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August 11, 2014

Jenna H. Linn
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Clerk of Court
19th JDC, Parish of East Baton Rouge
P.O. Box 1991
Baton Rouge, LA 70821

ATTN: CIVIL SUITS DEPARTMENT

RE: *Robert Burns, Rev. Freddie Lee Phillips v.
Louisiana Auctioneer's Licensing Board, et al.
Docket No. 631,669 Sec. 24
Our File No. 1107-0007*

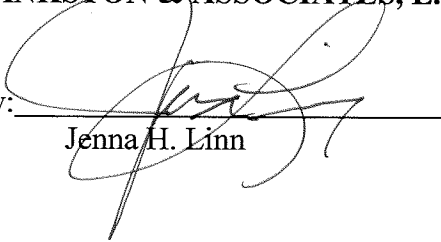
Dear Sir/Madam:

Enclosed please find the original and three copies of an *Exception of No Cause of Action* on behalf of defendants in the above referenced matter. Please file the original into the suit record, submit two copies to the sheriff's office for service and return a conformed copy to our office in the enclosed self-addressed, stamped envelope.

Our firm's check in the amount of \$245.00 is enclosed to cover the costs of same.

Thank you for your attention to this matter and should you should have any questions or comments, please do not hesitate to contact me.

Sincerely,
BANKSTON & ASSOCIATES, L.L.C.

By: 
Jenna H. Linn

Enclosure: Exception of No Cause of Action/check/envelope
cc: Robert Burns (*via email only*)
Rev. Freddie Phillips (*via email only*)
Client (*via email only*)

**ROBERT BURNS,
REV. FREDDIE LEE PHILLIPS**

DOCKET NUMBER 631,669 SEC. 24

VERSUS

19TH JUDICIAL DISTRICT COURT

**LOUISIANA AUCTIONEER'S LICENSING
BOARD, CHARLES "HAL" McMILLIN,
JAMES M SIMS, DARLENE JACOBS-LEVY,
JEFFREY HENDERSON, TESSA
STEINKAMP, CHARLES "CLAYTON"
BRISTER**

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

EXCEPTION OF NO CAUSE OF ACTION

NOW INTO COURT, through undersigned counsel come, **Louisiana Auctioneers' Licensing Board, Charles McMillin, James Sims, Darlene Jacobs-Levy, Jeffrey Henderson, Tessa Steinkamp, and Charles Brister** (hereinafter referred to collectively as "Defendants" or "Exceptors") appearing for the purpose of this exception, excepting to Plaintiffs' Petition for Damages, Declaratory Judgment, and Writ of Mandamus. As more fully set forth in the attached and incorporated Memorandum in Support of No Cause of Action, the Plaintiffs have failed to state a cause of action for damages and for a writ of mandamus. Additionally, Plaintiffs have failed to state a claim against named Defendants and board members, Charles McMillin, James M. Sims, Darlene Jacobs-Levy, Jeffrey Henderson, Tessa Steinkamp, and Charles Brister, upon which relief can be granted. Furthermore, Plaintiffs have failed to state a cause of action for the amendment and enforcement of the LALB Board Meeting Management and Open Meetings Rules.

WHEREFORE, Defendants/Exceptors pray that their exception be maintained and granted, dismissing all claims against Charles McMillin, James M. Sims, Darlene Jacobs-Levy, Jeffrey Henderson, Tessa Steinkamp, and Charles Brister, dismissing the claims for damages, mandamus, and for the amendment for the LALB Board Meeting Management and Open Meetings Rules, and for all general and equitable relief to which Defendants are justly entitled, including reasonable attorneys' fees as provided in La. R. S. 42:26.

Respectfully Submitted:

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ROBERT BURNS,
REV. FREDDIE LEE PHILLIPS

DOCKET NUMBER 631,669 SEC. 24

VERSUS

19TH JUDICIAL DISTRICT COURT

LOUISIANA AUCTIONEER'S LICENSING
BOARD, CHARLES "HAL" McMILLIN,
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JEFFREY HENDERSON, TESSA
STEINKAMP, CHARLES "CLAYTON"
BRISTER

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF EXCEPTION OF NO CAUSE OF ACTION

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel come Defendants/Exceptors who file this Memorandum in Support of their Exception of No Cause of Action pursuant to La. C.C.P. art. 927.

