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October 24, 2013

EBR Clerk of Court
19th Judicial District Court
300 North Blvd.
Baton Rouge, LA 70802

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, Bankston and Associates, LLC

Dear Sir or Madam:

Please find enclosed one (1) original and two (2) copies of Defendants' Declinatory Exception of *Lis Pendens*, Proposed Order and Defendants' Memorandum In Support of Declinatory Exception of *Lis Pendens*, which are filed in the above-referenced matter on behalf of our clients, Louisiana Auctioneer's Licensing Board, Charles "Hal" McMillin, Darlene Jacobs-Levy, Gregory L. "Greg" Bordelon, and Charles "Clayton" Brister. Please file the original and return a date-stamped copy with our runner. Also, our runner is hand-delivering the filed original pleading directly to Judge Hernandez's Office.

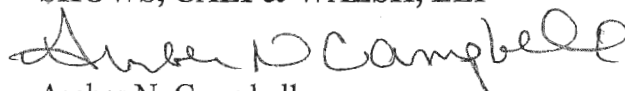
Pursuant to La. R.S. 13:4521, no court costs are required to be paid in advance, as this is being filed on behalf of a state entity.

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

With kindest regards, I remain

Sincerely,

SHOWS, CALI & WALSH, LLP



Amber N. Campbell

Legal Secretary to Grant Guillot

Enclosure: Defendants' Declinatory Exception of *Lis Pendens*, Proposed Order and Defendants'
Memorandum In Support of Declinatory Exception of *Lis Pendens*

Cc: Robert Burns
Jenna Linn

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October 24, 2013

The Honorable Judge Todd Hernandez
19th Judicial District Court Courthouse
300 North Boulevard
Baton Rouge, LA 70801
Via hand delivery

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, Bankston and Associates, LLC

Dear Judge Hernandez:

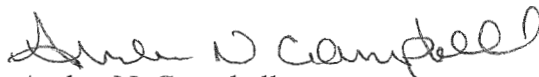
We have filed Defendants' Declinatory Exception of *Lis Pendens*, Proposed Order and Defendants' Memorandum In Support of Declinatory Exception of *Lis Pendens* on behalf of our clients, Louisiana Auctioneer's Licensing Board, Charles "Hal" McMillin, Darlene Jacobs-Levy, Gregory L. "Greg" Bordelon and Charles "Clayton" Brister. We would appreciate you setting the Exception for hearing at your convenience.

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

With kindest regards, I remain

Sincerely,

SHOWS, CALI & WALSH, LLP



Amber N. Campbell

Legal Secretary to Grant Guillot

Enclosure: Defendants' Declinatory Exception of *Lis Pendens*, Proposed Order and Defendants'
Memorandum In Support of Declinatory Exception of *Lis Pendens*

Cc: Robert Burns
Jenna Linn

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' DECLINATORY EXCEPTION OF *LIS PENDENS*

NOW INTO COURT, through undersigned counsel, come the LOUISIANA AUCTIONEERS LICENSING BOARD ("*LALB*"), CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, and CHARLES "CLAYTON" BRISTER (collectively, "*Defendants*"), who file the following Declinatory Exception of *Lis Pendens* in response to the Petition for Damages for Defamation filed by ROBERT BURNS (hereinafter "*Plaintiff*").

1.

Defendants assert a Declinatory Exception of *Lis Pendens* pursuant to Louisiana Code of Civil Procedure article 925(A)(3) as to the entirety of Plaintiff's Petition for Damages for Defamation (hereinafter "*the instant lawsuit*").

2.

On November 9, 2012, Plaintiff instituted an action titled "*Robert Burns v. Louisiana Auctioneer's Licensing Board, Charles "Hal" McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. "Greg" Bordelon, and Charles "Clayton" Brister*", which was filed with this Court, designated Case Number 616916, and allotted to Section 25 ("*the Open Meetings Law lawsuit*"). The Open Meetings Law lawsuit arises out of the Defendants' alleged violation of the Open Meetings Law, which occurred at a September 17, 2012, administrative hearing regarding the matter of *LALB v. Robert Burns* ("*the Burns hearing*").

3.

