be -- the entire
9 chapter must be read in pari materia.

10 THE COURT: One moment. "Or if a referendum
11 measure."

12 MR. MILLER: That refers --

13 THE COURT: Why would they need the words "if
14 a referendum measure," if the referendum measure is
15 only those -- only done by initiatives?

16 MR. MILLER: There are two defined terms in
17 that sentence: "Initiative" which is defined by
18 Article IV, which is a proposal by the citizens for
19 approval.

20 THE COURT: All right.

21 MR. MILLER: And "referendum," which is
22 defined by Article V, which is a proposed repeal of
23 an existing measure, and then there is referendum
24 in the loose sense, which is how it was used on the
25 ballot, for a vote of the electors. If you read

1 Article V in its entirety -- and I would submit if
2 you read 5.01 in its isolation, but certainly if
3 you read Article V as it must be, together, it
4 compels the conclusion that referendum as defined
5 therein is the repeal of an existing measure.

6 There is a distinction -- or initiative is
7 mentioned separately in 5.07 because according -- I
8 gave you an example earlier. Here's another
9 example, an initiative which is -- in Article IV
10 initiative is passed in an election or Article IV
11 initiative is amended by the city commission before
12 it's put up. Referendum can be used -- and it's
13 passed -- referendum can be used to repeal it by
14 the same people who proposed it. Maybe they didn't
15 like how it was amended by the city commission.
16 That's why you need this kind of clarification.

17 MR. BERGER: May it please the Court. The
18 Article IV is initiatives to do repeals. Article V
19 talks about any type of referendum and how they're
20 to be placed on the ballot. You cannot read 5.01
21 out of the Article V entitled "Referendum," which
22 Article IV is a different section as we said about
23 repeals. Article V is about any referendum. And
24 why the City of Hollywood would be so concerned
25 about the subject to a ballot initiative in its own

1 standards to be able to put something on their
2 ballot without argument or prejudice -- why is the
3 government sitting here saying they don't want to
4 be subject to having something on the ballot
5 without argument or prejudice?

6 MR. MILLER: May I respond to that, your
7 Honor?

8 MR. BERGER: But, you know, that
9 notwithstanding 5.01 is clear, and if we want to
10 read the whole thing in pari materia, you need
11 5.01, that's how we define referendum, and if you
12 go to 5.07, any statutory construction, if a
13 referendum measure, you have to go back to how
14 referendum is defined under 5.01, that's law school
15 101.

16 MR. MILLER: May I respond, your Honor?

17 THE COURT: Sure. I like being at tennis
18 matches.

19 MR. MILLER: Exactly, it's ping pong.
20 Mr. Berger now twice, an accomplished rhetorician,
21 and now has impugned the motives of the City in
22 trying to run away from its ordinance is
23 ridiculous. The City like the plaintiffs just want
24 the right law applied.

25 Referendum does not apply to this election.

1 If it did, we certainly would not be running from
2 our own laws. It demeans the argument which here
3 fore has been conducted at a fairly high level and
4 it's really a distraction and not worth listening
5 to.

6 THE COURT: All right. Let's move on. I want
7 to talk a little bit about injunctions.

8 MR. MILLER: I will defer to Mr. Elkins.

9 MR. ELKINS: Thank you, your Honor. The
10 plaintiffs have gone ahead in their amended
11 complaint and they have asked for injunctive relief
12 as to all four counts. There's no individual claim
13 in this complaint for injunction; instead, the
14 plaintiffs' argument for injunction focuses really
15 on two paragraphs in the general allegations,
16 paragraphs 9 and 10, and then in the wherefore
17 clause with each count they simply ask for
18 injunctive relief. I think it's very well settled
19 in Florida law that you need four -- you need to
20 establish four elements for injunction. By
21 "establish," I mean you have to plead and then
22 demonstrate facts for those four elements, and
23 that's obviously irreparable harm, the absence of
24 an adequate remedy at law, a clear legal right to
25 the relief requested, which really the courts

1 define as a substantial likelihood of success on
2 the merits, and then that the public interest
3 consideration will be served by the granting or
4 denial of the injunction.

