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January 22, 2013

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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 vs. LA Auctioneer's Licensing Board, et al*
Docket No.: 616,916, 19th Judicial District Court
My File No.: 1107-0001

Dear Sir/Madam:


Enclosed please find the original and one copy of a *Motion for Summary Judgment* on behalf of defendants, Louisiana Auctioneer's Licensing Board, et al. Please file the original into the suit record and return a conformed copy to our office in the enclosed self-addressed, stamped envelope.

Please note that defendant, Louisiana Auctioneer's Licensing Board, is exempt from filing fees pursuant to La. R.S. 13:4521.

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

Sincerely,

BANKSTON & ASSOCIATES, L.L.C.

By: 
Larry S. Bankston
Jenna H. Linn

LSB:jmr
Enclosure: Motion for Summary Judgment
cc: Honorable Wilson Fields
Sandy Edmonds
Robert Burns

8708 Jefferson Highway, Suite A • Baton Rouge, LA 70809
Telephone (225) 766-3800 • Facsimile (225) 766-7800

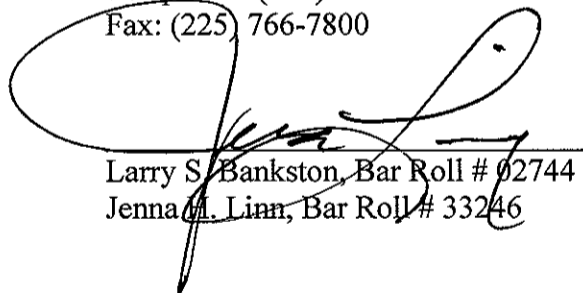
ROBERT BURNS	*	NUMBER 616,916 SECTION 25
VERSUS	*	19TH JUDICIAL DISTRICT COURT
LOUISIANA AUCTIONEER'S LICENSING BOARD, CHARLES "HAL" McMILLIN, JAMES M. SIMS, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, CHARLES "CLAYTON" BRISTER	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes defendants, Louisiana Auctioneer's Licensing Board, Charles McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. Bordelon, and Charles Brister, who pursuant to Article 966 of the Louisiana Code of Civil Procedure and for reasons more fully explained in the attached memorandum, move this honorable Court for a summary judgment, dismissing Plaintiff's claims against Defendants, as there are no genuine issues of material fact and Plaintiff will be unable to meet its burden of proof at a trial of this matter.

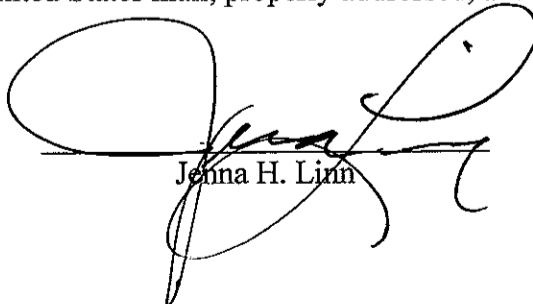
Respectfully Submitted,

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

CERTIFICATE

I hereby certify on this 22nd day of January, 2013, 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	*	NUMBER 616,916 SECTION 25
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	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

RULE TO SHOW CAUSE

CONSIDERING THE FOREGOING Motion for Summary Judgment filed on
behalf of Defendants:

IT IS ORDERED that plaintiff, Robert Burns appear and show cause on the _____ day
of _____, 2013, at _____ o'clock __.m., why the motion
should not be granted.

Baton Rouge, Louisiana, this _____ day of _____, 2013.

JUDGE

PLEASE SERVE:

Robert Burns
4155 Essen Lane, Ste 228
Baton Rouge, LA 70809

ROBERT BURNS	*	NUMBER 616,916 SECTION 25
VERSUS	*	19TH JUDICIAL DISTRICT COURT
LOUISIANA AUCTIONEER'S LICENSING BOARD, CHARLES "HAL"McMILLIN, JAMES M. SIMS,	*	PARISH OF EAST BATON ROUGE
DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, CHARLES "CLAYTON" BRISTER	*	STATE OF LOUISIANA

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Defendants, Louisiana Auctioneer's Licensing Board, Charles McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. Bordelon, and Charles Brister, move for Summary Judgment on the ground that there is no genuine issue of material fact, and they are entitled to judgment as a matter of law. This Memorandum is submitted in support of Defendants' Motion for Summary Judgment.