The Petition in Plaintiff's Open Meetings Law lawsuit and the Petition in the instant matter, which was filed on September 11, 2013, name the same parties as Defendants. Furthermore, the alleged cause of action that forms the basis of Plaintiff's instant lawsuit arises out of the same September 17, 2012, administrative hearing that gave rise to the Open Meetings Law lawsuit. Pursuant to Louisiana Code of Civil Procedure article 531, because two or more suits are pending in a Louisiana court on the same transaction or occurrence and between the same parties in the same capacities, Defendants are entitled to have all but the first suit (the Open Meetings Law lawsuit) dismissed through a declinatory exception of *lis pendens*.

4.

For the foregoing reasons, and for the reasons more fully set forth in the accompanying Memorandum, Defendants respectfully request that this Court dismiss the instant lawsuit in accordance with Louisiana Code of Civil Procedure articles 531 and 925(A)(3).

WHEREFORE, for the foregoing reasons, Defendants, LALB, CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, and CHARLES "CLAYTON" BRISTER hereby request that this Honorable Court order the Plaintiff to show cause, if he can, why this Court should not grant Defendants' Declinatory Exception of *Lis Pendens*;

PRAY FURTHER that after a hearing on this Exception, the Court dismiss the instant lawsuit in accordance with Louisiana Code of Civil Procedure articles 531 and 925(A)(3);

PRAY FURTHER for all other just and equitable relief to which Defendants are entitled.

Signature on next page.

RESPECTFULLY SUBMITTED,

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



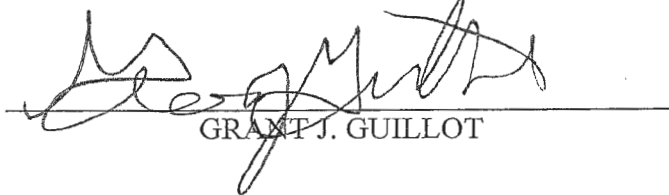
BY: E. Wade Shows (7637)
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*Attorneys for Defendants, Louisiana Auctioneer's
Licensing Board, Charles "Hal" McMillin, Darlene
Jacobs-Levy, Gregory L. "Greg" Bordelon, and
Charles "Clayton" Brister*

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 24th day of October, 2013.



GRANT J. GUILLOT

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

ORDER

Considering the foregoing Declinatory Exception of *Lis Pendens* filed by Defendants, LOUISIANA AUCTIONEERS LICENSING BOARD, CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, and CHARLES "CLAYTON" BRISTER (collectively, "**Defendants**");

IT IS HEREBY ORDERED that Plaintiff, ROBERT BURNS, appear and show cause on the ____ day of _____, 201____, at ____:____ __.M. why Defendants' Declinatory Exception of *Lis Pendens* should not be sustained.

_____, Louisiana, this ____ day of _____, 2013.

HONORABLE JUDGE TODD HERNANDEZ
Nineteenth Judicial District Court

PLEASE SERVE:

Robert Edward Burns
4155 Essen Lane, Apartment 228
Baton Rouge, LA 70809-2152
Plaintiff, in proper person

Jenna H. Linn
Bankston & Associates, L.L.C.
8708 Jefferson Highway, Suite A
Baton Rouge, LA 70809-2411
Attorney for defendants Larry S. Bankston and Bankston & Associates, L.L.C.

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 SUPPORT OF
DECLINATORY EXCEPTION OF *LIS PENDENS*

MAY IT PLEASE THE COURT:

Defendants, the LOUISIANA AUCTIONEERS LICENSING BOARD ("*LALB*"), CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, GREGORY L. "GREG" BORDELON, and CHARLES "CLAYTON" BRISTER (collectively, "*Defendants*"), file this Memorandum in Support of their Declinatory Exception of *Lis Pendens* in the above-referenced matter and respectfully represent as follows:

I. FACTUAL BACKGROUND

On September 11, 2013, Plaintiff, Robert Burns, filed the above-captioned lawsuit against the Defendants in the form of a Petition for Damages for Defamation (hereinafter "*the instant lawsuit*"). He also named Larry S. Bankston and the law firm, Bankston & Associates, L.L.C., as additional defendants in the instant matter. Plaintiff's lawsuit alleges, among other things, that he was defamed during a September 17, 2012, administrative hearing regarding the matter of *LALB v. Robert Burns* ("*the Burns hearing*"). Prior to said hearing, complaints were made against the Plaintiff alleging violations of LALB licensee policies and procedures. At the Burns hearing, LALB considered evidence surrounding the complaints and, concluding that the allegations had merit, ordered a public reprimand of the Plaintiff. Plaintiff asserts that he is entitled to damages from all named Defendants due to their alleged defamatory statements made at the Burns hearing.