BACKGROUND

The plaintiff, Robert Burns, was at one time licensee of the Louisiana Auctioneer's Licensing Board (LALB). Burns did not renew his license after a complaint was filed against him by an auction house in 2012. Plaintiff, Freddie Phillips, is currently a licensee of the LALB. The LALB is an executive agency of the State of Louisiana whose mission is to contribute to the health, safety, and management of the property of the people of Louisiana in the transfer of property by auction.¹ Both Burns and Phillips were previously members of the LALB board, but neither were reappointed by the governor. This is the seventh lawsuit filed by Burns against either the board, executive director, and/or its legal counsel.

LAW AND ARGUMENT

I. Legal Standard for No Cause of Action

La. C.C.P. art. 891 and the related articles require that the plaintiff's petition "contain a short, clear and concise statement of all causes of action arising out of, and other material facts of, the transaction, or occurrence that is the subject matter of the litigation." With a peremptory exception of no cause of action, the defendant claims that the plaintiff's petition fails to state a cause of action against it, which claim challenges the legal sufficiency of the petition. The term "cause of action" when used in the context of the peremptory exception has been defined as "the operative facts which give rise to the plaintiff's right to judicially assert the action against the

¹ La. R.S. 37:3101, *et seq.*

defendant.”²

The function of the peremptory exception of no cause of action is to test the legal sufficiency of the plaintiff's petition by determining whether the law affords a remedy on the facts alleged in the pleading.³ Thus, the exception tests whether, as a matter of law, the plaintiff has stated a justiciable cause of action against the defendant.⁴ Generally, when a court considers a peremptory exception of no cause of action, it should confine itself to the four corners of the petition and documents attached thereto and made a part thereof.⁵ Facts may not be disputed on the trial of the exception.⁶ A peremptory exception of no cause of action is therefore triable on the face of the petition.⁷ A plaintiff is not required to plead the theory of the case; however, conclusions of law or conclusions of fact are not considered as true for purposes of the exception.⁸

Additionally, under La. C.C.P. art. 1915, relative to partial judgments, partial exceptions, and partial summary judgments, a court is allowed to "sustain ... an exception in part, as to one or more but less than all of the claims, demands, issues, theories, or parties."

II. Plaintiffs' Petition fails to state a cause of action against Defendants for damages.

Pursuant to La. C.C.P. Art. 927, a suit or portion of a suit is subject to dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Plaintiffs allege that they are entitled to damages from Defendants pursuant to La. R.S. 42:28; however, Plaintiffs fail to state a cause of action for which relief in the form of damages may be granted under La. R.S. 42:28. La. R.S. 42:28 is part of the Chapter entitled "Open Meetings Law," and it provides for civil penalties against board members that knowingly and wilfully participate in a meeting in violation of the open meetings laws. Specifically, La. R.S. 42:28 provides,

² *Ramey v. DeCaire*, 869 So. 2d 114 (La. 2004); *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1238 (La. 1993)

³ *Peters v. Allen Parish School Bd.*, 996 So. 2d 1230 (La. Ct. App. 3d Cir. 2008); *Bell v. Patterson Ins. Co.*, 999 So. 2d 117 (La. Ct. App. 2d Cir. 2008); *Poole v. Poole*, 7 So. 3d 806 (La. Ct. App. 3d Cir. 2009); *Ramey v. DeCaire*, 869 So. 2d 114 (La. 2004); *City of New Orleans v. Board of Directors of Louisiana State Museum*, 739 So. 2d 748 (La. 1999); *Roberts v. Sewerage and Water Bd. of New Orleans*, 634 So. 2d 341 (La. 1994); *Broussard v. F.A. Richard & Associates, Inc.*, 740 So. 2d 156 (La. Ct. App. 3d Cir. 1999).

⁴ *Willis v. State ex rel. Louisiana Dept. of Highways*, 212 So. 2d 555 (La. Ct. App. 1st Cir. 1968).

⁵ *Cahill v. Schultz*, 521 So. 2d 442 (La. Ct. App. 4th Cir. 1988).

⁶ *Vanguard Homes, Inc. v. Home Builders Ass'n of Greater New Orleans*, 219 So. 2d 567 (La. Ct. App. 4th Cir. 1969).