I. FACTUAL BACKGROUND and PROCEDURAL HISTORY

The plaintiff, Robert Burns, was a licensee of the Louisiana Auctioneer's Licensing Board, and the individually named defendants are members of the Louisiana Auctioneer's Licensing Board (LALB). The LALB is an executive agency of the State of Louisiana. Its mission is to contribute to the safety, health, and management of the property of the people of Louisiana in the transfer of property by auction. The present suit arises out of a claim by Mr. Burns that LALB and its individual members violated the Open Meetings Law by discussing his character in an Executive Session.

On September 17, 2012, the LALB held an Administrative Hearing to discuss possible violations by Robert Burns of policies and procedures regulating LALB licensees. At the conclusion of evidence and testimony of all witnesses, James Sims, LALB vice-chairman, moved for the Board to enter into Executive Session. Mr. Burns, who was represented by counsel, requested that any discussions regarding his character remain as part of the open session. Mr. Burns' request was denied by the Administrative Law Judge who expressed that the Board had a "right" to enter into Executive Session. The Administrative Law Judge was assigned by the Louisiana Attorney General's office to provide legal advice to the Board. The Board sits as the jury for violations of the license holders. Thus, LALB went into Executive

Session, and upon deliberation, LALB decided to issue Mr. Burns a public reprimand for his violations.

Following the initial Administrative Hearing, it was alleged by Plaintiff that the Executive Session had been held in error. In response to such allegations, the proceeding was reset on January 8, 2013. At the reset deliberation, Mr. Burns was afforded ample opportunity to be heard in connection with the proceeding. Mr. Burns made an opening statement. Furthermore, the deliberations of the LALB members were conducted in an open manner whereby Mr. Burns had full opportunity to hear the discussion. Following the open deliberations, LALB members, again, rendered a decision to publically reprimand Mr. Burns.

II. LAW AND ARGUMENT

A. Summary Judgment Standard

Summary judgment procedure is favored in Louisiana to secure the just, speedy, and inexpensive determination of all actions.¹ A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to a judgment as a matter of law.² An issue is genuine if reasonable persons could disagree.³ A fact is material if when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery.⁴

The party moving for summary judgment bears the burden of proof. However, if the movant will does not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.⁵

¹La. C.C.P. art.966(A) (2).*Comeaux v. Star Enterprise/Motiva Enterprise*, 02-0024 (La. App. 1st Cir. 12/20/02), 836 So.2d 359, 361.

²La. C.C.P. art.966(B).

³*Smith v. Our Lady of the Lake Hospital*, 93-2512 (La.7/15/94), 639 So.2d 730,751

⁴*Penalber v. Blount*, 550 So. 2d 577 (La. 1989).

⁵La. C.C.P. art. 966(B)(2).

B. Statement of Undisputed Facts

1. An Administrative Hearing was held on September 17, 2012 regarding the matter of LALB v. Robert Burns.
2. At the conclusion of the presentation of evidence and testimony of all witnesses, LALB moved to enter into an Executive Session.
3. The presiding Administrative Law Judge ruled that LALB could enter into an Executive Session at that time.
4. In compliance with such ruling, LALB entered into an Executive Session.
5. LALB decided to issue Mr. Burns a public reprimand for his violations.
6. On December 26, 2012, LALB notified Plaintiff that the Board had reset the deliberation on his hearing for the January 8, 2013.
7. Mr. Burns made an opening statement in the proceedings held on January 8, 2013.⁶
8. Per Mr. Burns' request, the Board deliberated in open session at the January 8, 2013 hearing.
9. LALB members also disclosed oral reasons why they felt Mr. Burns should receive a public reprimand.
10. At such time, at the January 8, 2013 meeting, LALB again decided to issue Mr. Burns a public reprimand.

C. Board Relied Upon Legal Advice from Hearing Officer

The Board sits as a jury to determine if any violation of the Louisiana Auctioneers laws. An administrative law judge advises the board on legal issues. It was this advice that is the subject of this litigation. Based upon that advice, the Board went into executive session to deliberate and determine if any penalty should be imposed. It was the advice of the administrative law judge that the board sits as a "juror" and therefore like a jury it could deliberate in private. There is little case law concerning the deliberation of regulatory boards which sit as a "jury" for its license holders. It is certainly logical to conclude that a board sitting as a "jury" would be able to deliberate in private. There appears to be only one reported case,

⁶See Paragraph 28 of Plaintiff's Amended Petition.

