



**BANKSTON & ASSOCIATES**  
A LIMITED LIABILITY COMPANY  
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February 21, 2013

Jenna H. Linn  
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Clerk of Court  
19<sup>th</sup> 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, 19<sup>th</sup> Judicial District Court  
My File No.: 1107-0001

Dear Sir/Madam:

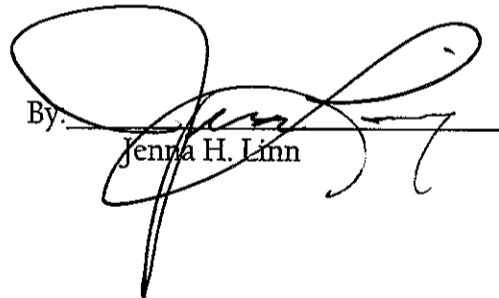
Enclosed please find the original and one copy of *Defendants' Opposition to Plaintiff's Motion for Summary Judgment* on behalf of defendants, Louisiana Auctioneer's Licensing Board, et al. Please file the original into the suit record and return a conformed copy to our office in the enclosed self-addressed,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

JHL: jmr  
Enclosure: Opposition/envelope  
cc: Honorable Wilson Fields (via facsimile only)  
Sandy Edmonds (via email only)  
Robert Burns (via email only)

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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  
GREGORY L. "GREG" BORDELON, \*  
CHARLES "CLAYTON" BRISTER \* STATE OF LOUISIANA

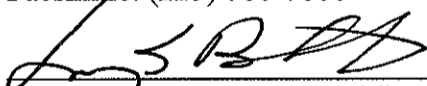
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**DEFENDANTS' OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

NOW INTO COURT, through undersigned counsel, come defendants, Louisiana Auctioneer's Licensing Board, Charles McMillian, James M. Sims, Darlene Jacobs-Levy, Gregory L. Bordelon, and Charles Brister, who respectfully oppose plaintiff's, Robert Burns, Motion for Summary Judgment on the grounds that there are genuine issues of material fact, plaintiff has failed to establish that he is entitled to summary judgment as a matter of law, and for reasons more fully outlined in the attached and accompanying Memorandum in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

WHEREFORE, Defendants, pray that Plaintiff's Motion for Summary Judgment would be DENIED in its entirety and for all other legal and equitable relief.

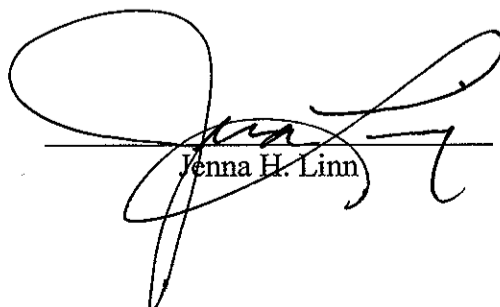
Respectfully Submitted:

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Larry S. Bankston, Bar Roll #02744  
Jenna H. Linn, Bar Roll #33246  
*Attorneys for Defendants*

**CERTIFICATE**

I hereby certify on this 21<sup>st</sup> day of February, 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, \* PARISH OF EAST BATON ROUGE  
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CHARLES "CLAYTON" BRISTER \* STATE OF LOUISIANA

.....  
**MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

***MAY IT PLEASE THE COURT:***

NOW INTO COURT, through undersigned counsel, come defendants, Louisiana Auctioneer's Licensing Board, Charles McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. Bordelon, and Charles Brister, who respectfully oppose Plaintiff's Motion for Summary Judgment on the grounds that there are genuine issues of material fact, and pray that Plaintiff's Motion for Summary Judgment be denied.

**FACTUAL BACKGROUND**

The plaintiff, Mr. Robert Burns, was a licensee of the Louisiana Auctioneer's Licensing Board (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.

Prior to this matter, several complaints were made against the plaintiff regarding alleged violations of LALB licensee policies and procedures. On September 17, 2012, the LALB held an administrative hearing to hear evidence surrounding the pending complaints. At the conclusion of the evidence, James Sims, LALB vice-chairman, moved for the members to enter into executive session for deliberations. The plaintiff interjected, requesting that the deliberations be held openly. LALB members sought guidance from the presiding administrative law judge. The administrative law judge, who had been assigned to the hearing by the Attorney General's office, informed the members that they were within their rights to hold the deliberations in executive session. Following the deliberations, LALB members found that the complaints against the plaintiff had merit and issued Mr. Burns a public reprimand.