5 In their complaint, your Honor, either in a
6 conclusory fashion or factually, plaintiffs make no
7 mention of a substantial likelihood of success on
8 the merits. There's no statement in the complaint
9 that says the plaintiffs have a substantial
10 likelihood of succeeding on the merits, which
11 although would be conclusory, would at least
12 acknowledge that essential element of a claim for
13 injunction. It's left out. Therefore, any claim
14 for injunction or the request for remedy for
15 injunction should be denied at this point, or they
16 should be forced to replead it since they're
17 missing that essential element.

18 Additionally, your Honor, the plaintiffs only
19 in a conclusory manner plead that they will suffer
20 irreparable harm and that there's no adequate
21 remedy at law. They simply state in their
22 complaint, we have no adequate remedy at law and we
23 will suffer irreparable harm, and that's in
24 paragraphs 9 and 10 of their complaint. They also
25 specifically say, we're not seeking money damages,

1 but that's not the test for injunction. The test
2 for injunction is whether or not money damages are
3 available, and we're not here to decide that today.
4 As your Honor has pointed out, we can't go beyond
5 the four corners of the complaint, but simply
6 pleading in a conclusory manner, we have no
7 adequate remedy at law and will suffer irreparable
8 harm isn't enough either. There has to be actual
9 facts. We have no adequate remedy at law because,
10 and there needs to be facts there to support why
11 there are no money damages available. Simply
12 saying we're not seeking money damages is not
13 enough.

14 And, finally, with respect to public interest
15 considerations, the plaintiffs never state in their
16 complaint the public interest will be served
17 because. They make an argument in their papers
18 that the entire complaint relates to public
19 interest issues, and that's a hundred percent true,
20 but then by that definition every single lawsuit
21 would be able to satisfy that prong for injunctions
22 since lawsuits as a general manner relate in some
23 manner to public interest since the rule of law is
24 being applied.

25 The question for injunction is not whether the

1 lawsuit addresses public interest issues; it's
2 whether the grant of the injunction or the denial
3 of the injunction will serve the public interest,
4 and the only allusion to that in the complaint is
5 that the plaintiffs simply say that the boards need
6 to comply with the laws and, therefore, that will
7 serve the public interest, and that's a conclusion.
8 They simply need to plead ultimate facts to
9 establish each of these elements. And, again,
10 putting aside irreparable harm, adequate remedy at
11 law and public interest considerations, there's no
12 mention of substantial likelihood of success on the
13 merits, and by omitting that by itself the claims
14 for injunction should fail.

15 THE COURT: Now, when you say "the claims,"
16 well, you're saying since there's not a separate
17 count for temporary injunctive relief, that those
18 portions of the four counts which allude to the
19 remedy of injunctive relief should be struck,
20 assuming arguendo that the rest of the counts
21 remain?

22 MR. ELKINS: That's correct, your Honor.

23 THE COURT: At least the tumors should be
24 removed --

25 MR. ELKINS: That's correct, your Honor.

1 THE COURT: -- from your position?

2 MR. ELKINS: Yes. There is no claim for
3 injunction. They have simply tried to plead it in
4 the general allegations. They then used the
5 wherefore clause to incorporate those general
6 allegations, but those are conclusions, they're not
7 ultimate facts, and in very lengthy counts, I would
8 add. You know, the majority of this complaint are
9 allegations of each Count, 1, 2, 3 and 4. The
10 general allegations compose only a small portion of
11 the complaint. They make no further mention of
12 facts that support an injunction for each count
13 other than a wherefore clause asking for it. So,
14 yes, we're asking that the injunctive relief be
15 dismissed or they be forced to replead with actual
16 facts as opposed to conclusion. And with respect
17 to the element of substantial likelihood of success
18 on the merits, that they address it at all because
19 it's not addressed in this complaint.

20 THE COURT: If your motion to strike is
21 denied, does the plaintiff have the right to invoke
22 and request a temporary injunction hearing when
23 there's no separate count for injunction?
24 Normally, the Court sees a separate count for
25 injunctive relief.

1 MR. ELKINS: And that's pointed out in our
2 papers.

3 THE COURT: Do they have the right to ask for
4 a temporary injunction hearing, assuming they get
5 by these pleading issues? Since they haven't
6 brought it in a separate count, can they invoke the
7 Court and have an evidentiary temporary injunction
8 hearing based on the counts as filed?

9 MR. ELKINS: As the papers are currently
10 situated, we say no. They could, I supposed,
11 theoretically, file a motion for a temporary
12 injunction which would be under the same pleading
13 standards that we are arguing about here, but since
14 they have raised the issue of injunction and they
15 have asked for that relief and they haven't filed a
16 claim, we think it's appropriate to dismiss those
17 claims since they haven't pled the ultimate facts
18 that are necessary for that injunction.

