



BANKSTON & ASSOCIATES
A LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

Larry S. Bankston
larry@bblawyers.net

November 10, 2014

Jenna H. Linn
jlinn@bblawyers.net

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 an original and three (3) copies of Defendant's, Louisiana Auctioneers' Licensing Board, *Exception of No Cause of Action and, Alternatively, Exception of Improper Joinder and/or Cumulation*. Please file same, submit to the Judge, and return a signed, conformed copy to me in the enclosed self-addressed, stamped envelope.

Our firm represents the Louisiana Auctioneer's Licensing Board which is a State agency; therefore, we are not charged a filing fee.

If you should have any questions or comments, please do not hesitate to contact me.

Sincerely,

BANKSTON & ASSOCIATES, L.L.C.

By: _____

Jenna H. Linn

JHL/sms

Enclosure: exception/envelope

Cc: Robert Burns (via e-mail only)
Rev. Freddie Phillips (via e-mail only)
Clients (via e-mail only)
Judge R. Michael Caldwell (via facsimile 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 AND, ALTERNATIVELY,
EXCEPTION OF IMPROPER JOINDER AND/OR CUMULATION**

NOW INTO COURT, through undersigned counsel come, **Louisiana Auctioneers' Licensing Board**, (hereinafter referred to as "Defendant" or "Exceptor") appearing only for the purpose of these exceptions, excepting to Plaintiffs' Amended Petition for Declaratory Judgment and Writ of Mandamus. As more fully set forth in the attached and incorporated Memorandum in Support of No Cause of Action and Improper Joinder and/or Cumulation of Actions, the Plaintiffs have failed to state a cause of action for which relief can be granted, and the Plaintiffs have improperly cumulated actions which employ different forms of procedure.

WHEREFORE, Defendant/Exceptor prays that its exception of no cause of action be maintained and granted, dismissing all claims herein, or, alternatively, that its exception of improper joinder and/or cumulation of actions be maintained, and for all general and equitable relief to which Defendant/Exceptor is justly entitled, including reasonable attorneys' fees.

Respectfully Submitted:

BANKSTON & ASSOCIATES, L.L.C.
8708 Jefferson Hwy, Suite A
Baton Rouge, LA 70809
Telephone No.: (225) 766-3800
Fax: (225) 766-7800



Larry S. Bankston, Bar Roll # 02744
Jenna H. Linn, Bar Roll # 33246

CERTIFICATE

I hereby certify on this 11th day of November, 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

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STEINKAMP, CHARLES "CLAYTON"
BRISTER

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

**MEMORANDUM IN SUPPORT OF EXCEPTIONS OF NO CAUSE OF ACTION AND
IMPROPER JOINDER AND/OR CUMULATION OF ACTIONS**

MAY IT PLEASE THE COURT:

NOW INTO COURT, through undersigned counsel come Defendant/Exceptor who files this Memorandum in Support of its Exceptions of No Cause of Action and Improper Joinder and/or Cumulation of Actions pursuant to La. C.C.P. art. 926 and art. 927.

PROCEDURAL HISTORY

This matter was originally filed by the Plaintiffs as a Petition for Damages, Declaratory Judgment, and Writ of Mandamus. Defendants excepted to such Petition, filing an Exception of No Cause Action, which was heard by this Honorable Court on October 14, 2014. The Court sustained Defendants' Exception of No Cause of Action, allowing Plaintiffs to amend their petition to state a justiciable cause of action.

On November 3, 2014, Plaintiffs filed an Amendment to Petition. Plaintiffs' amended petition removes their request for damages and deletes the Louisiana Auctioneers Licensing Board Members as defendants. However, Plaintiffs amended petition fails to provide additional allegations or facts that remedy their failure to state a justiciable cause of action. While Plaintiffs add additional language to their Petition recognizing Plaintiff, Burns' high school achievements, promoting his publication, and discussing a wholly unrelated "scandal," Plaintiffs' amended petition still fails to state a cause of action for which relief can be granted.

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 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

¹ La. R.S. 37:3101, *et seq.*

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).

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 for declaratory relief.

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." In this case, Plaintiffs request this this Court declare certain rules enacted by LALB null and void. However, such relief cannot be granted as Plaintiffs have stated no legal basis for a declaration nullifying the subject rules.