*Sandifer v. Louisiana State Bd. of Practical Nurse Examiners*⁷, in which this factual situation has been raised. However, the law on this issue is still unclear.

In *Sandifer v. Louisiana State Bd. of Practical Nurse Examiners*⁸, the plaintiff refused to submit to a drug screen. In response, the Louisiana State Board of Practical Nurse Examiners (“Board”) met in executive session to review the Hearing Officer’s finding of fact and recommendation regarding disciplinary proceedings for plaintiff’s refusal to submit to the drug screen. The plaintiff was ultimately placed on probation for her actions.

Subsequently, the plaintiff brought action against the Board, alleging that the Board failed to comply with Open Meeting Laws. Plaintiff alleged that discussions regarding disciplinary proceedings should have been held at an open meeting. As such, the district court voided the Board’s action of placing the plaintiff on probation and enjoined any further action by the Board enforcing the penalties it imposed. The Board appealed the district court’s decision. On appeal, the Louisiana Supreme Court explained that although Open Meeting Laws provide that plaintiff may require such discussion be held at an open meeting, “this provision is to be construed liberally”.⁹ The court held that “this purely technical violation of meeting in executive session in which the plaintiff can show no harm thereby should not result in voiding the disciplinary action against plaintiff.”¹⁰ “The plaintiff should have to show harm or prejudice before being granted such extraordinary relief.”¹¹ Ultimately, the Supreme Court chose to recall the granting of the writ; however, the reason for such action is unclear.

In the present case, and upon the advice of the administrative law judge, the LALB met in executive session to discuss the disciplinary proceedings concerning the Plaintiff. The APA authorizes agencies to conduct adjudications and requires an adjudication to be conducted according to procedures similar to those applied in court proceedings.¹² Courts have described the nature of these proceedings as “quasi-judicial.” Traditionally, those who exercise judicial authority (judges, juries) deliberate in private. The Legislature was certainly aware of this tradition when it bestowed quasi-judicial authority on agencies through the APA, and surely intended that agencies deliberate in private when exercising their quasi-judicial authority. However, even if this Court disagrees with such private deliberations, the Plaintiff should have to

⁷ 8 So. 3d 546, 2008-1159 (La. 3/17/09).

⁸ 8 So. 3d 546, 2008-1159 (La. 3/17/09).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 547.

¹² La. R.S. 49:950, *et seq.*

show harm or prejudice before being granted the relief requested herein, and the Plaintiff has failed to do so.

D. Ratification Cures Defects Which Result from Open Meetings Violation

Even if this Court determines that the original deliberation in which LALB deliberated in Executive Session was in violation of the Open Meetings Law, any such violation was ratified by the January 8, 2013, open deliberation. This subsequent ratification cured any defect in the prior deliberation along with any injury claimed by Robert Burns herein. The ratification of the LALB previous deliberation makes moot Mr. Burns claim for damages. Therefore, the defendants are entitled to a judgment as a matter of law.

A factually similar case to the one at bar was analyzed by a Louisiana court of appeals in *Delta Development Co., v. Plaquemines Parish Com'n Council*.¹³ In *Delta Development Co.*, holders of mineral rights moved for a preliminary injunction against members of the parish commission council.¹⁴ The mineral holders, Delta Development Company, sought to enjoin the public body from continuing a previously filed suit against the holders to recover mineral rights.¹⁵ The preliminary injunction alleged that the Council violated the Open Meeting Law in adopting a resolution authorizing the suit.¹⁶ A summary of the cases surrounding facts are as follows.

The Council originally adopted a resolution authorizing a suit to recover mineral rights held by the Delta Development Corporation. The Council filed suit on the same day, August 25, 1983, the resolution passed. On October 17, 1983, Delta Development Corporation filed for a preliminary injunction alleging multiple open meetings violations. However, as the suit for preliminary injunction was pending, the Council passed an additional resolution ratifying the previous decision. At the hearing on the preliminary injunction, the trial court dismissed the action holding that it became moot when the Council ratified the previous decision.