19 THE COURT: Well, that's that other issue, but
20 I think separate and apart from your assertion that
21 they haven't pled with enough specificity, can you
22 have a temporary injunction hearing without a count
23 for a temporary injunction and simply raise it as
24 one of your remedies in the counts you do file?

25 MR. ELKINS: I would argue no.

1 THE COURT: All right.

2 MR. BERGER: Your Honor --

3 THE COURT: Mr. Berger.

4 MR. BERGER: -- that clearly is not the law,
5 by the way. The proper pleading is to plead
6 substantive issues, not remedies. A count for
7 injunction is a plea for a remedy, so that -- and
8 Henry Trawick and the Florida Supreme Court are
9 clear on that issue. So you don't have a count for
10 injunction. You have a substantive count and you
11 ask for a remedy.

12 THE COURT: All right.

13 MR. BERGER: So that's just -- I mean,
14 that's -- I'm sorry, that's just not even -- not
15 going there. We had asked for declaratory relief
16 because we -- and it's pretty clear why we ask for
17 declaratory -- not it's pretty clear, it is clear.
18 There is a bona fide actual, present and practical
19 need for declaration by this Court as to what are
20 the rights and obligations of the board of trustees
21 as a result of enactment of ordinance. And we go
22 on and if the Court will -- I mean, we go on ad
23 nauseam as to --

24 MR. ELKINS: We don't challenge declaratory
25 relief, your Honor, so I think --

1 THE COURT: What's that?

2 MR. ELKINS: We don't challenge their prayer
3 for declaratory relief, so as much as earlier the
4 plaintiff said we could save some time by arguing
5 certain issues, I mean, we don't have to reread the
6 prayer for declaratory relief that they point out.
7 We didn't challenge that, so I'm not sure why we're
8 talking about it.

9 MR. BERGER: Your Honor, if our declaratory
10 relief is granted, we are asking for a permanent
11 injunction to enforce the judgment, and this is no
12 different than I've done for -- I mean, this is not
13 unusual. When they didn't challenge declaratory
14 relief, I was wondering why they were challenging
15 the injunction. If we were here on a TRO, you
16 know, these issues would be important. We are not.
17 We are here for declaratory relief and we are here
18 for a permanent injunction to enforce the
19 declaratory relief should we win. And they have
20 just said they're not challenging all of the things
21 we have said about our need for declaratory relief.

22 MR. ELKINS: Well, I'll just say, they have
23 pled ultimate facts to establish a claim for
24 declaratory relief. They didn't simply say, we're
25 entitled to a declaration; they pled facts, and so

1 we don't challenge the adequacy of the pleading.
2 We certainly will challenge ultimately in the case,
3 should it go forward, of their entitlement to that
4 declaratory relief based on the facts. And also,
5 your Honor, there's nothing in the complaint that
6 says if we prevail on declaratory relief, we are
7 seeking this injunction to enforce the said relief.
8 With the injunction in paragraph 9 and
9 the injunction request in paragraph 10, it's very
10 clear that it's a separate request for relief; it's
11 not tied to any ruling on a declaration of rights,
12 and there are no facts -- ultimate facts to support
13 each of the elements, which even if they're
14 pleading it for relief they still have to plead
15 those facts. Simply saying the board of trustees
16 will suffer irreparable harm isn't enough; they
17 need facts, and they did that with declaratory
18 relief, but that hasn't happened with injunction.
19 In fact, they don't even mention substantial
20 likelihood of success on the merits. It never
21 comes up in this complaint.

22 THE COURT: Well, isn't Mr. Berger's point the
23 following, assuming that the Court declares that
24 the ballot did not meet the requirements of the law
25 and if the Court invalidates the ballot? If the

1 Court makes that declaration, is there any need for
2 injunctive relief? What is the City going to do?
3 They will appeal, wouldn't you?

4 MR. ELKINS: Of course.

5 THE COURT: You would appeal. Would we have a
6 specter of the City saying, well, too bad, trial
7 judge, we're not going to appeal and we're not
8 going to follow the declaration, as far as we're
9 concerned it's still passed? The City wouldn't do
10 that.

