IN THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

SHANE STEVEN WOOD and
JACOB DANIEL BISSONNETTE,

Plaintiff,

vs. Case No.: 2013-CA-000809

CITY OF FLAGLER BEACH, a
municipality organized and existing
under Florida law.

Defendant.
_____/

DEFENDANT, CITY OF FLAGLER BEACH'S, MOTION TO DISMISS/ MOTION TO STRIKE/MOTION FOR MORE DEFINITE STATEMENT

COMES NOW Defendant, CITY OF FLAGLER BEACH ("City"), by and through its undersigned counsel, and pursuant to Rule 1.140, Florida Rules of Civil Procedure, hereby files this Motion to Dismiss/Motion to Strike/Motion for More Definite Statement, and as grounds therefore would state as follows:

1. Plaintiffs, SHANE STEVEN WOOD and JACOB DANIEL BISSONNETTE, have filed and served a two-count Complaint naming the City as the defendant. Count I purports to assert a claim for retaliatory discharge in violation of Section 112.3187, Florida Statutes (the "Whistleblower Statute"). Count II purports to assert a claim for violation of the confidentiality provision of Section 119.071, Florida Statutes.

2. Count I of the Complaint fails to state a cause of action and should be dismissed with prejudice because Plaintiffs are barred from filing the instant lawsuit based on their failure to exhaust their administrative remedies as provided in Section 2-400 of the City's Code of Ordinances pursuant to Section 112.3187 (8)(b), Florida Statutes.

3. Paragraph 9 of the Complaint should be stricken as it contains immaterial, impertinent, or scandalous matter and violates Florida Rule of Civil Procedure 1.140(f).

4. The Complaint fails to state a cause of action and should be dismissed in its entirety because Plaintiffs have taken a "shotgun" approach to their pleadings and have failed to comply with the minimum pleading requirements set forth in Florida Rule of Civil Procedure 1.110(f).

WHEREFORE, Defendant, CITY OF FLAGLER BEACH, respectfully requests the entry of an Order dismissing the Complaint for failing to state a cause of action, striking paragraph 9 of the Complaint, and/or in the alternative requiring Plaintiffs to provide a more definite statement setting forth the facts, dates and times that support each claim being asserted by each separate Plaintiff against the City, together with such and other further relief the Court deems just and proper.

A. PLAINTIFFS' WHISTLEBLOWER CLAIMS ARE BARRED BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

5. It is settled that "where adequate administrative remedies are available, it is improper to seek relief in the circuit court before those remedies are exhausted." *Communities Fin. Corp. v. Florida Dep't. of Envt'l. Regulation,* 416 So.2d 813, 816 (Fla. 1st DCA 1982); *Dep't. of Envt'l. Protection v. PZ Constr. Co., Inc.*, 633 So.2d 76, 78 (Fla. 3d DCA 1994); *Friends of the Everglades v. State, Dep't. of Envt'l. Regulation*, 387 So.2d 511 (Fla. 1st DCA 1980); *Sch. Bd. of Leon County v. Mitchell*, 346 So.2d 562 (Fla. 1st DCA 1977); *Sch. Bd. of Flagler County v. Hauser*, 293 So.2d 681 (Fla. 1974); *Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n*., 689 So.2d 1127, 1129 (Fla. 1st DCA 1997).

6. The legal principle that a party must exhaust any administrative remedy available to her or him prior to turning to the courts for relief is applicable to statutory causes of action under the Whistleblower's Act. *See, e.g., McGregor v. Palm Beach County*, 674 F.Supp. 858, 861 (S.D. Fla. 1987); *City of Miami v. Del Rio*, 723 So.2d 299, 300 (Fla. 3d DCA 1998) (holding that exhaustion of administrative remedies is applicable to whistleblower litigation); *University of Cent. Florida Bd. of Trustees v. Turkiewicz*, 21 So.3d 141, 146 (Fla. 5th DCA 2009) (stating that cases involving employees of local governments have consistently

held that an aggrieved employee must exhaust his or her administrative remedies prior to filing suit).

7. The Whistleblower's Act provides that :

> **Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure for handling such complaints** or has contracted with the Division of Administrative Hearings under s. 120.65(8) to conduct hearings under this section. The administrative procedure created by ordinance must provide for the complaint to be heard by a panel of impartial persons appointed by the appropriate local governmental authority. Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction.

Section 112.3187(8)(b), Florida Statutes (emphasis added).