Previously, on November 9, 2012, Plaintiff instituted an action titled “*Robert Burns v. Louisiana Auctioneer’s Licensing Board, Charles “Hal” McMillin, James M. Sims, Darlene Jacobs-Levy, Gregory L. “Greg” Bordelon, and Charles “Clayton” Brister*”, which was filed with this Court, designated Case Number 616916, and allotted to Section 25 (“*the Open Meetings Law lawsuit*”). A copy of Plaintiff’s Petition for Damages and Judgment Voiding Action filed in the Open Meetings Law lawsuit is incorporated herein and attached hereto as **Exhibit “A”**. Said lawsuit arises out of the Defendants’ alleged violation of the Open Meetings Law during the Burns hearing. The alleged cause of action that forms the basis of Plaintiff’s instant Petition (the defamation claim) arises out of the same September 17, 2012, administrative hearing that gave rise to the Open Meetings Law lawsuit. Furthermore, the Petition in Plaintiff’s Open Meetings Law lawsuit and the Petition in the instant matter name the same parties as Defendants, aside from the fact that Larry Bankston and Bankston & Associates, L.L.C. are not named defendants in the Open Meetings Law lawsuit.

Pursuant to Louisiana Code of Civil Procedure article 531, because two or more suits are pending in a Louisiana court on the same transaction or occurrence and between the same parties in the same capacities, Defendants are entitled to have all but the first suit (the Open Meetings Law lawsuit) dismissed through their Declinatory Exception of *Lis Pendens*.

II. LAW AND ARGUMENT

A. Overview of Lis Pendens

Louisiana Code of Civil Procedure article 531, which pertains to *lis pendens*, provides,

When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

Louisiana Code of Civil Procedure article 925(A)(3) provides,

The objections which may be raised through the declinatory exception include but are not limited to the following:

(3) *Lis pendens*.

Therefore, in accordance with La. C.C.P. art. 531, a declinatory exception of *lis pendens* urged pursuant to La. C.C.P. art. 925(A)(3) should be granted when the two suits are based on the same

transaction or occurrence and involve the same parties in the same capacities. Plaintiff's instant lawsuit is based on the same transaction or occurrence as another lawsuit he has filed and that is currently pending before this Court, the Open Meetings Law lawsuit. Furthermore, both suits involve the same parties in the same capacities. Therefore, Defendants' Declinatory Exception of *Lis Pendens* should be sustained and Plaintiff's Petition for Damages for Defamation should be dismissed.

B. Same Transaction or Occurrence

In order for an exceptor to be successful on a declinatory exception of *lis pendens*, the two lawsuits at issue must be based on the same transaction or occurrence. La. C.C.P. art. 531. 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. La. R.S. 13:4231 provides,

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

(2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

As explained by the Louisiana Court of Appeal for the First Circuit in *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,

[R]es judicata bars relitigation of a subject matter arising from the same transaction or occurrence of a previous suit. Thus, the chief inquiry is whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action.

Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654, 95-0671, p. 12 (La. 1/16/96), 666 So.2d 624, 632.

Therefore, an exception of *lis pendens* should be sustained when the final judgment in the first suit would be *res judicata* in the second suit. *De Lee v. Price*, 94 So.2d 79, 81 (La. App. 1 Cir. 1957), citing *State ex rel. Marston v. Marston*, 67 So.2d 587 (La. 1953); see also *Funai v. Air Ctr., Inc.*, 499 So.2d 669, 673 (La. App. 3 Cir. 1986), citing *Scott v. Ware*, 160 So.2d 237 (La. App. 2 Cir. 1964).

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*, 98–1792 at 4; 731 So.2d 502 at 504 (Emphasis added). The preclusion doctrines are *stricti juris*; thus, any doubt concerning the application of *res judicata* or *lis pendens* must be resolved against their application. *Jensen Const. Co. v. Department of Transp. and Development*, 542 So.2d 168, 171 (La. App. 1 Cir. 1989), writ denied, 544 So.2d 408 (La. 1989).