11 MR. ELKINS: Of course not.

12 THE COURT: So why would there need to be any
13 injunctive relief? What would the Court have to
14 do, tell you it's now invalidated, you have to
15 follow the Court's ruling?

16 MR. ELKINS: Well, I think that's what the
17 plaintiffs are seeking to do is to both get their
18 declaration and then -- and now they're telling us,
19 they're asking for the injunction to enforce their
20 declaration.

21 THE COURT: What would the Court do with
22 respect to that? Now, maybe there's other aspects,
23 though.

24 MR. BERGER: If it please the Court, I mean,
25 I'm reading from our pleading and maybe we're

1 reading different pleadings. Given the board of
2 trustee's belief that the ordinance was enacted in
3 violation of the law, the board of trustees will
4 suffer irreparable harm if that belief proves to be
5 well-founded in which case the board of trustees
6 will have a clear legal right to the relief being
7 requested for the reasons further explained in the
8 amended complaint. This is typical and not
9 unusual. We are saying we are in doubt and if we
10 are right we will suffer irreparable harm. We need
11 to not be ordered to -- we need an order to prevent
12 us from following the unlawful statute.

13 Declaration and injunctive relief is the way the
14 final judgment would be constructed at that point
15 in time, a permanent -- a declaration that the
16 ordinance is invalid and an injunction against the
17 City enforcing that ordinance. They would then
18 appeal.

19 MR. ELKINS: With all due respect, your
20 Honor --

21 THE COURT: Let him finish.

22 MR. ELKINS: I wasn't trying to interrupt.

23 MR. BERGER: I was interrupted twice.

24 THE COURT: Go ahead, Mr. Berger.

25 MR. BERGER: All right. So all of this is

1 here that if we are right we will suffer
2 irreparable harm and then we go on to say that
3 because of these complex statutes and complex
4 ordinances, the board of trustees has no adequate
5 remedy at law. These statutes and ordinances need
6 to be interpreted through declaration, and that's
7 what a dec action is about in these instances and
8 they haven't challenged that. So what happens if
9 we win? There's a judgment invalidating the
10 election and there's an injunction against that
11 ordinance, which is on the City of Hollywood's
12 books being enforced, that's the remedy that
13 happens. If there's just merely a declaration that
14 the ordinance is invalid and they then go and
15 enforce the ordinance, we have to come back to you.

16 THE COURT: How do you know as you sit here
17 now that if a court of competent jurisdiction
18 declares the ordinance to be invalid, it didn't
19 meet the requirements of the law for a proper
20 ballot for our voters, what facts do you -- don't
21 you have to marshal some facts that they're going
22 to ignore the Court's declaration and enforce the
23 amended ordinance allegedly passed by the citizens
24 of Hollywood?

25 MR. BERGER: Well, they've already ignored the

1 law in electioneering for this and ignored their
2 own ordinance with respect to what could be put on
3 the ballot.

4 THE COURT: That's not the issue. Isn't the
5 issue, Judge, we need a safeguard here. If you
6 declare that it was an invalid election, we need
7 the Court to also declare -- to enjoin the City
8 from attempting to enforce the amended ordinance
9 which is invalid as a matter of law. They're going
10 to go forward. They're going to ignore the Court's
11 order and we need you under the powers of contempt
12 to order them not to enforce an invalid ordinance.

13 MR. BERGER: I think everything the Court is
14 saying is a hundred percent correct; however, at
15 the pleading stage this is an appropriate remedy to
16 ask for in connection with the declaration.

17 THE COURT: Don't you have to allege some
18 facts, first of all, that you think that they would
19 ignore the Court's declaration, wouldn't you have
20 to allege something?

21 MR. BERGER: I mean, I don't think so, Judge,
22 and here's the reason why. I think that when a
23 court issues the declaration saying the law is
24 invalid, the ordinance is invalid, the contract is
25 invalid, that is an equitable remedy, that that is

1 an equitable declaration, and the equitable relief
2 that the court issues with it is some language that
3 tells third parties that this is no longer the case
4 in addition to whatever, so that someone can come
5 into court and say in the judgment that there is a
6 remedy for not following the declaration of the
7 court, and the remedy -- the traditional remedy is
8 injunction, that when the court declares something
9 to be invalid, the traditional remedy is, and you
10 are enjoined from enforcing.

11 THE COURT: I see your point, you're saying,
12 not only do we declare it but you are prohibited
13 from enforcing this defective ordinance.