After the hearing, LALB members recognized that the advice they received from the administrative law judge may have been inconsistent with certain provisions of the Open

Meeting Law.<sup>1</sup> In an abundance of caution, the deliberations were reset on January 8, 2013. At the reset hearing, Mr. Burns was afforded an opportunity to be heard by making an opening statement before the LALB members. As per Mr. Burns request, the LALB members' deliberations regarding the complaints against him were discussed in an open meeting. Following the deliberations, the LALB members again voted to issue Mr. Burns a public reprimand as a penalty for violations of LALB licensing rules.

## LAW AND ARGUMENT

### A. STANDARD FOR ISSUANCE OF SUMMARY JUDGMENT

The applicable standard for a summary judgment is set forth in La. C.C.P. art. 966. The article indicates that a summary judgment is proper if the pleadings, depositions, affidavits, and interrogatories on file demonstrate the existence of no genuine issue of material fact and that the mover is entitled to summary judgment as a matter of law.<sup>2</sup> The burden is on the mover to establish that there is no genuine issue of material fact.<sup>3</sup> A fact is material if "it is essential to the plaintiff's cause of action under the applicable theory of recovery and without which plaintiff could not recover."<sup>4</sup> Furthermore, it is only when reasonable minds must inevitably conclude that the mover is entitled to a judgment as a matter of law that summary judgment is warranted.<sup>5</sup>

Upon a motion for summary judgment, the initial inquiry is whether the supporting documents by the moving party are sufficient to resolve all material issues of fact.<sup>6</sup> In order to meet this burden, the mover is required to meet a strict standard of showing that it is "clear as to what is the truth and that there has been excluded any real doubt as to the existence of a genuine issue of material fact."<sup>7</sup> While weighing the competing documents by the mover and opponent for summary judgment, "the supporting documents must be closely scrutinized and the non-mover's indulgently treated."<sup>8</sup> Furthermore, where the court is faced with competing reasonable inferences, "the reasonable inferences must be viewed in the light most favorable to the party opposing the motion."<sup>9</sup> It is only when the court determines that the moving party has met his burden that the onus shifts to the opponent to establish that a material fact is at issue.<sup>10</sup>

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<sup>1</sup> La. R.S. 42:6, *et seq.*

<sup>2</sup> La. C.C.P. art.966(B).

<sup>3</sup> *McKey v. GMC*, 96-0755 (La. App. 1st Cir. 2/14/97) 691 So.2d 164, 167.

<sup>4</sup> *Id.*, at 168.

<sup>5</sup> *McKey v. GMC*, 96-0755 (La. App. 1st Cir. 2/14/97) 691 So.2d 164, 167.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at 168.

<sup>9</sup> *Id.*, at 168.

<sup>10</sup> *Id.*

## **B. STATEMENT OF DISPUTED FACTS**

1. Plaintiff was provided notice of the hearing held on September 17, 2012, calling for deliberations on the complaints that he violated policies and procedures of the Louisiana Auctioneer's Licensing Board.
2. Plaintiff's assertion that LALB members went into executive session for the express purpose of discussing plaintiff's character is denied as written.
3. Plaintiff's assertion that defendants failed to provide plaintiff notice that hearing would involve deliberations on his character is denied as written.
4. The plaintiff was provided with notice of the hearing held on September 17, 2012.
5. Plaintiff participated in the hearing held on September 17, 2012.
6. Plaintiff's character was not at issue in the deliberations.
7. Deliberations pertained to plaintiff's violations of policies and procedures of the Louisiana Auctioneer's Licensing Board.
8. Defendants did not knowingly and willfully violate Louisiana's Open Meeting Law.
9. The Plaintiff has not suffered any damages herein.
10. The January 8, 2013 meeting ratified the actions taken by LALB during the September 17, 2012 meeting.

## **C. PLAINTIFF'S ALLEGATIONS**

Plaintiff alleges in his motion for summary judgment that he was harmed when the defendants held their deliberations in executive session. The plaintiff does not make any specific showing of harm, but alleges that the closed deliberation deprived him of the ability to hear the discussions regarding his character. Plaintiff contends that defendants knowingly and willfully violated the Open Meeting Law. As a result, Plaintiff contends that he is entitled to an award of \$100 from each LALB member under La. R.S. 42:28. Plaintiff also requests his public reprimand be rescinded as void under La. R.S. 42:24. Plaintiff has failed, however, to provide evidence, aside from the allegations set forth in his petition, that defendants operated to intentionally prejudice his rights. Furthermore, plaintiff fails to recognize that an action which is voidable under La. R.S. 42:24 may be ratified by a subsequent action which comports with the requirements of the Open Meeting Law. A fuller explanation of the defendants' argument in opposition to plaintiff's motion for summary judgment is set forth below.