Specifically, Plaintiffs' Petition requests a declaratory judgment from this Court declaring LALB Board Meeting Management and Open Meetings Rules Numbers 2, 6 and 7 unenforceable and further requests that this Court amend Rule Number 10 to require probable cause before LALB can initiate a search of anyone attending LALB public meetings. 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.

Plaintiffs contend that a declaration nullifying rules 2, 6, and 7 should be made based upon a finding that the clear intent of these rules "is not to 'maintain public decorum' and never have been, but instead are intended to inhibit public dissemination of discussions of public matters."⁹ However, Plaintiffs have failed to state any law or legal standard that allows for a rule enacted by a state agency to be declared null on the basis that it was enacted for unsatisfactory intentions. It should be noted that the alleged illegal rules have not impeded Burns from video all board meetings and posting each to his website. Because Burns has selectively edited the video recordings, LALB now has the meetings professionally recorded and posted on the website of the LALB.

Plaintiffs do not allege that the subject rules violate any law, nor do Plaintiffs allege that the rules were unlawfully enacted. Plaintiffs simply do not like what they believe to be the

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

⁹ Plaintiffs' Amendment to Petition, paragraph 16.

reason for enacting such rules. However, such dissatisfaction is not a cause of action under the law to request the relief the Plaintiffs have requested herein.

In accordance with La. R.S. 37:3112, the LALB may enforce rules and regulations to provide for the efficient operation of the board. Additionally, 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.¹⁰

Compliantly, LALB has enacted rules to efficiently operate and to establish standards for the use of lighting, recording or broadcasting equipment to insure proper decorum in a public meeting. While, there is a general right for a citizen to record public meetings, this right is not unrestricted.¹¹ “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 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.”¹²

Plaintiffs do not contend that they are unable to record the LALB’s meeting because, as noted by the Plaintiffs, Plaintiffs proudly record every meeting of the LALB. Plaintiffs simply elude that the aforementioned rules inconvenience their recording activities; however, Plaintiffs do not have a cause of action to invalidate rules because they are allegedly inconvenient.

Furthermore, as noted above, Plaintiffs request a declaration from this Court amending Rule Number 10 to require probable cause before LALB can initiate a search of anyone attending LALB public meetings. All of the LALB meetings take place in public buildings and are open to the general public. The building used by LALB for meetings does not have any initial screening such as this courthouse. An East Baton Rouge Parish Sheriff’s deputy attends each public meeting, which enforces the rules of public decorum. It is not only reasonable, but prudent, to advise all members of the general public that attendance at the meetings may subject the person to a search. Again, Plaintiffs have failed to state any legal standard that would allow for the requested relief.

Further, Defendant submits that a declaratory judgment is not the proper procedure to

¹⁰ La. Rev. Stat. Ann. § 42:23, emphasis added.

¹¹ Op. Atty. Gen., No. 95-277, Sept. 6, 1995.

¹² *Id.*

amend a state agency's rules, and Plaintiffs fail 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, Plaintiffs' claim for declaratory judgment 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.¹³ Mandamus is an extraordinary remedy, which is used sparingly by the courts and will not be issued in doubtful cases.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ There is no legal requirement that LALB add links to its website, nor have Plaintiffs cited any such statutory requirement of the LALB. While Plaintiffs have amended their original Petition to now add allegations of racial discrimination in support of their Writ of Mandamus, which is at all times denied by the LALB, such is not a basis for mandamus.

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.¹⁸ 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 several LALB meetings to discuss their desire to have a link to LAPA's website placed on LALB's website. At the request of Plaintiff Phillips, an item was placed on the agenda in which

¹³ La.C.C.P. arts. 3862; *Louisiana Dept. of Treasury, etc. v. Williams*, 451 So.2d 1308 (La.App. 1st Cir.1984).

¹⁴ *Id.*

¹⁵ *Felix v. St. Paul Fire and Marine Ins. Co.*, 477 So.2d 676 (La.1985).

¹⁶ Plaintiffs' Original Petition, paragraph 42, Plaintiffs' Amendment to Petition, see prayer.

¹⁷ *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.