8. Although the act states employees "may file a complaint with the appropriate government authority," the act also provides that public employees are only entitled to bring a civil action "after entry of a final decision by the local government authority" if the local governmental authority has adopted an administrative procedure to deal with whistleblower complaints. *Dinehart v. Town of Palm Beach*, 728 So.2d 360 (Fla. 4th DCA 1999). Therefore, public employees are only entitled to bring a civil action without having first filed a complaint with the appropriate governmental authority where the local governmental authority has ***not*** adopted an administrative procedure. *Dinehart*, 728 So.2d at 361 – 362.

9. The *Dinehart* court concluded that the appellants failed to exhaust their administrative remedies and that under the Whistleblower statute, the trial court lacked jurisdiction over the claim filed in circuit court. *Dinehart*, 728 So.2d at 361 – 362; Section 112.3187(8)(b), Florida Statutes; *Del Rio,* 723 So.2d at 299.

10. The *Dinehart* court also found that even if exhaustion was not deemed jurisdictional under the act, then the judicially recognized principle of deference to the administrative process, here the local government administrative procedure, was applicable. *Dinehart*, 728 So.2d at 361 – 362.

11. "By the exercise of deference, the town is afforded the opportunity to further develop the factual record or to exercise its discretion favorably to Appellants and to assure that the town's discretion is exercised on a full record. The result benefits judicial policy and efficiency". *Dinehart*, 728 So.2d at 361 – 362; s*ee, e.g., State, Dep't. of Health & Rehabilitative Servs. v. Artis,* 345 So.2d 1109 (Fla. 4th DCA 1977); *Odham v. Foremost Dairies, Inc.*, 128 So.2d 586 (Fla. 1961); *Gamma Phi Chapter of Sigma Chi Fraternity v. University of Miami,* 718 So.2d 910 (Fla. 3d DCA 1998); *State, Dep't. of Revenue v. Brock,* 576 So.2d 848 (Fla. 1st DCA 1991), *rev. denied,* 584 So.2d 997 (Fla. 1991).

12. In the instant mater, contrary to Plaintiffs' assertions in paragraph 6 of the Complaint, the City has established an administrative procedure via ordinance for the handling of whistleblower complaints and the Plaintiffs failed to utilize that

procedure before filing the subject lawsuit.

13. Section 2-400 of the City's Code of Ordinances establishes: (1) a procedure for handling whistleblower complaints; and (2) a panel of impartial persons appointed by the City that makes, upon hearing the employee's complaint, findings of fact and conclusions of law so that a final decision may be made by the City.

14. Section 2-404(a) provides as follows:

> Any employee protected under this article who alleges retaliation may file a written complaint with the city manager, or such other official or officials as may be designated by resolution of the city commission to receive such complaint, alleging a prohibited personnel action, **no later than sixty (60) days after the prohibited act**.

15. Here, neither Plaintiff filed any such written complaint with either the City Manager or any other City official prior to filing the instant lawsuit. Plaintiffs' failure to exhaust their administrative procedures as provided for in Section 2.400 bars their claims for whistleblower retaliation as alleged in Count I of the Complaint. Based on the dearth of case law addressing this very issue, Count I of the Complaint fails to state a cause of action and must be dismissed with prejudice.

B. PARAGRAPH 9 OF THE COMPLAINT SHOULD BE STRICKEN AS IT CONTAINS IMMATERIAL, IMPERTINENT, OR SCANDALOUS MATTER AND VIOLATES FLORIDA RULE OF CIVIL PROCEDURE 1.140(F).

16. Rule 1.140(f), Florida Rules of Civil Procedure permits "[a] party [to] move to strike ... redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." A motion to strike matter as redundant, immaterial or scandalous should be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision. *Rice-Lamar v. City of Fort Lauderdale,* 853 So.2d 1125, 1133 -1134 (Fla. 4th DCA 2003).

17. In the instant matter, Plaintiffs allege in paragraph 9 that "As a result of Plaintiffs' investigations, criminal charges have been filed against Pace, who remains employed with the City and was promoted to Chief of the fire department despite his involvement with the falsification of official records."

18. The allegations contained in paragraph 9 have no bearing on whether Plaintiffs were allegedly subject to retaliation and thus, is immaterial to their claim. Instead, Plaintiffs have included such an allegation in an attempt to sensationalize their claims. Therefore, paragraph 9 should be stricken from the Complaint as it is immaterial, impertinent and scandalous.

C. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO COMPLY WITH THE MINIMUM PLEADINGS REQUIREMENTS OF RULE 1.110(F).