14 MR. BERGER: Correct, and my colleagues have
15 said they have no problem with having pled the
16 declaration.

17 THE COURT: Now, let me ask you this then
18 because temporary or permanent injunction requires
19 the four prongs.

20 MR. BERGER: Yes.

21 THE COURT: Is there a need for the Court --
22 what would be the irreparable harm because
23 according to the City if they were a rogue -- when
24 I say "a rogue," you get an adverse court decision
25 and you say, that's fine, what is the judge going

1 to take a rifle and put it to our heads? We're
2 going to go forward anyway with the funding that we
3 think the citizens have approved, a reduced funding
4 for the pension plans or whatever; don't they have
5 an adequate remedy at law? Because the adequate
6 remedy is they could be sued because they have
7 breached their fiduciary obligation for the system.
8 Can't you put a money value on this?

9 MR. BERGER: No, your Honor. The reason why
10 we can't put a money value on this -- and that is
11 something that will be further developed -- is I've
12 sat on public boards, and many others here probably
13 have as well, and when you don't know which law to
14 follow, you go to court and you say, please tell us
15 which law to follow. You don't want to subject
16 yourself as a public board member to not
17 administering whatever program, law or whatever
18 when you are in doubt as to which one law to
19 administer.

20 THE COURT: Is your point this: If they defy
21 the court and there's inadequate funding, it's
22 irreparable harm because once it's -- the damage
23 can't be calculated with any specificity; it would
24 be irreparable because -- because of the inadequate
25 funding the harm cannot be reduced to a money

1 judgment; is that the point you're trying to raise?

2 MR. BERGER: There are several points, that's
3 one of the points.

4 THE COURT: But that wasn't alleged in the
5 complaint, was it?

6 MR. THOMPSON: Yes, it was.

7 THE COURT: It was?

8 MR. BERGER: Yes, it was, your Honor, in
9 paragraphs 3 through 13.

10 THE COURT: That if it went forward anyway
11 after the Court declared the ordinance to be
12 invalid, that by the time the Court addressed that
13 issue and if they inadequately fund -- well, it
14 historically was at a certain level, that you would
15 not be able to calculate in monetary terms the
16 damage?

17 MR. BERGER: Well, we would not be able to --
18 it would create an accounting mess, and accounting
19 is an equitable situation, and it would create an
20 accounting mess as to whether or not we gave his
21 benefits the right, his benefits the right, his
22 benefits the right way, how to restructure all of
23 that, and we are completely on the equity side of
24 all of this and that's why we ask for declaratory
25 relief and that's why the enforcement of the

1 declaratory relief is injunctive and that's why my
2 colleagues --

3 THE COURT: Did you allege facts in support of
4 the four prongs?

5 MR. BERGER: We --

6 MR. THOMPSON: Yes.

7 THE COURT: What facts did you allege?

8 MR. BERGER: Wait. The only -- yes. If you
9 look at 3 through 13 -- and I'll walk you through
10 them -- the only thing that we did not -- we said
11 that if our belief proves well-founded as to the
12 reason we are asking for a declaration, that is the
13 only thing that on the likelihood of success,
14 that's what we said there. As to the irreparable
15 harm, as to no adequate remedy at law and as to
16 serving the public interest, I can walk the Court
17 through in paragraphs 3 through 13 and elsewhere
18 where we said it obviously serves the public
19 interest, we are administering a public pension
20 fund and we wish to do it the right way. In terms
21 of irreparable harm, we mentioned some of the
22 things that you just said about we need to get the
23 benefits to the right people the right way and
24 those people need to be relying on getting their
25 benefits for their retirement the right way.

1 In terms of likelihood of success, we've
2 talked about that, and I think -- did I leave one
3 out?

4 THE COURT: Public interest.

5 MR. BERGER: Public interest. We're the
6 public body that is supposed to administer this.
7 We need to know how to do it the right way and
8 we've alleged that. And they haven't challenged
9 our request for declaration. We've alleged all of
10 these other things and we can allege these other
11 things to the extent there is a technical problem
12 with respect to political advertisement as opposed
13 to whatever other word we used in the complaint.
14 These elements are here. This is a classic request
15 for declaratory relief. We have a potential
16 invalid election, which if the election is valid it
17 requires us to do one thing; if the election and
18 referendum are invalid, we are required to do
19 another thing. That is a classic request for a
20 declaration, classic request.