⁷ *City of New Orleans v. Board of Directors of Louisiana State Museum*, 739 So. 2d 748 (La. 1999); *McCoy v. City of Monroe*, 747 So. 2d 1234 (La. Ct. App. 2d Cir. 1999); *Darville v. Texaco, Inc.*, 447 So. 2d 473 (La. 1984); *Goodwin v. Agrilite of Louisiana*, 643 So. 2d 249 (La. Ct. App. 2d Cir. 1994); *Doe v. Entergy Services, Inc.*, 608 So. 2d 684 (La. Ct. App. 4th Cir. 1992); *Sevarg Co., Inc. v. Energy Drilling Co.*, 591 So. 2d 1278 (La. Ct. App. 3d Cir. 1991); *Ventura v. Cox Cable Jefferson Parish, Inc.*, 583 So. 2d 1237 (La. Ct. App. 5th Cir. 1991); *Johnson v. Edmonston*, 383 So. 2d 1277 (La. Ct. App. 1st Cir. 1980).

⁸ *Leatherman v. East Baton Rouge Parish*, App. 1 Cir. 1972, 275 So.2d 806; *Southern Chemical & Fertilizing Co. v. Wolf*, Sup. 1896, 48 La. Ann. 631, 19 So. 558; LA-C.C.P. Art. 927

Any member of a public body who knowingly and wilfully participates in a meeting conducted in violation of this Chapter, shall be subject to a civil penalty not to exceed one hundred dollars per violation. The member shall be personally liable for the payment of such penalty. A suit to collect such penalty must be instituted within sixty days of the violation.⁹

Plaintiffs' Petition goes on in nauseam opining that Defendants have somehow aided in "fostering an environment of extreme hostility entailing Petitioner's statutory right to videotape meetings."¹⁰ Plaintiffs' Petition, in great length, discusses Plaintiffs' unhappiness with the behavior of other private citizens and the East Baton Rouge Sheriff's Department deputies that attend the LALB meetings. Plaintiffs' specifically state that "through this petition, Petitioners seek damages against each member of Defendant LALB, for their fostering of that environment in violation of Louisiana's open meeting laws regarding La. R.S. 42:23(A)."¹¹ La. R.S. 42:23 provides,

A. All of the proceedings in a public meeting may be video or tape recorded, filmed, or broadcast live. However, any nonelected board or commission that has the authority to levy a tax shall video or audio record, film, or broadcast live all proceedings in a public meeting.

B. A public body **shall** establish standards for the use of lighting, recording or broadcasting equipment to insure proper decorum in a public meeting.¹²

While Plaintiff complains of the environment at LALB meetings, such dissatisfaction is not a violation of La. R.S. 42:23 nor any other Open Meetings Law. Defendants have complied with La. R.S. 42:23 in adopting standards for the use of recording equipment at its public meetings. Defendants have adopted the following standards in connection therewith:

- a) Those videotaping the meeting may do so while seated.
- b) The use of tripods for cameras is prohibited.
- c) Those taping and otherwise needing power for equipment must provide their own source of electricity. No electrical cords are allowed.

The use of the word "shall" in La. R.S. 42:23 makes it clear that the public body is required to establish standards in connection with the use of recording equipment at its public meetings. LALB has complied with such mandate. While, there is a general right for a citizen to record public meetings, this right is not unrestricted.¹³ "The public body is to establish standards so this can be accomplished in an orderly fashion. It would follow that under most circumstances it is

⁹ La. Rev. Stat. Ann. § 42:28

¹⁰ Plaintiffs' Petition, paragraph 26.

¹¹ Plaintiffs' Petition, paragraph 26.

¹² La. Rev. Stat. Ann. § 42:23, emphasis added.

¹³ Op. Atty. Gen., No. 95-277, Sept. 6, 1995.

not likely that it would be feasible that any and all persons present be allowed to record the meeting under any conditions they may desire.”¹⁴

Quite simply, the allegations made by Plaintiffs do not amount to a violation of Louisiana’s Open Meetings Law for which relief in the form of damages may be granted. Plaintiffs’ relief for monetary damages against Defendants is limited to La. R.S. 42:28, which only allows for damages if a member of a public body knowingly and wilfully participates in a meeting conducted in violation of the Open Meetings Law Chapter. No such situation is present in this case, and Plaintiffs have failed to plead facts that would warrant a cause of action under La. R.S. 42:28. As such, Plaintiffs’ claim for damages against defendants should be dismissed.

