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January 30, 2014

The Honorable Todd Hernandez
19th Judicial District Court Courthouse
300 North Boulevard
Baton Rouge, LA 70801
Via facsimile to 225-389-8941

Re: *Suit No. 624,531, Section 27; 19th Judicial District Court; Parish of East Baton Rouge; Robert Burns v. Louisiana Auctioneer's Licensing Board, Charles "Hal" McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. "Greg" Bordelon, Charles "Clayton" Brister, Tessa Steinkamp, Larry S. Bankston and Bankston and Associates, LLC*

Dear Judge Hernandez:

We are submitting herewith by facsimile our Reply Memorandum in response to Plaintiff's Memorandum in Opposition to Defendants' Declinatory Exception of *Lis Pendens*. Although the Reply Memorandum is not required under the Local Rules to be filed with the Clerk of Court's office, we will be filing the Reply Memorandum with the Clerk's office once it reopens tomorrow.

If you have any questions please do not hesitate to contact my office.

With kindest regards, I remain

Sincerely,

SHOWS, CALI & WALSH, LLP



Dana D. Riddick

Legal Secretary to Grant J. Guillot

Enclosure

Cc: Robert Burns, via e-mail to: robert@auctionsellsfast.com

Jenna Linn, via e-mail to: jinn@bblawyers.net

ROBERT BURNS

DOCKET NUMBER 624,531 SEC. 27

VERSUS

19TH JUDICIAL DISTRICT COURT

LOUISIANA AUCTIONEER'S LICENSING BOARD, CHARLES "HAL" McMILLIN, JAMES M. SIMS, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, CHARLES "CLAYTON" BRISTER, TESSA STEINKAMP, LARRY S. BANKSTON, BANKSTON AND ASSOCIATES, LLC

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S OPPOSITION TO DECLINATORY EXCEPTION OF *LIS PENDENS*

MAY IT PLEASE THE COURT:

The LOUISIANA AUCTIONEERS LICENSING BOARD ("*LALB*"), CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, CHARLES "CLAYTON" BRISTER, JAMES M. SIMS, and TESSA STEINKAMP (collectively, "*Defendants*"), through undersigned counsel, respectfully files the following Memorandum in Response to the Opposition to Defendants' Declinatory Exception of *Lis Pendens* filed by ROBERT BURNS (hereinafter "*Plaintiff*").

In his Opposition, Plaintiff alleges that the instant matter (hereinafter "*the instant lawsuit*") and the matter allotted Case Number 616916, which is currently pending before Section 25 (hereinafter "*the Open Meetings Law lawsuit*"), are not the same transaction or occurrence and do not involve the same parties in the same capacities, and thus, the Court should refrain from dismissing this matter pursuant to La. C.C.P. art. 531 and La. C.C.P. art 925(A)(3). For the reasons that follow, Plaintiff's allegation is meritless.

A. *The Open Meetings Law lawsuit and the instant lawsuit arise out of the same transaction or occurrence.*

In his Opposition, Plaintiff has provided the Court with a chart wherein he contrasts the two lawsuits in an effort to show they did not arise from the same transaction and occurrence. Specifically, Plaintiff uses the chart to distinguish the two lawsuits from each other by representing as follows:

- 1) Each lawsuit requires an individual, separate vote;

- 2) While the cause of action in the Open Meetings Law lawsuit is subject to a 60-day prescriptive period and can give rise to damages limited to \$100.00 for each named defendant plus a pro-rated share of court costs and attorney's fees, the cause of action in the instant lawsuit (defamation) is subject to a one-year prescriptive period and can result in an unrestricted amount of damages;
- 3) The two causes of action (a violation of Louisiana's Open Meetings Law and defamation) could have occurred mutually exclusive of each other; and
- 4) While LARRY S. BANKSTON and TESSA STEINKAMP were not included as defendants in the Open Meetings Law lawsuit because they did not participate in the September 17, 2012, administrative hearing at which the alleged violation of the Open Meetings Law occurred, LARRY S. BANKSTON and TESSA STEINKAMP are named defendants in the instant lawsuit because they allegedly defamed Plaintiff.