The Louisiana Court of Appeals for the Second Circuit gives guidance on the application of *res judicata* and compulsory demand in the matter of *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. The Second Circuit explains,

The doctrine of *res judicata* was substantially changed by La. Acts 1990, No. 521, § 5, effective January 1, 1991, and the act applies to all actions filed on or after that date. 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. **“[I]t 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.”** Comment (a)1990 to La. R.S.

13:4231. When the judgment is in favor of the plaintiff, all causes of action asserted are extinguished and merged in the judgment. Causes of action that were *not* asserted by the plaintiff are also extinguished, and are barred by the judgment. Comment (f) 1990. (Emphasis added.)

La. R.S. 13:4231 presently provides a broad application of *res judicata*, the purpose of which is to foster judicial efficiency and protect litigants from multiple and protracted litigation. *Prudhomme v. Iberville Insulations*, 93-778 (La. App. 3d Cir. 3/2/94), 633 So.2d 380. The statute was amended in 1990 to make a substantive change in the law: **a judgment bars all causes of action arising out of the same transaction or occurrence.** *Steptoe v. Lallie Kemp Hospital*, 93-1359 (La. 3/21/94), 634 So.2d 331, 335. (Emphasis added.)

Along with La. R.S. 13:4231, La. C.C.P. art. 425(A) was amended, effective January 1, 1991, to provide: “A party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation.” According to the Comment 1990 to Art. 425, “[t]his amendment expands the scope of this Article to reflect the changes made in the defense of *res judicata* and puts the parties on notice that all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation must be raised.”

In *Goodman*, the plaintiff, Goodman, filed suit against the defendant, Spillers, alleging, *inter alia*, detrimental reliance. *Goodman*, 28,933, 686 So.2d at 164-65. Goodman based his detrimental reliance claim on an earlier litigated matter wherein Goodman was sued by the defendants, including Spillers, for breach of fiduciary duty. *Id.* In the earlier suit, Goodman reconvened against the defendants alleging unfair trade practices and violation of consumer protection law. *Id.* In the second suit, Goodman claimed that his detrimental reliance damages were the result of his reliance to his detriment on Spillers’ advice or promises, all stemming from the first action. *Id.* The Court concluded that Goodman’s detrimental reliance claim comprised part of the same transaction or occurrence as the reconventional demands in the first lawsuit, and thus, his second claim was compulsory and should have been asserted by Goodman in the first suit. *Id.*

Moreover, in the matter of *Capital One, N.A. v. Serv. Door & Millwork, LLC*, 2011-0691 (La. App. 1 Cir. 11/9/11), the First Circuit upheld the trial court’s granting of the defendants’ declinatory exception of no cause of action, explaining,

When a comparison of the demands in the [first] suit is made to the third-party demands in the [second] suit, it is clear that, even though the causes of action are different, all of the demands arise out of the open account credit agreement between [the plaintiff] and [the defendant]. In the [first] suit, [the plaintiff] is seeking to recover sums allegedly due on the open account. At the same time, the third-party plaintiffs [the defendants], are

seeking damages in the [second] suit based on an alleged breach of contract, misrepresentations, detrimental reliance, and unfair debt collection practices that are all related to the same open account and credit agreement. Accordingly, the district court correctly concluded that the requirement that the two suits be based on the same transaction or occurrence was met in this case.

Regarding the case at bar, Plaintiff has alleged in two separate lawsuits defamation claims and Open Meetings Law violations against Defendants, all of which stem from the Burns hearing that took place on September 11, 2012. Thus, the Burns hearing is the transaction or occurrence that gave rise to the claims in both the instant lawsuit and the Open Meetings Law lawsuit. Just as the parties in *Goodman* and *Capital One, N.A.* were required to assert in the original lawsuit any subsequent claims arising out of the same transaction or occurrence, 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 from the Burns hearing, this Honorable Court should grant Defendants' Declinatory Exception of *Lis Pendens*.

C. Same Parties in the Same Capacities

Aside from the same transaction or occurrence, a finding of *lis pendens* requires that the two lawsuits be between the same parties in the same capacities – in other words, there must be “an identity of parties.” La. C.C.P. art. 531. As explained by the First Circuit in *Code v. Dep't of Pub. Safety & Corr.*, 2011-1282 (La. App. 1 Cir. 10/24/12), 103 So. 3d 1118, 1124-25 writ denied, 2012-2516 (La. 1/23/13), 105 So. 3d 59,

An identity of parties exists whenever the same parties, their successors, or others appear, so long as they share the same “quality” as parties. *Mandalay Oil & Gas, L.L.C. v. Energy Development Corp.*, 20010993, pp. 16–17 (La. App. 1 Cir. 8/4/04), 880 So.2d 129, 140, writ denied, 2004–2426 (La. 1/28/05), 893 So.2d 72. Thus, the jurisprudence does not require that the parties in the two lawsuits be physically identical as long as they share the same “quality” as parties. *Jensen*, 542 So.2d at 171.