III. Plaintiffs have failed to state a cause of action for a writ of mandamus.

A writ of mandamus may be issued to compel the performance of a ministerial duty required by law in cases where the law provides no adequate relief by ordinary means.¹⁵ Mandamus is an extraordinary remedy, which is used sparingly by the courts and will not be issued in doubtful cases.¹⁶ Further, it is well settled that mandamus will lie only to compel the performance of duties that are purely ministerial in nature and in which no element of discretion is left to the public officer.¹⁷

In this case, Plaintiffs seek a Writ of Mandamus from the Court directing LALB to place a website link for Louisiana Association of Professional Auctioneers’ (LAPA) website on LALB’s website.¹⁸ This clearly cannot be classified as a ministerial duty of the LALB. A writ of mandamus will only issue to compel a public official to perform a purely ministerial duty, which a law or an ordinance in plain and unmistakable terms requires him to perform as a part of and in connection with his official functions.¹⁹ There is no legal requirement that LALB add links to its website, nor have Plaintiffs cited any such statutory requirement of the LALB.

Further, a “ministerial duty” which judicial process in the form of writ of mandamus may require a governmental department to perform is one in which nothing is left to discretion.²⁰ Such is not the case herein. It is completely within the LALB’s discretion whether it adds links to its website. In this case, the LALB has fully evaluated the information provided to it by Plaintiffs regarding LAPA. As noted in their Petition, Plaintiffs have had the opportunity at

¹⁴ *Id.*

¹⁵ La.C.C.P. arts. 3862; *Louisiana Dept. of Treasury, etc. v. Williams*, 451 So.2d 1308 (La.App. 1st Cir.1984).

¹⁶ *Id.*

¹⁷ *Felix v. St. Paul Fire and Marine Ins. Co.*, 477 So.2d 676 (La.1985).

¹⁸ Plaintiffs’ Petition, paragraph 42.

¹⁹ *Hughes v. Parish Council of Parish of East Baton Rouge*, App. 1 Cir.1950, 48 So.2d 823; *State ex rel. Hutton v. City of Baton Rouge*, Sup.1950, 217 La. 857, 47 So.2d 665.

²⁰ *Hoag v. State*, Sup.2004, 889 So.2d 1019, 2004-0857 (La. 12/1/04).

several LALB meetings to discuss their desire to have a link to LAPA's website placed on LALB's website. Plaintiffs have been unable to provide much information regarding the association. The two Plaintiffs herein are the only members of LAPA. Accordingly, LAPA only has one member that is a licensed auctioneer in the state of Louisiana. Further, the Plaintiffs have been unable to provide Defendants with any corporate documentation for LAPA. Defendants evaluated the information Plaintiffs provided concerning LAPA and on March 5, 2013, Defendants voted unanimously, rejecting the request to add a link to LAPA's website to LALB's website. Such action is clearly an exercise of the LALB's discretion.

In another case involving a request for mandamus, *R.A.K. v. Bd. of Trustees of State Employees Grp. Benefits Program, Dep't of Treasury*, the Board adopted a rule, which reduced the benefits payable on claims involving treatment of mental or nervous conditions.²¹ The plaintiff sought to have the Board declare its own rule invalid and/or inapplicable to him, and requested a writ of mandamus directing the Board to continue paying his claim on the same basis as they formerly had. The First Circuit found that such action clearly could not be classified as a ministerial duty.²² Furthermore, the court noted that such action would certainly involve the exercise of the Board's discretion.²³ For those reasons, the court held that a writ of mandamus was not appropriate in this case.²⁴

As in *R.A.K.*, the subject Plaintiffs' request for a writ of mandamus is not appropriate in this case. Adding links to its website is not a ministerial duty of the LALB, and such action is purely one of discretion that the LALB may exercise. Accordingly, Plaintiffs' claim for a writ of mandamus should be dismissed.

IV. Plaintiffs have failed to state a cause of action for declaratory judgment against the individual board members.

Plaintiffs' Petition requests a declaratory judgment from this Court declaring LALB Board Meeting Management and Open Meetings Rules Numbers 2, 6 (incorrectly referred to as number 5), and 7 unenforceable and further requests that this Court amend Rule Number 10 (incorrectly referred to as number 9) to require probable cause before LALB can initiate a search of anyone attending LALB public meetings. Plaintiffs contend that such declaration should be made based upon a finding that the clear intent of these rules "is not to 'maintain public

²¹ 558 So. 2d 633 (La. Ct. App. 1990).

²² *Id.* at 636.