¹⁸ *Hoag v. State*, Sup.2004, 889 So.2d 1019, 2004-0857 (La. 12/1/04).

the issue was presented to the LALB. The issue was fully discussed and the request was unanimously denied by the LALB. At that meeting, Plaintiffs were unable to provide information regarding the alleged organization. Based upon comments at the meeting, 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. It appears that LAPA was created by Phillips and Burns for the sole purpose to post edited video of the LALB meeting and institute attacks on the operations of the board and its staff.

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.¹⁹ 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.²⁰ Furthermore, the court noted that such action would certainly involve the exercise of the Board's discretion.²¹ For those reasons, the court held that a writ of mandamus was not appropriate in this case.²²

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 improperly joined and/or cumulated actions for declaratory judgment and writ of mandamus.

Louisiana Code of Civil Procedure Article 461 defines a cumulation of actions, providing that the "cumulation of actions is the joinder of separate actions in the same judicial demand, whether by a single plaintiff against a single defendant, or by one or more plaintiffs against one

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

²⁰ *Id.* at 636.

²¹ *Id.*

²² *Id.*

or more defendants.”²³ Louisiana Code of Civil Procedure Article 463 allows for two parties to join in the same suit as plaintiffs if:

- (1) There is a community of interest between the parties joined;
- (2) Each of the actions cumulated is within the jurisdiction of the court and is brought in the proper venue; and
- (3) All of the actions cumulated are mutually consistent and employ the same form of procedure.²⁴

In this particular case, Plaintiffs have failed to satisfy the third above referenced requirement. Plaintiffs are improperly joined and/or have improperly cumulated an action for a Writ of Mandamus, a summary proceeding, with an ordinary action for Declaratory Judgment.²⁵ Courts have consistently held that a suit for mandamus cannot be cumulated with a suit for declaratory judgment.²⁶ The actions brought by Plaintiffs herein do not employ the same procedure and therefore result in an improper cumulation of actions.

CONCLUSION

Plaintiffs have failed to state a cause of action for declaratory judgment and mandamus. Accordingly, such claims should be dismissed herein. Plaintiffs have requested this Court to nullify certain rules enacted by the LALB and mandate that a link be added to the LALB’s website. However, Plaintiffs’ original Petition and Amendment to Petition fail to state any legal authority for the relief requested. 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 should be dismissed.

Further, Plaintiffs have improperly joined and/or cumulated an ordinary proceeding and a summary proceeding. Thus, if Plaintiffs’ claims are not dismissed for failure to state a cause of action, Defendant respectfully requests, in accordance with La. C.C. P. art. 464, that the court (1) order separate trials of the actions; or (2) order the plaintiff to elect which action he shall proceed with, and to amend his petition so as to delete therefrom all allegations relating to the action which he elects to discontinue.²⁷

Defendant additionally contends that this lawsuit is of a frivolous nature and was brought

²³ La. Code Civ. Proc. Ann. art. 461

²⁴ La. Code Civ. Proc. Ann. art. 463

²⁵ See La. C.C. P. art. 1871 and *Frierson v. Sheridan*, App. 1 Cir.1991, 593 So.2d 655 (Suit for declaratory judgment is ordinary, not summary proceeding.); See La. C.C. P. art. 3781 (A writ of mandamus is a summary proceeding.)

²⁶ *Citizens Organized for Sensible Taxation (C.O.S.T.) v. St. Landry Parish Sch. Bd.*, 528 So. 2d 1048 (La. Ct. App. 1988); *Baker v. Morehouse Parish Sch. Bd.*, 41,874 (La. App. 2 Cir. 4/25/07), 956 So. 2d 121; *E. Baton Rouge Parish Sch. Bd. v. Foster*, 2002-2799 (La. 6/6/03), 851 So. 2d 985, 990-91

²⁷ La. Code Civ. Proc. Ann. art. 464

with no substantial justification, and Defendant should be awarded attorneys' fees herein.

Respectfully submitted by:

BANKSTON & ASSOCIATES, LLC

8708 Jefferson Hwy, Suite A

Baton Rouge, LA 70809

Telephone No.: (225) 766-3800

Facsimile: (225) 766-7800


Larry S. Bankston, Bar Roll No.: 02744

Jenna H. Linn, Bar Roll No. 33246

CERTIFICATE

I hereby certify on this 11th day of November, 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

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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, alternatively, why Defendant's Exception of Improper Joinder and/or Cumulation 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.