Thus, persons may appear in the same “quality” as parties when they share identical interests and represent the same legal right, known as privity. *Smith v. LeBlanc*, 06-0041 (La. App. 1 Cir. 8/15/07), 966 So.2d 66, 78. The named defendants in the Open Meetings Law lawsuit are the same as the named defendants in the instant matter, with the following exceptions: Larry Bankston and Bankston & Associates, L.L.C., who are not represented by undersigned counsel,

are not named defendants in the Open Meetings Law lawsuit; however, those defendants also share identical interests to and represent the same legal right as LALB.

Several Louisiana courts have found that parties who are not physically identical, such as LALB and Larry S. Bankston and his law firm, Bankston & Associates, L.L.C., but who nevertheless share the same “quality” as parties constitute “the same parties on the same capacities” for the purpose of *lis pendens* and *res judicata*. In *Funai*, 499 So.2d at 674, the Louisiana Court of Appeal for the Third Circuit held that the insurer and the policyholder were the same party for purposes of an exception of *lis pendens*. The court reasoned that their identities were “virtually merged into one, to the extent of the policy limits.” *Id.* If the policyholder were cast in judgment, the insurer would be liable for paying the judgment as provided in the policy. *Id.* Thus, the interests of the insurer and the policyholder were identical and represented the same legal right. *Id.*

In addition, in *Bowman v. Liberty Mut. Ins. Co.*, 149 So.2d 723 (La. App. 1 Cir. 1963), the First Circuit found that an employee and employer were the same party for purposes of *res judicata* when the basis for the relief sought was solely the employee’s negligence while acting within the scope of his employment. If the employee were found to be liable, the employer would be responsible for paying the judgment under the doctrine of *respondeat superior*, whether or not the employer had been named in the suit. *Id.* Thus, the interests of the employee and employer were identical and represented the same legal right.

Similar to *Funai* and *Bowman*, the interests of LALB and its legal counsel, Larry S. Bankston and Bankston & Associates, L.L.C., are identical and represent the same legal right. Louisiana Administrative Code 46:III.703(B)(3), which was promulgated in accordance with La. R.S. 37:3112, provides,

The board is authorized and may do the following:

[E]mploy legal counsel to carry out the provisions of the statute and rules, provided that the fees of such counsel and the costs of all proceedings, except criminal prosecutions, are paid by the board from its own funds.

As the legal counsel employed by LALB, defendants Larry S. Bankston and Bankston & Associates, L.L.C., have the same interests and legal rights possessed by LALB, including its legal interests in the Open Meetings Law lawsuit (in which they are, in fact, representing LALB).

Therefore, these defendants and LALB are “merged into one” for the purpose of *lis pendens*. *Funai*, 499 So.2d at 674. Thus, the Open Meetings Law lawsuit and the instant matter involve the same parties in the same capacities. Because the two lawsuits also arise out of the same transaction or occurrence, this Honorable Court should sustain Defendants’ Declinatory Exception of *Lis Pendens*.

III. CONCLUSION

For the foregoing reasons, Defendants 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.



BY: E. Wade Shows (7637)
Grant J. Guillot (32484)
SHOWS, CALI & WALSH, L.L.P.
628 St. Louis Street (70802)
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Baton Rouge, LA 70821
Telephone: (225) 346-1461
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*Attorneys for Defendants, Louisiana Auctioneer’s
Licensing Board, Charles “Hal” McMillin, Darlene
Jacobs-Levy, Gregory L. “Greg” Bordelon, and
Charles “Clayton” Brister*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of 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 24th day of October, 2013.



GRANT J. GUILLOT

COST ON FILE \$ 950.-
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BY quats
BY CLERK OF COURT

NUMBER 1016.910 DOCKET # 21
19TH JUDICIAL DISTRICT COURT

SEC. 25

ROBERT BURNS

VERSUS

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

PETITION FOR DAMAGES AND JUDGMENT VOIDING ACTION

NOW UNTO COURT comes Plaintiff, Robert Edwin Burns, in proper person,
who asserts the following:

1.