19. Rule 1.110(f) provides as follows:

> All averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all subsequent pleadings. **Each claim founded upon a separate transaction or occurrence** and each defense other than denials **shall be stated in a separate count** or defense **when a separation facilitates the clear presentation of the matter set forth**.

20. The liberal notice pleading standard does not require a court to tolerate "shotgun" pleadings. "The typical shotgun complaint contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1295 (11th Cir. 2002). In such cases, it is "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief," such that the responding party cannot reasonably be expected to draft a responsive pleading." *Anderson v. District Bd. of Trustees of Cent. Fla. Community College*, 77 F.3d 364, 366 (11th Cir. 1996).

21. Here, Plaintiffs' Complaint is a perfect example of a "shotgun" pleading, in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief being asserted by the separate plaintiffs. Under the Florida Rules of Civil Procedure, a defendant faced with a

complaint such as Plaintiffs is not expected to frame a responsive pleading. Fla.R.Civ.P. 1.140(d).

22. In the instant matter, Plaintiffs have failed to comply with Florida Rule of Civil Procedure 1.110(f) which requires a party to plead each claim founded upon a separate transaction in a separate count. *See* Fla. R. Civ. P. 1.110(f); *Pratus v. City of Naples*, 807 So.2d 795, 797 (Fla. 2d DCA 2002); *see also Aspsoft, Inc. v. WebClay,* 983 So.2d 761, 768 (Fla. 5th DCA 2008) (holding that plaintiff's complaint set forth defective claims by "impermissibly comingling separate and distinct claims" in a single count); *Dubus v. McArthur,* 682 So.2d 1246, 1247 (Fla. 1st DCA 1996) (stating that the "task of the trial court was made more difficult because the appellants' amended complaint improperly attempts to state in a single count separate causes of action"). Plaintiffs have re-alleged all of the facts contained in Count I into Count II which makes it impossible for the City to determine exactly which facts support which claim brought by which plaintiff.

23. The contents of a pleading should not just meet the minimum requirements for that type of pleading. They should clearly and adequately inform the judge and the opposing party of the position of the pleader. The arrangement should be designed to make an orderly and effective presentation. To guide the pleader along these lines the rules require presentation in separately numbered paragraphs and in counts (1.110(f)).

24. Here, the Complaint purports to allege that the City retaliated against Wood and Bissonnette (Count I) and that the City violated Section 119.071, Florida Statutes. Wood and Bissonnette are separate individuals with separate claims against the City. Plaintiffs have impermissibly commingled their claims in Counts I and II. Each of their claims is based on separate transactions and its own set of facts. However, the Complaint fails to delineate which facts are specific to Woods' claim and which facts are specific to Bissonnette's claim. Thus, preventing the City from framing and formulating its defenses as it pertains to each plaintiff. The Complaint does not comply with the minimum pleading requirements set forth in Rule 1.110 and in so doing, fails to state a cause of action. Consequently, dismissal is warranted on this ground. *See Aspsoft, Inc.*, 983 So.2d at 768.

25. Alternatively, where, as here, Plaintiffs assert multiple claims for relief, a more definite statement, if properly drawn, will present each claim for relief in a separate count, as required by Rule 1.110 (f) and with such clarity and precision that the Defendant will be able to discern what the Plaintiffs are claiming and to frame a responsive pleading. Accordingly, Plaintiffs should be ordered to provide a more definite statement as to the facts, including but not limited to the identity of those persons who took alleged unlawful actions against the Plaintiffs,

the dates and times supporting each claim being brought by each separate plaintiff so that the City can frame an appropriate response to the allegations.

WHEREFORE, Defendant, CITY OF FLAGLER BEACH, respectfully requests the entry of an Order dismissing the Complaint for failing to state a cause of action, striking paragraph 9 of the Complaint, and/or in the alternative requiring Plaintiffs to provide a more definite statement setting forth the facts, dates and times that support each claim being asserted by each separate Plaintiff against the City, together with such and other further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via E-mail to Dennis K. Bayer, Esq. at denbayer@aol.com on this 23rd day of September, 2013.

/s/Cindy A. Townsend, Esq.

MICHAEL J. ROPER, ESQ.
Florida Bar No.: 0473227
CINDY A. TOWNSEND, ESQ.
Florida Bar No.: 0788961
Primary E-mail: ctownsend@bellroperlaw.com
Secondary E-mail: hcavallo@bellroperlaw.com
Bell & Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
Telephone: (407) 897-5150
Facsimile: (407)897-3332
Attorneys for City of Flagler Beach