Defendants submit that none of the four representations above preclude the instant lawsuit from arising out of the same transaction or occurrence that is the subject matter of the Open Meetings Law lawsuit for the purpose of *lis pendens*. As stated in Defendants' Exception, the requirements for establishing *lis pendens* conform to the requirements of *res judicata*, and the test for *lis pendens* is whether a final judgment in the first suit would be *res judicata* in the subsequently filed suit. *Citizens Sav. Bank v. G & C Dev., L.L.C.*, 2012-1034, pp. 6-7 (La. App. 1 Cir. 2/15/13), 113 So.3d 1085, 1089, citing *Code v. Department of Public Safety and Corrections*, 2011-1282, p. 4 (La. App. 1 Cir. 10/24/12), 103 So.3d 1118, 1125. Furthermore, "*res judicata* precludes a second suit between the same parties if "the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation." *McGregor v. Hospice Care of Louisiana in Baton Rouge, L.L.C.*, 09-1357, p. 10 (La. App. 1 Cir. 2/12/10), 36 So.3d 272, 279, writ denied sub nom., *McGregor v. Hospice Care of Louisiana Baton Rouge, L.L.C.*, 10-0701 (La. 5/28/10), 36 So.3d 253. In determining whether this requirement is met, the crucial inquiry is **not whether the second suit is based on the same cause of action as the first suit**, but **whether the second suit asserts a cause of action that arises out of the same transaction or occurrence that was the subject matter of the first suit.**" *Leon v. Moore*, 98-1792 (La. App. 1 Cir. 4/1/99), 731 So.2d 502, 504, writ denied, 99-1294 (La. 7/2/99), 747 So.2d 20 (Emphases added).

As noted by the Louisiana Court of Appeals for the Second Circuit in *Goodman v. Spillers*, 28,933, pp. 5-6 (La. App. 2 Cir. 12/23/96), 686 So.2d 160, 164-65, writ denied, 97-0225 (La. 3/27/97), 692 So.2d 393 and writ denied, 97-0423 (La. 3/27/97), 692 So.2d 400,

A second action is barred when it arises out of the same transaction or occurrence as the prior action. This promotes judicial economy and fairness because the litigants must seek all relief and assert all rights arising from the same transaction or occurrence in the first action. **“It would not matter whether the cause of action asserted in the second action was the same as that asserted in the first or different as long as it arose out of the transaction or occurrence that was the subject matter of the first action.”** (citing Comment (a)1990 to La. R.S. 13:4231).

While Plaintiff provides the Court with a chart that points out legitimate differences between the two lawsuits, those differences stem from the fact that the two lawsuits involve different causes of action. However, both causes of action – the Open Meetings Law violation claim and the defamation claim – arise out of the September 17, 2012, administrative hearing at which LALB considered evidence surrounding the complaints made against the Plaintiff alleging violations of LALB licensee policies and procedures. While it is true that a defamation claim is a different cause of action than a claim alleging an Open Meetings Law violation, the cases cited above clearly indicate that a finding of *lis pendens* does **not** require the two lawsuits to arise out of the same cause of action; rather, the cause of action that is the basis of the second lawsuit must arise out of the same transaction or occurrence that is the subject matter of the first lawsuit. Both the Open Meetings Law lawsuit and the instant lawsuit arise out of the same subject matter – the September 17, 2012, administrative hearing. Therefore, Plaintiff in the instant matter is required to bring his defamation claims in the currently-pending Open Meetings Law lawsuit. Because he has failed to do so and has instead instituted a separate lawsuit for defamation claims arising out of the September 17, 2012, administrative hearing, this Honorable Court should grant Defendants’ Declinatory Exception of *Lis Pendens*.