That he is a person of the full age of majority and resides in the Parish of East
Baton Rouge, State of Louisiana.

2.

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 whose office at all times pertinent herein is located in the Parish of East
Baton Rouge, State of Louisiana, and whose Chairman and representative for
Service of Process is Ms. Tessa Steinkamp, LALB Member and Chairman, 116
Rue Aries Road, Slidell, LA 70461-5226.

JAMES M. SIMS, LALB Member and Vice Chairman, a major resident and
domiciliary of the Parish of Union, State of Louisiana.

CHARLES "HAL" McMILLIN, LALB Member, a major resident and
domiciliary of the Parish of Calcasieu, State of Louisiana.

DARLEEN JACOBS-LEVY, LALB Member, a major resident and domiciliary
of the Parish of Orleans, State of Louisiana.

CHARLES "CLAYTON" BRISTER, LALB Member, a major resident and
domiciliary of the Parish of Rapides, State of Louisiana.

GREGORY L. "GREG" BORDELON, LALB Member, a major resident and
domiciliary of the Parish of Jefferson Davis, State of Louisiana.



REC'D C.P.
NOV 16 2012

EXHIBIT

4A)

3.

The LALB held an Administrative Hearing entailing the matter of LALB v. Robert Burns on Monday, September 17, 2012.

4.

Immediately prior to the meeting, Petitioner, along with Petitioner's mother overheard LALB Executive Assistant, Sandy Edmonds, inform a party, believed to be the Administrative Law Judge who would oversee the proceeding, prior to the hearing and who, upon information and belief, is employed by the Louisiana Attorney General's Office that, "The Board will be going into Executive Session."

5.

Petitioner requested a private conference with his legal counsel, Robert Loren Kleinpeter, in the break room of the meeting facility, at which time he informed Mr. Kleinpeter of the Board's intent and stated that he did not want any Executive Session transpiring entailing a discussion of his character. Mr. Kleinpeter then inquired, "So you're saying that you want everything discussed as part of an open meeting?" to which Petitioner responded in the affirmative. Mr. Kleinpeter then stated, "Then I'll make it known at the appropriate time of your desire for everything to take place in an open meeting."

6.

At the conclusion of the presentation of evidence and all witnesses having been called, LALB Vice Chairman James Sims made a motion for the Board to enter into Executive Session. The motion was seconded by Member Charles "Hal" McMillin and was unanimously approved.

7.

As clearly captured on Petitioner's videotape of the meeting (along with videotape which the LALB also produced), Petitioner's Counsel sought to be recognized, and upon obtaining such recognition by the Administrative Law Judge, stated: "Uh, I think that he [Petitioner] has the right for it to be heard in an open session if he wants to." The Administrative Law Judge then stated, verbatim, "Well, he has a right... They have a right to go into Executive Session to discuss character and other type issues. He has the

right to have those issues outside.....to be heard in an open session, so **we're going to go into Executive Session to discuss character issues and once we come outside of Executive Session, we'll be able to discuss those issues outside of his character."**

8.

At the point that Petitioner's attorney stated that Petitioner had the right to insist that discussion of his character take place in open session "if he wants to," Board Member and LALB Vice Chairman James Sims defiantly stated, "No he doesn't. Not for this!"

9.

On no less than six (6) previous meetings, the LALB has routinely sent Petitioner a certified letter, as required by LA R. S. 42:17(A)(1), indicating the LALB's intent to discuss Petitioner's character and affording him the option of insisting that such discussion take place in an open forum. For each of those instances, Petitioner has indicated that he desired for the discussion to take place in an open format and not in Executive Session.

10.

The last such letter Petitioner received from the LALB regarding the required notice of anticipated character discussion was dated May 15, 2012 and is attached hereto and made a part hereof as Exhibit P-1. Furthermore, the regularity with which Petitioner was receiving these letters (basically before every meeting from late 2010 to mid 2012) is readily apparent in that the LALB's Executive Assistant failed to even change the deadline date at the bottom of the letter, Exhibit P-1, and left it as "Monday, **March 19, 2012**" even though, as stated above, the letter itself was dated May 15, 2012.

11.