21 THE COURT: We're not on the declaration now.
22 We're on if your need for a prohibition, if the
23 Court declares the election to be invalid --

24 MR. BERGER: The judgment in our view --

25 THE COURT: -- that there would be irreparable

1 harm if the Court doesn't enter at least a
2 temporary injunction barring them from enforcing
3 the ordinance.

4 MR. BERGER: Our concern is simple. The final
5 judgment in this case would need to be
6 self-executing and the remedy for the declaration
7 is injunction, so we don't have to start another
8 lawsuit. We shouldn't have to start another
9 lawsuit. We should have a finality of the judgment
10 and at the end of the day, if we prove the need for
11 this relief at that time, if they -- if the City of
12 Hollywood comes in and says, we will self enjoin
13 ourselves and we'll write this into the final
14 judgment and we will not enforce this until the
15 appeal is through, right, okay, maybe at that point
16 we can say, okay, we'll write it that way and we
17 respect the government and all that is done, but
18 until that is done we need a self-executing
19 judgment, something where our relief has a remedy.

20 THE COURT: I've got a little bit more
21 argument on this.

22 MR. ELKINS: Very brief, your Honor. I think
23 the questions you asked sort of illustrate our
24 point. They haven't pled specific facts to
25 establish irreparable harm. We will be irreparably

1 harmed because, here is why a money judgment would
2 not suffice, here is why we cannot obtain a money
3 judgment. What they said was is we're not seeking
4 one, so that's not the same thing.

5 Second, plaintiffs will have you believe that
6 an action for declaratory judgment in and of itself
7 sort of subsumes into it an action for injunction
8 and that's not the case. An action for declaratory
9 judgment is a party saying, we're not sure about
10 our rights. We think our rights are this. They
11 say our rights are that. Court, you tell us what
12 our rights are, and they haven't pled that. That
13 does not, though, automatically entitle them to an
14 injunction. They need to plead facts to establish
15 all four elements of injunction.

16 And finally, your Honor, as we alleged in our
17 papers, at least as to the individual plaintiffs,
18 those individual plaintiffs do, in fact, have an
19 ability to get a money judgment and, regardless,
20 they would need to plead why money damages would
21 not be available in this instance, that's what
22 we're saying, is plead the ultimate facts to
23 establish the four elements. And there's no
24 pleading here that says, if we get a declaratory --
25 if you agree with our declaratory judgment

1 position, you then will need to give us an
2 injunction to enforce that.

3 MR. BERGER: That's actually what --

4 THE COURT: Is this your point: If the Court
5 ended up declaring that the election was invalid,
6 the ballot language is confusing, or whatever
7 grounds, and if -- I mean, this is amazing -- that
8 the City would say, we're going to defy the Court,
9 we're going to fund it the way the people voted,
10 now, would they need to file another lawsuit and
11 ask for a temporary and permanent injunction?
12 Judge, in lawsuit number one you declared the
13 ordinance invalid. By their actions they have
14 indicated they are going to underfund it anyway in
15 accordance with the ballot election. We have to
16 file -- do they have to file another whole new
17 lawsuit requesting injunctive relief where they
18 could allege, the City has made it clear, here are
19 the specific facts, it will be irreparable harm,
20 and at that point maybe it would be needed for
21 injunctive relief. Does the City -- is there any
22 present facts that the City would somehow defy a
23 court order?

24 MR. ELKINS: The City would not defy a court
25 order.

1 THE COURT: Anything is possible. I mean,
2 what you do is you immediately say, let's get our
3 appellate lawyers. We just had a trial judge
4 invalidate a ballot, a whole election on an
5 important ordinance. We need the Fourth District
6 to review this.

7 MR. ELKINS: The City would never not follow
8 the law, and your Honor is correct, there are no
9 facts pled to demonstrate that the City would and
10 the City would not do that, but there's no facts in
11 their complaint to suggest otherwise either.

12 MR. BERGER: All right. Here's -- you know,
13 your Honor, first of all, paragraph 9 says exactly
14 what my opponent says I didn't say, that if our
15 belief proves to be well-founded we need an
16 injunction. It's done as in paragraph 8 says -- in
17 paragraph 8 to protect the board and so that the
18 board understands that the City will not be forcing
19 it to do something else.