#### **D. EXECUTIVE SESSION HELD IN GOOD FAITH**

LALB members were operating in good faith and neither intentionally nor knowingly violated Open Meetings Laws by conducting their deliberations in executive session. In a hearing on a violation of the Louisiana Auctioneers laws, the LALB members participate as the jury. An administrative law judge presides over the proceeding to provide LALB members with legal guidance. In the present case, at the conclusion of the evidence, the LALB members requested the opportunity to discuss in a closed meeting the issues relating to complaints filed against Mr. Burns. In response to the request, the administrative law judge reasoned that because LALB members were acting as “jurors” they should be entitled to deliberate in private.

There is one factually similar case that demonstrates the reasonableness of the LALB’s decision, *Sandifer v. Louisiana State Bd. Of Practical Nurse Examiner*.<sup>11</sup> In *Sandifer*, the Louisiana Board of Nursing Examiners (The Board) met in executive session to review disciplinary proceedings regarding a nurse’s refusal to submit to a drug screening.<sup>12</sup> The Board ultimately decided to place the nurse on probation.<sup>13</sup> However, the plaintiff contested the decision claiming the executive session was held in error.<sup>14</sup> The district court sided with the plaintiff and voided the Board’s decision. Upon appeal, though, the Louisiana Supreme Court held that although under Open Meeting Laws the plaintiff may prevent certain discussions from being held in executive session, “the provision is to be construed liberally.”<sup>15</sup> The court found that a “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.”<sup>16</sup> “The plaintiff should have to show harm or prejudice before being granted such extraordinary relief.”<sup>17</sup> The court’s decision in *Sandifer*, recognizes that trivial or hyper-technical diversions from the Open Meeting Law should not be construed to undue reasonable outcomes. Absent a showing of harm or prejudice, the actions of a body which violated the Open Meeting Law, but were undertaken reasonably, should not be voided.

In this case, LALB members relied on the legal expertise of the administrative law judge in overruling Mr. Burns’ request to hold the deliberations openly. Defendants logically concluded as a “jury” that they were able to deliberate in private. Based on this reasoning and the

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<sup>11</sup> 80 So.3d 546, 2008-1159 (La. 3/17/09).

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> 80 So.3d 546, 2008-1159 (La. 3/17/09).

<sup>16</sup> Id.

<sup>17</sup> Id. at 547.

advice of the presiding administrative law judge, the LALB members made a reasonable calculation that the executive session was permissible. In light of this reasonable calculation, the plaintiff's contention that LALB members knowingly or intentionally violated Open Meeting Laws is without merit.

Plaintiff attempts to argue that he was prejudiced by the LALB members' decision. However, neither plaintiff's motion for summary judgment, or memorandum in support, set forth any objective showing of harm. Furthermore, the plaintiff fails to establish how the outcome of the deliberations would have been substantially different if they had not been held in executive session. In the absence of a showing of harm or a demonstration that the outcome would have been materially different, the plaintiff cannot establish the extraordinary circumstances necessary to void the public reprimand.

#### **E. PUBLIC REPRIMAND RATIFIED by JANUARY 8 DELIBERATION**

In addition to a failure to demonstrate that he was injured by such a technical violation of the Open Meeting Law, plaintiff's claim is also moot because the LALB's action was ratified by the subsequent deliberation held on January 8, 2013. In *Delta Development Co., v. Plaquemines Parish Com'n Council*, a factually similar case, the court held that even where an Open Meeting Law violation occurred, the plaintiff's claim was moot where the action was ratified.<sup>18</sup>

In *Delta Development Co.*, mineral rights holders moved for a preliminary injunction against members of the parish commission council.<sup>19</sup> The mineral rights holders sought to enjoin the parish council from continuing in a suit against the holders to recover mineral rights.<sup>20</sup> The mineral rights holders, Delta Development Company, argued that the parish council violated the Open Meeting Law when it adopted a resolution authorizing the suit against it.<sup>21</sup> Namely, Delta Development contended that the resolution passed by the parish council was not among the listed exceptions necessary for an executive session.<sup>22</sup> The court took note of the plaintiff's argument and agreed that the actions of the parish council amounted to a violation of the Open Meeting Law. However, the court reasoned that under La. R.S. 42:9 the product of a violation of the Open Meeting Law was relatively null rather than absolutely null.<sup>23</sup> Therefore, the parish council's actions could be ratified. Because the parish council held a subsequent meeting that comported

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<sup>18</sup>Delta Development Co., Inc. v. Plaquemines Parish Com'n Council, 451 So.2d 134 (La. App. 4th Cir. 1984).