B. The Open Meetings Law lawsuit and the instant lawsuit involve the same parties in the same capacities.

Plaintiff also alleges that the Open Meetings Law lawsuit and the instant lawsuit do not involve the same parties in the same capacities because Defendants cannot impute liability onto LARRY S. BANKSTON and TESSA STEINKAMP in their capacities as representatives of LALB because neither LARRY S. BANKSTON, TESSA STEINKAMP, nor LALB can be held personally liable for violating the Open Meetings Law. However, Defendants would like to point out to the Court that **Plaintiff is the one who named LALB as a defendant in the Open**

Meetings Law lawsuit. In Plaintiff's Petition for Damages and Judgment Voiding Action and Amendment to Pleadings filed in the Open Meetings Law lawsuit, Plaintiff states as follows:

- **Made Defendants** in this petition for damages are...**LOUISIANA AUCTIONEER'S LICENSING BOARD (LALB)**, an executive agency of the State of Louisiana and **a body corporate with the power to sue and be sued**...(Petition, Paragraph 2)(emphases added).
- The **LALB failed to provide Petitioner with the notice requirement of LA R.S. 42:17(A)(1)** requiring a minimum of 24 hours in advance of the intent to enter into Executive Session for discussing Petitioner's character (despite having done so for numerous past meetings), **nor did the Board as a whole** nor any of its Members **offer Petitioner the right to insist that such discussion of his character take place in an open forum.** (Petition, Paragraph 13)(emphasis added).
- Given the **clearly illegal nature of the Executive Session of the LALB** and its Members, Petitioner, **in addition to having the right to seek civil penalties against these Board Members** pursuant to LA R.S. 42:26(A)(5), **Petitioner also has the legal rights, Pursuant to LA R.S. 42:26(A)(4) to seek of this Honorable Court a Judgment rendering any action taken by the LALB resulting from this illegal Executive Session meeting as void** pursuant to the voidability provisions of LA R. S. 42:24. (Petition, Paragraph 16)(emphases added).
- At any rate, the totality of the circumstances surrounding the meeting of the LALB and its membership in Executive Session on September 17, 2012...enable Petitioner to **seek a Judgment of this Honorable Court rendering the action of the LALB "reprimanding" Petitioner void**, and Petitioner seeks such a Judgment from this Honorable Court through this Petition. (Petition, Paragraph 18)(emphasis added).
- Further, this Petition has been filed within...the same 60-day timeframe for obtaining a Judgment **rendering the LALB's action of "reprimanding" Petitioner void as permitted by LA. R. S. 42:24.** (Petition, Paragraph 19)(emphasis added).
- Petitioner additionally prays for this Honorable Court to render a **Judgment against Defendant LALB rendering its members' action of "reprimanding" Petitioner void pursuant to LA R. S. 42:26(A)(4)** as a result of Defendant LALB having rendered its ruling based upon an illegal Executive Session and with such requested Judgment from this Honorable Court available to Petitioner as a remedy in accordance with the voidability provisions of LA. R. S. 42:24. (Petition, Prayer)(emphasis added).
- The mere fact that the LALB, upon the advice of Defense Counsel Bankston, initiated "reset deliberations" for January 8, 2013 is itself an admission of the LALB's part that **it has indeed violated LA. R. S. 42:17(A)(1)** and that Defense Counsel Bankston failed in his legal obligation to advise Defendant LALB and its Members properly of their obligations under the Statute. (Amendment to Pleadings, Paragraph 25)(emphasis added).

- Furthermore, as counsel for the LALB, it was Defense Counsel Bankston's responsibility to know Louisiana's Open Meetings Laws...and inform his own client that they were defying LA R. S. 42:17(A)(1) and also acting contrary to its own previous actions...Thus, **the LALB knowingly and willfully violated LA R. S. 42:17(A)(1)! It's that simple!** (Amendment to Pleadings, Paragraph 27)(emphasis added).

For the Court's ease of reference, Defendants have attached hereto as **Exhibit "A"** and **Exhibit "B"**, respectively, a copy of Plaintiff's Petition for Damages and Judgment Voiding Action as well as a copy of Plaintiff's Amendment to Pleadings, both of which were filed in the Open Meetings Law lawsuit.