20 Now, let's take the facts in the hypothetical
21 that you and my colleague have been discussing.
22 You issue a declaratory relief judgment --

23 THE COURT: I declare the ordinance invalid.

24 MR. BERGER: We go on appeal, there is no
25 injunction, there's nothing that stops the City on

1 appeal. Unless I go to the Fourth DCA, there's
2 nothing that stops the City from enforcing the
3 prior ordinance.

4 THE COURT: Have you ever seen any
5 municipality in a case of a court declaring that an
6 election is invalid from going forward anyway; has
7 that ever happened?

8 MR. BERGER: Yes.

9 THE COURT: It has?

10 MR. BERGER: Yes, presidents of the United
11 States, your Honor, have done it and certainly
12 other political officials have done it, have
13 refused to enforce court orders. Abraham Lincoln
14 in the Civil War said the Supreme Court made this
15 decision, now let's see them enforce it.

16 And the answer to that is a simple yes. So my
17 response is for declaration, injunctive relief is
18 the self-executing remedy, so I don't have to start
19 a new lawsuit. I can come back to you and say,
20 Judge, they are not following your declaration.
21 And, yes, political figures have done this
22 throughout our history and that's why courts also
23 put in declarations injunctive relief.

24 THE COURT: I'll give you the last word and
25 then we've got to adjourn. I've got people in the

1 courtroom.

2 MR. ELKINS: Our last point is simply all of
3 what Mr. Berger says may very well be true, that's
4 fine. They need to plead it. They did not plead
5 it with sufficient facts. That's our only point.

6 THE COURT: All right. Thank you, folks.
7 We've got to reconvene again because -- did we
8 cover all of Count 1 now?

9 MR. MILLER: I think we covered it.

10 MR. ELKINS: We covered all of injunction for
11 sure.

12 THE COURT: We still have to cover, what,
13 Counts 2 --

14 MR. MILLER: 2 and 3 and then one of the
15 complaints has an additional count.

16 THE COURT: So we have Count 2, Court 3 and
17 Count 4.

18 MR. BERGER: Unfortunately, we -- yes, 3 is
19 different in both counts, but 2 and 4 are the same
20 as 2 and 3 in the one.

21 MR. MILLER: We can straighten all that out.

22 MR. BERGER: Right, we can.

23 THE COURT: All right. How much more time do
24 you think we need?

25 MR. MILLER: Another hour, another hour and a

1 half.

2 MR. BERGER: Another hour and a half to be
3 safe.

4 MR. MILLER: I will tell you that Count 1 is
5 the most complicated.

6 MR. BERGER: It is.

7 MR. MILLER: But the law of the other two is
8 more obscure.

9 MR. BERGER: I'm agreeing with you so I'm
10 saying --

11 THE COURT: Obscure?

12 MR. MILLER: It's somewhat more obscure
13 because you're going to get into the details of
14 labor law and you're going to get into the details
15 of pension law.

16 MR. BERGER: I agree with my colleague, and
17 that's why I'm saying an hour and a half to be
18 safe. I don't think we need two.

19 MR. MILLER: An hour and a half will be good.

20 THE COURT: I'll see what I can do. I'll see
21 what we can do here. I need you to give my
22 judicial assistant Eva some times that both sides
23 are available.

24 MR. BERGER: We'll do it right now, Judge.

25 THE COURT: All right. Thank you.

1 MR. BERGER: May we be excused, your Honor?

2 THE COURT: Yes.

3 MR. BERGER: Thank you, your Honor.

4 MR. ELKINS: Thank you, your Honor.

5 MR. BERGER: Do you want us to take anything
6 back, Judge? We're happy to relieve you of
7 whatever you want to be relieved of.

8 THE COURT: I'm going to need all of this.
9 Was this part of the complaint?

10 MR. BERGER: Yes.

11 THE COURT: It was?

12 MR. BERGER: Yes.

13 THE COURT: Interesting. Well, you can keep
14 this.

15 (Thereupon, the proceedings were adjourned at
16 12:48 p.m.)

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C E R T I F I C A T E

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I, Nancy B. King, Registered Professional Reporter, State of Florida at Large, certify that I was authorized to and did stenographically report the foregoing proceedings, pages 1 to and including 77, before THE HONORABLE RICHARD D. EADE, and that the transcript is a true and complete record of my stenographic notes.

Dated this 17th day of September, 2012.

Nancy B. King, Court Reporter