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id., at 137.

<sup>23</sup> Id., at 138.

with the Open Meeting Law to pass the resolution, the court found that the action had been ratified. As a result, the plaintiff, Delta Development Co.'s claims were found moot and a decision was rendered in favor of the defendants.<sup>24</sup>

In an additional case, *Marien v. Rapides Police Jury*, the court also found that actions held in a subsequent meeting, which complied with Open Meeting Law requirements, ratified the violations of a previous meeting.<sup>25</sup> In *Marien*, the plaintiffs challenged a resolution passed by the local police jury.<sup>26</sup> In their complaint, the plaintiffs' alleged that the vote for the resolution was held without proper notice.<sup>27</sup> The police jury provided notice of the hearing, but did not observe the proper time delay.<sup>28</sup> The court recognized that this error violated the Open Meetings Law.<sup>29</sup> The court found, however, that the police jury ratified its action by holding a meeting with proper notice at a subsequent meeting ten days later.<sup>30</sup> "The ratification action...cured that problem."<sup>31</sup> Again, the court found in favor of the defendants.

In the case at bar, the LALB recognized that there was some confusion regarding its previous decision to hold its deliberations in executive session at the September 17, 2012 hearing. In response, and out of an abundance of caution, the members decided to reset the hearing for January 8, 2013. Prior to the reset hearing, the plaintiff was provided with sufficient notice that the members would again deliberate on the complaints filed against him. At the hearing, the plaintiff was given full opportunity to appear before the members. The plaintiff took advantage of this opportunity by delivering an extensive opening statement. Following the conclusion of the presentation of evidence, the LALB members openly deliberated regarding the complaints against the plaintiff. By his own admission, the plaintiff was able to fully participate in the reset hearing, thereby, curing any defects in the prior deliberations. At the conclusion of the hearing, the LALB members rendered an identical decision and issued a public reprimand against the plaintiff. Therefore, in accordance with the decisions rendered by the court in *Marien* and *Delta Development*, the plaintiff's claims are moot.

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<sup>24</sup> Id.

<sup>25</sup> *Marien v. Rapides Parish Police Jury*, 98-0077 (La. App. 3d Cir. 7/8/98) 717 So.2d 1187.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id., at 1192.

<sup>29</sup> Id.

<sup>30</sup> *Marien v. Rapides Parish Police Jury*, 98-0077 (La. App. 3d Cir. 7/8/98) 717 So.2d 1187, 1192.

<sup>31</sup> Id.

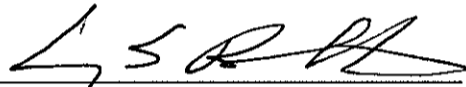


**CONCLUSION**

In conclusion, the plaintiff, who as mover carries the burden of proof, has failed to establish that he is entitled to a judgment as a matter of law. In contrast to plaintiff's allegations, the defendants in this case acted reasonably in relying on the administrative law judge's assessment that they were entitled to deliberate in executive session. The plaintiff does not allege in either his petition or subsequent motion for summary judgment that the hearing held on January 8 violated any provisions of the Open Meeting Law. Therefore, in accordance with the jurisprudence, the subsequent hearing cured any previous defects. As a result, the plaintiff's claims are moot and should be dismissed.

Respectfully submitted by:

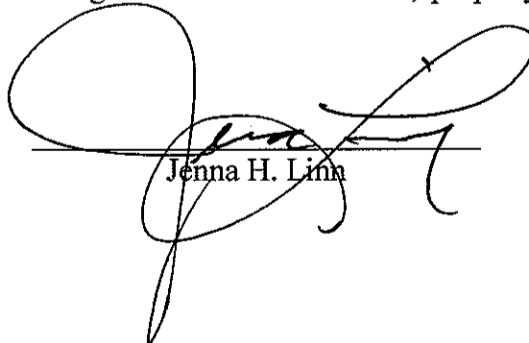
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Larry S. Bankston, Bar Roll No.: 02744  
Jenna H. Linn, Bar Roll No. 33246

**CERTIFICATE**

I hereby certify on this 21<sup>st</sup> day of February, 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