As evidenced by the statements made by Plaintiff in his Petition and Amendment to Pleadings, Plaintiff clearly believes he has a cause of action against LALB for its alleged violation of the Open Meetings Law. Although Plaintiff attempts to convince the Court that LALB cannot be considered an identical party in both lawsuits because LALB cannot be held personally liable for a violation of the Open Meetings Law, Plaintiff has alleged in pleadings that "the totality of the circumstances surrounding the meeting of the LALB and its membership in Executive Session on September 17, 2012...enable Petitioner to seek a Judgment of this Honorable Court rendering the action of the LALB 'reprimanding' Petitioner void." (Petition, Paragraph 18). Furthermore, in his Prayer, Plaintiff prays "for this Honorable Court to render a Judgment against Defendant LALB rendering its members' action of "reprimanding" Petitioner void pursuant to LA R. S. 42:26(A)(4) as a result of Defendant LALB having rendered its ruling based upon an illegal Executive Session and with such requested Judgment from this Honorable Court available to Petitioner as a remedy in accordance with the voidability provisions of LA. R. S. 42:24." (Petition, Prayer). Therefore, **Plaintiff has clearly represented to the Court that he believes it is possible for LALB to be subject to liability under the Open Meetings Law**, which is why Plaintiff named LALB as a defendant in the Petition filed in the Open Meetings Law lawsuit.

Because LALB can be subject to liability under the Open Meetings Law pursuant to La. Rev. State. 42:26(A)(4), said liability can be imputed onto TESSA STEINKAMP and LARRY S. BANKSTON by virtue of the fact that TESSA STEINKAMP, as Chairman of LALB, and LARRY S. BANKSTON, legal counsel for LALB, share identical interests with and represent

the same legal rights afforded to LALB. See, *Smith v. LeBlanc*, 06-0041 (La. App. 1 Cir. 8/15/07), 966 So.2d 66, 78. Those shared identical interests include LALB's legal interest in the Open Meetings Law lawsuit. As explained by the Louisiana Court of Appeal for the First Circuit in *Mandalay Oil & Gas, L.L.C. v. Energy Dev. Corp.*, 2001-0993 (La. App. 1 Cir. 8/4/04), 880 So. 2d 129, 142 *writ denied*, 2004-2426 (La. 1/28/05), 893 So. 2d 72,

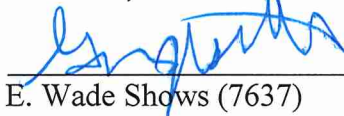
As noted in *Terrebonne Fuel*, 95-0654 at pp. 11-12, 666 So.2d at 631, Louisiana's res judicata law was broadened by the 1990 amendment and is now in line with federal provisions. Under federal law, **the preclusive effect of a judgment binds the parties to the action and nonparties who are deemed the "privies" of the parties in these limited circumstances:** (1) the nonparty is the successor in interest of a party; (2) the nonparty controlled the prior litigation; or (3) **the nonparty's interests were adequately represented by a party to the action, who may be considered the "virtual representative" of the nonparty, because the interests of the party and the nonparty are so closely aligned.** *Certified Finance, Inc. v. Cunard*, 01-0797, p. 7 (La. App. 1st Cir. 4/17/02), 838 So.2d 1, 4, *writ denied*, 02-1802 (La. 10/14/02), 827 So.2d 424.

TESSA STEINKAMP, as LALB's chairman, and LARRY S. BANKSTON, as LALB's attorney, both share an interest with LALB in seeing that LALB complies with the provisions of the Open Meetings Law, thus not subjecting itself to avoidance actions under La. Rev. State. 42:26(A)(4). Therefore, Plaintiff's contention that the two lawsuits do not involve an identity of parties for the purpose of *lis pendens* is wholly without merit.

In conclusion, Defendants again respectfully request that this Court sustain their Declinatory Exception of *Lis Pendens* and dismiss the instant lawsuit in accordance with Louisiana Code of Civil Procedure articles 531 and 925(A)(3).

RESPECTFULLY SUBMITTED,

SHOWS, CALI & WALSH, L.L.P.



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Steinkamp*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Declinatory Exception of *Lis Pendens* has been forwarded to all counsel of record by depositing same in the U.S. Mail, postage prepaid and properly addressed and/or through facsimile transmission and/or through transmission via electronic mail.

Baton Rouge, Louisiana, this 30th day of January, 2014.



GRANT J. GUILLOT