

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
2006 APR 14 P 2:48

ALFRED E. EHM, *pro se*

Plaintiff,

v.

BOARD OF TRUSTEES of the
SAN ANTONIO METROPOLITAN
TRANSIT AUTHORITY,

Defendant.

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Civil Action No. SA: 06-CA-0103 (RF)

**RESPONSE TO PLAINTIFF'S BRIEF CONCERNING
JUDICIAL SCRUTINY OF FRANCHISE-DENIAL**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant, BOARD OF TRUSTEES OF VIA METROPOLITAN TRANSIT AUTHORITY OF SAN ANTONIO ("Board of Trustees"), files this Response to Plaintiff's Brief Concerning Judicial Scrutiny of Franchise-Denial ("Brief"). For the reasons that follow, the Court should disregard Plaintiff's Brief as an impermissible Sur-Reply on the merits of the pending Motion to Dismiss (Docket No. 4). In the alternative, if the Court desires further briefing on the merits of the arguments presented in the instant Brief, Defendant will provide additional arguments to the Court in a timely fashion.

1. On February 27, 2006, Defendant filed the pending motion to dismiss pursuant to Rule 12(b) (Docket No. 4). In its motion, Defendant demonstrates that the Court is without *in personam* jurisdiction over the Defendant because the Board is not the proper party defendant and because, even if the Board were a proper defendant, Plaintiff failed to effect proper service of process on it. *See* Docket No. 4, at 2-3. Defendant also established in its motion that

Plaintiff's Original Complaint states no claim upon which relief may be granted and is subject to dismissal for this reason as well. *Id.* at 4-10. Pursuant to Civil Procedure Rules 12(b)(2), (5), (6), and (7), Defendant sought dismissal of this frivolous suit and an award of its costs and fees of defense. FED. R. CIV. P. 12(b)(2), (5), (6), and (7). Plaintiff responded on March 10, 2006, asserting a number of misplaced arguments. Docket No. 7. Because the arguments raised no issues that required additional briefing, Defendant elected not to file a Reply brief.

3. On March 17, 2006, Plaintiff filed a motion and brief, which also currently remain pending before the Court, asking it to certify the matter as a class action under FED. R. CIV. P. 23(a), (b) (Docket Nos. 8, 9). Pointing out that because the Court has not yet decided the pending, jurisdictional challenge or determined that the Complaint does state a cognizable cause of action against it, Defendant asserted in a brief response that Plaintiff's motion was premature (Docket No. 10).

4. The instant Brief is merely an inappropriate attempt by Plaintiff to bolster arguments asserted in his response to Defendant's Motion to Dismiss. The arguments asserted in the Brief echo and expand upon those Plaintiff has already made and, as such, constitute an inappropriate Sur-Reply, made without leave of Court. *See* Local Rule CV-7(e). However, because they do not raise new issues or present novel questions not yet briefed, Defendant will not address them substantively here.

5. Based upon these factors, Defendant responds to Plaintiff's Brief, asking that the Court strike the arguments made therein as not properly before the Court or simply disregard this submission in its entirety. Should the Court desire further briefing on the merits of the arguments presented in the Brief, Defendant will submit additional, responsive arguments in a timely fashion.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests the Court strike or disregard Plaintiff's Brief Concerning Judicial Scrutiny of Franchise-Denial, issue a ruling on the merits of the pending Motion to Dismiss (Docket No. 4), and award Defendant its fees and costs of defense, along with any further relief to which it is otherwise justly entitled.

Respectfully submitted,

By: 

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**COUNSEL FOR DEFENDANT, BOARD OF TRUSTEES OF
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SAN ANTONIO**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Response to Plaintiff's Brief Concerning Judicial Scrutiny of Franchise-Denial** was served on Plaintiff, proceeding *pro se*, this 14th day of April, 2006, via certified mail, return receipt requested:

Alfred E. Ehm
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