Upon receipt of the letter, Petitioner forwarded same on to his attorney, Robert Loren Kleinpeter. Mr. Kleinpeter, in turn, upon ascertaining that the May 21, 2012 LALB agenda was void of any line-item for discussion of Petitioner, advised Petitioner how to handle the matter. Mr. Kleinpeter informed Petitioner that, given the circumstances (no agenda item calling for discussion of him), no discussion of his character was appropriate either in Executive Session or in an open forum.

12.

During the May 21, 2012 LALB meeting, the Board motioned itself into Executive Session for a matter in which Petitioner knew it would be impossible for Members not to discuss his character. Petitioner indicated to the LALB at that May 21, 2012 LALB meeting that he had received the "character letter," Exhibit P-1, and, furthermore, that he had been advised by his attorney, whom he did not identify at that time to be Mr. Kleinpeter, that no discussion of him was appropriate in any manner whatsoever either in an Executive Session or open session. Accordingly, as evidenced by the top of page three (3) of the minutes of that meeting, which are attached hereto and made a part hereof as Exhibit P-2, the LALB abruptly reversed itself and reconsidered the motion to enter into Executive Session and actually made a new motion **not** to enter into Executive Session with Members Greg Bordelon and Vice Chairman James Sims in opposition, thus maintaining their defiant stand to enter into Executive Session, Petitioner's admonition relayed indirectly from his attorney notwithstanding.

13.

In permitting itself to go into Executive Session at the September 17, 2012 LALB meeting for the clear purpose of discussing Petitioner's character, each of the individual Board Members named as Defendants of this Petitioner did knowingly and willfully violate LA R. S. 42:17(A)(1). The Members' knowledge of the Statute was demonstrated innumerable times at prior meetings through Petitioner's steadfast insistence that any discussion of his character take place in an open forum. Furthermore, in the case of LALB Vice Chairman James Sims, he defiantly stated that the Board would go into Executive Session in direct violation of LA R. S. 42:17(A)(1) with the full knowledge that Petitioner had a right to insist that such discussions take place in an open forum. 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. As referenced by the verbatim quotations of the Administrative Law Judge in paragraph seven (7) of this petition, there can be no doubt whatsoever that Petitioner's

character was to be discussed in that Executive Session. Furthermore, since the LALB alleged as a basis for convening the hearing that Petitioner is "incompetent," by default, the LALB would have to discuss Petitioner's "competency" during the Executive Session, which is another of the elements for which Petitioner was required to be notified in writing no less than 24 hours prior to the meeting and afforded the opportunity to insist that the discussion take place in an open forum. Furthermore, as evidenced by the comments of LALB Executive Assistant Sandy Edmonds in Paragraph four (4) of this Petition, the Board's intent to do so was premeditated and represented an action for which it had been warned against innumerable times by Petitioner as an action he would not accept nor tolerate.

14.

By knowingly and willfully entering into an illegal Executive Session notwithstanding the stated desires of Petitioner for the discussion to be in an open forum expressed through his attorney, Robert Loren Kleinpeter, the individual members of the LALB, pursuant to LA R. S. 42:28, are **personally** liable unto Petitioner for the amount of \$100 each. Further, Pursuant to R. S. 42:26(C), upon successful awarding of a Judgment of this Honorable Court in which such \$100 civil penalty is assessed against each Member and awarded to Petitioner, he is also entitled to reasonable attorney fees and the costs of this Petitioner.

15.

Title 42 imposes a duty upon any member of a public body to know Louisiana's Open Meetings Laws, and in the instance referenced throughout this Petition, LALB Members did in fact know the pertinent law as Petitioner has driven it home to them repeatedly in past meetings (as well as through emails to certain named Defendants). Nevertheless, the fact that the Board was provided with questionable legal guidance by the Louisiana Attorney General's Office through its Administrative Law Judge is inconsequential. Furthermore, it was the LALB and its members who made the decision to hire the Louisiana Attorney General's Office to serve as Administrative Law Judge for hearings such as what took place on September 17, 2012. Petitioner's rights under R.S. 42:17(A)(1) cannot be violated as the result of an potentially misguided attorney employed by the Louisiana Attorney General's Office who uttered with

specificity that the LALB could convene an Executive Session for the stated purpose of discussing Petitioner's character (see quote of paragraph 7 of this Petition) notwithstanding Petitioner's expressed desire for such discussion to transpire in an open forum.