The court of appeals reasoned that pursuant to La. R.S. 42:9, any action taken in violation of the Open Meetings Law shall be “voidable by a court of competent jurisdiction.” The court of appeals recognized that this language compels the conclusion that action taken by a public body without compliance with the Open Meeting Law is not an absolute nullity. The product of a

¹³*Delta Development Co., Inc. v. Plaquemines Parish Com'n Council*, 451 So.2d 134 (La. App. 4th Cir. 1984).

¹⁴*id.*

¹⁵*id.*

¹⁶*id.*

violation of an Open Meetings Law is rather relatively null.¹⁷ The importance of this distinction means that such an action may be corrected by ratification provided the ratification is adopted after full compliance with the Open Meetings Law.¹⁸

The court of appeals further noted that the purpose of the Open Meetings Law is to protect citizens from secret decisions made without any opportunity for public input.¹⁹ “The public has a right to know what is being considered and is entitled to ‘direct participation’ in deliberations.” However, even where it can be assumed that a violation has occurred causing injury or harm to the public as a result of such a violation, the injury or harm is cured when the decision is ratified in a manner in accordance with the Open Meetings provisions.²⁰ Thus, the statutory penalties for any previous violation are unnecessary.

E Louisiana Auctioneer’s Licensing Board’s Ratification Cured Any Previous Injury

In this case, the members of LALB heard evidence and testimony regarding allegations against Mr. Burns in an Administrative Hearing held on September 17, 2012. At that time, the Administrative Law Judge ruled that the Board could enter into an Executive Session to discuss the matters. Upon deliberation, the LALB decided to issue Mr. Burns a public reprimand.

Following the aforementioned meeting, allegations arose concerning compliance with the Open Meeting Laws. In an effort to rectify any improper guidance given to the Board, the LALB had the deliberations reset in an open session. The open session was held on January 8, 2013. During the open session, Mr. Burns had ample opportunity to be heard prior to the deliberations. Mr. Burns, in fact, made an extensive opening statement in the proceedings.²¹ LALB members also disclosed oral reasons why they felt Mr. Burns should receive a public reprimand. Mr. Burns undoubtedly disagrees with the outcome of the LALB members’ decision. However, he does not allege that the deliberation held on January 8, 2013, violated the Open Meetings Law in any manner. Therefore, it is undisputed that LALB ratified its decision to issue Mr. Burns a public reprimand.

As the court of appeals noted in *Delta Development Co.*, any claim for damages or injury that Mr. Burns may have had after the September 17, 2012 deliberation became moot following the January 8, 2013 deliberation. The January 8, 2013 deliberation was done in public and was

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*, at 138.

²⁰*Id.*

²¹See Paragraph 28 of Plaintiff’s Amended Petition.

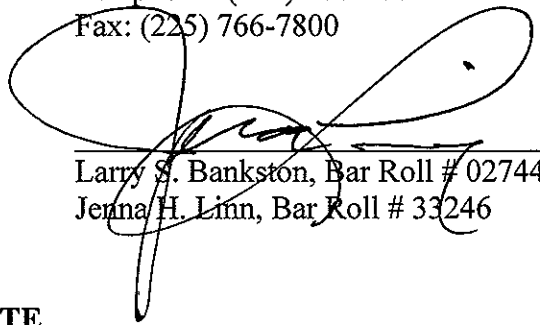
fully observed by the public and Mr. Burns. The board discussed the claims against Mr. Burns. The Board rectified any previous violations of the Open Meetings Laws which may have occurred in the September 17, 2012 proceeding. In the absence of any showing of harm, Mr. Burns should not be entitled to damages. Furthermore, assessing penalties against the LALB and its individual members would contravene the intended purpose of the statute by undermining the public body's ability to correct itself by ratification.

III. Conclusion

In closing, the defendants in this case are entitled to a judgment as a matter of law because there is no genuine issue as to whether the deliberations held on January 8, 2013 violated the Open Meetings Law. It is agreed upon by both parties that the January 8, 2013, deliberation was held in accordance with the law. During this deliberation, Mr. Burns had a full opportunity to be heard. The discussion of his character was held in the open. The LALB rendered a decision in which it ratified the previous decision to issue Mr. Burns a public reprimand. Upon the ratification, Mr. Burn's suit for damages arising out of any previous allegations of Open Meetings Laws violations became moot. Therefore, summary judgment is appropriate as a matter of law, in favor of Defendants, dismissing Plaintiff's claims against Defendants.

Respectfully Submitted,

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

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I hereby certify on this 22nd day of January, 2013, 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