²³ *Id.*

²⁴ *Id.*

decorum' and never have been, but instead are intended to inhibit public dissemination of discussions of public matters."²⁵ Said Rules currently provide as follows:

2. Those videotaping the meeting may do so while seated.
6. The use of tripods for cameras is prohibited
7. Those taping and other wise needing power for equipment must provide their own source of electricity.
10. All attending the meeting are subject to search.

In a proceeding brought to enforce Open Meetings Laws, plaintiff may request declaratory judgment.²⁶ Pursuant to La. R.S. 49:963, "the validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the parish in which the agency is located. The agency shall be made a party to the action." However, there is no requirement that the individual board members may be made defendants in an action for declaratory judgment, nor is there any permissive language that would allow an action for declaratory judgment to be brought against individual board members.

In this case, Plaintiffs have failed to state a cause of action against the individual board members in connection with the demand for declaratory judgment. Furthermore, Defendant, Darlene Jacobs-Levy, was not present at the meeting in which the subject Rules were voted on and adopted by the Board. Additionally, Defendant, Jeffrey Henderson, was not even a member of the board at the time that these rules were voted on and adopted by the board. Thus, at the very least, Defendants, Darlene Jacobs-Levy and Jeffrey Henderson, should be dismissed from the above captioned matter.

Furthermore, while this Court may declare a violation of the Open Meetings Law, which is at all times denied, Defendants submit that a declaratory judgment is not the proper procedure to amend a state agency's rules. Defendants contend that Plaintiffs have failed to state a cause of action to implement a revision to LALB Board Meeting Management and Open Meetings Rules, rule number 10. A declaratory judgment is not the proper procedure for the LALB to adopt and implement a new rule. Accordingly, such claim should be dismissed, and the request for declaratory judgment concerning a violation of the Open Meetings Law in connection with the other rules should proceed against the LALB only. The individual board members named as Defendants herein should be dismissed from this matter as a proper claim has not be stated

²⁵ Plaintiffs' Petition, paragraph 19.

²⁶ La. R.S. 42:26.

against the members.

CONCLUSION

Plaintiffs have failed to state a cause of action for damages and mandamus. Accordingly, such claims should be dismissed herein. Further, Plaintiffs have failed to state a cause against the individual board members for declaratory judgment, and the LALB board members should be dismissed from this proceeding. Additionally, a declaratory judgment is not a proper procedure to request the amendment and implementation of a new rule by LALB, as such, Plaintiffs' request to amend Rule Number 10 (incorrectly referred to as number 9) should be dismissed. Defendants additionally contend that this lawsuit is of a frivolous nature and was brought with no substantial justification, and Defendants should be awarded attorneys' fees herein.

Respectfully submitted by:


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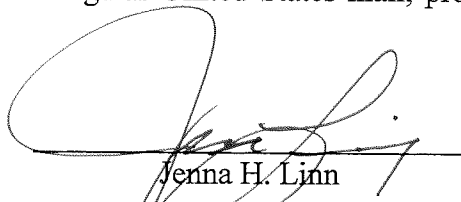


Larry S. Bankston, Bar Roll No.: 02744

Jenna H. Linn, Bar Roll No. 33246

CERTIFICATE

I hereby certify on this 11th day of August, 2014, a copy of the foregoing pleading was served on counsel for all parties to this proceeding, by transmitting a copy of same via electronic mail, facsimile or regular United States mail, properly addressed, and first class postage prepaid.



Jenna H. Linn

ROBERT BURNS,
REV. FREDDIE LEE PHILLIPS

DOCKET NUMBER 631,669 SEC. 24

VERSUS

19TH JUDICIAL DISTRICT COURT

LOUISIANA AUCTIONEER'S LICENSING
BOARD, CHARLES "HAL" McMILLIN,
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JEFFREY HENDERSON, TESSA
STEINKAMP, CHARLES "CLAYTON"
BRISTER

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

ORDER

Considering the Foregoing:

IT IS ORDERED that Plaintiffs, Robert Burns and Freddie Phillips, show cause on the ___ day of _____, 201__ at _____ o'clock __m. why Defendants' Exception of No Cause of Action should not be granted and why Defendants should not be awarded attorney's fees and costs associated with filing this exception.

Baton Rouge, Louisiana, this _____ day of _____, 2014.

Judge, 19th Judicial District Court

Please Serve:

Plaintiff, Robert Burns
4155 Essen Lane, Apt. 228
Baton Rouge, LA 70809

AND

Plaintiff, Freddie Phillips
8055 Hanks Drive
Baton Rouge, LA 70812.