16.

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 right, 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.

17.

Upon emerging from Executive Session, the LALB, through its spokesperson and Member, Darlene Jacobs-Levy, an attorney with 43 years of legal experience in Louisiana, indicated to Petitioner that the Board had discussed the matter in Executive Session and made a decision to "formally reprimand" Petitioner. Defendant Jacobs-Levy's statement was a tad perplexing to Petitioner given that, an hour into the hearing, Ms. Jacobs-Levy indicated to the Administrative Law Judge that she'd seen "absolutely nothing" for which Petitioner could be disciplined in any manner whatsoever and even suggested to Petitioner's attorney that he move for Directed Verdict, which, as evidenced by the videotape of the meeting, Petitioner's attorney did. Ms. Jacobs-Levy's suggested move for Directed Verdict seemed even more perplexing to Petitioner when she shared with Petitioner in the parking lot after the meeting, in the presence of Petitioner's mother and Petitioner's attorney, that the LALB had "taken a vote during Executive Session regarding taking your license. That vote was 3-2 in favor. I was opposed to it and had to 'go to bat' for you to save your license. You better not let me down!" Ms. Jacobs-Levy also stated during her closing commentary after the Board emerged from Executive Session that Petitioner was "exceptionally intelligent" and should consider entering law school and that, were he to do so, she would likely hire him upon graduation. Petitioner has genuine difficulty reconciling such commentary with the fact that the LALB Members alleged as one of the key reasons for convening the hearing

that Petitioner is "incompetent." Petitioner openly wonders how an "incompetent" individual may gain acceptance into law school!

18.

At any rate, the totality of the circumstances surrounding the meeting of the LALB and its membership in Executive Session on September 17, 2012, during which it is undeniable that Petitioner's character and/or competence was intended to be discussed and in fact was discussed, without conforming to any of the provisions of LA R. S. 42:17(A)(1), 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.

19.

Pursuant to Case # 2008-CA-0952, Philip Courvelle and LA Recreational Vehicle Dealers Association, Inc. v. LA Recreational and Used Motor Vehicle Commission et. al., for which the First Circuit Court of Appeals overturned the civil penalties awarded by the 19th Judicial District Court imposed by Judge Morvant against that Commission's Members as a result of the Plaintiff's failure to name the Members of the Board individually as Defendants, Petitioner has named each of the five (5) Members of the LALB who participated in the illegal Executive Session of Monday, September 17, 2012 as Defendants. Further, this Petition has been filed within the 60-day timeframe permitted by R. S. 42:28 for the imposition of Civil Penalties against the Members of the LALB and 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.

WHEREFORE, petitioner, ROBERT EDWIN BURNS, prays that Defendants, LOUISIANA AUCTIONEER'S LICENSING BOARD, JAMES M. SIMS, CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, CHARLES "CLAYTON" BRISTER, and GREGORY L. "GREG" BORDELON be duly served with a copy of this petition, and cited to appear and answer same and, after all legal delays and due proceedings had, there be a judgment herein in favor of petitioner, ROBERT EDWIN BURNS, and against defendants, LOUISIANA AUCTIONEER'S LICENSING BOARD, JAMES M. SIMS, CHARLES "HAL" McMILLIN, DARLENE JACOBS-LEVY, CHARLES "CLAYTON"

BRISTER, and GREGORY L. "GREG" BORDELON awarding Petitioner \$100 in Civil Penalties from each Defendant (except the LALB itself as the civil penalty is a personal liability) pursuant to R. S. 42:28 along with each Board Member being assessed a 20% (one-fifth) share of Defendant's court costs in initiating this Petition as provided for under LA R. S. 42:26(C). 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

CERTIFIED TRUE COPY
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 Deputy Clerk of Court

Respectfully Submitted,

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Robert Edwin Burns

PLEASE SERVE:

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 85 H Brister Loop
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CIVIL

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| <input type="checkbox"/> 02-CONTRACT | <input type="checkbox"/> 12-PUBLIC SERV. COMM. |
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| <input type="checkbox"/> 09-PROPERTY RIGHTS | <input type="checkbox"/> 19- |
| <input type="checkbox"/> 10-INJUNCTION MANDAMUS | <input type="checkbox"/> 20- |

GREGORY L. "GREG" BORDELON

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TESSA STEINKAMP

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